IN THE SUPREME COURT OF FLORIDA

JOHN AUSTIN LANDRY, :

Appellant, :

vs. : Case No. 81,270

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR GLADES COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Although the trial in this case is numbered separately from the court documents, the sentencing and other hearings are numbered consecutively to the court documents rather than the trial. These documents and hearings will be designated by the letter "R." The trial transcript will be designated by the letter "T." Documents and hearings in the first supplement to the record on appeal will be designated as "S1," and the those in the second supplement to the record on appeal as "S2."

The second supplement includes copies of the actual audiotapes of the codefendants' statements which were played for the jury. Because the actual audiotapes do not have page numbers, they will be referred to as "S2 -- tapes." The transcripts of the audiotaped statements which are part of the trial transcript will be referred to by the letter "T" like the rest of the trial transcript.

The issues in this brief are arranged and argued in approximate chronological order. Pursuant to this Court's denial of Landry's motion to exceed the 100 page limit for capital cases, the following meritorious issues were deleted from the original brief:

> 1. THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST FOR INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO ADMITTED HAVING READ OR HEARD PRETRIAL PUBLICITY.
>
> 2. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON ABANDONMENT, WHICH WAS HIS THEORY OF DEFENSE.

Relevant parts of other issues, and some of the facts of the case, were also deleted to comply with this Court's order.

STATEMENT OF THE CASE

On May 3, 1992, the Appellant, John Austin Landry, and three codefendants were arrested in connection with the burglary and murder of Houston Edwin Downs. Landry was indicted by a Glades County grand jury for first-degree premeditated murder, first-degree felony murder, and armed burglary on May 20, 1992. (R. 7-9) Through counsel, Landry filed a Demand for Speedy Trial on May 22, 1992. (R. 12) The court denied the demand June 25, 1992, and later denied several motions for discharge. (See Issue7s I and II)

Landry was finally tried by jury, Circuit Judge Jay Rosman presiding, on November 3 through 19, 1992. The jurors found him guilty as charged. (R. 471-72, T. 2091) They recommended death by a vote of seven to five on November 19, 1992. (R. 478)

Landry was sentenced to death for felony murder December 15, 1992. (R. 661-62) Although the judge said he would merge the premeditated murder into the felony murder conviction, he entered a life sentence for premeditated murder. The judge did not file a written sentencing order. (S1. 1361) Upon realizing he had not sentenced Landry for burglary, the judge held a second sentencing December 23, 1992. He departed from the recommended guidelines sentence of 12 to 17 years, sentencing Landry to a consecutive life sentence for burglary. No written order was made or filed for the burglary sentence (S2. 1636) and the judge did not sign the scoresheet which was filed December 28, 1992. (R. 633)

Notice of Appeal to this Court was filed January 11, 1993. (R. 639) The Public Defender for the Tenth Judicial Circuit was designated to represent Landry in this appeal October 5, 1993.

STATEMENT OF THE FACTS

Dawn Downs, age 32, married the victim in this case, Houston Edwin ("Ed") Downs, age 56, about two years prior to the homicide.[1] (T. 493, 553) Ed Downs did not have a regular job but dealt in real estate and rentals. He gave Dawn an allowance of $1000 every two weeks. (T. 556) They built a cypress "cracker" house with a porch around it, in the middle of a woods in the Muse area of Glades County, off Tom Coker Road. The house had three bedrooms, six bathrooms, a fireplace with gun racks on both sides, and a pool. They also had a barn, three caretakers' houses and a cook house. The property included orange groves, a pond and a creek. In the barn, they kept tractors, a swamp buggy, a horse surrey, jeeps, three-wheeled motorcycles, and several other vehicles. (T. 493-98)

On Saturday night, May 2, 1992, Ed and Dawn went to bed at 10:00 p.m. Although Ed went right to sleep, Dawn watched "Sisters" on television until 11:00, at which time she also went to sleep. (T. 501) Their Jaguar and Dawn's Jeep Wagoneer were in the garage because they planned to drive the Jaguar to a family reunion the next day. Ed's truck, which was normally kept in the garage with Dawn's jeep, was in the barn. In his truck, Ed kept a set of house keys, a key to the front gate, and a garage door opener. (T. 505)

Dawn was awakened by gunfire and sat up in bed. She saw two figures to her right, holding guns, three or four feet from Ed's side of the bed. (T. 509) She did not get a good look at them

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[1] The court excluded proffered evidence that Ed Downs was formerly married to Dawn's mother and Dawn was his stepdaughter. (T. 578-82) He also excluded evidence that Ed Downs was indicted for smuggling marijuana, prior to the homicide. (T. 570-79)

because she did not turn her head. She screamed and lay down on the floor. She kept her head down, "playing dead," with her hair around her head so she could not see anything. (T. 511, 559) The lights in the bedroom were dim. After a third shot, Ed took a deep breath, sighed, and she heard nothing more from him. (T. 512-13)

After the third shot, the intruders starting looking around, opening drawers, and rummaging through things. (T. 514) The voices sounded between ages 16 and 21. (T. 515) When the boys came near where her, one of them said, "fucking bitch" several times; then said, "fucking bitch is still alive." (T. 516) The other voice said, "No, man. I shot her." The first voice said, "The fucking bitch is still alive." The second voice said, "Man, don't do that, because she can't see anything anyway. Her face is to the ground." The boys continued rummaging around. (T. 517)

After leaving her head, the two boys walked out of the room. Then three voices came back into the room.[2] She heard two names. One said "John" said to check the closet or something. Another said "Rick" or "Rich" already checked that. They took her wallet, in which she normally kept $300 to $500, and threw her purse and wedding rings near her head. (T. 519-23) A gold bracelet that said "Ed's toy" in diamonds was also missing. (T. 537)

Ed Downs normally kept up to $1000 in his pants pocket. His pants were found on the floor. Dawn and Ed each had a handgun on their respective sides of the bed. Dawn identified hers which was

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[2] Dawn Downs testified that only three intruders were in the room although four boys were charged and convicted. Dawn testified that the first two went out, then returned with a third person, and all three were in the room. (T. 560)

in a black case. (T. 525-27) Ed's gun was probably a .44 Magnum. It had been in a brown holster which she identified. (T. 527-29)

After about fifteen minutes, the boys left. (T. 529) Dawn waited about five minutes, then called Ed's name several times. He did not respond. She noted that it was about 1:20 a.m. The phone was dead. She did not try to check on Ed but instead ran out the sliding glass bedroom doors. She jumped the railing and ran to the house of caretakers Jacob and Kay Easterly. (T. 530-32)

Both caretakers, brothers Jacob (Charles) and Seldon Easterly, and their wives, Kay (Olive) and Nadine Easterly, described Dawn's arrival at their cottages that night. (T. 487F-490) While Jacob and Kay called 911, Dawn ran next door to awaken Seldon and Nadine. (T. 487K-487L) Dawn called Jack Watson, a lawyer friend of Ed's from Miami, and asked Nadine Easterly to call 911 and request John Brock, a detective with the Glades County Sheriff's Department. (T. 487FF, 563) Brock had been a friend for three years, had the combination to their gate, and lived nearby.[3] (T. 1087-88)

Nadine, Kay, Seldon and Dawn returned to the Downs home while Jacob Easterly opened the gate and directed law enforcement and medical personnel to the house. (T. 487Z-487AA) When the law enforcement officers arrived, they performed CPR until Ed was transported to the hospital where he was pronounced dead. The doctor told Dawn he was killed instantly. (T. 534-36)

John Brock was dispatched to the Downs residence at 2:00 a.m.

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[3] Brock had been to the Downs home various times prior to the homicide. Afterwards, he helped Dawn move some furniture. (T. 567, 1285) The judge did not allow defense evidence that Brock had investigated reports of marijuana on their property. (T. 568-69)

(T. 1086) He called the Florida Department of Law Enforcement to assist with processing the crime scene. (T. 1094) Agent John King coordinated the investigation for FDLE. (T. 1301) Brock and King took a statement from Dawn when she returned from the hospital, and Brock met with her on other occasions. (T. 555, 1097)

Franklin Delph and Ricky Young were picked up by the Hendry County Sheriff's Department on a suspicious persons complaint, while walking through a residential area early the next morning. They were dirty, wet, and wore no shoes. Deputy Ed Campbell knew them. He notified John Brock because he had received a report of trouble in the Muse area of Glades County. (T. 590-95)

Brock and Bruce Woerner, FDLE, went to Hendry County and met with the two suspects. Young implicated David Sorton and John Landry. (T. 627-28) Both Young and Delph gave taped statements to the officers. (T. 1103-04) Young agreed to accompany them to the crime scene to show them where evidence was discarded. (T. 1172)

The officers picked up David Sorton at work and arrested him en route to Glades County. (R. 529-30) Sorton gave a taped statement that evening and showed the officers where part of the money was hidden. (T. 727) Although they were unable to locate Landry, he reported to the Glades County Sheriff's Department that afternoon upon learning that he was sought in connection with the crime. (T. 632, 641, 1176) Over defense objection, both Sorton's and Young's taped statements were played for the jury during Brock's testimony. (T. 1124-72, 1180-1268) (See Issue V, infra.)

The officers searched David Sorton's car at the crime scene after John King obtained a search warrant and read it to the car.

They found a roll of duct tape and a ski mask. (T. 1309-12) An FDLE crime lab analyst testified that hair found in the ski mask was consistent with Franklin Delph's head hair. (T. 1355)

Codefendant David Sorton, age 20, testified for the State pursuant to a plea agreement under which he pled guilty to second-degree murder and first-degree burglary in exchange for his testimony against Landry and a twelve-year sentence. (T. 655, 659-60) Sorton was also promised a concurrent sentence on a pending charge. He understood that he might receive the death penalty if he did not enter into the agreement and cooperate with the State. (T. 732-35)

Sorton testified that, on the Saturday morning prior to the burglary and homicide, he drove Franklin Delph, 17, Ricky Young, 18, and John Landry, 20, to the Downs' residence in Muse. (R. 661, 811, 2117) They parked along a trail off the road and stayed in the woods along the property line. They were just looking around and did not stay long. Although someone suggested that Downs had marijuana plants growing, they found none. (R. 661-66, 745)

That evening, Sorton went to Mike Hinsley's house where Franklin was staying. John, Franklin, Ricky, Mike, and Mike's roommate were watching T.V. Either Franklin or Rick took a .22 semi-automatic rifle from Mike's house and put it in David's car without his knowledge. (R. 668-70, 747) Franklin, Rick, John and David left, and dropped off Rick and Franklin near John's house because John's mother did not like Franklin. David and John went to John's house. John's mother let them use her .22 pump action gun to go hunting. David recognized the gun because he cleaned it two years earlier. The spring was missing then. (T. 674-77)

The boys returned to the Downs' property and parked in the same place they parked before. John and Franklin had the rifles. David took his socks off to cover his hands to avoid leaving fingerprints. They walked around the house awhile looking through windows and trying doors. It was around 9:30 p.m. (T. 680-83)

They walked to the barn where the vehicles were kept. (T. 685) They saw people walking around on another part of the property and heard dogs barking, but did not see them. (R. 687-88) Eventually, they returned to the house and looked around the unlocked pool area. (R. 688) They tried to get in through the garage window but could not get the window open. (T. 691) Sorton cut the phone lines and Landry shut off the power by flipping a switch. (T. 692)

David and Rick returned to the barn where Rick found the house keys hanging in the truck. They entered the front door. (R. 694-95) David watched the door and Rick stayed by the pool table. John and Franklin, who had the rifles, went down the hall. David heard about four shots. Franklin came out of the bedroom appearing pale and shaken. He said, "I can't believe I did it." (T. 774)

David entered the bedroom, saw the man lying on the bed and went back out to join the others. They all went into the bedroom, at which time Sorton saw the lady lying on the floor face down. Sorton thought Franklin had a .44 revolver and Rick a .22 rifle. Either Franklin or Rick took the .44 out of the house. (T. 700-06)

John went up to the lady lying on the floor and said he thought she ("the bitch") was still alive. Franklin told John that he shot her. John had the gun in his hand but David did not think he was going to shoot her. David said he told John to leave her

alone, not to shoot her. John walked away. David thought Franklin and Ricky got some money (about $1000 or so) in the bathrooms. (T. 798) They were in the house ten or fifteen minutes total. (T. 710)

Outside, they handed David the money to carry. (T. 709) He thought Ricky had the .44 when they left. John and Franklin had the same guns they brought. (T. 712) When they arrived at the pond, they started throwing things into it. They threw the guns, the flashlight, wire cutters and several sets of keys. (T. 713)

When they walked back to David's car, David discovered that he had thrown his car keys in the pond. (T. 783) Franklin tried to hot wire Sorton's car but could not get it started. (T. 715) At that point, they saw a car coming. Franklin and Ricky went one way and David and John went another way. While running through the woods, John told David that his gun got jammed and wouldn't shoot. He also suggested that David report his car stolen. (T. 716-17)

They walked to the home of a friend, Danny Reynolds, who lived in Fort Denaud. They awakened the family and told Danny that David's car broke down. Danny and his father drove them back to David's house at about 2:30 a.m. David's brother, Billy, and a friend, Chris Howell, had returned from a concert and were still up. (T. 718-20) David and John eventually told David's brother what really happened. They split the money. David hid his share under a lawnmower behind the house. He thought it was about $1000. (T. 721-22) John left and David talked to Billy and Chris a little more. In the morning David reported the car stolen. (T. 723-24)

Ricky Young, age 18, gave a slightly different version of the events, in exchange for a seventeen-year sentence for second-degree

murder and first-degree burglary. (T. 811, 814) Ricky said he and Franklin Delph first discussed the burglary on the Thursday prior to the homicides. Franklin and John Landry planned to tape up the victims with duct tape and scare them with guns so they would open the safe. (T. 816) Rick asked to join them. (T. 902)

On Saturday morning, the four of them went to the Downs' estate in David Sorton's car to see if anyone was home. When it appeared that someone was home, they decided to return later to burglarize the place. (T. 818-19) According to Rick, John said he had worked for the man and the safe contained $500,000.[4] (T. 820)

Ricky claimed that it was John who borrowed the semi-automatic .22 rifle from Mike Hinsley, to go hunting. (T. 824-26) When they arrived at the Downs' residence, however, Franklin had the semi-automatic and John had the .22 pump he got from his mother's house. (T. 836) After they circled the house and explored the barn for more than two hours, Ricky suggested that the vehicles in the barn probably had keys in them and might have a key to the house. (T. 850, 860) Ricky found the keys hanging in the truck. (T. 854-55) One of the keys opened the front door. (T. 857, 859)

When John and Franklin entered the bedroom, Ricky hid behind the pool table. He saw a lot of guns around and was afraid the man would come out shooting. He thought David was nearby. (T. 863-64) He heard a faint scream and some shots. When John and Franklin emerged from the bedroom, Franklin said, "Man, I can't believe I

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[4] No evidence indicated that John Landry ever worked for Ed Downs. Landry testified that he did not know Ed or Dawn Downs and had never worked for them. (T. 1840) Dawn Downs testified that she had never met any of the defendants before. (T. 1893)

did that." John was trying to calm Franklin. John and Franklin were scared. At that point, all four of them walked outside the residence. Franklin told them the man had grabbed the front of his gun. John fired a shot, but then his gun jammed. (T. 864-66)

When Rick finally went into the bedroom, he saw the man on the bed and a woman face down on the floor. (T. 868) He looked for a safe but did not find one. John was standing over the woman and said, "The fucking bitch is still alive." Ricky said, "no, man, no she ain't. . . . Don't worry about it man, she can't see anyway." John walked off. (T. 873-76) Someone found a .22 revolver and Rick threw it under the bed because John told them not to take anything. Franklin found a .44 revolver and put it in his waist. (T. 878-79) John took about $1000, but he took nothing. (T. 883-84)

When they got to the pond, Ricky grabbed Franklin's .22 rifle and threw it in the pond. (T. 885-86) They returned to David's car and found that he had thrown his car keys in the pond. (T. 886) They then saw car lights and he ran with Franklin Delph through the woods. (T. 888) When they were picked up by law enforcement officers in the morning, Ricky first told them a story that he and Franklin had concocted about being chased by a truck. He then told them the truth. John Brock took him back to the scene of the crime. Ricky showed the officers where they had thrown the weapons and other items, and where David's car was abandoned. (T. 891-93)

Over defense objection (see Issue VII, infra), FDLE ballistics expert, Terry LaVoy, testified by means of a videotaped deposition taken to perpetuate his testimony. (T. 1457-1582) He identified a Winchester .22 caliber slight action rifle, commonly called a

"pump," which he said he test-fired twice with .22 long rifle caliber, copper-coated, cartridges from the scene. (R. 1478-80) When he received the weapon, the magazine was empty. (R. 1552-53) When asked by defense counsel, LaVoy examined the Winchester rifle and found that there was no spring in its magazine. He admitted that one could not load, reload and fire the rifle without a spring to push the cartridges into the chamber. (T. 1579-80)

When the prosecutor asked LaVoy how he was able to test-fire the Winchester .22 without a spring, he said his notes did not indicate that the spring was missing. Without a spring, the only way to test-fire the gun would be to place the cartridges, one at a time, in the chamber for test-firing. "Obviously," one could not check the mechanism of the firearm without the spring. LaVoy insisted, however, that he test-fired the gun twice. (T. 1582)

LaVoy also identified a .22 long rifle caliber Marlin semi-automatic rifle (T. 1489) He test-fired it four times. One of the four times, the rifle failed to eject the cartridge case, causing the rifle to jam. (T. 1494-95) He positively identified two .22 caliber fired Winchester cartridge casings found in the victim's bedroom as having been fired from the Marlin semi-automatic rifle, and not from the Winchester pump rifle. (T. 1501-03, 1543) He identified a third casing found south of Sorton's car as having been fired from the Marlin semi-automatic rifle. (T. 1506, 1543)

LaVoy found that a .22 long rifle caliber cartridge with copper plating, taken from the victim's body, could have been fired

from the .22 Winchester pump.[5] He could not, however, positively identify it as having come from that rifle to the exclusion of all others. (T. 1508-12) He positively identified two other .22 long rifle caliber bullets taken from the body as fired from the Marlin semi-automatic to the exclusion of all other guns. (T. 1512-20)

LaVoy identified a .22 caliber nine-shot revolver belonging to Dawn Downs, submitted with two types of ammunition. (T. 1522, 1543) The revolver was a convertible model with both a .22 long rifle caliber cylinder and a .22 Magnum cylinder. When submitted to LaVoy, it had the long rifle cylinder in place, and could not have fired .22 Magnum cartridges in that state. Although some of the revolver's ammunition had copper plating, LaVoy opined that the revolver did not fire any of the cartridges or casings from the crime scene. (T. 1522-29)

LaVoy opined that at least four shots were fired. No casing was recovered for one fired bullet. Although three casings were positively identified as having been fired from the Marlin, only two bullets recovered were fired from the Marlin. (T. 1526) He agreed that all three guns recovered were capable of firing any of the bullets recovered, except that the revolver cartridges could not be fired from the rifles. (T. 1528)

Dr. Michael Frank Arnall, the Glades County Medical Examiner, performed an autopsy on Ed Downs on May 3, 1992. (T. 1589, 1593)

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[5] On cross-examination, the defense brought out that the copper bullet was in a package labeled "gray metal bullet," like the other two packages which actually contained gray lead-colored bullets. Only the base portion of the copper bullet was a gray lead color. (T. 1555-56)

He found three gunshot wounds and one laceration. (T. 1595) He could not determine the order in which the wounds occurred. (T. 1633) He arbitrarily labeled them "A," "B," and "C." (T. 1597)

Wound "A" was located about an inch from the center of the chest. It would easily have been fatal. (T. 1597-1600, 1609) The victim may have lost consciousness within seconds. (T. 1602) The bullet removed from the wound was a gray metallic projectile with copper coloring on its surface. (R. 1602)

Wound "B" was four inches to the left of the mid line of the chest. A person could be conscious for seconds or, possibly, for a short number of minutes if this were the only injury. It would have been easily fatal. A gray metallic bullet was recovered from the wound. (T. 1607-10)

Gunshot wound "C" was located in the abdomen. That wound was also fatal. If it were the only wound, a person might run 100 yards before losing consciousness. With the other wounds, however, the victim would lose consciousness very quickly. A gray metallic bullet was removed from the wound. (T. 1612-15, 1619)

The cause of death was multiple gunshot wounds to the chest and abdomen. (R. 1619) The barrel of the gun was a number of inches away when the gun was fired. (T. 1600-01, 1606, 1612) On the palm of the victim's left hand, however, was a contact laceration created by a bullet scraping the skin. The gun was touching or close to touching the palm when discharged. A second laceration of the left hand was created by a blunt object, possibly the barrel of a firearm. The bullet that grazed the victim's hand could have been one that was removed from his chest or abdomen. (T. 1616-19)

John Landry testified in his own defense. (T. 1787-1879) He testified that he and the three codefendants were at a party two weeks before the homicide. He saw a green Jaguar there but did not see who was driving it. (T. 1788-89) Landry also testified that he, David Sorton and others had hunted on a number of occasions, sometimes in the Muse area around the Downs' residence. Several times they had found marijuana there. (T. 1790-91) He and David had discussed going back to look for marijuana. (T. 1793)

About 7:00 a.m. on the morning of the homicide, David and Rick arrived at Mike Hinsley's house where he and Franklin were staying. They decided to look for marijuana near the Downs' residence. The boys took David's car. (T. 1793-95) John and David split up with Rick and Franklin. They jumped the fence and looked for marijuana plants but did not find any. (T. 1796-97) When they met back up, Rick and Franklin were talking about the things they had seen around the Downs' house. They said they wanted to rob the house. John said no. (T. 1998) They returned to Mike's house. Dave went to work and Rick and Franklin continued talking about burglarizing the Downs house. John joined in the conversation, speculating where a safe might be found. (T. 1801-02)

About dark, David returned and asked if they wanted to go hunting. (T. 1803) They borrowed Mike Hinsley's gun. (T. 1804) Although they stopped at John's mother's house, he denied borrowing her gun. David already had a gun, but John did not recognize the second gun. They drove to the Downs' to hunt and look for marijuana. (T. 1806-07) While walking toward the house, they discussed burglary if no one was home. John did not want to do it. (T. 1811)

After walking around the house a number of times and checking out the barn, still unable to find any marijuana, they decided to burglarize the house. It appeared no one was home. (T. 1812-19) John attempted to take the electric meter apart. He handed his gun (the semi-automatic borrowed from Mike Hinsley) to Franklin while he and Rick tried to open the garage window. (T. 1821-23)

John was getting "pissed off" about the whole thing. He suggested they "get the hell out of here." Just as they started to leave, Rick said he wanted to check one of the cars to see if he could find keys. (T. 1824) Rick and David ran down to the barn to do so. John, who was still "pissed" and was worried about getting caught, waited with Franklin who then had the semi-automatic rifle. (T. 1825, 1865) When Rick returned with the keys and wanted to try the front door, John told them, "hell no." Rick then pulled him aside and told him he was waiting for some kind of signal; that he knew the lady in the house; and that she wanted him to kill her husband and make it look like a robbery.[6] (T. 1826-27) John "freaked out." Although Rick tried to talk him into continuing, and offered to give him some of the money, John refused and "hauled ass." He started walking back to Mike's house. (T. 1827)

David Sorton caught up with him by running and calling to him, and told him he thought Franklin had shot someone. (T. 1827-28,

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[6] Dawn Downs denied hiring Ricky Young to kill her husband. (T. 1892) She testified that she inherited the house and property, including mini storage units, a ranch, adjoining property, and a condominium in Colorado. (T. 1892) The judge would not allow the defense to introduce proffered testimony that Ed Downs had been indicted for drug-related offenses and the government had initiated forfeiture proceedings. (T. 572-82) See Issue III, infra.

1868) They walked to Ft. Denaud where a friend gave them a ride to Dave's house. David told his brother and a friend, Chris Howell, that David's car had been stolen. John then went to Mike's house to wait for Franklin and Rick to find out what happened. (T. 1828-32) The next day, John learned that the police were looking for him and went to the station where he was arrested. (T. 1834-35)

PENALTY PHASE

Dawn Downs testified about the affect her husband's murder had on her life. Because she was very afraid, she had purchased a new burglar alarm system and a cellular phone. She had even more guns than before. She target practiced regularly. Whenever there was a power surge, she ran for her gun and her phone. (T. 2111-12)

Prior to his death, she had been totally dependant on, and worshipped, her husband. He opened her mail for her and answered for her when she was questioned about anything. She had never written a check before her husband's death. She had to do these things for herself after his death, and was devastated. (T. 2113)

John Landry's stepfather, Henry Smith, and his mother, Julia Smith, testified about John's background. (T. 2114-26) John's father died when John was about three years old. (T. 2117) John then became close to an uncle who lived with them until his death when John was twelve. Mr. and Mrs. Smith testified that John was not a violent person. (R. 2115, 2118) Mrs. Smith knew he had been on probation although she had not seen the legal documents and was not aware of the extent of his legal problems. She said that John was bright and a good candidate for rehabilitation. (T. 2121-26)

SUMMARY OF THE ARGUMENT

Shortly after John Landry was indicted, his court-appointed lawyer filed a Demand for Speedy Trial. He had discussed the case with Landry, and they had decided to forego formal discovery in favor of a speedy trial. Nonetheless, the judge denied his demand because he did not believe defense counsel had adequately investigated the case and feared Landry would later allege ineffective assistance. Because Landry was ready for trial, the judge had no basis upon which to deny his demand for speedy trial. (Issue I)

Defense counsel filed several motions for discharge, attempting to follow the procedures set out in Rule 3.191 (speedy trial). The judge denied the motions because he had already denied Landry's speedy trial demand. Because Landry's right to speedy trial was violated, he must be discharged. (Issue II)

The judge made numerous errors during trial. He granted the State's many motions in limine, excluding most of the defense evidence; thereby precluding Landry from adequately presenting a defense. (Issue III) He refused to allow a codefendant who testified against Landry to testify as to his understanding of his sentence under his plea agreement with the State. (Issue IV)

Although the judge excluded much of the defense evidence (Issue III), he allowed the State to introduce a myriad of inadmissible hearsay. The prosecutor played two lengthy taped statements made by codefendants who testified against Landry at trial. The statements were made to law enforcement shortly after the codefendants' arrests, and were inadmissible for a number of reasons. (Issue V) The judge also allowed the State to introduce the

testimony of Chris Howell, a friend of the codefendants, although his testimony was blatant hearsay and he could no longer remember which defendant told him about the crime. (Issue VI) The judge then allowed the State to introduce, in lieu of live testimony, the videotaped perpetuated testimony of Terry LaVoy, the FDLE ballistics expert, who was out of the country, but could have testified in person the first week of trial. (Issue VII)

Although the State presented no evidence of premeditation, the judge denied the defense motion for judgment of acquittal as to that charge. (Issue VIII) When the jury found Landry guilty of both felony and premeditated murder, the judge said he would merge the premeditated murder count into the felony murder count. Nonetheless, the record reflects a life sentence for premeditated murder and a death sentence for felony murder. (Issue IX)

Although the trial judge sentenced Landry to death, he did not file a written sentencing order as required under Florida's death penalty laws. (Issue X) Even if the judge had sentenced Landry properly, however, the death sentence would be disproportionate. (Issue XI) Accordingly, if Landry is not discharged or a new trial ordered, his death sentence must be vacated and reduced to life.

The judge also failed to file a contemporaneous written order justifying his reasons for departing from the sentencing guidelines when he sentenced Landry to life in prison for the burglary. Thus, if Landry is not discharged or a new trial ordered, he must be resentenced within the sentencing guidelines for the first-degree burglary conviction. (Issue XII)

ISSUE I

THE TRIAL COURT ERRED BY DENYING LANDRY'S DEMAND FOR SPEEDY TRIAL.

John Landry was arrested on May 3, 1992. (R. 2) Counsel was appointed to represent him on May 5, 1992. (R. 178) Landry was indicted May 20, 1992, and, on May 22nd, through court-appointed counsel, filed a Demand for Speedy Trial. (R. 12) Although Rule 3.191(b) requires that, **no later than** five days from the filing of the demand, the court must hold a calendar call to set the case for trial (no less than five nor more than forty-five days in the future), no calendar call was held until June 22, 1992, when both Landry (under oath) and his lawyer told the judge that Landry would not be requesting discovery and was prepared for trial. (R. 184-96)

Despite Landry's professed readiness, the judge entered an order denying the Demand for Speedy Trial on June 25, 1992, finding it "apparent" that defense counsel was not ready for trial. (R. 91-92) Because Landry was prepared and ready for trial when he filed his Demand, and at the calendar call that served as a hearing on the motion, the trial court erred by refusing to set a date for trial within 60 days. Thus, Landry was denied his constitutional right to a speedy trial. Discharge is required.[7]

Under article I, section 16, of the Florida Constitution, every person charged with a crime has the right to a speedy trial. Florida Rule of Criminal Procedure 3.191(b) provides that a demand for speedy trial may be made at any time after the information or

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[7] Landry filed a Motion for Discharge after the 50th day, pursuant to Fla. R. Crim. P. 3.191(b)(4). (R. 103) The judge denied it based on his earlier determination that the defense had not prepared enough for trial. (R. 107)

indictment is filed. See State v. Gravlee, 276 So. 2d 480 (Fla. 1973); Dickey v. McNeal, 445 So. 2d 692 (Fla. 5th DCA 1984):

> **(b) Speedy Trial Upon Demand.** Except as otherwise provided by this rule and subject to the limitations imposed under subdivisions (e) and (g), every person charged with a crime by indictment or information shall have the right to demand a speedy trial within 60 days, by filing with the court having jurisdiction and serving on the state attorney a pleading entitled "Demand for Speedy Trial."
>
> (4) If the defendant has not been brought to trial within 50 days of the filing of the demand, the defendant shall have the right to the appropriate remedy as set forth in subdivision (p).

Fla. R. Crim. P. 3.191(b),(b)(4).

The 60 days begin to run from the date of demand. See Bryan v. State, 326 So. 2d 83 (Fla. 1st DCA), cert. denied, 336 So. 2d 602 (Fla. 1976). Prior to granting the discharge, the trial court must determine that no time extension was entered, that the delay was not attributable to the defendant, that the defendant was available for trial, and that the demand was valid. Fla. R. Crim. P. 3.191 (j),(p). In this case, no extension was entered and the only delay was that caused by the judge's denial of Landry's demand for a speedy trial. Landry was in the county jail, available and ready for trial. The trial judge erroneously determined that Landry's demand for speedy trial was invalid under the guidelines set out in Rule 3.191(g):

> **(g) Demand for Speedy Trial; Accused is Bound.** A demand for speedy trial binds the accused and the state. No demand for speedy trial shall be filed or served unless the accused has a bona fide desire to obtain a trial sooner than otherwise might be provided. A demand for speedy trial shall be deemed a pleading that the accused is available for trial, has diligently investigated his case, and prepared or will be prepared for trial within 5 days. A demand filed by an accused who has not diligently investigated his case or who is not timely pre-

> pared for trial shall be stricken as invalid upon motion of the prosecuting attorney. A demand may not be withdrawn by the accused except on order of the court, with consent of the state or on good cause shown. Good cause for continuances or delay on behalf of the accused shall not thereafter include nonreadiness for trial, except as to matters which may arise after the demand for trial is filed and which could not reasonably have been anticipated by the accused or his or her counsel. A person who has demanded speedy trial, who thereafter is not prepared for trial, is not entitled to continuance or delay except as provided in this rule.

Fla. R. Crim. P. 3.191(g).

A demand for speedy trial is a pleading by the accused that he is available for trial, has diligently investigated his case and is prepared or will be prepared for trial within five days. Fla. R. Crim. P. 3.191(g); see Salser v. State, 613 So. 2d 471, 474 & n.7 (Fla. 1993) (Kogan, J. dissenting); Jones v. State, 449 So. 2d 253 (Fla.), cert. denied, 469 U.S. 893 (1984); Carter v. State, 509 So. 2d 1126 (Fla. 5th DCA 1988) (defendant obviously unprepared for trial when he filed his demand because, as soon as he was formally arrested, counsel was appointed for him and almost immediately filed a request for discovery). As this Court held in State ex rel. Hanks v. Goodman, 253 So. 2d 129 (Fla. 1971):

> It is not only appropriate, but necessary, to ascertain whether or not the accused had a "bona fide desire" to obtain the speedy trial and to determine whether or not the accused or his attorney "has diligently investigated his case, and that he is prepared" for trial. If these prerequisites to the filing of the demand were not met, the demand for speedy trial should be stricken as being null and void.

253 So. 2d at 130.

In the instant case, both defense counsel and Landry had a "bona fide desire" to obtain a speedy trial and were prepared to go to trial. Landry and his attorney had discussed the case in detail

before filing the Demand. Defense counsel advised the court at the June 22 calendar call that he had spent many hours with Landry, researched the case, and had spoken to counsel for the three codefendants. There was only one eyewitness besides the codefendants. The case was not complicated and he did not think he could get any more information from discovery. (R. 184) He had not requested discovery or scheduled depositions, and had no motions pending.[8]

Although the prosecutor never filed a motion to strike the demand,[9] nor asked the judge to strike the demand, she advised the court that defense counsel did not request discovery or take depositions, and warned the judge that this was a "Rule 3.850 motion waiting to happen." (R. 241) She asked the judge to inquire as to whether Landry was willing to go forward with the trial and whether he had knowledge of his rights to discovery and depositions. (R.

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[8] Defense counsel never requested discovery. The month prior to trial (October 16, 1992), after the judge had denied his motions for discharge several times, and the Second District had denied his Petition for Writ of Prohibition, defense counsel participated in several depositions arranged by counsel for a codefendant. The judge ruled that this was not discovery and denied the State's motion for reciprocal discovery. (R. 359, 378-79, 388-89, 740-44)

That Landry participated in depositions several months after his demand for speedy trial was denied does not mean he was not ready for trial in May and June when he demanded a speedy trial. Once the court denied his demand for speedy trial and motions for discharge, defense counsel was not required to sit on his hands and do nothing further to prepare for trial lest he waive his client's speedy trial rights. Cf. State v. Embry, 322 So. 2d 515 (Fla. 1975) (filing of motion to suppress did not ipso facto negate demand); Obanion v. State, 496 So. 2d 977, 981 (Fla. 3d DCA 1986) (adding witness and moving to suppress did not indicate that defendant not ready for trial).

[9] Florida Rule of Criminal Procedure 3.191(g) provides in part that a demand filed by an accused who has not diligently investigated his case or who is not timely prepared for trial shall be stricken as invalid upon motion of the prosecuting attorney.

240, 246) Landry was sworn by the court and testified as follows:

THE COURT: How old are you, Mr. Landry?

THE DEFENDANT: Twenty-one, sir.

THE COURT: How much education do you have?

THE DEFENDANT: I got about 10th grade education, sir.

THE COURT: Do you read and write?

THE DEFENDANT: Yes, sir.

THE COURT: You don't have any problem with that?

THE DEFENDANT: No, sir.

THE COURT: Have you ever been to felony trial before?

THE DEFENDANT: Yes, sir.

THE COURT: Do you remember who represented you?

THE DEFENDANT: Mr. Rinard once and another lawyer in Fort Myers. I'm not sure of his name.

MR. RINARD: Just so I might be able to clarify things, I don't believe Mr. Landry, as an adult, has been through a trial. He has prior experiences in the felony court, but I don't believe any of his cases have ever been resolved by going to trial.

THE COURT: Have you ever gone through a trial with a jury before?

THE DEFENDANT: No, sir.

THE COURT: The prior examples you have, did they happen while you were an adult or did they happen while you were a juvenile?

THE DEFENDANT: As an adult, sir.

MR. REITER: He was a juvenile, but I believe he was waived as an adult.

THE COURT: Is that how you remember you were under the age of 18, but you were tried as an adult?

THE DEFENDANT: No, sir. I was an adult at the time.

THE COURT: Okay. For the record, Mr. Rinard is nodding affirmatively from the rear.

I need to tell you some things so you'll understand. I can understand the concept of wanting to get something behind you. However, I also need to tell you that with the charges that you have pending before you, that in two of them, if they go through under those circumstances, they're basically -- if you're convicted of first degree pre-meditate [sic] murder or if you are convicted of first degree felony murder, two different charges, then the penalty, if you are convicted, there's only two. In other words, in your experience, you've seen a score sheet and you looked at your prior record.

No matter what your prior record is, there are only two sentences. Once of them is life in prison without even a consideration for parole for 25 years. The other one is the death penalty. Those are the only two penalties that result in those two. The other one is an armed burglary?

MS. CHAPPEL: Yes, Your Honor, first degree burglary while armed or with the attempt to commit an assault and battery.

THE COURT: Okay. That can carry a potential life penalty itself. In doing that, we use this term discovery, but what that really means is the other -- your side, your attorney and yourself's ability to find out every possible bit of evidence the State has and to analyze that and to also find out any background information on you or whatever you want to do.

You have the right, for instance, to call -- they have a list of all the witnesses they're going to have. You have a right to have your attorney with you present, call that witness and have them testify under oath before the trial starts to see what they're going to say and analyze that and see if that's your understanding or how that might make an impression on people. You're allowed to do all that.

You're allowed to examine all the physical evidence. Physical evidence means the things that are involved, if there are any. I don't know anything about it, so I don't know if there is any physical evidence or not. All those things, though, you have a right to examine very carefully. Usually -- and I'm not saying that there's a right way and a wrong way. Usually this is done with great care because of the possible penalties involved. I mean, we're not talking about seriousness. We're talking about as serious as things can be.

Up to this time, you all haven't had a chance to do any of that. Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: You understand -- because I understand you have taken no depositions?

MR. REITER: That's correct, Judge.

THE COURT: So you don't know what a witness is going to say about -- you don't know what they're going to tell about you?

THE DEFENDANT: That's right, Your Honor.

THE COURT: You feel comfortable going to trial and placing your life on the line like that?

THE DEFENDANT: Yes, sir.

THE COURT: Have you talked to Mr. Reiter in detail about this and how you might do this?

THE DEFENDANT: Yes, sir.

MR. REITER: I already indicated, Judge, this is really not a complicated case. It's really straight forward.[10]

(R. 241-46)

Attorneys for the three codefendants were present and all agreed that they wanted a severance if, in fact, the cases were consolidated at that point:

THE COURT: I realize because of the way Glades County does this, they assign separate case numbers. So, in effect, we don't have four defendants. I guess if you all did this, you'll have to make a Motion to Consolidate.

MS. CHAPPEL: Well, actually, Your Honor, they are all on one indictment. So technically they are consolidated at this point.

THE COURT: So, in effect, this is a dual motion?

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[10] Landry's attorney also told the court that, frequently, the best way to find out about a case is from the individual who was there rather than from the paperwork produced. (R. 251)

MR. REITER: Right. It's a Motion to Sever as well.

THE COURT: Do any of you all have any comment or any position as far as your client's position in regard to this? Mr. Elver?

MR. ELVER: Your, Honor, my client's position in regard to this is if the Court intends to grant it, we're going to request a severance. We have filed a notice that we intend to engage in discovery and we intend to do that. . . .

(R. 246-47) The other two attorneys agreed that they wanted to sever if Landry were granted a speedy trial, and that they would probably not be ready for a trial in July, as was scheduled on the docket. (R. 247-49) Landry's counsel reiterated that he was also moving to sever:

MR. REITER: Also, one more point, if we're considering this as a Motion to Sever in conjunction with the speedy trial is that even if the Court does not grant the Motion for Speedy Trial, my client is the only one who did not give a statement and we would still request a Motion to Sever from the three regardless.[11]

(R. 249-50) He also said that he had twice made offers which the State turned down. Thus, because Landry would be going to trial anyway, he wanted to make the State prove its case as soon as possible, and Landry had that constitutional right. (R. 250)

On June 22, 1992, the judge denied the demand. His order stated that it was apparent Landry was not ready for trial because he had not reviewed discovery, questioned witnesses, or taken

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[11] The judge never ruled on the oral motion to sever. This case is distinguishable from cases such as Gonzalez v. State, 447 So. 2d 381, 382 (Fla. 3d DCA 1984), in which the court attributed delay to the codefendant's need for further discovery. In Gonzalez, defense counsel did not object to the continuance requested by co-counsel, made no motion to sever, nor demanded a speedy trial. In the instant case, defense counsel demanded a speedy trial and moved to sever, thus distinguishing this case from those governed by Florida Rule of Criminal Procedure 3.191(j)(2), in which the delay is attributable to a codefendant **in the same trial.**

depositions "or other information" from potential witnesses. He said the case was clearly ripe for an ineffective assistance claim if the defendant were convicted. He concluded that, "[t]he idea that something might be pulled off and that if it isn't, you would be bound by the consequences of such a severe penalty, is not within the rational thinking of this Court. . . ."[12] (R. 91-92)

Landry filed a Motion for Discharge on July 17, 1992. (R. 103) At the motion hearing that day (R. 148-151), defense counsel argued that the 50th day had expired, and requested that the judge grant the discharge and set the trial within 10 days.[13] At this hearing, the judge should have reconsidered whether Landry was ready for trial. A motion for discharge is also a renewed demand for speedy trial. See Thompson v. State, 615 So. 2d 737, 741 (Fla. 1st DCA 1993) (speedy trial demand reinstated upon filing of motion for discharge); Lasker v. Parker, 513 So. 2d 1374, 1377 (Fla. 2d DCA 1987). Instead, however, the judge held in his July 21, 1992, order that, because he had previously ruled that the defense was not ready for trial, the time periods had not run.[14] (R. 107)

In every case we found in which the appellate court held that

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[12] If the court meant to invalidate the demand pursuant to Rule 3.191(j)(4), he was required to order that the case be tried within 90 days from his June 25 order -- by September 23, 1992.

[13] Florida Rule of Criminal Procedure 3.191(b)(4) provides as follows: "If the defendant has not been brought to trial within 50 days of the filing of the demand, the defendant shall have the right to the appropriate remedy as set forth in subdivision (p)." Subdivision (p) includes the 15-day "window of recapture."

[14] Defense counsel noted that the State never moved to invalidate the demand as required by Fla. R. Crim. P. 3.191(g). At the June 22 calendar call, the prosecutor merely recited what she believed to be necessary trial preparation. (T. 148-51) The court order did not "strike" the demand, but "denied" it. (R. 91-92)

the defense was not prepared or ready for trial, defense counsel or the defendant himself had filed a document or made a statement which objectively showed that he was not ready for trial. See, e.g., Hood v. State, 466 So. 2d 1232 (Fla. 2d DCA 1985) (defendant filed demand for discovery after demand for speedy trial); State v. Kauffman, 421 So. 2d 776 (Fla. 5th DCA 1982) (ongoing investigation, including demand for discovery and scheduling of depositions, antithesis of being prepared for trial); State ex rel. Furland v. Conkling, 405 So. 2d 773 (Fla. 5th DCA 1981) (notice of deposition filed same day as demand, with deposition set for 11 days later); State v. Wright, 389 So. 2d 289 (Fla. 3d DCA 1980) (continuance sought for further discovery after demand); State ex rel. Ranalli v. Johnson, 277 So. 2d 24 (Fla. 1973) (motion to dismiss, filed two weeks after demand, alleged information was too vague to prepare defense); Turner v. State ex rel. Pellerin, 272 So. 2d 129 (Fla. 1973) (motion to compel discovery and take depositions filed two days after demand); cf. State v. Embry, 322 So. 2d 515 (Fla. 1975) (motion to suppress does not ipso facto negate previous demand).

In no case we have found has the trial judge determined that a defendant was not ready for trial merely because he did not request discovery, had not taken depositions, or had not spent enough time investigating the case. Although the trial judge indicated that Landry's counsel had not reviewed the witnesses, there was no showing that this was true. In fact, counsel represented that he had discussed the case with counsel for the codefendants; thus, he had some idea of what their testimony would be. His client had told him what happened the night of the homicide.

In State v. Gonzalez, 449 So. 2d 1299 (Fla. 4th DCA 1984), the court remanded for an evidentiary hearing where the court granted a dismissal over the prosecutor's objection that the defendant had not diligently investigated his case and was not actually prepared to go to trial within five days. The Gonzalez court noted that, although the defendant was in the room, he did not testify.

In the instant case, however, Landry testified that he had discussed the case with his lawyer and was satisfied with his representation. He was prepared to go to trial without discovery. (R. 188-89) Defense counsel represented that he had spent a lot of time discussing the case with his client and had investigated his case to the extent he believed necessary. He did not believe that he would benefit from discovery, and preferred a speedy trial.

This is not a case like Dickey v. McNeal, 445 So. 2d 692 (Fla. 5th DCA 1984), wherein the defendant filed a pro se demand for speedy trial prior to the appointment of counsel. At Dickey's hearing on the motion for discharge, his lawyer told the court that, because his client had demanded a speedy trial, he could not in good faith request discovery and ruin the speedy trial demand. See also Salser v. State, 613 So. 2d 471 (Fla. 1993) (Kogan, J., dissenting) (pro se pleading). Conversely, Landry was represented by counsel who filed the demand. Counsel had discussed the case at length with his client and investigated to the extent he believed necessary. His client had agreed to go to trial without discovery.

A defendant has a constitutional and statutory right to demand and be given a speedy trial. When the statutory criteria are met, the court must grant the defendant a speedy trial. It is not up to

the judge to determine trial strategy, or to deny the defendant a speedy trial because he believes it to be in the defendant's best interest. A defendant is routinely permitted to plead guilty in a capital case (e.g., Aileen Wuornos, Danny Rolling); and to waive counsel and/or Miranda rights and confess to the crime. The judge does not try to determine what is best for the accused but defers to him (as long as he is informed of his rights and competent) or to defense counsel. A speedy trial is no different. Landry was informed of his rights as shown by his testimony and chose to waive his right to discovery in favor of a speedy trial.

The judge erred by denying or disallowing the demand for both procedural and substantive reasons. First, the prosecutor never moved to strike the demand as required by Rule 3.191(g) (demand filed by accused who has not diligently investigated case or is not prepared for trial shall be stricken as invalid on motion of prosecuting attorney). In Small v. State, 596 So. 2d 751, 753 n.2 (Fla. 4th DCA 1992), Judge Farmer, in his dissenting opinion, questioned whether the rule authorized the court to strike a demand for speedy trial in the absence of a state motion to strike.[15]

Secondly, it is not up to the judge to decide how much trial preparation is necessary, or what the attorney should do to investi-

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[15] In this case, instead of moving to strike the demand, the prosecutor requested that the judge ask the defendant whether he understood what rights he was giving up. The judge did so. She advised the judge that defense counsel had not requested discovery or taken depositions. This was actually a reason to uphold the demand. In numerous cases cited herein, demands have been stricken because defendants did request discovery or schedule depositions at the same time they demanded speedy trials. In this case, defense counsel represented to the court that he had all the information he needed and was prepared to go to trial without formal discovery.

gate his case. The amount of pretrial investigation that is reasonable defies precise measurement. Strickland v. Washington, 466 U.S. 668, 680-81 (1984). Landry apparently believed that the benefit of a speedy trial outweighed any possible benefit from discovery. A defendant is not required to participate in reciprocal discovery. See Fla. R. Crim. P.3.220 ("If a defendant should elect to avail himself of the discovery process. . .").

Accordingly, the test to determine whether a defendant is ready for trial must be an objective one. See State v. Reaves, 609 So. 2d 701, 705 (Fla. 4th DCA 1992); Kauffman, 421 So. 2d 776. Neither the judge's, nor the prosecutor's, personal opinion as to what defense counsel should do to prepare for trial is determinative. The judge's finding that a defendant is not prepared for trial must be based on objective criteria such as the defendant's filing of pleadings that are the antithesis of being prepared for trial. See, e.g., Jones, 449 So. 2d 253 (defendant filed 17 pro se motions and requested discovery during two weeks preceding demand for speedy trial); State ex rel. Ranalli v. Johnson, 277 So. 2d 24 (Fla. 1973) (defendant filed motion to dismiss two weeks after demand alleging information too vague to prepare adequate defense).

State v. Reaves, 609 So. 2d 701 (Fla. 4th DCA 1992), provides an example of an objective determination that the defendant was not prepared for trial when his demand was filed. After the defense was granted six continuances, trial was rescheduled for March 2, 1992. On November 27, 1991, however, defense counsel demanded a speedy trial. At the same time, he prepared and mailed a status report stating that the defense would be ready for trial on March

2, 1992, with no mention of the speedy trial demand. In his status report, defense counsel listed 18 motions he needed to prepare, file and have heard prior to trial. He titled his demand by rule number only because he did not want to make it "horribly obvious" that he was filing it. Id. at 702-03, 706.

The Reaves court found it obvious, employing an objective standard, that Reaves was neither ready for trial nor interested in a speedy trial. He merely filed the demand as a gimmick, hoping to obtain a favorable result. The court noted that the right to a speedy trial is important and should be demanded loudly and clearly as opposed to not making it "horribly obvious." 609 So. 2d at 709.

In the instant case, defense counsel demanded a speedy trial loudly, clearly and repeatedly. His demand was titled "Demand for Speedy Trial" in large bold capital letters. He said he would not be requesting discovery, filed no motions and scheduled no depositions. Landry testified that he had discussed the matter with his lawyer, understood his right to discovery, but preferred a speedy trial. By an objective standard, the defense was ready for trial. The court erred by subjectively deciding otherwise.

Third, the court should not be permitted to deny a defendant a speedy trial because he believes that a "Rule 3.850" action might follow, as did the judge in this case. His opinion was nothing more than speculation. An ineffective assistance claim would most likely be futile if based on trial strategy. Appellate courts uniformly agree that trial tactics will not form the basis for an ineffective assistance claim. Strickland v. Washington, 466 U.S. 668, 681 (1984) (if counsel investigates each line of defense

before making a strategic choice, the choices "will seldom if ever" be found wanting, as advocacy is an art not a science); Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985) (tactical decisions will not be second-guessed unless shown to be patently unreasonable).

In Melendez v. State, 612 So. 2d 1366, 1367 (Fla. 1992), this Court considered counsel's performance during the penalty stage in light of Melendez's statement that he wanted the death penalty because it would allow him to receive a speedy trial and publicity to prove his innocence, and that he would rather take that gamble than go to prison for a long time for something he did not do. This Court found that counsel was not ineffective for failing to investigate further and present additional mitigating evidence. Id.; see also Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990) (failure to adequately investigate penalty phase not so serious as to deny right to effective assistance of counsel); Gibson v. State, 557 So. 2d 929 (Fla. 5th DCA 1990) (inadequate discovery did not create a "probability of different results").

In Roesch v. State, 627 So. 2d 57, 58 (Fla. 2d DCA 1993), the defense demanded a speedy trial to force the state to trial within ten days, even though he had not completed his own investigation, because he knew that two key state witnesses were not immediately available. Remanding for an evidentiary hearing, the Second District ruled that, if anything conclusively demonstrated that the defendant freely chose the strategy followed by counsel after being adequately informed of the risks and benefits, the trial court could again deny his ineffective assistance claim. Id.

These cases indicate that the likelihood of Landry's success

in a Rule 3.850 motion was not great. Even if this were not so, however, the trial judge was not at liberty to decide whether Landry needed discovery or to second-guess his tactical decisions. Because the codefendants had made statements implicating Landry, perhaps Landry thought it advantageous to go to trial before these codefendants had a chance to get together to iron out any discrepancies in their stories and enter into plea agreements to testify against him. Perhaps he wanted to get his version of the burglary and homicide before a jury as soon as possible.

Just as the defendant should not be permitted to control the docket, neither should the state be permitted to do so. The prosecutor was served with notice of Landry's demand for speedy trial a month prior to the calendar call and failed to schedule a hearing to address the matter, as required by the rule, or move to strike the demand. If the prosecutor was not prepared for trial, the judge could have scheduled the trial toward the end of the 60-day period, thus affording the prosecutor time to prepare her case. As defense counsel noted, it was not a complicated case.

Although Landry filed various motions for discharge which are the subject of Issue II of this brief, he was never afforded his right to a speedy trial upon demand. He was finally tried alone, commencing November 3, 1992. Because the trial court erroneously denied Landry his constitutional and statutory rights to a speedy trial, his conviction and sentence must be vacated and he must be acquitted of the burglary and homicide.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR DISCHARGE BECAUSE HIS RIGHT TO SPEEDY TRIAL UPON DEMAND WAS VIOLATED.

Defense counsel was presented with a procedural dilemma after the judge denied his demand for a speedy trial. Although the judge refused to set the case for trial within 45 days as required by Rule 3.191(b)(2) when a demand is made, he also failed to strike the demand as contemplated by Rule 3.191(g), upon motion by the prosecutor. Moreover, the prosecutor did not even make a motion to strike the demand. Nor did the judge give the prosecutor 90 days to try the case as required by Rule 3.191(j) when a motion to dismiss is denied because the demand for speedy trial was invalid under subsection (j)(4).[16] Instead, the trial judge ignored the requirements of Rule 3.191 and denied Landry's several subsequent motions for discharge, despite his continued availability and readiness for trial. (See timetable following page 45, infra.) The court's denial of Landry's motions for discharge, in addition to his earlier denial of Landry's demand for speedy trial, requires that Landry be discharged.

Defense counsel waited 50 days after denial of Landry's demand for speedy trial and on July 17, 1992, filed a Motion for Discharge pursuant to Rule 3.191(b)(4). (R. 103) Instead of (1) granting the motion for discharge and setting the case for trial within the 15-day window; (2) considering the motion a renewed demand for speedy trial and determining whether Landry was by then sufficiently

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[16] The other reasons for denying a motion for discharge and ordering trial set within 90 days are listed on page 38, infra.

prepared for trial;[17] or (3) denying the motion because the demand was invalid in accordance with subdivision (g) and scheduling the trial within 90 days under subdivision (j), the judge denied the motion based on his earlier determination that the defense was not sufficiently prepared for trial. He ruled that, once that finding was made, the time period ceased to run. (R. 107)

Because the judge believed the time period had not run, he should have considered the defense motion a renewed demand for speedy trial. Had he done so, the judge should have granted the demand at this time and set the trial within 45 days because Landry was continuously available and ready for trial.[18] Forty-five days from the July 17, 1992, hearing was August 31, 1992. Sixty days from the renewed demand, including the 15-day window of recapture in Rule 3.191(p), expired on September 17, 1992. The trial was not held until November 3, 1992.

Once the trial judge failed to consider Landry's motion for discharge to also be a renewed demand for speedy trial, he should at least have proceeded according to Rule 3.191(j), based on the reasoning supporting his own ruling that Landry's speedy trial demand was invalid, or "denied." Rule 3.191(j) provides that a motion for discharge will be granted unless one of the following is

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[17] A motion for discharge must be treated as a renewed demand for speedy trial. See Thompson v. State, 615 So. 2d 737, 741 (Fla. 1st DCA 1993) (speedy trial requirement reinstated upon filing of motion for discharge); Lasker v. Parker, 513 So. 2d 1374, 1377 (Fla. 2d DCA 1987).

[18] The other option was to strike the demand upon motion by the prosecutor pursuant to Rule 3.191(g), and scheduled the trial within 90 days. See Rule 3.191(j). Defense counsel later made this argument. (R. 394-95) See discussion at page 41, infra.

exceptions shown:

> (1) a time extension was ordered and has not expired;
> (2) the failure to hold trial is attributable to the accused or a codefendant in the same trial or their counsel;[19]
> (3) the accused was unavailable for trial; or
> (4) the demand referred to in subdivision (g) is invalid.

Because the trial court apparently denied the July 17th motion for discharge based on subdivision (4) above, he should have proceeded, as the rule mandates, by ordering that the trial be scheduled and commence within 90 days of his written or recorded order of denial.[20] Fla. R. Crim. P. 3.191(j). This would have required that trial commence by October 24, 1992.[21] He did not do so, however, and the trial did not begin until November 3, 1992. (See timetable following page 45, infra).

The pretrial proceedings are confusing because the trial court (and in some cases the parties too) did not follow the procedures outlined by the rule. At the "Sounding of the Docket" on August 21, 1992 (R. 209-227), over his objection that speedy trial had already run, defense counsel again announced that Landry was ready

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[19] This provision is not applicable because, although counsel for the codefendants were still requesting discovery, all of the defendants had requested severances and it was not anticipated that they would be tried together. (R. 246-50) The three codefendants negotiated pleas; Landry was the only defendant tried.

[20] It might also be argued that the judge should have ordered that trial be scheduled and commenced within 90 days of the June 22 hearing, or June 25 order, when he first denied the demand for speedy trial. This would have mandated that the trial commence by September 23 or 26, 1992. See Fla. R. Crim. P. 3.191(j).

[21] October 24 was determined by counting 90 days from July 21, 1992, when the judge signed the written order denying the motion for discharge, and allowing for the five-day tolling of speedy trial from the judge's October 14 order tolling the time, until three days (mailing time) after the Second DCA's October 15, 1992, denial of the defense Petition for Writ of Prohibition.

for trial. (R. 212) The attorneys for the three codefendants were not ready for trial. (R. 212-14) They wanted a continuance without waiving speedy trial which, under Rule 3.191(a) (without demand), would not expire until October 25, 1992. (R. 215-17) They advised the judge that they had discussed their options, without consulting Landry's counsel, and had agreed that an extension of speedy trial was the best alternative. Thus, the judge extended speedy trial for 30 days to determine whether crime scene diagrams requested by the codefendants' lawyers existed.[22] (R. 224-26)

On September 30, 1992, the date then scheduled for trial, Landry filed another Motion for Discharge alleging violation of his right to speedy trial on demand. Counsel alleged that Landry had been continuously ready and available for trial despite the judge's finding that he had not participated in formal discovery. (R. 164-62) The new judge -- Circuit Judge Jay Rosman -- refused to reconsider the defense motion for discharge. He said he was required to defer to Judge Gerald's prior ruling. (R. 711-13)

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[22] Why the court extended speedy trial is a mystery. Two months remained before 175 days expired; the codefendants had not demanded a speedy trial; and trial was scheduled to commence prior to that time. Moreover, it would not take the prosecutor long to discover whether crime scene diagrams existed and, if so, to make them available to counsel. Extensions of time are permitted by Rule 3.191(i), for any of four reasons. The trial court apparently extended the speedy trial time based on the stipulation of counsel for the codefendants (Rule 3.191(i)(1)). Landry did not enter into the stipulation. His lawyer reiterated that speedy trial had run as to his client. Moreover, he had not requested discovery nor crime scene diagrams. He was not involved in the decision by the codefendants' lawyers and did not agree to an extension of speedy trial. Accordingly, the extension did not affect Landry's speedy trial rights. Cf. McKinney v. Yawn, 625 So. 2d 885, 891 (Fla. 1st DCA 1993); Lobik v. State, 506 So. 2d 1077 (Fla. 2d DCA 1987) (defendant who has made court aware of speedy trial issue can stand silent when court schedules trial outside speedy trial date).

Defense counsel advised the court that he had prepared a Petition for Writ of Prohibition ("Petition") to file in the Second District Court of Appeal ("Second District") on that date. The State announced that it was now prepared for trial. The trial judge delayed the trial until the next morning to check the status of the Petition. (R. 721-24) The Petition was filed in the Second District on September 30, 1992. (R. 169-83) The following morning, the trial judge reported that, at 4:30 the previous afternoon, the Second District's clerk called and advised that the court was entering an order to show cause on the writ, and needed a response by October 2, 1992. (R. 727-28) He said he would await the Second District's decision before trying Landry. (R. 728-29)

The prosecutor filed a motion dated October 2, 1992, to toll speedy trial during pendency of the Petition. (R. 280) At the October 5, 1992, hearing (R. 699-703), the trial judge agreed to grant the motion to toll speedy trial over "strong and strenuous" defense objection that speedy trial had run. (R. 703) His written order granting the State's motion to toll speedy trial was dated October 14, 1992. (R. 288) The following day, the Second District denied the Petition for Writ of Prohibition, without prejudice to raise the issue on appeal after conviction. The court's written order was dated October 15, 1992.[23] (R. 420)

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[23] The denial of the Petition does not affect this appeal. See McKinney v. Yawn, 625 So. 2d 885, 886, 892 (Fla. 1st DCA 1993) (writ of prohibition only reviews legal sufficiency of order denying motion to discharge and does not determine disputed issues of fact or sufficiency of evidence to support judge's findings; thus, whether delays resulting from late discovery should be charged against State reviewable only on appeal from conviction -- not by writ of prohibition); Obanion v. State, 496 So. 2d 977, 980 (Fla. 3d DCA 1986) (denial does not constitute ruling on merits).

On the morning of trial, November 3, 1992, defense counsel filed another motion to discharge based on his demand for speedy trial. (R. 394-95) He argued that the trial should have commenced within 90 days of the court's July 21 order denying his demand for speedy trial. See, e.g., Thompson v. State, 615 So. 2d 737, 741 (Fla. 1st DCA 1993); Obanion v. State, 496 So. 2d 977 (Fla. 3d DCA 1986). Ninety days from July 21, 1992, would have been October 19, 1992. The court, however, entered an order tolling speedy trial during the pendency of the Petition for Writ of Prohibition, on October 14, 1992.[24] The order denying the writ, dated October 15, 1992, was sent directly to the trial judge. Because his assistant could not remember when he received it,[25] the parties applied Rule 3.070 which provides that, when a party is required to do something within a prescribed time after service of a legal document, if the document is served by mail, three days must be added. Three days from October 15 would have been Sunday, October 18, so the time would have been tolled from October 14 (order signed) until October 19 (Monday), or five days. If five days were added to October 19, the trial was required to begin by October 24, 1992 (T. 125-27)

The prosecutor argued that the tolling of speedy trial should be from the October 5th hearing, rather than the written order, through October 20th, or 15 days. She arrived at October 20th by combining Rule 3.070 (the three-day mailing rule) with Rule 3.040,

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[24] A court order is required to toll speedy trial during an interlocutory appeal. State v. Barreiro, 460 So. 2d 945 (Fla. 3d DCA 1984).

[25] See State v. Jenkins, 389 So. 2d 971 (Fla. 1980) (when order silent as to time tolled, it runs from date court received order).

which provides in part that, when the time period is less than seven days, Saturdays, Sundays and legal holidays are excluded from the computation. She then added the 15 days to October 19th to extend the period until November 3, 1992, which was the date trial commenced. (T. 129-130) The judge said he would agree with the prosecutor's calculations and proceed to trial. (T. 145)

The prosecutor's computation was clearly incorrect for two reasons. First, the tolling did not commence until the trial judge signed the written order on October 14, 1992. See Williams v. State, 350 So. 2d 81 (Fla. 1977) (motion and order notified all concerned of when speedy trial time would start and stop, following an interlocutory appeal).[26] The prosecutor's second error was the incorrect application of Florida Rule of Criminal Procedure 3.040. Instead of excluding Saturday and Sunday because the three-day mailing time was less than seven days, she should have applied the first part of the rule which provides that, when the last day falls on a weekend or holiday, the period is extended until the next working day (when the mail would be delivered). Accordingly, the time tolled was not 15 days, but four days (October 14 to October 19, 1992), as was computed by defense counsel.[27]

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[26] If tolling were computed from the hearing date instead of the written order, we would also have to start the 90 days from the July 17th hearing rather than the July 21st order; thus, the trial would still have commenced four days after the time expired.

[27] Before the jury was sworn on November 4, 1992, defense counsel asked the court to also consider the Motion for Discharge on the basis that the State had agreed that November 3, 1992, was the last day to commence trial and the jury panel for this case was not yet sworn. See Fla. R. Crim. P. 3.191 (c) (trial commences when jury panel for specific trial sworn for voir dire); accord Moore v. State, 368 So. 2d 1291 (Fla. 1979). The judge had told (continued...)

Although the prosecutor did not argue that the 15-day "window of recapture" in Rule 3.191(p) was applicable, the Appellee may raise this argument based on Howard v. State, 599 So. 2d 1043 (Fla. 2d DCA 1992); State v. Ferrante, 561 So. 2d 422 (Fla. 3d DCA 1990); and State v. Veliz, 524 So. 2d 1157 (Fla. 3d DCA 1988). In those cases, the Second and Third Districts held that the 15-day window applied when the court ordered that a case be tried within 90 days following denial of a motion for discharge pursuant to subsection (j). The Second District relied on the Third District's decision in Veliz. This Court, however, has not yet considered this issue and we contend that the 15-day window is not applicable in such a case.

Rule 3.191(j) states that once the court determines that discharge is inappropriate for reasons set forth in (2), (3) or (4) of that subsection, the pending motion for discharge shall be denied; the trial, however, "shall be **scheduled and commenced** within 90 days of a written or recorded order of denial." There is no mention of the "remedies set forth in subsection (p)," which includes the 15-day window. All of the other subsections to Rule 3.191 which contain time limits, specifically refer to the remedies in subsection (p).

Rule 3.191(a) provides that, if an accused is not tried within 175 days, he is entitled to "the appropriate remedy as set forth in

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[27](...continued)
Mr. Rinard (counsel for a codefendant) that the same jury would be used for another trial if anything precluded Landry's trial. See Stuart v. State, 360 So. 2d 406, 409 (Fla. 1978) (jury panel sworn and qualified for the week does not amount to commencement where jury not seated for particular trial). The judge interrupted defense counsel and asked how many more motions for discharge he intended to make. He granted a continuing objection. (T. 380-821)

subdivision (p)." Rule 3.191(b)(4) provides that, if an accused files a demand for speedy trial and has not been brought to trial in 60 days, he is entitled to "the appropriate remedy as set forth in subdivision (p)." Rule 3.191(m) provides that, when an accused is not brought to trial within 90 days from the granting of a new trial, he is entitled to "the appropriate remedy as set forth in subdivision (p)."

Rule 3.191(j) does not refer to subsection (p). It provides that, if the court finds discharge inappropriate for one of the reasons specified in subsection (j), the pending motion shall be denied, **"provided, however, that trial shall be scheduled and commence within 90 days of a written or recorded order of denial."** Had the committee and the legislature intended the 15-day window to apply, Rule 3.191(j) would provide that, if the defendant is not brought to trial within 90 days, he is entitled to "the appropriate remedy as set forth in subdivision (p)." The rule of lenity requires that criminal statutes be strictly construed in favor of the accused. § 775.021(1), Fla. Stat. (1993). Because the the 15-day window reference was omitted from Rule 3.191(j), we must assume the legislature did not intend it to apply to that provision.

When the state is given 90 rather than 60 days in which to try the case, it should not be given 15 more days. The intent of subsection (p) is to provide an additional 15 days as a "safety valve" to give the state a chance to remedy a mistake -- not to permit the system to forget time constraints. Freeman v. State, 520 So. 2d 110, 111 (Fla. 2d DCA 1988) (Parker, J., concurring). Once the judge has denied a motion for discharge and given the state 90 days

to bring the defendant to trial, the prosecutor should not make the mistake of forgetting the time limits. Thus, the 15-day window is unnecessary because the 90 days is the "window of recapture."

In Agee v. State, 622 So. 2d 473 (Fla. 1993), this Court held that the state is not entitled to the 15-day "window of recapture" when it files a new information after entering a nolle prosequi, under Florida Rule of Criminal Procedure 3.191(o). When a defendant moves to dismiss after charges are refiled, he is entitled to automatic dismissal if the original speedy trial time has expired.

The same should be true in this case. There must be a limit to how many extra chances the state is given. Otherwise, the state could hold up discovery indefinitely to prevent the defense from being ready for trial, thus getting an additional 90 days, and an additional 90 days, and an additional 90 days. There would be no risk because, even if the judge granted a dismissal motion, the state would still have 15 days to try the case. Thus, the state could control the trial docket, denying the defendant a speedy trial. Cf. George v. Trettis, 500 So. 2d 588 (Fla. 2d DCA 1986) (state must furnish discovery within sufficient time to allow defendant to use it without forfeiting right to speedy trial).

Because the trial court erroneously denied Landry's motions for discharge, after denying him a speedy trial, this Court should vacate Landry's convictions and sentences and discharge him.

SPEEDY TRIAL DEMAND AND MOTION FOR DISCHARGE TIMETABLE

1992

May 3	Defendant arrested
May 5	Counsel appointed
May 20	Indictment filed
May 22	**DEMAND FOR SPEEDY TRIAL** filed (Rule 3.191(b))
June 22	DEMAND argued at calendar call (Rule 3.191(b)(1))
June 25	Judge "denies" DEMAND by written order

More than 50 days since DEMAND filed (Rule 3.191(b)(4))

July 17	**MOTION FOR DISCHARGE** filed and denied in court
July 21	Judge denies MOTION FOR DISCHARGE by written order
Sept. 30	**MOTION FOR DISCHARGE** filed and denied in open court **PETITION FOR WRIT OF PROHIBITION** filed in Second DCA Second DCA orders State to respond to writ
Oct. 2	State Motion to Toll Speedy Trial during pending writ
Oct. 5	Motion to Toll Speedy Trial granted orally at hearing
Oct. 14	Motion to Toll Speedy Trial granted by written order
Oct. 15	Second DCA denies writ without prejudice

More than 90 days since DISCHARGE denied (Rule 3.191(j))

Nov. 3	**MOTION FOR DISCHARGE** filed and denied in court Jury panel sworn for voir dire
Nov. 4	Oral **MOTION FOR DISCHARGE** Jury sworn for Landry trial
Nov. 24	Defense **Motion for Arrest of Judgment** (speedy trial)
Dec. 15	Court denies Motion for Arrest of Judgment Landry sentenced to death

ISSUE III

THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTIONS IN LIMINE TO EXCLUDE DEFENSE EVIDENCE SUGGESTING THAT THE VICTIM'S WIFE, DAWN DOWNS, MAY HAVE BEEN INVOLVED IN THE CRIME.

The State filed a number of motions in limine before and during trial, requesting that the judge order Landry's attorney to refrain from mentioning in front of jury, or eliciting without proffer, various evidence related to Landry's defense that Dawn Downs was involved in the murder of her husband. (R. 256-57, 398-99, 408) Dawn's alleged motive was to prevent the government from taking their property in a forfeiture action if Downs were convicted of drug dealing. The prosecutor also objected to defense counsel's cross-examination of various witnesses to elicit evidence to support the defense theory. Evidence the prosecutor asked the court to exclude concerned:

(1) Unsealed drug-related indictments against Ed Downs;

(2) Alleged romantic involvement between Detective John Brock, Glades County Sheriff's Department, and Dawn Downs;

(3) Cultivation of marijuana on the Downs' property;

(4) Political contributions (offered but not accepted) by Ed or Dawn Downs to the political campaign of John Brock;

(5) Allegations that Dawn Downs was involved in the death of her husband;

(6) That Dawn Downs was also Ed Downs' stepdaughter; and

(7) That Ed Downs paid his caretakers in cash.

(R. 256-57, 398-99, 408, 487DD-487EE, 547) The trial judge granted all of the State's motions but said he would reconsider his rulings

if the defense showed that the evidence was relevant. (T. 363-90, 388, 550-52 757) He eventually allowed testimony that Landry and the codefendants looked for marijuana on the Downs' property (T. 1884) but did not allow any evidence implicating Ed Downs in the growing of the marijuana. He allowed some of the defense evidence concerning Dawn's alleged conspiracy to have her husband murdered but excluded the evidence showing her motive -- the drug indictment and forfeiture proceeding. (T. 572-82) He excluded all of the other defense evidence listed above (T. 586-87, 1882-90) and, in several cases, even refused to allow the defense to proffer the evidence to show its relevance. (T. 487DD-EE, 551)

(1) The Unsealed Drug Indictment.

The trial judge would not allow the defense to introduce the proffered testimony that Ed Downs had been indicted by the federal government for drug smuggling about a month before the homicide, and the government had initiated forfeiture proceedings against the Downs' property. (T. 572-82) Because the State did not object, the judge allowed Dawn Downs to proffer the testimony. (T. 570)

Dawn proffered that her husband had been indicted by the federal government. The indictment charged that Downs and some friends were smuggling marijuana from Columbia. The federal government was trying to take her home and the entire estate through a forfeiture action, and had been trying to do so at the time of her husband's death. She was fighting the forfeiture action and had five attorneys -- one in Ft. Meyers, two in Miami, one in Ft. Lauderdale and one in Boulder, although not all of them

were working on the forfeiture action. (T. 570-78).[28]

On cross-examination, Dawn denied that she had knowledge of the indictment when her husband was murdered. She said she read it in the paper about a month after the murder. Later, an attorney and the federal agents came to videotape the property. (T. 578-79) Dawn admitted, however, that Detective John Brock said someone had been growing marijuana on their property and Ed Downs let him go on the property to investigate. (T. 575-76)

Evidence of the drug indictment showed that Dawn had a motive to kill her husband. Without this information, the jury would have found it hard to believe that Dawn conspired to have her husband killed. Had the jurors known about the indictment and forfeiture action, they might have disbelieved her testimony that she was not aware of it at the time of the homicide. The timing was certainly suspicious, suggesting a motive for the homicide.[29]

(2) Relationship Between Dawn Downs and John Brock.

Dawn Downs testified in a proffer that she first met John Brock when he asked to investigate a report that someone had been growing marijuana on their property. Ed let him go on the property to investigate. (T. 570-76) After Brock's testimony on redirect,

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[28] Defense counsel said the Downs' home was worth 1.6 million; Dawn said she didn't know its value. (T. 571-74)

[29] Defense counsel asked Roger Anderson, FDLE, if he tested the money found at David Sorton's house to see if it had cocaine residue on it. He said no. The prosecutor moved to strike. The judge immediately sustained the objection and told the jury to disregard it and not consider it in their final deliberations. (T. 650(75)) Without knowledge of the indictment, the jurors would not have understood why the question was even asked, or may have suspected that Sorton or the other defendants were on drugs.

defense counsel asked to question Brock further about his relationship with Dawn Downs and his investigation of Ed Downs for growing marijuana on the property. The prosecutor said the "tip" was that someone else was growing marijuana on the Downs' property. The judge ruled that defense counsel's questioning was beyond the scope of redirect. When defense counsel argued that the prosecutor had established that Brock once took her to the Downs' residence, the judge allowed defense counsel to address that particular time, but no other occasions when Brock went to the Downs' house after the murder. Defense counsel asked nothing further. (T. 1287-90)

(3) Cultivation of Marijuana on Downs' Property.

When Dawn Downs admitted that John Brock was a close friend and had been to their house a number of times, defense counsel asked if she knew "John Brock was investigating criminal . . ." The prosecutor objected. (T. 567) Defense counsel argued that on deposition Brock said he had been to the Downs property a number of times. The prosecutor said the only investigation was of the marijuana. Brock had the combination to the Downs' gate in case he needed to investigate or if anything went wrong. (T. 569)

Defense counsel argued that the evidence was relevant because Brock knew the names "Rich," or "Rick," and "John" because he had prior dealings with them. Defense counsel did not know whether Brock had seen or investigated them on the property before, or investigated a burglary in which they were involved. The judge sustained the State's objection unless and until the defense showed a prior contact later. The court told the jury to disregard the last question. (T. 570) He later allowed the defendants to testify

that they looked for marijuana on Downs' property.

David Sorton testified that they went out along the Downs property line at noon on the day before the crime and looked around the woods because "he was supposed to have some plants growing out there of something . . ." (T. 666) They found none. (T. 745) Rick Young testified that, although they did not go to the Downs' estate looking for marijuana, someone said there may have been some there. (T. 905-06) Landry testified that they went looking for marijuana the night of the homicide. He said that he and Sorton had done so several times before, and had found some in the bushes before. (T. 1790-91) All other evidence concerning the growing of marijuana on the property was excluded.

(4) Political Contributions Offered to John Brock.

Dawn Downs testified in proffer that she offered John Brock a campaign contribution of $500 but he refused it. (T. 581-82) The judge erroneously excluded this evidence because it was relevant to show the friendship between Dawn Downs and John Brock, which was probative as to whether they may have conspired to have Ed Downs killed, or whether Brock may have covered up Dawn's involvement, because of a romantic relationship.

(5) Dawn's alleged Involvement in her Husband's Death.

Landry testified that he was at a party two weeks before the homicide. The three codefendants were also there. (T. 1788) He saw a green Jaguar there but did not see who was driving it. (T. 1789) Dawn Downs drove a green Jaguar. (T. 505) She denied hiring Ricky Young to kill her husband. (T. 1892)

Landry testified that, when he became frustrated with the attempted burglary of the Downs' home and wanted to leave, Rick Young pulled him aside and told him that he was waiting for some kind of signal. He said he knew the lady in the house and that she wanted him to kill her husband and make it look like a robbery. (T. 1826-27) John "freaked out." Although Rick tried to talk him into continuing, and offered to give him some of the money, John refused to continue with the burglary and left. (T. 1827)

Dawn testified that she inherited the house and property, including mini storage units, a ranch, adjoining property, and a condominium in Colorado. (T. 1892) Because the trial judge would not allow the defense to introduce proffered testimony that Ed Downs had been indicted by the federal government for drug-related offenses and that the government had initiated forfeiture proceedings against the property (T. 572-82), however, the defense was not able to establish a motive for Dawn's complicity in the homicide.

(6) Dawn Downs was also Ed Downs' Stepdaughter.

Just before defense counsel cross-examined Dawn Downs, the State moved to preclude any reference to the fact that Dawn Downs was formerly the stepdaughter of Ed Downs. (T. 547) The trial court granted the State's motion, but said the defense could raise the issue again if it became relevant. Defense counsel noted that he could not show that the evidence was relevant because the court precluded him from asking the necessary questions and precluded him from proffering evidence which would show its relevancy. The judge said he would leave it to the defense to develop their defense, but that the questions were remote at that time. (T. 550-52)

Dawn Downs later testified in a proffer that Ed Downs was previously married to her mother. Dawn married him shortly after he and her mother separated. (R. 576) She had not worked for seven years. She was listed jointly on Ed's checking account. Ed gave her an allowance in cash. (T. 580) This excluded evidence was relevant to show Dawn's motive to murder her husband -- that she married him for his money and was afraid she would lose everything if he was convicted of smuggling marijuana.

(7) Cross-examination of Caretakers.

During the cross-examination of caretaker Charles Easterly, defense counsel asked how he was paid. The prosecutor objected to the relevancy of the evidence. Defense counsel argued that it was relevant to establish the type of business Mr. Downs may have been involved in -- possibly, drugs. He asked to proffer the testimony. The judge said the evidence was not relevant and specifically denied the defense request to proffer the testimony. (T. 487DD-EE)

During cross-examination of caretaker Seldon Easterly, defense counsel asked how he was paid. The prosecutor objected. Again, defense counsel asked to make a formal proffer, explaining to the judge that the testimony was relevant to the defense. The judge asked what counsel expected the response to be. Defense counsel said he expected the witness to say he was paid in cash. (T. 490) The prosecutor told the judge that the defense was attempting to show that Easterly was paid in cash and did not know how Mr. Downs made his money which was "highly prejudicial." The judge complained about the defense continually asking to proffer testimony and denied the defense request to proffer the evidence. (T.491-92)

Later, during a proffer, Dawn Downs testified that the caretakers were paid by her husband in cash. (T. 580) He paid everyone on his staff in cash. Dawn's allowance was paid in cash. (T. 580) The trial judge committed error by excluding the evidence (T. 586-87) because it tended to show that Dawn Downs was aware, or had reason to suspect, that her husband was smuggling drugs and may have known of the indictment and forfeiture action.

* * * * *

The trial court erred by excluding the above evidence, and by denying defense counsel's requests to proffer evidence:

The Court Erred by Excluding Defense Evidence.

The right to develop and present a theory of defense is a fundamental constitutional right. Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). The evidence excluded in this case was probative and supported Landry's claim of innocence. If Dawn Downs hired Ricky Young to kill her husband, and Landry was not aware of the plot until the last minute, at which time he left, he was not guilty of murder.

In Astrachan v. State, 28 So. 2d 874 (Fla. 1947), this Court noted as follows:

> The rule with reference to the admissibility of indirect, collateral, or circumstantial evidence is that 'great latitude is to be allowed in the reception of indirect or circumstantial evidence. It includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry,

> or to assist, though remotely, to a determination probably founded in truth.'

28 So. 2d at 875. Applying the "rule" to the case at hand, the judge erred by excluding testimony that would have "elucidated the inquiry" and assisted the jury in determining the truth.

In Moreno v. State, 418 So. 2d 1223 (Fla. 3d DCA 1982), the court stated as follows:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. . . . Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. . . .

Id. at 1225 (citations omitted); see also Rivera v. State, 561 So. 2d 536 (Fla. 1990).

It is well-established that a defendant may give evidence concerning a third party's involvement with the crime so long as the evidence directly connects the third party with the crime. Cikora v. Wainwright, 661 F. Supp. 813, 824 (S.D. Fla. 1987); Barnes v. State, 415 So. 2d 1280, 1285 (Fla. 1982) (Grimes, J., dissenting). In this case, Dawn Downs had a motive to want her husband dead. He had been charged with drug smuggling. If he were convicted, the government could take all of their property in a forfeiture action. If her husband were dead, he could not be tried nor convicted and she would inherit all of his property. Additionally, Dawn was much younger than her husband and was formerly his stepdaughter. Defense evidence suggested she may have been at a party with some of the codefendants two weeks before the homicide. The implication was that, while at the party, she may have hired one of the codefendants (Ricky Young) to kill her husband.

"Any evidence tending to establish that a witness is appearing for the State for any reason other than to tell the truth should not be kept from the jury." Williams v. State, 600 So. 2d 509 (Fla. 3d DCA 1992). Dawn Downs was a crucial identification witness for the State. The prosecutor asked her questions about her relationship with her husband, such as how long they had been married, where she was from, and when they built their house. Because of her marriage to the victim, Dawn had a stake in the case. Her credibility was placed in issue by defense counsel's allegations that she was involved in the murder of her husband. Even if she was not involved in the crime, her credibility was affected by her relationships with her husband and Brock. Defense counsel should have been "afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as she did." Mendez v. State, 412 So. 2d 965, 966 (Fla. 2d DCA 1982). The court erred by refusing to allow defense counsel to adequately cross-examine Dawn Downs concerning her relationship with John Brock, and other matters pertaining to her relationship with her husband.

In Corley v. State, 586 So. 2d 432, 434 (Fla. 1st DCA 1991), rev. denied, 598 So. 2d 78 (Fla. 1992), the court explained:

> It is widely recognized that a defendant has the right to fully cross-examine an adverse witness to reveal any bias, prejudice, or improper motive that the witness may have in testifying against the defendant . . . . The matters tending to show bias or prejudice that the defendant wishes to elicit on cross-examination do not have to be within the scope of direct examination. Nor is the defendant required to lay any other predicate prior to eliciting the information on cross-examination.

The trial judge violated Landry's right to confront and cross-examine adverse witnesses, and his right to present a defense, when

he excluded the most crucial defense evidence and precluded defense counsel from cross-examining John Brock and Dawn Downs as to their motives to testify against Landry. Dawn had a motive to lie if she engaged someone to kill her husband. If she was romantically involved with Brock, he had reason to lie to protect her.

As explained in State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986), the harmless error test places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to the conviction. The United States Supreme Court has accorded special recognition to the harmfulness of any curtailment of the defendant's right to effective cross-examination, declaring that it "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. 308, 318 (1974). The violation of Landry's right to confront and cross-examine the State's key witnesses prevented Landry from fully developing his defense, thus requiring reversal of the convictions and remand for a new trial.

The Court Erred by Disallowing Defense Proffers.

In support of his "Motion for New Trial," defense counsel argued that the judge erred by denying his requests to proffer testimony. Because the court did not allow the proffers, the defense was unable to establish a nexus to get the defense evidence admitted. Without a proffer, this Court cannot determine whether error occurred, nor can the State prove it harmless. (R. 777-80)

The trial court may not refuse to allow a proffer necessary to preserve a point on appeal. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (citing Pender v. State, 432 So. 2d 800 (Fla. 1st DCA

1983)). A proffer is necessary to ensure full and effective appellate review. B.F.K. v. State, 614 So. 2d 1167 (Fla. 2d DCA 1993); Piccirrillo v. State, 329 So. 2d 46, 47 (Fla. 1st DCA 1976).

In Pender, the court noted that, "this court cannot know what the excluded testimony was intended to prove, or whether it would have been relevant to any material issue at trial, when the trial court refused to allow counsel to make a proffer." 432 So. 2d at 802 (citations omitted). The Pender court also noted that the trial court's failure to allow a proffer thwarted the defendant's right to cross-examination and his right to confront witnesses, thus implicating the United States and Florida Constitutions. Because the court had no way of knowing what the testimony would have been, it could not find the error harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967) (defining standard for harmless error when violation of constitution rights occurs); Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341, 1345 (Fla. 4th DCA 1990) (refusal to allow proffer).

In Smith v. State, 594 So. 2d 846 (Fla. 2d DCA 1984), the court reversed because the judge cut off defense counsel when he tried to lay a predicate for impeachment purposes. The judge did the same thing here. When defense counsel tried to establish a nexus, the court did not allow him to ask or proffer the questions and testimony needed to do so. As did the Smith court, this Court should reverse for the proffer and potential admission of the excluded defense evidence. See also Kimble v. State, 537 So. 2d 1094 (Fla. 2d DCA 1989) (defendant's failure to lay proper predicated caused by trial court's refusal to permit it).

The trial court refused to allow defense proffers of testimony by the caretakers, Charles and Seldon Easterly, that they were paid in cash. Landry was not allowed to proffer their testimony as to Downs' type of work, or to connect Downs' alleged marijuana smuggling with Brock's investigation of marijuana. (T. 487DD-EE, 580) Because the court refused to allow these proffers, this Court cannot now determine whether the exclusion of the evidence was harmless. Accordingly, a new trial is required.

ISSUE IV

THE TRIAL COURT ERRED BY DISALLOWING CODEFENDANT RICK YOUNG'S TESTIMONY CONCERNING HIS UNDERSTANDING OF HIS SENTENCE UNDER THE PLEA AGREEMENT.

Evidence of any understanding or agreement concerning future prosecution is relevant to credibility and the jury is entitled to hear it. Giglio v. United States, 405 U.S. 150, 155 (1972). A "reasonable probability" that false evidence may have affected the jury's judgment requires a new trial. Routly v. State, 590 So. 2d 397, 400 (Fla. 1991). Impeachment evidence, including any deal between the State and the witness as to sentence, is relevant. Glendening v. State, 604 So. 2d 839, 841 (Fla. 2d DCA 1992); accord United States v. Bagley, 473 So. 2d 667 (1985).

In the case at hand, the State did not withhold evidence from the defense, but successfully prevented the jury from hearing it by objecting to defense counsel's question. When he asked codefendant Rick Young how much of the promised seventeen-year sentence he thought he would actually serve, the judge sustained the State's objection. (T. 900-01) Counsel then asked Young whether he under-

stood that he would receive gain time and whether he believed he would serve the entire seventeen years. Each time, the judge sustained the State's objection and did not allow Young to answer. Counsel tried one last time, but again the judge sustained the prosecutor's relevancy objection. (T. 898-899)

The restriction of defense counsel's cross-examination was error for several reasons. All relevant evidence is admissible, unless prohibited by law. § 90.402, Fla. Stat. (1993). The judge nor the prosecutor cited any law excluding the evidence. If Rick Young was told that he would serve less than seventeen years, which would certainly be true because of gain time, this was relevant to his understanding of the plea agreement and, therefore, to his motive to testify for the prosecution. See Blanco v. State, 353 So. 2d 602 (Fla. 3d DCA 1977); see also Fulton v. State, 335 So. 2d 280, 283-84 (Fla. 1976) (defense has absolute right to cross-examine state witnesses about plea agreements); Patterson v. State, 501 So. 2d 691, 692 (Fla. 2d DCA 1987); Watts v. State, 450 So. 2d 265, 268 (Fla. 2d DCA 1984) (demonstrates "witness's motive for testifying for any reason other than to tell the truth").

Secondly, the prosecutor opened the door to this impeachment by asking Young about his agreement with the State. In McCrae v. State, 395 So. 2d 1145, 1152 (Fla. 1981), this Court noted that one of the objects of cross-examination is "to elicit the whole truth of transactions which are only partly explained in the direct examination." Questions designed to elicit facts tending to contradict, explain or modify an inference which might otherwise be drawn from testimony are legitimate cross-examination. Evidence

concerning the time Young expected to spend in prison in exchange for his testimony would have more fully apprised the jurors of the extent of his self-interest and motive to lie for personal gain.

Additionally, the court's restriction of defense counsel's cross-examination violated Landry's Sixth Amendment right to confrontation. The right to cross-examination includes the right to examine a witness as to matters affecting his credibility, including a possible motive for testifying. Davis v. Alaska, 415 U.S. 308 (1974). An abuse of discretion in curtailing cross-examination of a key prosecution witness regarding matters germane to his testimony may "easily constitute reversible error," especially in a capital case. Coxwell v. State, 361 So. 2d 148, 152 (Fla. 1978); accord Pait v. State, 112 So. 2d 380 (Fla. 1959) (error in capital case must be carefully scrutinized before written off as harmless).

This error was compounded by the court's denial of the defense motion to disqualify the assistant state attorney. (R. 718) Because the prosecutor who negotiated the agreements with Richard Young and David Sorton also prosecuted Landry, the defense was unable to call her as an impeachment witness. (R. 162) Counsel could not question the codefendants' attorneys concerning plea negotiations because of attorney-client privilege. Although the state has no privilege, defense counsel could not question the prosecutor because she was prosecuting Landry. (R. 714-15) Thus, he was unable to ask whether anyone told Young he would serve less than seventeen years. This made the court's evidentiary ruling even more harmful.

The right to develop and present a theory of defense is a fundamental constitutional right. Chambers v. Mississippi, 410

U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). Landry's defense was that he did not commit the crime. It was essential to his defense to convince the jury that the two codefendants who provided direct evidence of his guilt were lying. Evidence of Young's prospective sentence was central to his credibility. Thus, the court's restriction of cross-examination concerning the amount of time Young had been told he would spend in prison deprived Landry of his constitutional right to present a meaningful defense.

When an error affects a constitutional right, the reviewing court may not find it harmless unless the state proves beyond a reasonable doubt that the error did not contribute to the defendant's conviction. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Landry's codefendants provided the only details of the murder directly implicating Landry. Had the jurors not believed Young, they might not have found Landry guilty. Thus, the error was harmful and the case should be reversed for a new trial.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE TAPED STATEMENTS OF TWO CODEFENDANTS TO BOLSTER THE CODEFENDANTS' TRIAL TESTIMONY.

Over defense objection, the trial court allowed the State to introduce into evidence, and play for the jury, two hour-long taped interviews with codefendants Ricky Young and David Sorton, made just after their arrests. (T. 1116, 1180) Defense counsel objected to their introduction as prior consistent statements because the defense did not allege recent fabrication. (T. 1111-12) The codefendants allegedly altered their stories during their depositions

a week earlier, but returned to their original taped versions after refreshing their memories before trial. (T. 1115-18)

The taped statements were inadmissible for numerous reasons. First, the codefendants did not make the prior consistent statements before their motives to fabricate existed. Second, parts of the taped statements were inconsistent, rather than consistent, with the codefendants' trial testimony, and other parts were inadmissible hearsay unrelated to the codefendants' trial testimony. Third, the statements violated Landry's right to confrontation because they were taken by law enforcement officers at a time when the defense had no opportunity for cross-examination. Fourth, defense counsel did not have an opportunity to listen to the tapes prior to trial and the court refused to require the State to proffer them so that he could object to irrelevant or prejudicial parts. Fifth, the court refused to instruct the jury that the taped statements could not be considered as substantive evidence, but only to rebut charges of improper influence or motive. Lastly, the tapes should have been excluded because the danger of unfair prejudice and unnecessary introduction of cumulative evidence far outweighed any probative value. See § 90.403, Fla. Stat. (1993).

(1) Prior Consistent Statements.

It is well established that a prior consistent statement may not be introduced to corroborate or bolster the credibility of the witness's trial testimony. Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1993); Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986); Van Gallon v. State, 50 So. 2d 882 (Fla. 1951). Additionally, because they are generally hearsay, prior consistent statements are

inadmissible as substantive evidence unless they qualify under an exception to the hearsay rule. Rodriguez, 609 So. 2d at 500. An exception to the general rule allows such evidence when the prior consistent statement is used to rebut an express or implied charge of improper influence, motive or recent fabrication.[30] It is essential, however, that the prior consistent statement have been made prior to the existence of the reason to falsify. Anderson v. State, 574 So. 2d 87, 92 (Fla. 1991); Jackson, 498 So. 2d at 910; Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988).

A close examination of the record fails to show that Landry's attorney raised any implication of recent fabrication. To the contrary, he challenged the credibility of the witnesses because they blamed Landry to exonerate themselves. A witness's credibility is always at issue, and a general attack on credibility does not satisfy the hearsay exception for prior consistent statements. See Turtle v. State, 600 So. 2d 1214 (Fla. 1st DCA 1992).

A police officer should not be permitted to recount the victim's description of the criminal incident. Jenkins v. State, 547 So. 2d 1017, 1021 (Fla. 1st DCA 1989); Reyes v. State, 580 So. 2d 309 (Fla. 3d DCA 1991); Lamb v. State, 357 So. 2d 437 (Fla. 2d DCA 1978). This case was even worse. Instead of having a police officer testify concerning the codefendants' prior statements, the State played two hour-long tapes for the jury. The videotaped

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[30] Section 90.801(2)(b) provides that "[a] statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . [c]onsistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication."

statements were cloaked with credibility because Detective Brock was doing the questioning and thus presenting the evidence to the jury. The statements were introduced as part of Brock's testimony. See Allison v. State, 162 So. 2d 922 (Fla. 1st DCA 1964) (danger acute where out-of-court statement repeated by law enforcement).

The rule against the use of prior consistent statements is apparent upon reflection. Without the rule, a witness's testimony can be blown out of proportion. If the witness told the same story to a group of reputable citizens, these citizens could then "parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens." Allison, 162 So. 2d 922. This is exactly what happened here. Instead of hearing two codefendant versions of the crime, the jury heard four versions -- two from each of the codefendants. Although none of the four versions were exactly the same, all four accused Landry of taking part in the homicide. Thus, it was as though four witnesses testified that Landry was involved rather than only two.

The codefendants had reason to make false statements from the moment of their arrests. Their only hope was to blame the murder on Landry and Delph to exonerate themselves. Perhaps they thought Landry would escape and they would not have to confront him with their stories. A natural reaction to being accused of a crime is to blame someone else. They probably believed that, if they could convince Brock they were not involved in the shooting, they would be charged with less serious crimes. John Brock encouraged such reasoning by telling them he wanted to hear their sides of the

story; that they would feel better if they got it off their chests; and that he had already heard other defendants' versions of the facts. (T. 1127-29, 1186-88) He encouraged them to implicate the others. (T. 1132-33) Because their motives to lie -- to exonerate themselves, arose at the moment of their arrests, and continued through trial, the hearsay exception is inapplicable.

When defense counsel argued that he never alleged recent fabrication, the judge said that recent fabrication was just one of the areas the evidence code touched on. He said that the other dealt with "improper enforcement or breach of [interruption by court reporter] by cross-examination concerning the plea," and that he believed that "triggers this section." He said that if it were just recent fabrication, he would understand defense counsel's argument. (T. 1121) Although it is unclear, the trial judge apparently believed that section 90.801(2)(b)'s provision requiring that the prior consistent statement be offered to rebut an express or implied charge of improper influence or motive was not subject to the requirement that the statement must have been made before the existence of the motive to lie. Thus, the trial judge may have believed that, because defense counsel cross-examined the co-defendants about their plea agreements, their prior consistent statements were admissible without any defense allegations of recent fabrication.

The judge's misunderstanding of the law is supported by comments at the hearing on the defense motion for new trial, which the judge denied. (T. 786) Defense counsel asserted (without contradiction) that the State's alleged purpose in introducing the

tapes was to show there was no recent fabrication. He continued (still without contradiction) that the court denied their admission on that basis but allowed the tapes to rebut [a charge of] undo influence or motive. (R. 778-79) Thus, defense counsel's understanding of the court's ruling -- which was not contradicted by the prosecutor or the judge -- was that the judge admitted the tapes to rebut a charge of undue influence or motive rather than a charge of recent fabrication. He believed that prior consistent testimony was admissible to bolster the trial testimony merely because the defense alleged that the witnesses had a motive to lie. This, of course, is not the law.

Defense counsel appropriately cited case law indicating that the prior consistent statements were inadmissible to corroborate the codefendants' trial testimony notwithstanding the State's claim that they were introduced to rebut defense counsel's suggestion that the witnesses' testimony was based on improper motive. This is because the statements were made after, not before, the motive to falsify. See Jackson v. State, 498 So. 2d 906 (Fla. 1986) (prior consistent statements made after, not before, motive to falsify were inadmissible to corroborate testimony); accord Columtino, 620 So. 2d 244, 245 (Fla. 3d DCA 1993) (prior statement made after crime terminated and witness had motive to lie was inadmissible). The trial judge apparently still failed to understand the distinction.

Codefendant David Sorton entered into a plea agreement with the State, under which he promised to testify, tell the truth, and render substantial assistance to the State, in exchange for a 12-

year sentence. (T. 730-35) Defense counsel asked Sorton a number of questions concerning the homicide. (T. 735-95) Six times he attempted to impeach Sorton's testimony with references to a deposition taken five days or a week earlier. (T. 738, 740, 755, 763-64, 771) He did not suggest that Sorton fabricated his testimony after entering into the plea agreement.

Defense counsel elicited from Ricky Young that he had entered into a plea agreement with the State under which he pled to second-degree murder and first-degree burglary in exchange for a 17-year sentence. He agreed to testify if needed, to tell the truth, and to give substantial assistance. He would not be sentenced until after all of the defendants' cases were completed. If he changed his statement, the deal would be off and he would go to trial on his original charges which included first-degree murder. (T. 895-97) Defense counsel attempted to impeach Young's credibility seven times by referring to a deposition taken about a week before trial. (T. 907, 914, 962, 987-88, 989-91) He did not suggest that Young fabricated his testimony after entering into the plea agreement.

To the contrary, defense counsel brought out that the codefendants could not change their stories under their plea agreements. Although their deposition testimony varied slightly, at trial, they returned to the original versions given to the police. It was defense counsel's contention that the codefendants' stories were fabricated at the time of their arrests and that, pursuant to the plea agreements, they could not recant their original statements. Thus, the taped statements made before the plea agreement, were made after the motive to fabricate existed.

(2) Tapes Included Inadmissible Hearsay.

The taped statements were prejudicial because they contained not only prior consistent statements, but also, a number of prior inconsistent statements which would only have been admissible if offered by the defense as impeachment. The tapes contained a myriad of information outside the scope of the codefendants' trial testimony. Much of it was irrelevant and prejudicial. In Jackson v. State, 599 So. 2d 103, 107 (Fla.), cert. denied, 121 L. Ed. 2d 546 (1992), this Court found that it was error to admit those portions of a taped statement containing information not elicited during the trial testimony. Although, in Jackson, the error was harmless, it was not harmless in this case.

Some examples of the myriad of irrelevant and prejudicial information contained in the tapes are as follows: When Rick Young denied being at the crime scene, Detective Brock told him that Franklin Delph already told them Rick was there but was not in the room when the man was shot. This was blatant hearsay -- Delph did not testify. When Rick again denied involvement, Brock said his name "came up from the victim" -- that he and John Landry conversed in the victim's bedroom and called each other by name. Brock told him he was under arrest for first-degree murder and that it was up to him whether he wanted to tell his side of the story. Rick said he had nothing else to say. (T. 1127-29) Brock terminated the statement and restarted the tape two minutes later. (T. 1129-30) He said that while the tape was off, Ricky said he told "them" not to shoot. (T. 1131) Although Rick did not want to say who he meant, when Brock told him they already had the names, Rick named

the codefendants. (T. 1132-33) None of this information was otherwise brought out at trial, nor was it relevant.

Detective Brock talked David Sorton into talking during the taped statement. Sorton cried for nearly fifteen minutes. (See S2 -- tapes) Brock told him they wanted to hear his side of the story. He said he could see that what happened was bothering him a lot and suggested that it would help to get it off his chest. He told David that "we" must face "our" problems. (T. 1186-88) This irrelevant sermonizing suggested that Landry failed to "do the right thing" and confess his involvement to the police.[31]

(3) No Opportunity for Cross-Examination.

During Rick Young's taped statement, the court overruled defense counsel's objection to testimony that Franklin Delph made a taped statement that was an hour-and-a-half long. (T. 1164-67) Although Delph did not testify, the jury heard that he made a long taped statement and might draw inferences from the fact that neither the statement nor Delph were produced in court. Moreover, defense counsel could not cross-examine anyone concerning the taking of Delph's statement. The judge asked if defense counsel wanted him to inquire of the jury as to whether they drew any inferences, and offered to give a curative instruction. He declined. (T. 1165-67) Either of these measures would only have drawn attention to the matter and made it worse.

Although defense counsel frequently objected, the trial judge

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[31] At the end of David Sorton's statement, defense counsel renewed his motion for mistrial on the same grounds. The trial judge asked him, "How many times do you have to make that motion for a mistrial?" (T. 1268-69)

allowed hearsay and leading questions on the tapes. For example, David Sorton said that John and Franklin said they "shot them" and "they were dead." (T. 1226) This was clearly inadmissible hearsay not subject to cross-examination.

Discovery depositions are inadmissible at trial[32] because opposing counsel does not have the same motivation to cross-examine the deponent that he would have at trial; thus, the right to confrontation is violated. See State v. Basiliere, 353 So. 2d 820 (Fla. 1977). Applying this same logic to statements taken by the police, the taped statements played for the jury in this case presented an even greater problem.

Defense counsel was not present when the statements were taken, of course, and had no opportunity to cross-examine the codefendants. Although he cross-examined the codefendants at trial, it was six months later, after the codefendants had an opportunity to rehearse their stories for trial.[33] Landry's counsel could not adequately cross-examine the codefendants concerning both their taped statements and their lengthy trial testimony which consumed a total of 300 pages of transcript and at least four or five hours of trial time (T. 655-730, 795-98, 811-895, 992-993, 1124-72, 1180-1268), because the cross-examination would have consumed too much time and would have been unduly confusing to both the witnesses and the jury.

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[32] A discovery deposition is not admissible as substantive evidence in a criminal case unless taken to perpetuate testimony. Rodriguez v. State, 609 So. 2d 493, 498 (Fla. 1992).

[33] In the case of discovery depositions, cross-examination of the witnesses at trial does not suffice. See State v. Basiliere, 353 So. 2d 820 (Fla. 1977).

(4) No Proffer of Tapes.

Defense counsel informed the court that he had not heard the tape, so could not object in advance to inadmissible testimony. The judge denied his request to hear them prior to their introduction in court. (T. 1116-18) When the court announced his decision to admit the tapes, defense counsel asked the judge to clarify his ruling for the record. He said,

> You're denying us the opportunity to first preview this tape, to listen for anything that could be prejudicial, that could be in violation of our client's constitutional rights?

(R. 1122) The judge noted the defense objection for the record and said he had indicated the tape would be admissible. He said the prosecution could proceed at the risk of any testimony that would be subject to mistrial. (T. 1122) Defense counsel objected again when the tapes were admitted into evidence. (T. 1124)

(5) No Jury Instruction that Tapes Only for Impeachment.

The trial judge compounded his error by failing to instruct the jury that the taped statements could only be used for impeachment purposes and not as substantive evidence, and by allowing the prosecutor to argue them as substantive evidence in her closing. Defense counsel asked the court to instruct the jurors that the taped statements could not be considered as substantive evidence at the time they were played for the jury. The judge denied the instruction without hearing it, and without prejudice. He said he would re-entertain instructions at the close of all the evidence. Defense counsel objected because the jury would be considering the evidence as to guilt at the time they heard the tapes. (T. 1270)

At charge conference, defense counsel asked for a special instruction that the statements could not be used to establish guilt but only to rebut charges of undue influence or motive. (R. 444) The judge denied the requested defense instruction. (T. 1931) He also denied the State's proposed instruction on the subject. (R. 448) This was clearly error. See Smith v. State, 573 So. 2d 306 (Fla. 1990) (prior inconsistent statements can only be used for impeachment); State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986) (prior inconsistent statement to police officer was not substantive evidence); Ivery v. State, 548 So. 2d 887 (Fla. 2d DCA 1989) (trial court erroneously admitted prior inconsistent statement without instructing jury that statement was only relevant to credibility).

The judge erroneously denied the defense motion to bar the prosecutor from arguing the content of the tapes as substantive evidence of guilt. He said he allowed the taped statements not as substantive evidence but "based upon cross-examination," and that, if the prosecutor complied with the cases cited, she could argue the tapes to the jury. (T. 1933) If the tapes were admissible at all, they were admissible only for impeachment and the court was required to so inform the jury.

(6) Undue Prejudice.

If for no other reason, the tapes should have been excluded because of unfair prejudice. See §90.403, Fla. Stat. (1993). In Pardo v. State, 596 So. 2d 665, 668 (Fla. 1992), this Court held that, even though the hearsay statements of a child victim of sexual abuse were admissible under section 90.803(23), Florida Statutes, the court was still required to weigh the reliability and

probative value of the hearsay statements against the danger that they would unfairly prejudice the defendant, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence. The same should apply here. Even if otherwise admissible, the taped statements should have been excluded because of their prejudicial nature.

Throughout his taped statement, David Sorton said, "I guess" this and that happened. For example, Sorton "guessed" Franklin and John planned to kill the man when they got in the house. Although defense counsel objected and moved for mistrial because David was speculating -- "I guess, I guess, I guess" -- the judge overruled the objection and denied the motion. (T. 1213-14) Defense counsel objected again because Brock asked David to speculate as to what John and Franklin whispered. Sorton said he could not hear but thought they were discussing who would fire the first shot, "or whatever." The judge sustained the defense objection but denied the motion for mistrial. Defense counsel said no instruction would cure the taint. (T. 1221-23) This speculative testimony should not have been heard by the jury and certainly prejudiced Landry's case.

When witness credibility is crucial, as in this case, the improper admission of self-serving hearsay violates the defendant's right to confrontation as surely as if he had been denied the right to cross-examine the witnesses to impeach their credibility. See Chambers v. Mississippi, 410 U.S. 284 (1973); Pointer v. Texas, 380 U.S. 400 (1965); Fulton v. State, 335 So. 2d 280, 283-84 (Fla. 1976) (absolute right to impeach state witnesses' credibility). The admission of the taped statements was reversible error.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING CHRIS HOWELL'S HEARSAY TESTIMONY.

The trial judge denied a defense motion to exclude the hearsay testimony of Chris Howell and allowed Howell to testify, thus compounding the error in the above issue (admitting codefendant David Sorton's taped statement to bolster his trial testimony) by allowing Howell to further bolster Sorton's testimony. (T. 982-84) Over defense objection, Chris Howell testified about what either David Sorton or John Landry told him about the homicide.

Howell was a guest at David Sorton's house in LaBelle at the time of the homicides. (T. 1030-34) At 3:30 in the morning, Howell and David Sorton's brother, Billy, were awake when David and John Landry returned to Sorton's home. (T. 1038) Howell testified that either Landry and/or Sorton told them they broke into a house and someone was shot. The prosecutor attempted to impeach him with his deposition several months earlier, during which he told FDLE's John King that John Landry did most of the talking. Howell remembered what he said on deposition only after reading it. He did not recall the actual conversation, or who told him about the homicide. (T. 1045-46) Either David or John told him the victim grabbed Franklin's gun and Franklin fired the first shot. He thought both the husband and wife were shot, and that John's gun jammed "or something." (T. 1049-50)

Howell admitted he was afraid to testify, and was having trouble remembering because he did not want to be there. (T. 1047-48) He did not like testifying against his friends. (R. 1066) He went over his statement with the prosecutor the day before the

trial. (R. 1060) He had no independent recollection of who said what. (R. 1066) He was "doing drugs" when gave the deposition and at the time of the homicide, but no longer. (T. 1068)

No other testimony substantiated Howell's testimony that David and John told him about the homicide. David Sorton testified that "they" told his brother, Billy Sorton, what happened. (T. 721) He did not mention telling Chris Howell what happened. John Landry testified that Sorton told his brother, Billy, that his car was stolen. John then asked for dry pants and went into another room, after which he returned to Mike Hinsley's house. (T. 1831-32) He said Sorton must have told his brother about the murder after he left. (T. 1872) He did not mention anyone telling Chris Howell.

A major problem with Chris Howell's testimony was that Howell had no independent recollection of the events to which he testified, nor whether Sorton or Landry told him about the crime. His testimony was based solely on his reading of his prior deposition the day before the trial. This was no different than admitting the discovery deposition itself which, of course, would not have been admissible. See Clark v. State, 614 So. 2d 453, 454-55 (Fla. 1992).

The testimony might have been admissible as a party admission under section 90.803(18), Florida Statutes, if Landry had made the statements; however, Howell did not recall who made the statements. They were not admissible as prior consistent statements for the same reasons the codefendants' taped statements did not qualify for that hearsay exception. (See Issue V, supra.) Moreover, they were not consistent with Sorton's trial testimony and Sorton may not even have made them. Howell's testimony should have been excluded.

ISSUE VII

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PERPETUATED DEPOSITION TESTIMONY OF BALLISTICS EXPERT TERRY LAVOY, INSTEAD OF REQUIRING LIVE TESTIMONY.

The State filed a Motion to Perpetuate the Testimony of Terrance LaVoy, the FDLE firearms examiner, who planned to be out of the country during part of the trial (November 7-14, 1992). (R. 371-72, 374-75) Defense counsel objected because the prosecutor failed to provide reasonable notice as required by Florida Rule of Criminal Procedure 3.190(j). He received the documents on the Friday before trial and the deposition was taken the following Monday, before the trial commenced. (R. 734) The court granted the State's motion but stated, in his written order, that the witness must testify live if available. (R. 390; T. 737)

At trial, defense counsel objected to the State's introduction of the three-hour videotaped deposition. Although LaVoy had been available during the first week of trial, by the time the prosecutor sought to introduce his videotaped testimony, he had left the country. (T. 1435-41) By allowing the State to use Terry LaVoy's videotaped deposition, the court violated Landry's sixth amendment right to confrontation.[34]

The prosecutor argued that the defendant and his counsel were present to cross-examine LaVoy and make objections when LaVoy's testimony was perpetuated November 2, 1992. She said she needed to

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[34] At the motion for new trial on December 15, 1992, defense counsel again argued that the court erred by admitting LaVoy's perpetuated testimony. He noted that, when a State witness was unavailable during penalty phase, the court recessed until he could get there, showing preference toward the State. (R. 781-82)

have Dawn Downs and the Easterlys and the lab analysts testify the first week. She tried to put LaVoy on the stand Friday before he left but he had to testify in Hernando County in another first-degree murder case that day. (T. 1439-40, 1442) The judge found that the State took reasonable steps and allowed the videotape to be introduced in lieu of live testimony. (T. 1445)

Defense counsel then asked to first proffer LaVoy's deposition. He had made numerous objections throughout the deposition and wanted the judge to rule on them. He said he might want to move to strike based on the rulings. The judge denied the motion and said he would consider the objections as raised. (T. 1446)

Florida Rule of Criminal Procedure 3.190(j) allows the state or defense to perpetuate testimony when a material witness may not be available to testify. Subsection (6) provides, however, that, "No deposition shall be used or read into evidence when the attendance of the witness can be procured. . . ." Under section 90.804(1)(e), Florida Statutes, a witness may be declared unavailable if he "[i]s absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means." The burden of demonstrating the unavailability of a witness rests on the party seeking to use the missing witness's previous testimony. Jackson v. State, 575 So. 2d 181, 187 (Fla. 1991); see also Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986).

Section 90.804(1)(e), which defines unavailability, required the State to make a good faith effort to procure LaVoy's attendance at trial. Cf. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983);

McMillon v. State, 552 So. 2d 1183, 1184 (Fla. 4th DCA 1989) (mere taking of a deposition to perpetuate testimony does not ipso facto qualify it for admission at a subsequent trial unless agreed to by opposing party). In this case, the prosecutor could have had LaVoy testify on Wednesday or Thursday of the first week but did not try. When he could not testify Friday, she waiting until Monday, after he left town, and introduced his deposition testimony instead. In other words, once LaVoy's testimony was perpetuated, the prosecutor made no real effort to schedule his testimony before he left the country, or to reschedule the trial to include his testimony. She did not request a continuance until his return or ask LaVoy to delay his trip or reschedule his testimony in the other case so that he could testify at Landry's trial. Because the prosecutor failed to make a determined effort to bring LaVoy before the jury to testify in person, the videotape did not qualify for admission as an exception to the hearsay rule and should have been excluded.

The improper admission of LaVoy's testimony in this case can in no way be deemed harmless error. In Clark v. State, 614 So. 2d 453 (Fla. 1992), which pertains to the erroneous introduction of discovery deposition testimony,[35] this Court noted that a court must look at the importance of the testimony in the prosecution's case, whether it was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and

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[35] A discovery deposition that is not taken to perpetuate testimony is never admissible as substantive evidence even in the absence of a proper objection at trial. Clark v. State, 614 So. 2d 453, 454-55 (Fla. 1992).

the overall strength of the prosecutions's case. 614 So. 2d at 454-55. The same should apply to perpetuated deposition testimony.

LaVoy's testimony was probably the most important testimony the State introduced at trial. Although two codefendants gave their versions of the events, they had reason to fabricate -- to exculpate themselves. LaVoy's testimony was necessary to support their accusations. It was the only demonstrative evidence bearing on the critical issue of who shot the victim. To make matters worse, LaVoy's testimony raised as many questions as it answered.

LaVoy positively identified two .22 long rifle caliber bullets taken from the body as having been fired from the Marlin semi-automatic, allegedly fired by Franklin Delph, to the exclusion of all others. (T. 1512-20) He compared a .22 long rifle caliber cartridge with copper plating, taken from the victim's body, and found that it was consistent with being fired from the Winchester .22 caliber slight action rifle, commonly called a "pump," which he said he had test-fired twice with .22 long rifle caliber, copper-coated cartridges from the evidence in this case. (R. 1478-80, 1508-09) This was the gun the prosecutor argued Landry used to fire a shot. (T. 1958-59) LaVoy could not positively identify the bullet as having come from that rifle to the exclusion of all others. (T. 1508-12) Although the copper bullet was labeled "gray metal bullet," like the other two packages which contained lead bullets, only the base of the copper bullet was gray. (T. 1555-56)

When asked by defense counsel, LaVoy examined the Winchester rifle and found no spring in its magazine. He admitted that one could not load, reload and fire the rifle without a spring to push

the cartridges into the chamber. (T. 1579-80) When the prosecutor asked LaVoy how he was able to test-fire the Winchester .22 without a spring, he said his notes did not show the spring missing. He said that, "obviously," one could not check the mechanism of the firearm without the spring. He insisted, however, that he test-fired the gun. (T. 1582) He could not explain how the spring disappeared between his test-firing and the deposition. (T. 1308)

LaVoy further identified a .22 caliber Magnum revolver in a black plastic case, belonging to Dawn Downs. The .22 Magnum was a convertible revolver with both a .22 long rifle caliber cylinder and a .22 Magnum cylinder. When submitted to LaVoy, it had the .22 long rifle cylinder in place. (T. 1529) Although one type of ammunition for that gun had copper plating (T. 1522, 1528), as did one of the bullets removed from the victim (T. 1602), in LaVoy's opinion, the revolver did not fire any of the bullets recovered. LaVoy agreed, however, that all three guns were capable of firing any of the bullets recovered from the body. (T. 1522-28)

LaVoy's testimony was not cumulative. No other ballistics expert testified. There was no evidence to corroborate his testimony. Although defense counsel cross-examined LaVoy at the deposition, he was unable to cross-examine him at trial. The prosecutor did not call LaVoy to testify earlier because she needed to introduce other evidence first. The defense could not cross-examine LaVoy based on the evidence first introduced by the State because LaVoy was not there. Presumably, the prosecutor knew what her witnesses would say prior to LaVoy's taped deposition, while defense counsel did not have the benefit of that information.

The overall strength of the prosecution's case was not great. Evidence of Landry's participation in the murder itself was provided solely by two codefendants who testified in exchange for reduced sentences. Both testified that they were not in the room during the homicide. Thus, their impressions were based on hearsay and guesswork. Franklin Delph, who was allegedly in the room when Downs was shot, did not testify.

LaVoy's testimony was critical to both the State and the defense. It related to the most important issue in the case -- who shot Ed Downs. By admitting LaVoy's deposition testimony instead of requiring the prosecutor to produce him to testify in court, the trial court below deprived Landry of rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16, 17, and 22 of the Constitution of the State of Florida, including the rights to due process of law and confrontation of witnesses.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER.

Although Landry was separately charged with and found guilty of both felony and premeditated murder, the State presented no evidence that the murder of Ed Downs was premeditated. Evidence consistent with an unlawful killing is insufficient to prove premeditation. Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991). In this case, there was no evidence

of a fully-formed conscious purpose to kill.

Defense counsel moved for a judgment of acquittal at the end of the State's case, alleging that the State failed to prove premeditation. Two of Landry's codefendants had testified that their intent was to tie up the victims with duct tape and scare them. (T. 1644) Duct tape was found in Sorton's car. (T. 1310) The codefendants who testified were not sure who actually shot Downs. (T. 697-700, 863-64) The ballistics expert was only able to determine that one bullet was consistent with having been fired from the gun Landry's codefendants said he carried. (T. 1508-12) Thus, no evidence proved that Landry fired a shot or hit Downs.

At the end of the defense case, defense counsel moved for a "directed verdict," arguing that the State failed to make a prima facie case of premeditation. The trial court denied the motion. (T. 1894-95) The court also denied a defense motion for judgment of acquittal as to premeditated murder, after the trial. (R. 491) At the December 15 sentencing, defense counsel renewed the motion. In moving for a new trial, he argued that premeditation was not shown. The motions were denied. (R. 773-77)

A plan to rob does not establish premeditation. Jackson v. State, 498 So. 2d 906 (Fla. 1986); Hardwick v. State, 461 So. 2d 79 (Fla. 1984) (as applied to premeditation in establishing the CCP aggravating factor). Even an intent to kill does not by itself establish premeditation. Brown v. State, 444 So. 2d 939 (Fla. 1984); Peavy v. State, 442 So. 2d 200 (Fla. 1983).

The evidence in this case suggests a botched burglary rather than a premeditated murder. It is similar to Jackson v. State, 575

So. 2d 181, 186 (Fla. 1991), in which this Court found the evidence insufficient to prove premeditation, because it was "equally consistent with the theory that [the victim] resisted the robbery, inducing the gunman to fire a single shot reflexively . . . . " Testimony indicated that the boys burglarized the Downs' home to steal. They discussed scaring the Ed and Dawn Downs so they would open the safe. (T. 816) When one of the boys pointed a rifle at Ed Downs, Downs tried to grab the rifle and one or both boys fired. (T. 864) The medical examiner supported this theory. (T. 1616-17)

It is obvious that the jurors did not understand the concept of premeditation because they erroneously found Landry guilty of premeditated murder. The error was harmful because the court's failure to acquit Landry of premeditation certainly affected the jury's advisory verdict. The jurors' erroneous belief that Landry premeditated the murder surely influenced them to recommend death despite the lack of an instruction on the "CCP" aggravator.[36] Moreover, were Landry convicted only of felony murder, his death sentence would be even more disproportionate. (See Issue XI, infra) A judgment of acquittal of premeditated murder must be granted.

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[36] Additionally, had Landry been convicted only of felony murder, undersigned counsel could have argued that the instruction on the felony murder aggravator constituted impermissible doubling because the underlying charge of burglary served as the basis for both the conviction of felony murder and the finding of the felony murder aggravator; thus, the aggravator failed to genuinely narrow the class of persons eligible for the death penalty. See Arave v. Creech, 123 L. Ed. 2d 188 (1993); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Accordingly, the repetitive aggravator could not constitutionally be weighed by the judge or jury to impose a death sentence. See State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. granted, 53 Crim. L. Rep. 3013, cert. discharged, 54 Crim. L. Rep. 2021 (1993); cf. Espinosa v. Florida, 120 L. Ed. 2d 854 (1992); Stringer v. Black, 117 L. Ed. 2d 367 (1992).

ISSUE IX

THE APPELLANT'S SENTENCE FOR PREMEDITATED MURDER MUST BE VACATED BECAUSE THAT CONVICTION WAS MERGED INTO THE FELONY MURDER CONVICTION.

Despite the absence of any evidence of premeditation, the jury found Landry guilty of both premeditated and felony murder -- two separate counts. The judge, prosecutor and defense counsel agreed that Landry's convictions for felony murder and premeditated murder must be merged for sentencing. They decided to merge the premeditated murder into the felony murder. Defense counsel agreed because he had argued throughout trial that the State presented no evidence of premeditation. (R. 808-09) (See Issue VIII, supra.)

Despite this decision, the sentencing documents show that, as to Count II -- premeditated murder -- Landry was given a 25-year minimum mandatory life sentence, to be served consecutive to the death sentence. (R. 663-66) This is clearly an illegal sentence and must be vacated. See Sirmons v. State, 634 So. 2d 153 (Fla. 1994) (dual convictions and sentences are not permissible when offenses are merely degree variants of an underlying core offense); § 775.021(4), Fla. Stat. (1993).

ISSUE X

LANDRY'S SENTENCE MUST BE REDUCED TO LIFE BECAUSE THE TRIAL COURT DID NOT FILE A WRITTEN SENTENCING ORDER.

Florida's capital sentencing statute provides as follows:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the [weighing of aggravating and mitigating] circumstances. . . and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment.

Section 921.141(3), Florida Statutes (1993) (emphasis added).

In Van Royal v. State, 497 So. 2d 625 (Fla. 1986), the court vacated the defendant's sentence of death and ordered the imposition of a life sentence because written findings were not prepared until after the trial court surrendered jurisdiction. In his concurring opinion, Justice Ehrlich wrote:

> While I eschew deciding a case other than on its merits, we have no alternative. The legislature has spoken and said that "if the [trial] court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082." The trial judge, for reasons not disclosed in the record, egregiously failed to perform his statutory duty in the sentencing process. We must do ours and vacate the death sentences and remand for the imposition of life sentences in accordance with section 921.141.

497 So. 2d at 630.

In Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989), this Court set down a hard and fast rule requiring a contemporaneous written order:

> In Van Royal and its progeny, we have held on substantive grounds that preparation of the written sentencing order prior to the certification of the trial record to this court was adequate. At the same time, however, we have stated a strong desire that written sentencing orders and oral pronouncements be concurrent. Patterson v. State,

> 513 So. 2d 1257 (Fla. 1987); Muehleman [v. State, 503 So. 2d 310 (Fla. 1987)]. We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of Van Royal and its progeny. Nevertheless, we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

525 So. 2d at 841.

In Stewart v. State, 549 So. 2d 171 (Fla. 1989), this Court made it abundantly clear that the Grossman rule has teeth:

> Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence.

549 So. 2d at 176-77. Grossman became effective June 24, 1988. The sentencing in this case occurred December 15, 1992 -- more than four years after Grossman. The judge made no written sentencing order in this case. (S1. 1631) Moreover, he did not even make oral findings when he sentenced John Landry to death.[37] (S1 1631)

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[37] The judge's oral reasons for sentencing Landry to death did not comply with the requirements of Florida's death penalty statute. He found that "no significant criminal history" (which defense counsel never argued) was rebutted by the State, and noted that Landry was 21 years old and not a minor. (R. 802-04) He found the crime particularly heinous, although the jury was not instructed on HAC and the crime did not fit this Court's definition of that factor. (T. 799) The judge orally found numerous nonstatutory aggravating factors. He found that the defendants were armed and "evidently" prepared for loss of life; that nothing would cause a homeowner more concern for his safety than a burglary and shooting in his own bedroom; that Landry showed no remorse; that Ed Downs apparently gave a lot of himself to others; that Landry took more than a life -- he took a husband, father and grandfather; that Dawn was almost killed too and her security impacted; that Ed Downs was "everything" to her; that she no longer slept with a husband but with a gun; that Landry masterminded the burglary; that the co-defendants testified against him; and that he shot and killed Downs with "fatal wounds through the heart." (R. 799-802)

Compare Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987) (no oral findings), with Stewart, 549 So. 2d 171 (oral findings).

"A court's written findings of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it." Van Royal, 497 So. 2d at 628. Thus, the court's written findings of fact are at the core of the constitutional requirement that the death penalty not be arbitrarily imposed. Additionally, without the specific written reasons, this Court cannot determine whether the judge followed the statutory requirements or whether his findings supported imposition of the death penalty.

In Christopher v. State, 583 So. 2d 642 (Fla. 1991), this Court reduced Christopher's death sentence to life imprisonment because the written findings were not made until two weeks after the oral pronouncement of sentence. Again, in Hernandez v. State, 621 So. 2d 1353 (Fla. 1993), this Court vacated the death sentence and remanded for imposition of a life sentence because the trial court failed to issue contemporaneous written reasons supporting the death sentence. This court explained that the purpose of requiring written findings is to ensure that the death sentence

> results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution.

621 So. 2d at 1357. Furthermore, the purpose of requiring a contemporaneous written order is "to ensure that written reasons are not merely an after-the-fact rationalization for a hasty, visceral, or mistakenly reasoned initial decision imposing death." Id.

The United States Supreme Court has recognized that the imposition of death by public authority is "profoundly different from all other penalties", and requires stronger substantive and procedural safeguards than any form of noncapital sentencing. See, e.g., Lockett v. Ohio, 438 U.S. 586, 605 (1978). Because the trial court sentenced Landry to death without filing written findings in support of the death sentence (S1 1631), if Landry is not discharged and a new trial is not ordered, the sentence must be vacated and the case remanded for imposition of a life sentence.

Even if this Court reverses Landry's conviction and remands for a new trial because of guilt phase errors argued in this brief, this Court must mandate the imposition of a life sentence if Landry is again convicted of first-degree murder. Because life was the only lawful sentence which could be imposed in the absence of written findings to support a death sentence, the trial court's failure to enter written findings effectively acquitted Landry of the death sentence under section 921.141(3). Cf. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991) (reasonable life recommendation by jury effectively acquitted defendant of death sentence).

Florida's constitutional protection against double jeopardy prohibits again subjecting him to the death penalty for this offense if he is retried or resentenced for any reason. Art. I, § 9, Fla. Const. Due process of law prohibits subjecting Landry to the death penalty on retrial because it would be fundamentally unfair to force him to choose between arguing meritorious guilt phase issues on appeal or relying on the lack of a written sentencing order to vacate the death penalty.

ISSUE XI

THE APPELLANT'S SENTENCE MUST BE REDUCED TO LIFE BECAUSE IT IS DISPROPORTIONATE.

The death penalty is reserved for the most heinous of crimes and the most culpable of murderers. See, e.g., Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 434-44 (Fla. 1993); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied sub nom, 416 U.S. 943 (1974). Landry does not fit this category.

In considering the proportionality of the death sentence, this Court should consider only the felony murder conviction. Based on the reasoning set out in Issue VIII, supra, the trial court erred by failing to grant the defense motion for judgment of acquittal as to premeditated murder. The murder in this case could not have been premeditated because the State failed to prove that Landry actually shot the victim, or that any of the defendants ever planned to kill anyone. In addition, Landry's premeditated murder conviction was allegedly merged into his felony murder conviction for sentencing. (T. 808-09) (See Issue IX, supra.)

Impulsive killings during the course of other felonies have been found unworthy of a death sentence. See, e.g., Proffitt v. State, 510 So. 2d 896 (Fla. 1987) (defendant stabbed victim who awoke during burglary); Caruthers v. State, 465 So. 2d 496 (Fla. 1985) (defendant shot convenience store clerk during robbery); Richardson v. State, 437 So. 2d 1091 (Fla. 1983) (defendant beat victim to death during residential burglary). To give Landry the death penalty for felony murder on these facts would violate the

constitutional requirement of proof of culpability great enough to render the death penalty proportional punishment, and would fail to "genuinely narrow the class of persons eligible for the death penalty." See Zant v. Stephens, 462 U.S. 862, 877 (1983). The death penalty is unconstitutionally disproportional punishment as applied to this case. See Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982); Parker v. State, 19 Fla. L. Weekly S390 (Fla. Aug. 11, 1994) (State failed to prove Parker, rather than codefendants, killed victim); Jackson v. State, 575 So. 2d 181 (Fla. 1991) (discussed infra).

Mere participation in a robbery that results in murder does not warrant the death penalty even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison, 481 U.S. at 151. The death penalty may be proportional punishment, however, if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life. Tison, 481 U.S. at 158. Major participation alone is not enough to establish the requisite culpable state of mind. Id. at 158 n. 12.

In Tison, the defendants, Ricky and Raymond Tison, sons of Gary Tison who was serving a life sentence for killing a prison guard, planned and executed a prison break. They armed their father's cellmate, also a convicted killer, and broke out of jail. When their car broke down in the desert, they flagged down a passing car. Gary Tison and his cellmate repeatedly shot and

killed all four occupants. The Court determined that both Ricky and Raymond "subjectively appreciated that their acts were likely to result in the taking of innocent life," and that their respective states of mind amounted to "reckless indifference to the value of human life." 481 U.S. at 152.

In Diaz v. State, 513 So. 2d 1045 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988), the evidence proved that Diaz entered a bar possessing a gun equipped with a silencer, from which a reasonable inference can be drawn that he contemplated killing someone. Not only did he discharge the weapon with twelve innocent people in the bar, but a witness testified that it was Diaz who actually killed the bar manager during the hold-up. Id.; see also DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988) (defendant raped victim and stood by while codefendants struck her with lumber after taking purse).

Unlike this case, the facts in Tison, DuBoise, and Diaz presented compelling evidence that each defendant actively participated in the crimes, and that each had a highly culpable state of mind. In the case at hand, the State's evidence was inconclusive as to whether Landry actually shot the victim and no evidence indicated that any of the defendants anticipated violence. Downs was apparently shot in reaction to his attempt to grab Delph's gun.

An example of a case in which this Court found that the death penalty was not warranted under Tison and Edmund, is Jackson v. State, 575 So. 2d 181 (Fla. 1991). Although the evidence against Jackson showed that he was a major participant in the robbery, it did not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder

conviction rested solely upon the theory of felony murder. A reasonable inference could be drawn from the evidence that either of the two brothers fired the gun. There was no evidence Jackson carried a weapon or intended to harm anybody when he walked into the store. There was no opportunity for Jackson to prevent the murder because the sudden, single gunshot was a reflexive reaction to the victim's resistance. Id.; accord White v. State, 532 So. 2d 1207, 1221-22 (Miss. 1988) (Enmund and Tison are not satisfied in murder case with multiple defendants and no eyewitnesses where actual killer not clearly identified).

This case is much like Jackson. If the codefendants' testimony is believed, Landry was a major participant in the robbery. Nevertheless, the State failed to prove his state of mind was sufficiently culpable to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder. No evidence suggested that Landry intended to kill anyone. In fact, the evidence showed that Landry intended only to commit a burglary and rob the victims. Although the codefendants testified that Landry and Delph went into the bedroom with rifles, neither of them saw what happened in the bedroom. The ballistics expert indicated that three shots were fired from the gun allegedly carried by Franklin Delph. Although the fourth shot may have been fired from the Winchester that Landry allegedly carried, he could not be sure. Additionally, although he testified that he test-fired the Winchester, it did not have a spring in it at the time of his deposition (see Issue VII, supra), which raises the question of how the gun was fired during the homicide and testing.

As in Jackson, the evidence indicated that the victim in this case was shot because he tried to grab the gun from Delph. (T. 864) That the shooting was not planned is evidenced by Delph's excited utterance when he emerged, appearing pale and shaken, and said, "I can't believe I did it." (T. 774) Landry had no time to prevent the killing. Although he had an opportunity and motive to kill the victim's wife, he did not do so.[38] Moreover, Landry turned himself in when he learned that deputies were looking for him.

There are other reasons why death is disproportionate in this case. First, Landry's codefendants all received lesser sentences. Sorton and Young entered into plea agreements, testified against Landry, and were sentenced to twelve and seventeen years respectively. (T. 655, 814) Delph, the main if not only triggerman, was a juvenile. He received a 40-year sentence with a 3-year minimum mandatory and credit for time served.

Disparity in sentencing is a valid and often cited mitigating factor. See, e.g., Parker v. State, 19 Fla. L. Weekly S390, 391-92 (Fla. Aug. 11, 1994); Jackson v. State, 599 So. 2d 103, 110 (Fla.), cert. denied, 121 L. Ed. 2d 546 (1992); Fuente v. State, 549 So. 2d 652, 658-59 (Fla. 1989); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988) (jurors may have considered accomplice's seventeen-year sentence in recommending life); Craig v. State, 510 So. 2d 857 (Fla. 1987) (degree of participation and relative culpability of accomplice, with any disparity of treatment, properly considered in

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[38] Both codefendants testified that Landry held a gun to her head while she lay on the floor. Because each codefendant took credit for being the one who told Landry not to kill her (T. 798, 876), the testimony that Landry stood over her with the gun is also suspect. In any event, no one shot her.

sentencing); Rogers v. State, 511 So. 2d at 535 (accomplices' lesser sentences may be considered mitigation). Identical crimes committed by persons with similar criminal backgrounds require identical sentences; Slater v. State, 316 So. 2d 539, 542 (Fla. 1975). Uniformity and predictability of result are what Florida's death penalty statute was intended to accomplish. See Furman v. Georgia, 408 U.S. 238 (1972); Dixon, 283 So. 2d 1.

This Court has upheld disparate sentencing when the defendant was the "dominant force" behind the homicide. See, e.g., Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986); Meeks v. State, 339 So. 2d 186, 192 (Fla. 1976). Such cases are distinguishable, however, because the defendants therein were clearly more guilty than their accomplices. In Marek, for example, the defendant talked to the two women the men stopped to help for forty-five minutes before convincing them to get into the truck. His accomplice remained in the truck most of that time and did not talk with the women. In Meeks, the defendant killed two men in robberies two weeks apart. His accomplice was only involved in one robbery. 339 So. 2d at 192.

This case is more like Parker v. State, 19 Fla. L. Weekly 390, in which the State failed to proved that Parker was personally responsible for the death of any of the three victims, although he may have stabbed or slashed one victim's throat after a codefendant shot her. None of his codefendants were sentenced to death. In this case, Landry was clearly less culpable than Franklin Delph who fired at least three shots, two of which hit the victim and were fatal. The defendants ranged in age from 17 to 20 years, with similar criminal histories. Thus, the evidence did not show that

Landry was more culpable than any of the other boys.

Although he made no written findings, the judge instructed the jury on three aggravating circumstances: (1) Landry was previously convicted of another violent felony; (2) the crime was committed while he was engaged in a burglary; and (3) the crime was committed for pecuniary gain. (T. 2161, 802-04) Two of these aggravating factors must be merged because the "pecuniary gain" and "committed during a burglary" factors are based on the same circumstance.

This Court has found it improper to separately consider two aggravating circumstances when both refer to the same aspect of the defendant's crime. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Castro v. State, 597 So. 2d 259, 261 (Fla. 1992). The Court has upheld findings of both aggravating circumstances -- committed during a burglary and for pecuniary gain -- only where the burglary had a broader purpose than merely theft. See Brown v. State, 473 So. 2d 1260, 1267 (Fla.), cert. denied, 474 U.S. 1038 (1985). In this case, the defendants burglarized the Downs' house only for the purpose of pecuniary gain, and not for any broader purpose. Therefore, the burglary and the pecuniary gain aggravators were based on the same evidence. No distinct facts support two aggravators. See, e.g., Lawrence v. State, 614 So. 2d 1092, 1096 (Fla. 1993); Robertson, 611 So. 2d at 1233; Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, 116 L. Ed. 2d 81 (1991).

"Heinous, atrocious or cruel" and "cold, calculated and premeditated," the more serious aggravating factors, see Maxwell v. State, 603 So. 2d 490, 493 & n.4 (Fla. 1992), are not present in this case. The "committed during a burglary" factor should not

carry much weight because the killing apparently occurred only because the victim attempted to grab codefendant Delph's gun. The prior violent felony aggravator should not be given much weight because the prior violent felonies were burglaries and Landry had not previously killed or injured other persons. He had the opportunity to kill Dawn Downs but did not do so.

The judge instructed that jury could consider in mitigation (1) no significant history of prior criminal activity; (2) the age of the defendant at the time of the crime (20), and (3) any other aspects of defendant's character or record. (T. 2162) The record does not reflect that the defense requested these or any other mitigating factors.[39] Because the judge did not file a written sentencing order, it is unclear what factors he considered.

John Landry was twenty years old at the time of the offense. His father died when he was three years old and his uncle, who lived with them, died when he was about twelve. (T. 2117-18) Although Landry had been convicted of prior burglaries, most were as a juvenile. None of his codefendants, at least one of whom was equally culpable, received the death penalty.

If a new trial is granted on other grounds, this Court should still consider the penalty phase issues. See, e.g., Williams v. State, 574 So. 2d 136 (Fla. 1991); Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (penalty issues decided even though new trial

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[39] The judge asked counsel to go over aggravating and mitigating factors in chambers at 12:30 preceding the 1:00 penalty phase. The prosecutor said she had two aggravators and did not know what mitigation the defense would rely on. (T. 2097) She later told the judge they would rely on life experiences testified to by the family. Defense counsel said nothing. (T. 2102)

granted). Because the trial judge filed no written sentencing order (see Issue X, supra), and because death is not proportionately warranted, the death penalty should not be an option at a new trial. See Bullington v. Missouri, 451 U.S. 430 (1981) (defendant acquitted of as to death penalty for purpose of new trial when state failed to prove death penalty proportionately warranted); cf. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991) (defendant entitled to benefit of prior jury recommendation of life). Landry should not be forced to choose between appealing the guilt phase issues and a life sentence. For the purpose of judicial economy, therefore, this Court should reverse and remand for a new trial without the possibility of the death penalty.

ISSUE XII

THE APPELLANT MUST BE RESENTENCED FOR BURGLARY WITHIN THE SENTENCING GUIDELINES BECAUSE THE TRIAL COURT DID NOT FILE CONTEMPORANEOUS WRITTEN REASONS FOR DEPARTURE.

When sentencing Landry to death, the trial judge neglected to sentence him for burglary, even though the scoresheet was discussed and revised at the sentencing hearing. The judge also neglected to merge the two murder convictions. The Department of Corrections would not accept Landry for processing without a proper sentencing. Thus, the burglary sentencing was held December 23, 1992. (R. 807)

The guidelines scoresheet, prepared by the prosecutor, shows a permitted range of 12 to 17 years imprisonment which includes the enhancement for violation of probation. (R. 633) The prosecutor asked the judge to exceed the guidelines and impose a consecutive

life sentence for burglary, based on Landry's conviction for an unscored capital offense, and victim injury. When defense counsel objected, the prosecutor agreed to exclude victim injury because it might constitute doubling with the capital offense. (R. 810-11)

The judge imposed a consecutive life sentence for burglary. (R. 813) He orally stated that this sentence was "based upon the victim injury and the unscored capital case." (R. 812) Although defense counsel asked that the scoresheet reflect only the unscored capital conviction as a reason for departure, the judge never asked anyone to write anything on the scoresheet. (R. 812-13) Nevertheless, someone printed "Unscored Capital offense and victim injury" on the scoresheet in the space provided for "REASONS FOR DEPARTURE." The scoresheet does not reflect the sentence. (R. 633) It is obvious from looking at the scoresheet that it was printed by the prosecutor who prepared the form, except for the departure reasons which are printed differently. Everything is printed except the prosecutor's name. In the blank for "PREPARER," the prosecutor signed her name. (R. 633)

The judge did not sign the scoresheet. The prosecutor printed the judge's name in the space provided for "JUDGE." She printed the judge's name identically at the top of the form in the blank provided for "Judge at Sentencing." The record contains no written order stating the reasons for departing from the guidelines. (S2 1636) The departure reasons on the scoresheet do not qualify as written reasons because the judge did not sign the scoresheet. See Morris v. State, 19 Fla. L. Weekly D1683 (Fla. 2d DCA Aug. 3, 1994) (scoresheet did not constitute written departure order because not

signed by judge). Because the judge failed to provide contemporaneous written departure reasons, the case must be remanded for resentencing within the guidelines. Owens v. State, 598 So. 2d 64 (Fla. 1992); Faulk v. State, 626 So. 2d 1063 (Fla. 2d DCA 1993).

Even if the judge had signed the scoresheet, it would not constitute a valid departure order because it was not filed until December 28, 1992 -- five days after the sentencing. (R. 633) In Ree v. State, 565 So. 2d 1329, 1331 (Fla. 1990), this Court held that a judge may not depart from the guidelines without filing a contemporaneous written order citing reasons for his departure. In Scott v. State, 629 So. 2d 1070 (Fla. 1st DCA 1994), although the trial court indicated at sentencing that it was departing from the guidelines based on the defendant's escalating pattern of violent conduct, the judge did not sign and file a written departure order until the next day. Although the written order reflected the same justification, the appellate court found it invalid because it was not filed contemporaneously with the oral sentencing. Id. at 1071; see also State v. Lyle, 576 So. 2d 706 (Fla. 1991).

Because Landry's judge never signed the guidelines scoresheet, which was not filed until five days after the oral sentencing, and never entered a written guidelines departure order, if Landry is not discharged and a new trial ordered, the life sentence for burglary must be vacated, and the case reversed and remanded for resentencing within the guidelines for the burglary.

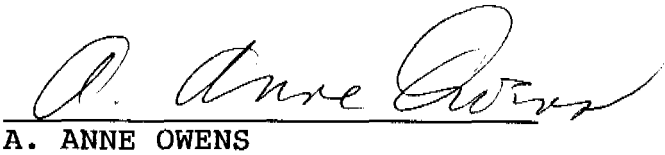
CONCLUSION

For the reasons discussed in Issues I and II of this brief, the trial court violated Landry's constitutional right to a speedy trial; thus, Landry must be discharged. If this relief is not granted, the case must be reversed and remanded for a new trial for reasons set out in Issues III through VII. In any event, Landry's convictions for premeditated and felony murder must be merged (see Issues VIII and IX), and his death sentence reduced to life because the trial court failed to make or file a written sentencing order, and because the death sentence is disproportionate. (See Issues X and XI). The burglary sentence must also be vacated and Landry must be resentenced within the guidelines because the trial court failed to make written findings justifying the guidelines departure sentence. (See Issue XII)

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Office of Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, this 15th day of November, 1994.

Respectfully submitted,



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