IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

v. CASE NO. 81,358

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

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STATEMENT OF THE CASE

Anthony Mungin was charged by indictment filed March 26, 1992, with the 1990 first degree murder in Jacksonville, Florida, of Betty Jean Woods. (R1). The guilt phase trial was conducted from January 25, 1993, through January 28, 1993, and resulted in a verdict of guilty of first degree murder. (R324, T1057). The penalty phase trial was held on February 2, 1993, and resulted in a jury recommendation of the death sentence by a seven-to-five vote. (R382, T1256). On February 23, 1993, Judge John D. Southwood sentenced Anthony Mungin to death. (R401, T1291). A notice of appeal was filed February 24, 1993. (R411).

STATEMENT OF THE FACTS

Guilt Phase

On Sunday, September 16, 1990, between 1:30 and 2:00 p.m., Ronald Kirkland stopped at the Lil' Champ store on Chaffee Road near Interstate 10, in Jacksonville. (T663-664). There was a tan or cream colored compact car parked in the lot. (T676). As Kirkland went in, a black man coming out of the store carrying a

brown bag almost knocked him over. (T664,671). Kirkland got a brief glimpse of the man as they passed; then, because he was angry at being bumped, Kirkland turned and saw the back of the man's head. (T677-678). The man coming out of the store had longish hair done up in a "jeri curl" and had a growth of beard. (T680-681). The beard could have been a couple of weeks old, but Kirkland could not give any estimate as to how old the growth appeared. (T681).

Kirkland did not see anyone in the store; he got a diet coke and waited for the clerk to return. (T664). A few minutes later, Kirkland noticed a woman lying on the floor behind the counter, near an open cash register. (T664-665,667). He removed two undissolved aspirins from the woman's mouth and attempted CPR; the woman started coughing blood; Kirkland turned her on her side and noticed a wound on the woman's head. (T665). Another customer came in and called 911. (T665). The other customer also looked at the open cash register. (T681). Kirkland did not know if the other customer checked both cash registers in the store. (T681-682). The woman, Betty Jean Woods, a store employee, was taken to a hospital. (T652,659,689). She died four days later of a gunshot wound to the head. (T639,661).

On September 16, 1990, the day he found Ms. Woods, Kirkland told a detective he was not sure he would be able to recognize the man who had come out of the store as he went in. (T682). On September 20, 1990, however, the same detective showed Kirkland six or seven photographs; Kirkland narrowed the pictures down to

three, then picked out a photograph of Anthony Mungin. (T671-674,683). In the photograph, Mungin had short hair and no beard. (Exhibit 7). The officer who showed Kirkland Mungin's photograph did not testify. Kirkland also identified Mungin in the courtroom. (T671).

An evidence technician lifted twenty-nine latent fingerprints from the crime scene. (T628-629). Most were from the door, but he also looked for fingerprints on the cash registers, the safe, and the counter top. (T628-629,631). No prints were lifted from the safe. (T629). No evidence was presented of any comparison of the latent prints obtained with Mungin's fingerprints. The evidence technician also observed a purse behind the counter in the Lil' Champ. (T630). He saw no indication that the purse had been gone through. (T630-631). The evidence technician testified that the scene had been contaminated before he arrived, and that various people had walked behind the counter. (T625). A shell casing was found on the floor of the Lil' Champ store. (T621-622).

Dennis Elder, a Lil' Champ Food Stores supervisor, arrived at the store at 2:15 or 2:30 p.m. the day of the shooting. (T688-689). Police were there and Ms. Woods was being taken away by a Life Flight helicopter. (T694). During a walk through the store with the police, Elder did not notice anything missing or out of place. (T694).

Elder performed what he called a "cash count." (T689). This involved calculating from the cash register records the amounts

taken in to determine how much money was supposed to be in the store. (T692-693). Elder would then count the cash actually in the store and determine whether the store was over or short. (T693). Elder determined that the store had $59.05 less than the register reading indicated should have been there. (T694).

Elder testified the locations in the store where cash is kept are the two cash registers, a safe, a box under one of the registers, and in clips. (T690-692). The safe is out of sight. (T690-691). The box was for big bills. (T692). The clips were to hold money customers would give to prepay for gas; there was a different clip for each of the four gas pumps. (T691-692). After paying for gas, the clerk would give the customer change and put the prepaid cash from the clip in the cash register, the cash box, or the safe. (T691-692,699-700).

On the day of the shooting, only one of the cash registers would have been in use. (T695). The register that was not in use was in a locked down, turned off, drawer open, drawer empty position. (T696-697). The cash register that was used that day was also locked; when Elder opened it, he found approximately $57 in the drawer. (T698-699). At some point, an "E" indicator was triggered on one of the cash registers. (T703-704). The "E" indicates that someone has tried to open the cash register other than by entering the "amount tendered." (T704). Elder could not remember when the "E" indicator showed up. (T704).

When Elder looked, there was no money in the cash box under the register and there was no money in the clips. (T705-706). He

said he had no way of knowing whether when Ms. Woods was shot there was any money in the clips or in the cash box. (T700). He acknowledged that a cash shortage caused by theft of money from the cash box or clips would cause a cash shortage in the amount of $59.05 only if a customer had prepaid in that amount, which would be very odd, and he would not expect to find such an odd amount in the clips or cash box. (T700-702,706).

Elder also testified that company policy was never to have more than $50 out of the safe. (T702). He said that whenever he had checked in the past, Ms. Woods had complied with that policy, and that if on the day of the shooting there had been $59.05 in the cash box, in addition to the $57 in the cash register, Ms. Woods would have been greatly over what the policy allowed. (T702-703).

The medical examiner testified that Ms. Woods was shot one time, with the entrance wound above her left ear. (T640,642, Exhibit 5). The bullet travelled left to right and slightly front to back. (T643). The bullet was recovered just underneath the scalp opposite the entrance wound. (T643). The treating physician observed at the entrance wound a powder burn about one quarter to one half inch in diameter. (T655-656). The medical examiner testified that powder burns are not present unless the shot is fired from a distance of eighteen inches or less. (T649). Closer shots would cause a smaller area of powder burn. (T649).

On September 18, 1990, Mungin was arrested at 614 Jim Cody Street, Kingsland, Georgia. (T836-837). A search of the house at

that address revealed, in a bedroom, a .25 caliber Raven semi-automatic pistol, bullets, and Mungin's Georgia identification card. (T837-843).[1] The state's firearms identification analyst determined that the bullet recovered from Ms. Woods had been fired from the pistol seized at 614 Jim Cody Street, and the shell casing recovered at the Lil' Champ store was ejected from the same gun. (T880-885).

The state called a number of witnesses who were referred to by both parties as Williams Rule witnesses. (T707-711). Before the first Williams Rule witness, defense counsel requested a Williams Rule instruction. (T707). The judge told the prosecutor he did not know what the witness would testify to (T708), and asked which of the purposes in the Williams Rule he should instruct on. (T709). The judge pointed out he could instruct on more than one purpose. (T709). The prosecutor told him to instruct on identity. (T709). The judge asked if that was all the prosecutor wanted. (T709). Before the first Williams Rule witness, the court instructed the jury that as to the next several witnesses, the evidence they received was to be considered only for the limited purpose of proving the identity of the defendant. (T712-713). The other crimes evidence was as follows:

On September 14, 1990, two days before the Jacksonville shooting, at approximately 10:30 a.m., Anthony Mungin drove up in

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[1]The identification card, Exhibit 15, indicated that Mungin's age at the time of the crime was twenty-four.

a dark Ford Escort to Bishop's Country Store in Monticello, Florida, near Interstate 10, came in, and asked for some cigarettes. (T714,719). William Rudd, the clerk on duty, noticed that Mungin was a clean-shaven, clean-cut young man; he thought Mungin might be in the Navy. (T725). Mungin was wearing a cap, but Rudd could see that there were no curls hanging from underneath the cap. (T726). When the Rudd turned to get the cigarettes, Mungin shot him in the back. (T719,721). Rudd saw Mungin then get money from the cash box that was kept under the counter. (T722). When Rudd regained consciousness, he found that the money in the cash register was also missing. (T723). Mungin's fingerprint was found on the cash box. (T781). The bullet was not removed from Rudd, but an expended shell was recovered in the store, and was determined to have come from the pistol that was seized at Jim Cody Road in Kingsland, Georgia. (T 734,870,884-885). Mr. Rudd testified in this case, making an identification of Mungin in the courtroom. (T718-719).

The same day, September 14, 1990, at about 12:30 p.m., at the Carriage Gate shopping center on Thomasville Road near Interstate 10, in Tallahassee, Florida, Thomas Barlow witnessed Meihua Wang Tsai screaming and pointing at a black man in a red hat getting into an old faded red Escort with a Georgia tag. (T737-738). Barlow ran after the car and got the license plate number, which he gave to the police. (T740). The driver was wearing a cap, but Barlow was able to see that the driver did not have longish jeri curls coming from underneath the cap; he

testified that the driver's head was clean shaven in the back, or was cut close to the scalp. (T742-743).

A bullet recovered from the head of Ms. Tsai was determined to have come from the gun that was seized at Jim Cody Road. (T756-758,884-885). Apparently one bullet had gone through Ms. Tsai's hand and hit her head, but did not cause her to lose consciousness. (T760-761). The bullet was removed with use of a local anaesthetic. (T761). A spent shell recovered from the carpet of the Lotus Accents store at Carriage Gate was determined to have been fired from the same gun. (T748,884-885). Mungin's fingerprint was found on a receipt in the Lotus Accents store. (T750-752,785).

The witness, Barlow, was shown a photograph of a red Ford Escort that was stolen from in front of the Kings Lodge in Kingsland, Georgia, on September 13, 1990, and recovered, stripped of its tires, in Jacksonville, Florida, on September 18, 1990; Barlow identified that car as the one he saw being driven away from the Carriage Gate shopping center. (T739,795-798,820-823). Kings Lodge, where the Escort was stolen, is about a mile from Jim Cody Road, where Mungin was arrested. (T836).

In Jacksonville, about a mile from where the Escort was recovered, a four door Dodge Monaco Royal, a big car, white with a tan vinyl roof, was stolen on September 15 or September 16, 1990. (T799,802-803,806). The Dodge was recovered on September 18, 1990, near Kingsland, Georgia, about seventy-five to one hundred yards from the house where Mungin was arrested.

(T826,828). Two expended shells found in the Dodge Monaco were determined to have been used in the gun that shot Ms. Woods. (T828,853,884-885).

At the conclusion of the other crimes evidence, the judge instructed the jurors again that such evidence was to be considered only as proof of the identity of the defendant. (T829).[2]

At the close of the state's case, defense counsel moved for judgment of acquittal as to premeditated murder based on insufficiency of evidence of premeditation, and moved for judgment of acquittal as to felony murder based on insufficiency of evidence of the underlying felony of robbery. (T901-905). Both motions were denied. (T907). The judge instructed the jury on both premeditated murder (T1033-1034) and felony murder with robbery or attempted robbery as the underlying felony. (T1034-1037). The jury reached a general verdict of guilty of first degree murder. (R324, T1057).

Penalty Phase

The state called one witness during the penalty phase, Cecil Towle of the Tallahassee Police Department. (T1125). Towle testified to his interview of Meihua Wang Tsai, the victim of the Tallahassee shooting. (T1126-1127). At the time of the trial, Ms. Tsai was in China. (T1128). According to Towle, Ms. Tsai's

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[2]The firearms identification expert's testimony came after the conclusion of the collateral crimes evidence, and was not explicitly subject to the limiting instruction, although some of the expert's testimony related to the collateral crimes.

account of the Tallahassee shooting was as follows:

A young black man came into the store and pushed a thumb bolt latch, locking the door. (T1127). He said he wanted a gift for a friend, she showed him a jewelry box, and he said he would take it. (T1127). She wrapped the box and gave the man a receipt book to sign. (T1127). The man gave her a fifty dollar bill. (T1127). When she pulled out a cash box to make change, the man pulled out a gun and told her to step back and get the money out of the cash box. (T1127). She pushed a Sonitrol alarm, which failed to activate, and she kept telling the man to get out, to leave. (T1127). The man started walking toward the front door and she followed him, telling him to leave. (T1127). The man stopped, turned back toward her, pulled the slide back on the pistol, and put it up to her head. (T1127). She threw her right hand up, turned her head to the right, and was shot through the hand into her head behind the right ear with the bullet ending up under her right cheek. (T1127-1128). She screamed for help. (T1128). The man went out the front door, and she followed, bleeding and screaming for help. (T1128).

The state offered records of Mungin's judgment and sentence for the Monticello and Tallahassee crimes. (T1135). As to the Monticello crime, the records showed judgments of conviction of attempted second degree murder and armed robbery with a firearm, and sentences of fifteen years prison on the attempted murder and twenty years concurrent on the robbery, with a three year mandatory term. (Penalty Phase Exhibit 3). As to the Tallahassee

crime, the records showed judgments of conviction of attempted first degree murder and armed robbery and a sentence of life in prison as a habitual offender on each, the life sentences to be served concurrently with each other and any other sentence being served. (Penalty Phase Exhibit 4).

Mungin's counsel called a number of witnesses during the penalty phase, starting with Mungin's grandmother, Hagar Mungin, of White Oak, Georgia. (T1137-1138). Mrs. Mungin and her husband had raised Mungin since he was five years old, apparently because Mungin's mother, who lived in New Jersey, had too many children and had to work. (T1139). Mrs. Mungin had raised fifteen children of her own before she took in Anthony. (T1140). Anthony's mother would visit once or twice a year. (T1143-1144).

Anthony Mungin attended elementary school in Woodbine, Georgia, and did fine there. (T1140). Mungin was a very manageable child, always quiet; he never gave his grandmother trouble. (T1141). He was honest and would help Mrs. Mungin and do as she told him. (T1143). He also got along well with his grandfather. (T1143). The Mungin home was in a remote area, with no children living near. (T1141-1142). Mrs. Mungin's youngest child still at home when she took in Anthony was about sixteen or seventeen. (T1145). He did play with Anthony. (T1145). Mrs. Mungin did not allow Anthony to bring other children home to play because she had raised enough children and she was raising Anthony; she did not want to raise any more. (T1141).

When Mungin was eighteen, he left his grandmother's house

and moved in with an uncle in Jacksonville. (T1142-1143).

Mungin's younger cousin, Angie Jacobs, testified that when she visited in Mrs. Mungin's home, she saw that Anthony was respectful of his grandparents, and seemed close to them. (T1147). Mungin's older cousin, Clifton Butler, confirmed that Anthony was obedient to his grandparents. (T1150). The grandfather walked with a stick, and Anthony would fetch things for him to save him from having to walk. (T1150). Butler said that while Anthony lived with his grandparents, he attended church regularly. (T1150-1151). Butler had not had much contact with Mungin in recent years. (T1151-1152).

Tracy Black testified that Mungin is the father of her daughter. (T1153-1154). When she got pregnant in 1985, Anthony asked her to marry him, but she decided not to accept, due to the influence of her family. (T1154). Their daughter, Jennifer, was born on April 28, 1986. (T1154). Mungin remained in contact with Black and the child. (T1154). He provided support for the first year after the child was born. (T1155).

Camden County, Georgia, Deputy Sheriff Malcolm Gillette, who had testified for the state during the guilt phase as to Mungin's arrest and to the recovery of the stolen Dodge Monaco, testified for the defense in the penalty phase. (T823-828,1156-1157). He and Anthony were close friends in high school, and were on the wrestling team together. (T1157). Both were small boys. (T1157). The Anthony Mungin who Gillette knew was not violent at all; he was always quiet and got along with everybody. (T1157-1158).

Gillette had no contact with Mungin after 1984. (T1159).

Freddie Green, a Kingsland, Georgia, police officer, testified that he had known Anthony since elementary school. (T1160). In high school, Green was on the football team, and Anthony was the team manager. (T1161). Being team manager involved washing towels, jerseys, pants, cleaning up the locker room, bringing water to the field, and assisting as needed. (T1161). Mungin did a good job as team manager. (T1162). As to how Anthony got along with teachers and students at the high school, Green said he had never heard any complaints. (T1161-1162). Green had not had contact with Mungin since high school. (T1162-1163).

Ralph Pierce, the administrator of the Camden County School System, testified that when Mungin was a student at Camden County High School, Pierce was the athletic director and head football coach. (T1164). Anthony had tried out for football, but he was very small, a hundred pounds. (T1164). At the suggestion of Coach Brewer, an assistant coach, Anthony was made team manager. (T1164). As team manager, Anthony was responsible for making sure the equipment was in good working order and the players had what they needed, such as their game shoes. (T1165). There was a lot of work to be done, and Mungin was dedicated to the job. (T1165). Mungin was trustworthy; he always had the coach's keys and access to everything. (T1165). Pierce felt that Anthony enjoyed the camaraderie of being with the team and the coaches. (T1165). Anthony would also sometimes rake leaves at Pierce's

house to earn a few dollars. (T1166). Pierce said that Anthony was not aggressive or violent toward other students. (T1166).

Gene Brewer, the assistant superintendent for the Harris County, Georgia, schools, testified that he had known Anthony at Camden County High School. (T1167-1168). Brewer said Mungin had come out for football in the spring of his eighth grade year, but had weighed only 85 or 88 pounds and the equipment was too heavy for him. (T1168). Brewer recruited Anthony for team manager, and also for wrestling in the hundred pound class. (T1168). Mungin was a varsity wrestler for three years. (T1169). Anthony was very small, even for his weight class, but he wanted very much to be a member of the team, so he had to work hard. (T1169-1170). This involved eating properly, working out with weights, running, attending every practice, doing his very best, and being prepared to accept defeat. (T1169-1170). Team members were also expected to act appropriately in class and in the community. (T1170).

Brewer testified that Camden County High School is at the south end of the county and Mungin's home was at the north end, so Anthony often spent the night or the weekend at Brewer's home after wrestling competitions and after football games. (T1170-1171). Anthony ended up spending quite a bit of time with Brewer; he became like part of the family, and like a son to Brewer. (T1171). Brewer's own son is a couple of years younger than Mungin, but because Anthony was small and Brewer's son was tall, they matched up; they interacted well and were like brothers. (T1171). Brewer's son remembered Mungin as always

laughing during that time. (T1171). Brewer remembered Anthony as having been an average ability student, who made mostly C's and some D's; Mungin had to work hard, particularly in English. (T1171). His grades kept him from wrestling his senior year. (T1172).

Brewer said Mungin was not a violent child. (T1172). He had to coach aggressiveness into Anthony for wrestling. (T1172). He had to remind Anthony that he was going to be challenged physically and if he did not do something, he could get hurt. (T1172).

After Anthony's senior year, he worked for Brewer some, but after that, they had no contact. (T1173). Brewer kept up with Anthony's activities through one of his wrestling partners. (T1173).

A photograph of the wrestling team from the Camden County High School yearbook was admitted into evidence. (T1177-1178). In the picture, Mungin appears to be the smallest boy on the team. (Defendant's Exhibit 1).

Glen Young, Mungin's classification officer at Cross City Correctional Institution, appeared as a defense witness. (T1176). Young testified that Mungin had come to Cross City to serve a habitual life sentence on his attempted murder conviction from Leon County, and that during the six months Mungin was under Young's supervision, he had no disciplinary reports. (T1177,1179). Young also testified, essentially, that life sentences cannot be counted on to keep inmates in prison any

particular amount of time. (T1176-1182). His testimony on life sentences is reproduced below in Issue IV.

Dr. Harry Krop, a forensic psychologist, testified to Mungin's drug and alcohol abuse, and to his psychological state. (T1184-1206). Dr. Krop found no evidence of any major mental illness or personality disorder. (T1194). He found that Mungin functions in the average range of intelligence. (T1194). He found no evidence of neurological impairment. (T1194). Mungin did suffer from a history of drug and alcohol abuse, from about age 20. (T1194-1195). He used crack cocaine extensively for five or six years. (T1195-1196).[3] The drug and alcohol abuse contributed to a change in the lifestyle Mungin was leading. (T1195). Mungin was leading a normal life until he started abusing drugs. (T1195). Mungin's crimes were probably motivated by his need to support his drug habit. (T1196).

Dr. Krop expressed the opinion that Mungin could be rehabilitated. (T1197). The factors leading to that conclusion were: the normal life Mungin led before he started using drugs; Mungin's average intelligence; the lack of any diagnosable psychological disorder; and the fact that Mungin had not been a management problem in prison. (T1197-1198). Dr. Krop also expressed the opinion that Mungin would be able to function in an open prison population. (T1198). This tied in with Mungin's rehabilitation potential, including his history of functioning in

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[3]If Mungin used cocaine for six years, his age at the time he began using cocaine would have been eighteen, not twenty.

prison without disciplinary reports, and without engaging in violence. (T1198).

The judge instructed the jury on the aggravating factors of prior crime of violence, robbery, and pecuniary gain, with robbery and pecuniary gain to count as one. (T1246-1247). Defense counsel requested instruction on the statutory mitigator of the defendant's age at the time of the crime, but this was denied. (T1103-1107;1207-1208). The jury recommended the death sentence by a vote of seven-to-five. (T1255-1256).

The judge found as aggravating circumstances: prior violent crime, robbery, and pecuniary gain, with robbery and pecuniary gain counted as one. (R395-400). The judge found that Mungin's age of twenty-four was entitled to no weight in mitigation. (R398-399). The judge's findings as to non-statutory mitigation are dealt with below in Issue VII. The judge sentenced Mungin to death. (R395-400;T1291-1292).

SUMMARY OF ARGUMENT

ISSUE I THE TRIAL COURT ERRED IN OVERRULING A DEFENSE OBJECTION TO THE STATE'S PEREMPTORY STRIKE OF BLACK PROSPECTIVE JUROR HELEN GALLOWAY.

The prosecutor's purported reason for striking black prospective juror Helen Galloway, her "mixed emotions" about the death penalty, was ambiguous, and applied equally to a white juror who was not struck. The prosecutor's questions of Galloway were perfunctory, and his attempted rebuttal of the assertion that the strike was because of race, was unconvincing. Under State v. Slappy, 522 So.2d 18 (Fla. 1988), it was error for the

trial court to allow the state's strike of Mrs. Galloway.

ISSUE II THE EVIDENCE WAS INSUFFICIENT TO PROVE FIRST DEGREE MURDER.

A. The evidence was insufficient to prove premeditation. No evidence indicated that this shooting involved a fully formed decision to cause death. No evidence established the reason for the shooting or what led up to it. The cause of death, one gunshot wound to the head, does not show premeditation. In cases such as Jackson v. State, 575 So.2d 181 (Fla. 1991), where the manner of the killing does not show premeditation, and the evidence does not show what preceded the killing, this Court has held premeditation not proved.

B. The evidence was insufficient to prove robbery. The state argued from an accounting discrepancy that the killer must have taken money, but the state witness who testified to the discrepancy admitted that there was no way to know whether there was any money in the only places it could have been stolen from, and that the amount of the discrepancy would not be expected to be in those places. McKennon v. State, 403 So.2d 389 (Fla. 1981), holds this sort of accounting discrepancy evidence to be insufficient to prove robbery.

C. If this Court holds the evidence of both premeditation and robbery to be insufficient, the conviction must be reduced to second degree murder pursuant to section 924.34, Fla. Stat.

D. If this Court finds that the evidence was sufficient to prove either premeditation or felony murder, but

not both, then it was error to instruct the jury on the unsupported theory, and this error was not harmless. Under McKennon v. State, 403 So.2d 389 (Fla. 1981), submitting both grounds for first degree murder to the jury when the evidence of one of the two grounds is insufficient, is error that is not harmless unless there is no reasonable possibility the insufficient ground affected the verdict. The sufficiency of evidence for the other ground alone does not make the error harmless.

Decisions of this Court that seem to find error as to one ground harmless simply because of the sufficiency of the other ground should not deflect this Court from conducting a harmless error analysis as done in McKennon because: (1) the opinions neglecting to include this full harmless error analysis may simply reflect the omission of part of the Court's reasoning from those opinions; or, (2) if such decisions reflect a practice that deviates from McKennon, such practice should be discontinued as inconsistent with State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

In this case, there is a reasonable possibility the jury based its decision on the insufficient ground, so the error was not harmless.

ISSUE III THE TRIAL COURT ERRED IN ALLOWING THE STATE TO SHOW THAT MUNGIN SHOT COLLATERAL CRIME VICTIM WILLIAM RUDD IN THE BACK, HITTING HIS SPINE. THIS EVIDENCE WAS IRRELEVANT AND NOT HARMLESS.

Under the analysis of Amoros v. State, 531 So.2d 1256 (Fla. 1988), when a collateral crime is introduced to connect the

defendant to the gun used in the primary crime, only the details of the collateral crime that are relevant to prove that connection are admissible. Here, the only evidence from the Monticello crime that identified the gun was the expended shell, not the bullet that entered the Monticello victim, hitting his spine. Mungin's having shot the Monticello victim in the back, and the bullet having entered the Monticello victim's spine, were irrelevant.

ISSUE IV FUNDAMENTAL ERROR OCCURRED IN THE PENALTY PHASE WHEN A DEFENSE WITNESS TESTIFIED THAT INMATES SERVING LIFE SENTENCES ARE ELIGIBLE FOR CONDITIONAL RELEASE AND CAN BE EXPECTED TO BE RELEASED IN AS LITTLE AS FIVE YEARS.

The testimony of Glenn Young gave the jurors the impression their choice was not between death and life in prison for Mungin, but rather between death and some relatively short period in prison, perhaps as little as five years. This error destroyed the fairness of the penalty phase and made the jury's death recommendation unreliable.

ISSUE V THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCES OF ROBBERY AND PECUNIARY GAIN BECAUSE THE EVIDENCE DID NOT ESTABLISH THE KILLER TOOK OR ATTEMPTED TO TAKE ANY PROPERTY.

The evidence did not support a finding that the killer took or tried to take money, so there was no proof of the robbery or pecuniary gain aggravators. The judge's finding and weighing these aggravators was therefore error. Under Padilla v. State, 618 So.2d 165 (Fla. 1993), it was also error to instruct the jury

on unsupported aggravating circumstances.

ISSUE VI THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT MUNGIN'S AGE COULD BE CONSIDERED AS A MITIGATING CIRCUMSTANCE.

This Court has held in cases such as Scull v. State, 533 So.2d 1137 (Fla. 1988), cert.den. 490 U.S. 1037 (1989), that the age of twenty-four at the time of the crime is a permissible mitigating factor. Under Smith v. State, 492 So.2d 1063 (Fla. 1986), when the defendant's age is one that can be found to be mitigating, it is error to deny an instruction on the age mitigator.

ISSUE VII THE TRIAL JUDGE ERRED IN FAILING TO FIND AND GIVE SOME WEIGHT TO UNREBUTTED NON-STATUTORY MITIGATION.

The sentencing order failed to even refer to evidence of Mungin's good character from people who knew him, and failed to refer to evidence of Mungin's extensive abuse of alcohol and cocaine. Under Rogers v. State, 511 So.2d 526 (Fla. 1987), cert.den. 484 U.S. 1010 (1988), Nibert v. State, 574 So.2d 1059 (Fla. 1990), Dailey v. State, 594 So.2d 254 (Fla. 1991), and other cases, it was error of the trial court to fail to find in his order and give some weight to the unrebutted mitigating evidence.

ISSUE VIII WITHOUT THE AGGRAVATING CIRCUMSTANCES OF ROBBERY AND PECUNIARY GAIN, AND CONSIDERING THE MITIGATING CIRCUMSTANCES THE TRIAL JUDGE ERRONEOUSLY FAILED TO FIND, THE DEATH SENTENCE IMPOSED IN THIS CASE IS INAPPROPRIATE.

After removing the unsupported aggravators of robbery and pecuniary gain, only one aggravator remains, previous conviction

of violent crime. The weight of this aggravator is lessened by the fact that all of Mungin's violent crimes were committed during one three-day period. Mungin's violence, during one three-day period after twenty-four years of non-violence, does not show a basically violent nature, particularly in light of the substantial evidence that he was not violent at all before he started using cocaine. Weighed against this one aggravator, the evidence of Mungin's good character, potential for rehabilitation, and ability to function in prison, takes this case out of the category of most aggravated, least mitigated cases appropriate for the death penalty.

ISSUE IX MUNGIN'S CONVICTION AND DEATH SENTENCE VIOLATE THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Mungin's conviction and death sentence violate the due process, equal protection, cruel and unusual punishment, and right to a jury clauses of the Florida and federal constitutions because: jury selection was tainted by racial discrimination; the evidence was insufficient to prove guilt; the jury was misled as to its real sentencing options; age was excluded as a mitigator; the previous violent conviction statutory language was interpreted too broadly; the robbery and pecuniary gain aggravators do not genuinely narrow the class of death appropriate defendants, and applying them to felony murder cases construes the statute too broadly; the jury was not given the option of a true life sentence with no eligibility for parole; the jury's seven-to-five vote is not reliable; persons who could

convict but not impose death should not have been excluded from the jury; and Mungin was denied experts to investigate and testify to discrimination resulting from the death qualification of jurors, discrimination in the imposition of death sentences, and physical pain caused by electrocution.

ARGUMENT

ISSUE I THE TRIAL COURT ERRED IN OVERRULING A DEFENSE OBJECTION TO THE STATE'S PEREMPTORY STRIKE OF BLACK PROSPECTIVE JUROR HELEN GALLOWAY.

The prosecutor eliminated seven prospective black jurors from the jury, three by seeking and obtaining cause, and four by peremptory strikes. (T531-538,539-540,544-546,551-553,554-555). Four blacks served on the jury. (T559-560). As to the blacks struck for cause, no improper motive is claimed. As to three of the four blacks eliminated by peremptory strike, the prosecutor's articulated reasons for his strikes were not demonstrably pretextual. The state's use of a peremptory strike to remove Helen Galloway, however, was demonstrably pretextual, and denial of the defense objection to the strike of Mrs. Galloway was error.

Defense counsel asserted that the strike of Mrs. Galloway was exercised because Galloway was black, and requested the judge to conduct a Neal inquiry. (T531-533). The judge required the state to set forth its reasons. (T533-534). The prosecutor stated that Galloway was struck because she said she had mixed emotions about the death penalty, and that each juror, white or black, who reported mixed emotions about the death penalty, had

been struck. (T534). He noted that a white woman, Mrs. Podejko, was struck for this reason. (T534).

Defense counsel asserted that the state's purported reason was a ruse, and that having mixed emotions does not indicate whether the mix is weighted toward support or opposition to the death penalty. (T534-535). "Mixed emotions" is ambiguous, he said, and the state made no effort to clarify what Mrs. Galloway had meant. (T537). Defense counsel pointed out that Galloway's responses were no different "for example" from those of Mr. Venettozzi, who said the death penalty would depend on the circumstances. (T537). The prosecutor's sole rebuttal was his comment that the record spoke for itself as to his reasons, and that three people who said they had mixed emotions had been struck, without regard to whether they were black or white. (T537-538). The judge stated that having mixed emotions about the death penalty has nothing to do with race, and overruled the objection. (T538). Mrs. Galloway did not serve. (T559-560).

Mrs. Galloway had testified that she had lived in the area fourteen years, she was single, had one child, was a shipment coordinator for Revlon, and had worked for Revlon for eight and a half years. (T313,378-379). Mrs. Galloway was asked only three questions about the death penalty:

> MR. DE LA RIONDA (prosecutor): How do you feel about the death penalty?
> A VENIREMAN: I have mixed emotions.
> MR. DE LA RIONDA: Thank you, ma'am.

(T379).

> MR. DE LA RIONDA: ... Mrs. Galloway, same

questions. First part -- first part of the trial, could you find the Defendant guilty if the State proves the case against the Defendant, could you find him guilty knowing that it could subject him to the death penalty?
A VENIREMAN: Yes.
MR. DE LA RIONDA: Second part, if the aggravating factors outweigh the mitigating factors, could you make a recommendation of death?
A VENIREMAN: Yes.
MR. DE LA RIONDA: Thank you.

(T407-408).

Defense counsel was correct in asserting that Mrs. Galloway's answers were indistinguishable from those of Mr. Venettozzi, a white man who served on the jury. (R559-560). Mr. Venettozzi was questioned as follows:

MR. DE LA RIONDA: Venettozzi. How do you feel about the death penalty, sir?
A VENIREMAN: I think it's mixed. It depends on how serious.
MR. COFER: Excuse me, Your Honor, I couldn't hear the response.
A VENIREMAN: I believe it depends on the circumstances. I don't think I could say yes or no without knowing.
MR. DE LA RIONDA: Okay, thank you, sir.

(T374).

Mrs. Goodman, who sat as the alternate, also gave a response that is indistinguishable from that of Mrs. Galloway. Asked how she felt about the death penalty, she said, "I have mixed feelings on it." (T389).

Mrs. Podejko, cited by the state as a white struck for the same reason as Mrs. Galloway, in addition to having mixed feelings, had said she was not sure she could convict if a conviction might subject the defendant to a death sentence.

(T374,403-404). Thus, the prosecutor had a much more rational reason to strike Podejko than her mixed feelings, and his strike of her does not support his claim that the strike of Galloway was non-racial.

In State v. Slappy, 522 So.2d 18 (Fla. 1988), this court approved a non-exclusive list of five factors that could properly be considered as evidence that the prosecutor's reasons for striking minority jurors were pretextual. That list included "(1) alleged group bias not shown to be shared by juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror," and "(5) a challenge based on reasons equally applicable to juror who [was] not challenged." 522 So.2d 22. Slappy held that, absent convincing rebuttal, the presence of any of these factors dictated a finding of pretext:

> [W]here the total course of questioning of all jurors shows the presence of any of the five factors listed in Slappy and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext.

522 So.2d 23.

Here, defense counsel asserted, and the record supports, the presence of Slappy factors (1), (2), and (5). Factors one and two are interrelated. Mrs. Galloway's statement that she had mixed emotions about the death penalty did not show that she was biased against the state's position because her statement was ambiguous. Thus factor one is present. The state's perfunctory examination of Mrs. Galloway is evidenced by the failure to ask

any question to clear up that ambiguity. Thus factor two is present. Factor five is demonstrated by the state's failure to strike Mr. Venettozzi and Mrs. Goodman, whose testimony also indicated mixed feelings about the death penalty.

The prosecutor's rebuttal cannot be said to have been convincing. His assertion that the record spoke for itself did not establish that his reason was not pretextual. His statement that he struck three persons for saying they had mixed emotions, without regard to whether they were black or white, ignored his failure to strike Venettozzi, and ignored that the one white juror he claimed to have struck because of her mixed emotions, Mrs. Goodman, had expressed doubt that she could convict where the death penalty was a possibility. The prosecutor failed to give any explanation as to why he did not inquire further of Mrs. Galloway, to find out if her mixed feelings actually indicated a legitimate basis to strike her. In sum, the prosecutor's rebuttal failed to account for the evidence that the motive for his strike was racial. Under Slappy, the trial court erred in overruling the defense objection to the state's strike of Mrs. Galloway.

This error was not waived. In Joiner v. State, 618 So.2d 174 (Fla. 1993), this court found a Neil issue waived because:

> [Defense counsel] affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection. We agree with the district court that counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that

> events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury.

618 So.2d 176.

In this case, after listing the jurors who were left after all strikes had been made, the judge asked:

> THE COURT: ... Does that agree with everybody?
> MR. DE LA RIONDA (prosecutor): Yes, sir.
> THE COURT: Whether you like them or not, you agree those are the ones?
> MR. DE LA RIONDA: Yes, sir.
> THE COURT: Is that right, Mr. Cofer?
> MR. COFER (defense counsel): Yes, sir.

(T560). Thus, the judge made it clear he was not asking if defense counsel was satisfied with the jury. He was merely asking whether defense counsel agreed, "whether you like them or not" that the jurors the court had named accurately reflected the results of the jury selection process. Indeed, the reference to "whether you like them or not" indicated that the trial judge was well aware of defense counsel's objection to the strike of Mrs. Galloway, which had been made only moments before, during the same conference outside the presence of the jury. Defense counsel's agreement with the judge's "whether you like them or not" statement amounted to a reservation of his previously stated objections. No waiver can be inferred in these circumstances. See Landon v. State, 636 So.2d 578 (Fla. 4th DCA 1994).

ISSUE II THE EVIDENCE WAS INSUFFICIENT TO PROVE FIRST DEGREE MURDER.

A. The evidence was insufficient to prove premeditation.

At the close of the state's case, Mungin's counsel moved for judgment of acquittal as to premeditated murder because of the total lack of proof of premeditation. (T904). This motion should have been granted. There were no statements by Mungin indicating a decision to kill Betty Jean Woods. There was no evidence as to whether or not the victim and shooter knew each other before the shooting. There were no witnesses to what preceded the shooting, so there was no evidence of lack of provocation. Death was caused by one gunshot to the head, so there was no inference of premeditation to be drawn from a continuing attack, such as multiple gunshots or multiple stab wounds. There was no evidence that an unusually lethal gun or unusually lethal bullets were used, and no such conclusion could be drawn from evidence that a .25 caliber pistol was used.

The only evidence that might have suggested there was any prior intent to shoot Ms. Woods was the collateral crime evidence that Mungin had committed two robbery shootings two days before. That evidence was admitted for the limited purpose of establishing the identity of the shooter, not to prove intent or premeditation. Section 90.404(2)(b)(2), Fla. Stat., contemplates that collateral crime evidence will be admitted for a limited purpose and directs that the jury be so instructed. Here, the prosecutor informed the judge that evidence of the Monticello and

Tallahassee shootings was offered to prove identity. The judge instructed the jurors that identity was the sole purpose for which the collateral crime evidence was to be considered.

When the trial judge ruled on Mungin's motion for judgment of acquittal, his job was to look at the evidence from the jury's point of view. As this Court observed in Lynch v. State, 293 So.2d 44 (Fla. 1974):

> A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.

293 So.2d 45. (emphasis added). The jurors had no authority to fairly and reasonably consider collateral crimes to be evidence of premeditation when they had been specifically instructed to consider such evidence only for identity. See McNeil v. State, 433 So.2d 1294 (Fla. 1st DCA 1983), rev.den. 441 So.2d 633 (Fla. 1983), holding that prior inconsistent statements admitted for the limited purpose of impeachment may not be considered in evaluating the sufficiency of evidence of the crime. The evidence of premeditation in this case must be considered without regard to the prior shootings.[4]

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[4]Actually, there was no proof of premeditation in the collateral cases, and even if they had been, it is not at all clear that those prior crimes provide any evidence that the killing in this case was premeditated. Thus, even if the collateral crime evidence had been admitted for a broader purpose

The lack of premeditation evidence here may be compared with the evidence in Jackson v. State, 575 So.2d 181 (Fla. 1991). In Jackson, as here, there were no witnesses to the shooting itself. There, as here, customers entered a store and found the clerk lying behind the counter. The Jackson clerk had been shot once in the chest. There was substantial evidence that Jackson and his brother had gone to the store to commit a robbery, but there was no evidence to prove they had gone there to kill. This Court distinguished Jackson from cases with multiple stab wounds, unusually lethal weapons, and evidence of no provocation:

> Those facts are completely distinguishable from the instant case where there is no evidence to indicate an anticipated killing, and where all of the evidence is equally and reasonably consistent with the theory that Phillibert resisted the robbery, inducing the gunman to fire a single shot reflexively, not from close range, with an unidentified type of weapon and bullet. There is no evidence of a fully-formed conscious purpose to kill.

575 So.2d 186.

In Jackson, there was evidence that the defendant made an out-of-court statement claiming the victim was killed because he had resisted the robbery ("bucked the jack" 575 So.2d 185), but this evidence does not detract from Jackson's applicability here. Jackson's claim that the victim had resisted amounted to a denial of premeditation. That denial does not distinguish Jackson from this case on the issue of premeditation, however, because it was the lack of evidence proving premeditation, not Jackson's denial,

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than identity, the evidence of premeditation would still have been insufficient.

that made the evidence of premeditation in Jackson insufficient. Jackson's denial was irrelevant. Here, as in Jackson, there was no evidence to prove that the shooting was committed with a fully-formed conscious purpose to kill. Under Jackson, the evidence of premeditation was insufficient in this case.

Hall v. State, 403 So.2d 1319 (Fla. 1981), is another case where the evidence of premeditation was insufficient because there was no evidence of what happened immediately before the killing. Following an unrelated rape/murder and an abandoned robbery, Hall and his co-defendant were seen encountering a deputy sheriff. Later, the deputy was found, shot dead by his own gun through a gap in his bullet-proof vest. Hall's gun was underneath the deputy. Hall and his co-defendant were arrested, after a chase and a gunfight, in possession of the deputy's gun. This Court agreed with Hall's contention that there was no evidence of premeditation, other than conjecture. The defendants might have overpowered the deputy, taken his gun, and shot to kill, or they might have struggled with him and pulled the trigger without any intent to kill. Hall's conviction for premeditated murder was reversed, and reduced to second degree murder. There is no more evidence of premeditation in this case than there was in Hall.

In Hoefert v. State, 617 So.2d 1046 (Fla. 1993), there was evidence that the defendant got sexual gratification from choking his sexual battery victims, and had committed prior rapes with choking. The last time he was in jail, he had told a cell mate

he wished he had killed his victim, because if he had, he would not be in trouble. Sixteen days after he got out of jail, Hoefert met a woman in a bar. Several days later, the woman's decomposing body was found in Hoefert's home. There was a large hole in the backyard, which Hoefert had dug to bury her. The evidence as to how the victim died was slim, however, as there were no witnesses, and no trauma was discernable on her body. Taken at its best, the evidence indicated she had died of asphyxiation. This Court found the evidence insufficient to prove premeditation, and reduced the conviction to second degree murder. There is even less evidence suggesting premeditation in this case than there was in Hoefert.

Another case that is useful for comparison is Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990). In Smith, the defendant's ex-wife disappeared, he gave inconsistent explanations to neighbors as to her whereabouts, and he never called the police. A few days later, her body was found, wrapped in chains, with a bedspread taped around her, floating in Tampa Bay. The evidence showed that Smith had been living with the victim, that Smith may have discovered she was having an affair, and that Smith had tried to conceal the crime. The district court held:

> [T]he state was unable to prove the manner in which the homicide was committed, what occurred immediately prior to the homicide, the nature of the weapon, or the nature of any wounds. In addition, there was no evidence of the presence or absence of provocation and very little evidence of previous difficulties between the appellant

> and the victim.
>
> ...
>
> While all of these factors are consistent with a homicide, none of them is inconsistent with a killing which may have occurred in the heat of passion or without premeditation.

568 So.2d 968. Smith's first degree murder conviction was reduced to second degree murder.

There is no more evidence of premeditation here than in Smith. Here, as in Jackson, Hall, Hoefert, and Smith, there is no evidence of what occurred immediately prior to the homicide and no evidence of the presence or absence of provocation. The evidence leaves the issue of premeditation or lack of premeditation completely open to speculation.

The lack of proof of premeditation in this case may be contrasted with cases where the proof was there. In Cooper v. State, 492 So.2d 1059 (Fla. 1986), cert.den. 479 U.S. 1101 (1987), three victims of a home invasion robbery were found, face down, with hands bound behind their backs, dead from shotgun wounds. The defendant told police a decision was made to kill the victims after one of the victims recognized one of the robbers. In Blair v. State, 406 So.2d 1103 (Fla. 1981), the defendant had his wife's son dig a hole in the back yard, and then sent the wife's children to a Dairy Queen, telling them to stay away at least an hour, and that their mother would be gone when they returned. The mother's corpse was later found in the previously dug hole. In Preston v. State, 444 So.2d 939 (Fla. 1984), the victim was stabbed numerous times, almost completely

severing her neck, trachea, carotid arteries and jugular vein. In Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985), appeal dismissed 504 So.2d 762 (Fla. 1987), the defendant had increased the life insurance on her nineteen year old invalid son shortly before she drowned him.

In this case, the theory that Betty Jean Woods was the victim of a premeditated murder is unsupported by the evidence. Denying the defense motion for judgment of acquittal as to premeditation was error.

B. The evidence was insufficient to prove robbery.

Mungin's counsel also moved at the close of the state's case for acquittal as to felony murder based on the lack of proof of robbery or attempted robbery as the predicate felony. (T903-907). He argued that any evidence the shooter was engaged in a robbery was circumstantial, and was consistent with the hypothesis that the shooter was not engaged in a robbery. Denial of the motion for judgment of acquittal as to robbery/murder was error.[5]

As there were no witnesses to the shooting, there was no direct evidence that the shooting took place during a robbery. Elder, the Lil' Champ manager, testified that nothing in the store appeared to be disturbed or out of place. There was an undisturbed purse behind the counter. Thus, there was no physical evidence, such as an opened or out-of-place cash box,

[5]As discussed above, the evidence that Mungin had previously committed robbery/shootings was admitted solely for the purpose of proving the identity of the killer. Just as that collateral crime evidence is unavailable to prove premeditation, so is it unavailable to prove an intent to commit robbery.

forced lock, or damaged cash register to directly suggest a theft or attempted theft. There was no evidence of Mungin's fingerprints being found on a cash box or cash register (or anywhere else in the store). The only two pieces of evidence to indicate a possible theft were the "cash count," indicating that there should have been $59.05 more in the store than there was, and the "E" indicator on the cash register.

The problem with the cash count evidence is that it does not indicate the source of the discrepancy. Elder testified that if money was taken at the time of the shooting, it could have come only from the cash box or the pre-pay clips. He acknowledged that he had no way of knowing whether there was any money in the cash box or the clips at the time of the shooting, and that he would not expect the amount in the box or the clips to be such an odd amount as $59.05 anyway. He testified that if there had been that amount in the box, this would have been greatly over the amount allowed by company policy, and that Ms. Woods had always complied with company policy in the past.

The hypothesis that the shooter took $59.05 is not the only plausible explanation for the missing money. The cash discrepancy could have resulted from a mistake in entering the amount of sales on the cash register. If money was stolen at all, it could have been stolen by an employee or by someone who came into the store after the shooting. Kirkland, the customer who discovered Ms. Woods, testified that another customer came into the store and looked at a cash register while he gave CPR to

Ms. Woods. The evidence technician testified that the crime scene had been contaminated by various people walking behind the counter before he got there. The cash count does not prove that money was taken by the killer.

Neither does the "E" indicator on the cash register prove that the shooting occurred during a robbery or attempted robbery. Elder testified he did not remember when the indicator appeared. He also testified that when he first came, he walked through the store and saw nothing missing or out of place. The evidence thus fails to prove that the "E" indicator was even showing when the shooter left. It may have appeared after Elder came. Also, the customer who looked at the cash register while Kirkland gave CPR or one of the various people contaminating the crime scene could have triggered the "E" indicator in trying to see whether money had been taken. Even if the "E" indicator had been triggered while the shooter was in the store, it could have happened as an accidental effect of the shooting, such as Ms. Woods leaning or falling on the cash register keys.

In McKennon v. State, 403 So.2d 389 (Fla. 1981), this Court found the evidence of robbery insufficient in a situation identical in all material respects to that in this case:

> The state contends that a discrepancy in the amount of money shown in bookkeeping records and the amount contained in the cash register in the barbershop after the murder constituted a sufficient basis for the robbery instruction. ...
>
> We find no basis in the evidence for the robbery charge. The purported bookkeeping discrepancy did not prove beyond a reasonable

> doubt that any funds were taken from the deceased and hence was insufficient to prove commission of a robbery. We therefore hold that the court erred in instructing on felony murder and robbery.

403 So.2d 391. McKennon dictates a holding that the evidence of robbery was insufficient in this case. See also Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert.den. 471 U.S. 1045 (1985), where Eutzy killed a cab driver, but there was no evidence of cash or property taken, so the evidence was held insufficient to show robbery as an aggravating circumstance.

The district courts have also considered the sufficiency of proof of theft and robbery in circumstances comparable to those in this case. Green v. State, 578 So.2d 852 (Fla. 1st DCA 1991), considered the sufficiency of proof of theft based on an audit. Green was a bank teller, whose cash box turned up short $13,000 cash. Her grand theft conviction was overturned because the evidence failed to establish that the shortage was the result of theft, rather than an honest mistake. Green made reference to, but did not need to reach, the additional argument of the insufficiency of the state's proof that the teller had sole access to the cash box. In this case, as in Green, the evidence failed to show the cash discrepancy was due to theft rather than to mistake. The evidence here also failed to show that if there was a theft, it could only have been committed by the defendant.

In Maples v. State, 183 So.2d 736 (Fla. 3rd DCA 1966), the victim left a bar and went to his car, where the defendants struck him with a pool stick, breaking the car window and

knocking him unconscious. Before the attack, the victim's wallet contained approximately $100. The next day, it was found, empty, by a boy who lived next to the bar. Aggravated assault convictions were upheld, but the robbery convictions were reversed because there was no evidence proving the defendants had taken the victim's money. The defendants' fingerprints were on the pool stick, but not on the wallet, and there was no proof the theft occurred at the same time as the beating. Someone other than the defendants could have emptied the wallet after the assault.

The proof of robbery in Maples was actually stronger than in this case, because in Maples there was proof of a taking. Proof of an attack and a theft, however, was not enough to prove robbery in Maples because it was not proved that the attackers committed the theft. In this case, there was proof of an attack, but no proof of theft, and, like Maples, no evidence the attacker committed a theft.

In McConnehead v. State, 515 So.2d 1046 (Fla. 4th DCA 1987), a wallet belonging to the victim's roommate was found on the ground at a place where the defendant had been attacked, before he shot the victim. McConnehead's first degree murder conviction was upheld, based on premeditation, but the attempted robbery conviction was reversed. The Court found the evidence did not prove McConnehead had taken the wallet, as it could have been dropped where it was found by the victim as well as by McConnehead.

In Sanders v. State, 344 So.2d 876 (Fla. 4th DCA 1977), the defendants chased the victim when he left a bar, and helped him to his feet when he stumbled. The victim testified he had left the bar with a wallet in his pocket, and after being helped to his feet, the wallet was missing. Several witnesses gave testimony indicating the defendants had made motions toward the victim's pocket, and that they thought defendants had picked the victim's pocket, but no-one testified to having actually seen the defendants pick the victim's pocket. The court held this evidence insufficient to prove the defendants took the victim's wallet.

In Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), rev. den. 503 So.2d 328 (Fla. 1989), approved, State v. Law, 559 So.2d 187 (Fla. 1989), the victim was found on a dirt road, shot to death, and Fowler admitted to having shot him and driven off with the victim's car and wallet. Fowler was convicted of felony murder based on robbery. The district court held the evidence failed to disprove Fowler's claim that he had killed the victim in self-defense and the robbery/murder conviction was reversed.

The evidence here is not superior to that rejected in these cases. With no proof that the shooter took money or tried to get money, the state's theory that this was a robbery shooting is mere conjecture. The evidence of robbery was insufficient, and the motion for judgment of acquittal as to felony murder should have been granted.

C. If this Court holds the evidence of both premeditation and robbery to be insufficient, the conviction must be reduced to second degree murder.

This is the mandate of section 924.34, Fla. Stat. If, as Mungin contends, the evidence was insufficient to prove either premeditated or felony murder, then there was no proof of first degree murder at all, and the first degree murder conviction must be reduced to second degree murder.

D. If this Court finds that the evidence was sufficient to prove either premeditation or felony murder, but not both, then it was error to instruct the jury on the unsupported theory, and this error was not harmless.

This Court has dealt a number of times with the problem of a general verdict that could be based on either of two theories, one of which is tainted by error. McKennon v. State, 403 So.2d 389 (Fla. 1981), demonstrates the approach this Court has held to be required. In McKennon, the jury was instructed on both felony murder based on robbery, and premeditated murder, and returned a general verdict of guilty of first degree murder. This Court found the evidence of robbery insufficient, and the instruction on felony murder therefore to have been error:

> The purported bookkeeping discrepancy did not prove beyond a reasonable doubt that any funds were taken from the deceased and hence was insufficient to prove commission of a robbery. We therefore hold that the court erred in instructing on felony murder and robbery.

403 So.2d 391.

To determine whether this error required reversal, the Court conducted the following analysis:

> This holding does not require or justify reversal, however, because the state sought a conviction for murder based upon premeditation. The victim suffered multiple blows to the head, manual strangulation, and multiple wounds of the neck. ... The prosecutor made only a passing remark about the so-called robbery and did not argue felony murder to the jury. ... [T]he record reflects that there is not only sufficient but overwhelming evidence of premeditated murder. It is clear that the jury convicted McKennon of murder based on premeditation and that he was in fact guilty of premeditated murder. ... We are satisfied beyond a reasonable doubt that the submission of the felony murder charge to the jury was not prejudicial and did not contribute to the appellant's conviction. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967);

403 So.2d 391. The crux of the McKennon harmless error decision is that, given the evidence and the way the prosecutor argued the case, there was no reasonable possibility the jury based its verdict on the unsupported felony murder theory rather than the supported premeditation theory. If there had been a reasonable possibility the jury based its decision on the insufficient ground, the error would not have been harmless.

This reading of McKennon is confirmed by Franklin v. State, 403 So.2d 975 (Fla. 1981), which also dealt with the issue of harmless error in the context of a general verdict:

> When the state seeks a conviction of first-degree murder on the dual theories of premeditation and felony murder and there is error because the trial judge fails to instruct on the underlying felony, the conviction can stand only if the error is

> harmless. We adopt the harmless error test enunciated in [Chapman]. The reviewing court must be satisfied beyond a reasonable doubt that the failure to so instruct was not prejudicial and did not contribute to the defendant's conviction.
> ... The primary thrust of the state's case was felony murder. In closing argument felony murder was the dominant theme, and, indeed, the facts demonstrate felony murder more clearly than premeditation. It is at least as likely as not that the jury based its verdict on felony murder. The failure to instruct on the underlying felony cannot be considered harmless error in this case.

403 So.2d 976. It is clear from McKennon and Franklin that sufficiency of the evidence for the other ground of first degree murder does not alone make submission to the jury of an unsupported ground harmless. Only if there is no reasonable possibility that the jury based its decision on the unsupported ground, can the error be deemed harmless.

Other cases addressing harmless error in the general verdict situation include: Knight v. State, 394 So.2d 997 (Fla. 1981); Adams v. State, 412 So.2d 850 (Fla. 1982), cert.den. 459 U.S. 882 (1982); Brown v. State, 521 So.2d 110 (Fla. 1988), cert.den. 488 U.S. 912 (1988); Parker v. Dugger, 537 So.2d 969 (Fla. 1988); and Gunsby v. State, 574 So.2d 1085 (Fla. 1991), cert.den. 112 S.Ct. 136, 116 L.Ed.2d 103 (1991). Each of these cases dealt with the harmlessness of error that affected only one of the two grounds for murder submitted to the jury. In each of these cases, in finding the error harmless, the Court considered the emphasis given by the prosecutor to the non-tainted ground. The prosecutor's emphasis would have been irrelevant if sufficiency

of the evidence for the non-tainted ground alone made the error harmless. Thus, these cases must have been applying the McKennon harmless error analysis. See also Tubman v. State, 633 So.2d 485 (Fla. 1st DCA 1994), and Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989), each of which reversed for error that went only to one of two alternate grounds for conviction.

This Court dealt recently, in Dillbeck v. State, 19 Fla.L. Weekly S408 (Fla. Aug. 18, 1994), with error affecting one of the grounds for murder, in the context of a verdict that did show the basis of the jury's decision. Error was committed in the exclusion of evidence of Dillbeck's fetal alcohol effects, but the error affected only the premeditation theory. The special verdict revealed that the jury had found both premeditation and felony murder. This Court held:

> Although the trial court erred in refusing Dillbeck's bid to present fetal alcohol evidence during the guilt phase, we find the error harmless in light of the jury's written verdict finding both premeditated and felony murder.

19 Fla.L.Weekly S409. The implication of this language in Dillbeck is that when error taints one of the two grounds for first degree murder, this Court conducts a harmless error analysis in order to decide whether the error warrants a reversal. If the Dillbeck verdict had not specified which theory the jury found, the Court might not have been able to rule out the possibility that the jury had convicted of premeditated but not felony murder, in which case the error would not have been harmless.

The cases cited above, from Knight and McKennon to Dillbeck, reflect a rule that error going only to one of the grounds for first degree murder is not automatically harmless, just because there is no error as to the other ground, when there is no way to tell on which theory the jury based its decision. In general verdict cases, the error is harmless only if there is no reasonable possibility the jury based its decision on the tainted or unsupported theory.

Nonetheless, there are a number of cases, e.g. Brown v. State, 19 Fla. Law Weekly S261 (Fla. May 12, 1994), Jackson v. State, 575 So.2d 181 (Fla. 1991), Teffeteller v. State, 439 So.2d 840 (Fla 1983), cert.den. 465 U.S. 1074 (1984), in which this Court has seemingly not discussed, under similar circumstances, whether there was a reasonable possibility the jury based its decision on the tainted theory. It is not clear in such cases whether this Court has conducted the harmless error analysis required by McKennon and Franklin, and simply chosen not to include this part of the Court's analysis in the opinion, or the Court has pursued a different harmless error approach.

To the extent Teffeteller and other of this Court's decisions can be construed to mean that error as to one theory submitted to the jury does not matter if there was no error as to the other theory, even when there is a reasonable possibility the jury based its verdict on the tainted theory, this Court should reject such a construction. A rule making error harmless despite the reasonable possibility it affected the verdict would be

contrary to this Court's consistent handling of the harmless error issue since State v. DiGuilio, 491 So.12d 1129 (Fla. 1986). No case has overruled McKennon and Franklin. McKennon and Franklin explicitly considered whether submission of the tainted or unsupported theory could have affected the defendant's conviction. This Court should follow that explicit analysis rather than any implicit contrary practice suggested by other cases.

The harmless error analysis of McKennon and Franklin may also be mandated by the due process and cruel or unusual punishment clauses of the Florida constitution. Until Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), there was a strong argument based on Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), and cases following Stromberg, that federal due process required a new trial whenever a case was submitted to the jury on alternate grounds, one of which turned out to be based on insufficient evidence, if the general verdict did not reveal whether the jury convicted on the proper or improper ground. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983):

> One rule derived from the Stromberg case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. 881. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), and Tafero v. Wainwright, 796 F.2d

1314 (11th Cir. 1986), cert. den. 483 U.S. 1033 (1987), contain similar language.

In Griffin, however, the United States Supreme Court decided that this rule is not required by the federal constitution when the flaw of the invalid ground for the verdict is insufficiency of the evidence. Griffin stressed a common law presumption that when a verdict might rest on valid or invalid grounds, it will be assumed to rest on the valid ground. Under Griffin, federal due process is consistent with a conviction that could rest on evidence that is insufficient to prove guilt beyond a reasonable doubt, so long as there was another, sufficient, ground on which the jury might have based its verdict.

The presumption that given two possible grounds on which to base a conviction, the jury will always reject the insufficient ground, is not based on reality. The fact is, despite being instructed to acquit unless every element of the crime is proved beyond a reasonable doubt, juries do convict where the evidence does not even make out a prima facie case, and this Court has reversed numerous convictions where the jury has done this. E.g. Hoefert v. State, 617 So.2d 1046 (Fla. 1993); Walker v. State, 604 So.2d 475 (Fla. 1992); Scott v. State, 581 So.2d 887 (1991); Cox v. State, 555 So.2d 352 (Fla. 1989); Hall v. State, 403 So.2d 1319 (Fla. 1981); McArthur v. State, 351 So.2d 972 (Fla. 1977); Driggers v. State, 164 So.2d 200 (Fla. 1964); Davis v. State, 90 So.2d 629 (Fla. 1956); Mayo v. State, 71 So.2d 899 (Fla. 1954); Wyche v. State, 48 So.2d 162 (Fla. 1950); Douglas v. State, 152

Fla. 63, 10 So.2d 731 (1942); Forehand v. State, 126 Fla. 464 (1936); Jenkins v. State, 120 Fla. 26 (1935); Holton v. State, 87 Fla. 65 (1924).

Florida's approach, as reflected in the McKennon line of cases, is to look at the particular circumstances of each case to determine whether there is a reasonable possibility in the particular case that the jury based its decision on an unsupported theory. The McKennon approach is necessary to ensure that convictions are based on proof beyond a reasonable doubt. This Court has stated that proof beyond a reasonable doubt is mandated by due process under the Florida constitution. State v. Cohen, 568 So.2d 49 (Fla. 1990). Reversing convictions where there is a reasonable possibility the jury based its verdict only on a theory that was not proved is necessary to implement this requirement of the Florida constitution.

In this case, defense counsel requested a special verdict distinguishing between premeditated murder and felony murder, but the form used did not so distinguish and the jury returned a general verdict of first degree murder. (R52,324). During closing argument, the prosecutor told the jury:

> The Defense may get up there and attempt to argue that there is no robbery; the State didn't prove robbery. Well, first of all, the defendant is not charged with robbery. So, the State doesn't have to prove robbery. ... There [are] two ways of proving first degree murder. One is by premeditation. And the second one is by felony murder. That is, he committed a robbery.

(T978). The prosecutor argued to the jury that robbery was

proved by the cash discrepancy (T974,978,992,995-996), and that premeditation was proved by the close range shot to the head. (T980,990-991,996).

Because the prosecutor argued both felony murder and premeditation, and because he specifically invited the jury to convict based on either of the alternative grounds, it is not obvious which theory the jury accepted. There were substantial problems with the proof of each theory, as discussed above in the sufficiency arguments, so the reasonable possibility that the jury rejected either ground cannot be rejected. Under McKennon and Franklin, the error of submitting either premeditation or felony murder to the jury, if not supported by sufficient evidence, was not harmless beyond a reasonable doubt.

ISSUE III THE TRIAL COURT ERRED IN ALLOWING THE STATE TO SHOW THAT MUNGIN SHOT COLLATERAL CRIME VICTIM WILLIAM RUDD IN THE BACK, HITTING HIS SPINE. THIS EVIDENCE WAS IRRELEVANT AND NOT HARMLESS.

The state was allowed to present evidence of Mungin's September 14, 1990, robbery and shooting of William Rudd in Monticello, in order to prove the identity of the shooter in this case. The Monticello crime was relevant on the issue of identity because it showed that the murder weapon in this case was used by Mungin two days before. Mungin was linked to the Monticello crime by his fingerprint on the Monticello cash box and by Rudd's eyewitness identification. It was proved that the murder weapon from this case was used in the Monticello shooting by analysis of the ejected shell found at the Monticello crime scene. The

Monticello bullet was not compared because it was never removed from Rudd.

The fact that Mungin had shot Mr. Rudd in the back initially came in without any special emphasis or apparent effort to inflame. The facts emerged in the course of Rudd's description of the crime:

> Q So, what did you do?
> A I turned around as he entered the door and -- the cigarette rack was directly behind me. I turned around to get his cigarettes and as I turned my back he shot me.
> Q Going back to the car briefly, how many people were in the car?

T719. Defense counsel did not object to this matter-of-fact description of what happened. A little later, however, the prosecutor returned to the subject of Rudd being shot in the back:

> Q If I could, Mr. Rudd, get you to step down briefly and come in front of the jury. Would you indicate to the jury, please, where exactly it was that you were shot?
> A Right -- it hit my spine right in my back right up here in the upper part of the back there. The bullet hit the spine and -
> MR. BUZZELL (defense counsel): Your Honor, I will object to this testimony.
> THE COURT: Just a second.
> MR. BUZZELL: It's irrelevant for purposes of identity or any other limited purposes under William Rule.
> MR. HARDEE (prosecutor): Judge, it will be relevant.
> THE COURT: I will overrule the objection.
> BY MR. HARDEE:
> Q You can have a seat, Mr. Rudd. Now, what happened Mr. Rudd, after you got shot in the back?

T721.[6]

Defense counsel was correct. The fact that Mungin shot William Rudd in the back, hitting his spine, was not relevant, and nothing presented later in the trial made it relevant. What tied Mungin to the murder weapon was simply that he had used the gun in Monticello, not that he had shot Rudd in the back. It did not matter where the shot struck Rudd, or even whether it struck him at all, since it was Mungin's use of the gun, not where the bullet ended up, that tied Mungin to the gun and thus to the Jacksonville killing.

In Amoros v. State, 531 So.2d 1256 (Fla. 1988), the defendant was charged with the murder of his ex-girlfriend's new boyfriend, whose name was Rivero. Eyewitnesses put Amoros on the way to the crime scene moments before the shooting, but there were no witnesses to the shooting itself. The collateral crime evidence was that a month before this shooting, Amoros had fought with a man he found with another of his girlfriends, and the man, whose name was Coney, ended up dead, with Amoros holding the gun that killed Coney. The bullet that killed Rivero was fired from the same gun that killed Coney. Thus the Coney killing was relevant to tie Amoros to the murder weapon in the Rivero

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[6]The defense objection was preserved. Although the damaging testimony came out before defense counsel interrupted with his objection, the objection was still contemporaneous, and, if the objection had been sustained, the improper evidence could have been stricken and the error remedied by a curative instruction. Jackson v. State, 451 So.2d 458 (Fla. 1984).

killing.[7]

Amoros's counsel argued that the evidence from the Coney incident should have been limited to Amoros's possession of the gun, and the shooting itself excluded. The shooting of Coney was also relevant, however, this Court ruled, because it was the bullet, shot into and extracted from Coney, when compared with the bullet in Rivero, that proved the same gun was used, thus tying Amoros to the Rivero killing. This Court explained:

> Simply allowing testimony that Amoros had possession of a gun does not serve to identify it as the same murder weapon. The possession of the weapon, the firing of the weapon, the retrieval of the bullet fired from the weapon from Coney's body, and the comparison of the two bullets are all essential factors in linking the murder weapon to Amoros.

531 So.2d 1260. Amoros distinguished Jackson v. State, 498 So.2d 406 (Fla. 1986), cert.den. 481 U.S. 1010 (1987), where the trial judge had limited the collateral evidence to Jackson's possession of the gun, not its firing, by pointing out that in Jackson, the firing was unnecessary to link the gun to the earlier murder.

Under Amoros, evidence of the defendant's collateral use of a murder weapon is admissible to the extent it ties the defendant to the primary crime. Otherwise, the collateral use is irrelevant. Long v. State, 610 So.2d 1276 (Fla. 1992), ruled the same way with collateral evidence not involving a weapon. Long's collateral crime of rape was admissible in part because hair and

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[7]Amoros was acquitted of the Coney killing, but this did not negate the relevance of his possession during the Coney incident, of the gun that killed Rivero.

fiber (rather than a gun) from the collateral crime tied Long to the primary crime. This Court held, however, that the details of Long's treatment of the rape victim were not admissible. See also St. Louis v. State, 584 So.2d 180 (Fla. 4th DCA 1991), where evidence of defendant's irrelevant threats contained an implicit admission of the primary crime. The court ruled the threats were not inextricably intertwined with the admission, and the threats should have been excluded.

In this case, unlike Amoros, the bullet itself was not used to identify the Monticello gun as the murder weapon. Only the shell found on the floor of the Monticello store was used for that. The details of Rudd's injuries were unrelated to the shell and did not help identify the Monticello gun. Thus, the evidence that Mungin shot Rudd in the back, hitting his spine, was irrelevant. The only apparent purpose for evidence of Rudd being shot in the back, and being hit in the spine, was to elicit sympathy for Rudd and prejudice against Mungin. The overruling of Mungin's objection was error.

This error was not harmless. As this Court noted in Straight v. State, 397 So.2d 903 (Fla. 1981), cert.den. 454 U.S. 1022 (1981):

> If irrelevant, [admission of evidence of collateral crimes] is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

397 So.2d 908. The emphasis on Mungin's having shot Rudd in the back, hitting him in the spine, was a forceful indictment of

Mungin's character, which could be harmless only if the evidence were so strong that no reasonable jury could have convicted of a lesser offense or acquitted. This was not the case.

The weaknesses in the proof of premeditation and of robbery as the predicate for felony murder are discussed above in Issues II(A) and II(B), in the arguments as to the sufficiency of those elements of first degree murder. The evidence that Mungin was the person who committed this crime at all was also less than overwhelming.

There were essentially two reasons presented by the state to believe that Mungin committed this killing. The first was the testimony of Ronald Kirkland identifying Mungin as the person he saw rushing from the scene of the murder. This identification itself created doubt, since Kirkland's description of the man he saw leaving the store was inconsistent with the description of Mungin from two days before, given by other state witnesses. Kirkland had told police the day of the crime that the person leaving the scene had longish, jeri curled hair and facial hair. Yet the state witnesses who saw Mungin two days before the killing, agreed he had short hair and no curls. Rudd described Mungin as being clean shaven and clean cut, with no curls hanging from his cap, and appearing as if he were in the navy. Thomas Barlow testified that there were no curls hanging from Mungin's cap, and that the back of Mungin's head was clean shaven or cut close to his scalp. Kirkland told police the day of the crime he did not believe he would be able to identify the man he saw. It

was only after Mungin had been arrested that Kirkland identified Mungin's photograph, and the photograph was of a clean shaven man with extremely close-cropped hair. Because Mungin's photograph did not match the description Kirkland had given, the jurors could reasonably have questioned whether the police had somehow communicated to Kirkland that Mungin was the culprit, making Kirkland's identification unreliable. Kirkland's testimony as a whole raises the question of whether the killer was someone other than Mungin, someone with longish jeri curled hair.

The second reason the state presented to suggest that Mungin was the killer was the proof that Mungin's gun was the murder weapon. It was established that the gun Mungin had and used two days before this killing, and that Mungin had when he was arrested two days after this killing, was used to kill Ms. Woods. The bulk of the state's case was taken up with establishing, through the collateral crimes and the firearms identification, that Mungin's gun was used.

That Mungin's gun was used, however, does not prove that Mungin is the one who used it for this crime. Mungin may have loaned his gun to someone with longish jeri curled hair, and that person may have committed the murder. The lack of Mungin's fingerprints at the scene also raises a question as to whether Mungin committed this crime. Kirkland did not testify that the man he saw leaving the Lil' Champ was wearing gloves.[8]

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[8]The state also presented evidence of the movement of two stolen cars to suggest that Mungin was in Jacksonville during the general time period of the murder. Mungin's presence in

In sum, the evidence identifying Mungin's gun as the murder weapon was strong, but the evidence identifying Mungin as the killer was not very strong. A reasonable jury could have acquitted Mungin altogether. Given the weakness of the evidence of premeditation and of the predicate felony of robbery, a reasonable jury could also have convicted Mungin of second degree murder. Under these circumstances, it cannot be said beyond a reasonable doubt that the trial judge's overruling of Mungin's objection to the "shot him in the back" testimony had no effect on the verdict. Remand for a new trial is required. State v. DiGuilio, 491 So.12d 1129 (Fla. 1986).

ISSUE IV FUNDAMENTAL ERROR OCCURRED IN THE PENALTY PHASE WHEN A DEFENSE WITNESS TESTIFIED THAT INMATES SERVING LIFE SENTENCES ARE ELIGIBLE FOR CONDITIONAL RELEASE AND CAN BE EXPECTED TO BE RELEASED IN AS LITTLE AS FIVE YEARS.

In the penalty phase, the defense called Glenn Young, of the Department of Corrections. Mr. Young's testimony was as follows:

DIRECT EXAMINATION
Q Would you please state your name and business address, sir?
A Glenn Young, Cross City Correctional Institution.
Q And how are you employed, Mr. Young?
A I'm a correction/probation officer working in the classification department at Cross City.
...
Q Now, during the course of your employment did you have an opportunity to come in contact with an inmate by the name of Anthony Mungin?
A Yes, sir.
Q And when did Mr. Mungin arrive at your facility?
A In January of 1992.
...

Jacksonville is as consistent with his having loaned his gun to the killer as it is with his having been the killer.

Q Now, sir, what sentences -- or can you give me case numbers and counties for the sentences that he was under when he was sent to your facility?
...
A When he was sent to Cross City he was in for first degree murder, felony, attempted, as a habitual offender doing a life sentence with a three-year minimum mandatory sentence from Jefferson County and Leon -- or from Leon --
...
A and Jefferson.
Q Is he eligible for any early release?
A Not parole. There is only one way that he could be released. It's conditional release through the Parole Commission, which works almost like parole.
Q He would not be eligible for that, though, would he?
A Not if -- if he was -- I believe conditional release is -- it's not a controlled release. There is a lot of different releases. But he is not parole eligible. The only way he could be is if he is given a -- the Governor could give him a --
Q Pardon?
A Not a pardon. But it's after ten years they can go up for a -- it's not --
Q Let me ask you this: he is serving a life sentence, is he not?
A Yes. But life doesn't really mean life. I mean, it means life, but there are inmates that are released with a life sentence.
Q Those are inmates who were in the system prior to October 1 of 1983; is that not correct?
A Yes.
...
CROSS EXAMINATION
Q Hello, Mr. Young.
A Hi.
Q You mentioned that life doesn't mean life; is that what you said?
A Yes.
Q Because basically the law can be changed at any time or a sentence reduced --
MR. COFER: Objection, your honor. I'm not sure if that's an appropriate question.
THE COURT: Well, you asked him his expertise. I'm going to allow him to cross examine, too.
Q Isn't it true, sir, the law can be changed at any time in terms of awarding gained time, et cetera?
A Yes.
Q And, in fact, it has been changed in the last few years?
A The laws change quite frequently.
Q In fact, people in prison now are serving what; less

than ten or fifteen percent of their sentence now?
A I would hate to predict how much -- the percentage they are serving. I know a lot of times the public can be misled by how much time one actually does.
Q Well, how much is the maximum people do?
A An inmate sentenced to a 25-year mandatory on a life sentence, those are the inmates you see doing more of the time.
Q Everybody else gets what; they can get out after five, or ten, or fifteen years?
A Depending on the sentence and how much gained time he receives and his behavior while in there, that's true.
Q And, also, obviously depending on how old and overcrowded the prisons are?
A Yes, sir.
Q Is that true?
A Yes, sir.
REDIRECT EXAMINATION
Q Mr. Young, those individuals who are eligible for controlled release are those individuals who are serving what they call a term of years sentence?
A There is a conditional release and a controlled release. Those are two different types of sentences.
Q Those are both for individuals serving term of year sentences?
A I don't understand the word term.
Q Like a certain number of years?
A Yes, sir.
Q Versus a life sentence?
A Yes, sir.
RECROSS EXAMINATION
Q Just one follow-up about term versus life, versus life sentence, as Mr. Cofer asked you. You mentioned that the defendant in this case is currently serving a life sentence, but you cannot guarantee that he will not be released, five, ten, fifteen, twenty years from now, can you?
A No, sir.

(T1176-1182).

In its penalty phase closing argument, the state returned to the meaning of a life sentence. The prosecutor said:

> But what did [Glen Young] also say? He said that doing a life sentence under those charges doesn't mean it's life. That he can be released. The legislature can change the law at any time. And, as is obvious, it can be changed because of overcrowding in maybe

five, ten years or fifteen years.

(T1225).

At the time of the trial in this case, Mungin had already been sentenced as a habitual felon to life in prison on his convictions for attempted first degree murder and armed robbery for the Tallahassee robbery and shooting. As to those life sentences, Florida law does not provide any basis for ever releasing Mungin. Conditional release, which Mr. Young thought would be available to Mungin, is actually unavailable for any life sentence.[9] Florida's life sentence for non-capital crimes is a true life sentence, without the possibility of release.

For capital crimes, however, when death is not imposed, the life sentence, until recently, included the possibility of parole after twenty-five years. The life sentence for capital crimes was thus more lenient than the life sentence for non-capital crimes. This anomaly in the law was corrected by ch. 94-228, Laws of Florida. Now, the sentencing alternatives for first degree murder are death and life imprisonment without any

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[9]The conditional release statute deals with inmates released on their tentative or provisional release dates, section 947.1405(2), Fla. Stat., but tentative release dates are set only for prisoners serving a term of years, section 944.275(3)(a), Fla. Stat., and provisional release, since repealed by ch. 93-406, Laws of Fla. (1993), was available only for inmates with tentative release dates, and was in any event not given to persons sentenced as habitual offenders or sentenced for attempted murder, section 944.277, Fla. Stat. (1991). The expression, "term of years," means any sentence other than a life sentence. See Simmons v. South Carolina, 114 S.Ct. 2187, 129 L.Ed 2d 133 (1994): "For much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term." (emphasis added).

eligibility for parole. The Department of Corrections bill analysis of House Bill #323, which became ch. 94-228, stated:

> The proposed amendment addresses a current illogical effect in the statutes. A capital offense, which is the most severe level of crime, allows an inmate to be eligible for parole after serving 25 years. However, an inmate may receive a life sentence for a first degree crime (a less serious offense) and would never be eligible for parole under existing law.

(Appendix, DOC Bill Analysis, HB #323).

Thus, Young's testimony misled the jury as to the legal effect of Mungin's prior life sentence. Actually, absent a change in the law or a pardon, Mungin would never be released. Young's testimony indicated, however, that even under current law, Mungin's life sentence was not a true life sentence, and Mungin might be released in as little as five years.

Young's testimony also misled the jury about the meaning of the life sentence in capital cases. He said that inmates serving a twenty-five year mandatory are doing "more of the time." The implication is that just as life does not mean life, the twenty-five year mandatory does not really mean that twenty-five years will be spent in prison. In light of Young's general statements minimizing the significance of a life sentence, the jury could well have been left with the impression that even with a twenty-five year mandatory term, an inmate might serve much less than half of the twenty-five years.

It is evident from his examination of Glenn Young that defense counsel called Young to establish Mungin would never get

out of prison, and defense counsel was surprised by the answers he got. Defense counsel asked if Mungin was eligible for any form of early release. Instead of saying no, Young said, not parole, but he would be eligible for conditional release, "which works almost like parole". Defense counsel's efforts to minimize the damage were unsuccessful. Young insisted that Mungin was eligible for conditional release, and he said, "[L]ife doesn't really mean life." Young did concede that the inmates he referred to who had been released from life sentences had been "in the system" before 1983, but Young never said that his comments about life sentences did not apply to Mungin or to persons sentenced after 1983.

The prosecutor, on cross-examination, sought to reinforce and expand upon the bonus he had received from this defense witness. He started by getting Young to repeat his statement that life does not mean life. Then, he sought Young's testimony that the law could be changed at any time and the sentence reduced at any time. Defense counsel's general objection ("I'm not sure that's an appropriate question,") was overruled, apparently on the theory that the defense had opened the door: "Well, you asked him his expertise. I'm going to allow him to cross examine, too."

Mungin's counsel had requested an instruction that would have at least partially corrected the implication from Young's testimony that even the twenty-five year mandatory would not actually be served:

> In your deliberations you are to presume that if the defendant is sentenced to life imprisonment, he will spend the rest of his life in prison unless he is released on parole after 25 years. You are to presume that if the defendant is sentenced to death, he will be electrocuted.

(R332). The state objected to this instruction, and the court denied it. (T1103). The court gave the standard instruction informing the jurors that the life sentence choice would include the possibility of parole after twenty-five years: "The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years." (T1123). The advisory sentence verdict form also referred to the life imprisonment option as being without the possibility of parole for twenty-five years. (R382).

The United States Supreme Court recognized the importance of accurate information about the possibility the defendant will be released if the death penalty is not imposed, in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), and Simmons v. South Carolina, 114 S.Ct 2187, 129 L.Ed.2d 133 (1994). In Ramos, the court upheld an instruction informing jurors that the life without parole option could later be commuted by the governor to a parole eligible sentence. Ramos recognized that informing jurors that a defendant serving life might be released invites the jurors to vote for death if they believe defendant's eventual release should be prevented. Ramos holds that accurate information allowing the jury to assess the likelihood of such release is proper.

In Simmons, jurors were told to choose between death and life in prison, but were not told that the life sentence option would be without eligibility for parole. The holding of Simmons is that when the state argues death is appropriate because of the defendant's future dangerousness, and the defendant is ineligible for parole, due process requires that the jury be told of the defendant's parole ineligibility. Simmons is pertinent here because its analysis sheds light on the centrality of the possibility of future release to a jury's decision on death versus a lesser punishment. The Simmons court stated:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration.
> ...
> This court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.
> ...
> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

114 S.Ct 2193-2194.[10]

Thus reasonable penalty phase jurors who would reject life imprisonment as an option when life includes the possibility of parole, might well choose life when they know the law does not authorize the defendant's release. Even if the defendant does not seem to pose a threat of continued violence, a punishment that allows the defendant eventually to go free may be rejected as unacceptably lenient. For this reason, the longer jurors believe a defendant will spend in prison under the life option, the more likely they will choose life in prison rather than the death penalty.

Normally, in Florida, in pre-ch. 94-228 cases, jurors in the capital case penalty phase must choose between the death penalty and a prison sentence of at least twenty-five years. In such cases, the possibility of release after twenty-five years is bound to be a significant factor militating toward choosing a death sentence. In this case, however, Mungin had already been sentenced to a true life sentence. Thus, the actual choice the jurors faced was not between death and at least twenty-five years

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[10] In a statewide public opinion survey submitted in the Simmons case:

> More than 75 percent of those surveyed indicated that if they were called upon to make a capital-sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an "extremely important" or a "very important" factor in choosing between life and death.

114 S.Ct 2191.

in prison. Rather, the real choice was between death and letting Mungin spend the rest of his life in prison, with no provision for early release under current law.

Because of Glen Young's testimony, the jurors in this case may well have believed that if they did not recommend the death penalty, Mungin could be released in just a few years, far less even than the twenty-five year mandatory. This inaccurate information means that the jury in this case was making a false choice, based on an inaccurate view of the legal effect of habitual life sentences and capital life sentences.

It seems evident that if such misleading information had been given to the jury over the objection of defense counsel, this would have been reversible error. Here, the misinformation went to the jury mainly through defense counsel's examination of a defense witness, or through the state's cross-examination without a specific defense objection. Mungin's contention is that, despite the manner in which the misinformation arose, the erroneous information so severely tainted the jury's penalty determination that the jury's recommendation is not reliable and the error is fundamental. The jury's decision to recommend death was the answer to a flawed question. Just as a verdict of guilt cannot stand where the jury is materially misinformed about the elements of the crime or defense, so a death recommendation should not stand when the jury is materially misinformed about the consequences of a life recommendation. In an appeal of a

death sentence, such error must be deemed fundamental.[11]

> ISSUE V THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCES OF ROBBERY AND PECUNIARY GAIN BECAUSE THE EVIDENCE DID NOT ESTABLISH THAT THE KILLER TOOK OR ATTEMPTED TO TAKE ANY PROPERTY.

The state's failure to prove robbery or theft is discussed in Issue II(B). That discussion applies to the pecuniary gain aggravating circumstance, as well as the robbery aggravator, because, as discussed in Issue II(B), there was no evidence that the killer took property or tried to take property.

The lack of evidence of robbery or pecuniary gain makes the trial judge's finding of that aggravating factor incorrect. Mungin also asserts as error the instruction to the jury on this aggravating factor. This Court, in Johnson v. Singletary, 612 So.2d 575 (Fla. 1993), cert.den. 113 S.Ct. 2049, 123 L.Ed.2d 667 (1993), however, seemed to hold that instructing on an aggravating factor that is unsupported by the evidence is not

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[11]The ruling in King v. Dugger, 555 So.2d 355 (Fla. 1990), rejecting a post-conviction death sentence challenge despite the exclusion of testimony that the life alternative included a twenty-five year minimum mandatory portion, is not pertinent here. Even if evidence of the period the defendant would spend in prison were inadmissible because not considered to be mitigating, this does not mean that admission of highly misleading evidence on that subject may not be fundamental error. Also, the testimony that was excluded in King would have merely duplicated the information communicated to the jury as a binding instruction on the law. Here, the testimony asserted as error did not duplicate any instruction.

See Armstrong v. State, 19 Fla. Law Weekly S397 (Fla. Aug. 11, 1994), where the defendant was sentenced to death for murder and to life for robbery and attempted murder, and among the mitigation presented was "the alternative sentence is life imprisonment without the possibility of parole." 19 Fla. Law Weekly S398.

error because it would be presumed that jurors based their death recommendation on other factors, and not the unsupported factor. Johnson's analysis derives, through Sochor v. Florida, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), from Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), discussed in Issue II(D). As asserted in Issue II(D), presuming that jurors will not base their decision on a theory submitted to them if the theory is not supported by the evidence does not make sense. Padilla v. State, 618 So.2d 165 (Fla. 1993), illustrates the problem with Johnson's presumption. In Padilla, the trial judge instructed the jury accurately as to the meaning of cold, calculating and premeditated and himself found that aggravating circumstance present. As this Court held, however, the evidence did not support a finding of CCP. If trial judges who know the law find aggravating factors to be established even though they are actually unsupported by the evidence, it seems clear that juries do the same.

In any event, Johnson seems to have been superseded by Padilla. In Padilla, the jury was instructed on two other aggravators besides cold, calculated, and premeditated. The jury recommended death, and the trial judge found the existence of all three aggravators. This Court held there was insufficient evidence to support the CCP factor. Under Johnson, as Chief Justice Grimes pointed out in his partially dissenting opinion in Padilla, there was no need for a new jury recommendation, as it would be presumed the jury had rejected the unsupported

aggravator. Only a new reweighing by the judge was warranted, per Johnson. The majority, however, remanded for a new penalty phase before a new jury. Thus, Johnson has been implicitly overruled by Padilla.

The appropriate appellate response to jury instructions that tell the jury it can consider an unsupported factor in aggravation is not to make presumptions about how the jury reached its decision. Rather, the proper approach to an erroneous instruction is to consider whether in the specific circumstances of the case the error can be determined to have been harmless. Here, the harmless error question is whether there is a reasonable possibility that the availability of the improper aggravator affected the jury's recommendation. If not, the error was harmless. If there is a reasonable possibility the instruction did affect the decision, then the case should be remanded, as it was in Padilla, for a new penalty phase before a new jury.

Here, as discussed in Issue II(D), there is a reasonable possibility the jury found that Mungin committed a robbery, despite the lack of sufficient evidence. Other than the improper robbery and pecuniary gain aggravators, there was only one aggravator, prior violent crime. The force of the prior violent crime aggravator is lessened by the only prior violent crimes having been committed two days before this crime, suggesting, as discussed in Issue VI and VIII, that Mungin's violence may have been limited to one three-day aberration. If the jury improperly

found the robbery and pecuniary gain aggravators, this increased the number of aggravators from one to two (counting robbery and pecuniary gain as the same aggravator). Since five jurors found the death penalty unwarranted, it cannot be said there is no reasonable possibility that limiting the aggravators to one would not have influenced one more juror to recommend life.[12]

Thus, reversible error was committed when the judge instructed the jury on the robbery and pecuniary gain aggravators, and reversible error was committed again when the judge found those aggravators to exist, and weighed them in his sentencing decision.

ISSUE VI THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT MUNGIN'S AGE COULD BE CONSIDERED AS A MITIGATING CIRCUMSTANCE.

Mungin's age was proved during the guilt phase. His Georgia identification card was found at the home where he was arrested, and was admitted into evidence as State Exhibit 15; the card showed that at the time of the crime, Mungin was twenty-four years old. (T837-843;Exh.15). During the penalty phase, defense counsel requested the standard instruction on the defendant's age as a mitigating circumstance. (T1103-1107;1207-1208). The prosecutor acknowledged that Mungin's age was in evidence, but argued age alone could not be a factor without a showing that Mungin was immature for his age or under the care of an adult or unable to understand what he was doing. (T1104-1105;1206-1207). The prosecutor stated that Mungin had been on his own since he

[12]See also the harmless error discussion in Issue VI.

was eighteen. (T1207).[13] The judge refused to give the age instruction. (T1208). The only instruction the judge gave as to what the jury could consider in mitigation was the general mitigation instruction:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are: Any aspect of the defendant's character or record and any other circumstances of the offense.

(T1247-1248).

The age instruction should have been given because the jury had the right to find Mungin's age as a mitigating circumstance, even though the judge was free to find Mungin's age not mitigating. In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.den. 416 U.S. 943 (1974), this Court discussed the intent of the legislature in prescribing the age of the defendant at the time of the crime as a mitigating circumstance:

> Finally, the age of the defendant may be considered pursuant to [section 921.141 (6)(g), Fla. Stat.] This allows the judge and jury to consider the effect [of] the inexperience of the defendant on the one hand or, in conjunction with subsection (a), the length of time that the defendant has obeyed the laws in determining whether or not one

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[13]Actually, Mungin's grandmother testified that when Mungin was eighteen, he left her house and moved in with an uncle in Jacksonville. (T1142-1143). On cross-examination, she answered affirmatively to the prosecutor's leading questions, stating that Mungin had been out on his own since he left her (T1144). It is not clear what she meant by "on his own," since Mungin was living with his uncle. There was no evidence as to when or if Mungin moved out of his uncle's home.

> explosion of total criminality warrants the extinction of life.
> ...
> Thus, the Legislature has chosen to provide for consideration of the age of the defendant--whether youthful, middle aged, or aged--in mitigation of the commission of an aggravated capital crime.

283 So.2d 10.

While Dixon's statement that any age can be mitigating has not been consistently followed, e.g. Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert.den. 471 U.S. 1045 (1985), the age of twenty-four has been upheld as a valid mitigating factor. In Randolph v. State, 463 So.2d 186 (Fla. 1984), cert.den. 473 U.S. 907 (1985), the sentencing judge had found three aggravating factors and two mitigating circumstances, including the defendant's age of twenty-four. This Court found there was actually only one valid aggravator, and remanded for reweighing against the two mitigators. Randolph implicitly accepted age twenty-four as a valid mitigating circumstance, which could be weighed against the remaining aggravator. See also Oats v. State, 446 So.2d 90 (Fla. 1984), where the trial judge had found six aggravators, and the defendant's age of twenty-two as the only mitigator. This Court invalidated three of the aggravators, and stated:

> Because the judge weighed three impermissible aggravating factors, in addition to the three permissible ones, against the single mitigating factor of Oats' age, we cannot know if the result would have been different if the impermissible factors had not been present.

446 So.2d 95-96. Thus, age twenty-two was implicitly accepted as

a valid mitigating circumstance.

In Scull v. State, 533 So.2d 1137 (Fla. 1988), cert.den. 490 U.S. 1037 (1989), the state had cross-appealed, asserting that the mitigating circumstances found by the trial court, including Scull's age of twenty-four, were unsupported by the evidence. This Court upheld the finding of a mitigating circumstance based on Scull's being twenty-four:

> Scull was twenty-four years old when these murders were committed. The trial judge was in the best position to examine Scull's emotional and maturity level. This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases in which the defendants were twenty to twenty-five years old at the time their offenses were committed. [citations omitted] However, these cases do not address the question of whether a trial judge has abused his or her discretion by finding this mitigating circumstance. Scull's age of twenty-four alone could not establish a mitigating factor, but factors which were observable by the judge during the trial and sentencing proceeding support his finding that Scull's emotional age was low enough to sustain this mitigating circumstance.

533 So.2d 1143.

Scull means that a trial judge's finding of the age twenty-four as mitigating will not be disturbed, since the trial judge makes the decision to find age in mitigation based in part on his personal observation of the defendant. Thus whether or not to find the age of twenty-four a mitigating circumstance is within the judge's discretion. Neither a refusal to find age to be mitigating, nor a finding that age was mitigating, will be disturbed when the defendant was twenty-four at the time of the

crime.

In Huddleston v. State, 475 So.2d 204 (Fla. 1985), this Court approved the finding of age twenty-three as a valid mitigator. Huddleston was a jury override case in which the defendant argued that the his age of twenty-three provided a reasonable basis for the jury's life recommendation. This Court found that Huddleston's age was one of the circumstances that could justify the life recommendation. Thus, age twenty-three was upheld as a valid mitigator.

In Rhodes v. State, 19 Fla. Law Weekly S254 (Fla. May 5, 1994), where the trial judge found three aggravators and two mitigators, one of the mitigating circumstances was the defendant's age of thirty at the time of the crime. This Court stated:

> Our review of the record and sentencing order reveals that the aggravating and mitigating factors were properly weighed by the trial court.

19 Fla. Law Weekly S256.

In King v. Dugger, 555 So.2d 355 (Fla. 1990), at the defendant's original sentencing, the judge had found his age of twenty-three to be mitigating, but still imposed the death penalty. At King's resentencing, a different judge did not find King's age to be mitigating. This Court upheld the second judge's failure to find that age was a mitigating circumstance, not because there was anything incorrect about the first judge's use of age, but rather because the second sentencing was a new proceeding at which the new judge was not obligated to accept the

original judge's findings. Thus, in King, on the same facts, one judge could properly treat the age twenty-three as a mitigating circumstance, and another could properly choose not to treat age as mitigating. King noted:

> An age of twenty-something is "iffy" as a mitigating circumstance.

555 So.2d 358.[14]

Mungin's position is that because the age of twenty-four is a permissible mitigating circumstance, the evidence of his age alone was sufficient to require the trial judge to instruct the jury it could consider age in mitigation. If some additional evidence was needed, however, other than the jury's direct observation of Mungin, from which the jury could have found

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[14]Other cases that support the conclusion that age is a permissible mitigator for twenty-four old defendants include: Holmes v. State, 374 So.2d 944 (Fla. 1979), cert.den. 446 U.S. 913 (1980), stating that defendant's age of twenty-five and crime-free past were not persuasive mitigating factors, implying that age twenty-five was mitigating, just not persuasive; King v. State, 390 So.2d 315 (Fla. 1980), cert.den. 450 U.S. 989 (1981), reporting without comment the trial court's finding of age twenty-three as mitigating; Peek v. State, 395 So.2d 492 (Fla. 1980), cert.den. 451 U.S. 964 (1981), stating there is no per se rule as to what ages are mitigating; Cannady v. State, 427 So.2d 723 (Fla. 1983), finding a reasonable basis for the life recommendation in part in defendant's age of twenty-one; Routly v. State, 440 So.2d 1257 (Fla. 1983), cert.den. 468 U.S. 1220 (1984), upholding the trial court's rejection of age twenty-five as mitigating, based on the judge's observation of defendant at trial and other evidence, leaving implication that age twenty-five could have been found to be mitigating; Asay v. State, 580 So.2d 610 (Fla. 1991), cert.den. 112 S.Ct. 265, 116 L.Ed.2d 218 (1991), leaving the trial court's finding of age twenty-three as mitigating undisturbed; Gore v. State, 599 So.2d 978 (Fla. 1992), cert.den. 113 S.Ct. 610, 121 L.Ed.2d 545 (1992), upholding the judge's rejection of age twenty-four as mitigating based on evidence of Gore's sophistication, leaving implication that age twenty-four can be mitigating.

Mungin's age to have mitigating significance, such evidence was introduced in this case.

Dr. Krop testified that Mungin suffered from a history of drug and alcohol abuse from about age twenty (T1194-1195), but he also testified that Mungin had used crack cocaine extensively for five or six years. (T1195-1196). Since Mungin was twenty-four at the time of the crime, and was arrested two days after the crime, the jury could have concluded that Mungin had actually been using cocaine since he was about eighteen. (Six years before the crime, Mungin would have been eighteen.) Extensive cocaine use, among its many harmful effects, could hardly be doubted to interfere with the normal maturation process. Before Mungin's cocaine use, when he was in high school, the evidence showed he was well matched to play with a boy two years younger than himself. (T1171). If the jury knew that it could consider Mungin's age, it could have taken the evidence of his chronological age, together with evidence of his cocaine use, to conclude that Mungin may have been emotionally still a child.

The Dixon case suggests another way in which the jury could have considered Mungin's age in mitigation. Dixon noted that one proper way to see age as mitigating is to consider "the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life." 283 So.2d 10. Mungin did not assert the mitigating factor of no significant history of prior criminal activity, and the evidence of his extensive cocaine use

demonstrates that he was not living a law-abiding life prior to this crime. However, the jury could have taken Mungin's age and the crimes the state introduced on the aggravator of prior violent felony, to conclude that Mungin had gone a substantial length of time without committing violent crimes. Several defense witnesses, including two law enforcement officers, one of whom had testified for the state in the guilt phase, established that Mungin was a well-behaved child and was not a violent person through high school. Mungin's wrestling coach even had to teach him to be aggressive. The only convictions introduced to show that Mungin had a violent record were for crimes committed two days before the crime in this case. The jury could have seen the collateral crimes and the primary crime as a three day explosion of violence in an otherwise non-violent life.

Because Mungin's age of twenty-four at the time of the crime could have been considered as a mitigating circumstance, the trial court should have granted Mungin's request that the jury be so instructed. The standard instruction for the capital penalty phase includes a "Note to judge" that directs the judge to "Give only those mitigating circumstances for which evidence has been presented." Fla. Std. Jury Instr. (Crim.), Penalty Proceedings--Capital Cases. Implicit in the note is that every mitigating factor as to which there is any evidence must be given. This is no different from a non-capital case, in which the judge must instruct on every defense that is supported by evidence. That the evidence is weak or disputed in no way lessens the

requirement of giving the defense instruction. See, Gardner v. State, 480 So.2d 91, 92 (Fla. 1985): "A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory," and Canty v. State, 471 So.2d 676,678 (Fla. 1st DCA 1985): "It is axiomatic that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such an instruction, and the trial court may not weigh the evidence in determining whether the instruction is appropriate."

Nonetheless, Cave v. State, 476 So.2d 180 (Fla. 1985), cert.den. 476 U.S. 1178 (1986), while apparently accepting that the jury was free to consider or reject the defendant's age of twenty-four as a mitigating factor, still found no error in the trial court's failure to instruct the jury that the defendant's age could be considered. Cave found defense counsel's jury argument on age, combined with the general instruction to consider any aspect of the defendant's character, completely adequate. Echols v. State, 484 So.2d 568 (Fla. 1985), cert.den. 479 U.S. 870 (1986), also held that the failure to instruct on the age mitigator was not error because age could be considered under the general mitigating instruction.[15]

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[15]Lara v. State, 464 So.2d 1173 (Fla. 1985), held that the defendant's age of twenty-five did not require an instruction on the age mitigator. Lara gave no explanation for this holding, however, other than a citation to Simmons v. State, 419 So.2d 316 (Fla. 1982), and Washington v. State, 362 So.2d 658 (Fla. 1978), cert.den. 441 U.S. 937 (1979). Neither Simmons nor Washington dealt with the necessity of an instruction on age. Each simply

The suggestion of Cave and Echols that the age instruction is unnecessary because of the general mitigation instruction does not make sense. First, refusing to instruct on age contradicts the normal rule that the defendant is entitled to an instruction informing the jury of the law applicable to his case. Second, refusing to instruct on a mitigator with record support contradicts the directions in the standard instruction. If the standard instruction on age could be dispensed with because age is covered by the general instruction, no apparent distinction appears to prevent trial courts from dispensing with the standard instruction on the other statutory mitigators. Finally, the general mitigating instruction does not make it clear that age may be considered. The general instruction informs the jury it may consider the defendant's "character," "record," and "any circumstance of the offense." Reasonable jurors would not necessarily consider age to be an aspect of character, or a part of the defendant's record, or a circumstance of the offense. Indeed, without the standard instruction specifically referring to the defendant's age at the time of the offense, the mitigation instruction could be interpreted to prohibit consideration of age, as the instruction tells jurors what they may consider, and

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upheld the sentencing judge's decision to not find mitigation in the defendant's age, twenty-six for Washington, twenty-three for Simmons. Thus, neither Simmons nor Washington supports a rule that the jury need not be instructed on a statutory mitigating factor that the jury is free to find from the evidence. The basis for Lara's holding is not clear. In any event, any inference from Lara that the age instruction need not be given even when applicable is superseded by Smith v. State, 492 So.2d 1063 (Fla. 1986), discussed in the text, below.

age is not included.[16]

Any holding of Cave and Echols that the age instruction need not be given when it is applicable because age is covered by the general mitigation instruction was implicitly overruled by Smith v. State, 492 So.2d 1063 (Fla. 1986), in which this Court stated:

> Particularly, we find it was error to refuse to give the requested instruction on age when the accused was twenty years of age at the time of the crime. While it is ultimately within the province of the trial court to decide the weight to be accorded age as a mitigating circumstance, Jennings v. State, 453 So.2d 1109 (Fla. 1984), and it is not necessarily error to accord little or no weight to an age of twenty, id., we have on numerous occasions left undisturbed a trial court's determination that an age of twenty, and even older, is a mitigating circumstance. Even though the trial judge in this case found Smith's age and other factors did not outweigh the aggravating circumstances, Smith should have had the benefit of the standard instruction on age as a mitigating circumstance. We do not establish a maximum age below which the instruction must always be given. See Peek v. State, 395 So.2d 492, 494 (Fla. 1980)("There is no per se rule which pinpoints a particular age as an automatic factor in mitigating"), cert. den., 451 U.S. 964 (1981). We do conclude that in this case it should have been.

492 So.2d 1067. (Peek citation shortened).

Smith's holding that the defendant must get the benefit of the age instruction, even if the judge gives age no weight, makes

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[16]See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978): "We find it necessary to consider only her contention that her death sentence is invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." 438 U.S. 597. Note that "age" is listed separately from "character" and "prior record."

sense because the jury is free to make its own independent decision as to whether age is mitigating, and if it is, how much weight to give it. Not instructing on age is akin to a directed verdict for the state on age. This would be appropriate if age twenty-four were non-mitigating as a matter of law. It is not, however, as the cases discussed above demonstrate.

Smith declines to state a maximum age below which the age instruction must be given. If concludes that the instruction must be given for age twenty, however, because this Court has "on numerous occasions left undisturbed a trial court's determination that an age of twenty, and even older, is a mitigating circumstance." The determination of a trial court that age is mitigating is left undisturbed when the question is within the trial court's discretion. So, what Smith is saying is that for any age as to which the sentencing court has discretion to find age as a mitigating circumstance, the jury must be informed that age can be considered. As discussed above, this would include the age of twenty-four.[17]

The failure to inform the jury it could consider Mungin's age in mitigation cannot be determined to have been harmless. The standard this Court uses in determining the harmfulness of trial error, in the penalty phase of capital cases as in other criminal cases, is described in State v. DiGuilio, 491 So.2d 1129

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[17]The best policy would be to give the age instruction whenever the defendant requests it. This would be consistent with section 921.141, Fla. Stat., and with Dixon, and would free trial judges from having to draw arbitrary lines between what is and is not a potentially mitigating age.

(Fla. 1986). Thus, in O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989), where the error was the failure to instruct the jury of its right to consider as non-statutory mitigation the disparate treatment of other perpetrators, this Court applied DiGuilio to find the error was not harmless. In O'Callaghan, the jury knew about the lenient treatment given the other defendants, but was not told this was a circumstance they could consider in deciding whether the death penalty was warranted. Similarly, here, the jury knew Mungin's age, but was never told that his age was something they could consider in mitigation.

The harmless error test of DiGuilio, like the burden of proof beyond a reasonable doubt in criminal cases, is designed to err on the side of protecting the defendant. DiGuilio described the test as follows:

> The harmless error test, as set forth in Chapman [v. California, 386 U.S. 18 (1967)] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

491 So.2d 1138.

In conducting harmless error analysis of penalty phase error, this Court has considered the jury's vote. E.g., Omelus v. State, 584 So.2d 563 (Fla. 1991):

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the

> sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

584 So.2d 567. See also Hendrix v. State, 19 Fla. Law Weekly S227 (Fla. April 21, 1994), where the unanimity of the jury's death recommendation was a factor in finding any vagueness in the cold, calculated and premeditated instruction harmless.

In this case, the jury's vote was seven to five for death. If just one more juror had voted for life, this would have changed the recommendation. The possibility that, if they had been told they could consider Mungin's age in mitigation, one more juror would have voted for life, is not unreasonable.

> ISSUE VII THE TRIAL JUDGE ERRED IN FAILING TO FIND AND GIVE SOME WEIGHT TO UNREBUTTED NON-STATUTORY MITIGATION.

The evidence of non-statutory mitigation in this case falls into two categories, and was dealt with by the sentencing judge in that way. The first category is evidence from relatives and others who knew Mungin personally. That unrefuted evidence included that: Mungin only saw his mother once or twice a year since he was five years old. He was brought up by his grandparents in a remote area with no children near his age, and he was not allowed to bring children home. He was an honest, helpful, quiet, respectful, obedient, well-behaved child. In high school, he was not violent or aggressive and got along with everybody. As a member of the school's wrestling team, he had to

have aggressiveness coached into him. He showed dedication and a willingness to work for success against the odds, by his efforts as an undersized even for his weight class wrestler. He showed dedication, honesty, and trustworthiness, as well as hard work, in his position as football team manager. Two of the witnesses to Mungin's good character were law enforcement officers. When Mungin's girlfriend got pregnant in 1985, he asked her to marry him. Even though she refused, he supported her and the baby for a year after the baby was born in 1986; thus he provided support until he was about twenty-one years old.

In the sentencing order, the judge's sole acknowledgment of this first category of mitigating evidence was the statement that testimony was offered of "numerous witnesses including family members, friends, former schoolmates, and teachers, who stated that they knew the Defendant through his high school years." (R399). These witnesses said much more than that they knew Mungin, yet the order did not refer to the substance of any of this evidence, and did not explicitly find this mitigation to exist or not to exist. Instead, he stated:

> But, most of these witnesses had had little or no contact with Defendant since he was 18 years old and the defendant was 24 years old at the time of the commission of this offense. Consequently, the Court attaches <u>no significance or value</u> to this evidence.

(R399) (emphasis added).

The second category of mitigating evidence dealt with Mungin's use of drugs and adjustment to prison. Dr. Krop testified that Mungin had been abusing cocaine and alcohol

extensively since he was eighteen or twenty, and that his crimes were probably motivated by the need to support his drug habit. The evidence also showed that Mungin had complied with prison rules and was amenable to rehabilitation and to functioning in an open prison population without disciplinary violations or violence. The evidence showed that Mungin did not have an anti-social personality or any other psychological disorder that would prevent rehabilitation.

The sentencing order acknowledged the testimony that Mungin was not anti-social and could be rehabilitated, but focused on the psychological testimony that ruled out insanity and ruled out the statutory mental mitigating factors. The order stated that minimal weight was attached to this evidence. The order did not refer to Mungin's ability to function in prison, however, and the sentencing order totally ignored the testimony about Mungin's cocaine and alcohol abuse.

The defects in the sentencing order in this case require reversal of Mungin's death sentence under this Court's decisions. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert.den. 484 U.S. 1010 (1988), held that the trial judge's obligation in his sentencing decision is to determine three things: whether the mitigating facts alleged were supported by the evidence, whether those facts are of a mitigating nature, and whether the mitigating facts outweigh the aggravating circumstances.

Campbell v. State, 571 So.2d 415 (Fla. 1990), held:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in

> its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.

571 So.2d 419.

As this Court held in Nibert v. State, 574 So.2d 1059 (Fla. 1990), unrebutted mitigating circumstances must be found:

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.

574 So.2d 1062.

The sentencing order must make it clear which mitigating circumstances are found and which are not found. Thus, Mann v. State, 420 So.2d 578 (Fla. 1982), reversed for a new sentencing proceeding, because:

> [W]e are unable to discern if the trial judge found that the mental mitigating circumstances did not exist. If so it appears that he misconstrued the doctor's testimony. On the other hand, he may have found them to exist and weighed them against the proper aggravating circumstances. We, however, cannot tell which occurred. The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found; this case does not meet that test.

420 So.2d 581. (emphasis added). In Foster v. State, 614 So.2d 455 (Fla. 1992), cert.den. 114 S.Ct. 398, 126 L.Ed.2d 346 (1993), the sentencing order stated that the court had "considered the evidence" of the mitigating factors, and that the mitigators did not outweigh the aggravators, but this Court reversed because "we

are unable to say whether the court found any of the mitigating circumstances to exist or what weight was given to them." 614 So.2d 465. In Lamb v. State, 532 So.2d 1051 (Fla. 1988), the trial court found that none of the nonstatutory mitigating evidence "rose to the level of a mitigating circumstance to be weighed in the penalty decision." 532 So.2d 1054. This Court reversed the death sentence because it could not be certain whether the trial court had considered all the mitigating evidence. See also Cook v. State, 581 So.2d 141 (Fla. 1991), cert.den 112 S.Ct. 252, 116 L.Ed.2d 206 (1991):

> There was also testimony describing Cook as nonviolent and a follower, that he had undergone religious conversion in jail, and that he was a good worker and family man. Because the court's sentencing order does not specifically address any of these nonstatutory mitigating circumstances, it does not fully comply with this Court's recent pronouncement in Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) ...

581 So.2d 144.

Once a mitigating circumstance is found, it must be given some weight. As this Court held in Dailey v. State, 594 So.2d 254 (Fla. 1991): "Once established, a mitigating circumstance may not be given no weight at all." 594 So.2d 259.

The sort of nonstatutory mitigation presented in this case has been treated as validly mitigating evidence. In Rogers, being a good husband and father and having a good service record were deemed mitigating:

> Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character

traits to be weighed in mitigation.

511 So.2d 535. In Lamb, being helpful and good with children and animals was treated as mitigating. In Bedford v. State, 589 So.2d 245 (Fla. 1991), cert.den. 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992), having been a nonviolent person and a good father, husband and son were deemed mitigating. In Perry v. State, 522 So.2d 817 (Fla. 1988), although the defendant had committed a violent crime several weeks before the murder, evidence that over a long period of time he had never shown signs of being violent, and had been kind, good to his family and helpful around the home, were some of the mitigating circumstances deemed to form a reasonable basis for the jury's life recommendation. In Ross v. State, 474 So.2d 1170 (Fla. 1985), even though there was evidence the defendant was sober at the time of the crime, his drinking problem was among the mitigating factors the trial court erred in not considering. In Amazon v. State, 487 So.2d 8 (Fla. 1986), cert.den. 479 U.S. 914 (1986), and Norris v. State, 429 So.2d 688 (Fla. 1983), the defendant's history of drug abuse was among the mitigating circumstances held to make the jury's life recommendation reasonable.

In this case, the evidence of Mungin's good conduct at home, his responsible behavior and dedication at school, his nonviolent nature, and his support of his child, was unrefuted proof of positive aspects of Mungin's character. The failure of the sentencing order to deal specifically with any of this evidence, and the order's conclusion that this evidence had "no

significance or value" indicates that the judge either failed to find these mitigating circumstances, or found them to exist but not be mitigating, or found them to exist and be mitigating, but to have no weight whatsoever. The evidence of Mungin's extensive drug and alcohol abuse was also unrefuted, yet was neither found nor rejected by the sentencing order.

The trial judge was obligated to find in the sentencing order the existence of these nonstatutory mitigating circumstances and to give them some weight. The evidence of positive character was important to show that Anthony Mungin is not a worthless human being. There is good in him, as reflected in the good things he has done. The evidence of cocaine and alcohol abuse, while not explaining or excusing Mungin's crimes, does mitigate by giving some indication of how such an apparently good, normal person could so deviate from his moral foundation.

ISSUE VIII WITHOUT THE AGGRAVATING CIRCUMSTANCES OF ROBBERY AND PECUNIARY GAIN, AND CONSIDERING THE MITIGATING CIRCUMSTANCES THE TRIAL JUDGE ERRONEOUSLY FAILED TO FIND, THE DEATH SENTENCE IMPOSED IN THIS CASE IS INAPPROPRIATE.

The insufficiency of the evidence to prove robbery or pecuniary gain is demonstrated above in Issue II(B) and Issue V. Without these aggravating circumstances, the only aggravator remaining in this case is section 921.141(5)(b), Fla. Stat., previous conviction of another capital felony or a felony involving the use or threat of violence. One aggravating circumstance is normally insufficient to sustain a death sentence. As this Court recently stated in DeAngelo v. State,

616 So.2d 440 (Fla. 1993):

> This court has affirmed death sentences supported by just one aggravating circumstance "only in cases involving either nothing or very little in mitigation."

616 So.2d 443, citing Songer v. State, 322 So.2d 481 (Fla. 1975), judgment vacated on unrelated ground 430 U.S. 952 (1977). This Court has found the death penalty disproportionate in many cases with just one aggravating circumstance. E.g. DeAngelo, Clark v. State, 609 So.2d 513 (Fla. 1993), McKinney v. State, 579 So.2d 80 (Fla. 1991), Nibert v. State, 574 So.2d 1059 (Fla. 1990), Smalley v. State, 546 So.2d 720 (Fla. 1989), Songer, Lloyd v. State, 524 So.2d 396 (Fla. 1988), Ross v. State, 474 So.2d 1170 (Fla. 1985), Randolph v. State, 463 So.2d 186 (Fla. 1984), cert.den. 473 U.S. 907 (1985), Blair v. State, 406 So.2d 1103 (Fla. 1981).

Appellant has found only four cases in which this Court performed a proportionality analysis and the only upheld aggravating circumstance was previous conviction of capital or violent crime. In Knowles v. State, 632 So.2d 62 (Fla. 1993), the defendant walked into the trailer of his father's next door neighbor, and, with no apparent reason, pointed his rifle at one child, then jerked it to the right and shot another child. He then left the trailer, walked over to his father, shot his father twice, pulled his father from the father's truck, and drove off in the truck. There was evidence of a prior threat to the father. The conviction for killing the child was reduced to second degree murder, but the conviction for first degree murder of the father was affirmed. The only aggravating circumstance

that was upheld, was previous conviction of a crime of violence, based on the killing of the child. There was unrebutted evidence of statutory and non-statutory mitigation relating to Knowles's chronic abuse of alcohol and toluene and intoxication and bizarre behavior at the time of the crimes. This Court held the death sentence in Knowles to be unwarranted, and the sentence was reduced to life in prison.

In Slawson v. State, 619 So.2d 255 (Fla. 1993), cert.den. 114 S.Ct 2765, 129 L.Ed.2d 879 (1994), the defendant committed four murders, of a husband and wife and their two children, and caused the death of the woman's unborn fetus. The killing of the mother was particularly brutal, and included, while the woman was still alive, cutting her open to expel the fetus. On appeal, Slawson argued that as to the murders of the husband and the children, the only aggravating circumstance, previous capital felony, based on the other three murders, was outweighed by the mental mitigation. The trial judge assigned great weight to the one aggravating factor, because the prior convictions were for three murders, and because of the circumstances of the other murders. This Court upheld Slawson's death sentences, finding it proper for the trial court to consider the circumstances of the prior convictions in deciding to assign extra weight to this one aggravating circumstance.

In White v. State, 616 So.2d 21 (Fla. 1993), cert.den. 114 S.Ct. 214, 126 L.Ed.2d 170 (1993), the victim and defendant had dated in the past. Three days before the murder, White broke

into the victim's apartment and attacked her. In jail for that offense, he told another inmate that if he bonded out, he would kill her. He committed the murder the next day. The sole aggravating factor upheld on appeal was previous conviction of violent crime, for the attack three days before the murder. There was evidence of extensive drug abuse, and of deteriorating emotional condition, which this Court found to be substantial mitigation. The death sentence was found to be disproportionate, and was reduced to life.

Herzog v. State, 439 So.2d 1372 (Fla. 1983), though a jury override case, also included a proportionality analysis that supported the decision to reverse the override. Herzog tried to kill his paramour/fiance by smothering her with a pillow, and when that did not work, strangled her with a telephone cord. The only aggravating circumstance upheld was previous conviction of violent crime, for prior convictions of robbery and assault. Nonstatutory mitigating circumstances supported by the evidence included a heated argument with the victim, the domestic relationship with the victim, and lesser sentences given to co-defendants.

Although each of these cases involved the sole aggravating factor of previous conviction of capital or violent crime, none is truly equivalent to the circumstances in this case. Knowles found the death sentence disproportionate despite a previous conviction for a completed murder, which should be given more weight than Mungin's prior crimes, but the mitigation in Knowles

involved substantial impairment not shown here. The affirmance of the death sentences in Slawson is distinguishable, because the circumstances of the previous convictions, brutal, completed murders of a pregnant woman and children, carry more weight than Mungin's prior crimes. In some ways White is the most similar, because there the prior convictions were for violent crimes committed just three days before the murder, and the mitigation was not particularly stronger than in this case. The domestic context of the White murder, however, lessens the comparability of that case. Herzog is also a murder in the context of domestic violence.

Even aside from direct comparison with other cases, though, the circumstances of Mungin's previous convictions and the mitigating evidence introduced on his behalf indicate that the death penalty is not warranted in this case. First, the fact that the only prior violent crimes established were committed two days before the murder, suggests, as discussed in Issue VI, that the violence of those three days was an aberration in Mungin's life. This Court said in Hardwick v. State, 461 So.2d 79 (Fla. 1984), cert.den. 471 U.S. 1120 (1985), that the purpose of the prior violent felony aggravator is to determine whether the defendant has a propensity to violence. Three acts of violence during one three-day period after twenty-four years of non-violence does not show any deeply rooted propensity to violence. The mitigating evidence of Mungin's non-violent nature supports the conclusion that Mungin is not a habitually violent person.

That Mungin's violent crimes were limited to one three-day period should significantly reduce the weight assigned to the one properly considered aggravating factor in this case.

The mitigating evidence showed that Anthony Mungin was a good, responsible, caring person, with the potential to make something positive of his life, until he fell into the trap of crack cocaine. His obedience, respectfulness and helpfulness with his grandparents; his poignant try to be on the football team; his hard work to serve the football team he could not join; his efforts to succeed as a wrestler despite his small size and lack of aggressiveness; his good nature; his desire to marry his girlfriend when she got pregnant; his supporting her and the child for a year despite her refusal to marry him; the good opinion he earned of people who now serve in responsible positions in education and law enforcement - these all show a person whose character is basically good. His brief period of violence has lost him his freedom for the rest of his life.[18] His good past does not outweigh his crimes in the sense of excusing him; but the evidence of his good character makes this not one of those most aggravated least mitigated crimes that warrants death. This Court should find the death sentence unwarranted in this case, and reduce Anthony Mungin's punishment to life in prison.

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[18]As discussed in Issue IV, although a life sentence in this case would make him eligible for parole in twenty-five years, he is in fact ineligible for release from prison for the rest of his life because of his habitual life sentence in the Tallahassee case.

ISSUE IX MUNGIN'S CONVICTION AND DEATH SENTENCE VIOLATE THE FLORIDA AND UNITED STATES CONSTITUTIONS.

A. The trial court's overruling of the defense objection to the state's peremptory strike of black jurors, discussed in Issue I, also violates due process and equal protection under the federal constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

B. The evidence of premeditation and the evidence of robbery were insufficient as discussed in Issue II, and therefore fail to constitute proof beyond a reasonable doubt within the meaning of the due process clause of the United States Constitution. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

C. If the evidence of either premeditation or felony murder, but not of both, was insufficient, then, because the general verdict does not reveal on which basis the jury found guilt of first degree murder, and because, as discussed in Issue II(D), there is a reasonable possibility the jury based its decision on the insufficient ground, Mungin's conviction and death sentence violate the due process and cruel and unusual punishment provisions of the United States Constitution. Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) should be distinguished or overruled.[19]

D. The testimony of Glenn Young misleading the jury about

[19]Issue II(D) argues that this result is also mandated by the Florida constitution.

the meaning of a life sentence under Florida law makes the jury's recommendation, and the resulting death sentence, unreliable, and thus unconstitutional under the due process and cruel and unusual punishment clauses of the Florida and federal constitutions.[20] See Issue IV.

E. The refusal to inform the jurors that they could consider as a mitigating circumstance that Mungin was twenty-four at the time of the crime makes Mungin's death sentence cruel and unusual punishment under the Florida and federal constitutions.

F. Section 921.141(5)(b), Fla. Stat., makes having been "previously convicted of ... a felony involving the use or threat of violence" an aggravating circumstance. The term "previously convicted" is ambiguous, as it does not indicate to what the conviction must be previous. One reasonable reading of the statute is that the previous conviction must be obtained prior to the commission of the capital crime for which the death sentence is imposed. See Joyner v. State, 158 Fla. 806 (1947). C.f., State v. Barnes, 595 So.2d 22 (Fla. 1992). Any other reading of the statute violates the rule of strict construction of criminal statutes, making Mungin's death sentence a violation of due process and cruel and unusual punishment under the Florida and federal constitutions. Perkins v. State, 576 So.2d 1310 (Fla.

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[20]Throughout Issue IX, when reference is made to "cruel and unusual punishment" under the Florida and federal constitutions, this is mean to refer to both "cruel or unusual" punishment under Art.I, Section 17, Fla. Const., and to "cruel and unusual" punishment under the Eighth Amendment to the United States Constitution.

1991). Elledge v. State, 346 So.2d 998 (Fla. 1977), should be overruled. Here, although the previous crimes were committed two days before the capital crime, the convictions for the previous crimes were not obtained until after commission of the capital crime, and therefore cannot be considered to satisfy this aggravating factor.

G. The robbery and pecuniary gain aggravating circumstances make Mungin's death sentence cruel and unusual punishment under the Florida and federal constitutions because these automatic aggravators open up the possibility of the death penalty to a group of persons not genuinely restricted to the most aggravated and least mitigated murderers, and because applying these aggravators in a felony murder case violates the rule of strict construction of criminal statutes. White v. State, 403 So.2d 331 (Fla. 1981), cert.den. 463 U.S. 1229 (1983), should be overruled. See State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert.den. 446 U.S. 941 (1980).

H. Death sentences under the version of section 775.082, Fla. Stat., applied in this case are cruel and unusual and a violation of due process and equal protection under the Florida and federal constitutions because the statute did not give the jury the option of life without parole.[21]

I. Mungin's death sentence violates due process and is cruel and unusual punishment under the Florida and federal

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[21]As discussed in Issue IV, this anomaly in the law was removed by the legislature during the 1994 session.

constitutions because the jury's death recommendation was based on a bare seven-to-five majority.

J. Mungin's conviction and death sentence infringes, under the Florida and federal constitutions, his right to a jury of his peers, due process, and the right to be free of cruel and unusual punishment because the state was allowed to strike for cause potential jurors who were able to convict if the charge were proved, but were unwilling to consider imposing the death sentence. The statutory basis for the state's cause challenge of such potential jurors, section 913.13, Fla. Stat., by its terms only disqualifies persons whose beliefs prevent them from finding the defendant guilty of an offense punishable by death. Construing this statute to authorize disqualification of persons who can find a defendant guilty of capital murder violates the constitutional requirement of strict construction of criminal statutes. Also, death qualification of jurors denies defendants a jury that reflects the community as a whole.[22]

K. Mungin was denied his rights under the Florida and federal constitutions to equal protection, due process, and freedom from cruel and unusual punishment by the denial of experts to examine and present evidence of: racial and other discrimination resulting from the exclusion from the jury of

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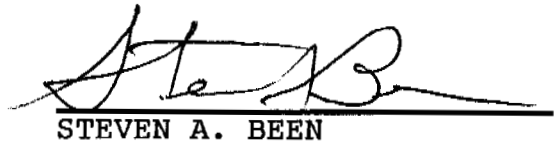
[22]In this case, nine of fifty-one prospective jurors testified they could vote to convict, but would not impose the death penalty. The jurors who could convict but not recommend death were: Golden (T404-405), Lawson (T413), Green (T415-416), Goodman (T416), Patrick (T417), Newkirk (T418), Rouse (T421), Downer (T422), Shelton (423). The jurors who could not vote to convict were Podejko (T403-404) and Bradford (T413).

persons who will not impose the death penalty (R31); racial and other discrimination in the imposition of the death penalty (R158); and the physical pain inflicted by electrocution (R83).

CONCLUSION

Anthony Mungin's first degree murder conviction is flawed by insufficient evidence and prejudicial trial error. His death sentence is flawed by prejudicial trial error and disproportionality. Mungin seeks, in declining order of preference: (1) discharge as to first degree murder and remand for a new trial on the charge of second degree murder; (2) reduction of his first degree murder conviction to second degree murder and remand for resentencing; or vacating of his death sentence and remand for a sentence of life in prison; (3) reversal of his conviction and remand for a new trial on the issue of guilt; (4) reversal of his death sentence and remand for a new penalty phase before a jury; (5) reversal of his death sentence and remand for reweighing and resentencing by the trial court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard Martell, Assistant Attorney General, by delivery to the Capitol, Plaza Level, Tallahassee, Florida, on this 1st day of November, 1994.

STEVEN A. BEEN