IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN, :

Appellant, :

v. : CASE NO. 81,358

STATE OF FLORIDA, :

Apppellee. :

_____/

APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE FACTS

Appellant accepts as accurate the state's additions to the facts (although most duplicate the facts in the initial brief), with the following exceptions:

Guilt Phase

The state's assertion that the cash count showed that $59.05 had become missing from the store on the day of the shooting, is not quite accurate. Dennis Elder testified that he got a reading from the cash register showing what had been rung up that day, subtracted out "voids," added in petty cash, and then compared his result with the amount of cash in the store to, "see whether you are over or short." (T693). Elder did not explain the $59.05 divergence found, except to state that it was unlikely that the amount of the discrepancy would have been in either of the places from which money could have been stolen, the clips or the money box, and to state that he had no way of knowing whether there was any money in those places at the time of the shooting. (T700-702,706). As noted in Issue IIB of the initial brief, there are

several possible causes of the discrepancy; e.g., it could have been caused by a failure to record "voids."

The answer brief's statement that a Dodge Monaco was stolen in Jacksonville before the Lil' Champ shooting, and found near where Mungin was arrested in Kingsland, Georgia, two days later, is correct. The state's implication, assumedly correct, is that Mungin was using that car during the period that included the time of the killing. The one car seen at the Lil' Champ at the time of the shooting, however, was apparently a car other than the Dodge Monaco. Ronald Kirkland described the car outside the Lil' Champ as a tan or cream-colored compact car, like a Chevette. (T676). The stolen car was a large, four-door, 1978 Dodge Monaco Royal, white with a tan vinyl top, a big car, not a compact. (T806).

Penalty Phase

The state asserts that none of the mitigation witnesses could testify about Mungin's conduct since the mid-1980's. Many of the mitigation witnesses testified to Mungin's good character from their knowledge of him through his high school years, but this was not all the mitigation. The mother of Mungin's child testified to his supporting her and their child through the child's first year, which would have ended in 1987, when Mungin was twenty-one. (T1154-1155). Glen Young, of the Department of Corrections, testified that at the Cross City Correctional Institution, where Mungin was serving his life sentence for the Tallahassee robbery/shooting committed two days before the date

of this crime, Mungin had had no disciplinary reports. (T1177,1179). Dr. Harry Krop testified that Mungin's extensive use of crack cocaine and abuse of alcohol for the past five or six years had contributed to Mungin's deviation from the normal life he had been leading before he started abusing drugs. (T1194-1196).

ARGUMENT

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

In the initial brief, Mungin asserted that the trial judge should have disallowed the state's peremptory strike of black prospective juror Helen Galloway. Allowing the state to eliminate Galloway was error under State v. Neil, 457 So.2d 481 (Fla. 1984), and State v. Slappy, 522 So.2d 18 (Fla. 1988), cert.den. 487 U.S. 1219 (1988), because there was no indication on the record that Galloway was biased against the state's position, because the state's questioning of Galloway was perfunctory, and because the state's asserted reason for the strike, Galloway's "mixed emotions" about the death penalty, was equally applicable to Mr. Venettozzi, a white juror who was not challenged.[1]

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[1] The initial brief also argued that the pretextual nature of the "mixed emotions" asserted reason for striking Mrs. Galloway was indicated by a comparison of Mrs. Galloway's answers with those of Mrs. Goodman, who sat as an alternate. As the state correctly points out, the prosecutor attempted unsuccessfully to remove Mrs. Goodman. Appellant withdraws that part of his argument that relates to Mrs. Goodman.

The state's brief classified the testimony of all the jurors about how they felt about the death penalty as falling into five categories. One category was "depends on the circumstances." Another was "mixed emotions." The state asserts that jurors were not struck just because they said their feelings about the death penalty depended on the circumstances, but were struck if they said they had mixed emotions. According to the state, Venettozzi fell into the "depending on the circumstances" category and Galloway fell into the "mixed emotions" category.

Mungin challenges the rationality of the state's assumption that the difference between "depends on the circumstances" and "mixed emotions" is significant, or that jurors answering "mixed emotions" could rationally be inferred to be less favorable to the state's position than jurors answering "depends on the circumstances." A person can have mixed emotions about the death penalty, and still believe that it should be imposed in every case of murder. For example, a person could feel, and many people undoubtedly do feel, that the death penalty is warranted and should be imposed, but still feel sadness that imposition of the death penalty will cause grief and tragedy for yet another family, the family of the defendant. On the other hand, a person whose feelings about capital punishment depend on the circumstances could feel that the death penalty is inappropriate except in particular circumstances not present in this case, such as the defendant having confessed, or the murder having involved torture. In sum, it is impossible to tell from "mixed emotions"

and "depending on the circumstances" answers whether a "mixed emotions" juror is more or less likely to vote to impose the death penalty than is a "depending on the circumstances" juror.

Even if there were a rational basis to distinguish between prospective jurors expressing mixed emotions and those stating that their feelings would depend on the circumstances, Venettozzi testified that he had mixed emotions. The state places emphasis on Venettozzi's not having used the word "emotions." Yet Venettozzi was asked, "How do you feel about the death penalty, sir?" (T374). (Emphasis added). His initial response was, "I think it's mixed." (T374). In other words, how he felt about the death penalty was mixed. "Feelings" and "emotions" are synonymous. There is no valid way to distinguish between Venettozzi's mixed feelings and Galloway's mixed emotions.

Venettozzi went on to say, "It depends on how serious. ... I believe it depends on the circumstances. I don't think I could say yes or no without knowing." (T374). The state concludes from this language that Venettozzi falls into the "depends on the circumstances" category. In fact, Venettozzi's answers show that the state's classifications do not make sense. Venettozzi expressed both mixed emotions and that his feelings would depend on the circumstances. Venettozzi's "depends on the circumstances" response in no way erased his "mixed emotions" response. If Galloway had been asked if her feelings depended on the circumstances, she might well have answered that they did, without retracting her "mixed emotions" response.

Allowing a party to strike blacks and not strike whites based on distinctions that are irrational or immaterial is no different from allowing blacks to be struck based on the lawyer's "bad feeling". See Suggs v. State, 624 So.2d 833 (Fla. 5th DCA 1993). The Neil/Slappy rule requires something more than this, in order to prevent discrimination based on the lawyer's conscious or unconscious bias. For the purposes of Neil/Slappy, "mixed emotions" and "depends on the circumstances" are identical.

As to the initial brief's assertion that the "mixed emotions" answer was ambiguous and the prosecutor's questioning of Galloway perfunctory, the state has made no direct response. The state has cited three cases, however, Walls v. State, 641 So.2d 381 (Fla. 1994), cert.den. 115 S.Ct. 943, 130 L.Ed.2d 887 (1995), Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert.den. 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994), and Happ v. State, 596 So.2d 991 (Fla. 1992), vacated on other grounds 113 S.Ct. 399, 121 L.Ed.2d 325 (1992), for the proposition that a juror's expression of mixed emotions about the death penalty is sufficient to defeat a Neil challenge. The state seems to be implying that since "mixed emotions" has been held to justify a challenged strike of a minority prospective juror, the prosecutor was justified in striking Galloway based on her mixed emotions, with no need to question her further.

The cited cases do not justify such a conclusion. In Walls, the struck jurors did not say they had mixed emotions. They

expressed "discomfort" with the death penalty. In Atwater, also, there was no mention of mixed emotions. The trial judge had observed that the struck juror had difficulty answering questions and was hesitant and "uncomfortable" with the death penalty. The difference between being uncomfortable with the death penalty and having mixed emotions about it, is less fine than the distinction the state seeks to make among "mixed emotions," "mixed feelings," and "depends on the circumstances." Discomfort with the death penalty suggests that imposing death would make the juror uncomfortable, which having mixed emotions about the death penalty does not.

An even more important difference between this case and Walls and Atwater, however, is that neither Walls nor Atwater dealt with an assertion that the state's reason applied as well to non-minority jurors who were not struck. If the state in this case had struck every juror whose answers reflected anything less than an unambiguous endorsement of the death penalty, then there would have been no need to question Galloway further about her mixed emotions. Because the state is trying to make fine distinctions among "mixed emotions," "mixed feelings," and "depends on the circumstances," however, the ambiguity in "mixed emotions" is important. Without questioning Galloway further, the state had no basis for believing that her answers showed less inclination to vote for death than did the answers of Venettozzi. In this context, the questioning of Galloway was perfunctory, as meant by Slappy.

The third case cited by the state on this point, Happ, did not deal with mixed feelings, with discomfort, or with reasons equally applicable to jurors not struck. In Happ, the state explained it had struck a black juror because she was a community college teacher of psychology and a Catholic. The defense did not challenge the sufficiency of this stated reason. Happ does not have any bearing on the issue raised in this case.

The state's brief touches on two other possible arguments against reversing based on this issue. First, the state notes that the trial in this case was in January of 1993, before State v. Johans, 613 So.2d 1319 (Fla. 1993)(decided February 18, 1993), abandoned the requirement of a threshold showing to trigger the duty to give reasons for striking a member of a minority. The state's brief noted the trial judge's doubt that the threshold had been met, but the state does not assert that the threshold was not met, and does not assert that failure to meet the threshold should be considered once the state gives reasons for its strike. Even if the state had argued this issue, the state's striking of the first two blacks to come up, when, as to one of them, no rational non-discriminatory basis for the strike appeared on the record, with a black defendant, was sufficient to meet the pre-Johans threshold. This is clear from the Johans decision itself. Johans applied the pre-Johans rule to hold that striking the first African-American questioned created a doubt as to whether the threshold had been met, and that any doubt had to be resolved in the favor of the person objecting to the

peremptory strike. Also, whether or not the threshold is met, once the state gives its reason, if the reason is pretextual under Slappy, the trial judge must disallow the strike, regardless of the threshold. See Reed v. State, 560 So.2d 203 (Fla. 1990), cert.den. 498 U.S. 882 (1990):

> [I]f it appeared from the prosecutor's explanation that his challenges were racially motivated, the trial judge would have been warranted in granting a mistrial despite not yet having ruled that the defense had made a prima facie showing.

560 So.2d 206.

The state argues that this issue is unpreserved under Joiner v. State, 618 So.2d 174 (Fla. 1993), but the state does not address the specific language used by the trial judge in this case, asking defense counsel if the jurors he named were the ones chosen, "whether you like them or not." As discussed in the initial brief, this question distinguishes this case from Joiner and prevents any inference in this case that defense counsel had become satisfied with the jury some time after his Neil objection was overruled.

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

A. The evidence was insufficient to prove premeditation.

The evidence the state relies on to show proof of premeditation is: (1) that the victim was killed by a single close-range shot to the head; (2) that the victim was shot while she was taking two aspirins, as evidenced by the undissolved

aspirins in her mouth; (3) that there were no other injuries to the body, or other evidence of a struggle; and (4) that the perpetrator had procured the murder weapon in advance, and had used it before.

As to number four, procuring the weapon in advance and using it before, the state is relying on the collateral crimes evidence that the jury was specifically told not to consider for any issue other than identity. That this evidence cannot be considered as proof of premeditation is discussed below in issue IIC. Even if the collateral crimes evidence were considered on this issue, however, it does not establish that Mungin procured a gun for this crime. Rather, the collateral crimes evidence establishes that Mungin possessed, and carried, the gun for at least two days before this crime, and had used it before this crime. That he carried a gun and felt free to use it does not show that he entered the Lil' Champ intending to commit murder.

The state's reliance on the lack of evidence of a struggle turns the burden of proof backwards. It is true that there was evidence (elicited by defense counsel) that the single gunshot wound was the only injury. (T645-646). The lack of injuries, however, does not establish that there was no struggle, since there could have been a struggle with no injuries. Other than the lack of injuries, there was no evidence as to whether the shooting was preceded by a struggle, just as there was no evidence as to whether the shooting was preceded by provocation. If lack of a struggle or lack of provocation were to be

considered as proof of premeditation, there would have to be evidence that there was no struggle or there was no provocation. There is no such evidence here.

The evidence available to establish premeditation, then, was that the shooter entered the store carrying a gun, that the gun was fired at close range to the victim's head, and that the victim had undissolved aspirin in her mouth when she was shot. The amount of time that elapsed between the perpetrator entering the store and the shooting is unknown. What the victim did or said before she was shot is unknown. What the shooter did or said before the shooting is unknown. It is not even known whether or not the victim and the shooter knew each other before the shooting, so it is also unknown whether there were previous difficulties between the shooter and the victim. The presence of aspirin does not show premeditation. The victim's motion of tossing aspirin into her mouth could even have been misconstrued by the shooter as a hostile gesture, and could itself have prompted an impulsive shooting. Shooting at the victim's head shows intent to cause death, or reckless disregard of the possibility of causing death, but it does not show whether or not the shooting followed and implemented a conscious decision to cause death. The state's brief does not attempt to show how the evidence establishes premeditation.

None of the cases relied on by the state involves a single gunshot with no evidence of what led up to the killing. In Asay v. State, 580 So.2d 610 (Fla. 1991), cert.den. 502 U.S. 895

(1991), the defendant was an avowed racist who killed two blacks, by his own statements, because of his white supremacist views. Asay did not challenge the sufficiency of proof of premeditation as to one of the murders. As to the other, eyewitnesses established that the victim was engaged in a friendly conversation with Asay's brother when Asay approached in a belligerent manner, his gun behind his back. The victim was backing away when Asay shot him, and Asay made statements that he had had to show the victim who was boss. Asay is far different from this case, in which there is an almost complete lack of information about the circumstances of the murder.

In Sireci v. State, 399 So.2d 964 (Fla. 1981), cert.den. 456 U.S. 984 (1982), the evidence held sufficient to prove premeditation included fifty-five stab and incisive wounds to the chest, back, head, and extremities, and a slit throat. In MacArthur v. State, 351 So.2d 972 (Fla. 1977), there was a single gunshot wound to the head of the defendant's husband from the gun the defendant was holding, but the evidence was held insufficient to prove murder at all, because there was no proof the killing was not an accident. In Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert.den. 471 U.S. 1045 (1985), the appellant made no guilt phase argument, and the affirmance of the conviction was not discussed or explained, other than a statement that the Court found no reason to disturb the verdict.

In Pterka v. State, 640 So.2d 59 (Fla. 1994), cert.den. 115 S.Ct. 940, 130 L.Ed.2d 884 (1995), the defendant had obtained a

driver's license in his roommate's name and had stolen and forged a money order issued to the roommate, before the killing. He had told a friend that if everything went as he hoped, he would be going back up north. After his arrest, Pterka gave statements to the police claiming that the victim had confronted him about the stolen money order, and in the resulting struggle, the gun had gone off accidentally. This was contradicted by the victim having told a bank officer and others that he would wait for the money order to return to the bank before charging Pterka, and he would let the police handle the situation and not confront Pterka directly, because he was afraid of Pterka. Also, expert testimony established that the victim was killed by a shot to the top of his head, fired at him from behind as he was in a reclining position, and that the gun had mechanisms to prevent accidental firing. Pterka is different from this case in the evidence of advance planning, particularly, Pterka's having obtained a driver's license in the victim's name before the killing, and in the evidence of the victim's wish to avoid provoking Pterka because of fear. Also, Pterka's having given statements of how the killing took place, and those statements having been shown to be untrue, further distinguishes Pterka from this case.

In Pietri v. State, 644 So.2d 1347 (Fla. 1994), the defendant had escaped from a work release camp four days before the killing, and had committed numerous crimes after his escape. The murder was of a police officer who stopped Pietri as he was

speeding in a stolen truck. Pietri complied with the order to pull over, and move the truck out of traffic. Eyewitnesses saw the officer approach the truck, his gun in its holster, and saw Pietri shoot the officer in the chest when the officer got to within two to four feet of the truck. Like Pterka, the evidence in Pietri included what happened immediately prior to the killing. Unlike this case, the evidence showed that there was no action of the victim, threatening or not, that could have provoked an impulsive shooting.

In Lindsey v. State, 636 So.2d 1327 (Fla. 1994), cert.den 115 S.Ct. 444, 130 L.Ed.2d 354 (1994), some time after the sixty-five year old defendant's twenty-two year old girl friend decided to leave him, he killed her and her brother. Lindsey called the police early in the morning and reported that he had awakened to find the two dead bodies. Each was killed with a shotgun blast to the head. The sufficiency of the evidence of premeditation was open to question, as indicated by Justice Kogan's dissent. The Court's affirmance did not explain how the evidence showed premeditation. It is clear, however, that killing two people, with two separate shotgun blasts, is more suggestive of premeditation, at least as to the second victim, than is a single shot to a single victim. The two blasts makes Lindsey comparable to the multiple stabbing cases.

The state's brief also refers to a statement made by defense counsel in closing argument, suggesting that the gun went off suddenly, without premeditation. The state construes defense

counsel's argument to assert that the gun could have gone off accidentally, which was refuted by the gun's six-pound pull. Defense counsel's assertion was not that the gun had gone off accidentally, but rather that the lack of evidence failed to prove premeditation. Defense counsel said:

> The evidence you have here is equally, using your common sense and applying the law, you can just as easily believe, and you should believe, that when this gun went off it went off suddenly and without premeditation. They haven't proved to you anything different. They are asking you to accept their guess. You can't do that.

(T1022). The premeditation issue here is not whether the state proved the gun did not go off accidentally. The issue is the lack of any evidence that the shooter fired in the implementation of a fully-formed conscious decision to cause death.

In the initial brief, Mungin cited Jackson v. State, 575 So.2d 181 (Fla. 1991), and Hall v. State, 403 So.2d 1321 (Fla. 1981), as examples of cases where evidence of premeditation similar to that in this case was found insufficient. The state attempts to distinguish Jackson and Hall on several grounds. First, the state says that there was evidence in those cases that the victim resisted and the gun went off unintentionally. Actually, there was no evidence in either case that the gun went off unintentionally. In Hall, there was no evidence, either, that the victim had resisted, although the Court pointed out that the lack of evidence did not negate the possibility that the victim had resisted. In Jackson, as here, the victim was found on the floor of the store, fatally wounded by a single gunshot.

In Jackson, there was no evidence to indicate the existence or non-existence of premeditation, except for the defendant's out-of-court statement that the victim had resisted a robbery. As observed in the initial brief, Jackson's statement could be taken as a denial of premeditation, but the defendant's denial would not prevent a finding of sufficiency if the evidence were otherwise sufficient. The evidence of premeditation in Jackson was insufficient without considering the defendant's statement. The state also distinguishes Jackson and Hall by saying that in neither of those cases was the victim killed "by a well-placed shot to the head at very close range." Answer Brief, p.12. Actually, the victim in Hall was wearing a bullet proof vest, and a shot to his body could have been killed him only if it entered in the gap at the armpit, which is exactly where the victim was shot. The Jackson victim was shot in the chest. In both Jackson and Hall the single shot fired was directed at a part of the victim likely to cause death, and did cause death. What those cases make clear, however, is that a single deadly shot is not enough to prove premeditation, without some evidence that the shot was implementing a previously formed conscious decision to cause death.

Hoefert v. State, 617 So.2d 1046 (Fla. 1993), was cited in the initial brief, not as similar to this case, but as a case where stronger evidence of premeditation was held insufficient. The state's dismissal of that case ignores the evidence that Hoefert had implied to a cellmate that he would kill his next

sexual battery victim. Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990), the state considers not comparable, in part, because there was no evidence of what occurred immediately before the killing, so the evidence did not eliminate the possibility that the killing was committed in the heat of passion, without premeditation. Smith was cited in the initial brief, despite its domestic context, precisely because it showed that when there is no evidence of what occurred before the killing, the possibility of a killing without premeditation cannot be eliminated.

B. The evidence was insufficient to prove robbery.

At trial and in the initial brief, Mungin has asserted that all of the evidence is consistent with the reasonable hypothesis that this shooting was not in the course of a robbery or attempted robbery. The state's brief argues that Mungin has compared this hypothesis of innocence with each piece of evidence separately, while the proper test of a hypothesis of innocence is that it is consistent with all of the evidence. That the defense hypothesis is consistent with all of the evidence may be seen from a postulated special case of the hypothesis, as follows:

Before the shooter arrives, the clerk has been on duty for several hours, during which she has made mistakes at the cash register, e.g., entering an incorrect digit for a sale rung up, failing to record the amount of refunds, giving incorrect change. The errors total $59.05. The shooter enters the store intending to make a purchase, carrying a firearm only out of habit or for protection. The shooter pays for his purchase, which is handed

to him in a paper bag. The shooter then becomes angry at the clerk, either because he recognizes the clerk as a person who has done him wrong in the past, or because of something the clerk says that he interprets as being insulting. They exchange angry words. During their argument, perhaps as she attempts to end the argument, the clerk tosses some aspirin into her mouth, which the shooter sees as an insulting gesture. The shooter, without reflection, fires one time, then turns and flees, pocketing his gun and carrying his bagged purchase. While Ronald Kirkland is giving the clerk CPR, another person who comes into the store checks the cash registers to see if any cash was taken. In trying to open the closed register, this person triggers an "E" reading.

Of course, this fleshed out hypothesis is just speculation. There is nothing unreasonable about the killing having happened this way, however, and it fits the evidence as well as does the state's robbery hypothesis. The state's hypothesis fails to account for the amount of the discrepancy not fitting the amount that would have been in the only places where money might have been taken, and the state's hypothesis fails to account for the presence of an undisturbed purse behind the counter with the cash box.

The state seems to say that the second person in the store after the shooting could not have triggered the "E" indicator, because there was no evidence he approached the closed register. Neither is there evidence he did not, however, and it is a

reasonable inference that he did. Kirkland said that this person checked the open cash register, and Kirkland did not see if he checked the closed register. (T681-682). If the other person was checking to see if money was taken, it would make sense for him to check both registers, and for him to have triggered the "E" indicator on the closed register, since assumedly he would not have known the proper way to open it. There is nothing surprising about Kirkland, busy with CPR, not noticing.

Also, the state's assertion that there were only two people in the store after the murder, other than police and emergency personnel, is not supported by the record. There was no testimony as to how many people went into the store or behind the counter, other than the testimony of the evidence technician that the crime scene was contaminated before he arrived, and that various people had been behind the counter. (T625).

The initial brief cited McKennon v. State, 403 So.2d 389 (Fla. 1981), as showing that robbery could not be proved by a bookkeeping discrepancy found after a murder. The state's attempts to distinguish McKennon are not persuasive. It is true that McKennon's victim was his employer, but this fact is consistent with McKennon having committed the murder in the course of robbing his employer. The McKennon murder, accomplished without a firearm, was more brutal than the killing in this case, but brutality is not inconsistent with a robbery. The state says there was nothing about the manner of the McKennon killing to indicate that robbery was the motive. In McKennon the

victim was a shop owner, the murder took place in the shop, and an audit afterward showed that the amount in the cash register did not equal the amount the books showed should have been there. The evidence in this case was no more indicative of robbery. Finally, the state asserts that McKennon is different because there, money was found in the only place that money would have been kept. The McKennon opinion does not say this. It says only that there was a discrepancy between the amount in the register and what the books showed. In this case, however, the evidence did show that after the shooting, there was money in the cash register, which was the only place where there would have been cash in the odd amount of the discrepancy.

Green v. State, 578 So.2d 852 (Fla. 1st DCA 1991), was cited in the initial brief as showing that an accounting discrepancy proves theft only if the discrepancy could only have been caused by theft, and the theft could only have been committed by the defendant. The state distinguishes Green in that there the discrepancy could have been caused by missing cancelled checks, rather than theft. This possibility does not distinguish this case, however. Here, the discrepancy could have been caused by missing voids or other errors, rather than a theft.

The state distinguishes Maples v. State, 183 So.2d 736 (Fla. 3rd DCA 1966), as involving an altercation, with the defendants waiting at the scene and being found without the stolen money. Actually, the Maples opinion does not indicate there was any altercation. The defendants struck the victim and knocked him

unconscious before he could even see who hit him. They did not wait at the scene. They left the victim's unconscious body and went into the adjacent bar. Apparently, no-one saw what they did after they knocked the victim out. The defendants could have emptied the victim's wallet and secreted the money somewhere before they went into the bar, and the opinion reflected no evidence of any motivation other than robbery. Nonetheless, with no evidence that the defendants took the wallet, and no evidence that someone else could not have taken it, the proof of robbery was insufficient.

These cases and the others cited in the initial brief, notwithstanding the state's efforts to distinguish them, do demonstrate that the circumstantial evidence rule, as applied to theft and to the theft element of robbery, required a judgment of acquittal in this case. Indeed, the state has cited not a single case to show that the evidence here was sufficient to prove robbery or attempted robbery. It was error to deny a judgment of acquittal as to felony murder based on robbery.

C. The collateral crimes evidence admitted for the limited purpose of proving identity may not be considered for other purposes.[2]

The state asserts that section 90.404(2)(b)(2), Fla. Stat., is virtually identical to Federal Rule of Evidence 404(b), and that under the federal rule, once admitted, the collateral crimes

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[2] In the initial brief, this topic was dealt with in Issue IIA. The state has dealt with this topic in Issue IIC, and appellant replies in Issue IIC.

evidence could have been considered for any relevant purpose, not limited to the purpose for which it was admitted. The federal and Florida rules are not identical, however, and the difference relates directly to this point. The Florida rule contains the following language:

> When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received ...

Section 90.404(2)(b)(2). The federal rule contains no such provision. Thus, the Florida rule explicitly directs that the jury's consideration of the collateral crimes evidence shall be limited, while the federal rule contains no such direction. This difference makes federal cases on this issue inapplicable. In any event, the federal cases the state cites deal with admissibility of collateral crime evidence. They do not hold that evidence the state has offered for, and the jury has been instructed to consider for, only one purpose, may be considered for a different purpose by the judge on a motion for judgment of acquittal.

Moreover, even if the collateral crimes evidence had been admitted to prove intent, that evidence, while suggestive of intent, was not sufficient to prove what was intended in this case. The evidence showed a propensity to commit robbery/shootings, but this does not contradict the reasonable hypothesis that this particular shooting was not pursuant to a

robbery, and was not premeditated.

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.

The initial brief acknowledged that in a number of cases this Court has affirmed first degree murder convictions with no discussion of the harmfulness of submitting an unsupported theory to the jury. This Court has never overruled McKennon v. State, 403 So.2d 389 (Fla. 1981), however, and has never explicitly held that the error of denying a judgment of acquittal as to premeditation or as to felony murder need not be analyzed for harmfulness. McKennon held that it was error to submit felony murder to the jury when the evidence did not support that ground, and analyzed that error for harmfulness under the normal harmless error standard. The state is wrong to dismiss McKennon's conclusions about the insufficiency of the evidence of felony murder as dicta. McKennon's analysis was necessary to its decision.

McKennon makes sense. Reviewing evidence for sufficiency is a normal part of the trial judge's job, on motion for judgment of acquittal, and normally, when the judge erroneously denies the motion and submits an unsupported ground to the jury, this is reversed. The only difference here is that the jury might have based its decision on another ground. This possibility is most logically considered as an issue of harmlessness. Under

McKennon, and under normal harmless error analysis, error can be treated as harmless only if there is no reasonable possibility the error affected the verdict. Under the rule the state seeks, there would be a special rule of harmlessness for the error of submitting an unsupported ground to the jury; such error would be harmless if there were any possibility the error had no effect on the verdict. Such a policy would introduce a significant area of unreliability in the outcomes of trials. Such unreliability has no place in Florida law at all, and is inconsistent with the higher standard of reliability we require for convictions leading to imposition of the death penalty.[3]

> 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.

As to appellant's contention that it was error to allow the

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[3] As to the state's dispute of the statement in the initial brief that it was arguable that reversal on this ground was required under federal law until the decision in Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed 2d 371 (1991), see Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986), cert.den. 483 U.S. 1033 (1987):

> Tafero contends that because the evidence presented at trial is insufficient to support a felony murder charge, and since the jury was instructed on both felony murder and premeditation, his convictions must be reversed because the jury returned only a general verdict. It is settled law 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."

796 F.2d 1318-1319. (citations omitted).

state to emphasize irrelevant, inflammatory details of the collateral crime, appellant relies on his initial brief. As to the state's claim that any error was harmless, Mungin notes that the state failed to respond to the thrust of his harmfulness argument. The initial brief pointed out that the evidence that Mungin was even present at the shooting was not strong. The one witness who claimed to have seen Mungin leaving the crime scene, had earlier given the police a description that seemed to be of a person other than Mungin. The state proved that Mungin's gun was used, but he could have loaned his gun to the person seen leaving the Lil' Champ. Given this fundamental weakness of the state's case, it cannot be said that allowing the state to dwell on irrelevant details of the prior crime was harmless.

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.

Appellant reproduced Glenn Young's testimony verbatim in the initial brief so this Court could easily judge for itself the full import of Young's testimony. Taken as a whole, that testimony gave the jurors the inaccurate impression that Mungin would spend very little time in prison serving his prior life sentence. Taken in its specifics, Young's testimony was that Mungin was eligible for conditional release. (T1177-1178). Young was challenged on that testimony, but he never clearly retracted it. (T1181). As discussed in the initial brief, Mungin is not actually eligible for conditional release or any other form of

release.

Whether this misleading testimony so undermined the fairness of Mungin's penalty phase as to warrant a new trial despite the testimony having come in through a defense witness, is a question this Court must decide without the guidance of on-point precedent. It is clear, as stated in the initial brief, that questions about the meaning of a life sentence are central to the jury's decision about whether a death sentence should be imposed. When the jury in this case recommended death, it was making a false choice. It was deciding between death and some indeterminately short time in prison. Under these circumstances, the jury's recommendation must be seen as fundamentally flawed.[4]

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.

Appellant relies on his initial brief and on the argument in Issue IIB above, for this issue.

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

The initial brief cited numerous cases for the proposition that treating the age of twenty-four as mitigating is allowed. The state's brief cites the reference in King v. Dugger, 555 So.2d 355 (Fla. 1990), to the age of "twenty-something" being

[4] The state asserts that the only evidence that Mungin was serving a life sentence was Young's testimony. Actually, the judgment and life sentence for the Tallahassee crime were admitted in evidence as Penalty Phase Exhibit 4.

"iffy" as a mitigator, as if being "iffy" meant the jury could not consider it. This is not so. As discussed in the initial brief, juries are free to credit "iffy" or weak evidence, or to reject it. The judge's proper role is to instruct the jury on the law and let the jury decide whether to accept or reject "iffy" evidence.

The state cites Scull v. State, 533 So.2d 1137 (Fla. 1988), cert.den. 490 U.S. 1037 (1989), as holding that age twenty-four alone will not establish a mitigating circumstance. This is a misleading representation of Scull. As discussed in the initial brief, Scull upheld the trial judge's finding of a mitigating circumstance based on Scull being twenty-four. Scull said that age twenty-four alone did not establish a mitigator, but that the judge had discretion, based on his observations at trial, to find the age of twenty-four to be mitigating. If the judge has discretion, based on his observations, to find age twenty-four to be mitigating, then the jury must also have such discretion, under Smith v. State, 492 So.2d 1063 (Fla. 1986), cert.den. 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995). Thus, Scull supports Mungin's contention that the jury should have been instructed on age.

The state argues that Mungin's age could not be considered because there was no evidence that Mungin was immature. The state gives no authority for the proposition that such evidence is a prerequisite to consideration of age, and Mungin disputes this proposition. In any event, the initial brief identified

evidence from which the jury could have concluded that Mungin was immature, or his age was otherwise mitigating. Initial Brief, pp.74-76. The state's brief simply ignores this evidence.

The state asserts that under Cave v. State, 476 So.2d 180 (Fla. 1985), cert.den. 476 U.S. 1178 (1986), and Lara v. State, 464 So.2d 1173 (Fla. 1985), the trial judge had discretion to not instruct on age. Cave accepted the jury's right to consider age twenty-four as mitigating, but affirmed despite the lack of an age instruction because Cave found the general mitigation instruction adequate. As the initial brief pointed out, Cave's reliance on the general instruction did not make sense, both because it deviated from the general rule requiring instruction on any defense the jury is free to find, and because the general instruction is not completely open-ended, and its terms do not cover age. Lara approved the failure to instruct on age for a twenty-five year old defendant, but gave no explanation other than a citation to two cases that were not on point.

The state's assertion that Smith did not overrule Cave and Lara because the defendant in Smith was twenty and Smith did not set a specific age below which the age instruction must be given, ignores the rationale of Smith. Smith held that for any age the trial judge would have discretion to find as mitigating, the jury must be instructed that age can be considered. Since Cave assumed, correctly, that the jury was free to find age twenty-four to be mitigating, under Smith, the Cave jury should have been instructed on age.

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

Appellant relies on his initial brief for this issue.

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 state's brief dismisses Mungin's proportionality argument as premised on the hope that this Court will find the evidence of robbery insufficient. It is, of course, true that Mungin's argument assumes this. As demonstrated in Issue IIB, in the initial and reply briefs, the precedents clearly show that the evidence in this case was insufficient to prove robbery. The state's answer brief cited not one case upholding a robbery conviction based on evidence such as that introduced in this case. Because robbery was not proved, this Court should evaluate this case as one involving a single aggravator.

The state emphasizes the three violent crimes Mungin has been convicted of, but nowhere acknowledges that those three crimes took place during one three-day period. The state also emphasizes that Mungin renounced any intention to claim he had no significant prior criminal history, and prevented the state from producing evidence of non-violent crimes. Yet the state's brief fails to acknowledge that, having the right to prove any conviction involving a crime of violence, the state produced nothing other than the one three-day cluster.

That, so far as the record shows, all the violence in

Mungin's life took place during one three-day period when he was twenty-four years old, refutes the impression that he is a fundamentally violent person. The evidence that his high school wrestling coach had to train aggressiveness into him to keep him from getting hurt, and the evidence that his character was good until he started using crack cocaine, tend to show that Mungin's brief period of violence was an aberration in his life.

Even if the robbery aggravator were upheld, Mungin's crimes do not make him one of those most aggravated, least mitigated murderers, Florida's sentencing scheme singles out for death rather than life in prison. This Court should vacate Mungin's death sentence.

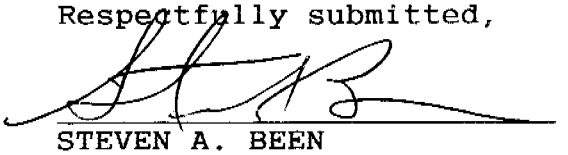
ISSUE IX MUNGIN'S CONVICTION AND DEATH SENTENCE VIOLATE THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Appellant relies on his initial brief for this issue.

CONCLUSION

Based on the foregoing, Anthony Mungin's first degree murder conviction and death sentence must be reversed.

Respectfully submitted,



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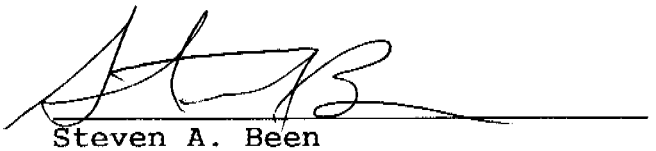
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Mr. Curtis M. French, Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, on this 10th day of April, 1995.



Steven A. Been