IN THE SUPREME COURT OF FLORIDA

DAVID PANGBURN,

Appellant.

vs. CASE NO: 81,650

STATE OF FLORIDA,

Appellee.

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APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

In this Reply Brief, "I.B." will refer to Appellant's Initial Brief and "A.B." will refer to the State's Answer Brief. All other references will be the same as in the Initial Brief. Those items referred to in Appellant's Appendix to his Initial Brief have since been made a part of the Record, at SR,623-630.

ARGUMENT

I.
CIRCUIT COURT COMMITTED CLEAR ERROR AND ABUSED DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS JULY 11, 1990 STATEMENT TO POLICE, WHEN EVIDENCE AT SUPPRESSION HEARING DEMONSTRATED VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHTS UNDER MIRANDA AND THAT STATEMENT WAS NOT VOLUNTARY

Appellant relies on these arguments and authorities in his Initial Brief on this Point at ppg 22-30.

II.
THERE WAS INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR ROBBERY WITH DEADLY WEAPON, WHERE EVIDENCE DID NOT DEMONSTRATE APPELLANT STOLE OR INTENDED TO STEAL VICTIM'S JEWELRY OR CAR BY FORCE OR FEAR BEYOND REASONABLE DOUBT

The State claims there was sufficient evidence to support Appellant's armed robbery conviction, and that evidence of the murders and the taking of Diane Matlawski's jewelry and car was sufficiently "continuous" to constitute robbery. §812.13, Fla.Stat.(1989); Jones v. State, 20 Fla.L.Weekly 29 (Fla.,January 12, 1995). A.B.,at 47,48. The State's rendition of evidence does not establish that Appellant killed or intended to kill Ms. Matlawski with intent to steal her property. Furthermore, the events between the killings and alleged taking was not "continuous" so as to sustain Appellant's convictions for armed robbery and/or murder, or the related felony-murder aggravating circumstance. Point VIII, infra; I.B.,at Points II,VIII.

Appellant's pre-trial statement that it was his brother Michael's "idea" to "kill the girls for the car", R,407, does not

demonstrate this was Appellant's intention, or that the timing of any such intention was sufficient to sustain David Pangburn's armed robbery conviction. The statement merely acknowledged this as Michael's intention, R,407, and does not even address when or how Appellant learned of his brother's intention. In fact, given Appellant's statement's references to him and his brother ("we") in other aspects, R,407, the absence of any such reference to anyone but Michael as to intent is compelling proof Appellant did not have or share such intentions. This statement could just as reasonably be interpreted to conclude that Appellant discovered this intent by Michael, well after the crimes were completed. State v. Law, 559 So.2d 187, 189 (Fla. 1989). His statement's reference to "getting the electric chair", or realization that "what we were doing was wrong", R,407, could easily have referred to aspects other than the taking of Matlawski's car and jewelry or a pre-existing intention to kill her for this reason. Supra.

The circumstances surrounding the killing, as observed by witnesses including those for the State, are inconsistent with a murder driven by a desire to take Ms. Matlawski's property. Alfred LeBlanc, Michael Pangburn's housemate, testified about seeing a lot of people there on the night in question, including Ms.Matlawski, and that it "sounded like a party". SR,553,592,593. LeBlanc thought Matlawski was "passed out" from drinking, when he saw her lying on the couch earlier in the evening of November 19-20, 1989. SR,552. The coroner's examination established a rather significant ingestion of alcohol

by Matlawski, as well as a "recreational" amount of cocaine in Matlawski's system when she was killed. R,794. Matlawski was known by Nancy Cole's own mother as a drug buyer and user. R,275,276, having done serious prison time for drug trafficking. R,410. In Michael Pangburn's original statement to police in July, 1990, he stated that Appellant looked "like he was out of his f___ing mind", SR,511. This was consistent with the State's express characterization in closing argument of LeBlanc's testimony, when the State argued that Appellant appeared "full of paranoia" and "looking crazy" when LeBlanc allegedly saw Appellant with a baseball bat in his hand. R,1042;(e.a.). These events are more consistent, or at the very least just as consistent with a frenzy killing arising at a party where cocaine and alcohol was consumed. Compare Knowles v. State, 632 So.2d 62, 63, 66 (Fla. 1992). As such, a directed verdict was mandated. Law.

The State notes alleged testimony by Michael and Linda Blair that they both saw Appellant driving and washing a red sports car, on separate days. AB,at 48. Closer examination of the Record shows Linda Blair's own admission, R,451, that her husband picked Michael, not David Pangburn, as the individual he saw with the car. R,430-434,451. Michael Blair saw no one besides Michael with this car. R,435. Raphael and Susan Quilles told police they saw Michael, not David, around the car at the Carriage Crossings complex. R,518. Assuming arguendo Linda Blair's identification of Appellant to be reliable, see IB,at

6,34, this would still not be inconsistent with a conclusion that taking the car was an afterthought, not the driving force motivating the killings. Law; Knowles; Parker v. State, 458 So.2d 750, 754 (Fla. 1984); compare, Jones, supra.

The evidence does not exclude every reasonable hypothesis but that Appellant killed Matlawski for the purpose of stealing her car, or to make her unaware of the stealing of her car. Knowles; Parker; compare Jones; compare Bartowsheski v. State, 661 P.2d 235, 238, 242, 245 (Col.1983)(cited with approval in Jones, 20 Fla.L. Weekly, supra, at 30). If the car were taken as an "afterthought", Appellant would be no more guilty of armed robbery as a principal then as a direct participant in the robbery itself.

Alfred LeBlanc testified to having seen Appellant driving Ms. Matlawski's car on a prior occasion, SR,547,548,566-567,569, a fact reiterated by the prosecution in its closing argument. R,1042. A defense witness testified that Appellant borrowed his red sports car on at least 5-10 occasions. R.831-835. Appellant's prior access to the victim's car or another red sports car like it is equally consistent with negating any intent to steal as the reason for the killing here. Knowles, supra.

This case is much closer to Knowles, and should be similarly analyzed to require reversal of Appellant's armed robbery conviction and felony-murder aggravator. Knowles, 632 So.2d, at 63, 66. In Knowles, the defendant ingested lacquer thinner, appeared to act "like he was completely gone" according to one

observer, retrieved a gun and shot the first victim in a trailer next door, Knowles at 63. As he saw his father getting into his truck, the defendant shot his father and drove away in his father's truck supra. This Court concluded that the felony murder aggravator based on robbery did not apply, since there was no evidence that defendant intended to take his father's truck before he shot his father, or that defendant shot his father to steal the truck, particularly in light of the fact the defendant had prior access to his father's truck. Knowles at 66. The State has failed to even address this, let alone distinguish Appellant's other supporting authorities in his Initial Brief. Harris v. State, 589 So.2d 1006, 1007 (Fla. 4th DCA 1991); Stevens v. State, 265 So.2d 540, 541 (Fla. 2nd DCA 1972).

This case is very distinct from those circumstances present in Jones. In Jones, this Court affirmed a robbery conviction and felony-murder aggravator because of evidence including the defendant's statement that he killed because the victims "owed me money..I had to kill them"; the presence of the victims' wallets, keys, money and other valuables in defendant's pockets when he was arrested at the scene; the presence of the female victim's purse in the same room where defendant was found, shot by the male victim before that victim died; and the "rolling over" of the male victim's body for the purpose of stealing items from his pockets. Jones, at 29-30. This type, magnitude and degree of direct evidence cannot be found here.

For the same reasons, the circumstances here are also

profoundly different from those in other decisions cited by this Court in the Jones case, Jones, at 30, which were in turn noted in Jones to be in contrast with Knowles, supra. Jones, at 30. Compare Bruno v. State, 574 So.2d 76, 80 (Fla. 1991)(robbery conviction upheld based on evidence that defendant seen admiring stereo just before using crowbar to hit and kill victim; defendant had borrowed car one month before to borrow victim's stereo and VCR equipment; defendant went back to victim's apartment after murder in same borrowed car to get stereo and VCR; defendant told others he got stereo from a person "who he killed"); Bartowsheski, 661 P2d, supra, at 238, 242, 245 (robbery upheld where defendant employed by victim and lived in victim's house, believed victim owed him money which victim disputed; defendant decided, stated and planned to steal rifles from victim as "repayment", and did steal rifles; and murder victim's position and blood pattern showed victim killed to prevent resistance to defendant's taking of guns); State v. Williams, 548 S.W.2nd 227, 230 (Mo.App.1977)(cited as support in Bartowsheski, supra, at 242; robbery upheld were armed men hold employees in one room, and money taken from purses of employees located in other room, even though employees were unaware of theft at time money taken); State v. Lora, 561 S.W. 2nd 728, 729 (Mo.App. 1978)(also cited as support in Bartowsheski; robbery affirmed where victim held at gunpoint in one room by defendant's brother while defendant in victim's bedroom, where money located in exposed mattress, even though victim did not see money taken or

discover it was taken until after defendant left).

Other Florida authorities cited by Appellee have no application here. In both Jones v. State, 19 Fla.L.Weekly 577, 581 (Fla.,November 10, 1994) and Fennie v. State, 19 Fla.L.Weekly 370, 371 (Fla.July 7, 1994), the defendants did not even challenge the sufficiency of robbery convictions, which were summarily affirmed by this Court. In Marquard v. State, 641 So.2d 54, 55, 57 (Fla. 1994), there was unequivocal intention expressed by the defendant therein in discussions with a co-defendant, to kill the victim for her car and her money, which is lacking in this case.

As to the jewelry, the sole and undisputed testimony is that Appellant took one of Ms. Matlawski's bracelets only after nurse Rita Flint told Michael Pangburn to remove them from the hospital for safekeeping. I.B.,at 6-7,32-33. R,475-480,493. This occurred more than 12 hours after Matlawski's death as estimated by the coroner, with no evidence showing mention of, let alone intervening control of the bracelets by David Pangburn. IB,at 32-33. This evidence clearly does not establish Matlawski was murdered for her bracelets, or that Appellant's taking of the bracelet more than a half day later for safekeeping while his brother remained hospitalized was a "continuing series of events" somehow episodically connected to Matlawski's murder., Jones.

Appellee has not and cannot deny that because the State pursued a felony-murder theory based on this armed robbery, and because it is possible the verdicts of murder rested on this

insufficient ground, all convictions and sentences must be reversed. See cases cited, IB,at 35-36.

III.
THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR FIRST-DEGREE MURDER OF DIANE MATLAWSKI ON BASIS OF PREMEDITATION OR FELONY-MURDER, OR FOR MURDER OF NANCY COLE ON FELONY-MURDER BASIS

Appellant relies on the arguments and authorities in his Initial Brief, at ppg 36-41.

IV.
APPELLANT WAS DENIED RIGHT TO FUNDAMENTALLY FAIR TRIAL BY PROSECUTORIAL ARGUMENT AT TRIAL PHASE WHICH IMPERMISSIBLY VOUCHED FOR POLICE OFFICERS' CREDIBILITY, MISSTATED EVIDENCE AND COMMENTED ON APPELLANT'S SILENCE IN FACE OF PRETRIAL INTERROGATION

Appellant relies on the argument and authorities in his Initial Brief, at ppg. 41-46.

V.
CIRCUIT COURT ABUSED DISCRETION IN ADMITTING GRUESOME AUTOPSY PHOTOS SHOWING EXTERIOR AND INTERIOR OF VICTIM MATLAWSKI'S HEAD WOUNDS, AND PARTIALLY DECOMPOSED FACES OF VICTIMS

Appellant relies on the arguments and authorities in his Initial Brief, at ppg. 46-49.

VI.

APPELLANT'S SENTENCING PROCEEDING VIOLATED APPELLANT'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS TO FAIR AND RELIABLE CONSIDERATION OF SENTENCE, WHEN JURY WAS NOT GIVEN APPROPRIATE INSTRUCTION AND VERDICT FORMS REQUIRING SEPARATE CONSIDERATION AND SEPARATE INDEPENDENT ADVISORY VERDICTS FOR SEPARATE CONVICTIONS INVOLVING MULTIPLE VICTIMS

The State's argument focuses on the voluntariness of Appellant's "waiver" of separate jury recommendations for each of the two murder counts, to the point where the State restated Appellant's statement of the issue. A.B.,at 65;65-72. This is a virtual concession that Appellant's death sentence was "the result of a fundamentally flawed process" preceding this "waiver", I.B.,at 50, where the verdict forms and instructions at penalty phase did not require or advise the jury to consider and return two separate advisory recommendations for each of the killings involved. The State's position ignores the nature and consequences of these defects.

It is beyond question that the defective lack of adequately channelled instruction and defective single 7-5 advisory recommendation came before any considerations of waiver addressed by the State. I.B.,at 50,51. The State's argument assumes as a fundamental premise that Appellant could nevertheless waive this resulting defective verdict after the fact, because Mr. Pangburn allegedly did not "press his request at the final sentencing hearing". A.B.,at 71. The defective verdict was returned on February 1, 1993, almost 2 months before the final sentencing hearing, R,1534-1561, and more than one month before the defect

was formally first acknowledged by the Circuit Court. R,1479-1480,1489-14909. The State has conceded the defective nature of this verdict and process leading up to the verdict, by failing to address or rebut Appellant's argument on this point. A.B.,at 65. At the time the jury was not provided the appropriate instructions or verdict forms on February 1, 1993, Appellant was then deprived of the required individualized and properly channelled capital sentencing proceeding, which consequentially created the defective verdict and death sentence. I.B.,at 49-56; Harris v. Alabama, 8 Fed.L.Weekly 585, 587 (U.S. Sup.Court, February 22, 1995); Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992); Glock v. Singletary, 36 F. 3rd 1014, 1025, 1027 (11th Cir. 1994).

This process, including the defective jury advisory recommendation, became a nullity that could not be "waived" after it occurred. e.g. Wilson v. State, 566 So.2d 36, 37 (Fla. 4th DCA 1990)(reversible error when defective verdict occurred as result of verdict from which omitted "robbery", contrary to instruction and including "robbery" as lesser included offense); Moore v. State, 496 So.2d 255, 256, (Fla. 5th DCA 1986)(when verdict did not conform to jury instructions, and/or defendant convicted of crime he was not charged with, verdict was either defective or a nullity and "either way", required reversal of "wrongful" conviction).

In Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1990), the First District faced an analagous situation when a jury returned

a general verdict of guilty on an indictment count that improperly charged two distinct and separate crimes of sexual battery. Bashans, supra, at 1304. Despite the fact that a challenge to this defect was first raised on appeal, the panel reversed the defendant's conviction as "fundamental error", concluding that without being able to determine which of the two offenses the jury found the defendant guilty of, a new trial was required. Bashans, at 1305; see also Owens v. State, 593 So.2d 1113, 1116 (Fla. 1st DCA 1992)(conviction reversed under Bashans when general verdict of guilty returned, and indictment charged two distinct offenses of "official misconduct", one of which had been invalidated as Unconstitutional; court observed that even though evidence sufficient on part of statute that remained Constitutionally valid, it could not be determined whether verdict based on Constitutional or Unconstitutional aspect, requiring new trial); see also Fountain v. State, 623 So.2d 572, 574-575 (Fla. 1st DCA 1993)(Allen, J., concurring in part and dissenting in part); but see Fountain, 623 So.2d, supra, at 572-574.

The jury's advisory verdict merely noted a 7-5 recommendation for death, without providing any basis to determine which of the two murders this recommendation applied to. R,1470-1471. This created a null and void verdict, necessarily affecting Appellant's death sentence, supra; see also Harris, supra. There was no legal or factual basis by which the Circuit Court judge, prosecution and defense could stipulate that

this illegal verdict and sentence could be construed as a death recommendation on the Matlawski murders and a life recommendation on the Cole killing. Id. R,1492-1493,1494,1500-1501,1512,2022,2033.

The State's argument notes that many fundamental rights can be waived. A.B.,at 71. The issue here is waiver of a defective verdict, not waiver of a right to a jury advisory verdict at penalty phase. Appellant can hardly question that, in the absence of an already rendered defective or void verdict, he could have initially waived his right to an advisory jury prior to any penalty phase proceedings being held. State v. Hernandez, 645 So.2d 432, 434-435 (Fla. 1994); Lamadline v. State, 303 So.2d 17 (Fla. 1974); see also Tucker v. State, 559 So.2d 218 (Fla. 1990)(can waive jury trial, guilt phase). However, Hernandez, Lamadline and Tucker, supra, did not involve situations where, prior to waiver, a defective guilt or penalty advisory verdict had already been rendered. If defective or void verdicts necessarily require reversal at the guilt phase, Wilson; Moore; Bashans; Owens, the same result of reversal is required when it occurs at a capital sentencing phase, given the nature of the death penalty and the fact that the defective instruction and verdict forms consequentially invalidated the entire sentencing proceeding through the advisory verdict and the trial court's imposing of a death sentence:

> ....the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the [capital sentencing] scheme adequately

> channels the sentencer's discretion so as to prevent arbitrary results....Error is committed when the jury considers an invalid factor, and its verdict is in turn considered by the judge....Such consequential error attaches whenever the jury recommendation is considered in the process....

Harris, 8 Fed.L.Weekly, at 587 (e.a.); see also Chaky v. State, 20 Fla.L.Weekly 107, 108 (Fla., March 2, 1995)(where this Court recently proposed adoption of a new rule requiring that a jury in capital cases be mandatorily given written jury instructions for deliberations at the guilt and penalty phase, because of "the nature of capital cases"); Wike v. State, 19 Fla.L.Weekly, 617, 618-619 (Fla. November 23, 1994)(Anstead, J., specially concurring opinion, joined by Overton, J.; Shaw, J.; Kogan, J.; Harding, J.)(concluding that defendant's right to have final closing argument at penalty phase should be more stringently enforced at penalty phase because of the qualitative difference in death as punishment).

Since Appellant's Initial Brief was filed in October, 1994, this Court has continued to review capital cases where separate advisory verdicts were returned for each of multiple murders in a given case. Jones v. State, 20 Fla.L.Weekly 29 (Fla., January 12, 1995)(death recommended for each of husband and wife victims, by 10-2 vote as to wife and 12-0 as to husband-victim); Thompson v. State, 19 Fla.L.Weekly 632 (Fla., November 23, 1994)(2 separate death recommendations, by 7-5 vote on each of 2 murders); Turner v. State, 19 Fla.L.Weekly 630 (Fla., November 23, 1994)(2 counts, 2 life recommendations by jury); Barrett v.

State, 19 Fla.L.Weekly 627 (Fla., November 23, 1994)(4 counts of first-degree murder, recommendation of life imprisonment for "each murder"). If this Court accepts the State's view that a defective verdict resulting from the absence of appropriate limiting instructions and verdict forms can be waived after it is rendered, this will invite the very arbitrariness in applying the death penalty that is strictly prohibited by law. Harris; Espinosa, supra; Proffitt v. Florida, 96 S.Ct. 2960, 2967-2970 (1976)(Stewart, J.; Powell, J;, Stevens, J, plurality opinion); Gregg v. Georgia, 96 S.Ct. 2909, 2932, 2940-2941 (1978)(Stewart, J.; Powell, J.; Stevens, J., plurality opinion); Furman v. Georgia, 92 S.Ct. 2726, 2760-2763 (1972)(Stewart, J., concurring opinion).

In Hernandez, this Court observed that the authority of a trial judge to accept a waiver of a penalty phase jury "comports with the general purpose of the advisory jury", citing to Dixon v. State, 283 So.2d 1 (Fla. 1973). In Dixon, this general purpose was described as permitting "separate and distinct consideration of penalty from guilt", to insure that "[t]he fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation". Dixon, 283 So.2d, supra, at 8. The effect of the defective jury advisory verdict here, at least indirectly, is that the jury considered the facts of Appellant's guilt of two murders to recommend death, without any channelling limits whatsoever. See Sumner v. Shuman, 107 S.Ct. 2716, 2722-2727

(1987)(death penalty statute invalidated under Eighth and Fourteenth Amendments because if provided for automatic death penalty when murder was committed by defendant who was in prison under sentence of life without parole). A death sentence based in any way on this defect cannot stand. Harris; Sumner, supra; Proffitt; Gregg; Furman, supra.

The State has further argued that Appellant did not meet the burden of showing good cause to withdraw any "waiver" of a new penalty phase jury. A.B.,at 73,74. This position fails to address the standard for granting withdrawal for jury waivers in Floyd v. State, 90 So.2d 105, 106 (Fla. 1956), as applied by Appellant, I.B.,at 58-59. Floyd speaks directly to the issue of withdrawing a waiver of trial by jury, a circumstance more analogous to a withdrawal of possible waiver of penalty phase by jury than withdrawal of a guilty plea relied on by the State. A.B.,at 73,74. The burden under Floyd effectively requires a showing of why withdrawal of a waiver of trial by jury should not be honored, Floyd, supra, as opposed to demonstrating why withdrawal of a guilty plea should be permitted. Brown v. State, 428 So.2d 369, 371 (Fla. 1983); Baker v. State, 408 So.2d 686, 687 (Fla. 2nd DCA 1982). Even in the "guilty plea" withdrawal context cited by the State, the favored construction is in a defendant's favor, and withdrawal cannot be denied "..in any case where it is evident that the ends of justice will best be served by permitting it [withdrawal]". Baker, 408 So.2d, supra. Under the appropriate Floyd analysis, or the Baker standard chosen by

the State, there was nothing in the Record justifying denial of Appellant's timely request to proceed to a new penalty phase with a jury. I.B.,at 58,59. In light of the circumstances and the nature of the death penalty, the "ends of justice" mandated that this request should have been granted. Floyd; Baker.

Significantly, this Court has consistently observed that even with a voluntary waiver of a penalty phase jury, a trial court can still disregard the waiver and convene an advisory jury to consider and recommend an advisory verdict. Hernandez, 645 So.2d, at 435; Palmes v. State, 397 So.2d 648, 656 (Fla. 1981); State v. Carr, 336 So.2d 358, 359 (Fla. 1976). This appears to be impliedly based, (judging from the certified question answered by this Court in Carr, supra), on the rationale that a waiver should be disallowed if the judge believes allowing such a waiver would undermine the underlying requirement against arbitrariness in imposing death announced in Proffitt and Furman, Carr, supra. This unequivocally creates much more stringent protection of a capital defendant's right to an advisory jury at penalty phase in light of the requirements of Furman and Profitt. Harris; Chaky, supra; Wike, supra. Under these circumstances, Appellant's letter to the Court, SR,626, was a good faith reasonable request to have a penalty phase jury consider appropriate advisory sentences, which should have been honored. Hernandez; Carr; Floyd.

The Circuit Court not only did not correctly rule on Appellant's request under Floyd, as the appropriate standard,

I.B.,at 59, but did not address whether to disregard any prior "waiver" of a penalty phase jury, Hernandez. At the very least Appellant's letter triggered the need to address this circumstance, especially when the letter created legitimate conflict over what Appellant really wanted in this regard. Hernandez; Carr; Floyd.

As made clear most recently in Harris by the U.S. Supreme Court, the defective verdict forms and absence of appropriate jury instructions had the consequential impact of invalidating the advisory verdict and actual sentence of death. Harris, at 587. Appellant's sentence must be reversed for a new sentencing proceeding with a jury or alternatively for a hearing to determine whether Appellant's request to withdraw his prior waiver should be granted, or whether, if the prior waiver is deemed valid, it should be disregarded to proceed anyway to a penalty phase jury proceeding under Hernandez.

VII.

TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING ADMISSION OF EVIDENCE AT PENALTY PHASE, OF APPELLANT'S PRIOR CRIMINAL RECORD DESPITE APPELLANT'S WAIVER OF MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY

The State has maintained that Appellant waived any error under Maggard v. State, 399 So.2d 973 (Fla.1981), and argues that the State was entitled to cross-examine Appellant at the penalty phase about prior convictions because Mr. Pangburn placed his credibility at issue by testifying. AB,at 75,76. This shows a

total misconception of the nature and magnitude of the rule initially announced in Maggard and reinforced in Geralds v. State, 601 So.2d 1157 (Fla. 1992).

The State initially asked Judge Backman to permit penalty phase questioning of Appellant concerning five prior burglary convictions,[1] to rebut any evidence of Appellant's potential for rehabilitation through imprisonment. R,1259. At that time and thereafter, Appellant's counsel clearly and unequivocally objected to such testimony and asserted the Maggard case as the basis for defense objections:

> MR. DALLAS: Judge, to the contrary I would argue, and I think that Maggard is the appropriate case...
>
> We're not trying to establish that he doesn't have a long history of criminal activity,...so I would ask that the State be limited or precluded from going into these other burglaries and other crimes that she may refer to.

R,1260. (e.a.)

X X X X X

> MR. DALLAS: I stand by my position that she [the prosecutor] should be precluded from discussing crimes that...are not being brought into issue by the defense....

R,1262. (e.a.) After the Court ruled this line of questioning to be admissible, Appellant's counsel "[took] exception to the Court's ruling", to which Judge Backman replied: "I understand". R,1286. Counsel further reiterated his Maggard objection:

> MR. DALLAS: ...Judge, as I said, I think

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[1]Ultimately, this evidence became 9 prior felony convictions. R,1427

> Maggard is to the opposite, you know. If we don't put in issue about him not having a criminal history or not having a history of violence, then the State is precluded and we rest on our objection.

R,1288. (e.a.) At the time the prosecutor sought to elicit the fact of Appellant's nine prior felony convictions as her first question on cross-examination, defense counsel initially objected, thereby further preserving this issue for appellate review. R,1426. Any subsequent statement about withdrawal does not alter the fact that Appellant's prior objections fulfilled the purpose of the contemporaneous objection rule, allowing the trial judge to acknowledge, consider and rule on the admissibility of the objected to testimony. Gainer v. State, 633 So.2d 480, 481 (Fla. 1st DCA 1994); Williams v. State 619 So.2d 487, 492 (Fla. 1st DCA 1993).

Furthermore, this Court has regarded Maggard error as being of "such magnitude" that it is reversible. Geralds, 601 So.2d, supra, at 1162, quoting Maggard, 399 So.2d, supra, at 977. In fact, two members of this Court, including Justice Overton, concluded this error was so crucial that it required a remand for a life sentence, rather than a new sentencing hearing. Maggard, at 978 (McDonald, Justice; Overton, Justice, concurring in part and dissenting in part). This Court has not wavered in continuing to regard the impact of testimony concerning a defendant's prior criminal activity at penalty phase as reversible error, when he has waived reliance on a lack of such history as mitigation. Geralds, at 1164 (noting unanimous

finding on this point). The reversible nature of this error is not exclusively contingent on the presence of objections, in light of this Court's grant of habeas corpus relief because of Maggard error in Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). If this Court believed that Maggard error required reversal to the extent that appellate counsel was considered ineffective for not raising the issue in Fitzpatrick, this underscores the magnitude of a Maggard error. Geralds; Fitzpatrick; Maggard.

The State reiterates the position taken by the trial prosecutor and Judge Backman that it was not at all erroneous to permit cross-examination of any witness, including a defendant about his prior record for credibility impeachment purposes. A.B.,at pp 76; R,1260,1261,1262,1286,1287. With all due respect, this fundamentally ignored the rejection of this position by this Court in Geralds:

> "..a defendant's convictions for non-violent felonies are inadmissible evidence of nonstatutory aggravating circumstances....The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment. This rule is of particular force and effect during the penalty phase of a capital murder trial....

Geralds, at 1162-1163. (e.a.) It is the hallmark of the Maggard rule that a defendant may not be penalized if he decides that a mitigator available for his benefit does not exist. Maggard, at 978. The mere fact of Mr. Pangburn's testimony, as opposed to defense testimony which "opens the door" by affirmatively placing

a defendant's criminal or psychological background at issue, does not permit questioning about prior convictions "under the guise of witness impeachment". Geralds; I.B,at 61-62.

The State's cited authorities have no application here whatsoever. The decision in Fotopoulos v. State, 608 So.2d 784, 791 (Fla. 1992) appeared to involve impeachment of a capital defendant who testified at the trial phase, totally irrelevant to a Maggard issue, and did not mention or address that any Maggard claim was at issue there. Fotopoulos, at 790, 791. In Marquard, supra, this Court merely listed in footnotes that there was a claim concerning "permitting cross-examination into the defendant's criminal history during penalty phase", and that there was "no error", without any further comment, analysis or discussion. Marquard, at 56, n.3; 58, n.4. These cases do not even remotely support the State's position on this issue, A.B.,at 76.

The error here was not harmless because of Appellant's testimony concerning one prior incarceration. A.B.,at 77. The State selectively ignores that the very first thing the State elicited on cross-examination was Appellant's 9 prior felony convictions. R,1427. Appellant's passing admission of one prior incarceration and making "mistakes", R,1411,1418, did not place mitigation of no significant prior criminal history at issue, nor did it amount to affirmative proof of nonviolent character or psychological background that "opened the door" to the State's question. Geralds; Maggard; compare Parker v. State, 476 So.2d

134, 139 (Fla. 1985). The jury's knowledge that Appellant served some prior prison time did nothing to eliminate or minimize the effect of the State's "ringing the bell" that Appellant was in effect a career criminal. Geralds, at 1162.

The State cannot escape the fact that Geralds is virtually exactly on point here, and requires reversal of Appellant's death sentence for violation of the Maggard rule.

VIII.
THERE WAS INSUFFICIENT EVIDENCE TO AGGRAVATING CIRCUMSTANCE THAT MURDER OF DIANE MATLAWSKI WAS COMMITTED DURING COMMISSION, ATTEMPTED COMMISSION OR ESCAPE FROM ROBBERY WITH DEADLY WEAPON

The State claims that Appellant's statement about his brother's intent and Appellant's possession of the victim's car and jewelry after the murders, demonstrates sufficient evidence to support the Circuit Court's finding of a felony-murder aggravating circumstances. AB,at 78,79. This position is unsupported factually and legally.

Appellant relies on his argument in Point II, supra, as support for the lack of sufficient proof that Appellant was guilty of armed robbery. As already noted, Appellant's pre-trial statement indicates nothing confirming that Appellant shared such intent, or did so at or prior to the murders. The statement itself clearly does not demonstrate that Appellant somehow assisted Michael Pangburn for the express purpose of stealing Diane Matlawski's car or jewelry. The mere fact that Appellant may have come into possession of the car or jewelry does not

alter the conclusion that such possession was an afterthought, and at most incidental to the murders. Knowles, supra, Clark v. State, 609 So.2d 513, 515 (Fla. 1992); Parker v. State, 458 So.2d 750, 754 (Fla. 1984).

Several of the State's authorities affirmed felony-murder aggravators based merely on the existence of a contemporaneous conviction for the underlying felony. e.g. Fotopoulas, 608 So.2d, at 793; Perry v. State, 522 So.2d 817, 820 (Fla. 1988). This is not sufficient under Appellant's authorities, where this Court has required a showing beyond a reasonable doubt that the underlying robbery was the primary motive for the murder. Knowles; Clark; Jones v. State, 580 So.2d 140, 146 (Fla. 1991); Parker; supra. Under the evidence here, the State did not meet this threshold, on independent or "principal" liability theories. I.B.,at 65-67.

Particularly in light of Appellant's prior access to the victim's red sports car and/or one just like it, the evidence was insufficient to show that any possession of the car or jewelry was more than an afterthought or incidental to Matlawski's death. Id; Point II, supra. The evidence here features none of the compelling evidence in cases cited by the State that demonstrated primary intent to rob as the dominant motive for murder. e.g., Bruno, supra; Scott v. State, 411 So.2d 866, 867-869 (Fla. 1982)(upheld felony-murder aggravator based on robbery, when both defendant and co-defendant stated their pre-existing intent to rob and kill victim, and tried to recruit third party expressly

for purpose of robbing as well as killing victim). Because the evidence did not exclude the reasonable hypothesis that robbery was not the primary or dominant motive to kill Ms. Matlawski, the Circuit Court's finding of a felony-murder aggravator was invalid. Chaky v. State, 20 Fla.L.Weekly 107, 108 (Fla.March 2, 1995); Knowles; Clark; Jones; Parker.

The State's contention of harmless error is particularly unpersuasive in its characterization of the mitigation in this case as "unavailing". A.B.,at 80. Judge Backman himself did not agree with this, finding considerable mitigating circumstances, and attributing "significant" weight to several of them. I.B.,at 15-16. In view of the error in finding this aggravator, the invalidity of the "hac" factor, I.B.,at Point XI,ppg 72-76; the relative weakness of one of the remaining two aggravating circumstances, I.B.,at 89,97, and the compelling evidence and findings of mitigation, the finding of an invalid aggravator here was not harmless. See cases cited, IB,at 67; see also Way v. Dugger, 568 So.2d 1263, 1267 (Fla. 1990)(when jury recommendation was 7-5 for death this Court could not say sentencing error was harmless where if error not made, correct instruction might have convinced one more juror to recommend life); compare Capehart v. State, 583 So.2d 1009, 1012, 1015 (Fla. 1991)(harmless error when invalid c.c.p. aggravating circumstance left three valid aggravators and only one mitigating circumstance that defendant's crime was result of frustration about racial discrimination in society); Rogers v. State, 511 So.2d 526, 535 (Fla.

1987)(harmless error based on two remaining valid aggravators compared to lone mitigator that defendant was "good father, husband and provider")

IX.

TRIAL COURT ABUSED DISCRETION IN GIVING STANDARD FELONY-MURDER AGGRAVATOR INSTRUCTION AND DENYING REQUESTED JURY INSTRUCTION THAT FELONY-MURDER CONVICTION SHOULD NOT BE RELIED ON AS PER SE BASIS FOR IMPOSITION OF DEATH PENALTY

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 67-69.

X.

AGGRAVATING CIRCUMSTANCE OF "FELONY-MURDER" AND CORRESPONDING JURY INSTRUCTION ARE UNCONSTITUTIONAL ON FACE AND AS APPLIED, BECAUSE §921.141(5)(D) FAILS TO ADEQUATELY NARROW CLASS OF THOSE ELIGIBLE FOR DEATH PENALTY

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 69-71.

XI.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT AGGRAVATING CIRCUMSTANCE THAT MURDER OF DIANE MATLAWSKI WAS "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL"

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 72-76.

XII.

TRIAL COURT ABUSED DISCRETION IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 76-78.

XIII.
JURY INSTRUCTION GIVEN AT PENALTY PHASE ON AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS AND CRUEL" WAS UNCONSTITUTIONALLY VAGUE

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 78-81.

XIV.
CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ADMITTING, CONSIDERING AND RELYING ON HEARSAY, IRRELEVANT, UNNECESSARY AND UNFAIRLY PREJUDICIAL EVIDENCE REGARDING "PRIOR VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE

Appellant argued that the admission of highly prejudicial, inflammatory hearsay at the penalty phase concerning the circumstances of a prior violent felony required reversal of his death sentence. IB,at 82-84. The State has summarily discounted this claim by merely stating that no unduly prejudicial testimony was admitted. AB,at 92. This does not adequately address or rebut the merits of Appellant's position.

The State ignores the line this Court has drawn between admissible and inadmissible evidence to support the "prior violent felony" aggravating circumstance. Duncan v. State, 619 So.2d 279, 282 (Fla. 1993); Rhodes v. State, 547 So.2d 1201, 1204-1205 (Fla. 1989). The State has additionally ignored the fact that line was crossed in this case. Rhodes. Besides the

certified copy of the 1980 robbery conviction, R,1290-1296, the jury heard additional testimony including the victim's injuries and hospitalization, the defendant's flashing of a knife during a chase after the crime, and a statement that the defendant allegedly robbed the victim because he had just been released from jail and had no money. R,1298,1299,1302; I.B.,at 83-84. The evidence of the alleged use of a deadly weapon by Appellant when chased down by other civilians was particularly inflammatory when the prior violent felony was not charged or adjudicated as an armed robbery, and the weapon had no connection to the commission of the prior felony. R,1290-1296,1298. It is hard to imagine anything more prejudicial under Rhodes and Duncan than reference to a defendant's flashing of a knife, totally collateral and irrelevant to the prior violent felony or the charged crimes here, in a capital penalty phase proceeding.

The prosecution reinforced these collateral and irrelevant facts in closing argument, including the fact of the victim's hospitalization and Appellant's alleged statements about recent release from jail. R,1440,1441. Judge Backman referred in his sentencing order to the victim's hospitalization and Appellant's apprehension by police "after being chased by civilians". R,2023. This distinguishes this case from Duncan, because both judge and jury did expressly rely on this inadmissible evidence as a basis for the death penalty. Duncan, at 282. This evidence was at least as prejudicial as the evidence of victim suffering and the attempted use of a knife to cut the victim's throat

condemned as reversible in Rhodes, at 1204. There is every reasonable possibility, given the prosecutor's closing argument and the judge's sentencing order, that this evidence affected the jury's recommendation and the Court's sentence of death. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

If this error is viewed as harmless, it will serve to swallow the rule announced in Rhodes. When the impact is so substantially inflammatory and insidious, reversal of a death sentence is appropriate.

XV.
IMPROPER ADMISSION AND CONSIDERATION OF PROHIBITED VICTIM IMPACT EVIDENCE VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND RIGHTS OF DUE PROCESS

Appellee has argued that the admission of victim impact evidence was not preserved, and in any event was harmless error because it was heard by the judge and not the jury. A.B,at 93. This argument ignores the importance of §921.141(7), Fla.Stat. as a statutorily mandated exclusion of the "victim impact" evidence specifically introduced here.

As evident from the Record, the prosecutor indicated that the victims were testifying as to the robbery count only. R,1461,1463. This was the only limited type of "next of kin" testimony Appellant's counsel agreed to. R,1461-1462. This appears to reflect at least an implied objection by defense counsel to any other kind of victim impact testimony, as

represented by the prosecutor's statements about this limited stipulation. R,1461-1462.

Furthermore, the exclusion of any evidence constituting "characterizations and opinions about the crime, the defendant, and the appropriate sentence" became a legislative mandate as of July 1, 1992, seven months before Appellant's sentencing proceeding. Laws of Florida, Chapter 92-81, §1; §921.141(7), Fla.Stat. (1992); State v. Maxwell, 647 So.2d 871, 872 (Fla. 4th DCA 1994); see also Maxwell v. State, Case No: 85,074; Fla. Supreme Court[2]. The language of this statutory exclusion is unequivocally mandatory. §921.141(7). As such, the trial judge's failure to follow this mandate was reversible error, effectively resulting in an "illegal" sentence that should not be subject to the contemporaneous objection rule. State v. Snow, 462 So.2d 455, 4457 (Fla. 1985)(when trial court failed to make particularized findings to support retention of jurisdiction, §947.16(3)(a), Fla.Stat., error was deemed reversible whether or not objection made at trial); Walker v. State, 462 So.2d 452, 454 (Fla. 1985)(same, when trial court failed to make findings as required for habitual offender under §775.084; State v. Rhoden, 448 So.2d 1013, 1016, 1017 (Fla. 1984)(same, when trial court failed to make necessary statutory findings to sentence juvenile as an adult). This error is clearly apparent within the Record.

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[2]This case is pending before this Court on a certified question of whether the section of §921.141(7) which allows other categories of victim impact evidence is Constitutional. State v. Maxwell 647 So.2d, supra, at 873.

Taylor v. State, 601 So.2d 540, 542 (Fla. 1992). The unequivocal statutory exclusion of the opinions expressed here about Appellant and the death penalty, IB,at 85; R,1464-1468, compels the additional conclusion that this error was fundamental, "basic to" this case and a denial of due process. State v. Johnson, 616 So.2d 1, 3 (Fla. 1993).

Appellant is mindful of the fact this Court has previously regarded this error as harmless, if the evidence was heard only by the judge. e.g. Colina v. State, 634 So.2d 1077, 1082 (Fla. 1994); Davis v. State, 586 So.2d 1038, 1041 (Fla. 1991). However, the trial judge here did not indicate at the time of the testimony that he would not consider it in sentencing (compare Colina, 634 So.2d, at 1082, where the trial court therein did so state at time of testimony). Furthermore, the enactment of §921.141(7) and its mandatory terms strongly suggest that a failure to exclude this evidence cannot be considered harmless. The impact of such inadmissible testimony on one "co-sentencer", Espinosa, 112 S.Ct., at 2929, is not reduced merely because not presented or heard by the other "co-sentencer" in a Florida capital sentencing proceeding. Id; see also Glock, 36 F.3rd, supra at 1025.

Furthermore, with all due respect, continued application of "harmless error" when only the judge hears such testimony will result in the "exception swallowing the rule", to the point where §921.141(7) will be meaningless. The trial court judge could not "unring the bell" rung here by this emotional appeal by the

victims' families for death, to a significantly greater degree than a jury could, such that the error should be considered harmless. Geralds.

XVI.
IMPOSITION OF DEATH PENALTY WAS DISPROPORTIONATE PUNISHMENT, AND SHOULD BE REDUCED TO LIFE IMPRISONMENT BASED ON COMPELLING SUBSTANTIAL AND UNDISPUTED EVIDENCE IN MITIGATION

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 88-95. Appellant further relies on this Court's recent decision in Chaky, 20 Fla.L.Weekly, supra, at 108-109, to support his position that his death sentence is disproportionate.

XVII.
TRIAL COURT ERRED IN CONCLUDING THAT AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATING CIRCUMSTANCES, REQUIRING REDUCTION OF SENTENCE TO LIFE IMPRISONMENT

Appellant relies on the arguments and authorities in his Initial Brief at ppg. 95-98.

CONCLUSION

Based on the foregoing arguments and authorities, and those contained in his Initial Brief, Appellant respectfully requests that this Court REVERSE Appellant's convictions for first-degree murder and robbery with a firearm and remand for a new trial. Appellant further requests that this Court VACATE the sentence of death imposed on Appellant and remand the proceedings for a new

sentencing proceeding and/or to impose a sentence of life imprisonment on Count I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Reply Brief has been furnished by MAIL DELIVERY to: SARA BAGGETT, Florida Attorney General's Office, 1655 Palm Beach Lakes Blvd., Suite #300, West Palm Beach, FL 33401, this 22nd day of MARCH, 1995.

RICHARD G. BARTMON, ESQ.

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