IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY FERRELL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,668

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On May 11, 1992, the grand jury in and for Orange County, Florida returned an indictment charging Appellant, Jack Dempsey Ferrell, with one count of first degree murder in violation of Section 782.04(1)(a)1, Florida Statutes (1991). (R175) On July 1, 1992, defense counsel filed a motion for appointment of co-counsel. (R201-202) Following a hearing, the motion for appointment of co-counsel was denied. (R209;SR5-6) Appellant filed several pretrial motions attacking the constitutionality of the death penalty including one which contended that the aggravating circumstances and the mitigating circumstances were overbroad and vague. (R252-256) Appellant also filed a motion to empanel a second jury for purposes of sentencing. (R224-225) This motion was denied. (R8)

Appellant proceeded to jury trial on February 1-4, 1993, with the Honorable Daniel P. Dawson, Circuit Judge,

presiding. (RT1-827) Appellant moved in limine prior to the commencement of trial to prevent the state from eliciting evidence of other bad acts on the part of the defendant. (T214-215,377-387) The Court ruled that this evidence was relevant to show premeditation and that the relevance outweighed any undue prejudice. (T215,383) Defense counsel further objected on numerous occasions when reference was made to the other bad acts. (T407,426,446,615-616,725) At the conclusion of all the evidence Appellant moved for a mistrial based on the totality of the prejudice caused by the numerous references to the prior bad acts. (T741-742) The trial court denied this motion. (T742) Following deliberations, the jury returned a verdict finding Appellant guilty of first degree murder as charged. (T826;R530)

On March 9, 1993, the jury reconvened for the penalty phase. (R27-138) The trial court denied Appellant's requested jury instructions regarding mitigation. (R37-38,538-539,572-573) Following deliberations, the jury returned an advisory recommendation that Appellant be sentenced to death by a vote of ten to two. (R130,575) Defense counsel filed a written memorandum of law in support of the imposition of a life sentence. (R577-582)

On April 21, 1993, Appellant again appeared before Judge Dawson for sentencing. (R139-161) The court first sentenced Appellant as an habitual violent felony offender on an unrelated charge to a term of thirty years in prison with the minimum mandatory ten years. (R151) The trial court then

sentenced Appellant to death for the murder conviction finding one aggravating factor and seven mitigating factors. (R152-159, 583)

Appellant filed a timely Notice of Appeal on April 26, 1993. (R593) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R592)

STATEMENT OF THE FACTS

AS TO THE GUILT PHASE:

Appellant and Mary Esther Williams lived together. (T435,454,591) The relationship between Appellant and Ms. Williams was quite volatile involving numerous arguments and nearly constant drinking on the part of each. (T424,446,449, 462-463,591-592)

On the evening of Friday, April 17, 1992, after Appellant got off work, he and Ms. Williams began drinking. (T593-595,465) When they got up the next morning they both began to drink again. (T595-596) The neighbors heard an argument between Appellant and Ms. Williams on Saturday morning but paid little attention to it since arguing was a common occurrence. (T435-436,465) Willie Cartwright, who lived in the same apartment building as Appellant, testified that on that Saturday morning, she observed Appellant go in and out of the apartment several times while she watched her T.V. (T435) At about noon, Ms. Cartwright went outside and observed Appellant drive up in his car, park it, and come across the courtyard. (T435) Appellant had a little plant in his hand which Ms. Cartwright figured he was taking to Ms. Williams to make up for the argument she had heard earlier. (T435-436) Ms. Cartwright had no conversation with Appellant that morning and although she never saw him with alcohol, Appellant had red eyes as if he had been drinking. (T442) Mary Wallace, another neighbor, also saw Appellant that morning and also heard the argument between

Appellant and Ms. Williams. (T456-457) Neither Ms. Wallace nor Ms. Cartwright heard any gunshots that morning. (T443,459) Ms. Cartwright first learned that Ms. Williams had been shot when Appellant came downstairs and told her she had better call the police because he had just killed his "old lady" upstairs. (T443) Appellant then went straight to his car and drove away. (T444) Ms. Wallace went up to Appellant's apartment and knocked on the doors and windows but got no response. (T460) She told Ms. Cartwright to call 911 which she did and the ladies waited for the police to arrive. (T460,448)

Ms. Cartwright testified that approximately one week before Ms. Williams was shot Appellant told her that he had "killed one bitch and he would do it again." (T446) Appellant also said that if he went back to prison he wouldn't be coming back this time. (T447) A friend of Appellant's, Frank McCollom, testified that approximately ten days before Ms. Williams was shot, Appellant came to him very drunk and very upset and told him he was going to kill Ms. Williams and go back up north. (T419) Months before this incident, Appellant had asked McCollom if he knew where he could get a gun. (T419) When McCollom asked him why he needed a gun, Appellant said he was going to kill Ms. Williams because they had had a fight and he was mad at her. (T419-420) McCollom did admit that during these occasions when Appellant threatened to kill Ms. Williams, he was very intoxicated and the threats were usually in response to a fight between Appellant and Ms. Williams. (T424)

The police arrived in response to a call of a reported shooting. (T469) When the first officer entered the apartment building, he saw a body on the northern-most bedroom floor lying face up. (T470) The officer identified himself and asked if the woman was okay but got no response. (T470) The officer detected shallow breathing but was unable to get any response out of her. (T470) The victim, identified as Mary Esther Williams, was admitted to the hospital with a gunshot wound and died ten days later. (T529) When Ms. Williams was admitted into the hospital she had a blood alcohol level of .299. (T530) An autopsy was performed on Ms. Williams on April 29, 1992. (T529) There were two head injuries consistent with gunshot wounds. (T531) One was an entrance wound from a bullet on the right side of the head approximately one inch in front of the right ear and on level with the mid portion of the right eye. (T531) This wound penetrated the base of the skull and the bullet was recovered. (T531) The second area was a gunshot wound of the left forehead at the hairline with the wound penetrating the scalp but not producing any injury to the skull itself. (T531) There was also an exit wound further back on the head. (T532) There was an additional entrance gunshot wound to the middle joint of the left index finger which the bullet passed from the back of the hand to the palm surface. (T532) The cause of death was determined to be an injury to the brain associated with hemorrhaging that was produced by the penetrating wound to the head as a result of a gunshot wound. (T538) Both wounds to the head were made from

someone located in front of the victim. (T542)

Appellant was arrested when he was pulled over in his car on April 18, 1993. (T513) When Appellant was stopped, the police also seized a gun which was sitting on the right front seat next to the driver's thigh. (T516) When Appellant was arrested there was a slight smell of alcohol about his person and he was extremely quiet. (T519) Appellant was very cooperative during his arrest. (T522) Investigator Robert Mundy responded to the scene and took statements from Willie Cartwright, Mary Wallace, and Frank McCollom. (T556) Following this he issued a be on the look out (BOLO) for Appellant or his car. (T556) Following Appellant's arrest, Mundy met with him at the Orange County Jail and read him his Miranda rights. (T557) Appellant understood all the rights and agreed to talk and gave a taped statement. (T558) At the time of the statement, Ms. Williams was not dead. (T560) In the statement, Appellant admitted that he and Ms. Williams had been drinking and got into an argument. (R498-500) During the argument, Appellant was taking his gun out of his pocket to put in his drawer and Ms. Williams pushed him causing him to fall back and raise his hand up and the gun went off. (R500) Appellant wasn't sure but he believed the gun may have fired twice. (R500) Appellant got scared and ran out the door and told the neighbors downstairs to call an ambulance. (R502) Appellant then proceeded to get into his car and drive to Winter Park where he began drinking at a bar. (R502) Appellant stated that he didn't intend to shoot Ms. Williams and was sorry

that it happened. (R503-505) An expert in firearms testified that she examined the gun in question and determined there was no way the gun could fire accidentally twice without the person pulling the trigger. (T583)

Appellant testified that he and Ms. Williams had been living together for approximately sixteen or seventeen months and planned to be married in August of 1992. (T591) Appellant testified that he drank every day both before he went to work and after he got home from work. (T591-592) Appellant drank about one-half gallon of Fleischman's gin every night. (T592) Ms. Williams would often drink with him. (T592) Appellant and Ms. Williams had one fight when they were drinking which resulted in each of them giving the other a black eye. (T592) Appellant worked on Friday, April 17th and got off work at approximately 2:30 p.m. (T592) Appellant cashed his check and bought a pint of gin which he and a friend drank. (T593) Appellant then bought another half gallon of gin and went home. (T592) After running some errands, Appellant and Ms. Williams arrived home at approximately 5:00 p.m. and began drinking. (T594) No arguments transpired that night between them. (T594) Ms. Williams went to bed at approximately 11:00 p.m. but Appellant continued to drink straight gin. (T595) Appellant fell asleep around 3:00 a.m. and woke up at 6:00 a.m. and started drinking again. (T595-596) When Ms. Williams got up she also started drinking and at 9:30 a.m. Saturday morning, Appellant went to a bar to get more liquor. (T596) At approximately 11:00 a.m. Ms. Williams' mother

and a friend came to their house. (T596) They stayed for approximately forty-five minutes and left to go to Morrison's to eat. (T596) Appellant and Ms. Williams discussed going to the laundromat but Ms. Williams did not want to go. (T597) Appellant wanted her to come along to keep him company but since she said no Appellant told Ms. Williams it was okay. (T597) Appellant loaded the clothes into the trunk of his car and while doing so observed a gun in a box in the trunk of his car. (T597) Appellant put the gun in his pocket and was going to put it in a chest of drawers. (T599) Appellant walked into the bedroom and had the gun in his right hand pocket and had cigarettes, lighter and keys in the other pocket. (T599) Appellant reached into his pocket to take his cigarettes and keys out and just as he pulled out his gun he observed a hand coming at him. (T602) Appellant flinched and stuck the gun up. (T602) The next thing Appellant knew, Ms. Williams was falling to the floor. (T602) Appellant tried to catch her but she fell on her face. (T602) Appellant panicked and left the apartment. (T603) Appellant went downstairs and told the people down there to call the police and the ambulance and then he left. (T603) He thought about Ms. Williams' mother and tried to find her to tell her what had happened. (T603) Appellant went to Winter Park but could not find Ms. Williams' mother. (T603) Appellant was scared and something told him he needed a drink. (T603) Appellant called the hospital to see how Ms. Williams was but they would give him no information so Appellant just went to a bar and drank beer and

whiskey. (T603) Appellant was on his way to give himself up to the police when he was stopped. (T604) Appellant stated he did not intend to kill Ms. Williams. (T604) Appellant further testified that he drank every day but that he never missed work because of drinking. (T608) Appellant denied ever telling Frank McCollom that he wanted to shoot Ms. Williams. (T612-614) Appellant admitted that he told Willie Cartwright that he had killed one bitch and would kill another but he was not referring to Ms. Williams. (T617) Appellant stated that when he told Ms. Cartwright that when he returned to prison he would not be coming back he was referring to the fact that he had lost a kidney and would probably die in prison. (T617)

Dr. James Upson, an expert in the field of neuro-psychology and forensic psychology examined Appellant on three separate occasions for a total of approximately ten hours. (T662) Appellant has an IQ of eighty which places him in the low normal to borderline range of intelligence in the bottom six or seven percentile. (T664) Appellant is not too bright but he is neither psychopathic nor psychotic. (T664) His achievement levels are in fact higher than expected which means he has used his abilities fairly well. (T665) After administering a whole series of psychological tests to Appellant, Dr. Upson concluded that Appellant suffered from brain damage and in particular frontal lobe impairment. (T667-679) In describing the events of the shooting to Dr. Upson, Appellant became tearful and felt very guilty about what happened. (T680-681) Dr. Upson testified that

prolonged alcohol use leads to a deterioration of the frontal area of the brain. (T682) Appellant showed signs of frontal lobe damage. (T683) Dr. Upson concluded that Appellant's brain damage and his continued alcohol abuse caused behavioral changes. (T684) Appellant suffered mental problems at the time of the shooting and Dr. Upson's opinion was that his ability to plan and conduct his behavior in a consistent fashion was diminished. (T688) When Appellant drinks he often gets impulsive. (T688) While the testing does not indicate that Appellant's brain damage is a result of drinking, Appellant had no other source such as head injury. (T696) In making his diagnosis, Dr. Upson considered Appellant's prior drinking habits, his prior work history, and prior observations by others about Appellant's behavior. (T725) Dr. Upson also considered the fact that Appellant had spent time in prison in the past for a murder he committed. (T725) Dr. Upson was aware that Appellant had spent seven and one-half years in prison during which time he was not drinking. (T727) Normally this previous murder conviction and incarceration would have had an effect on Appellant's ability to control his impulses if he did not use alcohol. (T730) However, the use of alcohol counteracts this experience. (T730) Although Dr. Upson concluded that Appellant was capable of knowing right from wrong, he was uncertain whether Appellant was able to appreciate the criminality of his act. (T734) Appellant's actions following the murder of telling someone to call the police because he had just killed someone is not an indication of

a very good planned event. (T735) The problem with impulsive behavior such as Appellant's, is that he loses cognitive control when he drinks and impulses simply take over. (T745) Appellant uses alcohol as a self medicator to alleviate stress and anxiety. (T744) Dr. Upson does not believe that Appellant planned to kill Ms. Williams but rather an argument ensued and Appellant just shot her. (T744)

AS TO THE PENALTY PHASE:

The state presented testimony of several witnesses regarding a prior murder committed by Appellant. (R45-75) In 1981, Appellant and several other men were involved in a card game. (R62) Appellant approached a car in which Bertha Mae Lane and two men were sitting. (R61) Appellant shot Ms. Lane in the chest and head eight times. (R56) Appellant was arrested approximately fifteen minutes after the shooting and was very cooperative with the police. (R58,70) When the police interviewed Appellant he asked them "I just want to ask you one thing, is the bitch dead" to which the police replied yes and Appellant replied "Good. I wanted to kill her." (R53,69) Grady Ayers prosecuted Appellant for the murder of Bertha Mae Lane. (R72) Although Appellant had given a statement saying the victim had threatened him with a knife, there was no evidence of self-defense. (R73-74) Ayers agreed to allow Appellant to enter a plea of guilty to second degree murder mainly because Appellant had no prior criminal record. (R72-75)

Dr. Upson reviewed Appellant's prior prison records

from 1980 through 1987 and determined that Appellant would function very well in a controlled setting such as a prison. (R80) There were no instances of Appellant being involved with violence while he was in prison. (R80) Dr. Upson does not believe Appellant is a dangerous individual so long as he is in a controlled setting. (R81) Dr. Upson also believed that Appellant was under the influence of extreme mental or emotional disturbance at the time of the shootings and this is based on his observances that Appellant has brain damage probably induced from his long history of alcoholism and had a volatile relationship with the victim. (R82) Dr. Upson believed that when Appellant drinks heavily his judgment is critically impaired and his behavior is impulsive. (R82) During these times Appellant is incapable of making rational decisions. (R82) Appellant's alcohol consumption aggravates his brain damage and makes it very difficult for him to conform his behavior to that required by law. (R82-83) While Appellant was never legally insane, he wasn't capable of thinking and acting rationally. (R83) Two of Appellant's employers testified that Appellant was very dependable and got along well with his coworkers. (R90,96) Appellant was an excellent hard worker and never had any problems with intoxication at work. (R91,97) His employer was aware of the circumstances of the instant case and of the prior 1981 murder. (R91)

Frankie Moore has known Appellant for twenty-eight years and lived with him and his wife for a while. (R100)

Appellant always worked and helped Ms. Moore in the past when she separated from her husband. (R101) Ms. Moore stated that when Appellant drinks he is a changed man but when he is not drinking he is very nice. (R102)

SUMMARY OF THE ARGUMENTS

POINT I: The trial court erred in permitting the state to present testimony concerning prior criminal acts on the part of Appellant. The state failed to give proper notice of intent to offer such testimony, the testimony was not relevant to any issue at trial and any probative value was greatly outweighed by the enormous prejudice of such evidence.

POINT II: The trial court erred in denying defense counsel's motion for appointment of co-counsel. By their very nature capital cases are extraordinary and unusual. The constitutional right to effective assistance of counsel can only be met by appointment of co-counsel in capital cases.

POINT III: The trial court committed reversible error by refusing to instruct the jury during the penalty phase on correct statements of the law as requested by defense counsel. These requested instructions were accurate statements of the law, were particularly applicable to the facts of the instant case and were not covered by the standard instructions.

POINT IV: The trial court's findings of fact in support of the death penalty are totally deficient in that they fail to list the mitigating factors found by the trial judge and the weight assigned thereto. The oral statements of the trial court at sentencing are equally deficient in that they are so vague as to what was found in mitigation that meaningful appellate review is impossible. Florida law requires a sentence of life imprisonment where a death sentence is not supported by

specific written findings of fact.

POINT V: Mr. Ferrell's sentence of death violates the Eighth and Fourteenth Amendments and Florida law because it is a disproportionate sentence in comparison with other similar cases. The death sentence rests upon a finding of a single aggravating circumstance and at least seven mitigating factors. This Court has never affirmed a death sentence solely on the finding of the aggravator present in this case when there was so much mitigation also present. No intent-laden aggravation was proved, like cold, calculated or premeditated or heinous, atrocious and cruel. Thus, this case presents the issue of whether death is proper when extensive evidence in mitigation balances against meager findings in aggravation. Appellant asserts that it is not.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE, OVERRULING HIS OBJECTIONS, AND DENYING HIS MOTION FOR MISTRIAL AND ALLOWING INTO EVIDENCE TESTIMONY OF A COLLATERAL CRIME, THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Prior to the jury being sworn, defense counsel made a motion in limine to prevent the state from eliciting evidence that Appellant in the past had stated, "I killed one I'll kill another." (T214-215) The basis for the objection was that no Williams Rule notice had been given and that the statements were unduly prejudicial. The state replied that these were not Williams Rule and thus no notice was required. (T214-215) The court initially held that these were admissible to show premeditation. (T215) Subsequently, and again before the jury was sworn, the state explained the full context of the statements of Appellant that they were going to be seeking to admit. (T377-387) The statements were first "I've killed one bitch and I will kill another" and the second "When I go back to prison I won't be coming back this time." (T377-378) The state's argument was that these statements were admissible to rebut the defense of accidental discharge or self-defense and to show premeditation. The defense objected and said while they may have some relevance the prejudice was overwhelming and outweighed any probative value these statements would have. The court ruled that the statements

were relevant to show premeditation and further held that the relevance outweighed any undue prejudice and denied the defense motion in limine. (T383-384) The court ruled that it would give a limiting instruction if the defense requested it. (T385) Thereafter, defense counsel objected on numerous occasions to the admission of such statements. (T407,426,446,615-616) Additionally, the state was permitted over objection to elicit from Dr. Upson the fact that Appellant had previously been convicted of murder and spent time in prison. (T634-654,725-730) Appellant also moved for a mistrial towards the end of trial based on the cumulative effect of the numerous times the state was permitted to elicit evidence of the prior murder. (T741-742) After each objection and/or motion, the trial court denied relief, although on one occasion the trial court did give a limiting instruction. (T446) Appellant asserts that the admission of this evidence was erroneous for several reasons.

First, during defense counsel's original motion in limine, counsel argued that no notice had been given by the state of its attempt to offer evidence of other crimes. The state's sole response to this argument was that no notice was required. This is incorrect. Section 90.404(2), Florida Statutes (1991) provides that similar fact evidence of other crimes or bad acts is admissible under certain conditions. However, Subsection (b)1 of this section provides as follows:

> When the state in a criminal action intends to offer evidence of other criminal offenses under Paragraph (a), no fewer then 10 days before trial, the

> state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

(Emphasis added). In the instant case, the statements sought to be admitted by the state clearly refer to a prior crime. By the state's own argument, they were using it to prove premeditation. In response to defense counsel's argument that no notice was given, the state merely responded that notice was not required. The trial court, apparently accepting this reasoning, held that the evidence was "otherwise admissible" and therefore no notice was necessary. The statement "I killed one bitch" is certainly Williams Rule evidence and subject to the notice requirement. When a trial court is alerted to the failure of the state to comply with the notice requirement, it is incumbent upon the trial court to hold a hearing much the same as if a discovery violation is alleged. This view was approved by the First District Court of Appeal in Distefano v. State, 526 So.2d 110 (Fla. 1st DCA 1988), wherein the court adopted a similar requirement for a defective notice of evidence as they do for a violation of the state's discovery obligation. In the instant case no hearing was conducted on this aspect. Therefore, just as this Court has held in discovery violation cases, the failure to hold a hearing is per se reversible error. Richardson v. State, 246 So.2d 771 (Fla. 1971).

Second, the statement concerning the prior murder is

totally inadmissible. The fact of a prior murder in no way proves or even tends to prove a material fact in issue in the instant case. This view was taken by the defense counsel when he suggested the statement should, at the very least, be redacted so that only the second part was admissible as tending to show intent. The instant case is the converse of the situation presented in Swafford v. State, 533 So.2d 270 (Fla. 1988). Swafford was charged with killing a woman in Daytona Beach. The state presented evidence that two months following this murder, Swafford suggested to another individual that they "go get some women." During the discussion during what could possibly occur Swafford told his companion that if anything happened they would just shoot the woman. When his companion asked if that didn't bother him Swafford replied "It does for a while, you know, you just get used to it." In holding such statements admissible, the court noted that this tended to prove that Swafford had previously committed the murder just two months before in Daytona Beach. The instant case involved a statement made before the murder for which Appellant was on trial and concerned a completely separate unrelated crime nearly ten years previous to the instant case. Similarly, the instant case did not involve a situation wherein the fact of the first murder was so inextricably wound up with the subsequent murder that to try to separate them would have been unwieldy and likely to lead to confusion. See Henry v. State, 574 So.2d 66 (Fla. 1991). Simply put, the statements concerning the prior commission of a murder

and the prior incarceration in prison were totally irrelevant and thus inadmissible.

Third, even if these statements had some marginal relevance, such relevance was greatly outweighed by the enormous prejudice which accrued because of them. In this regard the statements should have been held inadmissible under Section 90.403, Florida Statutes (1991). This was not a situation where the statements were admitted briefly and then no further mention made. Rather, as noted by defense counsel in his motion for mistrial, the state elicited the same comments or made comment upon these statements no fewer than eleven times during the course of the trial. Thus, the danger that the jury would be swayed to convict Appellant not on the evidence of the instant offense but rather because of this prior offense was greatly enhanced.

This Court has clearly held that the erroneous admission of irrelevant collateral crimes evidence is presumed harmful error because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged. Castro v. State, 547 So.2d 111 (Fla. 1989); Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022 (1981). In determining whether such error could be harmless, it is not enough to show that the evidence against Appellant was overwhelming. Rather, the error can be harmless only if it can be said beyond a reasonable doubt that the verdict could not have been affected by

the error. Castro, supra at 115. On this record, the error cannot be deemed harmless. The evidence before the jury showed that Appellant and Ms. Williams were involved in an often volatile relationship wherein both parties drank excessively and argued. There is no physical evidence to contradict Appellant's version that the killing was accidental. Thus, the fact that Appellant has previously been convicted of a murder could certainly have been the deciding factor in arriving at Appellant's guilt of first degree murder in the instant case. A new trial is required to correct this error.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO APPOINT CO-COUNSEL.

Defense counsel filed a motion to appoint co-counsel in the instant case. (R201-202) The grounds for such motion were that the issues in the case were complex and inasmuch as defense counsel had to prepare for both guilt and penalty phases assistance was necessary to alleviate the burden. At the hearing on the motion, the trial court denied it. (SR5-6) Appellant asserts that this ruling was erroneous.

The Federal and Florida Constitutions ensure to an accused the right to effective assistance of counsel. In the criminal justice system there is no more complex litigation than death penalty litigation. This Court has recognized that capital cases by their very nature are extraordinary and unusual. White v. Board of County Commissioners of Pinellas County, 537 So.2d 1356 (Fla. 1989). Because of the unusual and complex nature of such litigation, the ABA Guidelines for Selection and Performance of a Appointed Counsel in Death Penalty Cases unequivocally call for at least two attorneys to represent a capital defendant at each stage of a capital case. Both attorneys must be qualified to practice at that stage of litigation. ABA Guideline 2.1. Additionally, and as pointed out by counsel below, the state has allocated resources to assure that they were represented by more

than one attorney. Basic fairness and due process require that an accused be afforded the same rights. In the instant case defense counsel was clearly concerned about his performance as he alerted the trial court to the possibility that a motion for post conviction relief attacking his competence would be filed somewhere down the road. The trial court denied the motion for appointment of co-counsel stating only that he could see no extraordinary need for such appointment. It is submitted that the trial court's observation simply misses the point. By their very nature, death penalty cases are complex. The investigation and presentation of mitigation evidence is crucial since the stakes are so high. One attorney, particularly an appointed counsel in private practice, cannot afford either the time or the resources to adequately discharge his duties to his client. Undersigned counsel invites this Court to adopt a rule requiring two attorneys be appointed in all capital cases. Such a rule would ensure that an accused defendant facing the ultimate penalty receives all the rights and protection afforded him by the Constitution. The failure of the trial court in the instant case to grant the motion to appoint co-counsel was clearly error which requires reversal of Appellant's sentence and conviction and a remand for a new trial.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIAL REQUESTED JURY INSTRUCTION IN THE PENALTY PHASE.

Appellant filed written requests for numerous special jury instructions at the penalty phase. (R295-305,572-573) The trial court denied all of the requested instructions. Appellant contends that the trial court committed reversible error in denying Proposed Instruction Numbers 2 (R296), 11 (R305), 12 (R572) and 13 (R573).

Due process of law applies "with no less force at the penalty phase of the trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978). The need for adequate jury instructions to guide the recommendation in capital cases was expressly noticed in Gregg v. Georgia, 428 U.S. 153, 192-3 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law .... When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries by carefully and adequately guided in their deliberations.

The instructions given in this case were far from adequate to avoid the constitutional infirmities that inhered in death sentences imposed under the pre-Furman statutes. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the inadequately instructed jury's recommendation.

All of the rejected instructions recited in the preamble to this point were correct statements of the law and were applicable to Appellant's case. The standard instructions did not clearly tell the jury that the death penalty is reserved only for the most aggravated and least mitigated of all first degree murders. [Proposed Instruction #2]. The jury was never informed that the jurors had to individually consider the evidence presented in mitigation regardless of the views of the fellow jurors. [Proposed Instruction #11]. While the jury was told what constitutes an aggravating circumstance they never were adequately informed as to what a mitigating circumstance was and how the jury was to consider the evidence presented in mitigation. [Proposed Instruction #12]. Finally, although the jury was given the catch-all instruction on mitigation, the Proposed Jury Instruction Number 13 delineated the nonstatutory mitigators which were present in the instant case and which have been found by this Court to in fact be mitigating factors. As it was, the jury was left with just a vague statement that any other aspects of Appellant's character could be considered in mitigation. This does not meet the criteria for having specific individualized jury instructions tailored to the case.

Contrary to the trial court's assertion, the standard jury instructions did not cover these specially requested instructions. Florida Rule of Criminal Procedure 3.390 provides that the presiding judge shall charge the jury upon the law of the case. Unfortunately, Appellant's jury was never adequately instructed. Hence, Appellant's death sentence is constitutionally infirm.

POINT IV

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION AS WELL AS SECTION 921.141(3), FLORIDA STATUTES (1991), THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE WITHOUT MAKING THE REQUISITE FINDINGS OF FACT TO SUPPORT THE SENTENCE IN WRITING AS REQUIRED.

The penalty phase of Appellant's trial was conducted on March 9, 1993. (R27-138) On March 31, 1993, defense counsel filed a memorandum of law in support of a life sentence. (R577-582) On April 21, 1993, Appellant appeared before Judge Dawson for sentencing. (R139-161) Appellant was sentenced to death by Judge Dawson. The written findings of fact in support of the death penalty filed the date of sentencing, reflect a finding of a single aggravating circumstance and then the conclusory statement that the court has carefully weighed the aggravating circumstance as well as the circumstances presented in mitigation and the court found that the aggravating circumstance outweighs the mitigating circumstances. (R583) At the sentencing hearing, the trial court recited the mitigating factors urged by the defense counsel. (R156-157) Appellant asserts that the findings by the trial court are totally deficient to afford any kind of meaningful review by this Court and therefore the sentence of death must be vacated and the cause remanded with instructions to sentence Appellant to life.

Section 921.141(3), Florida Statutes (1991), provides

in pertinent part:

> ... [I]f the court imposes a sentence of death, it shall set forth in writing its finding upon which the sentence of death is based as to the facts ... In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in Subsections (5) and (6) and upon the records of the trial in the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment...

(Emphasis supplied).

This Court has dealt with this particular issue in Van Royal v. State, 497 So.2d 625 (Fla. 1986). The Van Royal trial judge entered its written finding as to aggravating and mitigating factors approximately five weeks after the record on appeal was filed with this Court. This Court was satisfied that the trial court's oral pronouncement of the death sentence was sufficient to supply jurisdiction in this Court. However, this Court found that the death sentence could not be sustained since there were no specific findings of fact to support the death sentence which this Court could review. In so ruling, this Court distinguished previous decisions in Cave v. State, 445 So.2d 341 (Fla. 1984), Ferguson v. State, 417 So.2d 639 (Fla. 1982), and Thompson v. State, 328 So.2d 1 (Fla. 1976) where the records on appeal in those cases also did not contain separate written findings of fact on which the death sentences were based. However, in each of those cases this Court was satisfied that the trial court had indeed made specific findings of fact on the

record at the sentencing proceedings so as to comply with the statute. This Court revisited Van Royal and reaffirmed its holding in Bouie v. State, 559 So.2d 1113 (Fla. 1990). In reversing the death sentence in Bouie, this Court held that there was no indication of which aggravating circumstances and which mitigating circumstances, if any, were deemed applicable by the trial court. This Court noted that neither the oral nor the written findings recite any facts upon which the trial judge based his decision to impose death. Because of the absence of these requisite findings, this Court once again reversed a death sentence and remanded for imposition of a life sentence for Mr. Bouie.

In the instant case, the written findings of fact are totally deficient. There is no recitation at all concerning the mitigating evidence and factors deemed applicable. The oral pronouncements are equally deficient in that they merely recite those factors urged by the trial counsel and do not make any determination as to whether the trial court in fact found them to be mitigating circumstances. Certainly the finding of fact to support the mitigating factors is completely missing from the record on appeal. While we do know that the trial court concluded that the single aggravating circumstance outweighed the mitigating circumstances, without the precise findings of fact, there is no way for this Court to review in any meaningful fashion the propriety of the trial court's sentence. Therefore, under Van Royal and its progeny, Appellant's death sentence must

be vacated and the cause remanded for imposition of a life sentence.

POINT V

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In imposing the death penalty, Judge Dawson found that the state had proved one aggravating circumstance that Appellant had previously been convicted of another felony involving the use or threat of violence to a person. Section 921.141(5)(b), Florida Statutes (1991). This aggravating circumstance was based on Appellant's previous conviction for second degree murder in 1981. (R155,583) In mitigation the trial court listed seven factors which were urged by the defense. (R156-157)[1] Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and

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[1] In its written findings of fact, the trial court makes no mention of any mitigating factors. During the sentencing hearing the trial court did list the factors which were urged to be considered by trial counsel. However, as argued previously in Point IV, supra, the findings of fact are deficient to afford any meaningful appellate review and thus, Appellant's death sentence cannot stand.

unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973), cert. denied sub nom., 416 U.S. 943 (1974). See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Appellant's case is neither "most aggravated" nor "unmitigated." Indeed, it is the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in ... substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," Fitzpatrick, 527 So.2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

First, this case is not "most aggravated." No aggravating circumstance relating to intent, or indeed, to any aspect of the offense was found by the sentencer, only that Appellant had a prior conviction for a violent felony. "[T]he aggravating circumstance of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent."

Fitzpatrick, 527 So.2d at 812.[2] To the undersigned's knowledge, this Court has affirmed a death sentence when the only aggravating circumstance present was the prior conviction of a felony involving violence on a single occasion involving a single murder. See Duncan v. State, 619 So.2d 279 (Fla. 1993).[3]

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, 527 So.2d at 812. Three statutory and four nonstatutory mitigating circumstances were discussed by the sentencing judge, and were supported by abundant testimony.[4] The statutory mitigating circumstances alone render the death sentence disproportionate. That Appellant's ability to conform his conduct to that required by law and his extreme emotional and mental disturbance is amply supported by the evidence presented both at trial and penalty

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[2] These are Florida's most serous aggravating circumstances, and truly define "the most aggravated, the most indefensible of crimes." Dixon, 283 So.2d at 8. Heinous, atrocious, or cruel, as an aggravating circumstance, intuitively, and in fact, plays a substantial role in the affirmance of Florida death sentences. Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller," 13 Stetson L.Rev.523 (1984). Eighty-two percent of death sentences in Florida involved a finding of heinous, atrocious, or cruel, and sixty-eight percent involve cold calculated and premeditated. Radelet, Rejecting the Jury: The Imposition of the Death Penalty in Florida, 18 U.C Davis L.Rev. 1409, 1418 (1985).

[3] The aggravating circumstance of prior violent felony conviction does exist in cases affirmed by this Court, but always in addition to other sustained aggravating circumstances.

[4] Of these mitigating factors discussed by the trial judge there is no way of determining what weight the trial court assigned to them. This highlights the deficiency of the findings by the trial court since there is no way for this Court to offer meaningful appellate review.

phases. Dr. Upson gave his opinion which was uncontradicted that Appellant suffered some mental impairment and frontal lobe damage due to his severe alcoholism. It was Dr. Upson's testimony that Appellant could not form the requisite intent for first degree murder. While the jury obviously disregarded this aspect in finding Appellant guilty of first degree murder, this evidence must be considered in mitigation since it is unrebutted.

Without question, this case is not a proper one for capital punishment. It cannot fairly be compared with other cases reversed by this Court, because, as noted, none has ever been this mitigated and non-aggravated. A look at reversal on proportionality grounds does, however, reveal that since more aggravated and less mitigated cases than Appellant's are not proper for the ultimate penalty, surely Mr. Ferrell must be spared.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court accepted the sentencing judge's findings of five statutory aggravating circumstances, including those that showed culpable intent (pecuniary gain/arrest avoidance). Mr. Fitzpatrick had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot the officer while holding three persons hostage with a pistol in an office; Mr. Ferrell was not engaged in the commission of a felony at the time of the offense. Mr. Fitzpatrick had been previously convicted of violent felonies, as has Mr. Ferrell. Mr. Fitzpatrick established the existence of three statutory mitigating circumstances -- extreme

mental or emotional distress, substantially impaired capacity to conform conduct, and age. Id. at 811. Mr. Ferrell established these also. Mr. Fitzpatrick's crime was significantly more aggravated than Mr. Ferrell's, yet this Court found Mr. Fitzpatrick's actions to be "not those of a cold-blooded, heartless killer," since "the mitigation in this case is substantial." Id. at 812.

Moving from five down to two statutory aggravating circumstances, this Court has not hesitated to reverse on proportionality grounds, in circumstances less mitigated than Mr. Ferrell's. For example, in Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony/felony murder), when compared to two mitigating circumstances (age/unfortunate home life), "does not warrant the death penalty." Id at 188.[5]

As indicated above, this Court has affirmed a death sentence where the sole aggravating circumstance related to a prior violent felony conviction on only a single occasion. In Duncan v. State, 619 So.2d 279 (Fla. 1993), this Court affirmed a death sentence based on the single aggravating factor of a prior conviction for violent felony. As in the instant case, Mr.

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[5] Of special importance to the Court in mitigation in Livingston and in many of the following cases is the offender's addiction to and/or intoxication from drugs, or alcohol. This overriding factor is also present in Appellant's case.

Duncan also had a previous conviction for second degree murder when he killed his girlfriend. In that case, the trial court found a single aggravating factor and found two statutory and thirteen nonstatutory mitigating circumstances although the trial court ruled that six of the nonstatutory mitigating circumstances should be given little or no weight. The state however cross-appealed the trial court's findings that Duncan was under the influence of alcohol at the time of the murder, that Duncan was under the influence of extreme mental emotional disturbance at the time of the murder and that Duncan's ability to conform his conduct to the requirements of law was substantially impaired. This Court agreed with the state and struck the findings of these mitigating circumstances. This Court ruled that there was no evidence to support such findings. In the instant case these findings are amply supported by the record on appeal. Dr. Upson testified that he examined Appellant on numerous occasions and concluded that the mental mitigating factors were indeed present in Appellant's case. Additionally, the evidence of Appellant's alcohol use at the time of the murder was substantial and unrebutted. Empty gin bottles were found in the apartment, the neighbors testified as to Appellant's alcohol usage and when Appellant was arrested the arresting officer detected an odor of alcohol about him. Thus, the situation in the instant case is easily distinguishable from that in Duncan. The overwhelming evidence of these mitigating factors and the substantial weight they must be given are sufficient to outweigh the single

aggravating circumstance present in the instant case. Additionally, this case can be distinguished from Duncan in that the evidence that the murder arose from a heated domestic argument is amply supported by the record. The state's own witnesses testified that on the morning of the murder Appellant and Ms. Williams were involved in a heated argument. Indeed, their relationship was marked by repeated instances of domestic discord and substantial alcohol abuse. This factor was not present in Duncan.

Counsel can point to only five other cases where this Court has affirmed a death sentence based on a single valid aggravating circumstance. See Arango v. State, 411 So.2d 172 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); and Gardner v. State, 313 So.2d 675 (Fla. 1975). In all but one of the previously cited cases where death sentences based on a single, valid aggravating factor were affirmed, the crimes involved torture-murders. In Gardner, Douglas, and LeDuc nothing was found in mitigation by the trial court. In Arango, the only mitigating factor was that Arango had no significant prior criminal history. In Armstrong (the only non-torturous murder), this Court upheld one valid factor in aggravation, but agreed with the trial court that there were no mitigating circumstances to weigh. Appellant's case involves substantial mitigation that was actually accepted by the trial court. (R 1342-44)

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court faced a death penalty imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U>S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly

> compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, 544 So.2d at 1011.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that, "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

In Penn v. State, 574 So.2d 1079 (Fla 1991), this Court approved the trial court's finding that the murder was heinous, atrocious, or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So.2d 90 (Fla. 1984), receded from on other

> grounds, Preston v. State, 564 So.2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstance in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Compare Smalley v. State, 546 So.2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So.2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So.2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this case.

Penn, 574 So.2d 1079, 1083-4. See also, McKinney v. State, 579 So.2d 80 (Fla. 1981) [Death sentence disproportionate given only one valid aggravator, and mitigation shows that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history].

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for

imposition of a life sentence. When compelling mitigation exists such as that existing in this case, as found by the trial judge, the death penalty is simply inappropriate under the standard previously set by this Court.

CONCLUSION

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

As to Points I and II, reverse his judgment and sentence and remand for a new trial;

As to Point III, vacate the death sentence and remand for a new penalty phase;

As to Points IV and V, vacate the death sentence and remand with instructions to sentence Appellant to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Jack D. Ferrell, #A-083905 (44-1237-A1), P.O. Box 221, Raiford, FL 32083, this 10th day of January, 1994.

Michael S. Becker

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