IN THE SUPREME COURT OF FLORIDA



VIRGINIA GAIL LARZELERE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 81,793

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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**INITIAL BRIEF OF APPELLANT**

**PRELIMINARY STATEMENT**

In referring to the record on appeal, the following symbols will be used:

**(R )** The pleadings consisting of eight volumes, 1338 pages;

**(T )** The transcripts consisting of fifty-nine volumes, 7360 pages; and

**(SR )** The supplemental record consisting of five volumes, 628 pages.

The Appellant, Virginia Larzelere, will be referred to as the Appellant or by her proper name. The government will be referred to as the State or the prosecutor.

## STATEMENT OF THE CASE

On May 24, 1991, a grand jury indicted the Appellant, Virginia Gail Larzelere, and Jason Eric Larzelere for the premeditated murder of Norman Larzelere. (R4) Due to a conflict of interest, the state attorney for the Seventh Judicial Circuit voluntarily disqualified himself and the governor assigned the state attorney for the Ninth Judicial Circuit to investigate and prosecute the case. (R6-8) On May 24, 1991, Appellant filed a written notification of the exercise of her constitutional rights. (R10-11) Appellant filed a demand for discovery as well as a Brady[1] demand. (R14-15,18-19, 313-14)

Appellant filed a motion for special verdict forms at the penalty phase that would allow the jury to make specific findings regarding aggravating circumstances. (R20-24) Appellant filed a motion to dismiss the indictment based on constitutional grounds (separation of powers). (R28-29) Appellant also filed a motion to preclude comments and instructions that tended to denigrate the role of the jury at the advisory phase (Caldwell v. Mississippi). (R30-37) Appellant filed a motion for two separate juries, one to consider guilt and the other to consider penalty. (R61-62) Appellant also filed a motion to compel the State to disclose evidence of mitigating circumstances. (R66-69) Appellant filed a motion in limine seeking to prohibit any inquiry of prospective jurors regarding their attitude towards

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

the death penalty. (R70-72) Prior to trial, Appellant also filed a motion seeking to prohibit jury dispersal throughout the proceedings. (R103-4)

Appellant moved for a statement of aggravating circumstances. (R105-9) Appellant asked the trial court to declare Section 921.141(5)(i), Florida Statutes, unconstitutional (automatic aggravator in premeditated murders and shifting of burden of proof). (R112-14) Appellant sought to restrict dismissal of jurors who could be fair at the guilt phase but were not "death-qualified." (R115-24) Appellant moved to declare Florida's death penalty statute to be unconstitutional in that the aggravating and mitigating circumstances are impermissibly vague and overbroad. (R140-47) Appellant filed a motion to dismiss based, inter alia, on the arbitrary and capricious application of the death penalty in this state. (R148-57) Appellant challenged the constitutionality of electrocution as cruel and unusual punishment. (R158-59)

Appellant moved for disclosure of impeachment information. (R167-87)

On June 22, 1991, Appellant moved for a change of venue. (R200-205) The trial court deferred ruling on the Appellant's motion for change of venue until jury selection then denied it. (R321; T1604)

The trial court granted the State's motion to sever the trials of Virginia Larzelere and Jason Larzelere. (R255-56,274-76,323) The court denied most of Appellant's motions dealing

with Florida's death penalty. (R302-10) On November 1, 1991, the trial court denied Appellant's motion to dismiss the indictment due to governmental misconduct. (R324) On February 10, 1992, the trial court denied Appellant's oral motion to dismiss due to prosecutorial misconduct. (R397)

After the presentation of all evidence, Appellant renewed her motion for judgment of acquittal which the trial court denied. (T5705-6)

During the charge conference, the trial court denied Appellant's requests for several special jury instructions (interest in outcome; number of witnesses and contradicted testimony; law enforcement witnesses; accomplis called by the government; and circumstantial evidence). (T5731-41; R406-12,434-35) Although the State did not request it and Appellant objected to it, the trial court gave the standard instruction dealing with a defendant's statement. (T5744-45) The State believed that the instruction was a required one.

The trial court denied numerous jury instructions requested by the defense. (R406-12,434-35) Following deliberation, the jury found the Appellant guilty of first-degree murder as charged in the indictment. (R436; T5935-38)

Following a penalty phase, the jury returned a bare majority recommendation (7 to 5) that the court impose the death penalty. (R446)

On May 14, 1993, the trial court adjudicated the Appellant guilty of first-degree murder and sentenced Virginia Larzelere to

death by electrocution. (R1268-72) The court entered written findings of fact in support of the death penalty finding that the murder was committed for financial gain[2] and that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.[3] (R1273-83) The trial court rejected all statutory mitigating circumstances. (R1283-89) The trial court did find that the evidence supported several nonstatutory mitigating circumstances. (R1290-97) Appellant filed a notice of appeal on May 21, 1993. The trial court declared Appellant indigent and appointed the Office of the Public Defender, Seventh Judicial Circuit, to perfect this appeal. (R1300,1304) This Court has jurisdiction. Art. V, §3(b)(1), Fla. Const.

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[2] §921.141(5)(f), Florida Statues.

[3] § 921.141(5)(i), Florida Statutes.

## STATEMENT OF THE FACTS

THE SHOOTING

Dr. Norman Larzelere practiced dentistry in the town of Edgewater, Volusia County, Florida. On March 8, 1991, at approximately 1:00 p.m., Emma Lombardo, Dr. Larzelere's dental assistant, heard the sound of running footsteps in the hall. When she looked up, she saw Dr. Larzelere run down the hall with a masked gunman chasing him. Dr. Larzelere fled to the waiting room and closed the door behind him. (T2407-9) Lombardo described the masked man chasing Dr. Larzelere as tall and skinny. He wore a long-sleeved, blue shirt, jeans and gloves. Lombardo could not see the gunman's hair or skin color. (T2429) Lombardo described the assailant's physique as similar to Jason Larzelere's build, Dr. Larzelere's stepson.[4] (T2416-17)

As Lombardo watched from approximately seven feet away, the masked man fired a shotgun blast through the door of the waiting room. Dr. Larzelere, mortally wounded[5], fell to the floor calling for help. The gunman turned and left through the rear of the building. (T2411-16)

At the time of the shooting, Hilda Levezinho was in the waiting room in anticipation of her 1:00 p.m. appointment.

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[4] During the aftermath of the shooting, Lombardo heard a hysterical Virginia Larzelere screaming, "Jason? Is that you? Jason?" (T2420)
Lombardo, the only witness to hear this, failed to mention it until several days following the shooting. (T4023-24)

[5] Doctors pronounced Norman Larzelere dead at 2:11 p.m. (T2850-65)

Levezinho heard running before Dr. Larzelere burst into the waiting room, closing the door behind him. Levezinho heard Dr. Larzelere asking for help and heard him twice ask, "Where are you Jason?"[6] (T2158-60)

At the time of the shooting, Virginia Larzelere, Dr. Larzelere's wife and office manager, was the only other person in the building. (T2397-98) When the shooting occurred, Virginia ran from the business office and struggled with the assailant as he attempted to flee. (T2420-24,4672-74) After unsuccessfully attempting to impede the gunman's escape, Virginia ran back inside and called 911. (T2023-25) Lombardo eventually took over the phone and Virginia tended to her mortally wounded husband. (T2425-26) Police and emergency medical technicians responding to the scene found Virginia Larzelere kneeling over her dying husband. (T2602-9) Virginia appeared to be hysterical, crying and shaking. (T2610-11,2615-16)

Responding to police questioning at the scene, Virginia described the assailant as male, possibly Hispanic, approximately 5'9" tall, 190 pounds, wearing a black shirt with a hood over his face. (T2613) The getaway car[7] was a blue Toyota with a green

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[6] Shortly after the murder, Ms. Levezinho told the insurance investigators that Dr. Larzelere yelled, "where are you (an uncommon male name that she could not remember)?" Since that interview and prior to trial, Ms. Levezinho claimed to have remembered the name "Jason." Ms. Levezinho could not be certain that her memory had been affected by reading newspaper accounts of the crime. (T2155-60)

[7] Emma Lombardo did not see Virginia's struggle with the gunman, nor did she hear the getaway vehicles. (T2420-27)

and white tag. The tag had the word "garden" on it and also possibly had a "2" and a "7" on the license. (T2613) Virginia told police that immediately prior to the shotgun blast, Dr. Larzelere exclaimed, "Where's Jason?" (T2612-13)

KRISTEN PALMERI

Kristen Palmeri[8], a Kelly Services employee, first began working for Dr. Larzelere in February, 1990. Palmeri worked at the dental office sporadically and without a fixed schedule. (T4120-27) Palmeri also lived at the Larzeleres' home on occasion. She had her own telephone line at the Larzelere home. (T4127-29) She drove a white Toyota Celica GT with a car phone provided by Dr. Larzelere. (T4129-30)

On the day of the murder, Palmeri called the dental office to see if she was needed. Virginia suggested that Palmeri come in to work and she arrived at the office during the lunch hour. (T4132-36) After typing and running some errands, Virginia told Palmeri to go to the florist and to "have an alibi and be seen."[9] Virginia handed Palmeri a coffee cup containing a handful of valium. She instructed Palmeri to save the drugs, that Virginia would need them later. (T4135-38) Palmeri left the office about 12:30, went to the florist, got gas for her car, and ate lunch. (T4135-40) When Palmeri returned to the dental office, she saw

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[8] In exchange for her testimony, Kristen Palmeri received use immunity from the State. (T4288)

[9] Palmeri admitted that she did not remember Virginia's instructions to have an alibi until several weeks had passed. (T4382-83) She admitted giving perjurious statements to police. (T4361-63)

the aftermath of the shooting.[10] (T4142-51)

Virginia Larzelere rode in a police car with a detective to the hospital, while Palmeri followed in her own car. (T4152-58) Palmeri sat with Virginia in the waiting room of the hospital. Palmeri described how Virginia would cry[11] when the chaplin was present. When Virginia and Palmeri were alone, Virginia did not appear to be upset. Palmeri claimed that Virginia explained that she had "things to do" and asked Palmeri to get rid of the chaplin. (T4160-61)

Palmeri admitted that she had a stormy relationship with the Larzeleres during her employment. Palmeri had been fired by the Larzeleres, albeit temporarily, on more than one occasion. One of Palmeri's terminations came when the Larzeleres discovered that she stole a gold coin from Virginia's purse. (T4343-46)

THE INSURANCE POLICIES

The State charged Virginia Larzelere with conspiring with her son Jason to kill Dr. Larzelere for the insurance proceeds. In May of 1985, almost six years before the shooting, Dr. Larzelere purchased two life insurance policies for himself and his then fiancee, Virginia. One policy was issued in the amount of $150,000.00 and the other for $100,000.00. The policies were

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[10] Barbara Herrin, president of the Sun Bank branch across from the dental office, was watching the office during and after the shooting. Herrin saw Palmeri drive by the office slowly right after the shooting. Palmeri returned fifteen minutes later, pulled in, and asked what was happening. (T3976-93)

[11] Palmeri testified that Virginia could "cry on cue," as she had seen her do it in the past. (T4160-61)

"super life", graded-premium policies where the premium increased each year. The beneficiaries on each policy were Norman, Virginia, and Katherine Larzelere. Both of these policies were still in effect at the time of Norman's death. (T2750-61)

On October 13, 1986, more than four years before the shooting, Dr. Larzelere bought another $25,000.00 life insurance policy, this one from Allstate. The policy listed Virginia as the first beneficiary. (T2761-67) In December, 1986, still more than four years before the shooting, Dr. Larzelere bought a $250,000.00 life insurance policy, ostensibly to replace the $150,000.00 Kentucky Central policy purchased more than a year before. In applying for the new policy, the Larzeleres both misrepresented the fact that the only other life insurance policy was the $150,000.00 Kentucky Central policy. They failed to mention the $100,000.00 Kentucky Central or the $25,000.00 Allstate policy. (T2768-77)[12] In 1988, three years before the shooting, the couple bought another State Farm life insurance policy for an additional $300,000.00. (T2778-82) Contemporaneous with this purchase of insurance on Dr. Larzelere's life, the couple also bought a $250,000.00 life insurance policy on Virginia's life with Norman listed as the beneficiary. (T2772,2784-87)[13]

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[12] Even if the agent had known of the other policies, he still would have sold the additional insurance to the Larzeleres. (T2792-96)

[13] The Larzeleres were a life insurance buying family. In January, 1987, Virginia bought a policy on her father and unsuccessfully attempted to buy one on her mother. The latter

On September 28, 1990, the couple bought another life insurance policy from Allstate which was worth approximately one million dollars after Norman's murder. Virginia was listed as the prime beneficiary. (T2805-11) The Larzeleres also bought a mortgage/life insurance policy in December, 1990, worth approximately $200,000.00. (T2812,2867-87) The Larzeleres executed a financial statement revealing their net worth to be more than one million dollars. (T2901) Following the shooting, Virginia made claims on several of the policies. (T2765-67,2778-82,2802-4)[14]

The State also presented evidence that one of Dr. Larzelere's wills may have been forged. The evidence conflicted on this issue. (T5535-42) Three witnesses to the will, patients of Dr. Larzelere, denied knowingly signing the will. (T3950-75)

VIRGINIA'S AFFAIRS

The State offered evidence that Virginia loved often if not wisely.[15] Several of her paramours claimed that Virginia attempted to solicit them to murder Norman Larzelere. Norman Lee Karn, Jr., had a three month affair with Virginia in early 1989.[16] (T2023-24,2028) Karn's, testimony was fraught with inconsistency. When confronted with the fact that he attempted

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was declined due to ill health. (T2787)

[14] Virginia subsequently waived proceeds of at least one policy for her children's benefit. (T2765-67)

[15] Virginia initially denied any extramarital affairs. (T4676)

[16] Karn admitted that Virginia dumped him. (T2060)

to sell his testimony for $500,000.00, Karn claimed to be joking. (T2053-54) Karn admitted that Virginia, who never mentioned any life insurance, had never directly asked him to kill her husband.[17] (T2055-56) Karn claimed that Virginia told him that she was worth forty million dollars and that Norman had made repeated attempts on her life. (T2030-32) She told Karn that she was separated from Norman and had commenced divorce proceedings.[18] (T2029-30) She planned to move to California and marry Karn. (T2032-36)

In late February, 1989, Karn introduced Virginia to Ron Hayden, a country singer and friend of his.[19] (T2038-40) After Karn introduced Virginia[20] to Hayden during a night of drinking at a southern California club, Virginia explained that her husband refused to grant her a divorce. (T2074) She displayed a large sum of money and explained that her husband followed a weekend routine.[21] (T2074,2081-82) She offered Hayden $20,000.00, a plane ticket, and a job if he would carry out the

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[17] Karn claimed that "in so many words", Virginia told him that she wanted Norman eliminated. (T2031)

[18] Virginia described her relationship with Norman as turbulent, physically violent, untrusting, and without intimacy. (T2046)

[19] Although Karn claimed to have known Hayden only a couple of years, Hayden testified that they had been friends for approximately seventeen years. (T2070)

[20] At trial, Hayden could not identify Virginia as the woman he met that night. (T2071)

[21] Hayden knew Virginia's offer was forthcoming. Karn had first broached the subject of killing Dr. Larzelere. (T2072, 2080)

dastardly deed with a shotgun. (T2038-42,2075) Hayden never believed that Virginia was serious about having her husband killed, dismissing it as "bar talk."[22] (T2079-83,2042-43) Both Karn and Hayden denied having anything to do with the doctor's murder. (T2045,2076)

Virginia also had an affair in 1989 with Phillip Langston, a patient at the dental office. (T2089-90,2095) Virginia confided in Langston about her troubled, violent marriage.[23] She also complained that Norman was having a homosexual affair. (T2095) Following a particularly egregious fight with her husband, Virginia came to Langston's home in a rage. She told Langston that she had to "get rid" of Norman and announced her willingness to pay $50,000.00 to accomplish that goal. (T2096) Langston did not believe that Virginia was serious and told her to calm down. (T2096-97,2104-5) This was the only time that Langston heard Virginia ever mention a desire to have Norman killed. (T2104) Norman Larzelere ultimately found out about Virginia's affair with Langston and called Langston asking him to terminate the relationship. (T2106) It took Langston six weeks after the murder to call the police and "report" what he knew. (T2106)[24]

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[22] Karn admitted that, after this incident, Virginia never again mentioned killing her husband. (T2054-55)

[23] Like many married couples, the Larzeleres had their ups and downs. (T2428-29,2461,3891-95,4348-49)

[24] Langston admitted a certain animus toward Virginia. He considered her to be a conniving, scheming, habitual liar. (T2104) He also admitted owing more than $5,000.00 to Virginia, money she loaned him during their affair. (T2104-5)

STEPHEN HEIDLE

On October 27, 1990, Stephen Heidle met Jason Larzelere, Virginia's son. Over the next few months, the two became very good friends. Heidle stayed at Jason's Orlando apartment several nights a week and the two frequented nightclubs on the weekends. (T3011-13) On December 20, 1990, Jason moved into a Metro West house. Jason began paying Heidle to run errands and Heidle began spending even more time with Jason. (T3014-15) On January 15, 1991, Heidle left his job at Barnett Bank[25] and relied on the money he made running errands for the Larzeleres as well as some financial support from Heidle's own mother. (T3029)

Heidle was the star witness for the State.[26] Prior to testifying at trial, Heidle believed that he would receive complete immunity by cooperating with the police. (T3297-98) By the time he testified, Heidle understood and expected benefits for his testimony. (T3330-31) He did not think that he would be prosecuted for his involvement, but admitted that it was important to maintain his innocence in the actual shooting. (T3300) Additionally, Heidle committed a third-degree felony for which he was never prosecuted.[27] (T3292) He also had a pending

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[25] In reality, Heidle was fired from his bank job. (T3846-48)

[26] Heidle admitted that he perjured himself when he gave his first statement to police. (R3332) He admitted he was not worried about a perjury prosecution. (T3462-63)

[27] Heidle admitted perjury on his tax return. (T3332,3356-57)

DUI charge in Orange County at the time he testified.[28]

Stephen Heidle also admitted the personal bias against both Jason and Virginia Larzelere. Heidle, an admitted homosexual, confessed to one sexual episode with Jason Larzelere. (T3385) Heidle also revealed that he and Jason had been feuding in December, 1990. (T3359) In the weeks after the shooting, Heidle and Jason drifted apart. (T3483) By the time he testified, Heidle had grown to loathe Jason. (T3393) Heidle believed that due to his homosexuality, Virginia did not like him. (T3418-20) Heidle and Jason argued over furniture, Jason's car, and homosexual lovers. (T3497-3501,3506-10,3513)

Stephen Heidle denied any prior knowledge of Dr. Larzelere's murder. He claimed to have been an unwitting dupe in Jason and Virginia's conspiracy to kill the doctor. Stephen returned from a relative's funeral in Massachusetts the night before the murder. (T3034-35,3040-41) Heidle spent that night at his mother's Debary home, while she remained out of state. (T3034-36,3044-50) Jason also spent the night of March 7th at the Heidle home. The next morning, the day of the murder, Heidle followed in his car as Jason Larzelere drove his own car to a Deland storage unit to pick up some files that Virginia requested. (T3046-51) Kristen Palmeri, who was supposed to meet them there, never showed up. (T3048-51) Heidle noticed that the files that Jason retrieved from storage included several of Dr.

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[28] Due to a conflict, the local state attorney's office below withdrew and an Orange County prosecution team prosecuted Virginia Larzelere.

Larzelere's life insurance policies totaling more than one million dollars. He also noticed that Jason retrieved the doctor's will which left everything to Virginia. Heidle had seen these documents before, when he and Jason retrieved them from the same storage room in late November. (T3051-53,3066-69) After loading the documents into Jason's car, the pair returned to Heidle's Debary home. (T3069-70,3089-90) Jason offered to have Mrs. Heidle's car detailed, and the two planned to meet for lunch at Jason's Metro West house in Orlando. They both left Debary at approximately 10:30 a.m., Jason in Mrs. Heidle's Maxima. (T3090-93)

Heidle testified that he stopped at the dry cleaners, but the clothes were not ready. He arrived at the Metro West home about noon. (T3094-3100,5034-39,5060) He left shortly thereafter and picked up two lunches at Burger King. After eating and watching some television, Heidle called his mother in Massachusetts at approximately 1:15 p.m. and talked for approximately thirty minutes. (T3101-2) Wondering why Jason had not shown, Heidle called Jennifer Blankenship, a friend in Debary, at approximately 2:00 p.m. He asked her to look in his garage to see if Jason had returned Mrs. Heidle's car. (T3104-5) Heidle made a couple of other calls that afternoon and also had a pizza delivered. (T3105-7) Heidle testified that Jason finally arrived at the Metro West house around 4:00 p.m. (T3111) Heidle was concerned about his mother's car and irked at Jason's tardiness. When Heidle announced his intent to go to dinner with

his homosexual lover, Jason asked that he wait until Virginia called to notify them of Norman's death. (T3111-12) Heidle went ahead with his plans for dinner and then went to his lover's home in Debary. (T3114,3126) Jason called about 9:00 p.m. and asked Heidle to pick up some things at the Metro West house and to meet Jason at the Larzelere Deland home. (T3126-27) Heidle did as Jason asked. At the Larzelere home, Heidle met Kristen Palmeri for what he claimed was the first time. He had only briefly met Virginia Larzelere on one prior occasion. (T3136-38) While he was at the house, Heidle heard no conversation about the murder. (T3139) After leaving the Larzelere home, Heidle heard about Dr. Larzelere's murder on the 11:00 news. (T3138-40)

HEIDLE'S AND PALMERI'S INVOLVEMENT AFTER THE SHOOTING

Stephen Heidle had known Jason Larzelere for less than five months before the murder. (T3011-13) Heidle met Virginia Larzelere for only the second time on the day of the shooting. He met Kristen Palmeri for the first time that same day. (T3136-38) In spite of these limited relationships, Stephen Heidle did whatever was asked of him after the murder. At the request of the Larzeleres, Heidle returned to their home the morning after the murder. He found Palmeri, Virginia, Jason and others going through files. (T3147-49) Heidle remained at the Larzelere's home most of that day. While the others worked on files most of the afternoon, Heidle and Jason fed the dogs and watched TV. (T3149-50) Heidle left the house briefly to run several errands. Heidle spent that night at the Larzelere home. Throughout that

evening and the next morning, Palmeri, Virginia, and others continued to look through files. Heidle claimed that he noticed the Allstate insurance policies among the papers perused. (T3150-51)

Stephen Heidle remained at the Larzelere home for three days. At Virginia's direction, papers from Jason's, Heidle's and Palmeri's wallets and appointment books were removed and burned. (T4172-76) Virginia said that she did not want anything connecting her to them nor anything connecting anyone to any "wrong doings." (T3152-58) At some point during the weekend, Virginia allegedly complained that a life insurance policy had not matured, but she promised to "find a way." (T3150-51)

Jason appeared to be sleepy and somewhat lackadaisical. (T3149) When Jason complained about money and not being allowed to drive or leave the house, Virginia told him to stop complaining. She said that he would get his $200,000.00 for "taking care of business." (T3150-51,4178) Despite his lack of involvement in the murder, Heidle appeared to accept the discussion that all of them would eventually have to go to the police department. (T3154-55) At the Larzelere's request, Stephen Heidle retrieved a plastic bag containing a shotgun from his mother's Debary attic. The Larzeleres explained that Jason had placed it there the day of the shooting. (T3159-61,4179-80) That weekend, Heidle and Palmeri used Virginia's shower to encase the shotgun and a .45 handgun in concrete. (T3163-70,4183-87) Heidle claimed that the deed was accomplished under Virginia's

supervision. Early Monday morning, at Virginia's suggestion, Heidle and Palmeri drove off to find a body of water to dump the concrete-encased guns. (T3171-72,4188-95) The couple went first to DeLeon Springs only to find it closed for the night. (T3172) They then headed east on I-4 and then north on I-95 and eventually dumped the guns into Pellicer Creek near St. Augustine.[29] (T4188-95)

Palmeri claimed that Virginia explained that she had faked the robbery because Jason, who was supposed to have arrived between 12:00 and 12:30, was late.[30] (T4280) Palmeri also testified that Virginia feigned mouth-to-mouth resuscitation in an attempt to silence Norman who was calling out Jason's name. (T4281) Virginia stated her concerns about what Emma Lombardo and the patient in the waiting room saw and heard. (T4281) During the days following Dr. Larzelere's shooting, Jason and Virginia reenacted the murder with Jason playing the role of the gunman and Virginia playing the role of the victim. (T4281-82) Palmeri also overheard Virginia and Jason arguing about money. Virginia told Jason that Stephen Heidle was not to be trusted and that the money was not going to be split three ways. (T4376-77)

THE POLICE INVESTIGATION OF VIRGINIA LARZELERE

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[29] During the defense case-in-chief, three witnesses testified that in the weeks before the murder, they observed Stephen Heidle in possession of a handgun which looked remarkably similar to the one recovered with the shotgun from Pellicer Creek. (T5559-64,5592-97,5657-65)

[30] Although she never asked Virginia what was going on, Palmeri claimed that she willingly helped with the cover up. (T4165-4217)

Much of the State's case was based on the "contradictory" information that Virginia Larzelere supplied to the police following the murder. Police insisted that Virginia's description of the gunman and the shooting varied over the course of several interviews with them and others. On March 21, 1991, Virginia told Special Agent Bob Darnell of the FDLE that the gunman was 5'10", 195 pounds, dark clothing, olive complexion, dark curly hair with some grey, wearing a ball cap with a ponytail sticking out the back. He wore aviator-style sunglasses and had a strong body odor. Virginia insisted that the gunman did not look like anyone she knew, including Jason. After the shooting he jumped into the passenger side of a blue Toyota or Saab which then drove away. The car had a white license plate with green lettering that included the numbers "8", "4", and "9". The car had a CB antenna. The car had a bumper sticker that said, "Plant a garden, grow marijuana." As it left the parking lot, the car was followed by two men on motorcycles, one of which was a Harley Davidson. Although Virginia stated that she did not remember calling out Jason's name during the shooting, she admitted that she could have. She explained that, although she could not articulate it, there was something about the car that reminded her of Jason. (T4570-73) Virginia voluntarily came in and gave the statement of her own free will. (T4576)

Caroline Stokes met Virginia Larzelere at the dental office in August, 1990. Stokes visited Virginia at the Larzelere home on the Sunday following the murder. (T4580-82) Stokes was also

present during Virginia's March 10th interview conducted by Detectives Gamell and Osbourne, and the interview by Pat Lamee of the Orlando Sentinel. (T4591-92) Stokes claimed that Virginia described the assailant with varying details each time. (T4584-85) The variations were that the gunman went from being masked to unmasked, medium to taller, and average size to bigger. (T4600)

Investigator David Gamell of the Edgewater Police Department recorded a statement of Virginia Larzelere on the night following the murder. (T4642-43) After a short break, Investigator Gamell recorded a second statement during the early morning hours of March 9, 1991. (T4645-47) During the March 8th interview, Virginia said she heard running from the back of the office and then heard one, maybe two shots. As the gunman ran by, Virginia grabbed him by the arm and broke two of her fingernails. She described the gunman as wearing black boots and carrying a bag under his arm. He was not wearing gloves and she noticed his dirty fingernails. During the struggle, Virginia was tossed into the coffee pot. (T4672-74) The gunman jumped into the passenger side of an automobile and drove away with a Harley Davidson leading the way and with a Honda Golden following. (T4676)

Virginia heard Norman call out Jason's name. (T4677) She explained to Gamell that, after he was shot, Norman was calling out all of their children's names. This could have prompted Virginia to call out for Jason. (T4682-83) Later, Virginia opined that she may have called out Jason's name because, right

before the shooting, she and Norman had been discussing allowing Jason to live with them again. (T4682)

In a subsequent interview, Virginia told Gamell that the assailant had dark skin, wore dark pants with dirty combat boots. (T4680) Virginia had initially told Gamell that the getaway car was a bluish Datsun hatchback. In one interview, Virginia told Gamell that the car had a whip antenna. She said the car had a green and white Georgia license plate with "278" or "478" on the tag. She also said that the word "garden" was either on or in the vicinity of the license plate. (T4686) Gamell admitted that it was not unusual for a hysterical witness whose spouse had just been murdered to later give a more detailed statement when she was no longer medicated. (T4713-14)

Cheryl Osbourne, a detective with the Edgewater police, drove Virginia Larzelere to the hospital after the shooting. At some point during the evening, Virginia described the assailant as having olive-colored skin and wearing combat boots. (T4866-69) He carried a long weapon and had a package under the other arm. His car had a green and white license plate with the word "garden" printed on it. (T4870) Virginia described breaking her fingernail when she reached out to grab the gunman's arm. (T4870)

On March 26, 1991, Pat Lamee, an Orlando Sentinel reporter, interviewed Virginia Larzelere. Virginia described the murder as a "burglary gone bad." She described the gunman as approximately 5'10", 240 pounds, olive skin, dark hair and eyes, and a one-inch

ponytail. He also had chewed-off fingernails. (T4465-72) The gunman took gold coins and drugs from the office safe. (T5471-72) Virginia described her tussle with the gunman as he fled. (T5472) Virginia told Lamee that Jason was weak and took medication to control his seizures. (T5474-75) After the article appeared in the Sentinel, Virginia called Lamee and expressed her anger that the entire description of the assailant had not been printed. (T5425-26) Virginia explained that the police wrongly claimed that she initially described the gunman as being masked. (T5479-82)

Virginia urged the police to investigate Paul Gatzy, a motorcycle enthusiast vacationing in Edgewater, who received emergency dental treatment from Dr. Larzelere on March 7th. He returned on the morning of the shooting for further treatment. (T2170-77) Virginia Larzelere had told police and others that the gunman stole cash, valium, and gold coins from the office safe. (T4603,4679) Mr. Gatzy, in particular, had expressed interest in the safe and the drugs inside. Virginia told Investigator Gamell that Gatzy complained that the doctor had not prescribed valium for his toothache. (T4679) Virginia told Detective Bennett that Mr. Gatzy had made her and Mr. and Mrs. Gerke, a patient couple in the office the morning of the murder, uncomfortable. (T5101-2) Both Gatzy and his fiancee denied arguing with Virginia Larzelere over valium. (T2177-78,2212-

17)[31] After obtaining more medication on the morning of the murder, Gatzy hopped on his 1994 Harley Davidson and rode away. (T2177-82) The Gerkes noticed the Gatzys at the office, but did not remember any offensive behavior on their part. (T2225-32,2237-39,2246-49) Emma Lombardo confirmed Virginia Larzelere's anxiety about Gatzy's craving for valium. (T2390-91) After the shooting, Lombardo noticed that valium was missing from the safe. (T2393-94) Lombardo had not noticed any cash or gold in the safe that morning. (T2395-96) Following the shooting, police found several bottles of drugs in the safe, including two bottles of valium. (T4912,5307-10)

The State also presented evidence that Virginia and Jason Larzelere maintained that Jason could not drive safely due to seizures he suffered as a result of an automobile accident. The State presented witnesses that this was a ruse on the part of the Larzeleres and that, in reality, Jason could function normally. (T2348-55,3017-19,4282-83,4453-59,4500-4,4581-84)

The State also presented a variety of telephone record evidence. Some of this evidence supported the testimony. Some of it revealed numerous phone calls between Virginia, Jason, Kristen Palmeri, Stephen Heidle, and other players. (T4772-4863)

With the help of Heidle, police recovered the sawed-off shotgun and Remington pistol from Pellicer Creek. They found no usable prints on the weapons and could not determine if the

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[31] Gatzy had an aversion to valium. (T2219-20) Emma Lombardo recalled that Gatzy refused Dr. Larzelere's offer of valium. (T2386-87)

shotgun was the murder weapon. (T4240-64,5286)

When the police confronted Kristen Palmeri with the guns recovered from Pellicer Creek, she decided to point the finger at the Larzeleres. (T4284) She agreed to cooperate with police and attempted to obtain incriminating statements from Virginia in a taped phone conversation. Despite Palmeri's best efforts, Virginia made no incriminating statements. (T4286-88,4368-69)

In an April 5, 1991, interview, Jason Larzelere told Detective William Bennett of the Edgewater Police Department that he was with Stephen Heidle in Orlando at the time of his father's murder. (T5065-67,5077-80) Heidle's attempts to elicit incriminating statements from Virginia were also unsuccessful. (SR605-16)

## SUMMARY OF THE ARGUMENT

POINT I: The defense attempted to impeach Stephen Heidle, the key State witness. The impeachment evidence consisted of Heidle's poor reputation for truth and veracity in the community. The court excluded the evidence based on his conclusion that the community was too small and fleeting. Stephen Heidle limited his own community be his lifestyle. During the months preceding the murder, Heidle spent all of his waking hours at gay bars in central Florida. His associates who accompanied him to these bars were the only community that Stephen Heidle knew. As such, they were in the best position to know Heidle's reputation. The trial court should have admitted the evidence and allowed the jury to determine what weight to give it.

POINT II: The trial court should have granted the motion for mistrial where a State witness violated the trial court's order in limine. Specifically, Kristen Palmeri testified that Jason Larzelere, Appellant's son and codefendant, snorted cocaine prior to the funeral of his father. The jury was undoubtedly prejudiced. The spill-over effect of "guilt by association" is a very real danger.

POINT III: The trial court should have granted Appellant's numerous requests for special jury instructions. All of the requested instructions had a legal basis. Additionally, several were not covered by the standard instructions, for example, the circumstantial evidence instruction.

POINT IV: The State introduced several taped statements,

interviews, and conversations of both Virginia and Jason Larzelere. The State chose to introduce only portions thereof. Defense requested that the statements be admitted in their entirety pursuant to the doctrine of completeness. The trial court's refusal to do so violated Section 90.108, Florida Statutes (1993).

POINT V: The trial court abused its discretion in denying Virginia Larzelere's pro se motion to discharge her lawyer. At a bare minimum, the trial court should have granted Larzelere a continuance to seek other counsel. Sentencing is a critical stage and Virginia Larzelere should not have been forced to proceed with counsel with whom she was dissatisfied.

POINT VI: A new trial is warranted where the jury was contaminated by extrajudicial information. It is undisputed that several of the jurors were threatened in the parking lot following the verdict of the guilt phase. Specifically, an individual threatened to blow up their car. This caused consternation. Additionally, some evidence pointed to the fact that jurors may have considered inappropriate, extrajudicial information during deliberations at the guilt phase. The safer course of action would have been to grant a new trial with a new jury. The trial court compounded the error by inquiring into the jurors' state of mind during deliberations.

POINT VII: The trial court allowed the State to, over objection, introduce bullets that Virginia Larzelere turned over to Edgewater police. In the days following her husband's murder,

Virginia Larzelere was the victim of a drive-by shooting at her house. She turned over to police what she thought were the bullets fired at her during this incident. A State expert concluded that the bullets had never been fired and that markings on them were made by a tool. In light of the fact that the bullets were not what Appellant thought they were, they had no relevance to the case. The evidence prejudiced Appellant because it inappropriately supported the State's theory that Appellant was attempting to misdirect the police investigation.

POINT VIII: The trial court found two aggravating circumstances, that the murder was committed with heightened premeditation and for financial gain. The State's theory was that Appellant made sure that her husband's life was heavily insured and then killed him for the monetary proceeds. It is factually impossible to plan a murder for insurance proceeds without both of these aggravating circumstances applying. This case scenario is indistinguishable from the line of cases holding that improper doubling of aggravating circumstances occurs where a court finds pecuniary gain and felony-murder when a defendant commits a robbery/murder.

POINT IX: Despite Appellant's invocation of her constitutional rights, the police conducted electronic surveillance of a holding cell where they deliberately placed Appellant and her codefendant. Although the State obtained no incriminating statements, Appellant submits that the government conduct was so outrageous as to justify dismissal of the

indictment.

POINT X: Appellant attempted to present evidence that the State tried but failed to obtain incriminating statements from Appellant through the electronic surveillance of her holding cell. The trial court refused to allow the defense to present the evidence concluding that it was irrelevant and immaterial. A defendant has a constitutional right to present evidence in his defense. The evidence showed that the government tried but failed to obtain any incriminating statements. The evidence also showed the great lengths that the government was willing to go to in their attempt to make a case against Virginia Larzelere.

POINT XI: Due to the pervasive pretrial publicity, the jury pool was obviously tainted. Despite the fact that a jury was picked with relative ease, almost all of the veniremen had heard about the case. A juror's conclusory assurances that they can be fair is not determinative of the matter. The court should have granted the motion for change of venue.

POINT XII: The evidence is legally insufficient to support Appellant's convictions. The State's case is almost entirely circumstantial. Furthermore, in light of the fact that the convictions rest on admittedly perjured testimony, this Court must reverse.

POINT XIII: Appellant maintains that the State failed to establish, by the appropriate quantum of evidence, the existence of a conspiracy between Virginia and Jason Larzelere. As such, Jason's statements constituted inadmissible hearsay.

POINT XIV: Finally, Appellant contends that the ultimate sanction is disproportionate when applied to her. Virginia Larzelere also challenges the constitutionality of Florida's death sentencing scheme for a variety of reasons, many of which have been previously rejected by this Court.

## ARGUMENT

Virginia Larzelere discusses below the reasons which, she respectfully submits, compel the reversal of her convictions and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I of the Florida Constitution, and such other authority as is set forth. Appellant anticipates that the State will argue harmless error. In considering the issues, Appellant points out that Jason Larzelere, Appellant's codefendant, was acquitted on similar evidence. (T1292-93)

## POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S ATTEMPTS TO IMPEACH STEPHEN HEIDLE, THE KEY STATE WITNESS, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The theory of defense at trial was an attempt to point the finger at Stephen Heidle as the actual murderer. Heidle's credibility was absolutely critical. The cross-examination consumed almost six hundred transcript pages and three volumes of the record. (T3279-3864) Heidle was the one who told the jury about the "cover-up" following the murder. Heidle, along with Palmeri, disposed of the guns, one of which was allegedly the murder weapon. Stephen Heidle's testimony, in essence, made the State's case against Virginia Larzelere. The trial court's

limitation of defense counsel's cross-examination was pivotal. Likewise, the trial court's limitation of evidence regarding Stephen Heidle's reputation for truth and veracity was crucial.

During Appellant's case-in-chief, defense counsel attempted to present witnesses that would testify as to Stephen Heidle's unsavory reputation for truth and veracity. Karen Walker, had known Stephen Heidle approximately one year prior to her testimony. (T5578) She "ran with" Heidle and a group of friends who frequented the gay clubs in central Florida. (T5578) The group spent their time at Big Bang, Southern Nights, and Parliament House, all gay bars in Orlando. (T5584) Walker estimated that she had been in the company of Heidle approximately thirty-four times at various gay clubs between February/March, 1991, through April. (T5585-86) Walker named four or five men who were in Heidle's circle of friends. (T5586-88) All were comrades who spent time with the group at the gay bars. (T5588)

The trial court accepted the State's argument and ruled that the small number of people in the community as well as the short period of time did not establish a sufficient predicate for the admissibility of the reputation evidence. (T5589-91) Defense counsel argued, to no avail, that Stephen Heidle did not work during this time period, nor did he go to school. (T5589) Heidle spent all of his time in the three gay bars in Orlando. One reason that his mother finally kicked him out of the Debary home was his predilection for staying out until 4:00 a.m.

(T5589-90)

Glen Pace met Stephen Heidle in December, 1990, at Sarah Gabrys' house. Clayton Cooper and Joshua Romero were also present. (T5626-27) At the time of trial, Pace had not seen Heidle since April, 1991. (T5627) From December to April, Pace socialized with Heidle at least three times a week, either at Heidle's Debary house or at the Orlando night clubs. (T5628-30) Heidle spent most of his time with Pace, Jason Larzelere, Clayton Cooper, and Sarah Gabrys. (T5630) Aside from the fact that Heidle had lied to Pace on several occasions, Pace testified that Heidle's reputation in the community for truthfulness was a bad one. Stephen Heidle was known to be a liar by approximately 99% of the people that knew him. (T5630-32) The community included Sarah Gabrys, Joshua Romero, Clayton Cooper, James Cole, George Ferrell, Brian Shepardson, Donny, and Ariel, all homosexuals who frequented Big Bang, Southern Nights, (gay clubs in Orlando), and Tracks (a gay club in Tampa). (T5638-40) During the first four months of 1991, Pace and other Heidle acquaintances would stand around at the gay bars and discuss Heidle's reputation. (T5641) Pace recounted specific discussions he and friends had regarding Heidle's untruthfulness. (T5642-44) Heidle's entire circle of friends consisted of gays or people who associated with gays. (T5645) Heidle and Pace had also been to Boulevard Station, a gay bar in Daytona Beach. (T5646) Debary has no gay bars. (T5645-46) Heidle invariably traveled to Orlando in order to socialize. (T5646) Pace knew of only two friends Heidle had in

Debary, Jennifer and Susan. (T5646)

After listening to the proffer of Glen Pace's testimony, the trial court ruled:

> As to the reputation testimony, the Court finds that the segment of the community or cross-section of the community testified to by this witness, which is the base from which, and the individuals within that, quote, segment within which he has described have given him the input based upon which he is here to testify to the reputation for truth and voracity [sic], is not sufficiently broad-based nor neutral enough or generalized enough to be classed as a community, within the applicable law or the Court is required to make that determination.
>
> Furthermore, the Court has considered the relatively short period of time that this witness has testified to as having known Stephen Heidle, the small number of people this witness has testified to as having supplied him with the information, which the Court points out, are specific instances of conduct that largely were known by an experience, if believed, by this individual himself, in his relationship with Stephen Heidle.
>
> And the Court finds that, largely, the basis for his inclination to be prepared to testify on this issue is his personal opinion and rumor with regards to the specific instances.
>
> And for all those reasons, the Court believes that there's not a sufficient reliable basis to allow the opinion of this witness on the reputation for truth and voracity [sic] of Stephen Heidle.

(T5651-52)

Section 90.609, Florida Statutes, provides that a witness'

credibility may be attacked by evidence of the witness' reputation for truth and veracity in the community or among his associates. Williams v. State, 344 So.2d 927 (Fla. 3d DCA 1977). Reputation testimony is the only evidence that is admissible. Schavers v. State, 380 So.2d 1180, 1181 (Fla. 5th DCA 1980). The proper foundation for the admission of such reputation evidence is establishing that the witness knows the person's reputation for the trait involved. Hinson v. State, 59 Fla. 20, 52 So. 194 (1910). Reputation testimony of this type is admissible as an exception to the hearsay rule. §90.803(21), Fla. Stat. (1991). The statute refers to "reputation of a person's character among his associates or in the community." Id. It is clear that evidence of a person's reputation may be gathered from his associates rather than simply from the neighborhood where the witness resides or works. The logical approach is to allow reputation testimony based on discussions at areas where the person has some constant association. See Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937).

The trial court excluded the proffered evidence, concluding that the community was too small and of insufficient duration. The trial court's ruling was clearly erroneous. As defense counsel pointed out below, the proffered witnesses knew Stephen Heidle in the community in which Heidle chose to live. Heidle did not play recreational softball. He did not go to church. He did not go to school. His only "job" was occasionally helping the Larzeleres. The vast majority of his waking hours were spent

at various gay bars in central Florida. (T5650)

> This is the people that he hangs out with, and this is where he's known. And in Stephen Heidle's existence, this is his community.
>
> It's not a geographical location, Your Honor. It's the people that he's known with and that he associates with, and that he's known to.

(T5651)

The traditional definition of "community" has been the community in which the person resides. See 2 Weinstein, Evidence §405[02]. "However, in many urban areas today, persons may not know their neighbors." Erhardt, Florida Evidence §405.1, p.191 (1994 Edition). In recognition of our changing society, the concepts of "community" and "associates" have expanded.

> Today it is generally agreed that proof may be made not only of the reputation of the witness where he lives, but also of his repute, as long as it is 'general' and established, in any substantial community of people among whom he is well known, such as the group with whom he works, does business, or goes to school.

McCormick, Evidence §43, p.159 (4th ed.)

This Court has allowed reputation testimony to be based on discussions at places of employment or other areas in which the person has some constant association, rather than where the person lives. Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937) [Error to exclude character witnesses who would prove defendant's reputation where she worked but could not testify as to her reputation where she resided.] This Court stated:

> [W]e are persuaded that 'the community' or 'neighborhood' whose estimate of a person's character or reputation is most important is the community or neighborhood where he or she is best known...

Hamilton v. State, 176 So. at 94. It is also enlightening to note that the "reputation as to character" exception to the hearsay rule, section 90.803(21), includes within the exception "reputation of a person's character **among his associates** or in the community." (Emphasis added).

Some Florida decisions limit reputation among a group other than in the area where the person resides, only to situations in which there is "a showing of the unavailability of reputation witnesses from a person's residential community." See Webster v. State, 500 So.2d 285, 287 (Fla. 1st DCA 1986) [Evidence of a person's reputation on a college campus was not admissible because there was no predicate showing the unavailability of reputation witnesses from the person's residential community.] However, Erhardt criticizes this line of cases, pointing out the better view of admitting reputation evidence whenever it is within a substantial group of persons of which the person is constantly interacting. Erhardt, Florida Evidence §803.21 (1994 ed.) Erhardt points out that this approach would properly leave the question for the jury in deciding how much weight should be given the testimony. Id. Otherwise, counsel is left with no indicated method of how to prove that residential reputation witnesses do not exist. "There should be no hierarchy of reputation between particular groups and no predicate showing of

unavailability."

Pursuant to Section 90.105(1), the trial court must find as a preliminary fact that the reputation is sufficiently broad-based. Appellant's trial court concluded that the defense had not met this particular burden. However, a person's reputation must, out of necessity, be based on the spectrum, however small, of his own associations. Here, in the months preceding the murder, Stephen Heidle spent most of his time in the company of a small group of friends that frequented the gay bars of central Florida. Although Heidle lived with his mother in Debary, he spent little time there. The defense certainly could not have called Heidle's own mother concerning his reputation. She spent no time with his friends. The only other people that Heidle spent any time with were the Larzeleres, both of whom exercised their constitutional right not to testify. The defense presented the only community that Stephen Heidle knew.

Appellant recognizes that the trial court has broad discretion in ruling on the admissibility of evidence which ruling will not be disturbed absent a clear showing of abuse of discretion. See generally Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987). Appellant believes she has met that burden in the instant case. The testimony of Stephen Heidle was critical to the State's case. The length of cross-examination proves how important defense counsel thought Heidle's testimony was. Stephen Heidle's community in the months prior to the murder was limited to a small group of friends and associates who socialized

at gay clubs in central Florida. As such, the reputation testimony was reliable and admissible. The trial court should have allowed the jury to determine the weight to give the evidence of Heidle's reputation. The trial court's ruling deprived Appellant of a fair trial. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17, Fla. Const.

## POINT II

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL AFTER KRISTEN PALMERI TESTIFIED IN VIOLATION OF THE ORDER IN LIMINE THAT JASON LARZELERE USED COCAINE AND KILLED PEOPLE.

Appellant filed a motion in limine to prohibit testimony concerning uncharged criminal conduct. The trial court heard the motion on October 4, 1991. (T288,368-85) Pretrial discovery revealed that both Virginia and Jason Larzelere had allegedly engaged in drug use, drug dealing, extra-marital affairs, inappropriate sexual liaisons, and other immoral or illegal conduct. (T369) In arguing his motion, defense counsel prophetically stated:

> I'm not concerned that [the prosecutor] is going to get up there and say, Is it true Jason snorts coke?...I am afraid that [the witness] is going to get up and make a statement like that.

(T376) While the State conceded that certain matters were irrelevant, the prosecutor agreed to file a written proffer of collateral crimes evidence that the State would introduce at trial. The court reserved ruling on the motion in limine. (T377-85; R325-26) Prior to the testimony of Kristen Palmeri, the prosecutor stipulated to the inadmissibility of Jason Larzelere's statements to Kristen Palmeri regarding his admitted homosexuality and his statement that he was only good for "doing drugs...or killing people." (T3940-41) The parties were so careful that the State proffered Palmeri's testimony outside the presence of the jury. (T4079-4119) The prosecutor instructed

Palmeri to avoid mentioning Jason's homosexuality and drug dealing. (T4069-72) Palmeri then proceeded to testify about the funeral arrangements for Dr. Larzelere. (T4196-97) The prosecutor asked how Jason prepared for the funeral in terms of "the way he fixed himself up." (T4197) Palmeri explained how Jason rubbed acne medication on his face to look pale. Palmeri continued:

> And she told him that he was supposed to be sad and he was supposed to act like an invalid. And as I was getting dressed downstairs, Jason proceeded to come downstairs and do coke in the tanning room in front of me.

(T4197) Defense counsel immediately moved for a mistrial. (T4197-98) The prosecutor explained that the witness had been instructed not to mention Jason's drug use. The prosecutor argued that, in any event, the testimony was not prejudicial to Virginia Larzelere. (T4198-99) The prosecutor suggested that the court strike the offensive testimony and read a curative instruction. (T4199) The court sustained the defense objection, struck the offensive testimony, and instructed the jury to disregard the testimony entirely. (T4199-4201) In response to the court's question, the jury agreed that they could disregard the testimony. (T4201) The court reinstructed the witness to refrain from mentioning any illegal drug use. (T4202-3) The judge took the motion for mistrial under advisement. (T4199) The defense subsequently renewed her motion for mistrial, and the trial court denied it. (T5705-6)

"[A] defendant's character may not be assailed by the State

in a criminal prosecution unless good character of the accused has first been introduced." Young v. State, 141 Fla. 529, 195 So. 569 (1939). See also § 90.404, Fla. Stat. (1991); Jackson v. State, 545 So.2d 260 (Fla. 1989) [reversed where jury learned that prior jury had convicted defendant of same crime]; Hardie v. State, 513 So.2d 791 (Fla. 4th DCA 1987) [police officers' testimony created impression that defendant had prior record]; and Russell v. State, 445 So.2d 1091 (Fla. 3d DCA 1984) [mere reference to "mug shots" entitles defendant to new trial]. This Court has held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity of the crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 396 So.2d 903, 908 (Fla. 1981). Accord Peek v. State, 488 So.2d 52, 56 (Fla. 1986).

Virginia Larzelere's jury heard that her son, co-conspirator, codefendant, and dominated pawn of a triggerman was snorting cocaine prior to Dr. Larzelere's funeral. Despite the jury's assurances to the contrary, they could not have disregarded such cavalier and callous behavior on the part of Jason Larzelere. The State argued below that the objectionable evidence implicated only Jason, not Virginia Larzelere. That argument cannot carry the day. The State's theory was that Virginia Larzelere manipulated her teenage son into shooting his stepfather, so that both Virginia and Jason could share in the insurance proceeds. This Court has recognized "guilt through

association" as a working concept in juries. Fulton v. State, 335 So.2d 280, 285 (Fla. 1976).

> There's also the possibility of a "spill-over" effect. The jury's perception of the defendant might have been colored by the knowledge of a friend's involvement and a collateral matter. The danger of "guilt by association" is a real one, which ought to be minimized whenever possible.

The situation in Larzelere's case is much more egregious than that in Fulton. Virginia's son and co-conspirator was snorting cocaine prior to the funeral of the murder victim, his stepfather. The timely motion for mistrial should have been granted. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LAW OF THE CASE.

Rule 3.390(a), Florida Rules of Criminal Procedure, states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel....

Defense counsel filed several written requests for special jury instructions at the guilt phase. (R406-12) All of the instructions had a basis in the caselaw cited in the written requests, and several were not adequately covered by the standard instructions. The trial court denied all of the requested instructions. (R406-8,410-12;T5731-40) A jury must be apprised of all the pertinent law. Snedegar v. Arnone, 532 So.2d 717 (Fla. 4th DCA 1988). When an erroneous instruction is given, the proper test is not whether the jury was actually misled, but whether the jury might reasonably have been misled. See Florida Power & Light Co. v. McCollum, 140 So.2d 569 (Fla. 1962). Such a test seems appropriate also when a request for a special instruction that is justified by the evidence is refused. Snedegar v. Arnone, 532 So.2d at 719. Clearly, the key question is whether the requested special instructions were accurate statements of the law which were not covered by the standard jury instructions. See, e.g., Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

Defense counsel requested the following special jury

instructions: (1) Interest In Outcome (R406) -- In evaluating credibility of witnesses, the jury should consider the witnesses' interest in the outcome of the case; (2) Number Of Witnesses And Uncontradicted Testimony (R407) -- The fact that one party called more witnesses and introduced more evidence than the other should not necessarily result in a verdict for that side; (3) Credibility Of Law Enforcement Witnesses (R408) -- The testimony of police is not worthy of more or less consideration than that of any other sworn witness; (4) Accomplices Called By The Government (R410) -- Accomplice testimony must be scrutinized with great care; and (5) Circumstantial Evidence (R412) -- The former Standard Jury Instruction on circumstantial evidence.

Appellant concedes that some of the requested special instructions are covered, albeit not as thoroughly, in the standard jury instructions. However, Appellant submits that the requested instructions would have offered a more thorough and accurate explanation of the applicable law. Additionally, the requested instructions dealing with circumstantial evidence and the credibility of police officers are not covered by the standard instructions.

Appellant recognizes that the circumstantial evidence instruction has been deleted from the standard jury instructions. In doing so, this Court stated:

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a

specific case.

In the matter of Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). If any case is appropriate for a circumstantial evidence instruction, it is this one. The State's case was a web of circumstances. To well and truly try the issues in this case, the jury needed to know that the circumstantial evidence, however strongly it might suggest Virginia Larzelere's guilt, is insufficient if it does not exclude every reasonable hypothesis of innocence. Here, the jury was told nothing about weighing the circumstantial evidence. Without any guidance in this crucial area, the jury might reasonably have been misled. See Florida Power & Light Co. v. McCollum, 140 So.2d 569 (Fla. 1962).

Similarly, the trial court denied the requested instruction concerning the credibility of law enforcement witnesses. (R408) The requested instruction told the jury that a police officer's testimony is not necessarily entitled to greater weight than that of an ordinary witness. This concept is clearly not contained in the standard jury instructions. It is important because juries frequently put more stock in a police officer's testimony simply because he is a police officer.

> ...Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law...

Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980). Bowles was entitled to a new trial based on improper testimony of four

police officers that the defendant's testimony was not worthy of belief. Larzelere's jury was not instructed as to the proper way to consider police officers' testimony.

"While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case." Steele v. State, 561 So.2d 638, 645 (Fla. 1st DCA 1990). The standard jury instructions should be amplified or modified to the extent required by the facts of a particular case. Cruse v. State, 588 So.2d 983 (Fla. 1991); Yohn v. State, 476 So.2d 123 (Fla. 1985). The trial court's denial of the requested jury instructions deprived Virginia Larzelere of her constitutional rights to due process of law. Amends. V, XIV, U.S. Const.; Art. I, § 9, Fla. Const.

## POINT IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE SELECTED PORTIONS OF TAPED STATEMENTS AND REFUSING APPELLANT'S REQUEST TO INTRODUCE THE COMPLETE STATEMENT IN COMPLIANCE WITH SECTION 90.108, FLORIDA STATUTES (1993).

The State introduced into evidence and played for the jury selected portions of several statements. Before any tapes were played, defense counsel interposed an objection to the State's practice of picking and choosing certain portions of statements to present. Defense wanted the statements and tapes played in their entirety.

> [Defense counsel]: All these statements he's got right there, Judge, are statements taken from Virginia Larzelere by law enforcement either on the phone or in person over a period of two months, and one by Jason too.
>
> But the problem we ran into on Saturday is the State decided that there were things that they had originally agreed with us we had the right to go in and they didn't want those in.
>
> * * *
>
> ...There are large portions of tapes that the State has chosen not to play...they should allow the entire tape in.
>
> * * *
>
> THE COURT: ...I don't believe that the State in their case should present your defense or include in a taped statement that portion that might in fact be inculpatory....even if that means that you have to introduce in your case in chief something that you might not have had to had the State...introduced the

> whole thing, I'm ruling that they do not have to....
>
> * * *
>
> [Defense counsel]: So the record is clear, I will say it again that our position is under 90.105 (sic) under the doctrine of completeness, it is our demand that the entire statement be put in.

(T4614-17) The State then published to the jury an obvious abridgement of the March 10, 1991, police interview of Virginia Larzelere. (T4661; SR570-604; State's Exhibit 48)[32]

State's Exhibit 67, was an audiotaped interview of Jason Larzelere by Sergeant Bennett on April 5, 1991. (T5077-80; SR617-23) Another consisted of a taped telephone conversation between Sergeant Bennett and Virginia Larzelere on April 4, 1991, State's Exhibit 68. (T5088-9; SR624-28) Defense counsel objected and requested that the entire tape be played pursuant to Section 90.108. (T4474-79,5067-69) The trial court then allowed the State to play their selected portion of Jason's interview rather than the entire tape. (T5077-80) The defense interposed the same objection to the State playing a selected portion of a taped phone conversation between Sergeant Bennett and Virginia Larzelere on April 4, 1991. (State's Exhibit 68). (T5083-87) Defense counsel clearly articulated his objection.

> [Defense counsel]: Your Honor, my objection again is under the doctrine of

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[32] Counsel attempted to obtain a complete transcript of the taped interview by supplementing the record. Unfortunately, the transcript of the tape clearly indicates that only Pages 59 through 84 were transcribed. (SR571)

completeness pursuant to 90.108, request the entire tape be played other than those portions we've objected to.

*  *  *

When I told her (the prosecutor) that there were other portions of these tapes I wanted played, she said it didn't go toward the conviction of Virginia Larzelere and she was not interested in introducing those parts...

*  *  *

THE COURT: Okay. Now, is there anything that you can specifically argue that is prejudicial of chopping out this portion that they want to play and it would not be remedied by you seeking to have the remainder introduced provided it's otherwise admissible?...You'll have every opportunity to cross-examine this witness about whatever it is that you want to cross-examine him about the tape recording, whatever is being said as he's sitting there, and I'm not going to cut that right that you have off. Maybe I'm not understanding that argument of prejudice you are making. What is the argument of prejudice?

[Defense counsel]: Judge, I want the entire tape in.

THE COURT: I understand that. I'm asking you, what is the prejudice if I don't allow it or don't require the State to present the entire tape but to give you a choice during your case should you choose to do so?

[Defense counsel]: It is at this time highlighting a very small portion of a 66 page statement that's down to one-third of that statement at this time. Because if it was I, to use the word "inconsistency", that small inconsistency is greatly outweighed by the overall tone, attitude and demeanor of Virginia Larzelere with respect to this particular matter.

> THE COURT: But when you're bringing that out yourself, of course, the prejudice versus me requiring the State to do it at this time.
>
> [Defense counsel]: That's the prejudice, Judge.
>
> THE COURT: Okay. I'm going to overrule that objection. I don't understand your argument but I am not eliminating the right of the defense to come back and introduce the remaining portion of what the State doesn't seek to introduce at this time.

(T5083-87) The State then played a portion of the audio tape that consumed one and a half pages of transcript. (T5088-89)

Section 90.108, Florida Statutes (1993), states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

The Law Revision Council Note (1976) explains the twofold reasoning of the Section. First, it avoids the danger of mistaken first impressions when matters are taken out of context. Second, it avoids the inadequate remedy of requiring the adverse party to wait until a later point in the trial to repair his case.

The statute is abundantly clear. The trial court erred. The adverse party seeking to have the tape played in its entirety need not show prejudice. The trial court's ruling denied Virginia Larzelere her constitutional right to a fair trial.

Amends. V, VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT V

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S PRO SE MOTION TO DISCHARGE COUNSEL, THE PRO SE MOTION TO CONTINUE, THE PRO SE MOTION FOR NEW TRIAL, COUNSEL'S MOTION TO WITHDRAW AND ALLOWING SENTENCING TO PROCEED WITH APPELLANT'S ORIGINAL LAWYER.

Shortly before trial commenced, Larzelere attempted to substitute different counsel for Jack Wilkins, her trial lawyer. (T472-83) She ultimately abandoned these attempts. Prior to the start of trial, the judge, at the State's request, explained the potential conflict that existed between Jason and Virginia Larzelere. John Howes originally represented only Jason Larzelere while Jack Wilkins represented only Virginia Larzelere. A week before Virginia's trial began, Howes filed a notice of appearance as co-counsel on behalf of Virginia, while Wilkins filed a similar notice of appearance in Jason's case. The trial court informed both Jason and Virginia of the potential conflict that existed where both were represented by co-counsel. Both Jason and Virginia indicated that they understood and waived any potential conflict. (T508-11,577-92,617-57)

After the guilt and penalty phases had concluded, Virginia Larzelere filed a pro se motion for new trial citing various conflicts as well as specific allegations of ineffectiveness. (R542-46; T6436-53) On June 12, 1992, the court held a hearing on Appellant's pro se motion. (T6567-6619) In response to Appellant's pro se motion, Virginia's lawyers made an oral motion to withdraw. (T6573) Appellant asked for a continuance to

secure the presence of various witnesses to prove the conflict of interest and the allegations in her motion. (T6575-76) The trial court denied the motion to continue. Appellant argued that the trial court had erred in approving her waiver of conflict which resulted in the failure to call her codefendant to testify in her behalf at trial. Appellant withdrew her previously made waiver of conflict for purposes of all future proceedings. (T6576) Appellant also alleged conflict regarding a private investigator working for both Jason and Virginia; her lawyer's control of her finances; specific acts or omissions resulting in ineffectiveness of counsel at trial; and lack of contact with her lawyer prior to trial. (T6576-82) The trial court ordered counsel to respond to the specific allegations which he did. (T6583-6605) The trial court denied Appellant's renewed request for a continuance so that she could prove her claims. (T6606-7) The trial court ruled that Appellant had failed to show that her counsel had been ineffective. The court found Appellant's previous waiver of conflict to be intelligent, voluntary, and valid. (T6609-11)

Pointing out that his client, who faced a potential death sentence, had no confidence in him anymore, Wilkins renewed his motion to withdraw which the trial court denied. (T6611-13) The trial court offered Appellant the opportunity to represent herself or to remain with her current representation. (T6613-14) Appellant had previously been declared indigent. (T6574) When Larzelere requested time to think about her choice regarding

self-representation, the trial court denied that request and a sentencing hearing was set for September 4, 1992. (T6614-19, 6671) At the commencement of the sentencing hearing to present mitigating evidence to the trial court, Wilkins requested permission to withdraw as counsel. (R663-65; T6671-74) The newly filed petition for leave to withdraw alleged that Bonnie Gilbert claimed that Wilkins requested that she assault the jurors in the parking lot; that Jason's biological father alleged that Wilkins had previously represented and had a sexual dalliance with Virginia Larzelere in 1975; and that Wilkins had a sexual relationship with a Volusia County court reporter prior to Virginia's trial. (R663-65) The trial court denied the motion as insufficient as a matter of law. (T6674; R666) The sentencing hearing concluded after the testimony of two corrections officers from the Volusia County Jail. (T6671-91) On May 11, 1993, the court sentenced Virginia Larzelere, with Jack Wilkins at her side, to death in the electric chair. (T7318-60)

In Cash v. Culver, 122 So.2d 179 (Fla. 1960), this Court held that "a fair and reasonable chance to obtain counsel in a criminal case is absolutely vital to the validity of an ultimate judgment of guilt." Appellant recognizes that an application for a continuance is addressed to the sound discretion of the trial court, and the denial of such a motion should not be reversed by an appellate court unless there has been a palpable abuse of this judicial discretion which appears clearly and affirmatively in

the record. Magill v. State, 386 So.2d 1188 (Fla. 1980).

> It is axiomatic that in all criminal prosecutions the accused enjoys the right to have assistance of counsel for his defense and implicit in this guarantee is the right to be represented by counsel of one's own choice. Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932)....

Linton v. Perini, 656 F.2d 207, at 208 (6th Cir. 1981). The circuit court also recognized:

> Every person has a constitutional right to retain at his own expense his own counsel so long as that right does not unreasonably interfere with the normal progress of a criminal case. Conversely, a state may not arbitrarily interfere with this right in the name of docket control. Evidence that a defendant was denied this right arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice. Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel.

Id., 656 F.2d at 211-212.

The level of competence demonstrated by Appellant's lawyer matters not.

> The government argues that [the appellant] was competently represented by appointed counsel at trial. That, however, is not a relevant consideration. A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice. "Obtaining reversal for violation of such a right does not require showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings." Flanagan v. United States, 465 U.S. 259, 104

> S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1988). In this respect, the denial of one's selected lawyer is quite different from a claim of ineffective counsel where a harmless error test is appropriate. The right at stake here is similar to that of self-representation. "The right is either respected or denied; its deprivation cannot be harmless."...

United States v. Rankin, 779 F.2d 956, 960 (3d Cir. 1986). In Rankin, the circuit court reiterated that although a trial judge has broad discretion in granting or denying continuances, the denial of a postponement to allow his lawyer to finish another client's trial so that he could represent Rankin at his trial required that a new trial be granted. See also Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985) (A requirement that prejudice be shown "has no applicability to counsel of choice cases[.]"); United States v. Ray, 731 F.2d 1361, 1365-66 (9th Cir. 1984) (Denial of the qualified right to counsel of choice is reversible error regardless of whether prejudice is shown.)

Almost three months before the sentencing hearing, Virginia Larzelere made it clear she did not want to proceed with Jack Wilkins as her lawyer. (T6567-6619) Despite several requests to continue the case, the trial court forced her to proceed with Wilkins. The trial court rebuffed Wilkins' attempts to withdraw from further representation. (T6611-13,6671-74) Although the trial court offered Appellant an opportunity to represent herself, the court would not even allow her time to think about that critical choice. (T6613-14) The trial court allowed only one other option, staying with current counsel. (T6613-14) The

trial court's action denied Larzelere her constitutional right to due process of law. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT VI

THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION FOR NEW TRIAL WHERE THERE WAS EVIDENCE THAT THE JURY HAD BEEN CONTAMINATED BY EXTRAJUDICIAL INFORMATION.

After the jury found Virginia Larzelere guilty as charged, three jurors left the courthouse and were threatened in the parking lot by Bonnie Gilbert, a black female who had no connection to the case. (T5970-6051) Gilbert threatened to blow up one of the juror's car. Police subsequently arrested Gilbert and charged her with a second-degree felony. (T5970-89) Jurors Day, Eubanks, and Bufis testified about the incident. (T6006-51) The incident angered Bufis, but had no effect on Day. The incident upset Brenda Eubanks. All three assured the court that they could continue jury duty, and that the incident would have no effect on their deliberations. (T6006-52) The trial court then questioned each of the other jurors individually. (T6067-6118) While some of the jurors knew about the parking lot incident, some of them did not. All jurors agreed that they could still be fair.

Appellant immediately moved for a new guilt phase based on the contamination of the jury. (T6128-36) Appellant moved for a mistrial of the penalty phase based on the same grounds. (T6139-48) Although the court found improper contact by a third person, the court concluded that no prejudice accrued. Even if previously prejudiced, the court found any taint removed. (T6148-51) Appellant challenged Juror Day for cause based on his

testimony that he believed that one of the parties was somehow involved in the parking lot incident. Appellant also challenged Juror Bufis for cause based on his testimony that he was concerned after the incident and was so fearful that he would not allow his wife to drive his truck. (T6152-3) The trial court denied both challenges for cause.

Neither side presented any evidence at the penalty phase. (T6171-89) Since most of the day had been consumed by the hearing on the jury taint, defense counsel requested the jury be excused to go home and return the next day for argument and instruction. (T6189-93) The trial court insisted that both sides proceed with closing argument. (T6193-6207) After closing, the court gave the jury a choice of deliberating that night or returning the next day. Although Appellant wanted to allow the jury to go home that night, the trial court decided to sequester the jury after they decided to return the next day for instruction and deliberation. (T6207-38) Appellant observed that Juror Eubanks was visibly upset when the sequestration was announced, but the court disagreed. The jury returned the next day and, following instructions, returned a bare majority (7 - 5) recommendation that Virginia Larzelere die in Florida's electric chair. (T6238-66)

After the penalty recommendation, another jury problem came to light. A fledgling author interviewed Juror Joyce Kelley about her service on the Larzelere jury. (T6314-6415) A private investigator also interviewed Joyce Kelley. (T6416-33) Kelley

alleged numerous improprieties during the trial. Kelley claimed that some jurors were discussing the evidence before deliberations. (T6334-37,6352-53,6428-29) Four jurors concluded that Larzelere was guilty during the first week of the trial. (T6339) Kelley also claimed that, during deliberations, one juror revealed that he had read a newspaper article indicating that Jason was going to plea bargain for a ten year sentence. (T6372-73) Juror Stan French took notes on the evidence during trial recesses. (T6376-79,6429-30,6751-52) After Kelley initially voted not guilty, the other jurors pressured her based on the misconception that a hung jury would lead to Larzelere's freedom. (T6382-85) Kelley also revealed that several of the jurors perjured themselves when the denied knowing about the parking lot incident.[33] (T6392-97) After Stan French was individually questioned about the incident, he returned to several of the other jurors and communicated the reason for the court's inquiry. (T6395-97,6426-27) Kelley was angry that the jury had been threatened and no one told her. (T6393-95) Kelley testified that several jurors made comments indicating that they had read media accounts of the case contrary to the court's orders.[34] (T6743-57)

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[33] When examined by the court, Juror Kelley's memory was refreshed. Kelley concluded that she was truthful during the court's examination regarding the parking lot incident. (T6758-69)

[34] Juror Kelley understood the court's instruction to be that they should avoid all media, not just media that dealt with the case. (T6880-81)

Subsequently, Kelley admitted confusion as to when other jurors mentioned Jason's plea bargain. She was not sure if the comment occurred during the guilt deliberations or the penalty deliberations. (T6931-51) The trial court subsequently interviewed all of the jurors regarding extrajudicial media exposure, Jason's plea bargain, the parking lot incident, and juror note-taking. (T7046-7237) For the most part, the other jurors denied Kelley's allegations of misconduct during their jury service. All the jurors maintained that any irregularities had no effect on their deliberations. On April 30, 1993, the trial court rendered an exhaustive order denying Appellant's motion for new trial. (R1070-1247)

If there is reasonable ground to conclude that a jury acted through prejudice or unlawful cause, a new trial is appropriate. See Florida Publishing Company v. Copeland, 89 So.2d 18, 20 (Fla. 1956). It is fundamental that every defendant is entitled to be tried by a fair and impartial jury. See, e.g., Marrero v. State, 344 So.2d 883 (Fla. 2d DCA 1977). Our system of law has continuously endeavored to prevent even the possibility of unfairness. In re Murchison, 349 U.S. 133 (1955). In conclusion, this and any other case tried in our judicial system is to be induced only by evidence and argument in open court and not by any outside influence. Patterson v. Colorado, 205 U.S. 454 (1907). If there is a reasonable possibility that cumulative errors have contributed to the conviction, a new trial is mandated. See Chapman v. California, 386 U.S. 18 (1967).

During the course of the trial, there was some indication that the jurors were talking about the evidence before they started their deliberations. The trial court felt compelled to sua sponte instruct the jury that they should not deliberate until they had heard all of the evidence. (T3778-83,3838-39, 3767-72) As far as examining the jurors as to how the extra-judicial matters may have played a part in their deliberations, the court may have compounded this problem. § 90.607(2)(b), Fla. Stat. (1993) and Keen v. State, 639 So.2d 597 (Fla. 1994). Defense counsel specifically requested that the trial court not make such an inquiry. (T6927-28,6952-60) The safer and more prudent course of action was to grant a new trial. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ALLOWING THE STATE TO INTRODUCE IRRELEVANT AND PREJUDICIAL EVIDENCE.

In the days following the shooting, Virginia Larzelere reported to the Edgewater Police that her residence had been the victim of a drive-by shooting.[35] (T5095-98) Believing that Appellant was attempting to cover up her own guilt, the police failed to respond or investigate the shooting. Fed up with the detectives' attitude, Virginia searched her own property attempting to find evidence of the shooting. She found what she thought were bullets fired by the assailants. Virginia turned these bullets over to the police. (T4535-36) At trial, the State introduced this physical evidence over Appellant's objection that the bullets were neither relevant nor material. (T5236) A State firearms expert opined that the bullets had not been fired. He further conjectured that the markings on the bullets had been made by a tool. (T5282) Therefore, the jury was left with the unmistakable impression that Virginia Larzelere was attempting to direct suspicion away from her and Jason and direct it toward phantom gunmen.

All relevant evidence is admissible. § 90.402, Fla. Stat. (1993). Evidence is relevant if it tends to prove or disprove a material fact. § 90.401, Fla. Stat. (1993). The trial court

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[35] Virginia was not lying about the shooting. One of the State's own witnesses saw the shooting and personally called 911. (T4535)

improperly admitted the bullets that Virginia Larzelere turned over to the Edgewater police. The evidence failed to prove or disprove any material fact. The State's theory which the jury obviously believed was that, after having her husband killed, Appellant attempted to misdirect the police investigation away from herself. The irrelevant and immaterial evidence admitted over objection prejudiced Virginia Larzelere. The State's evidence tended to show that the bullets did not come from the drive-by shooting. Virginia Larzelere found the bullets on her property and believed that the bullets had been fired by unknown assailants. The evidence she turned over to the police were probably bullets dropped by some hunter or other gun enthusiast passing through the area. There is no telling how old the bullets were nor how long they had been on the Larzelere property. Even if the bullets were slightly relevant, the court should have excluded the evidence where its relevance was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. § 90.403, Fla. Stat. (1993). The introduction of the evidence violated Appellant's right to a fair trial. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT VIII

IN CONTRAVENTION OF THE EIGHTH AMENDMENT, THE TRIAL COURT FOUND THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED AND THAT THE MURDER WAS COMMITTED FOR FINANCIAL GAIN WHERE BOTH FACTORS ARE BASED ON THE SAME FACTS.

The trial court found that Virginia Larzelere made sure that her husband's life was heavily insured, then arranged to have him killed for the financial proceeds. Appellant submits, as she did below[36], that both aggravating factors should merge into one. Appellant could not have carried out this plan for financial gain without the requisite heightened premeditation. One necessarily follows the other. She could not have killed Dr. Larzelere for the insurance proceeds on a "spur of the moment decision." Both factors are based on the same aspect of the criminal episode, thus constituting impermissible doubling. See, e.g., Cherry v. State, 544 So.2d 184 (Fla. 1989).

Appellant recognizes that this Court has previously rejected a similar argument. See Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) and Echols v. State, 484 So.2d 568 (Fla. 1985). Fotopoulos killed his victim in furtherance of his plan to receive life insurance proceeds upon his wife's death. This Court repeated its conclusion from Echols:

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves

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[36] Appellant argued that the factors were duplicative and urged the trial court to instruct on only one. (T6175-77)

> separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement.

484 So.2d at 575.

Appellant submits that the Echols/Fotopoulos distinction is one without a difference. While pecuniary gain is a requisite of a murder committed during a robbery, similarly, pecuniary gain is a requisite result of a premeditated murder for insurance proceeds. There is simply no difference between the two scenarios. A planned murder for insurance proceeds must necessarily be one of heightened premeditation. Similarly, this Court found improper doubling where the only evidence supporting the "avoid arrest" aggravating circumstance was the fact that the victim was a law enforcement officer. Armstrong v. State, 19 Fla. L. Weekly S398 (August 11, 1994). Both of these aggravating factors cannot stand. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

Since a proper result would be the finding of only one aggravating factor, Appellant's death sentence is disproportionate and cannot stand. This Court has almost never affirmed a death sentence based on a single valid aggravating circumstance, especially where the sole aggravating factor related to "heightened premeditation." Virginia Larzelere's death sentence should be reduced to life imprisonment.

## POINT IX

IN VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT WHERE THE STATE ATTEMPTED TO BUG APPELLANT'S CONVERSATION WITH HER CODEFENDANT.

On January 31, 1992, the defense orally moved to dismiss all charges based on outrageous State misconduct. (R1615-17) The State admitted that they surreptitiously planted a recording device in the air conditioning duct connected to a holding cell where Virginia and Jason Larzelere were placed prior to an October 4, 1991, hearing.[37] The State admitted their actions, but contended that their conduct was neither illegal nor outrageous. (T1610-1710,1736-40) Despite electronic enhancement of the audiotape, the contents of the tape were essentially unintelligible. (T1702-4) After hearing evidence and argument, the trial court denied Appellant's motion to dismiss. (T1610-1747;R397)

Appellant contended below and maintains on appeal that the State's conduct was so outrageous and egregious that the conscience of the community should be shocked. The resulting violation of Appellant's rights to due process of law should result in a dismissal of all charges. Amends. V, XIV; Art. I,

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[37] Ironically, the subject of the October 4th hearing was Appellant's motion to dismiss the indictment based on another incident of alleged prosecutorial misconduct. That particular motion and hearing dealt with police attempts to recruit a "snitch" housed near Jason Larzelere's jail cell. (T288-367)

§16, 19, Fla. Const.

Aside from the fact that Appellant was represented by counsel on this particular offense (T1614), she had previously filed a notification of exercise of rights specifically asserting, inter alia, her assertion of her state and federal constitutional rights relating to self incrimination and searches of her residence and person. (R10-11) Furthermore, the State had, prior to the electronic surveillance, kept Virginia and Jason Larzelere separated at the jail and during all transports to court. (T1630-31,1722) Appellant recognizes that a defendant loses much of his expectation of privacy once he is incarcerated. See, e.g., State v. McAdams, 559 So.2d 601 (Fla. 5th DCA 1990). However, the invocation of a defendant's constitutional rights to silence and to an attorney is an important consideration. State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985). Calhoun invoked his right to remain silent and asked to see his lawyer. The police then gave Calhoun the illusion that he could privately confer with his brother in an interview room. This conversation was taped without their knowledge or consent. The Fourth District Court of Appeal ruled that, under these circumstances, admitting the defendant's statements would "make a mockery of the Miranda rights." State v. Calhoun, 479 So.2d at 243. The Calhoun opinion also based its affirmance of the trial court's order on the unlawfulness of the interception of the oral communication contrary to Section 934.03, Florida Statutes. Id.

Not for want of trying, the State failed to obtain any

evidence of value against Virginia Larzelere. Although defense counsel admitted there was no prejudice per se, the State's conduct was so outrageous that the charges should have been dismissed. If the defense had attempted to electronically surveil the prosecutors' discussions, not only would they face sanctions from the Florida Bar, they would also be charged criminally. (T1733) The conduct was so egregious, the trial court should have sanctioned the State by dismissing the charges. See, e.g., State v. Kelly, 640 So.2d 231 (Fla. 4th DCA 1994); Walls v. State, 580 So.2d 131 (Fla. 1991); Krajewski v. State, 587 So.2d 1175 (Fla. 4th DCA 1991); Locke v. State, 588 So.2d 1082 (Fla. 4th DCA 1991); State v. Williams, 623 So.2d 462 (Fla. 1993); Metcalf v. State, 635 So.2d 11 (Fla. 1994); and State v. Cayward, 552 So.2d 971 (Fla. 2d DCA 1989).

## POINT X

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE.

During the defense case-in-chief, the defense attempted to call Randy Means, the state attorney investigator involved in the electronic surveillance of the holding cell where the Larzeleres were placed. (T5668-75) See Point IX, supra. Defense counsel analogized the evidence to police dusting for fingerprints without finding any incriminating the defendant. Defense counsel also wanted to present evidence that the State arguably violated Virginia Larzelere's constitutional rights by the attempted surveillance. Specifically, defense counsel wanted to present evidence that Larzelere had filed a notice of invocation of constitutional rights indicating that she did not want to talk to police and asserted all of her privacy rights under the constitution. Although the trial court initially was inclined to allow the evidence, the court ultimately ruled that the evidence was irrelevant and immaterial. The court apparently accepted the State's argument that the garbled recording was not exculpatory. Instead, the inaudible recording was instead unenlightening and therefore irrelevant.

The trial court should have allowed the evidence and let the jury determine the evidence's weight. An accused has an absolute right to present witnesses to establish a defense. Washington v. Texas, 388 U.S 14 (1967). A trial judge does not have discretion to exclude relevant evidence unless it is inadmissible by virtue

of some recognized rule of evidence. Spencer v. Spencer, 242 So.2d 786 (Fla. 4th DCA 1970). Any doubt as to admissibility should be resolved in favor of allowing the evidence. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982).

The State ignored Appellant's invocation of her constitutional rights and deliberately placed Virginia in a holding cell with her son Jason hoping to record incriminating statements. They got nothing. The defense should have been allowed to present this exculpatory evidence. The defense should also have been allowed to present the evidence, since it tended to show that the State would go to great lengths to prove Virginia Larzelere guilty of her husband's murder. In this particular instance, the State came up empty-handed. The trial court should have allowed the defense to prove these pertinent facts. Amends. V, VI, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE WHERE PRETRIAL PUBLICITY PRECLUDED THE SELECTION OF A FAIR AND IMPARTIAL JURY.

Appellant filed a motion for change of venue and incorporated memorandum of law. (T200-5) On October 4, 1991, the trial court heard argument on the motion, then took it under advisement. (T205-40) Following jury selection, the trial court denied the motion. (T1604)

In Sheppard v. Maxwell, 384 U.S. 333 (1966), the United States Supreme Court held that the trial court's failure to protect Sheppard from pervasive and prejudicial publicity resulted in a denial of his right to a fair trial. Sheppard recognized an affirmative, fundamental duty on the part of the trial court to assure a fair trial by an impartial jury.

> ...But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity....

Sheppard v. Maxwell, 384 U.S. at 362. Traditionally, the record of voir dire has been found to be, not only the best, but also the most reliable source of evidence to indicate the existence or absence of both juror and community prejudice. Rideau v. Louisiana, 373 U.S. 723 (1963).

Although a jury was selected without great difficulty, the vast majority of potential jurors were aware of the pervasive

media coverage of the case. However, all of the jurors claimed that they could disregard any prior knowledge of the case and decide the case fairly on the evidence. See e.g. (T736,39) No one likes to admit that they could not be fair. See Williams v. Griswald, 743 F.2d 1533, fn. 14 (11th Cir. 1984). "[G]oing through the form of obtaining the jurors' assurances of impartiality is insufficient...." Silverthorne v. United States, 400 F.2d 627, 638 (5th Cir. 1968); See also Irving v. Dowd, 366 U.S. 717, 728 (1961) [Jurors' statements of their own impartiality to be given "little weight"]. General conclusory protestations of impartiality during voir dire are not sufficient to rebut the prejudice due to pretrial publicity. Coleman v. Kemp, 778 F.2d 1487, 1543 (11th Cir. 1985); See also Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987). Under certain circumstances, a trial court commits reversible error by permitting jurors to decide whether their ability to render an impartial verdict is impaired. United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980). In United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981), no member of the collective panel admitted to having formed an opinion on the guilt of the accused. Yet, because forty-eight of the fifty-six prospective jurors stated that they had read or heard about the case, the court reversed, holding that the trial court's inquiry was insufficient to reveal possible prejudice.

The test in Florida for determining whether a change of venue is required is:

> [W]hether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence in the courtroom.

Provenzano v. State, 497 So.2d 1177, 1182 (Fla. 1986), citing McCaskill v. State, 377 So.2d 1276, 1278 (Fla. 1978). The burden is on the defendant to raise a presumption of partiality. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). The question of jury partiality is one of mixed law and fact, requiring an appellate court to independently evaluate the voir dire testimony of impanelled jurors. Irving v. Dowd, 366 U.S. 717 (1961).

This Court's review of the record should conclusively demonstrate that Virginia Larzelere did not receive a fair trial by a reliable, impartial jury. The vast majority of the venire had read or heard media reports in some detail concerning the case. The jurors' assurances that they could be fair under the circumstances are incredible and unreliable. Virginia Larzelere did not receive a fair trial. She deserves at least that. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

## POINT XII

THE EVIDENCE, WHICH INCLUDED ADMITTEDLY PERJURED TESTIMONY, IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICTS THUS VIOLATING THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

At the conclusion of the State's case-in-chief, defense counsel moved for judgment of acquittal contending that the State failed to present a prima facie case. The trial court denied the motion. (T5531-32) The trial court denied Appellant's renewal of the motion for judgment of acquittal at the close of all the evidence. (T5705-6) The trial court erred. The State's evidence is legally insufficient to support the guilty verdict. The proof fails to preclude the reasonable possibility that Virginia Larzelere was not involved in any way with her husband's murder. The evidence of Appellant's guilt is almost entirely circumstantial.

"[T]he due process clause protects the accused against conviction except proof beyond a reasonable doubt about every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970).

> Under Florida law, where there is no direct evidence of guilt, and the State seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. [Citation omitted] The basic proposition of our law is that one accused of a crime is presumed innocent

> until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the State to carry its burden. [Citation omitted] It would be impermissible to allow the State to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. [Citation omitted]

Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1980). See Kicksola v. State, 405 So.2d 200, 201 (Fla. 2d DCA 1981) ["[E]vidence which furnished nothing stronger than a suspicion; even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction."] (Emphasis added).

Virginia Larzelere was present at her husband's dental office when a masked gunman entered the back door, chased Dr. Larzelere down the hallway, and shot him. Virginia and Norman Larzelere did not have a storybook marriage. Both had strayed sexually. Two years before the murder, Virginia had, on three occasions, suggested to her lovers that she wished her husband dead. No one thought that she was serious. Several years before his demise, Dr. Larzelere bought several life insurance policies. During the police investigation of the doctor's shooting, Virginia Larzelere suggested several suspects who did not figure into the State's theory at trial. While it is true that Virginia Larzelere said and did strange things both before and after the shooting, none of her behavior, either isolated or cumulatively, proves her guilt beyond and to the exclusion of every reasonable doubt.

Stephen Heidle and Kristen Palmeri claimed that they knew nothing about the murder beforehand, yet they helpfully pitched in to coverup the crime. During closing argument, the prosecutor was very forthcoming in admitting Stephen Heidle's perjury.

> Stephen Heidle, who again the evidence shows, despite his statements that he was willing to make to the police concerning his knowledge only occurring after the murder, his guilty knowledge occurring after the murder, the evidence is persuasive that Stephen Heidle also knew beforehand of the murder taking place.
>
> He was not the shooter, but that he was knowledgeable beforehand and was playing out his own little role....

(T5796)

Giglio v. United States, 405 U.S. 150 (1972) is right on point. Giglio's unindicted co-conspirator, Robert Taliento, identified Giglio as the instigator of the forgery scheme. Taliento testified that he had no deal with the government. This was a lie.

> As long ago as Mooney v. Holohan, [citation omitted], this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." ...In Napue v. Illinois, [citation omitted], we said "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears....When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule....A new trial is required if "the false testimony could...in any reasonable likelihood have affected the

> judgment of the jury..." [citation omitted].

Giglio, 405 U.S. at 153-54; See also Ellis v. State, 622 So.2d 991 (Fla. 1993). Appellant's conviction rests on suborned perjury. This Court must reverse her conviction and sentence.

## POINT XIII

THE TRIAL COURT ERRED IN ALLOWING HEARSAY EVIDENCE OVER OBJECTION THUS VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

Except as provided by statute, hearsay evidence is inadmissible. § 90.802, Fla. Stat. (1993). Section 90.803(18)(e) provides for the co-conspirator hearsay exception.

> A statement that is offered against a party and is:
>
> * * *
>
> A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

Hearsay statements made by one member of a conspiracy are admissible against another member of the conspiracy when it is shown: (1) that both the person making the statement and the person against whom it is offered are members of a conspiracy; [Nelson v. State, 490 So.2d 32, 35 (Fla. 1986)]; (2) that the statement was made during the course of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. Isom v. State, 619 So.2d 369 (Fla. 3d DCA 1993); See also Ehrhardt, Florida Evidence, § 803.18(e) (1994 Edition).

At Appellant's trial, the State introduced several of Jason Larzelere's hearsay statements. (T3112,3219-21,4284,4474-78)

The trial court ruled that the State had proved by a preponderance of the evidence that a conspiracy to murder Norman Larzelere existed between Jason and Virginia. The court ruled the hearsay statements admissible. (T2979-85) The trial court's ruling followed a lengthy pretrial hearing (T1748-1941) and additional proffers and argument at trial. (T2997-3004,2930-60, 4072-4120)

Appellant respectfully submits that the State failed to meet its burden of proof, using evidence independent of the hearsay statements, to prove the conspiracy which would then allow introduction of the hearsay. The error was compounded by the trial court's denial of Appellant's requested limiting instruction, i.e., that Jason's statements could not be considered as substantive evidence of Virginia's guilt, but could be considered with a respect to Jason. (T2984-85) The resulting introduction of the hearsay evidence without a proper limiting instruction denied Virginia Larzelere her constitutional right to a fair trial.

## POINT XIV

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

### 1. The Jury

#### a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

##### i. Cold, Calculated, and Premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[38] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to similar errors. See Hodges v. Florida, 113 S.Ct. 33 (1992) (applying Espinosa to CCP and acknowledging flaws in CCP instruction). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite, would directly conflict with the Cruel and Unusual

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[38] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction also unconstitutionally relieves the state of its burden of proving the elements of the circumstance as defined by case law construing the "coldness," "calculated," "heightened premeditation," and "pretense" elements.

**b. Majority Verdicts**

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only

Florida allows a death penalty verdict by a bare majority.[39]

**c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.**

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

**d. Advisory Role**

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

**2. The Trial Judge**

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like

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[39] Coincidently, Virginia Larzelere's jury recommended death by a bare majority, after hearing no evidence in mitigation. (R446)

problems prevent evenhanded application of the death penalty.

### 3. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[40] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination entrenches on the right to vote, it violates the Fifteenth Amendment as well.[41]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[42] Prior to that time,

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[40] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[41] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[42] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[43]

The history of elections of African-American circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, "Single Member Judicial Districts, Fair or Foul," Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In Volusia, Flagler, Putnam, and St. Johns Counties, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination[44] and disenfranchisement,[45] and use of at-large

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[43] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

[44] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Fifth Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial.[46] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show

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[45] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

[46] The results in choosing judges in Flagler, Putnam and St. Johns Counties (no black judges) and Volusia County (no black circuit judges) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

**4. Appellate review**

**a. Proffitt**

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

**b. Aggravating Circumstances**

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining

aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla.

1982) (rejecting HAC on same facts).[47]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[48] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

**c. Appellate Reweighing**

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

**d. Procedural Technicalities**

Through use of the contemporaneous objection rule, Florida

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[47] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and 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).

[48] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

has institutionalized disparate application of the law in capital sentencing.[49] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell[50] not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

**e. Tedder**

The failure of the Florida appellate review process is

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[49] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

[50] Campbell v. State, 571 So.2d 415 (Fla. 1991).

highlighted by the Tedder[51] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

**5. Other Problems With the Statute**

**a. Lack of Special Verdicts**

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment. Appellant raised this issue below. (R20-24,309-10; T419-20)

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible.

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[51] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument).

**b. No Power to Mitigate**

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

**c. Florida Creates a Presumption of Death**

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the

premeditation aggravating circumstance is applied to the case).[52] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[53] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

**d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.**

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett[54]

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[52] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[53] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

[54] Lockett v. Ohio, 438 U.S. 586 (1978).

principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett[55] principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

**e. Electrocution is Cruel and Unusual.**

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter

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[55] Lockett v. Ohio, 438 U.S. 586 (1978).

cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

## CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant requests this Honorable Court to grant the following relief:

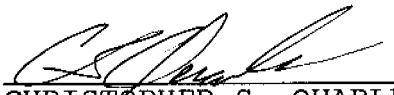
As to Points I through VII, X, XI and XIII, a new trial;

As to Points VIII and XIV, a reduction of Appellant's sentence to life imprisonment; and

As to Points IX and XII, reverse for discharge.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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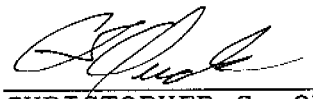
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Gypsy Bailey, Assistant Attorney General, The Capitol Building, Tallahassee, FL 32399-1050; and to Ms. Virginia Gail Larzelere, #842556 (DR #2), Broward Correctional Institution, P.O. Box 8540, Pembroke Pines, FL 33024, this 3rd day of February, 1995.



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ASSISTANT PUBLIC DEFENDER