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IN THE SUPREME COURT OF FLORIDA

JAMES E. HUNTER, Appellant,	)	
vs.	)	CASE NUMBER 82,312
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

JAMES E. HUNTER,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NUMBER 82,312

STATEMENT OF THE CASE

On September 23, 1992, the Appellant, James E. Hunter (a/k/a Psycho), was arrested for first degree murder. (R44-45)[1] On October 6, 1992, the Appellant and three co-defendants were indicted for one count of first degree murder, three counts of attempted first degree murder, one count of attempted armed robbery, and three counts of armed robbery. (R46-49)

On December 1, 1992, Appellant filed a motion for appointment of a confidential mental health expert, and Dr. Rotstein was appointed. (R315,316,320) On February 9, 1993, Appellant filed a motion for appointment of Expert for Mitigation purposes and Motion to determine procedure for appointment of defense experts. (R326-330) On March 2, 1993 an amended Motion for Determination of Defendant's Competence to Proceed was filed. (R350-51) On March 10, 1993 the trial court ordered a Mental Competency Examination of Appellant. On March 11, 1993 the

[1] The symbol "R" will be used herein to refer to the record on appeal, excluding the trial transcript. The symbol "TR" will be used to refer to the trial transcript.

Appellant filed a confidential, non-adversarial and Ex-Parte in Camera Application for Appointment of Expert which was granted. (R361,362) Numerous pre-trial motion challenging the validity of the Florida Capital trial and sentencing scheme were filed. (R383-563)

On June 2, 1993 a competency hearing was held wherein after taking testimony and argument on counsel, the trial court found Appellant competent to proceed. (R56-177,586) A motion to continue the competency hearing to secure the presence of Dr. Ehrlich was denied. (R98) July 8, 1993, the State filed a notice of intent to introduce similar fact evidence. (R594-595) The State also filed a timely notice of intent to sentence Appellant as a habitual violent felony offender. (R484)

On June 22, 1993, Appellant filed a Motion to Suppress. (R92-94) On July 9, 1993, a hearing was conducted on the Motion to Suppress. (R179-263) The Motion to Suppress was denied. (R247,618) Appellant filed a Motion to Continue and renewed said and requested an evidentiary hearing on said motion. (R602-4;TR4-6) The Motion to Continue was denied has well as the request for an evidentiary hearing on the Motion to Continue. (R605;TR6-8)

The case proceeded to jury trial on August 2, 1993, and the trial concluded on August 6, 1993. (TR314-1200) During the voir dire of the initial panel, Appellant moved that Appellant's alias "Psycho" be stricken from the indictment. (TR51) Although the trial court agreed that the alias may be prejudicial, the trial court denied the request stating that the request was

untimely. (TR51) At trial, Appellant objected to the admission of physical evidence which was subject to his earlier Motion to Suppress. (TR650,734,759,825,873) Appellant also objected to the evidence of other crimes. (TR619) Just before the state rested its case it was discovered that photographs of the Appellant were taken the night of the shooting on two occasions. (TR894) Counsel for Appellant moved for a mistrial on the grounds that the photos were not provided by the state to the Appellant and the photos were exculpatory in that they depicted the appearance of the Appellant that differed from that given by the eyewitnesses immediately after the shooting. (TR894) After a Brady Hearing the trial court denied the motion for mistrial. (TR943)

The jury returned verdicts of guilty as to the Count I charge of first degree murder; guilty of attempted second degree murder as to Count II; guilty of attempted first degree murder as to Count III; guilty of attempted first degree murder as to Count IV; and guilty of armed robbery as to Counts V, VI, VII and VIII. (R291-301) During the penalty phase proceeding, Appellant again filed a Motion for Determination of Defendant's Competence to Proceed based on the attorney's observations and the report of Dr. Rotstein. (R710-726) The Motion was summarily denied. (R1214) After a penalty phase proceeding, the jury recommended that Appellant be sentenced to death as to the Count I charge by a vote of nine to three. (R776) Following a sentencing hearing, Appellant was sentenced to death as to Count I, term of natural

life as a habitual violent felony offender as to Count II, a life term as to Counts III, IV, V, VI, VII and VIII with Counts II, III and IV running concurrent and Count V running consecutive to Count II and Count VI, VII and VIII running concurrent to Count V. (R826-842)

A Notice of Appeal was timely filed on August 31, 1993. (R862) This Appeal follows.

STATEMENT OF THE FACTS

On September 16, 1992, Tammie Cowan, Cathy Woodard, James Hunter, Charles Anderson, Andre Smith and Eric Boyd traveled from St. Augustine to DeLand, Florida. (TR667-671) There were two black BB guns and one silver handgun in the automobile. (TR671) In DeLand, the group tried to locate Andre Smith's mother. (TR672) After completing their business in DeLand, the group decided to proceed to Daytona Beach, Florida.

Immediately before leaving the DeLand area, at least part of the group confronted Reggie Barkley. (TR608-624,654-664) James Hunter robbed and/or assaulted Barkley with a firearm. (TR609,676-678) Shortly after the robbery/assault, a BOLO was transmitted throughout the Volusia County area. (TR625-626) The BOLO transmission alerted law enforcement officers to a grey four door sedan occupied by six to seven black individuals, two of whom were females. (TR625)

Tammie Cowan was the driver of the car. (TR632,669, 673) The group proceeded from DeLand to the Daytona Beach area. (TR676-679) Upon arriving in Daytona Beach, the group proceeded to the vicinity of Bethune Cookman College. (TR678-680,714-716, 747,783-785) Michael Howard, Taurus Cooley, Ted Troutman and Wayne Simpson were in the same area standing outside the "Munch Shop," on Second Avenue. (TR714-716,747,783-785) Howard, Cooley, Troutman and Simpson were observed by Cowan, Woodard, Hunter, Lewis, Anderson and Smith. (TR678,747-750,781-783)

James Hunter instructed Tammie Cowan to stop the

vehicle. (TR678) Hunter, Lewis, Anderson and Smith got out of the car and proceeded toward the four black males at the Munch Shop. (TR678-680,784) James Hunter was armed with a chrome handgun; Lewis and Anderson were armed with the BB guns. (TR678-680,784-785) Howard, Cooley, Troutman and Simpson had just started smoking a marijuana cigarette when they were approached by Appellant and his three companions. (TR714-716,738) Howard, Cooley, Troutman and Simpson were robbed at gunpoint and ordered to "give it up," by Appellant and his companions. (TR716) As the four victims were being robbed, they were ordered to lay face-down on the ground. (TR716-720,749-754,787) Suddenly, James Hunter pointed the firearm at Cooley and shot him. (TR721, 786-788) Hunter then shot the other three victims. (TR723-729, 755,788) The assailants then fled with the victims' clothing, jewelry, and other miscellaneous items of personal property. (TR788-790) The victims scattered, trying to find help. (TR729, 768-770)

Waiting in the automobile approximately three blocks from the scene of the robbery, Tammie Cowan could hear shots being fired. (TR680) When Eric Boyd and the others returned to the car, he stated that he took a pair of shoes and a beeper. (TR681) When James Hunter got back in the car, he instructed Cowan to drive off and stated that he had shot the victim because he had tried to run. (TR682) Cowan departed the area and proceeded north toward St. Augustine. (TR683-684)

While traveling North on Nova Road, in the city of

Ormond Beach, the automobile was observed by Deputy Richard Graves, at approximately 12:30 a.m. (TR624-626) Graves had recently heard the BOLO pertaining to the DeLand robbery/assault. (TR625) Graves noted that the automobile fit the general description given in the BOLO and that it was occupied by several black individuals. (TR627) Graves pulled in behind the automobile and began to verify information via his radio pertaining to the BOLO. (TR628-630) Graves had received the BOLO approximately ten minutes prior to observing the automobile. (TR628-630) Accordingly, he was concerned with the elapsed time of ten minutes not allowing the automobile to have traveled from the DeLand area to the Daytona Beach area. (TR628-629) Therefore, Graves continued to follow the vehicle and to radio for more precise information regarding the robbery/assault in DeLand. (TR629-630) Graves learned that the incident in DeLand occurred at approximately 11:44 p.m. on September 16, 1992. (TR629) Graves had originally observed the automobile at approximately 12:40 a.m. on September 17, 1992. (TR627) Thus, there was ample time for the automobile to have traveled from DeLand to Daytona. (TR629-630) Consequently, Graves initiated a traffic stop of the automobile. (TR631,693)

Upon stopping the automobile, Graves had Miss Cowan exit the vehicle and produce her drivers license and registration. (TR631-632) Miss Cowan was not able to produce a proper registration for the vehicle. (TR633) Graves was able to learn that Miss Cowan and the other individuals in the car had

been in the DeLand area earlier that night. (TR635) Graves radioed DeLand to have the victim brought to the location of the traffic stop to see if the victim could identify any of the individuals in the car. (TR640) When the victim arrived from DeLand, he identified several individuals from the car. (TR640, 659)

Ms. Cowan "consented" to a search of the automobile. (R406-407) A search of the automobile yielded the two BB guns used in the robbery, and numerous articles of personal property belonging to the victims. (TR638-640,868-873)

EVIDENCE OF AGGRAVATION

The State called Troy Massey to the stand. (TR1249) Mr. Massey testified that on May 3, 1992, he was assaulted by Mr. Hunter outside a bar in Palatka. (TR1251-52) As a result of the assault Mr. Massey suffered a broken nose, stitches on his face and his lip busted up. (TR1253) Related to this incident, the State introduced a felony conviction for aggravated battery. (TR1246) The State also introduced a certified conviction in Case Number 92-1236 for attempted armed robbery[2], and a conviction for throwing a deadly missile into an occupied vehicle (TR1246-47)

EVIDENCE OF MITIGATION

Dr. Ehrlich, a forensic psychiatrist, testified that he examined the Appellant on March 15 and July 23, 1993. (TR1273,

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[2] The attempted armed robbery conviction was the attempted armed robbery which occurred in DeLand the evening of the murder in the instant case.

1291) Based on those two examinations, Dr. Ehrlich concluded that the Appellant was suffering from bipolar disease manic type that was in remission during the second interview or, in the alternative, had been suffering from drug intoxication at the time of the first interview. (TR1291) Dr. Ehrlich further testified that if Appellant suffered from bipolar disease manic type, it would be the type of disease that would impair his ability to conform to the requirements of the law. (TR1297) Dr. Ehrlich further testified that he did not make a diagnosis of mental illness because there was no urine test done on Appellant to confirm or deny the use of drugs. (TR1299) Dr. Ehrlich was concerned about drug use despite the fact that at the time of the March 15th interview Appellant had been in jail for six months, specifically in an isolation cell at the jail, which would severely limit Appellant's ability to have access to drugs. (TR1311) Dr. Ehrlich also diagnosed Appellant as suffering from narcissistic personality disorder. (TR1305)

Dr. Rotstein, an expert in the field of psychiatry and neurology, testified. (TR1403) Dr. Rotstein performed mental examinations on the Appellant on January 20 and August 4, 1993. (TR1404) During the first interview Dr. Rotstein found Appellant to be confused and psychotic. (TR1404) Dr. Rotstein testified that Appellant's mother was an alcoholic when she was pregnant with Appellant and that showed signs of fetal alcohol syndrome. (TR1407) Appellant was abandoned by his mother when he was about three years old. Appellant's mother would knock Appellant in the

head, slam him around and say terrible things to him. (TR1411) Appellant's natural mother had many men around and was beaten in the presence of James and his sister. (TR1411) Dr. Rotstein concluded that Appellant suffered of narcissistic personality disorder. (TR1416)

Further testimony from family members revealed that when Appellant was about four years old, he was left alone in his house with his younger sister for three days. (TR1325) Appellant was found with feces on him and around his mouth. (TR1326) James and his sister were taken away and put in a child foster home. (TR1327) Thereafter, Appellant moved with his sister to the home of Mr. and Mrs. Hunter, which was a foster home. (TR1328) Ultimately, the Hunter's adopted Appellant and his sister. (TR1328) When Appellant was eight years old his adoptive mother, Mildred Hunter, passed away. After the death of Appellant's adoptive mother, Appellant's natural mother and natural grandmother both had sexual affairs with Appellant's adoptive father, Mr. Hunter. (TR1334)

When Appellant was fifteen he subsequently reunited with his mother. (TR1331) She gave James no motherly love. (TR1331) She would call him all kinds of bad names, bad treatment and take him to "Jukes"[3] from early night to the next morning.

Appellant had a stepbrother named Stanley Hunter.

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[3] "Jukes" are country places out in the woods where they have beer and wine. At these places there would routinely be fights and arguments and gunfire.

(TR1538) Appellant's adoptive father would give disparate treatment to Appellant and his stepbrother. (TR1539) Appellant would get beat with a switch.[4] Appellant's adoptive father would routinely whip Appellant's naked body in the shower with a switch. (TR1340) Beatings would be for things like not washing the dishes right or if he didn't come into the house when he was called in. In reaction to the severe beatings to Appellant, Appellant's sister, Kim Shivers, would bite herself and beat herself and threaten to kill herself. (TR1353) Appellant was forced to eat hot dogs, bread and watermelon until he would throw up. (TR1357) Appellant was made to eat cereal with ants in it. (TR1357)

When Appellant was twelve years old, he was hollering in the bathroom saying the devil was holding him in the bathroom and he wouldn't come out because the devil was holding him in there. (TR1344) In August 1992, Appellant was standing outside a bar known as Sticks and was shot in the back and reportedly a victim of a drive-by shooting. (TR1345)

STATE'S REBUTTAL

The State called Dr. Umesh Mahtra, a certified psychiatrist. (TR1578) Dr. Mahtra concluded that Appellant suffered from a personality disorder mixed with narcissistic and anti-social traits. (TR1586)

Investigator Ladwig testified that he interviewed Appellant shortly after the homicide and Appellant made

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[4] A "switch" is a branch from a plum tree. (TR1339)

contradictory statements about what occurred that evening. (TR1605-10)

SUMMARY OF ARGUMENTS

Point I: The trial court erred in denying the defendant's motion for mistrial based on the failure of the state to disclose photographs of the appellant taken immediately after the shooting thst were exculpatory, in violation of the right to due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution and Articlw I, sections 10 and 16 of the Florida Constitution.

Point II: The court committed a palpable abuse of discretion wheren it denied appellant's motion to continue where the state provided a supplemental witness list with 19 witnesses, 204 pages of discovery material, and where the state had of yet provided no discovery on an eyewitness co-defendant turned state witness on the eve of trial.

Point III: The trial court erred where it found appellant competent to stand trial where the balance of evidence supported the finding that the appellant was not competent to stand trial.

Point IV: The trial court erred by not appointing mental health experts and conducting a compentency hearing where counsel for appellant made proper motion for a determination of appellant's competentency on a reasonable factual basis that appellant was not competent to stand trial.

Point V: The trial court erred by instructing the jury during the penalty phase that they weigh the Cold, Calculated and Premeditated (CCP) aggravating circumstance in making their

penalty recomendation where the CCP aggravating circumstance did not apply to this case as a matter of law.

Point VI: The trial court erred by finding that a death sentence is the appropriate penalty in this case. The death penalty is a disproportionate penalty in this case and can perhaps best be described as a simple robbery "gone bad." It is a textbook felony murder. Two aggravating circumstances exist and they are not particularly compelling when weighed against the mitigating circumstances, i.e., James Hunter suffered from a deprived childhood and suffered from a personality disorder that manifested in that "he is not the type of person that can function lawfully within the constraints of our society."

Point VII: The appellant was denied due process of law and fair trial where a state expert improperly gave his opinion on the appellant's crediabilty, i.e., calling James Hunter a liar.

Point VIII: The trial court allowed state witnesses to testify about the details of a collateral crime. The collateral crime was not relevant to prove any material issue at trial; the undue, prejudicial affect of the collateral crime evidence outweighed any probative value of the evidence; the collateral crime evidence became a feature of the instant case.

Point IX: The physical evidence obtained from the search of the vehicle and offered and entered into evidence against Appellant should have been suppressed because the stop of the vehicle was based upon a vague BOLO which failed to establish

a reasonable suspicion that the occupants of the vehicle had committed a crime.

Point X: The trial court erred by inhibiting defense counsel's right to backstrike once the entire panel is formed by threatening to "personally take sanctions against defense counsel" if counsel exercised a second backstrike.

Point XI: The trial court erred by permitting the introduction that the appellant pointed a gun at one of the co-defendants after the shooting where the evidence was culmalative to issues a trial and rather showed propensity of the appellant to commit crimes or bad acts.

Point XII: The trial court erred by the limiting cross examination of a state witness where the general area of the being subject to the cross examination was introduced by the state in direct examination.

Point XIII: The trial court erred by not conducting a full Richardson hearing after defense counsel alleged a discovery violation by the state during the penalty phase.

Point XIV: Florida Statute Section 921.141 is unconstitutional.

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE FAILURE OF THE STATE TO DISCLOSE TO THE DEFENDANT EVIDENCE WHICH TENDED TO EXCULPATE HIM, IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE FLORIDA CONSTITUTION.

Prior to trial, the defendant filed a demand for discovery, requesting inter alia, "any material within the state's possession or control which tends to negate the guilt of the accused as to the offense charged." (R324) The defendant also made Motion for Production of Favorable Evidence, which the trial court denied. (R576) After the testimony of Detective Flynt, it was discovered that two sets of pictures were taken of defendant depicting his clothing and appearance the night of the homicide. (TR929,935) The first photo was taken by Detective Graves when he stopped the vehicle defendant was traveling in minutes after the shooting, and second photo was taken by Investigator McLean after defendant was placed in police custody. (TR929,935) The second picture of defendant shows that he wore biege shorts and a white Florida Gators T-Shirt when he was arrested immediately after the shooting. (See State Exhibits AA, BB, CC, DD) State witnesses described the shooter as wearing a red hat, red shirt and blue jean shorts. (R739,828) The failure of the State to provide the pictures taken of the defendant the night of the shooting was undisclosed material evidence, and the

case must be reversed for a new trial.

Rule 3.220(a)(1) and (2), Florida Rules of Criminal Procedure, require that, upon demand, the State must furnish a list of all witnesses whom the prosecutor knows to have relevant information concerning the charged offense or any defense thereto, and to provide to defense any material which tends to negate the accused's guilt. Brady v. Maryland, 373 U.S. 83 (1963), stands for the proposition that the nondisclosure of evidence favorable to the defense, when requested, results in a violation of due process when the suppressed evidence is material to the defendant's guilt or punishment. See also United States v. Bagley, 473 U.S. 667 (1985); State v. Hall, 509 So.2d 1093 (Fla. 1987); Boshears v. State, 511 So.2d 721 (Fla. 1st DCA 1987); Cipollina v. State, 501 So.2d 2 (Fla. 2d DCA 1986).

The non-disclosed evidence, which was in the possession of the State, were pictures taken of the defendant immediately after his arrest which showed that defendant did not fit the physical description of the shooter given by the witnesses, and showed that the state accused the wrong man of pulling the trigger[5]. Had the pictures been available, they would have been an invaluable tool in conducting cross-examination of the witnesses that made in court identifications of defendant despite

[5] The State argued that they provided the picture to defense counsel. Specifically, they claimed that they provided a photostatic copy of the lineup page used in the investigation of the armed robbery of Donald Clark which Appellant was not charged. The State did not disclose that the lineup picture was taken the night of the murder, nor did the lineup picture, as presented, show Appellant's clothing.

the fact that they gave different descriptions of the shooter immediately after the shooting, thereby affecting their credibility. This evidence meets the test of materiality announced in United States v. Bagley, 473 U.S. at 678 and 682. There, the Court held the government's failure to disclose information which might have been helpful in conducting cross-examination was reversible error if "the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial" and that there exists a reasonable probability that, had the evidence been disclosed, the result would have been different.

In Boshears, supra, the court reversed for the failure to disclose the contents of an investigative interview with an examining physician which "could have provided defense counsel with evidence which was to some degree exculpatory" and which "would have afforded counsel the means to challenge the victim's credibility." Boshears v. State, supra at 724.

In Cipollina v. State, supra, the court reversed for failure to divulge to the defense the name and address of a witness. The court found the missing evidence material in that it "may very well have been the final piece of the puzzle to complete the picture of [the defendant's] defense." Id. at 5. Similarly, in Arango v. State, 497 So.2d 1161, 1162 (Fla. 1986), the Supreme Court ruled that there was a reasonable probability that a different result would have been reached had evidence which tended to support the defendant's version of the events

been disclosed and introduced at trial.

In Robinson v. State, 522 So.2d 869 (Fla. 2d DCA 1987), the court reversed a conviction and ordered a new trial where the trial court conducted only a cursory review of the discovery violation during the hearing on the motion for new trial. This was ordered despite the fact that the non-disclosed reports were of debatable exculpatory value.

Because the State failed to provide material information in its possession to the defense which could have reasonably resulted, if fully developed, in a different outcome at trial, a new trial is required.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF TRIAL.

Ten days before trial Appellant moved for continuance on the grounds that co-defendant Andre Smith entered a plea to the charge agreed to testify and made a statement; neither of which had of yet been made available to Appellant. (R602) Additionally, Appellant moved for a continuance because the week before, Appellant received two hundred four (204) pages of discovery material and a supplemental witness list from the State with 19 additional witnesses. (R603) Finally, the investigation of Appellant's background for a potential penalty phase was not completed and required additional funds. (R603) The motion was denied. (R605)

The morning of trial Appellant again moved for a continuance on the grounds that an previously unknown eyewitness to the shooting, Danny Monroe, had given a sworn affidavit that differed from the events provided by the state's witnesses, and he could not be located. (TR4) Additionally, counsel claimed that Appellant's mental background had not been adequately explored, noting that it had just be discovered that Hunter was a victim of a drive-by shooting 6 weeks before the homicide in Daytona Beach, and requested an evidentiary hearing to make a record of what further preparation was required and why it had not been done. (TR6) Counsel argued that James Hunter would not have effective assistance of counsel without further

investigation of his background and mental status. (TR6) The trial court denied motion for continuance and the request for evidentiary hearing. (TR8)

The trial court's ruling on a motion for continuance is addressed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980). Moreover, the trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). In the instant case, the denial of the motion for continuance was a palpable abuse of discretion.

Due process requires that the defendant must be given ample opportunity to prepare for trial. Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983); Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981); Lightsey v. State, 364 So.2d 72 (Fla. 2d DCA 1978); Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975); Hawkins v. State, 184 So.2d 46 (Fla. 1st DCA 1966). In the instant case, the State supplied defense counsel with nineteen new witnesses, flipped a codefendant and procured an agreement for him to testify; provided two hundred four (204) pages of written materials two weeks before trial. Moreover, the mitigation investigator had only been working on the case for six weeks at the time of the motion to continue and was still developing mitigation evidence, and had informed defense counsel that more time would be required to develop mitigation evidence. In addition, a new eyewitness to the shooting was located and made

an affidavit and subsequently could not be located for trial. In the context of the capital case, defense counsel met his burden of showing that he had an inability to be prepared for trial.

In Lightsey v. State, supra, the state attorney was tardy in filing the information against the Appellant and was late in his discovery responses. The court found in Lightsey, that the trial court committed a palpable abuse of discretion in not granting a continuance under these circumstances.

In the instant case, Appellant filed a notice to participate discovery on December 29, 1992. (R323) The State then chose, some two hundred ten (210) days after the notice to participate discovery, to list nineteen (19) additional witnesses and provide two hundred four (204) pages of additional documents. The tardiness of the State in notifying Appellant of all the evidence it chose to use at trial put defense counsel in a position of having to "jump through numerous hoops" to be adequately prepared for trial.

Appellant also contends that this case being a capital case, and there being a showing from the examination of two psychiatrists that Mr. Hunter may have been suffering from extreme mental disorders, the trial court should have showed some deference to Appellant who was trying to adequately prepare the mental mitigation in this case. The abuse of discretion becomes more apparent where defense counsel requested and was denied the opportunity to have an evidentiary hearing to make a showing on the record of what steps were necessary to adequately prepare the

mitigation evidence in this case.

Wherefore, Appellant submits that the denial of the motion for continuance was a palpable abuse of discretion which violated Appellant's due process right to the benefit of counsel and resulted in the denial of his constitutional right to a fair trial. In light of the conduct of the State in failing to adequately satisfy their discovery obligations in a timely fashion, defense counsel did not have adequate time to prepare for trial which deprived Appellant of effective assistance of counsel. See White v. Ragan, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348, 1352 (1945); Harley v. State, supra.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING APPELLANT TO BE COMPETENT TO STAND TRIAL.

Rule 3.210(a), Florida Rules of Criminal Procedure provides:

> A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent.

Rule 3.211(a)(1) sets forth some considerations in determining the issue of competence to stand trial. These include, inter alia, a defendant's capacity to disclose to his attorney pertinent facts surrounding the offense; his ability to relate to his attorney; and his ability to assist his attorney in planning his defense. The constitutionally mandated standard for determining an individual's competency, is whether the accused has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); and Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979).

Florida courts have taken the view that in a competency determination, the trial judge is the finder of fact. A trial

court's decision on this issue will not be reversed on appeal unless an abuse of the exercise of his discretion appears. Fowler v. State, 255 So.2d 513 (Fla. 1971) and King v. State, 387 So.2d 463 (Fla. 1st DCA 1980).

Appellant contends that a mere numerical tabulation of the mental health experts reports submitted during the competency hearing tends one to the conclusion that James Eugene Hunter was not competent to stand trial. (TR267-280) However, the ultimate determination of competence is within the discretion of the trial judge. The Florida Supreme Court has stressed that psychiatric reports are "merely advisory to the court, which itself retains responsibility of decision." Block v. State, 69 So.2d 344, 346 (Fla. 1954). That determination, of course, is subject to review by the appellate court upon an entire record.

> ...The question of whether or not Appellant suffered from a clinically recognized disorder or psychosis is a question of fact, viewed by the usual clearly erroneous standard. If we decide that the evidence requires a finding of that mental disorder, then the further decision as to competency or incompetency is a matter upon which the appellate court assumed a greater decisional role and takes a "hard look" at the record. (Citation omitted)

Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980).

In the case at bar, Judge Graziano considered the report and testimony of Dr. Jack Rotstein, M.D., a psychiatrist; the report of Dr. Lawrence B. Ehrlich, M.D., a psychiatrist; the report and testimony of a licensed psychologist, Dr. Lynne Westby; the testimony of Ismael Lopez, a mental health

"specialist"; and Olney Mclarty, the forensic court liaison.

During the competency hearing, Appellant moved for a continuance to secure the presence of Dr. Erhlich.[6] (TR98) The court conceded that it would like to know the basis of Dr. Ehrlich's report by having him present, but without him present she would give the report little credence. (TR98) Appellant concedes that a motion for continuance is addressed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980). Moreover, the trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). Appellant submits that in light of the difficulty in securing Dr. Ehrlich's presence and the courts expressed interest in hearing testimony from this court witness, the court abused it's discretion in not continuing the competency hearing.

In Dr. Rotstein's report it was his opinion that Appellant was incompetent to stand trial because Appellant has a "psychosis, probably chronic schizophrenia and that he does not grasp the situation." (R79) He testified at the competency hearing that Appellant stated that he saw visions that talked to him. (R79) It was his opinion that Appellant was psychotic but he was uncertain whether appellant was a chronic schizophrenic. (R63,75) In Dr. Ehrlich's report he concluded that Appellant

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[6] The State informed counsel for Appellant that the court-appointed witness Dr. Ehrlich would not be available for the competency hearing. Counsel for Appellant relayed that information to the court ten (10) days before the hearing. (R94)

suffered from pressure of speech, flight of ideas, lability, and grandiosity which indicate that he suffers from Bipolar Disease, manic type.[7] (R375,79)

Dr. Westby found Appellant competent to stand trial. In her report she stated that Appellant believed he could not get a fair trial in Volusia County stating: "I just don't want no trial in Daytona. They see all them niggers up there and they get scared." Westby further claimed that Appellant could testify relevantly on his own behalf and based this on Appellant's comment that he was going to testify at trail: "I just can't tell that, but it's going to be a shock to the whole community." (R364) At the competency hearing Dr. Westby gave her opinion of the criteria for determining competency:

> If he can answer all the questions. Competency is a narrow issue. If you know what your charges are and how much time you can get and who are the major participants are in the trial and those few things, then you are considered competent to proceed.

(R100) Dr. Westby's understanding of competency was skewed in one important aspect: the defendant's ability to relate to and assist his attorney in the preparation of his defense.

Ismael Lopez, a mental health specialist at the Volusia County Branch Jail, also testified at the trial. (R142) Over defense objection, Lopez was declared an expert on the issue of

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[7] Dr. Ehrlich also stated that intoxication by cocaine or amphetamines would give the same clinical picture of Appellant, but that if it is certain that he was not getting drugs in the jail, he was suffering from Bipolar disease, manic type.

determining competency to stand trial. (R155) Appellant asserts that the trial court abused its discretion when it determined that Mr. Lopez was an expert in this area. The record shows that the state made the following inquiry as to whether Lopez was qualified as an expert in determining whether Appellant was competent to stand trial:

> STATE: Are you aware of the standards that are applied in determining competency to stand trial.
>
> LOPEZ: Sure.

(R152) Defense counsel performed a voir dire on Lopez and Lopez conceded that he never evaluated someone to determine whether they were competent to stand trial. (R155) The Appellant asserts that it is the trial court's duty to determine the qualifications of an expert witness on subject matter upon which the witness testifies. Johnson v. State, 314 So.2d 248 (Fla. 1st DCA 1975). In the instant case, there was no such inquiry made of Mr. Lopez concerning his understanding of the subject matter underlying the determination of competency. In fact, Lopez admitted that he never had performed a competency evaluation nor was he a doctor of psychology or psychiatry. (R155) Under these circumstances, this clearly was an abuse of discretion by the trial court. It was Mr. Lopez's opinion that Appellant was competent to stand trial and that Appellant's auditory hallucinations and claims of being Commander of the Third World were malingering. (R148,49)

Based upon the foregoing testimony and reports, Judge

Graziano found Appellant to be competent to stand trial. (R177) However, a close review of the evidence clearly shows that this ruling was error. Although two psychiatrists found that Appellant was not competent to stand trial, the judge chose to rely upon the opinion of a psychologist that used an improper competency standard and the opinion of an improperly court ordained "competency expert" to find Appellant competent. Appellant submits that Judge Graziano's ruling constituted an abuse of discretion. Due process was violated thus entitling Appellant to a new trial.

POINT IV

A TRIAL COURT CANNOT SUMMARILY DENY MOTIONS TO DETERMINE COMPETENCY TO STAND TRIAL AND COMPETENCY AT THE TIME OF THE OFFENSE WITHOUT FIRST APPOINTING EXPERTS AND HOLDING A COMPETENCY HEARING WHEN THE DEFENSE MOTIONS ARE SUFFICIENTLY SUPPORTED BY FACTUAL ALLEGATIONS.

Case law from this Court and other courts have consistently held that the federal and Florida constitutions mandate the appointment of experts and an adversarial hearing on the question of the defendant's competency when the issue is raised by factually-supported motions. To deny such appointment of experts and a hearing to determine competency violates Article I, Sections 9 and 16 of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Rule 3.210, Florida Rules of Criminal Procedure, provides that upon the filing of a motion which presents a reasonable basis to place the defendant's competency to stand trial in question, the court must follow the rule and shall set a hearing and order the defendant's examination by two or three experts. Fla.R.Crim.P. 3.210(b).

In Hill v. State, 473 So.2d 1253 (Fla. 1985); Fowler v. State, 255 So.2d 513 (Fla. 1971); and Kothman v. State, 442 So.2d 357 (Fla. 1st DCA 1983), this Court and the district court held that once a motion is filed suggesting a factual basis to doubt the defendant's competency to stand trial, the appointment of experts and a hearing are obligatory. The test for whether to

call for a hearing on competency to stand trial is **not** whether the defendant is in fact incompetent or competent; rather the test is whether there is a reasonable ground to believe the defendant may be incompetent. Kothman v. State, supra; Tingle v. State, 536 So.2d 202 (Fla. 1988). The trial court in the instant case failed to recognize this distinction by merely denying the defendant his experts and a hearing. See also Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); and Bishop v. United States, 350 U.S. 961 (1956).

These cases have involved similar allegations contained in the motions to determine competency as were utilized and rejected in the instant case. In Fowler v. State, supra, the basis for the request for competency was an allegation that the defendant was possibly a paranoid schizophrenic. In Hill v. State, supra, the Court cited with approval Drope v. Missouri, supra, wherein the basis was that the defendant was suicidal. The defendant's hallucinating and having an intellectual impairment of poor insight and judgment and having an unstable (labile) affect which could diminish the defendant's ability to consult with his attorney and aid in the preparation of his defense with a reasonable degree of understanding was the basis for the request in Kothman v. State, supra. A hearing was held to be required in each of these situations. It has been held to be immaterial that there was an indication that the defendant was coherent, was communicative or was adroit in explaining eye-

witness testimony as indicated in Bishop v. United States, supra, and Hill v. State, supra, or that the defendant knew what he was charged with and that he could be punished for it if found guilty, as indicated in Dusky v. United States, supra, or that the defendant was mentally alert and understood the court colloquies in the case. Pate v. Robinson, supra. See discussion of these cases in Hill v. State, supra at 1256-1258.

In these cases, these factual bases were held to present sufficient grounds for mandating a competency hearing and the appointment of experts. In the instant case, the defendant alleged and the report of Dr. Rotstein supported that the defendant was not competent to stand trial because Mr. Hunter was incapable to assist his attorney in his defense, manifest appropriate courtroom behavior, or testify relevantly. (R726) The Appellant met his threshold burden of providing a reasonable basis to question the Appellant's competency to stand trial.

In the case of Tingle v. State, supra, Tingle was convicted of sexual battery of his daughter. Two motions regarding Tingle's competency were filed. In the first motion counsel alleged that Tingle had attempted to stab himself with a ballpoint pen. The motion was denied after the court reviewed Tingle's Tri-County Medical Services file and interviewed emergency response personnel. In the subsequent motion defense counsel recited that she believed her client was hallucinating and a Tri-County mental health worker had the "informal impression that Tingle suffers from a paranoid schizophrenic

process." There was no formal denial of a subsequent motion in the record, however, while the jury was deliberating the trial court noted that he had called the Tri-County mental health worker, but she was not available. Thereafter, the trial court reviewed again the mental health file and found no mention of any such diagnosis. This Court found that the second motion was effectively denied by the trial court's failure to rule on it.

This Court ruled that Tingle was deprived of his due process right of not being tried while mentally incompetent:

> Under the circumstances present in this case, there were reasonable grounds to believe Tingle may have been incompetent. The trial judge's independent investigation was not sufficient to ensure that Tingle was not deprived of his due process right of not being tried while mentally incompetent. See Scott, 420 So.2d at 598. Florida Rule of Criminal Procedure 3.210 sets forth the procedure to be employed within this state for safeguarding that right.

Rule 3.210 provides in pertinent part that upon reasonable grounds that the defendant is not mentally competent to stand trial, the court shall **immediately** enter its order setting a time for a hearing to determine the defendant's mental condition. Similarly, with regard to the request in the same motion for experts to determine the defendant's competency at the time of the offense, the district court's opinion allows the trial judge himself to make such determination and to short-circuit the procedural dictates of Rule 3.210, Florida Rules of Criminal Procedure, which holds mandatory the appointment of experts once

defense counsel certifies his belief that the defendant may be incompetent. State v. Hamilton, 448 So.2d 1007 (Fla. 1984), requires the court to act and appoint an expert to aid the defense without the exercise of any discretion as to any matter of law or fact. Tingle v. State, supra.

Under a review of the facts of this case and the law cited above, it is clear that the defendant has presented reasonable grounds in his motion to believe that he is mentally incompetent. As so held in these cases, once a reasonable factual basis is presented by the defendant's motion, the appointment of experts and the holding of a formal hearing on competency to stand trial is mandatory. Upon the filing of a motion to appoint experts to determine the defendant's competency at the time of the offense (which, as pointed out above, was done) the appointment of an expert is also mandatory.

The actions of the trial court allows for the trial court to substitute its judgment for that of experts and effectively nullifies the criminal rules with regard to the appointment of experts and a hearing to determine competency at the time of the offense and to stand trial. Pursuant to Hill v. State, supra at 1258-1259; and Drope v. Missouri, 420 U.S. at 178-183, a retroactive determination of the defendant's competency is insufficient relief; the defendant's conviction must be vacated and the case remanded for the appointment of experts and a hearing on the defendant's competency at the time of the offense and to stand trial. If the defendant is found to

be competent, then a new trial must be held.

POINT V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The law is clear that, unless the parties agree that the judge may instruct on all the factors, the jury must be instructed on only those aggravating and mitigating factors that are supported by the evidence. See Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) ("The judge followed the standard instructions for those aggravating and mitigating circumstances for which evidence had been presented.") See also Standard Jury Instructions in Criminal Cases, 2d Edition, p. 80, ("Give only those aggravating circumstances for which evidence has been presented.")

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his

> efforts to secure such recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new recommendation on resentencing.

Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). Accord, Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.") (emphasis added).

Thus, this Court recognizes that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because the failure to do so skews the analysis in favor of imposition of the death penalty. A jury instruction on an improper statutory aggravating factor results in the same taint. When more aggravating factors are present, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the presence of an improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable under the Eighth and Fourteenth Amendments.

In the instant case, the State requested instruction on CCP for the following stated reasons:

> Based upon the circumstances in that the victim that was openly killed was the fourth person shot at the scene, that there was adequate time for an extended reflection and planning by the time Mr. Hunter had squeezed off his fourth round

into a fourth different victim after a time period that was not instantaneous.

(TR1640) The court agreed to give the CCP instruction over strenuous defense objection. (TR1649,50) In the State's closing argument that the death penalty was the proper sanction in this case, the state attorney spent the balance of his time arguing that this was a cold, calculated and premeditated murder. (TR1723-26)

There can be no conclusion other than that the jury applied the CCP factor in recommending imposition of the death penalty. The multiple shootings by Appellant would necessarily have been viewed by a lay person as cold, calculated and premeditated. Evidence and argument was presented by the State to that end, and the prosecution devoted the entire penalty phase to convince the jury that this multiple shooting was done with planning, calculation and heightened premeditation. Even is these offensive things had not been stressed, in all likelihood the jury still would have attributed weight to this factor when told by the court that it was permissible under the law that they do so.

This court dealt with the improper instruction of the HAC aggravating factor in the case of Omelus v. State, 584 So.2d 563 (Fla. 1991). In Omelus, the state stressed that three aggravating circumstances were clearly established by the evidence, specifically: (1) that the murder was committed for pecuniary gain; (2) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral

or legal justification; (3) that the murder was especially heinous, atrocious, or cruel. The state focused especially upon the last factor, that the murder was especially heinous, atrocious, or cruel. The jury returned a recommendation of death by an eight-to-four vote.

The trial judge subsequently imposed the death penalty, finding two aggravating circumstances: (1) that the murder was committed for pecuniary gain and (2) that it was committed in a cold, calculated, and premeditated manner. The trial court did not find as an appropriate aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This court found that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. In ordering a new penalty phase this court stated:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Clearly, the instant case is analogous to the error found in Omelus. To be sure, the jury would not appreciate,

however, that as a matter of law it could not properly weigh the cold, calculated, and premeditated nature of Wayne Simpson's murder into the equation of whether to recommend life imprisonment or the death penalty for Hunter. Indeed, the jury is presumed to have used this instruction and to have followed the law given it by the trial judge. Grizzell v. Wainwright, 692 F.2d 722, 726-27 (11th Cir. 1982), cert. denied, 461 U.S. 948 (1983). The burden is on the State to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. See Riley, 517 So.2d at 659; Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). The State cannot meet that burden. Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

POINT VI

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This case can perhaps best be described as a simple robbery "gone bad." It is a textbook felony murder. Two aggravating circumstances exist. They are not particularly compelling. The murder occurred during the commission of a robbery, and despite arguments to the contrary, there was an obvious lack of premeditation. Hunter has one prior aggravated battery, one prior throwing a deadly missile, an additional attempted armed robbery and an attempted first-degree murder conviction arising out of this same felony murder incident. Additionally, the trial court found mitigating circumstances, i.e., James Hunter suffered from a deprived childhood and suffered from a personality disorder that manifested in that "he is not the type of person that can function lawfully within the constraints of our society." (R853,854) On the spectrum of murder cases that this Court has reviewed, this case simply does not qualify as one warranting imposition of the death penalty.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court has again recognized its duty to review the circumstances of every Florida capital case. Reiterating the dictates of State v. Dixon, 283 So.2d 1 (Fla. 1973) and Furman v. Georgia, 408 U.S. 238 (1972), this Court stated:

It is with this background that we must

> examine the proportionality and appropriateness of each sentence of death issued in this State. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered even handedly.

Fitzpatrick at 811. Fitzpatrick also involved a defendant with evidence of substantially impaired mental capacity, extreme emotional disturbance, and low emotional age. In light of this Court's reduction of Fitzpatrick's sentence, a similar disposition of Hunter's case is mandated.

This Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffered from a mental disorder rendering him temporarily out of control. E.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). In Holsworth, the defendant, like Hunter, had a personality disorder. While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. The mother broke Holsworth's knife, but he obtained another from the kitchen and continued his attack. Both victims received multiple stab wounds. The daughter died. Although the jury recommended life, the trial judge found no mitigating circumstances and imposed death. However, this Court reduced the sentence to life citing Holworth's drug use, his mental impairment, his abuse as a child and his potential for productivity in prison.

Amazon was nineteen years old with the emotional development of a thirteen-year-old. He was raised in a negative family setting and had a history of drug abuse. There was inconclusive evidence that Amazon had ingested drugs on the night of the murder. During a burglary, robbery and sexual battery, Amazon lost control and, in a frenzied attack, administered multiple stab wounds to his robbery and sexual battery victim and her eleven-year-old daughter, who was telephoning for help. The trial court found no mitigating circumstances. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." 487 So.2d at 13.

James Hunter is likewise deserving of a life sentence. His crime was a product of his mental impairment. He had a personality disorder and suffered from fetal alcohol syndrome. He also had a deprived childhood arising from the fact that his mother abandoned him related to drinking problems, and his adoptive father routinely gave him severe beatings. The trial court found that his personality disorder prevents him from confining his conduct to the requirements of law. (R853) Eyewitness testimony established that Hunter discharged his weapon impulsively for an unknown reason. Although not found in the judge's sentencing order, Appellant reportedly loved children and would buy them all ice cream from the ice cream truck. (R719) He would also give money away to poor people. (R719)

Hunter's offense was apparently a simple robbery "gone bad." Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (defendant shot a convenience clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983) (defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, Hunter's life must be spared. James Hunter's death sentence is disproportionate to his crime. This Court must reverse the death sentence with directions to the trial court to impose life.

POINT VII

AN EXPERT WITNESS MAY NOT COMMENT ON THE CREDIBILITY AND TRUTHFULNESS OF THE DEFENDANT.

During the direct examination of State psychiatric expert Dr. Umesh Mahtra, the State asked the following question:

> All right. Based on your view of those volumous materials you have outlined in your observations of Mr. Hunter over the last two days and having an opportunity now to hear him testify yesterday, were you able to form an opinion of the defendant's mental health within the reasonable bounds of medical certainty?
>
> * * * *
>
> DR. MAHTRA: Well, I have several opinions about it. Number one, I found him to be an absolute liar.

(TR1585) Defense counsel made an immediate objection and moved for mistrial. (TR1585,86) The trial court sustained the objection, denied the motion for mistrial and instructed the court to disregard the last comment of Dr. Mahtra. (TR1586) Reversal of Appellant's death sentence is required on this issue.

Dr. Mahtra's testimony that James Hunter is a liar is inadmissible since this opinion testimony is not in the nature of a medical opinion, but rather was merely commenting on the credibility of a witness. Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986); Farley v. State, 324 So.2d 662, 663 (Fla. 4th DCA 1975) (holding that an expert witness may not draw legal conclusions that a criminal violation had occurred or that the defendant was guilty of that violation); Gibbs v. State, 193

So.2d 460, 463 (Fla. 2d DCA 1967). See also General Telephone Co. v. Wallace, 417 So.2d 1022, 1024 (Fla. 2d DCA 1982); Mills v. State, 367 So.2d 1068, 1069 (Fla. 2d DCA 1979). While an expert witness may give opinions in his area of expertise, he is precluded from offering legal conclusions which are solely for the trier of fact to decide. Fridovich v. State, 489 So.2d 143 (Fla. 4th DCA 1986); Spradley v. State, 442 So.2d 1039, 1043 (Fla. 2d DCA 1983). For the jury to hear an "expert" comment on the defendant's credibility has deprived the defendant of his constitutional rights to due process of law and the right to a fair and impartial trial by a jury. Amends. V, VI, XIV, U.S.Const.; Art. I, §§ 9, 16, 22, Fla.Const.

The introduction of this opinion evidence is thus improper and requires reversal. In the instant case it cannot be said beyond a reasonable doubt that the improper opinion testimony on the truthfulness of the defendant did not affect the verdict. Such evidence was held as a matter of law to not be harmless in United States v. Azure, 801 F.2d 335, 341 (8th Cir. 1986), even where the case against Azure was very strong, since the child witness "was a key government witness in the case, and her credibility was a very important issue." Since her testimony was "very likely bolstered by [the expert's] erroneously admitted believability opinion, [the court] cannot say that the evidence was harmless." Id. Here the defendant testified on his own behalf and his believability would make or break the State's case. The believability opinion testimony from Dr. Mahtra was

erroneous and prejudicial and very likely bolstered the State's version of events on which the jury may well have relied in recommending a sentence of death. Based on this testimony the jury may well have surrendered their own common sense in weighing testimony to the "experts" and may well have followed the "experts" testimony that the defendant was a liar. United States v. Azure, supra. The evidence was therefore not harmless.

A new penalty phase, is required.

POINT VIII

THE TRIAL COURT ERRED BY ALLOWING STATE WITNESSES TO TESTIFY ABOUT OTHER CRIMES, WRONGS OR BAD ACTS WHERE SAID TESTIMONY WAS NOT RELEVANT TO ANY MATERIAL ISSUES AT TRIAL AND WHERE ANY PROBATIVE VALUE OF THE EVIDENCE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT, BECAUSE IT BECAME A FEATURE OF THE TRIAL AND IT ONLY TENDED TO SHOW BAD CHARACTER OR PROPENSITY.

In Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), the Court declared that any fact relevant to prove a material issue is admissible into evidence even though it points to a separate crime, unless its admissibility is precluded by a specific rule of exclusion. Evidence of collateral offenses is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. Id. at 662. Evidence of other crimes or bad acts is admissible, however, where such evidence shows motive, intent, absence of mistake, common scheme, identity or a system or pattern of criminality. Id. The question of relevancy of this type of evidence should be cautiously scrutinized; but, relevancy is the test. Castro v. State, 547 So.2d 111, 114 (Fla. 1989). In Williams v. State, 117 So.2d 473 (Fla. 1960), the Court reaffirmed Williams v. State, 110 So.2d 654 (Fla. 1959), however, the Court reversed the defendant's conviction because the State had made a collateral offense a feature of the trial.

Section 90.404(2)(a), Florida Statutes (1991) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact an

> issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

This statute is a codification of the Florida law discussed above and the evidentiary rule is now commonly called the Williams Rule. The evidence frequently evaluated under this rule is commonly referred to as similar fact evidence. However, evidence of collateral crimes is admissible under the Williams Rule not because it is similar to the crime at trial, but because it is relevant to prove a material fact or issue in the trial, other than the defendant's propensity or bad character. Castro v. State, 547 So.2d 111, 114-115 (Fla. 1989). Thus, it can be confusing to refer to this evidence as similar fact evidence because the similarity of the facts involved in the collateral crimes does not insure relevance or admissibility; likewise, evidence of collateral crimes may be relevant and admissible though not similar. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989). Similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible, unless specifically excluded by a rule of evidence; a similar fact crime or "fingerprint crime" is simply one way to show relevance, and this does not bar the introduction of evidence of other crimes which are factually dissimilar to the crime charged if the evidence of other crimes is otherwise relevant to a material issue. Id. Nevertheless,

similar fact evidence is inadmissible if it only proves bad character or propensity of the accused. Id.

Moreover, even if similar fact evidence is relevant, it is not admissible when its probative value is outweighed by its unduly prejudicial effect. Section 90.403 Florida Statutes (1991) provides in pertinent part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Similar fact evidence is not inadmissible simply because it is prejudicial; however, when the probative value of the evidence is substantially outweighed by undue prejudice it is not admissible. Henry v. State, 574 So.2d 73, 75 (Fla. 1991). For example, when the collateral offense is made a feature of the present trial, the evidence is inadmissible. Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989), review denied, 547 So.2d 1210 (1989). The proscription of collateral crime evidence becoming a feature of the present trial is a specific application of the Section 90.403 balancing requirement. Id.

The criteria to use in conducting a Section 90.404(2) and Section 90.403 evaluation include: the strength of other evidence available to the prosecution to prove the material fact; whether the defense is disputing the material fact and if so how vigorously; the emotional impact of the collateral crime evidence; the similarities between the collateral crime and the crime charge; the proportion of evidence of collateral crimes *vis*

a vis direct evidence of the crime charged; whether the state or the defense adduced the collateral evidence; the nature of the crime charged; and, whether there is a proper jury instruction pertaining to the collateral crime evidence. See Huddleston v. United States, 485 U.S. 681, 689 n.6 (1988); See also Ehrhardt, Florida Evidence, Section 404.9 (1993).

In the instant case, the defense objected to the proffered testimony of Reggie Barkley. (TR608-623) Barkley had been assaulted by two armed, young, black males in DeLand, Florida, in the late evening hours of September 16, 1992. (TR608-612) Barkley identified Appellant's co-defendant, James Hunter, as one of the assailants. (TR609) He testified that Hunter was armed with a silver gun. (TR610) The two men fled in an automobile with five black individuals, including two black females. (TR611-612) Approximately two hours later, Barkley was taken to Ormond Beach where he identified his two assailants. (TR613) The defense objection to Barkley's testimony was overruled, and his testimony was presented to the jury. (TR654-664)

Tammie Cowan was also allowed to testify about the DeLand collateral crime, over defense objection. (TR674-678) In contrast to Barkley's testimony, Cowan testified that the four black males in her car got out and assaulted Barkley. (TR676-677) A substantial portion of Deputy Grave's testimony pertained to the collateral crime in DeLand; however, there was no defense objection to Grave's testimony about the DeLand incident.

(TR624-651)

Well before trial, the State gave notice of its intent to use similar fact evidence. (TR66-68) At trial, the State argued that the collateral crime evidence was relevant and admissible, because it was so intertwined with the instant case. (TR618) The State also argued that the DeLand robbery/assault was relevant, because the murder weapon used by Hunter in the instant case was a "very similar gun." (TR619)

The instant case and the DeLand collateral crime were not so intertwined that the instant case could not be clearly and affectively explained without reference to the DeLand crime. The "BOLO" is the real nexus between the two incidents. But for the BOLO, Deputy Graves may never have stopped the automobile which led to the arrest in the instant case. (TR624-641,876-884) However, it was not necessary for the State to examine witnesses in any detail about the DeLand collateral crime. It would have been sufficient for the State simply to establish that the car was stopped pursuant to a BOLO, without questioning witnesses about the specifics or particulars of the BOLO. By unnecessarily eliciting substantial, detailed testimony from Barkley and Cowan about the DeLand incident, the State made the collateral crime a <u>feature</u> of the instant case.

Moreover, the fact that a silver gun was used by Hunter in the DeLand collateral offense has very little, if any, probative value as to any material issue in the instant case. There was no real discrepancy in the evidence about who had the

silver gun in the instant case. All of the victim/eye witnesses (Taurus Colley [TR819], Theodore Troutman [TR752], and Michael Howard [TR718]) testified that Hunter had the silver or chrome gun. Such testimony was consistent with and corroborated by the testimony of two co-defendants, Bruce Pope and Tammie Cowan. (TR687,788) Thus, the probative value of the testimony about the DeLand collateral offense was far outweighed by its unfair prejudice. Accordingly, the trial court's failure to exclude the collateral crime evidence denied Appellant a fair trial.

POINT IX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS, WHERE THE STOP OF THE VEHICLE IN WHICH APPELLANT WAS TRAVELING WAS BASED UPON A VAGUE BOLO LACKING THE SPECIFICITY REQUIRED TO ESTABLISH A REASONABLE SUSPICION THAT THE OCCUPANTS OR AN OCCUPANT OF THE AUTOMOBILE HAD COMMITTED A CRIME.

In the early morning hours of September 17, 1992, Richard Graves, a Deputy with the Volusia County Sheriff's Department, received a BOLO (be on the lookout report) advising him that a series of armed robberies had occurred over a short period of time in the DeLand, Florida area. (R395; TR625-627) The BOLO described a grey, mid-sized, four-door automobile. (R395-397; TR627-628) The BOLO further advised that the vehicle was occupied by six to seven individuals consisting of at least two black females and three black males, with a female driver and a female passenger. (R397; TR628-630) At approximately 12:30 a.m., Deputy Graves was in Ormond Beach, on Nova Road, near the intersection of Fleming, Street. (R394; TR624-625) As Deputy Graves was waiting to turn north onto Nova Road, in Ormond Beach, Florida, he saw a vehicle that matched the description of the vehicle in the BOLO. (R398; TR627) The Deputy pulled behind and followed the vehicle, while attempting to learn more details about the suspect vehicle. (R398; TR628-630) The Deputy was most concerned with the time of the alleged robberies in the DeLand area. (R398; TR629-630) The Deputy learned that the alleged robberies had occurred approximately at 11:49 p.m., which

would have been approximately 40 minutes prior to his observing the suspect vehicle. (R398; TR625-627) The Deputy continued to follow the automobile, and "asked Central to contact DeLand P.D. to see if they had anymore specific information." (R399) The Deputy verified that there was a black female driver and passenger. (R399; TR625-626) The Deputy was able to identify the race of the occupants of the automobile as it passed in front of his headlights, just before the Deputy turned onto Nova Road. (R401) The Deputy observed that all occupants were black and that the driver was a black female. (R401,423) Deputy Graves requested back up from the Ormond Beach Police Department and upon making visual contact with the backup units, Deputy Graves initiated a traffic stop. (R399-402; TR631-632)

Deputy Graves approached the vehicle and requested the driver, Ms. Cowan, to produce her driver license and vehicle registration. Cowan produced her license but had trouble finding the vehicle registration. (R403; TR631-633) After questioning Ms. Cowan, Deputy Graves had learned that she and the occupants had been in DeLand earlier. (R405-406; TR633-635) Deputy Graves obtained additional clothing descriptions and was able to match them with the occupants of the vehicle. (R403-404; TR634-636) Approximately 45 minutes later, a DeLand police unit arrived at the scene with one of the alleged victims who identified several of the occupants of the stopped vehicle as being involved in the DeLand incident. (R409-410)

The United States Supreme Court, in Coolidge v. New

Hampshire, 403 U.S. 443 (1971), held that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." An automobile may not be stopped on a bare suspicion of criminal activity. See Coladonato v. State, 348 So.2d 326, 327 (Fla. 1977). To avoid Fourth Amendment violations, a stop of an automobile must at least be based upon a "well-founded suspicion" that the person or persons detained is or are engaging in, or about to engage in, or has or have engaged in criminal activity. Id. The instant case is very similar to L.T.S. v. State, 391 So.2d 695 (Fla. 1st DCA 1980), wherein a Jacksonville Sheriff's Deputy had received a BOLO advising him that a robbery had recently occurred in his area. Within one to two minutes of receiving the information and within a mile of the scene of the robbery, the Deputy observed an automobile traveling away from the scene of the robbery with three to four occupants, two or three of whom had fairly bushy hair. The court held that the BOLO was too vague and failed to provide an articulable basis for the Deputy to stop the vehicle. Id. at 696. The instant case contains the additional details of a grey mid-sized four door vehicle occupied by six or seven individuals at least two of whom were black females and three of whom were black males. (R397) However, in the instant case the stop occurred much longer after the alleged incident and much farther away from the scene of the crime. (R397-402) Indeed, The stop occurred in a completely different town. (R394-402)

In evaluating Fourth Amendment implications of a

vehicle stop pursuant to a BOLO, several criteria should be employed: the length of time between the offense and the stop; the distance from the scene of the offense and the stop; the direction of flight; the degree of specificity of the description of the vehicle; the degree of specificity of the description of the vehicle's occupants; and the source of the BOLO information. See Sumlin v. State, 433 So.2d 1303-1304 (Fla. 2d DCA 1983); Romanoff v. State, 391 So.2d 783-784 (Fla. 4th DCA 1980); L.T.S. v. State, supra.

In the instant case, the length of time and distance from the scene of the offense militate against the legitimacy of the stop, the lack of specificity of the description of the vehicle militates against the validity of the stop, and the lack of specificity of the description of the occupants of the vehicle militates against the validity of the stop. Would it have been constitutionally permissible for law enforcement officers to stop all grey mid-sized four-door vehicles occupied by two black females and three or four black males within approximately twenty or thirty miles north of DeLand, Florida? Clearly, the answer is no.

Ms. Cowan's consent to search the automobile was not freely and voluntarily given. The consent to search was obtained after illegal police activity: an illegal detention. That unlawful police action presumptively taints and renders involuntary any consent to search. Norman v. State, 379 So.2d 643 (Fla. 1980). When "consent" is given subsequent to an

illegal police action, the consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality which is sufficient to dissipate the taint of prior illegal conduct. Id. In the instant case, after the stop, Ms. Cowan was interrogated by Deputy Graves about where she had been prior to the stop. (R405-406) At first, Cowan denied being in DeLand. (R405) When pressed by Deputy Graves she admitted to being in DeLand. (R406) Deputy Graves then read her constitutional rights. (R406) Subsequently, Ms. Cowan consented to the search of the automobile. (R406-407) Under these facts, Ms. Cowan was acquiescing to authority, not voluntarily consenting to the search of the automobile. Thus, the consent to search was not freely and voluntarily given. Accordingly, the evidence which was seized as a result of the illegal search and which was the subject of the Appellant's Motion to Suppress (R93-94) should have been suppressed by the trial court. The trial court's failure to suppress said evidence constitutes reversible error.

POINT X

THE TRIAL COURT ERRED IN INHIBITING DEFENSE COUNSEL FROM EXERCISING PEREMPTORY BACKSTRIKES BEFORE THE JURY WAS SWORN.

During the jury selection process the following exchange occurred:

> THE COURT: Right now we have twelve jurors. Are those twelve jurors acceptable to the State?
>
> MR. ALEXANDER: Yes, they are, Your Honor.
>
> THE COURT: Mr. Burden, are they acceptable to Mr. Hunter?
>
> MR. BURDEN: No, Your Honor.
>
> THE COURT: Who do you wish to strike?
>
> MR. BURDEN: I would like to exercise a backstrike on Mr. Decker.
>
> THE COURT: Anyone else?
>
> MR. BURDEN: Would you like me to exercise all my backstrikes now?
>
> THE COURT: I certainly would.
>
> MR. BURDEN: Not at this time, Your Honor.
>
> THE COURT: Okay. Then I take it all the remaining ones are acceptable to you, Mr. Burden?
>
> MR. BURDEN: At this time, Your Honor, yes.
>
> MR. ALEXANDER: Let me make sure, since I haven't done this before in your court. Does this mean if Mr. Quarles says we're okay, and I say we're okay, that's it?
>
> THE COURT: That's right.

Mr. Quarles, are the remaining eleven acceptable to you?

MR. BURDEN: May I interrupt? Are you saying that I can't exercise anymore?

THE COURT: I asked you, did you have any that you wish to backstrike. Mr. Burden, I take it you have none, you indicated that you have none.

MR. BURDEN: Does this mean, Your Honor, that I can no longer exercise anymore backstrikes?

THE COURT: Mr. Burden, we're trying to get a jury here. You're not going to sit here and say, yes, they're acceptable, then, no.

You want somebody else, if there's someone unacceptable to you, I expect you to tell me so.

MR. BURDEN: Okay.

MR. QUARLES: Is it my turn?

THE COURT: Mr. Burden, is there anyone else you wish to strike at this time? Mr. Burden, can I have a response?

MR. BURDEN: Yes, Your Honor, you can. I'm still undecided on a particular juror, Your Honor. I can't make up my mind.

And my problem is, I would like to see who I finally have. And then if it's a choice between A and B, I would like to exercise one backstrike at that time.

That's the problem I have, Your Honor. And my understanding of the law, I'm perfectly entitled to that.

THE COURT: You're right about that. You're entitled to look at the whole panel and exercise your last backstrike in that fashion. But you're not likely to play games with this Court and backstrike and backstrike whenever you feel like it.

We have got jurors here for two days and they have a right to know what the decision is tonight, so those that we'll release, we'll release and send home.

> Now you're telling me that right now they're just acceptable to you.
>
> MR. BURDEN: Your Honor, as I said, and I am not trying to play games with this Court. I have a problem with one juror on here and I can't make up my mind at this time. I'm being completely candid with this Court.
>
> THE COURT: Mr. Burden, I'm going to go forward. If you come back and backstrike twice with this group, I'm going to personally take some sanctions against you as an officer of this Court.
> Do you understand?
>
> MR. BURDEN: Yes, Your Honor, your order's perfectly understandable to me. (TR565)

The appellant asserts that the trial court's threat of taking sanctions against defense counsel for merely wishing to make peremptory backstrikes improperly inhibited that right and denied appellant an impartial jury and a fair trial.

The principle of law that it is a right of a defendant to challenge any juror peremptorily before the jury is sworn was adopted by this Court more than one hundred years ago in O'Connor v. State, 9 Fla. 215 (1860), in which this Court stated:

> [I]f the prisoner, at any time before any juror was or jurors were sworn, had retracted his election of such juror or jurors and expressed his desire to challenge him or them, it was his right to do so until the whole of his peremptory challenges were exhausted.

Id. at 229. See also Jones v. State, 332 So.2d 615 (Fla.1976). Florida Rule of Criminal Procedure 3.310 provides that a party

may challenge an individual juror at any time before he is sworn to try the cause. By threatening the defense counsel with sanctions for using backstrikes before they were accepted as an entire panel, the trial court improperly restricted the right of the Appellant to consider the jury panel as a whole when exercising his peremptory challenges. In Tedder v. Video Electronics, Inc., 491 So.2d 533 (Fla. 1986), this Court stated that the only fair scheme in the handling of jury selection is to allow the parties to exercise their challenges singularly, alternately, and orally so that, before a party exercises a peremptory challenge, he has before him the full panel from which the challenge is to be made. The court then went on to say that this is not only the better practice but should be the rule. The Tedder court, accordingly, established the rule that absent exceptional circumstances a trial judge may not selectively swear individual jurors prior to the opportunity of counsel to view as a whole the entire panel from which challenges are to be made.

In Rivers v. State, 458 So.2d 762 (Fla. 1984) the trial judge stated during voir dire that she was not going to allow any more "backstriking." During jury selection, a group of prospective jurors were seated in the "jury box" for the initial round of voir dire examination. After some questioning, the exercise by respective counsel of their peremptory excusals and challenges for cause may result in dismissal of some prospective jurors, and their vacated seats are then filled by new prospective jurors. The effect of the judge's ruling was to

require the lawyers to accept any prospective jurors not challenged at the first opportunity. This court held that this procedure violated Florida Rule of Criminal Procedure 3.310, which provides that a defendant may challenge a prospective juror before the juror is sworn. Jones v. State, supra. However, in Rivers defense counsel did not subsequently attempt to "backstrike" any prospective juror after the judge made this statement, therefore the issue had not been properly preserved for appeal.

The case sub judice is distinguishable from Rivers for three reasons. First, the trial court's conduct was far more egregious wherein it threatened to personally pursue sanctions against counsel if it exercised a second backstrike. Second, defense counsel's stated objective on the record before being threatened with sanctions was to see the entire panel before deciding which juror to backstrike which is one of the stated benefits of backstriking to begin with[8], and had to otherwise subsequently use peremptory challenges on jurors without the benefit of knowing the entire panel. Third, the judges order caused defense counsel to exhaust peremptory challenges before the entire panel was seated. When asked to have an additional peremptory challenge to backstrike Juror Eskridge, the court denied the request. (TR570)

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[8] In this case this was especially important because appellant was being tried with a co-defendant whose attorney also had peremptory challenges. Counsel naturally wanted to see which members of the jury would be challenged by co-defendant's attorney before using a pre-emptory challenge of his own.

The Appellant argues that for the above stated reasons that the trial court's threat of taking sanctions against defense counsel for merely wishing to make peremptory backstrikes on the entire panel improperly inhibited that right and denied Appellant an impartial jury and a fair trial.

POINT XI

THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF IRRELEVANT, COLLATERAL AND PREJUDICIAL EVIDENCE OVER DEFENSE OBJECTION.

During the direct examination of Tammy Cowan, she detailed events leading up to the homicide in Daytona Beach. (TR678-80) Specifically, Tammy Cowan stated that Appellant, James Hunter, had the silver gun in his hand when he left Tammy Cowan's vehicle leading up to the homicide. (TR679) The State, already having established that the silver gun was in the possession of the Appellant, James Hunter, nonetheless asked the following question:

> Q: When was the last time that you saw the gun, Tammy?
>
> * * * *
>
> A: Last time I seen the gun, when James pointed it at Mr. Lewis.

(TR687) Defense counsel immediately objected to the above testimony on the grounds it was evidence of other crimes and moved for a mistrial. (TR687)

The general rule in Florida is that evidence of a collateral crime or other bad act is inadmissible where it proves only bad character or propensity committed to the charged crime. The objectionable evidence, admitted over objection, denied Mr. Hunter due process of law pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

A new trial is required.

Improper admission of collateral crime evidence is presumed to be harmful. See, e.g., Castro v. State, 547 So.2d 111, 115 (Fla. 1989). Even where there is overwhelming evidence of guilt, the State bears the burden of proving that the erroneously admitted evidence did not effect or contribute to the verdict. State v. Lee, 531 So.2d 133 (Fla. 1988). Evidence of collateral crimes or bad acts is inherently prejudicial because it creates the risk that a conviction[9] will be based on a defendant's bad character propensity to commit crimes, rather than on proof that he committed the crimes charged. Straight v. State, 397 So.2d 903 (Fla. 1981). To minimize this risk, the evidence must meet a strict standard of relevance. Heuring v. State, 513 So.2d 122, 124 (Fla. 1987). Evidence of other crimes must be of such a nature that they tend to prove material fact at issue. See State v. Sovino, 567 So.2d 892 (Fla. 1990). If relevant, such evidence must be excluded if its only relevance is to show bad character propensity or its probative value is substantially outweighed by danger of undue prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988).

Through the testimony of Tammy Cowan earlier, the State already had established that James Hunter had possession of the "silver gun" that presumably was used to commit this homicide.

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[9] In this case a death sentence.

The State at trial argued that the above testimony was relevant for the following reason:

> It is consistent with putting the firearm in his hand that night and consistent with showing that he was the one who was calling the shots that night. He was the one with the only real gun. When the last time that she saw the gun -- if we can -- the Court is inclined that that not come in, truly she should be allowed to testify that the last time she sees it is after they get back in the car, after the shooting occurred in Daytona Beach.
>
> THE COURT: She already testified to that.

As the court recognizes, the State introducing the above evidence was cumulative as the trial court observed earlier, nothing other than to show the propensity of Mr. Hunter:

> THE COURT: Then why and what probative value does the fact that he may have used it in a threatening manner saying it to threaten Mr. Lewis has to do with this case other than show the propensity of Mr. Hunter?

(TR689) Appellant contends that the State's conduct in introducing collateral crimes or bad act evidence violated Appellant's right to due process and requires a new trial.

POINT XII

THE TRIAL COURT ERRED IN LIMITING THE CROSS EXAMINATION OF A STATE WITNESS.

During the State's case-in-chief, Daytona Beach Detective Jimmy Flynt was called to the stand. (TR876) During direct examination, the State established that Detective Flynt was the investigator in charge of running the homicide investigation. (TR877) During the cross examination of Detective Flynt defense counsel attempted to elicit information that Detective Flynt gathered during his investigation. (TR884-86) It was during the cross examination that the State objected on the ground that the questions were outside the scope of direct. (TR886) The court sustained the objection. (TR886)

The defense counsel then requested and was granted an opportunity to make a proffer on the cross examination that counsel had sought to make. (TR886) The proffer was as follows:

> Q: Detective Flynt isn't true that on 9/20/92 you spoke Theodore Troutman?
>
> A: Yes.
>
> Q: And during speaking with him, isn't it true he gave you a description of the person who shot him on September 17th, 1992?
>
> A: Yes.
>
> Q: In fact, that description, the person who shot him had on a red hat, red T-shirt?
>
> A: Yes.
>
> Q: Did he also describe another participant as a person who had a fu-

man-chu beard?

A: Yes.

Q: Isn't it also true that as a part of your investigation, you determined whether the four people who were arrested for this charge were wearing that night when they were arrested?

A: Yes.

Q: Isn't it true that Mr. Hunter was wearing a white T-shirt with Gators written across the front?

A: I think so.

Q: And he was wearing a light pair of pants, a light colored pair of pants?

A: I don't know about the pants.

Q: You don't know about the pants?

A: No. I just have a picture of all four guys that were arrested.

Q: So you're talking that from actual pictures of them arrested right after the incident occurred?

A: When they were stopped at Ormond Beach one of the pictures was taken.

Q: Pictures were taken of them?

A: Yes.

(TR891-92) The above questions were not beyond the scope of direct examination where during direct the State introduced the fact that Detective Flynt was the lead investigator in this homicide. Therefore, cross examination should have been permitted into what matters Detective Flynt covered during that investigation.

Florida Rules of Evidence, Section 90.612(2), provides

that the scope of examination is limited to the specific matter of the direct examination. The extent of cross examination has been defined as follows:

> When the direct examination opens a general subject, the cross examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross examination should always be allowed relative to the details of the event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross examination is not confined to the identical detail testified to in chief, but extends to its entire subject matter, and to all matters it may modify, supplement, contradict, rebut or make clearer the facts testified to in chief...

Coxwell v. State, 361 So.2d 148, 151 (Fla. 1978); and Eberhardt v. State, 550 So.2d 102, 105 (Fla. 1st DCA 1989).

In the instant case, Detective Flynt was called as a witness by the State as the lead investigator. He testified to tests that he performed as the lead investigator. It was not beyond the scope of direct examination for defense counsel to further delve during cross examination in other aspects of this lead investigator's investigation. See Johnson v. State, 595 So.2d 132, 134 (Fla. 1st DCA 1992); Haigs v. State, 572 So.2d 991, 992 (Fla. 2d DCA 1990). The error complained of herein is a "constitutional error" and the State, as the beneficiary of the error, has the burden of proving beyond a reasonable doubt that the error did not contribute to the conviction. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986); Johnson v. State,

supra. Appellant asserts that the State cannot meet this burden in that the evidence that would have come in in the cross examination demonstrated that the surviving victims of the shooting in Daytona Beach gave descriptions to investigators that night and days after the shooting different from the appearance of Appellant that night. Therefore, a new trial in this matter is required.

POINT XIII

THE TRIAL COURT ERRED BY NOT CONDUCTING A FULL RICHARDSON HEARING AFTER THE DISCOVERY OF A RICHARDSON VIOLATION.

The State called Dr. Umesh Mahtra in the penalty phase as a psychiatric expert in rebuttal. (TR1563) Prior to Dr. Mahtra's testimony, defense requested a Richardson[10] hearing based on the revelation that Dr. Mahtra was a treating psychiatrist of Appellant in 1985, and that fact was not disclosed to defense. (TR1564) The court rejected the defense request for a Richardson hearing on the grounds that the court found that there was not a nondisclosure violation, and if there was a nondisclosure violation it was trivial. (TR1576)

Witness disclosure rules apply to rebuttal witnesses. Hatcher v. State, 516 So.2d 472 (Fla. 1st DCA 1990); Ratcliff v. State, 571 So.2d 1276 (Fla. 2d DCA 1990). This Court held in Brazell v. State, 570 So.2d 919 (Fla. 1990) that the failure of the trial court to determine on the record what effect a discovery violation had on the opposing party's ability to prepare for trial where the violation was inadvertent and willful is *per se* reversible error. Id. at 921 citing Smith v. State, 500 So.2d 125 (Fla. 1986). See also Z.B. v. State, 576 So.2d 1356 (Fla. 3d DCA 1991). Moreover, harmless error analysis does not apply to a trial court's failure to conduct an adequate Richardson hearing. McDugle v. State, 591 So.2d 660 (Fla. 3d DCA

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[10] Richardson v. State, 246 So.2d 771 (Fla. 1971).

1991); Smith, supra.

The trial court made the finding that there was no nondisclosure stating that defense counsel had the information and that any problem related to getting the information was created by defense counsel. (TR1576) The court made this finding based on a document that made no mention of Eagle Bend Home or Dr. Mahtra. (TR1574) The genesis of this entire matter was when defense counsel asked Dr. Mahtra why he was so sure that Appellant did not suffer from mental illness he stated, "I treated Mr. Hunter at least five times back in 1985 at this Eagle Bend Home for Boys and he was referred there by HRS as a behavior problem. I remember him them and this is what he's like now." (TR1563-64)[11] The trial court's finding that there was a non-disclosure is clearly erroneous in this case.

The trial court also noted that the information relating to Mr. Hunter's treatment as a juvenile was in the hands of defense counsel and the State had no idea that Dr. Mahtra had seen Mr. Hunter. This Court should reject this argument by Dr. Mahtra's own testimony he was a consultant to Eagle Bend Home a HRS facility in Lake County, Florida. This documentation should be deemed to be in the hands of the State vicariously and under the holding of Griffin v. State, 598 So.2d 254 (Fla. 1st DCA 1992), such knowledge should be imputed to the State Attorney's

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[11] Dr. Mahtra took the stand and partially refuted this version of events put forward by defense counsel. Although Dr. Mahtra does confirm that he did see Mr. Hunter five times and he was there as an HRS referral which directly implies it is for behavioral problems.

Office.

Therefore, based on the lack of proper Richardson inquiry, this Court should order a new penalty phase.

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.

ii. Cold, Calculated, and Premeditated

This applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[12] 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

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[12] 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."

Unusual 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.

iii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

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.

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. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the

defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. 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 problems prevent evenhanded application of the death penalty.

4. 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.[13] 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 trenches on the right to vote, it violates the Fifteenth Amendment as well.[14]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[15] Prior to that time, 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.

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[13] 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.

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

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

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).[16]

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 County, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination[17] and disenfranchisement,[18] and use of at-large election systems to minimize the effect of the black vote shows

[16] 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.

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

[18] 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."

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.[19] 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 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

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[19] The results in choosing judges in Citrus County (no black judges) and Marion County (no black circuit judges) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

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.

5. 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).[20]

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[20] 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).

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,[21] 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 has institutionalized disparate application of the law in capital sentencing.[22] See, e.g., Rutherford v. State, 545 So.2d

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

[22] 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

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[23] 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 highlighted by the Tedder[24] 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

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

[24] 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.")

strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. <u>Other Problems With the Statute</u>

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 <u>Delap v. Dugger</u>, 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.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. 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. <u>See</u> <u>Adamson v. Ricketts</u>, 865 F.2d 1011 (9th Cir. 1988) (en banc). <u>But</u> <u>see</u> <u>Hildwin v. Florida</u>, 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).[25] 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

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

mitigating circumstances sufficient to outweigh the presumption.[26] 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 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

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

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[27] 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 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.

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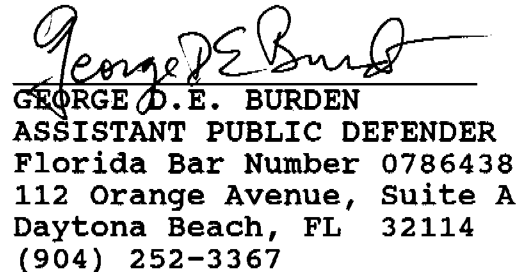
[27] Lockett v. Ohio, 438 U.S. 586 (1978).

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 reasons, authorities and arguments, Appellant respectfully requests that this Honorable Court reverse his convictions, vacate his sentences and remand this cause to the trial court for a new trial.

Respectfully submitted,



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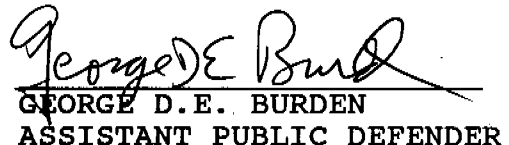
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal, and mailed to Mr. James E. Hunter, #115624 (44-2193-A1), P.O. Box 221, Raiford, FL 32083, this 19th day of April, 1994.



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