IN THE SUPREME COURT FLORIDA

STUART LESLIE POMERANZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,467

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For Martin County [Criminal Division].

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PRELIMINARY STATEMENT

The following symbols will be used:

"R" Record on Appeal

"T" Transcript of Proceedings

"SR" Supplemental Record on Appeal

STATEMENT OF THE CASE

On September 18, 1992 Mr. Pomeranz was indicted for first degree murder and robbery with a firearm R1-2. He was convicted of first degree murder and robbery with a firearm on August 10, 1993 R602-603. The jury recommended life by a vote of eight to four R638. The State filed a sentencing memorandum which requested a life sentence on both counts R643-647. The memo stated that there are not "sufficient legal factors to override the jury's recommendation" R643. Mr. Pomeranz was sentenced to death on Count I and to a consecutive life sentence on Count II R665-685.

STATEMENT OF THE FACTS

Officer Paul Reader responded to an A and M Discount Beverage Store in Port Salerno, Florida at about 10:26 p.m. on April 19, 1992 T1211-1212. Seven .32 caliber casings were found T1227. There were two cash registers T1227. One was on the floor, dangling from a power cord T1227-1228. There was a small amount of money on the floor T1246. Five bullets were recovered from the deceased at the autopsy T1267-1268. The cash register on the floor had $385 in it T1286. The register on the counter had $632 in it T1287. He had no difficulty opening the drawers T1287.

Officer Paul Laska arrived at the scene at 10:38 p.m. The deceased had seven injuries from five shots T1344-1345. He had $6,260.00 on him, as well as an expensive watch T1354-1355. Dr.

Charles Diggs, the medical examiner testified that there were six gunshot wounds T1472. The cause of death was multiple gunshot wounds T1488. All the wounds were from the same type of gun T1505. Officer George Pimm stated that he received a call at 10:04 p.m. on April 19, 1992 to respond to A & M Discount Beverage T1750-1751. He **saw** the deceased laying behind the counter T1754.

James Hannon, formerly of the Martin County Sheriff's Office, responded to the scene on April 19, 1992 T1975. There was a cash register and money on the floor T1981-1982. The clock on the cash register tape did not correspond to the actual time R2125. There is a uniform differential between the register tape time and the actual time T2131. He had a composite drawing distributed based on a description of Carol Hughes, a witness R2145-2147.

Officer Hannon described a series of robberies in April. He discussed a home invasion robbery which took place on April 20, 1992; another which took place on April 27, 1992; a robbery of a Twistee Treat on April 28, 1992; and a robbery at a night depository on May 1, 1992. These all occurred in Martin County, Florida. He also discussed a robbery of a restaurant on May 19, 1992 in Alabama T2205. No one was injured in any of these cases T2217-2218. Mr. Pomeranz has never been convicted in any of these cases, except for the night depository case which was subsequently reduced to grand theft. Officer Hannon stated that he measured Mr. Pomeranz's height and that he is 5'10½". This was different than the 5'6"- 5'7" description given by witnesses T2262.

Officer Cucchiara of the Martin County Sheriff's Department was called by Jay Rinser on May 22, 1992, who had previously been an informant for him on narcotics **cases** T2699-2700. Kinser wanted help

for his girlfriend, who was not complying with her probation T2699-2700. Kinser told him he had information.

Lorenza Pasquale stated that on April 19, 1993 she lived near the store R1393. She went there at 10:00 p.m. with her son T1394. No one was in the store T1396. She stated that when she went in the store a man was coming out who was about 6'2", fat, with no glasses, dark green pants, a black T shirt, and who was about 22-23 years old. She stated that this was not Mr. Pomeranz T1407. She never saw him in the store T1407.

Hector Velasquez, the husbandof Lorenza Pasquale, testified that on April 19, 1992 his wife returned about 10:05-10:10 p.m. and was upset and crying T1453-1459. He said that Mr. Pomeranz had attempted to speak Spanish to him but it made no sense T1458-1461. His only conversations with Mr. Pomeranz were in English T1465.

Sean Bouchard was working as a stockboy at the A & M on April 19,1992 T1861. Mr. Pate1 told him to put the beer barrel in the cooler T1866. He was in the cooler with the door closed but not locked T1866. He heard three bangs and then heard two more T1866-1868. He heard someone yell one phrase with what sounded like a Spanish accent T1872. He saw a person about 19-22 years old looking in the store at about 8:20 p.m. T1881. This person was not Mr. Pomeranz T1884. He never saw the individual who did the shooting T1885.

Bonnie Johnson testified that she and her husband and her son left about 9:55 p.m. on April 19, 1992 to go to the A & M T1896. They approached and heard three loud noises T1899. They left and heard two more loud noises R1900. She claimed she saw a man in the doorway who appeared to be 5'8" to 5'10", with dark shoulder length hair, and was in his early to mid 20's R1904-1905. He had a slim build T1905.

Ina Thomas testified that she lived diagonally across the street T1932. She made two calls from the pay phone outside the store between 8 and 8:30 p.m. on April 19, 1992 T1942. She saw Mr. Pomeranz there T1945. His hair was "blondish" and down to his collar T1937, She was home later and heard three shots at 9:55 p.m. and then heard two more shots T1947-1949. She saw a brownish vehicle with a tan top in the store area around 8 p.m. and again around 10 p.m. T1952.

Elizabeth Hernandez testified that she went with her children to the store at about 9:30 p.m on April 19, 1992 T2478. She saw a car as she was leaving the store T2480. Mr. Pate1 **was** alive when she left T2483. Three men drove up T2510-2511. Two went in the store and the other went to the phone T2511. She identified Lyndon Kinser as the driver of the car and a man who went in the store T2514-2516.

The prosecution's testimony concerning collateral offenses began with Mohatnmad Amarabijad who owns **a** Sizzler Restaurant in Huntsville, Alabama T1543. He hired Mr. Pomeranz to work in his restaurant on May 14, 1992 T1544. He stated that on May 19, 1992, Mr. Potneranz worked the night shift T1554. Mr. Pomeranz came up with a gun and said "don't move, or I'll shoot" T1560-1561. He then forced him to open the safe T1562. He began struggling for the gun T1563. He eventually got away T1570. Mr. Porneranz got away with $3,600 T1574. Mr. Pomeranz could have easily killed him and did not T1628-1629. Officer Michael Smith of the Huntsville, Alabama police testified that **a** .32 caliber pistol was recovered from a dumpster near the Sizzler on May 26, 1992. Joseph Williamson of the FBI testified that the five bullets recovered from the body of Mr. Pate1 matched this gun T1686.

Roy Wright stated that on April 27, 1992 his home was burglarized by three masked men T2277. He can't identify any of the perpetrators.

Violet Wright also described the burglary of their home on April 27, 1992 T2290. She stated there were three men; one short, one tall, and one with a checkered jacket T2296. No one was shot and she could not identify anyone T2302.

Mark Meachamtestified concerning a robbery at a night depository on May 1, 1992. He claimed that he went to a night depository at First Union Bank after 11 p.m. on May 1, 1992. He claimed Mr. Pomeranz pointed a handgun at him T2307. He took the bank bag with $1,500 in it. He was not shot T2312-2313.

Anthony Jacksontestifiedthat he has five felony convictions for robberies andburglaries T2546-2547. He is currently in prison T2547. He stated that he met Mr. Pomeranz through his uncle, Lyndon Kinser R2546. Mr. Pomeranz moved in with him in April, 1992 T2547. They lived in the area of the store T2547. He claimed that he and Mr. Pomeranz robbed the home of the Nicoles on April 20, 1992 R2551. They took the man's wallet T2553. No was injured T2552. He claimed that he and Mr. Pomeranz had committed another home burglary of the Wrights T2556-2557. He and Kinser burglarized a home on May 7, 1992 T2561. Jackson admitted that he had told the police that three people had committed the robbery of the Wright's home T2624-2625. He had lied under oath R2632. The police told him they might be able to get him a deal T2634. He stated the police badgered him to change his story on the number of people in the Wright robbery T2637. He stated that he's capable of perjury and that the police knew he was committing perjury and supported it T2637. He stated that his cousin originally purchased the .32 pistol for Kinser T2638. He had been a cellmate of Darrin Cox T2642.

Lyndon Kinser testified that he pled guilty to first degree murder and armed robbery in this case T2781-2782. He received a life sentence on the murder and a concurrent sentence on the armed robbery T2781-2782. He received concurrent sentences in two other robbery cases and a grand theft case T2792. He's been convicted of between 20 and 25 felonies T2792. He's 29 years old T2783. He claims he's known Mr. Pomeranz since June, 1991 T2784. He stated that he bought a 77 Olds 2 door Cutlass in February, 1992. He stated that in March, 1992 Mr. Pomeranz moved in with his nephew, Anthony Jackson T2789. He illegally bought the .32 caliber handgun from a 14 year old friend of his nephew T2796-2797. He cleaned it up and gave it to Mr. Pomeranz T2797. He claimed that on April 19, 1992 he arrived at Tony Jackson's trailer at about 9:15-9:20 p.m. T2811. He claimed he talked to Mr. Pomeranz in his car for 10-15 minutes T2812. He claimed that Mr. Pomeranz proposed a robbery at the A & M T2812. He agreed and they planned the robbery together T2812-2813. They left at 9:42 p.m. and when they arrived there was a woman and two children standing in the doorway T2815. He claims Mr. Pomeranz had a .32 caliber. He claimed that Mr. Pomeranz went in and came out with a lollipop T 2826. They drove away and came back T2826-2827. He claimed Mr. Pomeranz went in and he drove away briefly T2828-2829. He then came back and Mr. Pomeranz dove in the car T2829. As he was driving away he claimed that Mr. Pomeranz admitted firing five shots, killing the man, and taking $51.00 T2830.

He claimed that Mr. Pomeranz told him that he had robbed a Twistee Treat on April 28, 1992 with a .32 caliber handgun T2840. He claimed that Pomeranz told him he hid the gun T2840-2841. He claimed that Tony Jackson then got the gun, gave it to him and he gave it to

Mr. Pomeranz on April 29, 1992. He stated that he and Mr. Pomeranz robbed a man at a night depository on May 1, 1992 T2850-2851. He stated that Mr. Pomeranz called him from Alabama and admitted robbing a man there T2858. He has filed a motion to mitigate his sentence and a motion for post-conviction relief T2868-2870.

Mr. Kinser claimed that Mr. Pomeranz stated:

> He told me that when he walked in the store the second time, that he went over and got another sucker and laid it on a register, that was for him to ring up the sale to get the register open, because like I told you awhile ago, it was computerized. He said when Pete opened the register, he pulled the gun out. He said that Pete tried to grab the gun so he shot him. He said, Pete was falling back, he grabbed a hold of the drawer of the register and pulled it up on top of him. He said he ran around there and grabbed a handful of money and split.

T2872.

Kinser purchased the gun in question through his nephew T2884. He cleaned it and made it operable T2886. He had shot the gun previously T2894-2895. He traded in his car days after this incident T2907-2908. He was spending $3,000 a week on cocaine T3120.

Kinser pled guilty to first degree murder, three armed burglaries, burglary, and four violations of probation. He could have gotten the death penalty on the first degree murder charge T3137-3138. He could have also gotten consecutive life sentences on the armed robberies instead of the concurrent thirty years he received T3138. He could have received habitual offender sentences on these counts and did not T3139. He committed a burglary and grand theft May 16, 1992 by himself T3140-3141. On May 7, 1992 he committed an armed robbery and armed burglary with his nephew, Tony Jackson T3140-3141.

Darrin Cox claimed he spoke to Mr. Pomeranz in the Martin County Jail T3159. Cox claimed Mr. Pomeranz stated that he began shooting the man when he grabbed the gun T3163-3164. He claimed that Mr.

Pomeranz stated that he robbed a man in Alabama with a .32 T3165-3166. He also claimed that Mr. Pomeranz told him that he and Jay Kinser had robbed a man at a night depository T3168.

Mr. Cox stated that he had been convicted of eleven felonies, including trafficking in cocaine, two counts of grand theft, burglary of a structure, possession of cocaine, leaving the scene of an accident with bodily injury, and three counts of aggravated assault on a law enforcement officer T3175-3176. He received a plea agreement to eleven years after he gave a police statement on this case T3176. He's since moved to mitigate his sentence T3178-3179. He hopes his testimony here will reduce his sentence T3178-3179. The judge deferred ruling on his motion to mitigate until after this trial T3184-3185. His case involved a high speed chase in which he wrecked three police cars and a civilian car T3191-3192. He injured a man T3192. He could have been habitualized and given consecutive sentences on all counts T3193-3196. He's testifying to try to get his sentence reduced T3205-3206.

The defense case began with Officer Becky Bagley who testified that she created a composite based upon the description of Carol Hughes T3297-3298. Officer Reeder testified that he had no difficulty opening both cash registers at the scene T3322. There was money in both cash drawers T3328-3329.

Steven Draketestifiedthathe purchased a 1977 Cutlass (formerly owned by Kinser) on April 26, 1993 T3481. The car had no dashboard clock T3484. He installed car stereos for a living T3478-3479. He could tell that everything on the dashboard was original T3483. (This contradicted Kinser's testimony that he knew the time by looking at the dashboard clock.)

Steven Kinser testified that he is Jay Kinser's nephew and is 15 years old T3590. His uncle asked him to buy a gun T3591. They went to buy a gun from Henry Gerstoff T3592. His uncle gave Gerstoff $24 and said he would pay him $30 later, which he never did T3594-3596. This gun was the . 32 caliber Colt in question.

Carol Hughes stated that in April, 1992 she lived in the area of the A & M store T3600. She knew what Stuart Pomeranz looked like T3601. She went to the store about 9:45-9:50 p.m. T3602. She saw three men at the pay phone T3605. She gave a description of one of the men T3608. He was 5'7"-5'8", very dark, had kinky hair, and weighed about 130-140 lbs. T3608. The police made a composite from her description T3610. All three of the men were of Latin descent T3616. The men made her nervous T3606. None of the men were Stuart Pomeranz, Kinser, of Tony Jackson T3617-3618.

Clare Matalon and her husband own Jupiter Motors T3623. She stated that Jay Kinser purchased a 1977 Oldsmobile Cutlass on March 23, 1992 T3624. He was paying $55 a week T3625. He traded the car in for a 1981 Crown Victoria on April 22, 1992. His payments on this car were $75 a week T3627. Mr. Kinser had been making the payments on the first car and there was no indication it was going to be repossessed T3631.

Donna Pittman, Stuart Pomeranz's mother, testified that he is not Hispanic and no one spoke Spanish around him growing up T3632-3637.

The prosecution's rebuttal case began with Ed Barnard T3773. He claimed that he wrote a check to World of Sound on April 10, 1992 for a stereo on Kinser's car T3774. He claimed that Kinser traded in the 1977 Cutlass because it had mechanical problems T3780. Elliot Matalon, co-owner of Jupiter Motors testified that when Kinser and Ed

Barnard turned in the 77 Cutlass they claimed they wanted a larger car T3804. Michael Cinicolo testified that he is general manager of World of Sound in Stuart, Florida T3807-3808. He identified an invoice for a car stereo and speakers for April 10, 1992 to Kinser T3812-3813. The prosecution rested T3851. Motions for judgment of acquittal were denied T3869. The jury rendered a guilty verdict on both counts T4101-4102.

The prosecution's case in chief in the penalty phase case, consisted of the testimony of Mark Meacham T4181. He claimed that Mr. Pomeranz had robbed him at a night depository at a bank, which he had previously described. The State rested T4189.

The defense case beganwiththetestimony of Barry Norman, mother of Kim Norman, Stuart Pomeranz's girlfriend T4196-4197. She had known Stuart for 1% years T4197. He had always been kind, considerate, and respectful to her and her daughter T4197-4200. He was caring and thoughtful to both of them T4200.

Janet Mayerbach, Stuart's aunt, has known him since birth T4269. At the time of the offense he was 20 years old T4269. Stuart Pomeranz's father abused and hit his mother during her pregnancy T4270. His father had a drug problem T4271. He abused Stuart verbally and physically T4271. She saw him pulling Stuart around by the hair when he was young T4272. Stuart was often crying and screaming while his father was verbally and physically abusing him T4272. Stuart's mom eventually left his father T4272-4273.

Stuart's mother remarried Lawrence Bardon T4273. He had a good relationship with Stuart for a while T4273-4274. This changed when they had a child as a couple T4274. He began to totally ignore Stuart

T4274. He became emotionally abusive and seemed to enjoy frustrating and upsetting Stuart T4274-4275.

Stuart had always been very good to her as an aunt T4275-4276. He was caring and loving T4276. He never showed any anger or hostility to her or other members of the family T4276. Mr. Pomeranz was also very loving towards his mother T4306. The defense rested T4331.

The prosecution called Dr. Glenn Caddy as a witness. He is an expert in forensic psychology T4336. He examined Mr. Pomeranz on four occasions T4340. He testified that Mr. Pomeranz has an impulse control disorder T4412. It is the adult consequence of hyperactivity as a young child T4412. His impulsiveness makes him like an "11 or 12 year old" emotionally T4415. He also suffers from a "profound attention deficit problem" T4425. These problems stem from a neurological disorder T4425. Dr. Caddy stated that Stuart's problem got worse because he was misdiagnosed and inappropriately treated T4426. He was consistently abandoned or mistreated by his father and stepfather T4426. His father introduced him to drugs T4426. His early I.Q. tests reveal extreme deficits in the ability to focus and concentrate T4434. The jury recommended life by a vote of eight to four T4737.

SUMMARY OF THE ARGUMENT

1. The trial court erred in excluding evidence that the key prosecution witness had committed perjury.

2. The trial court improperly restricted the cross-examination of Lyndon Kinser regarding his benefits for work as an informant.

3. The trial court conducted an inadequate hearing concerning a prosecution discovery violation,

4. The trial court erred in excluding evidence concerning Kinser's reputation for truth and veracity.

5. The trial court improperly restricted cross-examination of Kinser concerning his criminal record.

6. Theprosecutionwas erroneouslyallowedtouse the re-cross-examination of Steven Drake to bolster the key State witnesses.

7. The trial court erred in denying a defense request for a subpoena duces tecum for the prison records of Lyndon Kinser.

8. The lower court improperly refused to release or conduct an in camera review of the grand jury testimony of prosecution witnesses.

9. Evidence was improperly introduced concerning a robbery which was subsequently reduced to grand theft.

10. Evidence was improperly admitted concerning a robbery in Alabama which was irrelevant,

11. The trial court improperly refused to observe the limits which had been placed on collateral crime evidence by a prior judge.

12. Evidence of irrelevant robberies was improperly admitted.

13. An improper special jury instruction was given on circumstantial evidence as proof of premeditation.

14. The jury was erroneously instructed on a principal theory of felony murder when there was no evidence to support this theory.

15. The trial court erred in denying a motion for judgment of acquittal as to robbery and as to felony-murder when there was no corpus delicti of robbery.

16. Mr. Pomeranz was involuntarily absent from pre-trial hearings.

17. Mr. Pomeranz was left unrepresented for a ten day period.

18. It violates double jeopardy to convict and sentence Mr. Pomeranz for first degree murder and robbery.

19. The trial court erred in imposing the death penalty after the prosecution agreed that life was the appropriate sentence.

20. The trial court erred in overriding the jury's recommendation of life imprisonment.

21. The trial court employed the wrong legal standard in overriding the life recommendation.

22. The trial court committed substantial errors in its sentencing order.

23. Victim impact evidence was improperly introduced.

24. Fla. Stat, 921.141(5)(d) is unconstitutional.

25. Electrocution is unconstitutional.

26. Florida's death penalty statute is unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN EXCLUDING CRUCIAL DEFENSE EVIDENCE BASED UPON AN ALLEGED DISCOVERY VIOLATION.

The trial court improperly excluded defense evidence that Lyndon Kinser had committed perjury. The exclusion of this evidence denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Fla.R.Crim.P. 3.220.

Lyndon Kinser was the key prosecution witness. The State had given notice that it intended to introduce evidence concerning an alleged collateral robbery, which took place on May 1, 1992. Kinser was a key witness in the collateral crime. Kinser testified that he and Mr. Pomeranz allegedly planned the May 1, 1992 robbery on the day that it happened T2946-2947. Defense counsel then attempted to

impeach Mr. Kinser with his inconsistent testimony at the trial of the robbery case. The State objected that it was a discovery violation as it was not specifically notified of intent to use this transcript T2947-2948. Defense counsel pointed out that this was a State witness relied on by the same State Attorney's Office in both cases T2948. The trial court ruled that this was a discovery violation and excluded the evidence T2948. Defense counsel proffered the prior inconsistent testimony T2952-2955. Kinser had testified that the robbery had been planned about a week or so prior to the event T2955. He had lied under oath.

The trial court erred in two respects in excluding this evidence. First, it erred in determining that this was a discovery violation. Second, it failed to conduct an adequate hearing pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971) before imposing the ultimate sanction of excluding key defense evidence.

The trial court erred in determining that this was a discovery violation. Fla.R.Crim.P. 3.220(d) outlines a defendant's discovery obligation.

> **(d) Defendant's Obligation.**
>
> (1) If a defendant elects to participate in discovery . . .
>
> (A) The defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing....
>
> (B) The defendant shall disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information andmaterial that is in the defendant's possession or control:
>
> (i) the statement of any person listed in subdivision (d)(l)(A), other than that of the defendant;
>
> (ii) reports or statements of experts made in connection with the particular case, including

> results of physical or mental examination and of scientific tests, experiments, or comparisons; and
>
> (iii) any tangible papers or objects that the defendant intends to use in the hearing or trial.

Fla.R.Crim.P. 3.220(d)

This rule imposes upon a defendant the obligation to provide statements of defense witnesses. It does not impose any obligation to provide statements of State witnesses. The court erred in determining that this was a discovery violation.

This could not be a defense discovery violation as the State was in possession of this material. In State v. Coney, 294 So. 2d 82 (Fla. 1974) this Court ruled that the defense is allowed discovery of all materials:

> In the actual or constructive possession of the State, not limited to that in the physical possession of the State Attorney's office.

294 so. 2d at 86.

Here, the material was a transcript of a trial conducted by the same State Attorney's Office.

This was not a discovery violation by the defense, but rather a violation of Brady v. Marvland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Impeachment evidence must be disclosed under this rule. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Gislio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The State has an affirmative duty to correct false evidence. Giglio, 405 U.S. at 153-154; Skipper v. Schumacher, 169 So. 58 (Fla. 1936) ; Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984).

> It is of no consequence that the falsehood bears upon the witness' credibility rather then directly upon the defendant's guilt.
>
> Nasue, 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221.

The State presented perjured testimony and prevented the defense from cross-examining on the inconsistency.

Assuming arguendo, that thetrialcourt correctlydeterminedthat this was a defense discovery violation, it failed to conduct an adequate inquiry before proceeding to the extreme sanction of excluding defense evidence. The trial court must determine whether the violation was inadvertent or willful, whether it was trivial or substantial and, most importantly, what effect it had on the opposing party's trial preparation. Richardson, at 775. The trial court made no findings on any of these issues T2947-2957,3097-3099. It then erroneously proceeded to the extreme sanction of exclusion without consideration of lesser sanctions.

A proper examination of the Richardson factors would point to the admission of this evidence. This action was inadvertent. Defense counsel specifically stated that he felt that the prosecution was on notice of this testimony T2952. He stated that he felt that since the same State Attorney's Office was prosecuting the robbery against the same defendant, they would have knowledge of this transcript T2952.

The alleged violation was trivial, This was a prosecution witness testifying concerning an alleged collateral offense that it chose to introduce into this case. It involves the witness' testimony in a robbery prosecution conductedby another Assistant State Attorney in the same office. It involves a witness who made a plea agreement concerning both of these cases in order to testify against Mr. Pomeranz. It strains credibility that it would not cross the prosecutor's mind that Kinser might be cross-examined concerning his testimony in the robbery trial should it be inconsistent. This is not a

case in which a witness or documents which were peculiarly within the possession of the defense were hidden from the State.

The trial court made no attempt to determine what prejudice accrued to the prosecution. It made no fact findings. It is hard to see what the prosecution would have done differently if it had been explicitly noticed that the defense intended to use this transcript. Although the prosecutor asserted that it was prejudicial, he gave no reasons T2946-2957,3097-3099. What would the prosecutor have done differently? Would he have coached Kinser better so that he would keep his stories straight? This is not prejudice under Richardson.

The trial court did not consider less severe sanctions, The trial court immediately excluded the evidence T2949-2952. As an afterthought the judge urged the prosecutor to review the transcript over the lunch break T2957-2958. The judge then renewed his ruling based upon a bald assertion of prejudice T3097-3100.

The exclusion of defense evidence is rarely justified. Wilkerson v. State, 461 So. 2d 1376 (Fla. 1st DCA 1985); Baker v. State, 522 so. 2d 491 (Fla. 1st DCA 1988); Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994); Donaldson v. State, 656 So. 2d 580 (Fla. 1st DCA 1995); Duarte v. State, 598 So. 2d 270 (Fla. 3d DCA 1992); Davie v. State, 555 so. 2d 447 (Fla. 4th DCA 1990).

> Relevant evidence should not be excluded from the jury unless no other remedy suffices, and it is incumbent upon the trial court to conduct an adequate inquiry to determine whether other reasonable alternatives can be employed to overcome or mitigate any possible prejudice.
>
> Wilkerson, at 1379.

The trial court made no attempt to explore less severe sanctions. Numerous cases reverse for the exclusion of defense evidence even where there is a far more prejudicial defense discovery violation such

as the complete failure to list a witness. Davie; Miller; Baker; Wilkerson; Duarte. These cases involve situations in which the State was truly surprised. Here, we have a State witness concerning a collateral crime which the State chose to interject into this case. This was a transcript of a State witness concerning the same State Attorney's Office. The witness made a plea bargain to testify in both cases. It strains belief that there was any surprise and/or prejudice. Indeed, there was no discovery violation. The exclusion of this testimony was error.

The exclusion of this evidence was harmful. Erroneous restriction of cross-examination of a key prosecution witness is reversible error. Coco v. State, 62 So. 2d 892 (Fla. 1953); Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Zerquera v. State, 549 So. 2d 189 (Fla. 1989). Kinser was the key prosecution witness. This impeachment would have shown that Kinser was committing perjury. Fla. Stat. 837.021. He was making materially inconsistent statements under oath in these proceedings. He was either lying to this jury or he had lied to the robbery jury. Knowledge of this may well have caused the jury to disbelieve Kinser's entire story. Reversal is required.

POINT II

THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF A PROSECUTION WITNESS CONCERNING THE BENEFITS LYNDON KINSER RECEIVED AS A POLICE INFORMANT.

The trial court improperly restricted cross-examination concerning the benefits which Lyndon Kinser had received for working as a confidential informant. This restriction was improper in three respects. (a) This was a subject which was gone into on direct examination. (b) It was relevant to the credibility of the key witness, Lyndon Kinser. (c) It impeached Ronald Cucchiara on a

material matter. This error denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The State called Officer Ronald Cucchiara as a witness T2690. He claimed that on May 22, 1992 he received a call from Kinser T2699-2700. Kinser wanted help for his girlfriend who was violating her probation T2699-2700. He wanted to "give him information" or "work for him" in exchange for helping his girlfriend T2699-2700. Kinser had worked as an informant for him previously T2700.

> Mr. Kinser was -- worked with me earlier on numerous cases when I was workingundercovernarcotics in the Martin County area. He had been used as a C.I. for me, as a confidential informant, and hadprovento be very reliable in information he had given me before. He had gotten to be kind of a trust between us as far as that I would tell him the truth exactly the way things would be and he trusted me in that sense of the word. He knew if I told him something he could depend on it and I wouldn't help him, I wouldn't lie to him and I wouldn't do anything to break the law or help him break the law. So we had kind of a rapport developed between us in '87, '88 when I was working undercover narcotics,
>
> T2700-2701.

The prosecution brought out Kinser's work for Officer Cucchiara in the late 1980's as a confidential informant. It had Officer Cucchiara directly vouch for the credibility of Kinser.

Officer Cucchiara also left the false impression that Kinser did not receive any benefits for his prior work. He stated:

> I wouldn't help him, I wouldn't lie to him and I wouldn't do anything to break the law or help him break the law.
>
> T2701 (emphasis supplied).

The statement, "I wouldn't help him," leaves the false impression with the jury that Kinser did not receive any benefits for his prior work for the Martin County Sheriff's Office.

Defense counsel tried to clarify this.

> Now, one of the things you did do with Lyndon Kinser is you helped him get off a crack cocaine problem back in the late '80's, right? Did you help him in drug rehabilitation?

T2714.

He was prevented from asking this question T2714-2715.

This question was proper cross-examination concerning a subject opened on up on direct examination. There is a broad scope of cross-examination concerning matters brought out on direct examination.

> [W]hen 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 an 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 details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief...,

Coco v. State, 62 So. 2d 892, 895 (Fla. 1953).

This Court has often relied on this doctrine to reverse convictions in capital cases. Coco; Coxwell ; Zerquera.

This area was opened up on direct examination. The State brought out Kinser's prior work as an informant. It had Officer Cucchiara vouch for the credibility of Kinser. It left the false impression that Kinser had received no benefits for his work. Giglio, susra. Mr. Pomeranz had a right to correct this false impression.

This cross-examination was also proper as it directly affected the credibility of the key prosecution witness. By vouching for the credibility of Kinser's work as an informant, and falsely implying that Kinser had received no benefits for his prior work the State had improperly bolstered Kinser's credibility. It was essential that the defense be able to counter this false impression.

> The defense should be allowed wide latitude to demonstrate bias or possible motive for a witness's testimony. Nelson v. ***State,*** 395 So. 2d 176 (Fla. 1st DCA 1980); ***Harmon v. State, 394 So.*** 2d 121 (Fla. 1st DCA 1980); ***Blair v. State,*** 371 so. 2d 224 (Fla. 2d DCA 1979). Anv evidence tending to establish that a witness is appearing for the State for any reason other than to tell the truth should not be kept from the jury. *Holt* ***v. State, 378 So.*** 2d 106 (Fla. 5th DCA 1980).
>
> Lavette v. State, 442 So. 2d 265, 268 (Fla. 1st DCA 1983) (emphasis added).

The Sixth and Fourteenth Amendments to the United States Constitution require the full exposure of a prosecution witness' motivations to testify. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 3447 (1974).

The relevance of this evidence is akin to that in Taylor v. State, 455 so. 2d 562 (Fla. 1st DCA 1984). Taylor, involved an allegation of a sexual attack in prison. Defense counsel attempted to bring out prior allegations of **sexual** assault by the victim and attempts to get prison transfers or better treatment from these complaints. 455 so. 2d at 563. The Court held it to be reversible error to exclude this evidence as it went to the witness' possible motive as to the current charge. 455 so. 2d at 565-566.

The prosecution attempted to bolster Kinser by vouching for the credibility of Kinser's prior work as an informant and falsely stating that he received no benefits for his prior work. The defense had a right to counter this by pointing out that Kinser's true motivation in his prior work as an informant was the same **as** in this case. His cocaine addiction and criminal activities get him into legal problems he can not get out of. He then goes to his friends in the Martin County Sheriff's Office and will say anything (true or false) in order

to get off his cocaine addiction and minimize his punishment. Here, Kinser admitted he was spending $3,000.00 a week on cocaine at the time he began dealing with the police T3120. He also admits that he was committing numerous armed robberies, armed burglaries, grand thefts, and parole violations. The benefits he received for working for the same police agency, the Martin County Sheriff's Office, when he was in the same situation, over his head in drugs and crime, are relevant to his motivation. It shows that his motivation was not to tell the truth, but to say anything to save himself.

Mr. Cucchiara said that Kinser knew "I wouldn't help him" T2701. Defense counsel had a right to cross-examine him to show that this statement was false and that he had helped him previously. Fla. Stat. 90.608 provides that a witness can be impeached by prior inconsistent statements and by proof that material facts are not as testified to. Fla Stat. 90.608(1)(a)(e). This cross-examination would qualify under this section.

This was harmful error. Kinser's credibility was key to this case. The prosecution improperly vouched for his credibility as an informant. It falsely left the impression that he received no benefits for his work. It was essential for the defense to counter this by showing that he went to the Martin County Sheriff's Office when he was over his head in crime and drugs and would say or do anything to reduce his criminal exposure.

POINT III

THE TRIAL COURT CONDUCTED AN INADEQUATE HEARING AND FAILED TO RULE CONCERNING A STATE DISCOVERY VIOLATION.

The trial court conducted an inadequate hearing and ultimately failed to rule on a prosecution discovery violation. This denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of

the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Fla.R.Crim.P. 3.220.

The prosecution was able to call Elizabeth Hernandez Calderone as a court witness T2472-2474. Mrs. Calderone stated that she went to the store at 9:15 p.m. on the night in question T2494. She had identified a photograph of Mr. Pomeranz as having been by the telephones that night T2484. She had not seen him in the store. She testified that Kinser was in the store when she left T2516. (This was directly contrary to Kinser's testimony.)

The prosecution impeached Mrs. Calderone with a deposition taken by Kinser's attorney R2494-2498. It brought out that Mrs. Calderone had allegedly stated that she went to the store at 9:30 p.m. and at 9:45 p.m. T2494-2495. It also brought out that she had allegedly identified Mr. Pomeranz as the person in the store T2496-2497.

Defense counsel objected to this as a discovery violation. He pointed out that this deposition was taken by Kinser's attorney before Mr. Pomeranz was ever charged in this case T2498-2499. (The original grand jury had no true billed Mr. Pomeranz, but had charged Kinser.) This statement had never been turned over to the defense T2498-2500.

The trial court conducted a inadequate hearing and never resolved the issue. Once a defendant makes a claim of a discovery violation the trial judge must conduct an adequate hearing and resolve the issue. Richardson v. State, 246 So. 2d 771 (Fla. 1971); Barrett v. State, 649 So. 2d 219 (Fla, 1994); Sears v. State, 656 So. 2d 595 (Fla. 1st DCA 1995); Tarrant v. State, 668 So. 2d 223 (Fla. 4th DCA 1996).

> Without intending to limit the nature or scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the State's violation was inadvertent or wilful, whether the violation was trivial or substantial,

and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.

Richardson at 775.

Once an asserted discovery violation is brought to the judge's attention, the trial court must conduct an inquiry and "rule on whether a violation occurred and determine whether the evidence was admissible." Sears, at 596.

The trial court's inquiry here was woefully inadequate under Richardson. The entire hearing is as follows:

MR. KRASNOVE: I object also on the grounds of Richardson. I was never furnished with the statement by Mr. Barlow. He had never furnished to me and just as you would not permit me to use that photograph to -- can we have a discussion out of the presence of the Jury, Judge?

THE COURT: We need to finish this.

MR. KRASNOVE: Judge, I object to him -- Judge, if I can't -- if I cannot use a photograph which he had access to of public records and because he alleged a Richardson violation, how could he possibly use a sworn statement of this witness which he never supplied me with, Judge? He has -- ask him if he ever supplied it to me and he'll say no if he's telling the truth. And just as he objected to my using the photograph, I now object to him using a sworn statement.

THE COURT: All right. The State's response.

MR. BARLOW: Judge, this is a public document that is within the court file for the Co-Defendant in this case. I assume Counsel has depositions from both of these cases. In this particular case this is not kept in the State's file, police file, this is a public document in the court file. This gentleman is well aware that Kinser was represented and prosecuted, well represented by Mr. Watson and was aware of the depositions taken in those cases. He may not like the answer that his witness -- his client has been identified being in the store, but that's the answer given. She changed the name a number of times in the store what time she went to the store, that's why we called her as a Court's witness. She hasn't been able to be consistent throughout one statement in this case.

MR. KRASNOVE: Your Honor, public record, newspaper article, he had the newspaper article. What Your Honor is permitting him to do --

THE COURT: All right. Let's go on.

T2497-2500.

The trial court failed to make any of the required findings under Richardson. It made no findings whether there was a discovery violation. It did not determine whether the violation was willful or inadvertent, whether it was trivial or substantial and what effect there was on the ability to prepare for trial.

This was a discovery violation. Florida Rule of Criminal Procedure 3.220(b)(1)(B) requires the prosecution to turn over the "statement" of any person on the prosecution's witness list.

> The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by a person and written or recorded or summarized in any writing or recording.

Id.

A deposition taken by the co-defendant's attorney before Mr. Pomeranz was charged in this case would qualify under this rule. It was undisputed that the prosection did not turn over the statement.

The trial court's failure to conduct an adequate hearing and resolve this issue was prejudicial. The failure to hold a complete hearing is error. Weary v. State, 644 So, 2d 156, 157 (Fla. 4th DCA 1994); Walker v. State, 573 So. 2d 1075 (Fla. 4th DCA 1991); Tarrant.

The deficient inquiry in this case is similar to that found to be reversible error in Tarrant.

> The trial court did not make a formal finding on the record, whether there was in fact a discovery rule violation. The trial judge further did not make findings as to whether the violation was trivial or substantial, willful or inadvertent, and what, if any, impact the discovery violation had on the appellant's ability to prepare for trial.

668 so. 2d at 225.

Although this Court has held that the failure to hold a proper Richardson hearing is not per se reversible error, it took pains to

emphasize that it would be harmful "in the vast majority of cases" and the cases in which it would be harmless would be "the exception." State v. Schopp, 653 So. 2d 1016, 1021 (Fla. 1995).

> If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful, In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless,
>
> 653 So. 2d at 1020-1021.

The courts have applied this test to hold the failure to hold an adequate hearing to be harmful error. Sears; Mason v. State, 654 So. 2d 1225 (Fla. 2d DCA 1995); Vincente v. State, 669 So. 2d 1119 (Fla. 3dDCA 1996); Tarrant; McArthur v. State, 671 So. 2d 867 (Fla. 4th DCA 1996).

This error is harmful. This alleged statement in the deposition by Kinser's attorney was directly contrary to Mrs. Calderone's testimony that it was Kinser who was in the store. It is easy to conceive of a variety of different actions Mr. Pomeranz would have taken had he known of this deposition. Defense counsel stipulated to Mrs. Calderone being called as a court witness, with the right to lead and cross the witness T2472-2474. If defense counsel had known of this deposition, he may well have vigorously fought this. He may have recognized that the prosecution was improperly trying to get her inconsistent hearsay in front of the jury. See Ehrhardt, Florida Evidence, § 608.2 (1996); United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975). This is akin to the sort of violation the Court found to be prejudicial in Tarrant.

> Following *Schopp*, we find that the State has failed to meet its burden of proving beyond a reasonable doubt that the State's transgression of the discovery rules was harmless.

> In the instant case, while the trial court offered Tarrant's counsel additional time to review the tape and the legal issues raised therein, the State has not demonstratedbeyond a reasonable doubt that Tarrant's trial preparation or strategy would not have been materially different if the tape had been disclosed. Without reaching the merits of appellant's claim that, if given an adequate opportunity to review the tape, she may have obtained suppression of this evidence on fifth amendment grounds, we cannot conclude beyond a reasonable doubt that appellant would not have explored this avenue if given the opportunity to do so, prior to the start of trial. As a result, we conclude that Tarrant is entitled to a new trial.

Tarrant, at 226.

There are additional avenues defense counsel could have taken had he been aware of this statement. He could have explored the circumstances regarding the alleged identification of Pomeranz in the deposition to attempt to show that the witness had been confused by Kinser's attorney. He could have moved for redeposition or spoken to the witness at length about this. This error is harmful.

POINT IV

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF LYNDON KINSER'S BAD REPUTATION FOR TRUTHFULNESS.

Mr. Pomeranz attempted to introduce evidence concerning Lyndon Kinser's bad reputation for truthfulness. The exclusion of this evidence violated Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Fla. Stat. § 90.405(1) and 90.803(21).

Mr. Pomeranz called Mitzi Caldwell, Kinser's sister, as a defense witness T3387. He proffered the following testimony:

> "QUESTION: And in your family you have a large family; don't you?
>
> "ANSWER: Yes.
>
> "QUESTION: How many brothers and sisters?

"ANSWER: There's eight of us.

"QUESTION: Right, okay. Among family members, did Jay have a reputation for being dishonest?

"THE WITNESS: Yes. "

T3392.

This evidence was excluded after lengthy argument T3393-3397.

The trial court erred in excluding this evidence. Fla. Stat § 90.803(21) and this Court's opinion in Hamilton v. State, 129 Fla. 219, 176 So. 89, 94 (1937) makes clear that reputation extends to groups other than a geographic community. Fla. Stat- § 90.803(21) defines the exception to the hearsay rule to prove reputation as follows:

> **(21) Reputation as to Character.** Evidence of reputation of a person's character among his associates or in the community.

§ 90.803(21).

The statement that this evidence is to include a person's "associates" demonstrates that this section includes reputation among any group of associates, not merely in a geographic community. In Hamilton, this Court held that it was error to exclude reputation evidence among one's co-workers. 176 So. at 94.

> Section 90.803(21) provides that the reputation may be among a person's "associates or in the community." While the common law required reputation to be community-wide, in today's urban society few individuals are so widely known in a city so as to have such a broad-based reputation. In recognition of our changing society, both judicial decision and the Federal Rules of Evidence have provided that the reputationmaybe among "associates;" that is, "within other substantial groups of which the (person) is a constantly interacting member, such as the locale where (the person) works." The key to the group is whether its size is sufficiently large so that the distillation of the group's feelings is reliable and not the opinion of a very few persons.
>
> Ehrhardt, Florida Evidence, p.690 (1996 ed.) (footnotes omitted).

The family relationship in the current case meets the criteria of associates. There are eight brothers and sisters in this family T3387. This is a large group of associates among which one could develop a reputation for truthfulness, A person normally has far more interaction with their family than among their community. A bad reputation for truth and veracity among one's family is relevant.

The exclusion of this evidence was harmful error. The prosecution's case depended on the testimony of Lyndon Rinser. Evidence from his own sister concerning his poor reputation for truthfulness would be powerful evidence. This case must be reversed for a new trial.

POINT V

THE TRIAL COURT ERRED IN RESTRICTING THE CROSS-EXAMINATION OF LYNDON KINSER CONCERNING HIS PRIOR CRIMINAL RECORD.

The trial court improperly restricted the cross-examination of Lyndon Kinser. This denied Mr. Pomeranz due process of law and a fair trial pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecution had Lyndon Kinser describe an incident in which he and Ed Barnard drove to Margate, Florida while he had a handgun in a t-shirt. The prosecution then asked:

> Q [Prosecutor]: Let me ask you. Did you show Ed the gun and tell Ed you had the gun?
>
> A [Kinser]: No. Ed's never seen the gun unless he seen it in here.
>
> Q Would Ed be upset with you if you started carrying guns and had that in front of him?
>
> A He would have been real upset, yes.

T2843-2844.

Defense counsel objected and asked that this last question and answer be stricken and the jury be told to disregard it T2844-2847. He also stated that this opened the door to Kinser's criminal past as in fact Ed Barnard was well aware of Kinser's prior robberies and other crimes T2844. The judge denied the motion to strike and denied the request to cross-examine further on this issue T2846-2847.

The trial court erred in refusing to strike this testimony or allow cross-examination on the issue. There is abroad scope of cross-examination concerning matters brought on direct examination. Coco· Coxwell; Zerauera. The prosecution brought out that Kinser lived with Ed Barnard, worked for him, and that they had known each other for 10 years T2785-2786. This was a close relationship. The prosecutor's question that Ed would be upset with him carrying a gun was an attempt to leave a false impression that carrying guns was out of character. The defense had a right to correct this false impression.

The restriction is similar to that held improper in Lusk v. State, 531 so. 2d 1377 (Fla. 2d DCA 1988). In Lusk a prosecution witness had stated that he was non-violent. Id. at 1379. The Court helditwas error to prohibit evidence of his prior violence to impeach him on this matter. Id. at 1382. This is harmful error.

POINT VI

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO USE IRRELEVANT CROSS-EXAMINATION OF STEVEN DRAKE TO IMPROPERLY BOLSTER THE CREDIBILITY OF THE KEY PROSECUTION WITNESSES.

The prosecutionimproperlyusedthe recross examination of Steven Drake to bolster its key witnesses. This denied Mr. Pomeranz due process of **law** and **a** fair trial pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The defense called Steven Drake as a witness. Steven Drake testified that he purchased a 1977 Cutlass (formerly owned by Kinser) on April 26, 1993 T3481. The car had no dashboard clock T3483. He installed car stereos for a living T3478-3479. He could tell that everything on the dashboard was original T3483. This testimony impeached Kinser's testimony that he knew the time of the robbery by looking at the dashboard clock.

On recross examination, the prosecutor attempted to pursue an improper line of inquiry, which was beyond the scope of direct or redirect examination. The prosecutor asked the following question:

> Mr. Drake, since we've gone into a little bit of your background history, the word snitch has been used here in trial with people.

R3529.

Defense counsel objected to this testimony as beyond the scope of redirect and as irrelevant T3530. This objection was overruled and the prosecutor was allowed to proceed.

> Q [Prosecutor] You know what a snitch is?
>
> A [Mr. Drake] Yes.
>
> Q. You've heard that term?
>
> A. Yes.
>
> Q. Now, do you see a snitch as a person that always gives -- a person that gives information but gives it falsely?

T3530.

Defense counsel then made a further objection that Mr. Drake was not an expert in these matters T3531. This was overruled T3531.

> Q. Mr. Drake, have you given information to the police in a quiet, undercover fashion so people wouldn't know?
>
> A. I have done work for the Martin County Sheriff's in the past few months.

Q. And you're not suggesting that by a person that gives information about other individuals that are committing crimes is committing a crime by giving false information; **are** you?

A. I've never given false information.

T3531.

This was beyond the scope of direct, irrelevant, outside the witness' scope of expertise, and an improper attempt to bolster the credibility of key State witnesses. Cross-examination is limited to the scope of direct examination. Echols v. State, 484 So. 2d 568, 573 (Fla. 1985); Steinhorstv. State, 412 So. 2d 332, 337 (Fla. 1982). One witness can not comment on the credibility of another witness. Tingle v. State, 536 So. 2d 202 (Fla. 1988); Moslev v. State, 569 So. 2d 832 (Fla. 2d DCA 1990); McKinney v. State, 579 So. 2d 393 (Fla. 3d DCA 1991) ; Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984).

This evidence was beyond the scope of direct and re-direct testimony. The defense had called Steven Drake to testify about a car stereo system, not "snitches" or informers. Mr. Drake had no special expertise in the area, It was improper to allow him to give this sort of opinion testimony. Floyd v. State, 569 So. 2d 1225, 1232 (Fla. 1990); Gilliam v. State, 514 So. 2d 1098, 1100 (Fla. 1987); Kelvin v. State, 610 So. 2d 1359, 1364 (Fla. 1st DCA 1992).

This was an improper attempt to bolster the credibility of key prosecutionwitnesses. All of the key State witnesses were people with long criminal records who had made deals for their testimony (Kinser, Darrin Cox, and Anthony Jackson). They are "snitches" in slang parlance. Kinser and Cox are the only witnesses who provide any direct evidence that Mr. Pomeranz committed this offense. Kinser had been an informant for the Martin County Sheriff's Office T2699-2700.

It was harmful to allow the prosecution to use defense witness, Steven Drake, tobolsterthese witnesses credibility by describing his giving true information as a police informant and downplaying the negative connotation of the term "snitches." Reversal is required.

POINT VII

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO ISSUE A SUBPOENADUCES TECUM FOR THE PRIOR RECORDS OF THE KEY STATE WITNESS WITHOUT EXAMINING THE DOCUMENTS IN QUESTION.

Defense counsel requested the Court to allow him to issue a subpoena duces tecum for the prison records of Lyndon Kinser over the previous three years. The trial court denied this request and rejected the idea of examining the documents in camera. This denied Mr. Pomeranz due process of law and a fair trial pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Florida Rule of Criminal Procedure 3.220.

Defense counsel filed a motion for a compelled mental evaluation of Kinser R241-242. The motion pointed out that Kinser had a long history of drug abuse and had been under the care of psychiatrists and psychologists. He also pointed out that Kinser is the principal witness in the case, He invoked his rights pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Defense counsel conceded at the hearing on the motion that at the current time, he did not have adequate cause to compel a mental evaluation of Kinser SR416-419. He stated that he would be satisfied with being given authority to issue a subpoena duces tecum for the prison records of Kinser for the last three years SR419-437. He pointed out that Kinser had admitted having been a cocaine addict prior to going to prison and again having been a cocaine addict soon

after this homicide, but claimed that he was not using cocaine at the time of the homicide SR417. Kinser admitted to having seen mental health professionals prior to going to prison, but stated that in prison he only had the annual psychological required of all prisoners and had no special psychological problems SR417. Defense counsel pointed out that he had information from his client, who had been housed with Kinser in prison, that Kinser was lying about his lack of psychological problems in prison SR419-420. He pointed out that the prosecution obtained Mr. Pomeranz' prison records through an investigative subpoena SR431. The court rejected in camera review of the records and denied the request for a subpoena duces tecum SR439-440.

The trial court erred in denying the subpoena duces tecumwithout at least examining the questioned records. In Vann v. State, 85 So. 2d 133 (Fla. 1956) this Court outlined the proper test for deciding whether to authorize a subpoena duces tecum. This Court held that the documents must be reviewed and turned over if they are "prima facie not irrelevant to some probable issue in the case." 85 So. 2d at 136.

The same principles have been applied to prosecution objections to a defense subpoena duces tecum.

> Whenever the State objects, as here, to the production of documents under a subpoena duces tecum, the proper practice is for the trial court to examine the subpoenaed documents to determine their relevancy resolving any doubts in favor of their production. Vann v. State, 85 So. 2d 133, 136 (Fla. 1956)....
>
> We emphasize that the trial court should have conducted a hearing to determine the relevancy of such documents, not their admissibility, and to thereafter turn over any such relevant documents to defense counsel. We express no opinion on, and for the trial court at the hearing would not be required to determine, the admissibility of such evidence. We are concerned only as to the production of such evidence for the inspection of defense counsel pursuant to the subpoena duces tecum.

Green v. State, 377 So. 2d 193, 202 (Fla. 3d DCA 1979), decision approved State v. Green, 395 So. 2d 532, 539 (Fla. 1981).

The trial court made no attempt to examine the records. This was error as the documents were not "clearly irrelevant." A witness' psychiatric historyand/or drug abuse can be relevant if it affects the witness' credibility. Gray v. State, 640 So. 2d 186 (Fla. 1st DCA 1994); United States v. Lindstrom, 698 F.2d 1154, 1159-1168 (11th Cir. 1983); Greene v. Wainwright, 634 F.2d 272, 275-276 (5th Cir. 1981); United States v. Partin, 493 F.2d 750, 763-764 (5th Cir. 1974). Prison psychological records could affect the witness' credibility. Indeed, the records could reveal the witness is a pathological liar.

Kinser's prison records couldalso be relevant in other respects. The prosecution brought out the fact that Kinser and Mr. Pomeranz had been in prison together T2783-2784. Kinser's prison records could reflect some antagonism against Mr. Pomeranz or motive to lie. The State brought out that Kinser had worked as a confidential informant for the Martin County Sheriff's Office (the same police agency as in this case) T2700-2701. His prison records could have led to undisclosed benefits he received in the prison system from his work.

The trial court prejudicially erred in denying the subpoena duces tecum without examining the records in question. Kinser's credibility was a key issue. Keen v. State, 639 So. 2d 597 (Fla. 1994).

POINT VIII

THE TRIAL COURT ERRED IN FAILING TO RELEASE OR CONDUCT IN CAMERA REVIEW OF GRAND JURY TESTIMONY.

The trail court erred in failing to release or conduct in camera review of the grand jury testimony in this case. This denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of

the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Fla. Stat. 905.27.

Mr. Pomeranz moved for the release of grand jury testimony of witnesses who were on the prosecution or defense witness list R399-400. He pointed out that he was entitled to such material pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He also pointed out the potential biases of key prosecution witnesses Lyndon Kinser and Darrin Cox R399. Both of these witnesses had made plea bargains with the prosecution in return for their testimony and had pending motions to mitigate their sentences R399. The motion was denied SR554-559.

Florida Statute 905.27 states that a court can require the disclosure of grand jury testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

Fla. Stat. 905.27.

Subsections (a) and (c) mandate liberal release of grand jury testimony. Fla.R.Crim.P. 3.220(b)(1)(B) requires the prosecution to turn over the statement of any person on the prosecution's witness list. There is no reason in law or logic to exempt grand jury testimony from the plainmeaning of this rule in light of the statutory authority provided by § 905.27.

The United States Supreme Court has declared Florida's grand jury secrecy doctrine to be violative of the First Amendment to the extent that it prohibits a witness from revealing his own testimony. Butterworth v. Smith, 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572

(1990) . The Court outlined the almost non-existent State interest in grand jury secrecy once anindividualhas been chargedandapprehended.

> When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape -- that individual presumably will have been exonerated, on the one **hand, or arrested or otherwise** informed of the charges against, on the other. There is also no longer a need to prevent the importuning of grand **jurors since their deliberations will be over.**

494 U.S. at 632-633 (footnote omitted).

Butterworth v. Smith is part of a broader trend of recognizing **the outmoded** nature of grand jury secrecy, especially when balanced against the due process rights of a criminal defendant and the requirements of Brady.

The United States Supreme Court outlined the general principles governing this issue in a case in which it reversed a conviction for failure to disclose grand jury testimony:

> Disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.

Dennis v. United States, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973 (1966).

The right to in camera review of otherwise confidential materials in a criminal prosecution was extended by the United States Supreme Court in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In Ritchie, the defendant, charged with sexual assault on his daughter, moved to have her Children and Youth Services file produced as it "might contain the names of favorable witnesses as **well as other,** unspecified exculpatory evidence." 480 U.S. at 43. The Supreme Court held the defendant was entitled to in camera review despite public policy reasons and specific statutes making the material confidential. Id. at 61. Hopkinson v. Shillinser, 866 F.2d

1185 (10th Cir. 1989); modified 888 F.2d 1286 (10th Cir. 1989) (en banc) applies the principles of Ritchie to grand jury testimony.

> Hopkinsonassertsthat evidencetendingto exculpate him may have been presented to this grand jury, but he cannot point to any specific exculpatory evidence because he has never seen the grand jury transcripts.

866 F.2d at 1220. The Tenth Circuit held he was entitled to an in camera review because "exculpatory evidence could have been presented" and in camera review preserves State confidentiality interests.

This Court has recognized this changing balance in Keen v. State, 639 So. 2d 597 (1994). In Keen this Court held that the trial court erred in failing to release or conduct in camera review of the grand jury testimony of a prosecution witness. Id. at 600, This Court also noted the strong policy in favor of release of the testimony:

> The United States Supreme Court held in ***Dennis*** that the advocate, not a trial judge, should examine grand jury testimony to spot inconsistencies. 384 U.S. 855, 874-75, 86 S.Ct. 1840, 1851-52, 16 L.Ed.2d 973 (1966). The trial judge's function "is limited to deciding whether a case has been made for production and to supervise the process." *Id.* at 875, 86 S.Ct. at 1851-52.

Id. at 600 n.4.

In the present case, the trial court prejudicially erred in failing to release the grand jury testimony of witnesses on the prosecution or defense witness list. At the very least, the trial court should have conducted in camera review of the testimony.

Assuming arguendo, that this Court feels that release or in camera review of the testimony of all witnesses is not required; at the very least release or in camera review of the grand jury testimony of Lyndon Kinser and/or Darrin Cox is required. These two witnesses provided the only direct evidence against Mr. Pomeranz in this case. Kinser had been convicted of between 20 and 25 felonies T2792. He admitted spending $3,000 a week on cocaine T3120. He was testifying

in return for a deal on a charge of first degree murder, numerous armed robberies, armed burglary, grand theft and violations of probation. Darrin Cox stated that he has been convicted of eleven felonies, including trafficking in cocaine, two counts of grand theft, burglary of a structure, possession of cocaine, leaving the scene of an accident with bodily injury, and three counts of aggravated assault on a law enforcement officer T3175-3176. He received a plea agreement after he gave a police statement in this case T3176. Both of these witnesses are witnesses whose credibility is highly suspect.

These two witnesses are akin to the witness, Ken Shapiro, in Keen, supra, 639 So. 2d at 600. They are key prosecution witnesses, their credibility is suspect, and they are testifying in return for benefits. Lyndon Kinser is an admitted co-participant as was Shapiro. It was harmful error not to release or conduct in camera review of these two witnesses' testimony as in Keen, supra.

POINT IX

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A COLLATERAL CRIME OF WHICH MR. POMERANZ WAS ACQUITTED.

The trial court erred in admitting evidence of a collateral offense of which he was subsequently acquitted. This denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecution admitted substantial evidence concerning the alleged robbery of Mark Meacham on May 1, 1992. He testified that he worked as the night manager for a restaurant T2304. He stated that at about 11:00 p.m. he took the deposit to the night depository T2305-2306. He was carrying $1,500 in a bank bag T2306. He testified concerning this alleged armed robbery T2307-2308. It also brought

this out through the testimony of Lyndon Jay Kinser. The prosecution argued this offense in closing argument T3913,4034.

This case **was** based on **a** robbery conviction in Case No. 92-556-CFB. This case was subsequently reversed for a new trial. Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). Mr. Pomeranz subsequently pled guilty to grand theft. (Appendix). The only element that distinguishes robbery from theft is the element of force, violence, assault, or putting in fear. Robbery is defined as:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> Fla. Stat. 812.13(1).

The statutory definition of theft is:

> (1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of **a** right to the property or a benefit therefrom.
>
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.
>
> Fla. Stat- 812.14(1).

The use of force, violence, assault, or putting in fear is the only distinction between robbery and theft or larceny. Johnson v. State, 612 So. 2d 689, 690 (Fla. 1st DCA 1993); Robinson v. State, __ So. 2d ___, 21 Fla. L. Weekly D746, 747 (Fla. 1st DCA March 27, 1996).

Conviction of a lesser offense is an acquittal of the higher offense. Bradley v. State, 378 So. 2d 870, 873 (Fla. 2d DCA 1979); Cook v. State, 647 So. 2d 1066, 1067 (Fla. 3d DCA 1994). Here, the

reduction from robberytograndtheftnecessarilyinvolves anacquittal of the element of force, assault, violence, or putting in fear.

It is a violation of Article I, Section 9 of the Florida Constitutiontointroduce evidence of a collateral offense of which the defendant has been acquitted. Burr v. State, 576 So. 2d 278 (Fla. 1991); State v. Perkins, 349 So. 2d 161 (Fla. 1977). The same principles apply to the acquittal of an element. Jaggers v. State, 588 So. 2d 613, 615 (Fla. 2d DCA 1991).

Here, the defendant was acquitted of the element of use of force or fear with the reduction to grand theft. The prosecution presented evidence, not of a grand theft, but of an armed robbery. This is reversible error. This issue is controlled by Jaggers. Jaggers had originally been charged with sexual battery upon three children. The Court had found the evidence insufficient for the element of penetration concerning two of the children (his daughter and stepdaughter) in a prior appeal. The Court held that it was error to admit testimony concerning the element of penetration upon retrial.

> We conclude there was error in permitting upon retrial the daughter and stepdaughter to give testimony regarding penetration of them as to which this court had directed that defendant be acquitted. ***See State v. Perkins, 349 So.*** 2d 161 (Fla. 1977). On remand for further retrial we direct that if the State again seeks to use the daughter and stepdaughter as ***Williams*** Rule witnesses, their testimony must be limited to exclude any mention of penetration of them.

Jaggers, supra, 588 So. 2d at 615.

The admission of this evidence is harmful error.

POINT X

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL OFFENSE EVIDENCE THAT WAS NOT RELEVANT TO ANY MATERIAL FACT IN ISSUE.

The trial court erred in admitting collateral crime evidence, over defense objection, that was not relevant to any material fact in

issue. This denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Fla. Stat. § 90.402-90.404.

Defense counsel filed a motion in limine to exclude evidence concerning an alleged robbery in Huntsville, Alabama R246-248. An evidentiary hearing was held on the issue SR741-841. The prosecution took the position at the hearing that it was not attempting to introduce the evidence based on the similarity of the two offenses SR838. It stated that it was entitled to introduce the incident to show possession of the gun at issue SR838. The prosecution stated:

> The State is attempting to take the position of one of relevancy and not of similarity.
>
> We are attempting to show that the perpetrator of the murder was in possession of that weapon on May 19, 1992.

SR838-839.

Defense counsel offered to stipulate to the fact that Mr. Pomeranz was in possession of the gun in question on May 19, 1992 in Huntsville, Alabama SR835,839. The trial court denied the motion in limine with a written order R276-278.

The prosecution called Mohammad Amarabijad, the victim of the alleged robbery. He stated that he hired Mr. Pomeranz to work for him at his Sizzler Restaurant in Alabama T1543-1544. He claimed that around 10:00 p.m. on May 19, 1992 he and Mr. Pomeranz were the only people in the store T1559-1560. He then went on to describe this robbery in detail.

The prosecution again argued this incident in closing argument.

> You know Mr. Mohammad Amarabijad from Huntsville, Alabama, he's the manager with the big heart. And his big heart led him to be a victim. That he gave a job to the Defendant, and the Defendant put a gun to his back and head to rob him.

T3914.

> The undisputed evidence in this case, Ladies and Gentlemen, the undisputed evidence is that on May 19th, 1992 in Huntsville, Alabama, the Defendant obtains a job at the Sizzler Steakhouse. So he can and so for one reason he gets that job, within three days to take advantage of his boss, Mohammad, the man with the big heart. And he uses this gun to speak for himself. This gun is how the Defendant talks.

T3919.

The evidence andargument concerning this incident was reversible error. The prosecution correctly conceded below that this incident was not sufficiently similar on a theory of modus operandi. Peek v. State, 488 So. 2d 52 (Fla. 1986); Drake v. State, 400 So. 2d 1217 (Fla. 1981); Thompson v. State, 494 So. 2d 203 (Fla. 1986); Rodriquez v. State, So. 2d ___, 21 Fla. L. Weekly D127.5 (Fla. 3d DCA May 29, 1996) ; Whitehead v. State, 528 So. 2d 945 (Fla. 4th DCA 1988). The only possible relevance is the use of the gun in question. This does not justify the admission of this inflammatory incident, in light of defense counsel's offer to stipulate to Mr. Pomeranz' possession of this gun on May 19, 1992 in Huntsville, Alabama.

Florida Statute 90.404(2)(a) states that collateral offense evidence can be admissible when it is relevant to a "material fact in issue." The Alabama robbery was not relevant to any material fact in issue. The prosecution conceded that the purpose of the incident was to link Mr. Pomeranz to the gun in question. Defense counsel offered to stipulate to Mr. Pomeranz' possession of the gun. This evidence was not relevant to any fact actually in issue. This must be a fact that the defense is actually contesting. Thomas v. State, 599 So. 2d 158 (Fla. 1st DCA 1992); Conlev v. State, 599 So. 2d 236 (Fla. 4th DCA 1992) ; Roberts v. State, 662 So. 2d 1308 (Fla. 4th DCA 1995); Paquette v. State, 528 So. 2d 995 (Fla. 5th DCA 1988).

> A critical aspect of thetestof admissibility under section 90.404(2) **(a)** is not onlywhetherthe charged and collateral offenses are 'strikingly similar' and 'share some unique characteristics which sets them apart fromother offenses,' but also whether such evidence tends to prove a material fact issue that is in dispute. If there is no bona fide dispute over a material fact that the similar fact evidence is offered to prove, then the probative value of such evidence necessarily has significantly less importance than its prejudicial effect, and the evidence should be excluded under section 90.403....
>
> Whether a relevant material fact is in issue is not necessarily established by the defendant's plea of not guilty (which denies each essential element of the charged offense), but must be determined from the particular facts and circumstances involved in each case, i.e., has the defendant put such fact in issue. This construction and application of section 90.404(2)(a) brings it into complete harmony with the purpose of sections 90.401 and 90.403.

Thomas at 162-163.

In Conlev, the Court reversed due to the admission of collateral offense evidence even though it linked the defendant to the homicide weapon. The Court stated:

> We reverse appellant's convictions for murder and robbery and remand for a new trial. It was error to admit evidence that the murder weapon, a gun, was given to appellant by a former girlfriend weeks earlier for the purpose of killing her husband. That alleged incident and conspiracy was totally unrelated to the crime charged here.
>
> The State asserts that the offending evidence was relevant to show how the weapon was acquired, as part of connecting the gun to the appellant. Also, the prosecutor argued at trial that the evidence **was** necessary to lay a possible foundation for the girlfriend's anticipated testimony that the conspiracy recounted by appellant to the police never occurred and that he lied to the police concerning how he acquired the gun. However, the appellant had already admitted his connection to the murder weapon in several statements to the police. Given appellant's admissions, the evidence concerning the details of the acquisition of the gun, involving his agreement to murder his girlfriend's husband, a police man, added nothing to the State's case other than to unnecessarily prejudice the appellant.

599 So. 2d at 237 (footnotes omitted).

In the present case, the defense was willing to stipulate to the possession of the weapon on the date in question. Thus, like in

Conlev, this fact was not in issue. The trial court prejudicially erred in admitting this inflammatory evidence.

Assuming arquendo, that some evidence of this incident was admissible, the details of this incident were not admissible. Long v. State, 610 So. 2d 1276, 1281 (Fla. 1991). This was harmful error.

POINT XI

THE TRIAL COURT ERRED IN REFUSING TO ABIDE BY THE LIMITS IMPOSED ON COLLATERAL OFFENSE EVIDENCE DURING THE PRE-TRIAL HEARING.

The trial court refused to adhere to the limits placed on collateral offense evidence during the pre-trial motion in limine hearing, which was conducted by a different judge. This denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Defense counsel filed a motion in limine to exclude evidence concerning an alleged robbery in Huntsville, Alabama R246-248. An evidentiary hearing was held on the issue SR741-841. The State took the position at the hearing that it was not attempting to introduce the evidence based on the similarity of the two offenses SR838. It stated that it was entitled to introduce the incident to show possession of the gun at issue SR838. Defense counsel offered to stipulate to the fact that Mr. Pomeranz was in possession of the gun in question on May 19, 1992 in Huntsville, Alabama SR835,839. The trial court denied the motion in limine with a written order R276-278. However, the judge placed certain limits on the evidence.

> Certain restrictions apply to the admissibility of the proposed evidence. This evidence willnotbe made a feature of the trial by the State on direct. Further, the State will not be able to argue the incident to the jury using the word "robbery." The State will not be permitted to attempt to elicit sympathy from the jury for Mr. Amarabijad.

R278.

The motion in limine was heard by Judge Schack. The case was tried by Judge Cianca. Prior to the witness' testifying defense counsel brought the prior limitation to the trial court's attention T1537-1541. He requested that the witness be admonished to stay within the limits outlined by Judge Schack T1537-1541. The trial judge refused to do this T1541.

The prosecution used this evidence in ways specifically prohibited by the original order. It used the incident to create sympathy for the victim. It editorialized that May of 1992 was "a tough time" in the victim's life T1543-1544. It then recounted the incident in great detail. See Point IX, supra. The prosecutor specifically argued sympathy for the victim and that this was robbery.

> You know Mr. Mohammad Amarabijad from Huntsville, Alabama, he's the manager with the big heart. And his big heart led him to be a victim. That he gave a job to the Defendant, and the Defendant put a gun to his back and head to rob him.

T3914-3915.

> The undisputed evidence in this case, Ladies and Gentlemen, the undisputed evidence is that on May 19th, 1992 in Huntsville, Alabama, the Defendant obtains a job at the Sizzler Steakhouse, So he can and so for one reason he gets that job, within three days to take advantage of his boss, Mohammad, the man with the big heart. And he uses this gun to speak for himself. This gun is how the Defendant talks.

T3919.

The trial court improperly allowed the prosecutor to use this incident to create sympathy for the Alabama victim and to argue this as a robbery rather than to merely link the gun up. This was error in two respects. (1) Substantively, the original limits were correct. (2) The successor judge ignored the limits, without having heard the evidence and argument in the original motion.

Evidence or argument designed to elicit sympathy for the victim is improper in the guilt phase of any case. Jones v. State, 569 So. 2d 1234 (Fla. 1990); Lewis v. State, 377 So, 2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So. 2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So. 2d 662 (Fla. 3d DCA 1958). The prosecution violated this rule. It repeatedly described the Alabama victim as "the manager with a big heart."

The limit that the State not be allowed to argue this incident as a robbery was also correct. The prosecution had conceded at the pre-trial hearing that the incidents were not similar enough to justify admission under the similarity doctrine. It was error to allow the prosecutor to consistently elicit the details to show that this was a robbery and to argue it as a robbery. See Point IX, supra.

The error is made more egregious by the fact that the judge had not heard the motion in limine. This Court has emphasized the limits that successor judges have over a prior judge's rulings. State v. Gary, 609 So. 2d 1291 (Fla. 1992).

> As the successor judge, Chief Judge Gary had only limited authority to issue orders inconsistent with his predecessor's rulings. ***Tingle v. Dade County Bd. of County*** *Comm'rs*, ***245 So.*** 2d 76 (Fla. 1971). Limits have proved necessary "'to promote the stability of decisions of judges of the same court and to avoid unseemly contests and differences that otherwise might arise among them to the detriment of the public confidence in the judicial function.'" ***Epperson v. Epperson,*** 101 So. 2d 367, 369 (Fla. 1958) (quoting ***Payne v. Superior Court, 87*** R.I. 177, 80 A.2d 159, 163 (1951)).

Id. at 1293.

This Court has also emphasized the unique need for a judge in a capital case to have heard all the evidence. Corbett v. State, 602 So. 2d 1240, 1243-1244 (Fla. 1992).

The trial judge had not heard the prosecution's statement that the evidence was not being introduced based on similarity but only to

link up the gun. Indeed, the trial judge described this evidence as "similar type fact material" T1537. He had not heard defense counsel's offer to stipulate to the possession of the gun SR835,841. If the trial judge had heard these facts he may well have understood the limited relevance of this evidence and the need to strictly limit its scope and use. This was harmful error.

POINT XII

THE TRIAL COURT ERRED IN THE ADMISSION OF COLLATERAL CRIME EVIDENCE.

The trial court erred in its admission of irrelevant collateral offenses. This evidence denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Fla. Stat- 90.403-90.404.

Appellant has separately raised the improper admission of the Meacham robbery. He has separately argued the admissibility of the Alabama incident. The trial court erroneously admitted evidence of other collateral crimes.

Roy Wright stated that on April 27, 1992 his home was robbed by three masked men T2277. No one was shot T2286. He cannot identify any of the perpetrators. Violet Wright also described the burglary of her home on April 27, 1992 T2290. She stated there were three men; one short, one tall, and one with a checkered jacket T2296. No one was shot and she could not identify anyone T2302.

The prosecution also called Anthony Jackson to testify. He claimed that he and Mr. Pomeranz committed the robbery of the Wrights T2556-2557. He also claimed that he and Mr. Pomeranz had robbed the home of the Nicoles on April 20, 1992. The prosecution called Lyndon Kinser to testify that Mr. Pomeranz committed a robbery of a Twistee

Treat on April 28, 1992 T2840. It argued these incidents in closing argument T3913-3914.

None of these robberies were admissible. None of these incidents had the unique similarities with the instant case to justify admission of this evidence. Peek v. State, 488 So. 2d 52 (Fla. 1986); Drake v. State, 400 so. 2d 1217 (Fla. 1981); Thompson v. State, 494 So. 2d 203 (Fla. 1986); Whitehead v. State, 528 So. 2d 945 (Fla. 4th DCA 1988).

Two were robberies of people in their homes by two (or three) perpetrators wearing masks. No one was injured in any of the incidents. These are strikingly different from the instant case. In the instant case, a sole perpetrator allegedly went into a convenience store without a mask.

Appellant did not object to this evidence. However, Appellant has raised two other issues of improper collateral crime evidence, the Meacham robbery and the Huntsville, Alabama robbery. The Meacham robbery was subsequently reversed and reduced to grand theft. It would have been impossible to object on these grounds. Appellant filed a motion in limine concerning the Huntsville, Alabama incident. This Court must consider all of the improper collateral offense evidence in evaluating the harmfulness of the error. Whitton v. State, 649 So. 2d 861, 864-865 (Fla. 1994). In Whitton, this Court was faced with three improper comments on silence. This Court found that only one of these was properly preserved. This Court held that it must consider all three comments in evaluating the harmfulness of the error. The same rule should apply to improper collateral crime evidence. If at least one improper collateral offense is properly preserved, this Court must consider all of the improper collateral offense evidence in determining the harmfulness of the error.

The improper collateral offense evidence was harmful in this case. Five separate robberies were admitted. The prosecutor argued these incidents in closing T3913-3914. He elicited sympathy for the victims of these robberies. He described one as "the manager with the big heart" T3914. Collateral crime evidence is "presumed harmful error." Straisht v. State, 397 So. 2d 903, 908 (Fla. 1981).

The erroneous collateral crime evidence could have well affected the jury. The error was exacerbated by the fact that the jury was only given the required limiting instruction in terms of the Alabama incident. Green v. State, 228 So. 2d 397, 399 (Fla. 2d DCA 1969).

> In itself the mere volume of testimony concerning the prior crime would not necessarily make it a "feature" in the second case. However, when considered with the additional fact that no limitinginstructionwas given, the prior crime could well have become a "feature instead of an incident" of the instant case in the jury's mind. They could not be expected to know for what limited purpose the evidence of the prior crime was admitted.

Id. at 399.

Assuming arquendo, this Court feels that it can not consider all of the collateral crimes under the doctrine of Whitton, supra; Appellant would argue that the admission of this evidence was fundamental error. The admission of these five robberies overwhelmed the jury and became a feature of the case. Mr. Pomeranz has never been convicted of any of these incidents, except for the Meacham robbery which was subsequently reduced to grand theft. This rendered the trial fundamentally unfair.

POINT XIII

THE TRIAL COURT ERRED IN GIVING A SPECIAL JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE AS PROOF OF PREMEDITATION.

The trial court erred in granting an unbalanced, incomplete special jury instruction on how circumstantial evidence could be used

to prove premeditation. This instruction denied Mr. Pomeranz due process of law pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecution requestedandreceived a special jury instruction on the use of circumstantial evidence as proof of premeditation. The jury was given the following jury instruction,

> Premeditationmaybe establishedbycircumstantialevidence. Evidence from which premeditation may be inferred include the manner in which the homicide was committed and the nature and manner of the wound.

T4041.

Defense counsel objected to this instruction T3683-3699. He pointed out that it improperly accentuated the concept of circumstantial evidence as proof of premeditation T3685-86,3691. He pointed out that the instruction never defined circumstantial evidence and it did not explain to the jury that circumstantial evidence had to exclude any reasonable hypothesis of innocence T3687,3696. He suggested the addition of the following language:

> If the State relies on circumstantial evidence to prove premeditation, the evidence must be inconsistent with any reasonable hypothesis of innocence. Whether the State's evidence fails to exclude all hypotheses of innocence is a question of fact for the Jury.

T3696.

This language was taken out of the most recent case relied on by the prosecution. Dupree v. State, 615 So. 2d 713, 715 (Fla. 1st DCA 1993). He also filed a slightly different written form of this.

> If the State relies on circumstantial evidence to prove premeditation, the evidence must be inconsistent with any reasonable doubt.

R601.

It was improper to tell the jury that premeditation could be proven by circumstantial evidence, to fail to give any explanation of circumstantial evidence, and then to suggest certain ways in which premeditation could be "inferred." This was a one-sided, incomplete, and prejudicial jury instruction. This Court has held:

> When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. ***Davis v. State, 90 So.*** 2d 629, 631 (Fla. 1956); *McArthur* ***v. State, 351 So.*** 2d 972 (Fla. 1977).
>
> Cox v. State, 555 So. 2d 352, 353 (Fla. 1989).

The current instruction failed to tell the jury this concept.

Jury instructions must be complete andbalanced. Jones v. State, 656 So. 2d 489, 491 (Fla. 4th DCA 1995). In Jones, the trial judge made extraneous comments in addition to the Standard Jury Instruction on reasonable doubt. 656 So. 2d at 490. The Court reversed.

> At bar, the trial judge's instructions were accurate as far as they went. However, the difficulty arises from the lack of completeness. The failure of the trial judge to give proper balancing instructions constitutes reversible error despite the fact that the appellant did not preserve the issue. Failure to give a complete and accurate instruction is ***fundamental error, reviewable in the*** *complete* ***absence of a request or objection.*** *See Carter v. State, 469 So.* 2d 194 (Fla. 2d DCA 1985).
>
> Id. at 491.

It is reversible error to give an unbalanced instruction on circumstantial evidence. United States v. Dove, 916 F.2d 41, 44-46 (2d Cir. 1990). In Dove, the court gave a hypothetical which only pointed out how circumstantial evidence could prove guilt. This instruction is similar. It tells the jury how to find guilt from circumstantial evidence without telling the jury that circumstantial evidence had to be inconsistent with any reasonable hypothesis of innocence.

This instruction also improperly highlighted the prosecution's theory of the case through the voice of the Court. It is error to single out one party's theory through a jury instruction. Baldwin v. State, 35 so. 220, 222, 46 Fla. 115 (Fla. 1903).

The prosecutor tried to justify the instruction by arguing that the proposition in the instruction had been lifted from caselaw. However, it is a mistake to haphazardly lift statements from judicial opinions and to feed them to the jury in an instruction. Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 n.3 (Fla. 1985); United States v. Burke, 781 F.2d 1234, 1240 (7th Cir. 1985).

In Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), the United States Supreme Court condemned an instruction which would permit the jury to assume intent from an isolated fact because it would allow prejudgment of a conclusion the jury should reach on its own.

> However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.... A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach on its own volition.

342 U.S. at 274-276.

The present instruction allows the jury to consider isolated circumstantial evidence only in favor of the prosecution, without being told that it must be inconsistent with any reasonable hypothesis of innocence.

This erroneous instruction is the sort of structural error which can never be harmless. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In Sullivan, the United States Supreme Court held that an erroneous reasonable doubt instruction can never be

harmless. The instruction here is akin to an erroneous reasonable doubt instruction.

Assuming arguendo, that this error can be harmless, it is harmful in the present case. The prosecution argued premeditated murder at length T3891-3897. He concluded his argument on premeditation by using this instruction.

> Premeditation may be established by the circumstantial evidence, evidence from which premeditationmaybe inferred include the manner in which the homicide was committed and the nature and manner of the wounds. The nature and manner of the wounds, Not one shot, but five shots in this particular case, with time to reflect in between those firing of those shots. And his statement that he makes about what his intent is, This is critical in this case.

Id. at 3897.

Given the State's reliance on this instruction, it is harmful.

POINT XIV

THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON PRINCIPALS WHEN THERE IS NO EVIDENCE TO SUPPORT THIS THEORY.

The trial court improperly instructed the jury concerning a principal theory of first degree murder. This denied Mr. Pomeranz due process of law and a fair trial pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The jury was instructed on first degree felony murder on a principal theory. The jury was given the following instruction.

> Ranjit Pate1 was killed by a person other than the defendant; but both Stuart Pomeranz and the person who killed Ranjit Pate1 were principals in the commission of the robbery.

R572-573.

Defense counsel objected to this instruction as not being supported by the evidence T3701-3708.

There was no evidence introduced to support this instruction. The key prosecution witness in the case was Lyndon Kinser. He testified that he drove the car and that Mr. Pomeranz was alone in the store when the man was killed T2812-2830,2872. The prosecution also called Darrin Cox, who claimed that Mr. Pomeranz had told him that he shot the man T3163-3164. Neither the prosecution nor the defense introduced any evidence that he acted as a principal while another person killed Mr. Patel. Jury instructions "must relate to issues concerning evidence received at trial," Butler v. State, 493 So. 2d 451, 452 (Fla. 1986). The giving of jury instructions on irrelevant matters, not supported by the evidence, is often reversible error. Butler; Griffin v. State, 370 So. 2d 860 (Fla. 1st DCA 1979); Palmer v. State, 323 So. 2d 612 (Fla. 1st DCA 1975). It is error to instruct on principals when the evidence does not support such a theory. Lovette v. State, 654 So. 2d 604 (Fla. 2d DCA1995); Hair v. State, 428 so. 2d 760, 763 (Fla. 3d DCA 1983). In Lovette, the Court reversed because the trial court had instructed on principals, when this instruction was not supported by the evidence. Id. at 606. In Hair the Court held it to be prejudicial error to fail to instruct the jury that the principal instruction only applied to one of the two crimes which he was on trial for. Id. at 763. This was harmful error.

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO ROBBERY AS THERE WAS NO CORPUS DELICTI OF ROBBERY.

The trial court erred in denying Mr, Pomeranz' motion for judgment of acquittal as to robbery as there was no corpus delicti shown. The conviction violates Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and

the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Mr. Pomeranz moved for a judgment of acquittal at the close of the prosecution's case and at the close of all the evidence on these grounds; which were denied T3276-3288,3852-3869. He also renewed this argument in a post-trial motion, which was denied R654-657,665-685.

In order to sustain a conviction the State must show corpus delicti of the crime charged, independent of the defendant's extra-judicial statements. State v. Allen, 335 So. 2d 823, 825 (Fla. 1976); Ruiz v. State, 388 So. 2d 610, 611 (Fla. 3d DCA 1980). This means:

> The State has a burden to bring forth substantial evidence tending to show the commission of the charged crime.
>
> Allen at 825.

There was no evidence introduced to show the element of taking, an element of robbery, independent of the defendant's statements. Fla Stat. 812.13. Mr. Pomeranz' alleged statements to Darrin Cox and Lyndon Kinser are the only evidence that property was actually taken. The crime scene supports the fact that nothing was taken. There were two cash registers T1227. One was on the floor, dangling from a power cord T1227-1228. There was a small amount of money on the floor T1246. The cash register on the floor had $385 in it T1286. The register on the counter had $632 in it T1287. There was no difficulty opening the drawers T1287. The deceased had $6,260.00 on him, as well as an expensive watch T1354-1355. The legal owner of the store stated that she has no way of knowing whether anything was taken T3256.

There is no "substantial evidence" of a robbery in this case, The evidence points away from a robbery. The victim had thousands of dollars and an expensive watch on his person. The cash drawers were

easy to open and full of money. There is no corpus delicti of robbery or attempted robbery. There is no "substantial evidence" that anything was taken or attempted to be taken. The robbery count must be dismissed. Appellant's conviction for first degree murder must also be reversed as the prosecution actively pursued a theory of robbery-murder. This was harmful error. Allen v. State, So, 2d ___, 21 Fla. L. Weekly D1503 (Fla. 5th DCA En Banc June 28, 1996).

Assuming arguendo, this Court feels there is adequate evidence to find a corpus delicti for an attempted robbery, there is no evidence of a completed robbery. The victim had an expensive watch and thousands of dollars on his person. The cash registers were full. The lawful owner of the store stated that she had no way of knowing if anything was taken. At the very least, the robbery count must be reduced to attempted robbery. This would also require a new trial on the murder count as the State pursued a robbery-murder theory. Allen.

POINT XVI

THE TRIAL COURT ERRED INCONDUCTINGTWO PRETRIAL CONFERENCES IN MR. POMERANZ' ABSENCE.

The trial court erred in conducting two pre-trial conferences in Mr. Pomeranz' absence. This denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Florida Rule of Criminal Procedure 3.180.

Mr. Pomeranz was involuntarily absent from two pre-trial hearings. The first took place on September 22, 1992. The Clerk's notes reflect his absence R8. Mr. Pomeranz' absence is also noted during the hearing itself SR8. The second hearing took place on June 4, 1993. Mr. Pomeranz' absence from this hearing is noted by the prosecution SR333-334.

The right to be present has been held to be a fundamental component of due process pursuant to Florida law and the United States Constitution. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Turner v. State, 530 so. 2d 45 (Fla 1987); Coney v. State, 653 So. 2d 1009 (Fla. 1995); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Florida Rule of Criminal Procedure 3.180(a) (3) requires the presence of the defendant at any pre-trial conference unless waived in writing. There was no such waiver.

Mr. Pomeranz' presence was essential at these hearings. The first hearing focused on the status of Mr. Pomeranz' counsel. Mr. Pomeranz was indicted September 18, 1992 Rl-3. He was arrested the same day R4. On September 22, 1992 a hearing was held primarily on the issue of counsel SR3-10. Mr. Pomeranz' family had retained Mr. Krasnove (defense counsel) to represent him on an unrelated robbery charge SR2-3. The trial court called a hearing to determine if Mr. Krasnove intended to represent him on this charge.

> THE COURT: Okay, you are going to represent him on the indictment, all his charges, that first --
>
> MR. KRASNOVE: No, I'm going to represent him on the case that I have right now, --
>
> THE COURT: Right.
>
> MR. KRASNOVE: -- which is the robbery case --
>
> MS. WOOD: That's 92-566, for the record.
>
> THE COURT: Okay, I don't even know what the --
>
> MR. KRASNOVE: -- on the murder case and -- and then depending on the other char- -- the other cases now in your file, that fact of the matter is, though, Judge, I discussed with his parents that I -- there's no way that I could economically represent him on the -- the number of potential cases which people have speculated that he might face, however, Your Honor, I feel at this point we don't have to make any decision on that.

SR3.

Mr. Krasnove indicated that he was still negotiating with Mr. Pomeranz' parents and was not yet representing Mr. Pomeranz on this count. Mr. Krasnove filed an appearance in this case on September 28, 1992 R22. Mr. Pomeranz was left without counsel on this case from his indictment and arrest on September 18, 1992 until September 28, 1992.

Mr. Pomeranz' presence could have affected the hearing. The trial judge offered to appoint counsel for Mr. Pomeranz SR2. However, his counsel on the robbery case, Mr. Krasnove, persuaded the judge to hold off while he continued to negotiate with Mr. Pomeranz' family SR2-3. Mr. Pomeranz may have asserted his right to counsel, which had attached under the Florida and United States Constitutions. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); Travlor v. State, 596 So. 2d 957 (Fla. 1992); Fla.R.Crim.P. 3.111. His absence was harmful error.

The second hearing at which Mr. Pomeranz was absent was on June 4, 1993 SR333-364. The venue of the trial was discussed. He had moved for a change of venue due to extensive prejudicial pre-trial publicity R102-196. He filed a motion for fees for an expert to analyze the publicity R202-203. This was denied SR292. Mr. Pomeranz filed a motion for reconsideration which was denied R223-228. He filed a Petition for Writ of Certiorari in the Fourth District Court of Appeal R262-267. This writ was still pending at the time of the June 4, 1993 hearing SR336-337.

Defense counsel originally asked the judge (Judge Cianca) to reconsidertheprior judge's (Judge Schack) ruling on this issue SR334-338. The trial court stated it would not reconsider the ruling SR339. The judge suggested moving the case from Martin County to St. Lucie

County on his ownmotion SR339-340. Defense counsel agreed SR339-340. The court did not rule SR347.

At the hearing on June 18, 1993 the trial court again took up this issue SR392-403. Mr. Pomeranz objected to moving the case to St. Lucie County SR392-402. He stated his attorney had not explained this issue to him SR393. He stated that St. Lucie County had the same problems as Martin County SR392-393. The trial court did not rule SR403.

This issue was taken up again on June 23, 1993.

> THE COURT: One of the things that concerned me about this case, not the substance of it, but procedurally when we were here last time, Mr. Pomeranz had sort of countermanded or disputed counsel's approval that for the sake of getting the case tried timely, he did not wish to go to St. Lucie County, where I had a courtroom all arranged and we could start the case on July 26th. So I don't know what the status of that is now, because that could alter or change the whole schedule.
>
> MR. KRASNOVE [defense counsel]: I think, Your Honor, that perhaps Mr. Pomeranz didn't communicate correctly. It's not that he didn't want to go to Martin -- to Ft. Pierce instead of Martin County, but he would have -- he would have preferred, if he had his druthers, so to speak, to go to Broward County or Palm Beach County or almost any other county.
>
> However, I believe Mr. Pomeranz will indicate today that as between Martin County and St. Lucie County, he would prefer to go to St. Lucie County and he would very much like the trial to begin as scheduled by this Court on July 26th.
>
> THE COURT: Is that agreeable with you, Mr. Pomeranz? Did you have time to share those -- that with Mr. Krasnove?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: You sure now?
>
> THE DEFENDANT: Yes.

SR410-411.

It was error to hold the June 4, 1993 hearing in Mr. Pomeranz' absence. A defendant has the right to be heard where a case is moved

to. State v. Lozano, 616 So. 2d 73 (Fla. 1st DCA 1993). It is clear that Mr. Pomeranz felt that he could not receive a fair trial in St. Lucie County. He stated so at the June 18, 1993 hearing. His statement at June 23, 1993 hearing was not an acquiescence in the hearing in his absence. Mr. Pomeranz merely stated that he agreed that St. Lucie County would be preferable to Martin County. He was never asked about pursuing his writ and attempting to show through expert assistance that he could not obtain a fair trial in Martin or St. Lucie County. If he had been present at the June 4, 1993 hearing his counsel might have never agreed to St. Lucie County. It was reversible error to hold this hearing in Mr. Pomeranz' absence.

POINT XVII

THE TRIAL COURT ERRED IN LEAVING MR. POMERANZ UNREPRESENTED FOR A TEN-DAY PERIOD.

The trial court erred in leaving Mr. Pomeranz unrepresented for a ten-day period. This denial of counsel denied Mr. Pomeranz' rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Fla.R.Crim.P. 3.111.

Mr. Pomeranz was indicted September 18, 1992 R1-3. He was arrested on the same day R4. On September 22, 1992 a hearing was held primarily on the issue of counsel SR3-10. Mr. Pomeranz' family had retained Mr. Krasnove (defense counsel) to represent him on an unrelated robbery charge SR2-3. The trial court called a hearing to determine if Mr. Krasnove intended to represent him on this charge.

Mr. Krasnove indicated that he was still negotiating with Mr. Pomeranz' parents and he was not prepared to commit to representing Mr. Pomeranz on this count. Mr. Krasnove filed an appearance in this case on September 28, 1992 R22. Mr. Pomeranz was left without counsel

on this case from his indictment and arrest on September 18, 1992 until September 28, 1992. His right to counsel had attached under the Florida and United States Constitutions. Massiah; Travlor. He did not receive counsel until ten days later. A hearing was conducted in his absence during this period. A person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932) . This was harmful error.

POINT XVIII

THE TRIAL COURT ERRED IN IMPOSING DUAL CONVICTIONS AND CONSECUTIVE SENTENCES FOR FIRST DEGREE MURDER AND ROBBERY.

Mr. Pomeranz was convicted of first degree murder and robbery and was given consecutive sentences on both counts. This violated Mr. Pomeranz' rights under the double jeopardy clauses of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Florida Constitution and Florida Statutes 775.02(4).

In State v. Enmund, 476 So. 2d 165 (Fla. 1985), this Court held that entering convictions for both felony murder and the predicate felony does not violate double jeopardy. However, the United States Supreme Court's decision in United States v. Dixon, 509 U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), overruled Enmund as to the federal double jeopardy clause, A 1988 amendment to the rules of construction set out in the Florida Statutes calls for this Court to recede from Enmund. This Court's opinion in Wright v. State, 586 So. 2d 1024 (Fla. 1991) mandates revisiting this issue as it relates to the double jeopardy clause of the Florida Constitution.

In the present case, Mr. Pomeranz was convicted of first degree murder and robbery R663-664. He was given consecutive sentences R665-

685. The jury was instructed on premeditation **and** felony murder R571-573. The prosecution vigorously pursued felony murder T3897-3904.

In Dixon, the United States Supreme Court held that the federal double jeopardy clause provided identical protection in the contexts of successive prosecutions and simultaneous prosecutions, and that accordingly one of its previous decisions, Gradv v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which relied on the opposite assumption -- had to be overruled. The Court reaffirmed in Dixon that the rule of Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. **2912**, 53 L.Ed.2d 1054 (1977), precludes dual convictions where a lesser statutory offense is "incorporated" as an essential element of **a** greater statutory offense. Felony murder and the predicate felony **fall** into the Harris exception, and the Florida Legislature has not expressed an intent for the two to be punished separately.

This Court held in Enmundthat the Legislature appeared to intend multiple punishments for both felony murder and the predicate felony. The 1988 version of Section 775.021(4), which applies to the 1992 offenses **charged** in this case, is significantly different from the 1983 version in effect at the time of Enmund.

In 1983, Section 775.021(4) read as follows:

775.021 Rules of construction

(4) Whoever, in the course of one criminal transaction or episode, commitsseparatecriminaloffenses, uponconviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

In 1988, the Legislature added the language underlined below:

(4) **(a)** Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or

more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal esisode or transaction and not to allow the principle of lenitv as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Ch. 88-131, s.7, Laws of Florida. The 1983 version incorporated the rule of Blockburser v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) . The 1988 version added a number of exceptions to this rule.

Nothing in any of the Florida Statutes indicates whether the Legislature intends separate convictions and punishment for felony murder and the predicate felony. Multiple convictions and punishments for felony-murder and the predicate felony violates the United States Constitution. Dixon; Harris.

Convictions and sentences for felony-murder and an underlying felony also violate the Florida Constitution. In Wright v. State, 586 so. 2d 1024 (Fla. 1991), this Court interpreted the double jeopardy clause of the Florida Constitution in a broader manner than the analogous provision of the United States Constitution. This Court should also overrule Enmund, supra based on the Florida Constitution. Mr. Pomeranz' convictions and sentences for robbery must be vacated.

POINT XIX

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY AFTER THE JURY RECOMMENDED A LIFE SENTENCE AND THE PROSECUTION AGREED THAT LIFE IS THE APPROPRIATE PENALTY.

The trial judge imposed the death penalty after the jury had recommended life imprisonment and the prosecution had agreed that life is the appropriate penalty. This is in violation of Florida law. Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). It is also in violation of the United States and Florida Constitutions. Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed. 173 (1991); State v. Bloom, 497 so. 2d 2 (Fla. 1986); Tillman v. State, 591 So. 2d 167 (Fla. 1991). This death sentence is imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 15, 16, 17 and Article II, Section 3 of the Florida Constitution.

The jury in this case recommended life by a vote of eight to four on August 13, 1993 R638. The prosecution filed its sentencing memorandum on August 19, 1993. It stated:

> There is not sufficient legal factors to override the jury's recommendation. R643.

The State's memorandum does not discuss any aggravating or mitigating circumstances, The memorandum concludes with a recommendation that a life sentence be imposed on both counts R646. Oral argument as to sentence was held on August 26, 1993 T4747-4763. The State argued for a life sentence on both counts T4747-4762. It stated there was no legal basis to override a life recommendation T4753-4762. The prosecutor stated:

> Judge, that's why we have suggested . . . that he be given the maximum sentence permitted by law.

> Andmaximum sentence bylaw in this case could be structured that Your Honor impose a life sentence upon the Defendant with the minimum sentence of 25 years without eligibility for parole for Count I, first degree murder.

T4759.

The State made no argument as to aggravating or mitigating circumstances. The only argument defense counsel made as to Count I was to congratulate the prosecutor on his statement that there is no legal basis to impose the death penalty T4771. The Court interrupted defense counsel's argument and made a statement which concluded:

> So today the State has -- is urging upon the Court in its final evaluation that whatever it does, what they're saying is that it should be two consecutive life sentences on Count I, and Count II running consecutive to a previous sentence now being served by Mr. Pomeranz. That's an area that this is the last opportunity to deal with it.

T4773-4774.

This told defense counsel that he should focus his attention on Count II and whether the sentences should be consecutive or concurrent. Counsel followed this suggestion T4774-4782. The trial court imposed the death penalty on September 9, 1993. R665-685.

It is an abuse of discretion to fail to find mitigating circumstances which the State has agreed to. Santos at 840. This same principle mandates that a trial court abuses its discretion when it fails to accept a State stipulation that there is a reasonable basis for a life recommendation. This flows from the State's ability to stipulate to mitigators. Mitigation often constitutes the reasonable basis for the life recommendation. The State can waive the validity of aggravators. Cannadv v. State, 620 So. 2d 165, 170-171 (Fla. 1993); Hamilton v. State, ____ So. 2d ___, 21 Fla. L. Weekly S227 (Fla. May 23, 1996). The lack of aggravation can also constitute a reasonable basis for a life recommendation. The logic of Santos and Cannadv

requires that this Court hold that a trial court abuses its discretion when it sentences a person to death after the State has stipulated that the jury's recommendation of life is reasonable.

The imposition of the death penalty when the prosecution has abandoned its intent to seek the death penalty violates Article II, Section 3 of the Florida Constitution. This section provides:

> The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise anypowers appertaining to either of the other branches unless expressly provided herein.

Article II, Section 3 prohibits a trial court from interfering with a prosecutor's decision whether to seek the death penalty in a case. State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986).

> Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the State attorney has complete discretion in decidingwhether and how to prosecute. Art. II, Section 3, Fla. Const. Cleveland; State v. Cain, 381 So. 2d 1361 (Fla. 1980); Johnson v. State, 314 so. 2d 573 (Fla. 1975).

Id. at 3.

The logic of Bloom mandates that a judge can not impose the death penalty after the State has affirmatively abandoned the death penalty. If the State has unfettered discretion whether to seek the death penalty, it also has unfettered discretion to abandon the death penalty. The State sometimes abandons the death penalty on the eve of trial or even after trial. Bloom also gives the State the right to abandon the death penalty after the jury's recommendation of life. Such a decision is better informed than an earlier waiver. The trial court had no authority to impose the death penalty under Article II, Section 3 of the Florida Constitution.

The imposition of the death penalty in this case also violates Article I, Sections 9 and 17 of the Florida Constitution. Tillman v.

State, 591 so. 2d 167 (Fla. 1991). Affirmance of the death penalty in this case would be unusual. The jury recommended life and the prosecutor agreed that life is the "maximum lawful sentence" and urged the trial court to impose a life sentence. Appellate counsel is unaware of any case in Florida in which this Court has affirmed a death sentence under this scenario, Counsel is only aware of one case in Florida in which the State had agreed to the reasonableness of the life recommendation and the judge imposed the death penalty. Turner v. State, 645 So. 2d 444, 448 n.4 (Fla. 1994). In Turner, this Court reduced the sentence to life imprisonment based on Tedder v. State, 322 So. 2d 908 (Fla. 1975). This Court has never affirmed a death sentence in which a jury recommended life and the State agreed with the reasonableness of the life recommendation. The affirmance of the death penalty in this case would be "unusual." It would violate Article I, Sections 9, 16, and 17 of the Florida Constitution and the Eighth and Fourteenth Amendment to the United States Constitution.

The imposition of the death penalty after the State's waiver of the death penalty denied Mr. Pomeranz due process and the effective assistance of counsel 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. In Lankford, the prosecution filed a statement that it would not be recommending the death penalty after trial, but before sentencing. 500 U.S. at 113-116. The trial court then imposed the death penalty after a sentencing hearing in which counsel argued over the length of the sentences. The United States Supreme Court held it be a violation of due process to impose the death penalty in such a circumstance. 500

U.S. at 124-128. This procedure also violates the due process clause of Article I, Section 9 of the Florida Constitution. Tillman.

Assuming arsuendo that it is not a per se violation of due process to impose the death penalty after the State has affirmatively abandoned it, it was a violation of due process in the present case. At the sentencing hearing, the only argument counsel made concerning the death penalty was to congratulate the prosecutor concerning his statement that there was no legal basis to override the life recommendation T4773. He made no argument as to aggravating or mitigating circumstances. Additionally, the trial court interrupted defense counsel and directed him towards the issue of the sentence on Count II and whether the sentences should be consecutive or concurrent T4773-4774, Counsel followed the suggestion T4774-4782.

The situation here is similar to Lankford. In Lankford, the United States Supreme Court held, in part, Lankford's counsel had been deluded into believing that the issue of the consecutive versus concurrent sentences and the length of sentence was the primary issue. 500 U.S. at 124-128. Here, counsel was led into the same position at the sentencing hearing before the judge. This was harmful error. This Court has emphasized the importance of the hearing before the judge. Spencer v. State, 615 So. 2d 688 (Fla. 1993). Appellant was denied due process by the judge's imposition of the death penalty after the State had abandoned its intent to seek the death penalty.

POINT XX

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDA-TION OF LIFE IMPRISONMENT.

The trial court erred in overruling the jury's recommendation of life imprisonment. This denied Mr. Pomeranz' rights 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 and Fla. Stat- 921.141.

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).
>
> Under Florida law, the role of the jury is one of great importance, and this is no less true in the penalty phase of a capital trial. *Tedder.* Juries are at the very core of our Anglo-American system of justice, which brings the citizens themselves into the decision-making process. We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the *Tedder* standard adopted in 1975 and consistently reaffirmed since then.
>
> Stevens v. State, 613 So. 2d 402, 403 (Fla. 1993).

There are at least three reasonable bases for a life recommendation. The first is the nature of the offense itself. The second is the lack of aggravators. The third is substantial mitigation.

The fact that the offense is a standard robbery murder is a reasonable basis for a life recommendation. McCaskill v. State, 344 So. 2d 1276, 1278-1280 (Fla. 1977).

> We have reviewed other first degree felony murder convictions involving robbery. Juries, under our new death penalty statute, have been reluctant to recommend the imposition of the death penalty in all but the most aggravated cases despite general knowledge and concern of the citizenry over the substantial increase in crime.
>
> 344 so. 2d at 1280.

In McCaskill, this Court held this to be a reasonable basis for a life recommendation without any discussion of mitigation.

In recent years, this Court has expanded this doctrine to reduce death recommendation cases to life on proportionality. Sinclair v. State, 657 So. 2d 1138, 1142-1143 (Fla. 1995); Thompson v. State, 647

So. 2d 824, 826-827 (Fla. 1994). The recent case of Terry v. State, 668 so. 2d 954 (Fla. 1996) is instructive. In Terry, this Court reduced the death sentence to life despite the jury's recommendation of death, the presence of two aggravators, and the fact that the trial court had found no mitigation. Id. at 995-996. This Court relied heavily on the fact that this was a "robbery gone bad". Id. at 965.

The State's own evidence in this case shows that at most this was a "robbery gone bad." Lyndon Kinser claimed that Mr. Pomeranz described the incident as follows:

> He said when Pete opened the register, he pulled the gun out. He said that Pete tried to grab the gun so he shot him. He said, Pete was falling back, he grabbed a hold of the drawer of the register and a pulled it up on top of him. He said he ran around there and grabbed a handful of money and split.

T 2872.

There is no evidence of any prior intent to kill. The prosecutor conceded that there was originally no intent to kill, but that this was a robbery gone bad T3898.

> It was clearly the evidence and clearly the Defendant's intent to go into that store, not originally to kill Mr. Patel, but his intent was to go into that store to rob. And when the robberywentbad, went sour, when Mr. Pate1 elected to fight for that gun.

T3898.

The nature of the offense is a reasonable basis for a life recommendation. McCaskill.

A second reasonable basis for a life recommendation is the lack of aggravation in the case. The trial court found four aggravating circumstances. Three of these aggravators are invalid. The trial court found the aggravators of previous conviction of violent felony, Fla. Stat. 921.141(5)(b); the capital felony was committed for the purpose of avoiding arrest, Fla. Stat 921.141(5) (e); the capital

felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification, Fla. Stat-921.141(5)(i); and it merged the aggravating circumstances of the homicide was committed during a robbery and the homicide was committed for pecuniary gain, Fla. Stat 921.141(5)(f). The first three aggravators are invalid.

The trial court based the prior violent felony aggravator on a robbery in Case No. 92-566-CFB. This case was reversed for a new trial. Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). Mr. Pomeranz pled guilty to grand theft. (Appendix). The reliance on a conviction which has been reversed violates the Florida and United States Constitutions. Burr v. State, 576 So. 2d 278 (Fla. 1991); Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

Grand theft is not a prior violent felony. This Court recently held that solicitation to commit murder is not a prior violent felony. Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994).

> We disagree with the court's conclusion that the solicitation convictions constitute prior violent felonies. According to its statutory definition, violence is not an inherent element of this offense. See § 777.04(2), Fla. Stat. (1991) ("Whoever solicits anothertocommitan offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation....")
>
> Id. at 1314.

Grand theft is not a violent felony. The statutory definition of theft is:

> (1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom,

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

Fla. Stat. 812.014(1).

The amount of money taken determines that the offense is grand theft rather than petit theft. Fla. Stat. 812.014(2).

The only element that distinguishes robbery from theft is the element of force, violence, assault, or putting in fear. Robbery is defined as:

"Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Fla. Stat. 812.13(1).

The use of force, violence, assault, or putting in fear is the only distinction between robbery and theft or larceny. Johnson v. State, 612 So. 2d 689, 690 (Fla. 1st DCA 1993); Robinson v. State, 21 Fla. L. Weekly D746, 747 (Fla. 1st DCA March 27, 1996).

Conviction of a lesser offense is an acquittal of the higher offense. Bradley v. State, 378 So. 2d 870, 873 (Fla. 2d DCA 1979); Cook v. State, 647 So. 2d 1066, 1067 (Fla 3d DCA 1994). The reduction from robbery to grand theft involves an acquittal of the element of force, assault, violence, or putting in fear.

This Court has rejected grand larceny as a violent felony. Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981). This Court's rejection of grand larceny necessarily means that it must reject grand theft as a violent felony. This is especially true given this Court's opinion in Elam. This aggravator is invalid.

The avoid arrest aggravator is also invalid. The only direct evidence as to why this homicide occurred is the testimony of Darrin Cox and Lyndon Kinser. Both of the witnesses indicated that the shooting began because the victim grabbed the gun T2872,3163-3164. There is nothing to show the avoid arrest aggravator. This aggravator is typically found in the situation where the defendant killed a law enforcement officer in an effort to avoid arrest or effectuate his escape. Mikenas v. State, 367 So. 2d 606 (Fla. 1978). When the victim is not a police officer, the aggravating circumstance cannot be found unless the evidence clearly shows that elimination of the witness was the sole or dominant motive for the murder. Scull v. State, 533 so. 2d 1137 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Riley v. State, 366 So. 2d 19 (Fla. 1978). Even where the victim may know the defendant, this factor is not applicable unless the evidence proves that witness elimination was the dominant or only motive. Geralds v. State, 601 So, 2d 1157 (Fla. 1992); Perry. The mere fact that the victim knew or could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (striking circumstance where defendant murdered woman who had witnessed her companion's murder) held:

> ... The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Williams v. State, 386 So. 2d 538 (Fla. 1980). Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. Menendez v. State, 368 So. 2d 1278 (Fla. 1979). "Proof of the requisite intent to avoid arrest and detection must be

very strong" to support this aggravating circumstance when the victim is not a law enforcement officer. Rilev v. State, 366 So. 2d 19, 22 (Fla. 1978).

The circumstance does not apply even where there is a substantial inference that the murder was committed to cover up a crime. Davis v. State, 604 So. 2d 794 (Fla. 1992) (burglar killed elderly woman who knew and couldidentifyhim; the fact that witness eliminationmayhave been a motive in the murder was insufficient to support circumstance); Menendez v. State, 368 So. 2d 1278 (Fla. 1979) (victim found lying on floor of his jewelry store with his hands outstretched in a supplicating manner; defendant had murdered the victim with a gun which had a silencer; while these facts suggested that Menendez committed the murder to avoid arrest, they did not amount to the very strong evidence required by law).

This Court's opinion in Davis v. State, 604 So. 2d 794 (Fla. 1992) is instructive.

> We agree with Davis that the trial court erred in finding that the murder was committed for the purpose of avoiding arrest. In the sentencing order, the court stated:
>
> > It was shown the victim and the Defendant were acquainted with each other, and that she therefore, unless prevented from doing so, could specificallyidentifythe Defendant astheperson who burglarized her home and robbed her of her possessions. The Court therefore finds that one of the Defendant's motives for killing the victim was to prevent his identification.
>
> We have long held that in order to find this aggravating factor when the victim is not a law enforcement officer, the Stat must show that the sole or dominant motive for the murder was the elimination of the witness. See Perry v. State, 522 So. 2d 817, 820 (Fla. 1988); Bates v. State, 465 So. 2d 490, 492 (Fla. 1985). The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance. Further, the mere fact that the victim knew the assailant and could have identified him is insufficient to prove the existence of this factor. Perry, 522 So. 2d at 820. The only evidence argued to the jury in support of this factor was that the victim knew Davis and could have identified him to

> the police. We find no other facts in the record to support the finding of this aggravating circumstance.
>
> 604 So. 2d at 798.

This aggravator is invalid.

The cold, calculated, and premeditated aggravator is also invalid. There is no evidence in this case of a prior plan to kill. The prosecutor conceded that there was originally no intent to kill T3898.

> It was **clearly** the evidence and clearly the Defendant's intent to go into that store, not originally to kill Mr. Patel, but his intent was to go into that store to rob.
>
> T3898.

Kinser's testimony concerning the discussions prior to the homicide only contemplate a robbery T2812-2813. This Court has consistently rejected this aggravator in cases where real or perceived resistance of a robbery victim led to the homicide. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Thompson v. State, 456 So. 2d 444, 446 (Fla. 1984); White v. State, 446 So. 2d 1031, 1037 (Fla. 1984); Maxwellv. State, 443 So. 2d 967, 971 (Fla. 1983). In Maxwell, the victim was robbed of several items. 443 so. 2d at 968, He protested giving up a ring from his wife. Id. He was then shot in the heart. Id. This Court rejected the aggravator. Id. at 971. In Hamblen, the defendant shot the victim in the back of the head at close range, because he suspected that she had triggered a silent alarm. 527 So. 2d at 801. This Court rejected this aggravator. Id. at 805. In Thompson, the victim stated he had no money and the defendant then killed him with a shotgun blast. 456 So. 2d at 444. This Court rejected CCP.

This Court's opinion in Rogers is instructive.

> The evidence at trial revealed that Rogers and Thomas McDermid, the State's chief witness rented a car on January 4, 1983, in Orlando. By his own admission, Rogers personally signed the rental agreement. After picking up two .45 caliber semi-automatic handguns, the pair drove to St. Augustine and "cased" an A & P and a Winn-Dixie grocery store. Deciding to rob the Winn-Dixie, Rogers and McDermid pulled into an adjoining motel parking lot, donned rubber gloves and nylon-stocking masks and proceeded inside. There, McDermid ordered the cashier, Ketsey Day Supinger, to open her register. When Supinger had difficulty complying, Rogers told McDermid to "forget it," and the two men ran out of the store toward their rental car. Rogers, however, trailed somewhat behind. During this interval, McDermid said he heard an unfamiliar voice behind him say, "No, please don't." These words were followed by the sound of one shot, a short pause, and two more shots.
>
> On the drive back to Orlando with McDermid, Rogers allegedly said he had seen a man, the victim, slipping out the back of the store during the attempted robbery. At trial, McDermid testified that Rogers said the victim "was playing hero and I shot the son of a bitch."
>
> Smith, the victim, in fact had been shot three times, once in the right shoulder and twice in the lower back. Police investigators later found three .45 caliber casings within six feet of the body. At trial a pathologist testified that two of the three shots, those to the back, caused severe damage to the lungs and a fatal loss of blood. In the pathologists's opinion, these two shots struck the victim while he was face-forward against a hard surface such as a pavement, resulting in characteristic exit wounds.

511 so. 2d at 529.

The Court rejected this aggravator stating that the actions were not "calculated." Id. at 533. The Court reached this result even though there was a pause between the shots and the last two shots were shots in the back, while the victim was down on the ground. This Court has consistently rejected this aggravator in cases in which the shooting began with victim resistance. This aggravator is invalid.

There is only one arguably valid aggravator in this case (the felony-murder-pecuniarygainaggravator). This Court has consistently reduced one aggravator cases to life imprisonment even when the jury recommends death. Sinclair, supra; Thompson, supra. This is a

reasonable basis for a life recommendation. Provence v. State, 337 So. 2d 783 (Fla. 1976).

A third general area providing a reasonable basis for a life recommendation is the substantial mitigation present in this case. There are several mitigators which individually and cumulatively provide a reasonable basis for the life recommendation.

1. Stuart Pomeranz was only 20 years old at the time of the offense T4269. In Perrvv. State, 522 So. 2d 817, 821 (Fla. 1988) this Court relied, in part, on the defendant's age of 21 to find a reasonable basis for a life recommendation in a robbery-murder, by strangulation, of a woman in her home. Perry also involved an extended beating and stabbing. Id. at 821. In Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994) this Court relied, in part, on the defendant's age of 20 to be a reasonable basis in a double murder of an elderly couple who had been stabbed to death, with multiple wounds, during a burglary of their home. The jury may well have reasonably concluded that Stuart Pomeranz qualified for the statutory mitigator of the age of the defendant. Fla. Stat. 921.141(6)(g). This is a reasonable basis for a life recommendation.

2. The second major mitigator is the fact that Stuart Pomeranz suffered from neurological impairment. The prosecution called Dr. Glenn Caddy as its witness. He testified that most of Stuart's difficulties stem from a combination of hyperactivity and attention-deficit disorder T4424-4425. He testified that these problems were neurological in origin and that Mr. Pomeranz had no control over them T4425. Dr. Caddy testified that Stuart had been "significantly inappropriately treated" in "at least one psychiatric facility" T4425-4426. Dr. Caddy also stated that Stuart Pomeranz suffered from an

impulse control disorder. In Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992) this Court relied, in part, on "adjustment disorder and attention deficit disorder" to hold a life recommendation reasonable. It did so despite the fact that the crime was a brutal beating and strangulation involving five aggravators includingheinous; atrocious, or cruel; cold, calculated, and premeditated; and two prior violent felonies. This is a reasonable basis for a life recommendationinthis far less aggravated case. Indeed, the jury in this case could have reasonablybelievedthat one or both of the statutorymentalmitigators are applicable. These are:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Fla. Stat. 921.141(b) (f).

At the very least this is significant non-statutory mitigation. This is a reasonable basis for a life recommendation.

3. The third major mitigator is the physical and emotional abuse Stuart Pomeranz suffered as a child. Janet Mayerbach, Stuart's aunt, testified that Stuart's father was "very, very abusive with him physically and verbally" T4272. Shetestifiedthat Stuartwouldbecome scared of him and cry and scream a lot T4272. She saw him pull Stuart down the steps by his hair T4272. Stuart's dad was also very abusive to Stuart's mom T4270-4271. He beat her often during her pregnancy T4270. He would throw things and curse T4271. Stuart's father had a drug problem T4271. Stuart's dad introduced him to drugs T4291.

Stuart's mom eventually left his father T4273-4274. Stuart's father is Stuart Pomeranz, Sr. T4270. He is Stuart Pomeranz, Jr.

Eventually, the family began to call him Derrick to disassociate him from his father T4272. This name stuck T4272.

Stuart's mom remarried Lawrence Bardon T4274. He had a good relationship with Stuart for a while T4273-4274. This changed completely when they had a child as a couple T4274. He began to ignore Stuart T4274. He became emotionally abusive and seemed to enjoy frustrating and upsetting Stuart T4275.

Dr. Caddytestifiedthat the abuse which Stuart suffered from his father and stepfather exacerbated the pre-existing problems from neurological impairment T4425-4426. This Court has relied, in part, on "a difficult childhood" to hold a life recommendation reasonable. Scott, supra, at 1277.

4. The fourth mitigator is the undisputed testimony of Janet Mayerbach that Stuart Pomeranz was a very caring and loving family member towards his aunt, mother and cousins T4275-4276,4306. This Court has relied, in part, on the fact that a defendant had positive family relationships to hold a life recommendation reasonable. Scott, supra, at 1277; Cooper v. State, 581 So. 2d 49, 52 (Fla. 1991). This is a reasonable basis for a life recommendation in this case.

5. The fifth mitigator is the emotional instability and immaturity of Stuart Pomeranz. The prosecution called Dr. Caddy who stated that Stuart suffers from an impulse control disorder T4412. He also stated that he is like an "11 or 12 year old" emotionally T4415. This testimony was unrebutted. This Court has relied on emotional instability and immaturity, in part, to find a life recommendation reasonable. Scott, supra, at 1277.

6. The sixth mitigator is the fact that the "killing, although premeditated, was most likely upon reflection of a short duration."

Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 so. 2d 1170, 1174 (Fla. 1985).

7. The seventh area that is a reasonable basis for a life recommendation is the credibility of the State's primary witness concerning the circumstances of the offense. Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991).

> There was guilt phase evidence which the jury could have reasonably found to be mitigating. The State's primary witness was the wife of the victim. The credibility of her testimony concerning the circumstances surrounding this murder couldhave reasonablyinfluencedthe jury's recommendation.

Id. at 167,

This is a distinct inquiry from "doubt about guilt." The circumstances of a crime and the relative roles of the various parties are valid mitigation.

Virtually the only direct evidence concerning the circumstances of this offense was the testimony of Lyndon Kinser. Kinser admitted that he has been convicted of between 20 and 25 felonies T2792. He pled guilty to first degree murder, three armed robberies, armed burglary, burglary, grand theft and four violations of probation T3136-3137. He could have received the death penalty on the first degree murder charge, but was allowed to plead to a life sentence with parole eligibility after twenty-five (25) years T3137-3138. He could have received consecutive life sentences on each of the armed robberies and the armed burglary T3138. Instead he received a 30-year concurrent sentence without habitualization T3138-3139. Kinser is a career criminal who received tremendous benefits in exchange for his testimony. He had a pending motion to further reduce his sentence T2868-2871. He was spending $3,000.00 a week on cocaine. His credibility is highly suspect.

Kinser admitted that he illegally purchased the gun allegedly used by using his 14 year old nephew T2796-2797. He cleaned the gun up and made it operable T2797. He helped plan the robbery T2812-2813. He admitted that he supplied the car in question and drove it to and from the robbery scene T2815-2833.

The jury could have believed Kinser to the extent that he and Mr. Pomeranz were both participants in a robbery-murder. Thus, Mr. Pomeranz would be guilty. However, they could have doubted his credibility as to his role. Kinser's testimony was guided by self-interest. They could have thought Kinser had a far greater role than he was admitting. See Lee v. Illinois, 476 U.S. 530, 544, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 514 (1986) (recognizes co-defendant's inherent motive to reduce his role and exaggerate defendant's). The jury could have thought that the robbery was Kinser's idea, or that he had also gone in the store, or even that he had completely reversed the roles and that Kinser was the triggerman. Kinser's credibility as to the "circumstances of the offense" is a reasonable basis for a life recommendation. Douglas, supra.

8. The eighth area that is a reasonable basis for a life recommendation is that the jury could have had doubt about who the triggerman is in the case. The jury could have believed Kinser to the extent that they were both guilty of felony-murder, but also believed that he was reversing the roles to save his own life. This Court has often relied, in part, on doubt of the identify of the triggerman to hold a life recommendation reasonable. Barrett v. State, 649 So. 2d 219, 222 (Fla. 1994); Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991).

9. The ninth reasonable basis for a life recommendation is the plea bargain given Lyndon Kinser who was highly involved in this

incident. He illegally purchased the gun and cleaned it up and made it operable. He helped plan the robbery, supplied the car, and drove it. Kinser was a principal in this offense. Disparate treatment of a co-perpetrator is a reasonable basis for a life recommendation. Barrett, supra; Fuente v. State, 549 So. 2d 652, 658 (Fla. 1989); Brookings v. State, 495 So, 2d 135, 143 (Fla. 1986).

There are several reasonable bases for the life recommendation. This court has held life recommendations to be reasonable in cases far more aggravated than the current case. Barrett, supra, involved four counts of first degree murder and one count of conspiracy to commit murder. Caruso, supra, involved a brutal double murder of an elderly couple. Parker v. State, 643 So. 2d 1032 (Fla. 1994) involved three murders. Jackson v. State, 599 So. 2d 103 (Fla. 1992), involved five murders. Heswood v. State, 575 So. 2d 170 (Fla. 1991) involved three murders, This case is far less aggravated than any of these cases and also has substantial mitigation.

This Court must also take into account the fact that the State stipulated to the reasonableness of the life recommendation and urged the trial court to impose a life sentence. Indeed, the State has waived any argument as to the validity of the override.

> Contemporaneous objectionandproceduraldefaultrules apply not only to defendants, but also to the State.
>
> Cannadv v. State, 620 So. 2d 165, 170 (Fla. 1993).

This Court has held that it is an abuse of discretion to fail to find mitigators which the State stipulated to. Santos v. State, 629 so. 2d 838, 840 (Fla. 1994). It would be an abuse of discretion to fail to find a life recommendation reasonable which the State stipulated to. The State has waived any argument as to the override. Hamilton, supra, at p.229. The life recommendation in this case is

clearly reasonable and the death sentence must be reduced to life imprisonment.

POINT XXI

THE TRIAL COURT EMPLOYED THE WRONG LEGAL STANDARD IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

The trial court employed the wrong legal standard in overriding the jury's recommendation of life imprisonment. This denied Mr. Pomeranz due process of law pursuant to Article I, Sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The death sentence in this case is imposed in violation of Article I, Section 17 of the Florida Constitution and Fla. Stat. 921.141 and the Eighth Amendment to the United States Constitution.

The jury in this case recommended life imprisonment R638. The prosecution stated there was no legal basis to override the life recommendation R643. The trial court imposed a death sentence based upon its "independent evaluation" of the aggravating and mitigating circumstances R667. The trial judge made no attempt to follow the legal standard outlined in Tedder v. State, 322 So. 2d 908 (Fla. 1975).

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

> Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation. See *Valle* v. State, 502 So. 2d 1225 (Fla. 1987); Floyd v. State, 497 So. 2d 1221 (Fla. 1986). A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless "the facts suggesting a

> sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State,* **322 So.** 2d 908, **910 (Fla. 1975)**. When there is some **reasonable** basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation. *See Gilvin v. State, 418 So.* 2d 996, *999* (Fla. 1982); *Mills v. State, 476 So.* 2d 172, 180 (Fla. 1985) (McDonald, J., concurring in part, dissenting in part), *cert. denied, 475* **U.S. 1031**, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).
>
> Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988).
>
> Under *Tedder,* the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment.
>
> Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990).

Here, the trial judge made two separate errors. (1) He did not follow Tedder and its progeny in terms of giving "great weight" to the jury's recommendation and only overriding that recommendation if no reasonable person could differ. Tedder, supra. (2) The judge made no attempt to view aggravators and mitigators as the jury could reasonably have viewed them in the light most favorable to the jury's verdict. Instead, he merely substituted his judgment for the jury's. Holsworth; Cheshire.

The trial judge never acknowledged Tedder or any other jury override case. He never acknowledged that he was giving the jury's recommendation "great weight" or any weight at all.

COUNT I

> Notwithstanding the jury's (8-4) advisory sentence recommending a life sentence without the possibility of parole for twenty-five (25) years, this Court has conductedits own independent evaluation of the aggravating and mitigating circumstances **as** required by Section 921.141(3), Florida Statutes.
>
> R666-667 **(emphasis supplied).**

This is the only mention of the jury's recommendation. It is clear that the judge gave no weight whatsoever to the jury's recommen-

dation of life, This error is akin to the error in Ross v. State, 386 so. 2d 1191, 1197-1198 (Fla. 1980). In Ross I this Court reversed as the judge gave undue weight to the jury's death recommendation. In the present case, the Court gave no weight to the jury's life recommendation. This is also reversible error.

The Court also erred in failing to make any attempt to view the aggravating and mitigating circumstances as the jury might reasonably have viewed them. In his discussion of aggravators and mitigators he never made mention of the jury's recommendation or made any attempt to determine how the jury could have reasonably viewed the evidence R667-686. Instead, the judge merely substituted his judgment. This is precisely what this Court condemned in Holsworth and Cheshire.

The use of the wrong legal standard in evaluating aggravating and mitigating circumstances is reversible error. Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Ferguson v. State, 417 So. 2d 631, 644-645 (Fla. 1982). In Mines and Ferguson this Court held that a resentencing was required as the Court used the wrong legal standard in evaluating mental mitigation. Here, the judge used the wrong legal standard in viewing all of the aggravators and mitigators. This is prejudicial error.

POINT XXII

THE TRIAL COURT COMMITTED SUBSTANTIAL ERRORS IN ITS SENTENCING ORDER.

The trial judge committed substantial errors in his findings of fact as to aggravating and mitigating circumstances, This denied Mr. Pomeranz due process of law and a fair sentencing proceeding pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Florida Statute 921.141.

The trial court committed substantial errors in its findings of aggravating and mitigating circumstances. Appellant has separately argued that three of the four aggravators are invalid, as a reasonable basis for a life recommendation. See Point XX. Assuming arsuendo, that this Court does not feel that there is a reasonable basis for a life recommendation, at least a judge resentencing is required due to the invalidity of aggravators. Lewis v. State, 398 So. 2d 432, 438-439 (Fla. 1981).

The trial court also committed substantial errors in its findings on mitigating circumstances. In terms of statutory mitigating circumstances the trial court applied the wrong legal standard. He failed to make any attempt to try to decide if the jury could have reasonably found these circumstances. Holsworth; Cheshire, See Point XX.

The trial court made a separate legal error in evaluating the age mitigator. Appellant was 20 at the time of the offense. This court has relied, on part, on ages of 20 and 21 as reasonable bases for a life recommendation. Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994); Perry v. State, 522 So, 2d 817, 821 (Fla. 1988). The judge rejected this mitigator. As part of his reasoning he stated:

> Our record indicates the Defendant is competent and has the capacityclearlytodiscernthedifferencesbetweencriminal and non-criminal activities.

R675.

The trial court clearly used the wrong legal standard. Every defendant who is tried is competent to stand trial. This is akin to the error this Court condemned in Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Ferguson v. State, 417 So. 2d 631, 644-645 (Fla. 1982); and Campbell v. State, 571 So. 2d 415, 418-419 (Fla. 1990). In Mines

and Fersuson, this Court reversed because the trial court had applied the sanity standard in evaluating mental mitigation. Here, the trial court applied the competency standard to reject the age mitigator in a twenty-year old. This error is particularly prejudicial in light of the jury's recommendation of life and of the unrebutted testimony from the State's own witness that Stuart Pomeranz was like an "11 or 12 year old emotionally" ***T4415.***

The judge's findings concerning non-statutory mitigating circumstances are deficient. The trial court erred in several respects. (1) It is impossible to tell what non-statutory mitigators the judge found and what weight he gave to them. (2) The judge erred in failing to find unrebutted non-statutory mitigating factors, (3) The trial court failed to consider whether the jury could have reasonably viewed any of these factors as mitigating.

The trial court must make specific findings of fact as to aggravating and mitigating circumstances. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); Bouie v. State, 559 So. 2d 1113, 1116 (Fla. 1990); Fla. Stat. 921.141. This written order is the basis for meaningful appellate review. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

This Court has imposed certain additional requirements concerning non-statutory mitigating circumstances.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. ***See Rogers v. State,*** 511 So. 2d 526 (Fla. 1987), ***cert. denied, 484*** U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.
>
> Campbell v. State, 571 So. 2d ***415, 419*** (Fla. 1990).

> Everymitigating factor apparent in the entire recordbefore the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process. ***Cheshire v. State, 568 So.*** 2d 908, 912 (Fla. 1990) (citing ***Rogers v. State, 511 So.*** 2d 526, 534 (Fla. 1987), cert. ***denied,*** 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Moreover,
>
> > when a reasonable quantumof competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court ***must*** find that the mitigating circumstance has been proved.
>
> ***Nibertv. State, 574 So.*** 2d 1059, 1062 (Fla. 1990) (emphasis added). The rejection of a mitigating factor cannot be sustainedunless supportedbycompetentsubstantialevidence refuting the existence of the factor. ***Id.*** (citing ***Kight v. State,*** 512 so. 2d ***922*** (Fla. 1987), ***cert. denied, 485*** U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); ***Cook v. State,*** 542 So. 2d 964 (Fla. 1989); *Pardo v.* ***State, 563 So.*** 2d 77 (Fla. 1990), ***cert. denied,-*** U.S. ___, 111 S.Ct. 2043, 114 L.Ed.2d 127 (1991)).
>
> Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

It is impossible to tell from the judge's order what non-statutory mitigators he found and what weight he gave them. The trial court stated:

> The statutory and non-statutory mitigating circumstances are not of sufficientweightto counterbalance the aggravating factors.
>
> R683.

The trial court must have found some non-statutory mitigating factors in order to have weighed them against the aggravating factors. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977).

> ***In*** the case ***sub*** *judice*, it does not expressly appear from the specific findings of fact that the trial judge found the existence of any mitigating circumstances. His written findings expressly negate the existence of certain mitigating circumstances. But the sentencing order concludes:
>
> > "... [I]t being the opinion of this court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this court after weighing the aggravatingandmitigating circumstances, being of the additional opinion that insufficient mitigating circumstances exist to outweigh the aggravating circumstances . .."

> In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter. Likewise, in concluding "that insufficient mitigating circumstances exist to outweigh the aggravatingcircumstances" he implicitly found *some* mitigating circumstances to exist.
>
> 346 So. 2d at 1003 (emphasis in original).

Thus, the trial judge must have found some non-statutory mitigating circumstances.

It is impossible to determine which non-statutory mitigating circumstances the judge found and what weight he gave them R675-685. The judge sometimes finds historical facts that would be mitigating, but never states whether he is finding a mitigating circumstance and what weight he is giving to it. For example, the judge states:

> The Defendant's aunt, Janet Mayerbach, testified the Defendant visited in her home as a child, playing with her children. She viewed him as a good nephew and as a good son who las given loved and affection by her, his grandmother and mother. She related the Defendant's father left him when the Defendant was 3½ years old, not to return to Defendant's life until the defendant was thirteen (13) years old; at which time she stated the Defendant's real father introduced the Defendant to marijuana. She spoke of the Defendant's problems with the step-father named Lawrence Barton, who treated the Defendant well until the birth of the Defendant's sister. At that time the stepfather paid no further attentiontothe Defendant; even after Mr. Barton divorced the Defendant's mother he would visit his daughter and not even acknowledge the Defendant.
>
> R677-678.

However, the judge never made a finding whether this is a mitigator or not and what weight he gave it. This continues throughout the judge's order on non-statutory mitigating circumstances. The order is fatally flawed. Bouie.

The trial court also failed to find unrebutted mitigating circumstances. There was unrebutted evidence that Stuart Pomeranz suffered from neurological impairment. The prosecution called Dr.

Glenn Caddy as its witness. He testified that most of Stuart's difficulties stem from a combination of hyperactivity and attention-deficit disorder T4424-4425. He testified that these problems were neurological in origin and that Mr. Pomeranz had no control over them T4425. Dr. Caddy also stated that Stuart Pomeranz suffered from an impulse control disorder. In Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992) this Court recognizes "adjustment disorder and attention deficit disorder" as mitigators. The State is bound by its own evidence. D.J.G. v. State, 524 So. 2d 1024 (Fla. 1st DCA 1987); Hodge v. State, 315 So. 2d 507 (Fla. 1st DCA 1975); Weinstein v. State, 269 So. 2d 70 (Fla. 1st DCA 1972). This Court has held that it is error to fail to find a mitigating circumstance which the State agrees to. Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). The trial court erred in failing to find this unrebutted mitigating circumstance.

Dr. Glenn Caddy also presented unrebutted testimony concerning the emotional instability and immaturity of Stuart Pomeranz. He stated that Stuart suffers from an impulse control disorder T4412. He also stated that he is like an "11 or 12 year old" emotionally T4415. This testimony was unrebutted. This Court has recognized immaturity as a mitigating circumstance. Scott, at 1277. It was error to fail to find this mitigator. Santos.

There was also unrebuttedtestimonythat Stuart Pomeranz had been abused as a child. Janet Mayerbach, Stuart's aunt, testified that Stuart's father was "very, very abusive with him physically and verbally" T4272. Stuart would become scared of him and cry and scream a lot T4272. She saw him pull Stuart down the steps by his hair T4272. Stuart's dad was also very abusive to Stuart's mom T4270-4271. He beat her often during her pregnancy T4270. He would throw things

and curse T4271. Stuart's father had a drug problem T4271. Stuart's dad introduced him to drugs T4291. Stuart's mom remarried Lawrence Bardon T4274. He had a good relationship with Stuart for a while T4273-4274. This changed completely when they had a child as a couple T4274. He began to ignore Stuart T4274. He became emotionally abusive and seemed to enjoy frustrating and upsetting Stuart T4275. Dr. Caddy testified that the abuse which Stuart suffered from his father and stepfather exacerbated the pre-existing problems from neurological impairment T4425-4426. This Court has recognized child abuse as a mitigating factor. Scott, supra, at 1277.

There is undisputed testimony of Janet Mayerbach that Stuart Pomeranz was a very caring and loving family member towards his aunt, motherandcousins T4275-4276,4306. Positive family relationships are a mitigator. Scott, susra, at 1277; Cooper v. State, 581 So. 2d 49, 52 (Fla. 1991). The trial court prejudicially erred in failing to find several unrebutted non-statutory mitigators.

The trial court also prejudicially erred in failing to view mitigation to determine whether the jury could have reasonably relied on any of the non-statutory mitigators. Holsworth; Cheshire.

POINT XXIII

THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE.

The trial court erred in hearing evidence concerning victim impact. The victim impact evidence in this case denied Mr. Pomeranz due process of law and a reliable sentencing proceeding pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The offense in this case took place before the effective date of the statute at issue. The use of this evidence in

the current case violates the ex post facto clause of Article I, Section 10 and Article X, Section 9 of the Florida Constitution and Article X, Sections 9 and 10 of the United States Constitution.

The prosecution introduced victim impact evidence before the judge from the son of the deceased T4783-4788. Defense counsel objected to the admission of victim impact evidence and pointed out that the offense took place before the effective date of the statute.

The offense in this case took place on April 19, 1992. Florida Statute 921.141(7) went into effect on July 1, 1992. The United States Supreme Court has stated the test for determining a violation of the Ex Post Facto Clause in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

> "Two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective ... and it must disadvantage the offender affected by it."
>
> 450 U.S. at 30.

This statute fails under this test. It applies to events occurring after the offense and severely disadvantages Mr. Pomeranz. It exposes him to highly emotional evidence designed to inflame the judge. This is a substantial disadvantage.

The evidence at issue here was highly emotional and irrelevant to any aggravating or mitigating circumstance. It violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. See Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991) (noting that certain type of victim impact evidence can violate due process). This was harmful error.

POINT XXIV

FLORIDA STATUTE 921.141(5)(d) IS UNCONSTITUTIONAL.

Florida Statute 921.141(5) (d) violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Pomeranz' death sentence unconstitutional pursuant to Article I, Sections 2, 9, **12,** 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The trial court found this **as an** aggravator R667-669.

Aggravating circumstance (5) (d) states:

> The capital felony was committed while the defendant **was** engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as **aggravators** are also felonies which constitute felony murder in the first degree murder statute. Fla. **Stat**- 784.04(1)(a)2.

This aggravating circumstance violates both the United States and Florida Constitutions. An aggravating circumstance must comply with two requirements before it is constitutional, (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant supra, at 2742, 77 L.Ed.2d at 249-250.

The felony murder aggravator fulfills neither function. It performs no narrowing function. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons

convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. This aggravating circumstance violates the Eighth and Fourteenth Amendments. Zant-

Assuming arguendo, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. The prosecution conceded that there was no intent to kill when Mr. Pomeranz entered the store and that the shooting began when the victim grabbed the gun T3869. Felony-murder was essential to making this first degree murder. This aggravator is also essential to death eligibility, as all the other aggravators are invalid. This aggravator violates the United States and Florida Constitutions on its face and as applied. Its use was harmful error.

POINT XXV

ELECTROCUTIONVIOLATES THE FLORIDAANDUNITED STATES CONSTITUTIONS.

Electrocution violates the United States and Florida Constitutions. 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, § 17 of the Florida Constitution. Electrocution is excruciating torture. See Gardner, Executions and Indisnities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96, 125 n.217 (1978). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v, Resweber, 329 U.S. 459, 480 n.2, 67 S.Ct. 374, 91 L.Ed. 1295 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body.

POINT XXVI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional.

1. The jury

a, Standard jury instructions.

The jury plays a crucial role in capital sentencing. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict. The standard jury instruction, on felony murder, does not serve the limiting function required by the Constitution. The instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. 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 at 9. The lack of unanimous verdict as to any aggravating circumstance violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution.

2. The trial judge

The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate) . Similarly, if the jury found the defendant guilty of felony

murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment.

3. Aggravating circumstances

Great care is needed in construing capital aggravating factors. 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. 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) (reinterpreting 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).

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare Kins v. State, 390 so. 2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So. 2d 354 (Fla. 1987) (rejecting aggravator on same facts).

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in

favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the State, ruling that the factor applies even to contemporaneous violent felonies. Lucas v. State, 379 So. 2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. Aldridse v. State, 351 so. 2d 942 (Fla. 1977). It applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

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 Swaffordv. 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,[1] it has been broadly interpreted to cover witness elimination. White v. State, 415 So. 2d 719 (Fla. 1982).

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

CONCLUSION

For the foregoing reasons, Mr. Pomeranz' conviction must be reversed, and his sentence of death vacated and reduced to life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 5th day of August, 1996.

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