IN THE SUPREME COURT FLORIDA



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|---|---|---|
| STUART LESLIE POMERANZ, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. 82,467 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

# REPLY BRIEF OF APPELLANT

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

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

Counsel for Appellant

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## AUTHORITIES CITED

**UNITED STATES CONSTITUTION**



**FLORIDA CONSTITUTION**



**OTHER AUTHORITIY**

## PRELIMINARY STATEMENT

The following symbols will be used:

"AB" Answer Brief of Appellee

"IB" Initial Brief of Appellant

"R" Record on Appeal

"T" Transcript of Proceedings

"SR" Supplemental Record on Appeal

Appellant will rely on his Initial Brief on Points II, IV, V, VII, VIII, x, XI, XII, XIV, xv, XVI, XVII, XVIII, XXI, XXII, XXIII, XXIV, XXV, and XXVI.

## STATEMENT OF THE CASE

Mr. Pomeranz was convicted of first degree murder and robbery R602-603. The jury recommended life R638. The State filed a sentencing memorandum which requested a life sentence R643-647. It stated there are not "sufficient legal factors to override the jury's recommendation" R643. Mr. Pomeranz was sentenced to death on Count I and a consecutive life sentence on Count II R665-685.

## STATEMENT OF THE FACTS

Appellant will add the following to his Initial Brief. Lorenza Pasquale claimed that Appellant spoke Spanish. Hector Velasquez said Mr. Pomeranz once attempted to speak Spanish to him but that it made no sense T1458-1460. Tony Jackson claimed to have heard Mr. Pomeranz "use other than the English language" once T2594-2596.

The medical examiner states:

> There's no way I can tell from an autopsy standpoint whether these two shots were inflicted while this person was standing up or . . . lying down.

T1504.

Katherine Colburn stated that she was present at a discussion about this case days after the event T1788. She heard someone say that $51 was taken T1788-89. She doesn't know who T1789. She was present with Michael Coberly, Anthony Jackson, and Stuart Pomeranz. Coberly testified that it was Tony Jackson who said this T1820-1821.

Bonnie Johnson testified that she could not identify Mr. Pomeranz as the man she saw in the doorway T1920.

Lyndon Kinser testified that he purchased the gun, cleaned it and made it operable T2886. He had shot it T2894-2895. He traded in the car days after this incident T2907-2908. He was spending $3,000 a week on cocaine T3120. He pled guilty to first degree murder, three armed burglaries, burglary, and four violations of probation. He could have gotten the death penalty T3137-3138. He could have gotten consecutive life sentences on the armed robberies instead of the concurrent thirty years he received T3138. He could have received habitual offender sentences and did not T3139.

Darrin Cox stated that he had been convicted of eleven felonies, including trafficking in cocaine, burglary, 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 statement on

this case T3176. He's since moved to mitigate his sentence T3178-3179. He hopes his testimony will reduce his sentence T3178-3179. The judge deferred ruling on his motion to mitigate until after this trial T3184-3185. He could have been habitualized and given consecutive sentences on all counts T3193-3196.

Barry Norman had known Stuart Pomeranz for a year and one half T4197. He had lived with her T4198. He had always treated her and her daughter with respect and was very thoughtful T4200.

Janet Mayerbach, Stuart Pomeranz' aunt, testified:

> I can tell you that Stuart's father, Stuart, Sr., I'll call him he was a very abusive man. While my sister was pregnant with my nephew, Stuart, she was abused and hit a lot by him. Which is very upsetting. I've seen marks on her while she was pregnant because of this.
>
> A. He was an abusive father. He was someone that wasn't in control of his life. He, from what I understand, had a drug problem. He was on the streets a lot. Never around. Stuart was abused by him physically, meaning striking him, verbally very abusive man....
>
> A. Well, my sister resided with her [mother] for protection reasons. He then became -- became taunting her, coming to the house to visit to try to see her banging on the door, throwing things, cursing, being very, very verbally abusive.
>
> I had worked approximately ten minutes away from where my home had lived and I used to call home a lot just to make sure that they were okay. There were occasions I've had to come home to witness what might be going on or him pulling Derick down the steps by the hair --
>
> **Q.** When you say "Derick," who will you referring to?
>
> A. I'm referring to my nephew. That's the name the family sort of gave him when he was very young because of the relationship with his father Stuart. We just did not

want to recognize him as Stuart because of the problems that we had with his father in the family.

Q. Okay.

A. So we just started to call him Derick and it sort of was how it stuck. He was very, very abusive with him physically and verbally to the point where Derick would get very frightened of him and cry and scream a lot.

T4270-4272.

His father took him into "the streets" and in pool halls and introduced him to marijuana at age 13 T4291.

She testified that Stuart's mom later married Lawrence Bardon T4273. Stuart was pleased to have a father in his life T4273. This changed after Mr. Bardon had a child with Stuart's mom T4274-4275.

As soon as that child was born, his relationship with Derick and totally severed to the point of being an abusive man. He would do things deliberately against Derick by buying his daughter things, bringing them into the house and I was a witness to that because he did that while Stuart stayed with me also in Florida when he came to visit me.

I also had a sister with me, and when he would come to the house he would deliberately brings things and smile and enjoy giving them to his daughter while his -- what was his son as he called sitting there and enjoyed his hostility of seeing Derick upset or frustrated.

T4274-4275. Mr. Bardon also "physically abused" Stuart "by striking him" T4293

The prosecution called Dr. Glen Caddy, an expert witness in forensic psychology T4334. He confirmed that Stuart was emotionally abused by both his father and stepfather T4232-4234. He was unduly punished for the smallest things T4344. He suffers from an impulse

control disorder and anti-social personality disorder T4411-4412. His impulse control disorder is the "adult consequence of hyperactivity" T4412. It causes an inability to concentrate and pay attention T4412. He is "very insecure and inadequate" T4412. He suffers from "profound attention deficit problems" T4425. The hyperactivity and "profound attention deficit disorder" are "neurologic in origin" T4425. This is confirmed by psychological assessments from the time he was five T4425. He has no control over these problems T4425. This got worse because he "was misdiagnosed and significantly inappropriately treated" T4426. He was in and out of psychiatric facilities T4433. His problems also got worse because the men in his life "either left him or mistreated him" T4426. This included his father who got him actively involved in drug use T4426. Stuart is like an 11 or 12 year old emotionally T4415. He's very immature and undeveloped emotionally T4417. "Even on his I.Q. test his ability to focus and concentrate is really very deficient" T4434. He has "profound deficits in the ability to function arithmetically" T4435-36. A person can have a normal I.Q. and have brain damage T4438-4439. There are indicators of limitations of neuropsychological functioning going back to childhood T4439.

Dr. Caddy testified that one of Mr. Pomeranz' problems is antisocial personality disorder T4428. He stated that sociopathy characterizes young people and is likely to improve with time T4428-4429. He stated that he is "likely to change profoundly" if given a

lengthy prison sentence T4430-4431. He stated that he thought the best alternative "would be a long prison term" T4417-4418.

## ARGUMENT

### POINT I

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

Appellee concedes that there was no showing of prejudice and the exclusion would be error under a discovery analysis.

Appellee claims that restriction of this cross-examination was proper because it involved extrinsic evidence to impeach a witness on a collateral matter AB13. Appellee never raised any argument remotely resembling this argument in the trial court. This issue was litigated as a discovery issue T2946-2955. This has been waived. Hamilton v. State, 678 So. 2d 1228 (Fla. 1996); Santos v. State, 629 So. 2d 838 (Fla. 1994); Cannady v. State, 620 So. 2d 165 (Fla. 1993).

> Contemporaneous objection and procedural default rules apply not only to defendants, but also to the state.

620 So. 2d at 170.

It would constitute a denial of due process to consider this issue on a theory never raised by the prosecution below. Mr. Pomeranz was never given a chance to respond to this argument in the trial court. The factual matters concerning this argument were never developed. Appellee relies on Caso v. State, 524 So. 2d 422 (Fla. 1988) for the principle that a trial court can be affirmed even when based on erroneous reasoning AB14. The situation in Caso is very

different from the current case. The State maintained a consistent position. The facts were fully developed. This Court employed a different legal analysis of the custody requirement. 524 So. 2d at 424. Here, the prosecution raised a discovery objection to cross-examination of the prosecution witness. Now, Appellee is arguing that this was impeachment on a collateral matter by extrinsic evidence.

Assuming arsuendo, that this Court considers Appellee's argument, it should reject it. Kinser was the key prosecution witness. The prosecution used Kinser to testify about this incident and an additional robbery, which he supposedly committed with Mr. Pomeranz. Kinser testified that the robbery was planned the day of the incident T2946-2947. Defense counsel was not allowed to impeach Kinser with his prior materially inconsistent statement that the incident had been planned ten days earlier. Kinser had claimed that the robbery-murder at issue had first been proposed by Mr. Pomeranz a few minutes before it occurred T2812. This would be consistent with his version of events in the other robbery. It is also a clever attempt to minimize his role in both of these incidents. His testimony at the robbery trial would show a completely different pattern and more planning and more involvement by him. This is a material contradiction.

This is harmful error. None of the other evidence showed that Kinser had committed perjury in a criminal trial and lied about his role in a robbery involving Mr. Pomeranz. This was far more powerful

impeachment than anything admitted at trial. The exclusion of testimony that Kinser had committed perjury is harmful error.

## POINT III

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

Appellee claims that "the discussion was adequate to establish that no prejudice occurred" AB24. The entire discussion is as follows.

> DEFENSE COUNSEL: Judge, I'm going to object to this. Your Honor, what Counsel is referring to is not a deposition in this case at all. He's referring to apparently a deposition that was conducted by Mr. Watson and Sharon Wood on a different case, Judge, in Mr. Kinser's case. Maybe she was referring to Mr. Kinser in that case, Judge.
>
> Judge, if Your Honor wants to look at the case number, look at the title, look at the defense attorney and decide for yourself. I object to what Counsel's doing, he's -- he is trying to mislead the witness. The case that he's referring to with this deposition, it is a deposition taken by Kinser's attorney, Kinser's attorney in a deposition of the State of Florida against Kinser. I was not prsent, my client was not charged at that time with the crime and it could very well be that Mr. Watson was referring to his client, Mr. Kinser, Judge.
>
> MR. BARLOW: That's not so, Judge. This is a sworn deposition of this witness and I certainly can impeach a witness by a prior inconsistent statement. And in this case she refers to the Photograph No. 3 of that lineup with this Defendant, and Mr. Watson is asking questions about both Defendants and about the actions in the case and she's identifying this Defendant as being --
>
> 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.

> DEFENSE COUNSEL: 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
>
> PROSECUTOR: 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 prosecutor, 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....
>
> THE COURT: All right. Let's go on.

T2497-2500. The trial court did not fulfill its responsibilities pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971).

> 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 willful, 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.
>
> 246 So. 2d at 775.

The trial judge never made any findings. He never determined whether there was a violation. He never found whether the violation

was substantial or trivial; willful or inadvertent; or what effect it had on the ability to prepare for trial.

Appellee claims that there is "no prejudice" from this discovery violation AB24-26. The only case relied on by Appellee is State v. Schopp 653 So. 2d 1016 (Fla. 1995). In Schopp, this Court recognized that "in the vast majority of cases" the error will be harmful. 653 So.2d at 1021. Schopp's defense had been to admit his guilt of burglary, but asked the jury to find him guilty of unarmed burglary. Id. at 1022. The jury returned the verdict he requested. This is in contrast to the present case, in which Mr. Pomeranz actively contested his guilt and the jury found him guilty as charged.

Appellee claims that the record demonstrates that defense counsel "was aware of the inconsistent statements" AB24. Appellee bases this on an earlier discussion regarding the State's motion to call Ms. Hernandez as a court witness T2472-2474.

> PROSECUTOR: Your Honor, I'm going to ask Elizabeth Hernandez be called as a Court's witness in this case. Elizabeth Hernandez has given confusing and various statements. She's given statements to law enforcement on at least three separate occasions. She's given a deposition in this matter and the statements have differed substantially from what I believe her testimony will be from when I met with her and discussed her testimony. She has --
>
> THE COURT: Do you have any objection?
>
> DEFENSE COUNSEL: Here's what the situation is, Your Honor. I'm also in a similar position with respect to some of what Mr. Barlow used to refer to as his witnesses. If I call Tony Jackson, I want the chance to examine him as I would cross examine.

> PROSECUTOR: I don't have objections to that....
>
> DEFENSE COUNSEL: I'm not going to object to him leading the witness if the point of this under civil theories he has a right to do that. I don't think it's necessary for the Court to call it a Court's witness, but I'm not going to object if Mr. Barlow leads the witness as he would in cross examination.

T2472-2474.

There is nothing in this colloquy to indicate that defense counsel was aware of the deposition in Kinser's case. (The later objection makes clear that counsel thought it was the deposition in his case.) He was concerned with the right to lead and cross other witnesses, and was willing to agree to this procedure concerning Ms. Hernandez in return for the same rights as to other witnesses. He made this decision without the Kinser deposition. He explicitly stated that he was unaware of the deposition in question T2496-2500.

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. Wearv v. State, 644 So. 2d 156, 157 (Fla. 4th DCA 1994); Walker v. State, 573 so. 2d 1075 (Fla. 4th DCA 1991); Tarrant v. State, 668 So. 2d 223 (Fla. 4th DCA 1996).

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.

An inadequate hearing is harmful error. Sears v. State, 656 So. 2d 595 (Fla. 1st DCA 1995); Mason v. Stat-e, 654 So. 2d 1225 (Fla. 2d DCA 1995); Vincente v. State, 669 So. 2d 1119 (Fla. 3d DCA 1996); Tarrant; McArthur v. State, 671 So. 2d 867 (Fla. 4th DCA 1996).

This error is harmful. The alleged statement in the Kinser deposition was directly contrary to her trial testimony that it was Kinser who was in the store. It is easy to conceive of different actions Mr. Pomeranz would have taken had he known of this deposition. Defense counsel stipulated to her 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).

Appellee relies on Brumbley v. State, 453 So. 2d 381 (Fla. 1984) to claim that defense counsel's objection to declaring Ms. Hernandez as a court witness would be unsuccessful. This misses the point. There were no findings below to determine what actions defense counsel could have taken differently if he had been aware of this deposition. Brumbley states that the trial court has certain discretion in calling witnesses as court witnesses. Id. at 384. There is no way to tell how the trial court would have exercised its discretion, if an objection had been made. Brumbley points out that there are restrictions on

impeaching court witnesses with prior inconsistent statements. Id. at 384. Mr. Pomeranz could have made this objection. This Court has emphasized the dangers of using prior inconsistent statements under the guise of "impeachment" as substantive evidence in violation of the hearsay statute and the Confrontation Clause. Morton v. State, so. 2d ___, 22 Fla. L. Weekly S100 (Fla. March 6, 1997).

This is akin to the 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 demonstrated beyond 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.

Defense counsel could have explored the circumstances regarding the alleged identification of Pomeranz to attempt to show that the witness had been confused by Kinser's attorney or could have further investigated to show why the deposition identification was incorrect. He could have moved for redeposition or spoken to the witness about this. This error is harmful.

## 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.

This issue is clearly preserved.

RECROSS EXAMINATION

PROSCUTOR:

Q 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.

DEFENSE COUNSEL: Objection, Your Honor, may we approach?

DEFENSE COUNSEL: This is completely absurd and I object to it, Judge, no relevancy. What he's doing -- what he's supposed to be asking is Recross Examination based on what questions were elicited on Redirect Examination.

PROSECUTION: Judge, he opened the door when he talked about background and jail and everything else.

THE COURT: Gentlemen, what I'm going to do, remember we talked about --

DEFENSE COUNSEL: Let's have a proffer.

THE COURT: It's a word that has many meanings. Overrule the objection, move on and get this witness done.

DEFENSE COUNSEL: Judge, I would ask for a proffer.

THE COURT: You made the objection for whatever it is, I'm ready to move on.

PROSECUTOR:

Q You know what a snitch is?

A 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?

DEFENSE COUNSEL: Objection, Your Honor, is this witness an expert of some sort of this --

THE COURT: You can ask him.

MR. KRASNOVE: I object, Your Honor.

THE COURT: I note it.

T3529-3531.

Mr. Pomeranz made three specific objections, relevancy, beyond the scope of redirect examination, and that the witness was not an expert in "snitches" and their truthfulness. These are all proper objections and are the grounds argued on appeal IB32. This is improper bolstering of the key State witnesses because it is irrelevant, beyond the scope of re-direct, and Drake had no expertise in this area. This is covered by the other **areas** and is an example of the harmfulness of the testimony. Assuming arguendo, that the issue of improper bolstering is not covered by the other objections, it is of no moment. There were three other valid objections.

Appellee incorrectly asserts that Mr. Pomeranz opened the door to this testimony AB32-33. On direct examination, defense counsel only asked Mr. Drake about his purchase of the car, his work on car stereos, and the condition of the dashboard T3477-3490. The prosecutor went into tangential issues concerning Mr. Drake's use of pawn shops T3511-3514. On redirect examination, Mr. Pomeranz did attempt to ask Mr.

Drake about his lack of criminal convictions T3515. However, the prosecutor objected to this question T3515. The objection was sustained and a motion to strike was grantedT3515. A question which was never answered and which was stricken does not open the door to anything. Hitchcock v. State, 673 so. 2d 859 (Fla. 1996). Appellee also points out that defense counsel later responded to the prosecutor's irrelevant questions about pawn shops T3522. It was the prosecution which first introduced this issue with its improper insinuations concerning Mr. Drake's use of pawnbrokers. Questions which are responsive to an earlier improper inquiry by opposing counsel, do not open the door to further improper questioning. Louette v. State, 152 Fla. 495, 12 So. 2d 168, 174 (Fla. 1973); Stripling v. State, 348 So. 2d 187, 193 (Fla. 3rd DCA 1977).

Assuming arsuendo, that Appellant's largely unsuccessful attempt to respond to the prosecutor's insinuations about Mr. Drake's use of pawn shops somehow opened the door to further questions about his lack of criminal record; this was not the purpose of the questions at issue. The questions had nothing to do with impeaching Mr. Drake.

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?

* * *

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 a person that gives information about other individuals that are committing crimes is committing a crime by giving false information?

A I've never given false information.

T3530-3531. This testimony did nothing to impeach Mr. Drake. This testimony actually bolstered the credibility of Drake by showing that he had given truthful information to the Martin County Sheriff's Office. The real purpose of this testimony was to bolster the credibility of Kinser, Darrin Cox, and Tony Jackson who had extensive criminal records and had made deals for their testimony. They were all informers or "snitches" in common parlance. This was harmful error as these are key State witnesses.

## POINT IX

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

Appellee agrees that collateral crime evidence is inadmissible for crimes of which a person has been acquitted and that conviction of a lesser is acquittal of the greater offense. However, it claims that this doctrine does not apply here. The only element that distinguishes robbery from theft or larceny is force, violence, assault, or putting in fear. Johnson v. State, 612 So. 2d 689, 690 (Fla. 1st DCA 1993);

Robinson v. Stat-e, 680 So. 2d 481 (Fla. 1st DCA 1996). The reduction from robbery to grand theft necessarily involves an acquittal of the element of force, assault, violence, or putting in fear.

Appellee incorrectly claims that Mr. Pomeranz "admitted" he committed he committed a robbery at the plea colloquy for grand theft AB42. The prosecutor laid out the factual basis:

> MR. LEVIN: Yes, Your honor, the State, if this case would have gone to trial would have shown that on or about May 1st, on May 1, 1992, the defendant Stuart Pomeranz did take property, U.S. currency from the property of Mark Beachman (phonetic) at the First Union Bank on 3405 Northwest Federal Highway, Jensen Beach, as outlined in the police reports which are in the court file, Your Honor. It happened in Martin County, Florida,

SR968. Neither Mr. Pomeranz, nor his counsel ever agreed to these facts SR968-977

Assuming arguendo, that Mr. Pomeranz can be seen as agreeing to the prosecutor's statement of the facts, it is not an admission of robbery. The prosecutor specifically stated that grand theft is a lesser included offense of robbery SR967.

## POINT XIII

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

Appellee misstates the nature of the issue here. The issue is the granting of the prosecution's unbalanced, special jury instruction on proof of premeditation. The trial court outlined the objectionable instruction and the defense clearly stated its objection.

> THE COURT: Evidence from which premeditation may be inferred includes the manner in which the homicide was committed and the nature and manner of the wound.
>
> DEFENSE COUNSEL: Yes. I'm objecting to that but I would not object to a general charge on circumstantial evidence. I just object to accentuating circumstantial evidence in this paragraph because I do not see that as a part of the standard portion of this particular charge, Judge.

T3685. The giving of this special instruction was reversible error as the prosecutor relied on it in closing argument T3897.

## 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.

There are three independent errors. (1) The trial court had no discretion to impose the death penalty in a case in which the State had abandoned the death penalty. State v. Bloom, 497 So. 2d 2 (Fla. 1986); Santos v. State, 629 So. 2d 838 (Fla. 1994). (2) The affirmance of the death sentence in this case, would be unusual and violative of the Florida Constitution. Tillman v. State, 591 So. 2d 167 (Fla. 1991). (3) The imposition of the death penalty violates due process and Florida Statute 921.141.

Appellee states that the trial judge must independently weigh aggravators and mitigators. This is true in a case in which the State is seeking the death penalty. The issue is whether a judge can impose the death penalty when the State is not seeking the death penalty.

Appellee claims that the prosecution continued to seek the death penalty throughout this case AB68-69. This is not supported by the

record. After the jury's recommendation of life, the prosecution filed a memorandum of law and presented oral argument at the sentencing hearing. The prosecutor expressed his personal opinion in the death penalty at the beginning of the memorandum R643. However, he went on to explain that legally there was no basis to impose the death penalty.

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

R642.

> It is therefore recommended that in Count I, First Degree Murder, the defendant be sentenced to life imprisonment and be required to serve no less than 25 years before becoming eligible for parole.

T649. At sentencing, the prosecutor again expressed his personal position that "death would be appropriate" T4757. However, he concluded with his sentence on the murder count T4759-4761. Lawyers often have personal opinions as to what the law should or should not be. These are irrelevant to a party's legal position. The State advocated a life sentence and abandoned the death penalty.

The imposition of the death penalty when the prosecution has abandoned the death penalty violates Article II, Section 3 of the Florida Constitution. 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 deciding whether and how to prosecute.

Id. at 3.

Bloom mandates that a judge can not impose the death penalty after the State has abandoned the death penalty. If the State has discretion whether to seek the death penalty, it also has discretion to abandon the death penalty. The State sometimes abandons the death penalty on the eve of trial or even after trial. Bloom gives the State the right to abandon the death penalty after the jury's recommendation of life. The trial court had no authority to impose the death penalty.

Appellee attempts to distinguish Santos as it involves the State's concession as to the existence of mitigators. If it is an abuse of discretion to fail to find mitigators that the State concedes, it is also an abuse of discretion to fail to impose a life sentence when the State concedes that there is no reasonable basis to override the jury's recommendation.

Turner v. State, 645 So. 2d 444 (Fla. 1994) is the only reported Florida case where the jury recommended life imprisonment, the State urged the trial court to impose a life sentence and the judge imposed the death penalty. The affirmance of the death sentence here would be unusual and violate the Florida Constitution. Tillman.

Appellee makes no attempt to respond to Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991). The State argued for a life sentence on both counts and made no argument as to aggravating or mitigating circumstances T4747-4762. 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 judge interrupted defense counsel's argument and said:

> 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.

This is virtually identical to Lankford. 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 Court held it be a violation of due process to impose the death penalty in such a circumstance. 500 U.S. at 124-128.

The procedure here violates Spencer v. State, 615 So. 2d 688 (Fla. 1993) and Armstrons v. Stat-e, 642 So. 2d 730 (Fla. 1994). In Spencer, this Court held that a trial court must hold an additional hearing between the penalty phase and the imposition of sentence to:

> a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person.

615 So. 2d at 691

In Armstrong, the trial judge allowed counsel to present evidence and argument, but the trial judge had already formulated his written order at the time the arguments were made. 642 So. 2d at 737. This Court held that the ruling in Spencer was prospective only and that in a pre-Spencer case, such as Armstrong, a defendant must show prejudice. In a post-Spencer case, this is per se reversible error.

The error in the present case is akin to the error in Spencer and Armstrong. There was a hearing between phases, but the judge affirmatively misled defense counsel as to the nature of the hearing. The hearing at issue took place on August 26, 1993 T4746-T4813. The decision in Spencer became final on March 18, 1993. 615 So. 2d at 688. This is per se reversible error. Assuming arsuendo, that a showing of prejudice is required, it is clear here. The jury recommended life and the prosecutor urged the judge to follow this recommendation. The trial court overrode this recommendation. Counsel's being misled into not arguing the propriety of the life sentence is prejudicial.

## POINT XX

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

Three general observations are in order concerning the State's brief. First, one wonders what's the State's position on this issue is. The prosecutor stated:

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

He stated that life is "the maximum sentence permitted by law" T4759. The State has waived any argument as to the validity of the override.

> Contemporaneous objection and procedural default rules apply not only to defendant, but also to the state.

Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

Second, Appellee cites no case in which this Court has upheld the override of a life recommendation in which the aggravation and mitigation are akin to the current case. This Court has reversed overrides in far more aggravated cases. Barrett v. State, 649 So. 2d 219 (Fla. 1994) involved four counts of first degree murder and one count of conspiracy to commit murder. Caruso v. State, 645 So. 2d 389 (Fla. 1994) 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. Hegwood v. State, 575 So. 2d 170 (Fla. 1991) involved three murders.

Third, Appellee makes precisely the same error as the trial judge. It never views the aggravation and mitigation in the light most favorable to the jury's verdict. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990).

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 first basis is not whether "death is disproportionate" AB71. Proportionality is a doctrine in death recommendation cases. The issue

is whether the nature of the offense, either alone or in combination with other factors, could constitute a reasonable basis for a life recommendation. In McCaskill v. State, 344 So. 2d 1276 (Fla. 1977) this Court relied on the fact that the offense was a standard robbery-murder as a reasonable basis for a life recommendation. This Court has expanded this doctrine to hold the death sentence to be disproportionate in death recommendation cases. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 647 So. 2d 824 (Fla. 1994); Terry v. State, 668 so. 2d 954 (Fla. 1996). This is a reasonable basis for a life recommendation, either alone or in combination with other factors.

The lack of aggravation is the second reasonable basis for a life recommendation. Three of the four aggravators found in this case are invalid. One of the aggravators is the prior violent felony aggravator, which was based on a robbery conviction, which has been reversed and in which Mr. Pomeranz was subsequently convicted of grand theft. Appellee relies on Mann v. State, 453 So. 2d 784 (Fla. 1984); Brown v. State, 473 So. 2d 1260 (Fla. 1985); and Johnston v. State, 497 So. 2d 863 (Fla. 1986). These are all distinguishable. Mann involved burglary with an intent to commit unnatural carnal intercourse. Brown involved an arson conviction. Johnston involved convictions for battery upon a law enforcement officer and terroristic threat. These are all crimes of violence.

This Court has 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 another **to commit** an 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.

The use of force, violence, assault, or putting in fear is the only distinction between robbery and theft or larceny. Johnson, supra; Robinson, supra. Conviction of a lesser offense is an acquittal of the greater 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 necessarily means that grand theft is not a violent felony. This is especially true given this Court's opinion in Elam. This aggravator is invalid.

Appellee's argument that Mr. Pomeranz "admitted to a robbery" is unavailing factually and legally. Mr. Pomeranz never admitted any

facts in this case. See Point IX. Legally, it is irrelevant. Grand theft is not a violent felony. Lewis; Elam.

Appellee's argument as to this aggravator misses the real issue. The issue is not whether a judge would have abused his discretion in relying on this aggravator if the jury recommended death. The issue is whether a jury could reasonably conclude that grand theft is not a violent felony. It obviously could.[1] At the very least, a judge reweighing is required in light of the reduction to grand theft.

The State incorrectly relies on Swafford v. State, 533 So. 2d 270 (Fla. 1988); Preston v. State, 607 So.2d 404 (Fla. 1992); and Thompson v. State, 648 So. 2d 692 (Fla. 1994) to claim that the avoid arrest aggravator is proper. All of these cases involve driving the victim to a remote area before killing him. Here, there was no abduction, no plan to kill, and the shooting began when the victim grabbed the gun T2872,3163-3164.

Appellee makes no attempt to distinguish the cases relied on by Mr. Pomeranz. See Davis v. State, 604 So. 2d 794 (Fla. 1992) (burglar killed elderly woman who knew and could identify him; the fact that witness elimination may have 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

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[1] See Buford v. State, 570 So. 2d 923 (Fla. 1990) (Holding Court must consider new evidence, not heard by the jury, in support of the life recommendation).

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).

Appellee erroneously relies on Scruires v. State, 450 So. 2d 208 (Fla. 1984) and Wickham v. State, 593 So. 2d 191 (Fla. 1991) to claim the "cold, calculated, and premeditated" (CCP) aggravating factor applies. Neither of these cases involve a situation like the present case in which the shooting began when the victim first grabbed the gun.

This Court has consistently rejected CCP in cases where real or perceived resistance of a robbery victim led to the homicide, Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Thompson v. State, 456 So. 2d 444 (Fla. 1984); White v. State, 446 So. 2d 1031 (Fla. 1984); Maxwell v. State, 443 So. 2d 967 (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. He was then shot in the heart. 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. In Thompson, the victim stated he had no money and the defendant then killed him with a shotgun blast. 456 So. 2d at 444.

Appellee misses the issue here. The issue is whether the jury could have reasonably rejected CCP. It clearly could have. Appellee improperly relies on Hill v. State, 643 So. 2d 1071 (Fla. 1994) and

Young v. State, 579 so. 2d 721 (Fla. 1991) to claim that striking this aggravator would be harmless. In both cases in which the jury recommended death. Appellee cites no override case in which the striking of this aggravator is harmless. If any aggravator is invalid, at the very least a judge reweighing is required.

Appellee claims that there was no "credible or meaningful" mitigation offered. Appellee relies on Foster v. State, 679 So. 2d 747 (Fla. 1996) for this proposition. In Foster, the jury recommended death. The issue was whether the trial judge abused his discretion in failing to find certain mitigators. The issue in this case is whether the jury could reasonably have found some or all of the mitigators outlined in the Initial Brief.

Appellee incorrectly relies on Munsin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996) and Sims v. State, 681 So. 2d 1112 (Fla. 1996) to hold that the age mitigator does not apply. Both involve 24 year old defendants and death recommendations. A jury may reasonably rely on this mitigator when the defendant is 20. Perry v. State, 522 So. 2d 817 (Fla. 1988); Caruso v. State, 645 So. 2d 839 (Fla. 1994). Neither Perry nor Caruso condition the age mitigator on other mental health problems. Both recognized such problems as independent mitigators. Assuming arguendo, that there is such a requirement, it was met here. There was unrebutted evidence from the State's own expert of mental health problems.

The prosecution called Dr. Glen Caddy, an expert witness in forensic psychology T4334. He confirmed that Stuart was emotionally abused by both his father and stepfather T4232-4234. He suffers from an impulse control disorder and anti-social personality disorder T4411-4412. His impulse control disorder is the "adult consequence of hyperactivity" T4412. It causes an inability to concentrate and pay attention T4412. He stated that the hyperactivity and "profound attention deficit disorder" are "neurologic in origin" T4425. This is confirmed by psychological assessments from the time he was five T4425. He has no control over these neurological problems T4425. This problem got worse because he "was misdiagnosed and significantly inappropriately treated" T4426. He was in and out of adolescent psychiatric facilities T4433. His problems also got worse because the men in his life "either left him or mistreated him" T4426. These included his father who got him actively involved in drug use T4426. Stuart is like an 11 or 12 year old emotionally T4415. He's very immature and undeveloped emotionally T4417. "Even on his I.Q. test his ability to focus and concentrate is really very deficient" T4434. He has "profound deficits in the ability to function arithmetically" T4435-36. He made clear that a person can have a normal I.Q. and have brain damage T4438-4439. There are indicators of limitations of neuropsychological functioning going back to childhood T4439.

The second major area of mitigation is the unrebutted evidence of neurological impairment as outlined by the State's own expert, Dr

Caddy. Appellee claims that this mental health mitigation should be rejected because it was not explicitly connected to the crime. This Court has rejected this argument. Wickham v. State, 592 So. 2d 191 (Fla. 1991); Amazon v. State, 487 So. 2d 8 (Fla. 1986). Such a restriction would volate the Eight Amendment. Eddinss v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Here, there is an obvious connection to the crime. Stuart's impulse control disorder, attention deficit disorder and hyperactivity could well have affected his overreaction when the victim grabbed the gun.

The third area of mitigation is the physical and emotional abuse suffered by Stuart as a child. Janet Mayerbach stated:

> I can tell you that Stuart's father, Stuart, Sr., I'll call him he **was** a very abusive man. While my sister was pregnant with my nephew, Stuart, she was abused and hit a lot by him. Which is very upsetting. I've seen marks on her while she was pregnant because of this....
>
> He was an abusive father. He was someone who wasn't in control of his life. He, from what I understand, had a drug problem. He was on the streets a lot. Never around. Stuart was abused by him physically, meaning striking him, verbally very abusive man.
>
> Q. And then what happened after that?
>
> A. Well, my sister resided with her (mother) for protection reasons. He then became -- became taunting her, coming to the house to visit to try to see her banging on the door, throwing things, cursing, being very, very verbally abusive.
>
> I had worked approximately ten minutes away from where my home had lived and I used to call home a lot just to make sure that they were okay. There were occasions I've had to come home to witness what might be going on or him pulling Derick down the steps by the hair --

Q. When you say "Derick," who will you referring to?

A. I'm referring to my nephew. That's the name the family sort of gave him when he was very young because of the relationship with his father Stuart. We just did not want to recognize him as Stuart because of the problems that we had with his father in the family.

Q. Okay.

A. So we just started to call him Derick and it sort of was how it stuck. He was very, very abusive with him physically and verbally to the point where Derick would get very frightened of him and cry and scream a lot.

T4270-72.

His father took him into "the streets" and in pool halls and also introduced him to marijuana at age 13 T4291.

She also testified that Stuart's mom later married Lawrence Bardon T4273. Stuart was pleased to have a father in his life T4273. The relationship changed after Mr. Bardon had a child with Stuart's mom T4274-4275.

As soon as that child was born, his relationship with Derick totally severed to the point of being an abusive man. He would do things deliberately against Derick by buying his daughter things, bringing them into the house and I was a witness to that because he did that while Stuart stayed with me also in Florida when he came to visit me.

I also had his sister with me, and when he would come to the house he would deliberately brings things and smile and enjoy giving them to his daughter while his -- what was his son as he called sitting there and enjoyed his hostility of seeing Derick upset or frustrated.

T4274-4275.

Mr. Bardon also "physically abused" Stuart "by striking him" T4291.

The fourth area of mitigation is the undisputed testimony that Stuart was a loving and caring family member towards his aunt, mother and cousins T4275-4276,4306. Appellee incorrectly claims that trial counsel did not argue this. Counsel stated:

> He has always remained a devoted son. He has always remained a devoted relative, a devoted nephew, a devoted cousin and a he has a lot of love to give.

T4720. This is mitigation. Scott v. State, 603 So. 2d 1275 (Fla. 1992).

The fifth mitigator is the emotional instability and immaturity of Stuart Pomeranz. Dr. Caddy stated that Stuart suffers from an impulse control disorder T4412. He is like an "11 or 12 year old" emotionally T4415. This was unrebutted mitigation. Scott.

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 (Fla. 1986); Ross v. State, 474 so. 2d 1170 (Fla. 1985). The prosecutor conceded the underlying facts for this mitigator in his closing argument.

> 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.

Appellee claims that this should be rejected as counsel did not explicitly argue this mitigator in closing argument. It relies on Jones v. State, 652 So. 2d 346 (Fla. 1995). First, it must be pointed out that Jones is a death recommendation case. In a life recommenda-

tion case, the court's duty is to determine whether there are "facts on the record" on which a reasonable juror could rely. Cheshire. Secondly, Jones states:

> A trial court is not required to speculate as to mitigation that is not apparent from the record. See Muhammad v. State, 494 So. 2d 969, 976 (Fla. 1986) (trial court has no obligation to infer a mitigating circumstance that was not urged at trial and for which no evidence was presented), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987); cf Farr v. State, 621 So. 2d 1368 (Fla. 1993) (mitigating evidence must be considered when contained anywhere in the record).

652 So 2d at 352. It must be noted that trial counsel did argue these underlying facts in his argument on the CCP aggravator T4715-4716.

The seventh, eighth, and ninth areas of mitigation relate to doubts about Kinser's role and the resulting disparate treatment. A witness called by the prosecution and ultimately declared a court witness, Elizabeth Hernandez, directly contradicts Kinser's testimony. She stated that she saw Kinser in the store and not Stuart Pomeranz T2514-2516. This could cause the jury to believe that Kinser lied and reversed the roles. This is a reasonable basis for a life recommendation. Cooper v. State, 581 So. 2d 49 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Barrett v. State, 649 So. 2d 219 (Fla. 1994).

The only jury override cases relied on by Appellee are clearly distinguishable. Washinston v. State, 653 So. 2d 362 (Fla. 1994) involved a brutal beating and rape murder of a 93 year old woman by an escapee from a work release center. Thompson v. State, 553 So. 2d 153

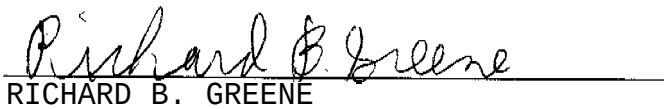
(Fla. 1989) involved a kidnapping torture murder by a defendant with a prior rape conviction. Carter v. State, 576 So. 2d 1291 (Fla. 1991) involved a double murder by a parolee. Torres-Arboledo v. State, 524 so. 2d 403 (Fla. 1988) involved a defendant with a prior murder conviction. None of these cases involve a 20 year old with neurological impairment, no original intent to kill, extensive child abuse, an older co-defendant sentenced to life and other mitigation. There are several reasonable bases for a life recommendation as the prosecutor agreed. This case must be reduced to life imprisonment.

## CONCLUSION

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

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600



RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

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 17th day of March, 1997.

Richard B. Greene

Of Counsel