IN THE SUPREME COURT OF FLORIDA

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DEC 18 1995
CLERK, SUPREME COURT
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CASE NO: 82,925

THOMAS MOORE,
Defendant/Appellant.

VS.

STATE OF FLORIDA,
Plaintiff/Appellee,
_____/

MERIT BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Thomas Moore is the Appellant in this capital case. The Record on Appeal consists of 15 volumes, and references to the pleadings and other matters of record will be referred to by the letter "R", while references to the transcripts will be denoted by the letter "T".

TABLE OF CITATIONS

CASES

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STATEMENT OF THE CASE

An indictment in the Circuit Court in and for Duval County, Florida, filed February 18, 1993, charged Thomas James Moore (Hereinafter MOORE) with the following: Count 1, Murder in the First Degree; Count 2, Attempted Armed Robbery; Count 3, Conspiracy to Commit Robbery; Count 4, Armed Burglary; Count 5, Arson; and Count 6, Possession of a Firearm by a Convicted Felon. (R3)

MOORE subsequently filed several motions and notices that are relevant to this appeal. They are:

1. Motion to Exclude Evidence on Argument Designed to Create Sympathy for the Deceased. (R214).

2. Motion Requesting Proffer of "Victim Impact Evidence". (R363).

3. Motion for New Trial (R490); and several requested jury instructions which shall be denoted later in this brief.

MOORE proceeded to trial before the Honorable John D. Southwood. At the close of the State's case, MOORE's Motions for Judgment of Acquittal were denied. (T1065). Count Six was not submitted to the jury. (R428-432).

After the Defense rested, and the trial court instructed the jury on the law, the jury found MOORE guilty of Counts 1, 2, 3, 4 and 5. (R428-432).

MOORE proceeded to the penalty phase of the trial, and the jury, after hearing additional testimony, recommended the death sentence for MOORE. (R489). The trial court agreed with the recommendation. In support of the death sentence, it found in aggravation that MOORE:

1. was previously convicted of violent felonies, to wit: armed robbery and aggravated battery.

2. committed the capital felony for the purpose of avoiding arrest.

3. committed the capital felony for pecuniary gain.

(R502).

In mitigation, the trial court acknowledged MOORE's young age, a statutory mitigating factor, but gave it "slight weight". (R503). The court further noted the testimony of witnesses who praised MOORE's character, but attached "no significance or value to this evidence". (R504).

As to the other convictions, the court found MOORE to be a habitual violent felony offender and imposed concurrent sentences of 30 years on Count 2, Armed Robbery; 10 years on Count 3, Conspiracy; life of Count 4, Armed Burglary; and life on Count 5, Arson. (R510-514).

MOORE filed a Motion for New Trial, which the trial court denied. (R490-496, 499).

This appeal follows.

STATEMENT OF THE FACTS

On January 21, 1993, THOMAS JAMES MOORE was a 19 year old black male living in Jacksonville, Duval County, Florida, in a large neighborhood generally known as Grand Park. (T1468; T1088-1089). He was friends with an adult resident of Grand Park, Johnny Parrish (Hereinafter PARRISH), and occasionally visited PARRISH at his home. (T1089-1090). Two other teenaged boys, Carlos Clemons (Hereinafter CLEMONS) and Vincent Gaines (Hereinafter GAINES), lived in the neighborhood, but MOORE did not know them prior to January 21, 1993. (T1094).

At about noon on January 21, 1993, MOORE saw CLEMONS pull a gun out of his pants and, along with GAINES, chase a neighborhood boy, Little Terry, down the street. (T1094). MOORE spent the next few hours visiting with various neighborhood friends, including Chris Shorter, at whose house he visited until approximately 3:00 p.m. (T1097).

At about 3:00 p.m., MOORE and his friend Johnetta Whitfield were walking through the neighborhood when they passed PARRISH's house, and PARRISH called MOORE over. (T-1100). MOORE and PARRISH sat outside PARRISH's house to drink some moonshine. (T1103).

As the three boys sat in front of PARRISH's house drinking and talking with PARRISH, CLEMONS and GAINES approached. (T1103). MOORE told PARRISH about seeing the pair chase Little Terry with a gun earlier that day, and PARRISH commented that the gun-toting pair better not come around his house because he, too, had a gun. (T1104). Shortly thereafter, MOORE and his friends left PARRISH's house, and MOORE

had a conversation with CLEMONS and GAINES on the street in the neighborhood. (T1105).

MOORE testified that the conversation was about CLEMONS and GAINES chasing Little Terry. (T1106). CLEMONS and GAINES testified that the conversation was about robbing PARRISH. CLEMONS testified that MOORE said he knew where they could get some money and pointed at PARRISH's house. (T787). CLEMONS testified that he agreed to go in the house with MOORE, and GAINES agreed to stand outside as a lookout and make noise if anyone was coming. (T790-791).

GAINES testified that he stood on the corner outside PARRISH's house, but did not see CLEMONS or MOORE go into the house. (T547). He said he heard two gunshots, and then saw CLEMONS take about five steps out the front door, turn around, and go back in the house. (T548). GAINES started walking away, and CLEMONS again emerged from the house, joined GAINES, and told him that MOORE had shot PARRISH. (T548-549). GAINES testified that he never saw MOORE leave the house. (T550-551).

CLEMONS' testimony was that he and MOORE went into PARRISH's house together, and the three drank some moonshine. (T795). He testified that the three were walking down the hallway when MOORE pushed him out of the way, pulled out a gun, asked PARRISH where the money was and, getting no response, shot PARRISH in the chest. (T796). He said he heard a second shot but did not see it, about two seconds after the first shot. (T800). He testified he then ran out the front door and joined GAINES, and ran home. (T804-805).

MOORE denied planning a robbery during his conversation with CLEMONS and GAINES on the street and said after talking with them about chasing Little Terry, he stopped back by PARRISH's house, talked to PARRISH for a while alone, and then left. (T1106-1107). Shortly thereafter, neighbors noticed smoke coming from PARRISH's house, and Bobby Kennedy entered the burning house, found PARRISH in a kneeling, slumped over position, and pulled him out of the house. (T691).

The medical examiner testified that PARRISH had been shot once in the head and once in the chest, and opined that PARRISH was already dead when he was exposed to the fire. (T736-737). The fire examiner testified that there were two separate fires in the house, both, in his opinion, intentionally set. (T905).

Christopher Shorter claimed that after the fire MOORE brought him a bag of clothes and asked him to burn them. (T995). Shorter also testified that, two days after the fire, Thomas Moore told him he shot PARRISH (T1000-1001) and set fire to the house. (T1003). A jailhouse informant, Randy Jackson, was serving a county jail sentence for a felony and testified that in the jail MOORE admitted to him that he killed Parrish. (T967). Another neighborhood teen, Larry Dawsey, testified over objection that two days after the shooting and fire MOORE showed him a pistol and said he was going to kill someone because he was tired of "everybody" saying he had killed Parrish. (T714).

SUMMARY OF THE ARGUMENT

In the case at bar, the trial court committed numerous errors, both in the trial phase and the penalty phase, each of which requires reversal.

First, the trial court erred in limiting defense counsel's cross-examination of the two key State witnesses, Carlos Clemons and Vincent Gaines, who were Defendant Thomas Moore's co-defendants and accomplices. Specifically, defense counsel was attempting to establish that CLEMONS and GAINES possessed a firearm shortly before the shooting, and that they chased a little boy through the neighborhood with the gun. This was imperative for the defense to establish its theory that CLEMONS was the real killer, and that CLEMONS and GAINES were lying in accusing MOORE of the murders. By shutting down defense counsel's cross-examination on this crucial point, the trial court violated MOORE's Fifth and Sixth Amendment rights.

Second, the trial court erred in limiting defense counsel's cross-examination of the fire captain on whether or not accelerants were used to start the fire in the victim's house. This evidence was critical for the defense in that it could have impeached the testimony of a key State witness, Christopher Shorter, as to how MOORE said the fire started. Because the court's curtailment of cross-examination prevented the defense from developing crucial impeachment evidence, the error was reversible.

Third, the trial court violated Defendant MOORE's due process right to a fair trial by repeatedly making improper comments on the evidence and the credibility of defense counsel in the presence of the jury.

Fourth, the trial court erred in admitting the testimony of Larry Dawsey that two days after the shooting, Defendant MOORE showed him a firearm and said he was going to kill someone if people didn't stop accusing him of murder. This testimony was irrelevant and immaterial, and served only to attack the Defendant's character and demonstrate him propensity for violence. Any slight probative value this testimony could have possibly had was far outweighed by its prejudicial effect.

Fifth, the trial court erred in admitting into evidence the prior consistent statement of key State witness Carlos Clemons, made to police, ostensibly to rebut recent fabrication. Because no charge of recent fabrication was made, this prior statement served only to bolster CLEMONS' trial testimony, which is impermissible.

Sixth, at penalty phase, the trial court erred in allowing the victim's daughter to testify that he was a good, kind person. This testimony did not fall within the parameters of permissible victim impact evidence as defined in Section 921.141(7), Fla. Stat. Therefore, a new penalty phase is required.

Finally, the trial court erred at penalty phase in allowing the State to turn mitigation into non-statutory aggravation in arguments to the jury. Only the aggravators listed in the statute are permissible at penalty phase, and the use of non-statutory aggravation deprived Appellant MOORE of his due process right to a fair hearing at sentencing.

Each trial error requires reversal of MOORE's convictions, and both sentencing errors require remand for re-sentencing.

ARGUMENT - ISSUE ONE

THE TRIAL COURT ERRED IN LIMITING DEFENDANT THOMAS MOORE'S CROSS-EXAMINATION OF KEY STATE WITNESSES VINCENT GAINES AND CARLOS CLEMONS ON CRUCIAL POINTS OF FACT.

The two key State witnesses against Appellant MOORE were his alleged accomplices, GAINES and CLEMONS. During cross-examination of GAINES, defense counsel wished to ask him whether he and CLEMONS, armed with a gun, had confronted and chased a boy named Little Terry through the victim's neighborhood earlier on the day the victim was shot. Defense counsel proffered the questions at sidebar and the trial court refused to allow the bulk of the questions, saying that GAINES had already testified that he was not with CLEMONS at that time of day. (T566-568).

Later, during cross-examination of CLEMONS, defense counsel attempted to ask CLEMONS what he did with the gun he had in his possession on the day of the victim's shooting death. (T 826). The trial court refused to allow the question, saying, "There is no evidence of that anywhere." (T826). Defense counsel then asked a series of questions and CLEMONS admitted that he and GAINES had chased Little Terry down the street. (T829). But when defense counsel followed up with the crucial questions, "Now, is it your testimony that you were not armed with a firearm at that time?", the trial court sustained an objection and refused to allow the question. (T828).

The incident in which GAINES and CLEMONS chased Little Terry through the neighborhood with a gun was critical to the defense theory of the case - that CLEMONS, not Appellant MOORE - killed PARRISH, and that GAINES and CLEMONS were lying. (T1260). The incident also was crucial for impeachment inasmuch as GAINES denied

the incident took place at all (T568-569), while CLEMONS admitted chasing Little Terry but denied having a gun at all that day, (T829), and witness Willie Reese said GAINES and CLEMONS chased Little Terry but didn't mention whether they had a gun or not. (T609-613). The Appellant, MOORE, testified that GAINES and CLEMONS chased Little Terry with a gun, (T1094), and Little Terry himself testified that Gaines and CLEMONS chased him, and that CLEMONS started to pull out a gun. (T1189-1190).

Because the incident was critical to the defense theory and for impeachment of key State witnesses GAINES and CLEMONS, the trial court's refusal to allow defense counsel to fully explore the incident on cross-examination of GAINES and CLEMONS was an abuse of discretion and reversible error.

Wide latitude is permitted on cross-examination in a criminal proceeding. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. den. 102 S.Ct. 2257, reh. den. 102 S.Ct. 3500. The standard of review for limiting cross is whether the limitation constituted an abuse of discretion. Id. at 969. Limiting cross-examination is particularly harmful where the witness is a key State witness against the defendant. Rivera v. State, 462 So.2d 540, 544 (Fla. 1st DCA 1985); Porter v. State, 386 So.2d 1209, 1213 (Fla. 3d DCA 1980); Stradtman v. State, 334 So.2d 100, 101 (Fla. 3d DCA 1976).

Not only were GAINES and CLEMONS key State witnesses, they were also accomplices. Testimony of an accomplice is disfavored and is to be closely scrutinized. Wolfe v. State, 190 So.2d 394, 395 (Fla. 1st DCA 1966). Therefore, great latitude should be permitted in cross-examining an accomplice who testifies for the State against the Defendant. Powe v. State, 413 So.2d 1272, 1273 (Fla. 1st DCA 1982). As set forth

above, the trial Court not only refused to allow "great latitude" in Appellant MOORE's cross-examinations of his two accomplices, but even prevented the defense from fully developing crucial impeachment evidence. This limitation constituted an abuse of discretion because full and fair cross-examination is a right, not a privilege. Rivera at 543.

The evidence defense counsel sought to elicit on cross examination of GAINES and CLEMONS was critical to establish that Appellant MOORE's two co-defendants were in possession of a gun the day PARRISH was shot, and could have corroborated the testimony of Appellant MOORE and Little Terry. But the trial court cut the cross-examinations off, thwarting the defense's efforts to present its theory of the case and impeach the testimony of the State's two key witnesses. The trial court's "discretion" does not, and should not, extend so far as to disable the defense in a death penalty case. This Court emphasized this point in Coxwell v. State, 361 So.2d 148 (Fla. 1978):

> Where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to the witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

Id. at 152.

This Court further illuminated the issue in Steinhorst v. State, 412 So.2d 332 (Fla. 1982), explaining that the two purposes of cross-examination are: (1) to weaken, test, or show the impossibility of the witness' direct testimony; and (2) to impeach the witness' credibility. Id. at 337. In the case at bar, full and fair cross-examination of GAINES and CLEMONS regarding their possession of a gun and violent actions a few hours before

PARRISH was shot would have weakened and tested their direct testimony that Appellant MOORE did the shooting. Similarly, such cross-examination would have impeached their credibility because their respective versions of the incident conflicted with each other and also with the testimony of Appellant MOORE and Little Terry.

The limitation on Appellant MOORE's cross-examination of these two key State witnesses impinged upon his Sixth Amendment and due process rights to fully confront his accusers at trial. Therefore, the trial Court abused its discretion and committed reversible error in limiting these key cross-examinations, and Appellant MOORE's convictions must be reversed.

ARGUMENT - ISSUE TWO

THE TRIAL COURT ERRED IN LIMITING DEFENDANT THOMAS MOORE'S CROSS-EXAMINATION OF THE FIRE CAPTAIN, REFUSING TO HEAR A PROFFER OF THE QUESTIONING, AND DENYING THE RESULTING DEFENSE MOTION FOR A MISTRIAL.

In addition to the limitations on the cross-examinations of the two accomplices, the trial Court improperly limited defense counsel's cross-examination of Captain Earl David Mattox, Jr., a fire arson investigator with the Jacksonville Fire Department and another important State witness. Mattox testified that there were two separate points of origin in PARRISH's house, and that the cause of the fires was arson. (T905). He opined that the fires were set by lighting a combustible material such as clothing or paper. (T912).

On cross-examination, defense counsel inquired whether any accelerants - flammable liquids such as gasoline - were present, and Mattox said no. (T917-920). Defense counsel then asked the arson expert: "If you have any question at all in your mind as to whether or not some sort of flammable liquid has been used, you have available to you, do you not, the Office of the Florida Fire College Laboratories; is that right?" (T920). Mattox answered affirmatively, and defense counsel then asked, " And they have gaschromatography machines--". At this point, the State interrupted the defense with an objection as to relevance, which the trial court quickly sustained. (T920). Defense counsel then asked to proffer the proposed questioning, and the trial Court refused to allow the proffer. (T920). Defense counsel's request for a mistrial was then denied by the trial court. (T921).

The line of questioning about the absence of accelerants in the fire and the scientific methods of ensuring that no accelerants were used was crucial to the defense because it could have impeached the credibility of State witness Christopher Shorter. Shorter testified that after PARRISH's death, Appellant MOORE "confessed" to him that he had killed PARRISH. (T1000). Shorter went on to claim that MOORE said he used a lawn mower in the house to set the house on fire, taking the top off the mower and using the gasoline as an accelerant. (T1003).

It was imperative for defense counsel to be able to show that Shorter was lying about MOORE's statement. The best way to show this was to establish conclusively, through Captain Mattox, that the fire was not started by use of the gasoline from a lawn mower. This is what defense counsel was attempting to do on cross-examination of Captain Mattox, and the trial court curtailed such efforts, hobbling the defense and even refusing to hear a proffer so that relevance could be properly determined.

Conversely, if Shorter was telling the truth and the fire was in fact set with gasoline from the lawn mower, then Captain Mattox was wrong about the absence of accelerants in the house, and his own credibility was in question. Either way, defense counsel was unable to attack the credibility of key State witnesses because the trial court cut off this important cross-examination.

Limiting the Defendant's ability to show that a State witness' testimony is implausible and to impeach the credibility of state witnesses violates the Defendant's Sixth Amendment and due process rights to confront his accusers. Steinhorst at 337. Furthermore, the Defendant has a right to present the whole picture to the jury, not just

bits and pieces. In Alexander v. State, 627 So.2d 35 (Fla. 1st DCA 1993), the Appellate Court reversed the Defendant's capital conviction because the trial court's restriction of cross-examination prevented the Defendant from "presenting the complete picture of the circumstances of the shooting..." Id. at 44. Here, the trial court prevented MOORE from showing the whole picture, amounting to an abuse of discretion. Such an abuse may easily constitute reversible error. Coxwell at 152. The abuse of discretion in the case at bar calls for a reversal of MOORE's convictions.

Furthermore, the trial court compounded its error in limiting cross-examination by refusing to allow a proffer of the proposed questions and Captain Mattox's answers. "Generally, the refusal of the trial court to allow a proffer prevents a determination of the propriety of the trial court's ruling and is reversible error." McGriff v. State, 601 So.2d 1320, 1321 (Fla. 2d DCA 1992). "In general, a trial court commits error if it denies a request to proffer testimony which is reasonably related to issues at trial." Jenkins v. State, 547 So.2d 1017, 1022 (Fla. 1st DCA 1989).

In the case at bar, the testimony about accelerants was not only reasonably related to issues at trial, but also crucial impeachment evidence. Therefore, the trial court's refusal to hear the proffer, as well as its limitation of the cross-examination, was reversible error. Because the error was reversible, the Defendant's motion for mistrial was improperly denied.

ARGUMENT - ISSUE THREE

THE TRIAL COURT ERRED BY REPEATEDLY MAKING PREJUDICIAL REMARKS IN THE PRESENCE OF THE JURY WHICH CONSTITUTED COMMENTS ON THE EVIDENCE AND DISPARAGEMENT OF THE DEFENSE, AND THE CUMULATIVE EFFECT OF THESE REMARKS DENIED THOMAS MOORE HIS RIGHT TO DUE PROCESS OF LAW.

Throughout the course of the trial, the trial judge repeatedly made comments on the evidence and comments rebuking and disparaging defense attorneys, Charles Cofer and Patrick McGuinness. The remarks are too numerous to list here, but following are examples of improper comments on the evidence:

- Cofer asked key State witness Gaines if he did anything to get the State to drop murder charges against him, and the State objected. Said the Court: "Well, he didn't do anything, just like Ms. Corey (the prosecutor) didn't indict anybody, Mr. Cofer." (T581).

- The State objected to Cofer asking Gaines when he expects to get out of prison. Said the Court: "He might think he's going to get out last week, Mr. Cofer. But that ain't true either." (T582).

- At one point, the judge said, "I'm not sure how any of the testimony that you or Ms. Corey is eliciting does anything." (T587). Defense counsel then asked for a sidebar and requested the Court to stop making improper comments, which the judge denied doing. (T587-590).

- The State handed witness Gaines a copy of a statement he had made to Detective Conn, and the defense objected, explaining that the defense had never brought up the statement. Said the Court: "That confused everybody." (T647).

- Defense counsel McGuinness asked an expert witness about body positions and shooting angles, and the State objected. Said the Court: "He is not an expert on how tall somebody is when they are kneeling, I don't think, Mr. McGuinness." (T756).

- Defense counsel McGuinness posed hypothetical questions to the State's expert, and the State objected. Said the Court: "Well, I think the answer is obvious." (T757).

- Witnesses were physically demonstrating the shooting scenario, and Cofer asked that the record reflect that the witness was standing about six feet away from the other demonstrator. Said the Court: "I don't know if that's accurate or not, but if you want to say so." (T798).

- The State objected to Cofer's question to co-defendant Clemons about what he did with a gun he had in his possession the day of the shooting. The State objected to the lack of predicate, and the Court sustained the objection, adding, " There is no evidence of that anywhere." (T826).

- When the defense objected to the State's use of a witness' prior consistent statements, the Court said, referring to the witness: "He hasn't admitted everything is false. Let's let her (the prosecutor) rehabilitate him if she can."

The trial court's statement, in the presence of the jury, that a State witness which the defense had already argued was presenting impermissible and prejudicial testimony to begin with, could be further "rehabilitated" by the State, compounded its initial prejudicial and reversible error.

Florida Statutes 90.106 clearly states, "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of a witness or the guilt of the accused." That means a judge may not comment on the evidence in the presence of the jury. Jones v. State, 6123 So.2d 1370, 1373 (Fla. 1992), cert. den. 114 S.Ct. 112, 126 L.Ed.2d 78. Any comment the judge makes should be nothing more than a direct response to defense counsel's legal argument, and should be a neutral ruling on the objection. Huff v. State, 495 So.2d 145, 148 (Fla. 1986).

The Fifth District Court of Appeal eloquently explained the reasons for this rule in March v. State, 458 So.2d 308 (Fla. 5th DCA 1984):

> Any comment by a trial judge made in the course of a jury trial which expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of the accused poses a threat of interfering with the jury's independent and impartial evaluation of the evidence. The dominant position of a judge in a case tried by a jury is such that his remarks or comments, especially if they relate to the proceedings before him, overshadow or tend to overshadow the actions of litigants, witnesses or other court officials. For this reason, comments on the evidence by a judge are prohibited and a judge should scrupulously refrain from any comments which could be so construed.

Id. at 310-311.

Here, every remark of the trial judge listed above was made in the presence of the jury, and every remark was a comment on the evidence. The remarks, both individually and when taken as a whole, were an abuse of discretion which invaded the province of the jury and therefore impinged upon Appellant MOORE's due process right to a fair trial.

Moreover, the trial court repeatedly rebuked defense counsel in front of the jury and made disparaging remarks about defense counsel's honesty and ethics, repeatedly implying to the jury that the defense was somehow "cheating." Examples follow:

- The judge said to witness Gaines: "Mr. Gaines, let me explain something to you. You don't have to tell Mr. Cofer what you discussed with your lawyer. You may, but you don't have to. Mr. Cofer is aware of that, too." (T580).

- Said the Court at one point, "Mr. Cofer, you are being so repetitive", followed by a lengthy rebuke in front of the jury, despite defense counsel's request for a sidebar. (T584).

- The State objected to a question by McGuinness as argumentative. The Court: "That is argumentative. I agree. Sustain the objection. Mr. McGuinness is probably aware of that also."

- Cofer asked a State witness about some marijuana charges. In ruling on the State's objection, the Court said: "Mr. Cofer knows that...You know that we don't need to discuss it. It's an improper question. Okay?" (T819-820).

- Cofer asked Clemons if his attorney told him he had to withdraw a previously negotiated plea. The Court broke in to advise Clemons that he did not have to answer, and added: "Mr. Cofer, of course, is aware of that, too, I assume." (T822).

- At one point the Court said to defense counsel, "Yes sir, you can approach the bench one more time." (emphasis added.) (T824).

- Cofer asked the Court if he could have "a moment". Said the Court: "Everybody uses that term. I think we ought to eliminate that from this trial. Go ahead. It doesn't seem to happen." (T1146).

- Said the Court to Cofer upon an objection from the State: "It's obviously hearsay, Mr. Cofer. You know that." (T1107).

In short, the trial court began rebuking defense counsel early in the trial and never let up, disparaging the defense repeatedly in the presence of the jury. This was an abuse of discretion. A trial judge abuses his or her discretion when he rebukes defense counsel so severely that it calls into question the attorney's ability as an advocate and sense of fairness, resulting in prejudice to the client. McDonald v. State, 578 So.2d 371, 373 (Fla. 1st DCA 1991), review den. 587 So.2d 1328; Wilkerson v. State, 510 So.2d 1253, 1254 (Fla. 1st DCA 1987).

In Alley v. State, 619 So.2d 1013 (Fla. 4th DCA 1993), the appellate court reversed the Defendant's conviction because the hostile exchanges between the judge and defense counsel were "reasonably likely to create a prejudicial effect on the defendant." Id. at 1015. The reversal was required even though the evidence of guilt was great. Id. So severely questioning defense counsel's level of advocacy and sense of fairness allows the trial court to "visit his attitudes on the defendant." Wilkerson at 1253.

In the case at bar, the combination of the trial judge's improper comments on the evidence and improper rebukes and derision of the defense attorneys worked to deny Appellant MOORE a fair and impartial trial. Accordingly, MOORE's convictions must be reversed.

ARGUMENT - ISSUE FOUR

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY BY LARRY DAWSEY THAT DEFENDANT THOMAS MOORE WAS IN POSSESSION OF A FIREARM TWO DAYS AFTER JOHNNY PARRISH'S DEATH.

At trial, over vigorous objection from defense counsel (T711-713), the State was permitted to present the testimony of Larry Dawsey, a neighborhood acquaintance of Appellant MOORE. Dawsey testified that, a couple of days after PARRISH's death, he ran into MOORE at a Chinese supermarket in the neighborhood. (T711). Dawsey testified that MOORE said "he was going to kill someone because he was tired of everybody telling him he killed that man." (T714). According to Dawsey's testimony, MOORE showed him a "black, brown-like" pistol while making the statement. (T714). Dawsey could not identify the gun, but said he thought (emphasis added) it was a .38 with a long barrel. (T714-715).

The trial court erred in admitting this evidence because Dawsey's entire testimony was irrelevant and immaterial and served only to depict MOORE as a gun-toting bad man with a propensity for murder.

Because the count of possession of a firearm by a convicted felon did not go to the jury, the state could not have been presenting the evidence that MOORE had a gun two days after the murder to prove an element of a charge against MOORE. Evidence of other bad acts is inadmissible in a criminal case where its only relevancy is to attack the defendant's character or show his propensity for crime. Vazquez v. State, 419 So.2d 1088, 1090 (Fla. 1982). The testimony that MOORE had a gun days after the murder did just that.

Furthermore, absolutely no proof was presented that MOORE's gun was the murder weapon; the testimony was merely proof that MOORE committed another, separate crime. Even if the evidence is sufficient to prove a defendant guilty of a crime other than but similar to the crime charged in the information, such proof is irrelevant. Fastow v. State, 54 So.2d 110 (Fla. 1951).

In addition, the statement MOORE allegedly made while brandishing the weapon had no bearing on any issue in the case, and was therefore irrelevant, bad-character evidence that should have been excluded.

Finally, even if MOORE's statement and/or possession of a firearm two days after the murder bear some small measure of probative value, it is far outweighed by the prejudicial effect of Dawsey's statement. Therefore, the evidence should have been excluded under §90.403, Fla. Stat. (1979). Vazquez at 1090.

Because Larry Dawsey's testimony was improperly admitted, Appellant MOORE's convictions must be reversed.

ARGUMENT - ISSUE FIVE

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A COPY OF CO-DEFENDANT CARLOS CLEMONS' WRITTEN STATEMENT GIVEN TO POLICE AT THE TIME OF HIS ARREST.

At trial, during the testimony of Detective Christi Conn, the State introduced into evidence a copy of the written statement given to police by CLEMONS, Appellant MOORE's co-defendant and the State's star witness. Defense counsel's objection as to hearsay was overruled. (T932-934). The statement was admitted ostensibly as a prior consistent statement to rebut a charge of recent fabrication.

Section 90.801(2)(b)(1989), Florida Statutes, provides that prior consistent statements are not hearsay and are admissible if offered to rebut an express or implied charge against the witness of improper influence, motive or recent fabrication. The standard of review for the admission of such statements is abuse of discretion. Jenkins supra. at 1020.

Here, defense counsel mounted a lengthy cross-examination of Clemons. He focused on Clemons' own plea bargaining and bias as a co-accused (T815-818); his possession of a firearm and chasing of a boy through the neighborhood on the day of the shooting (T826-828); and his close friendship with co-defendant GAINES and other State witnesses. (T830-832). He also took Clemons back through the details of the shooting he relayed to the jury on direct examination. (T832-848).

During cross-examination, defense counsel utilized Clemons' written statement to police and his deposition testimony to point out inconsistencies between Clemons' pretrial version of events and his trial version. (T843-847). At no time did defense

counsel make an express or implied charge against Clemons of improper influence, motive, or recent fabrication; defense counsel merely pointed out inconsistencies as part of his multi-pronged attack on Clemons' credibility.

In McDonald the appellate court held that the victim's prior statement to police was improperly admitted into evidence, explaining:

> In this case, while cross-examination of the victim did point out inconsistencies in her pre-trial and trial versions of events, there was no indication that she was changing her story at trial, or of improper influence or a motive to falsify.

Id. at 373.

Similarly, in the case at bar, there was no indication by defense counsel that Clemons was changing his story at trial; the implication was, simply, that Clemons was a liar. "A witness' credibility is always an issue at trial, and a general attack on that credibility does not satisfy the hearsay exception rule." Jenkins at 1021.

Because no charge of recent fabrication was made against Clemons, his prior written statement to police was offered into evidence only to bolster his direct testimony. Prior consistent statements of a witness are inadmissible to corroborate or bolster the testimony of the witness at trial. Jackson v. State, 498 So.2d 906 (Fla. 1986).

In short, the trial court abused its discretion by allowing the State to use what was clearly hearsay to bolster the testimony of the State's key witness against Appellant MOORE. Therefore, MOORE's convictions must be reversed.

ARGUMENT - ISSUE SIX

THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE WHICH DID NOT FALL WITHIN THE STANDARD SET FORTH IN SECTION 921.141(7), FLORIDA STATUTES (1992).

At the penalty phase of the proceedings, over vigorous objection by defense counsel, the trial court permitted the State to present victim impact evidence through the testimony of the victim's daughter, Doris Parrish. (T1464-1467). Ms. Parrish testified, "My dad was a good man. He never bothered nobody. And he was very free hearted, you know. He loved everybody." (T1466).

This testimony was improper victim impact evidence which deprived Thomas Moore of his due process right to a fair trial.

Section 921.141(7), F.S., allows victim impact evidence only if it is "designed to demonstrate the victim's uniqueness as an individual human being, and the resultant loss to the community's members by the victim's death." This statute was enacted in the aftermath of the U.S. Supreme Court's decision in Payne v. Tennessee, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), which held that it is up to each State to make rules on the admission of victim impact evidence. After the Statute was enacted, this Court found it facially constitutional in Windom v. State, 656 So.2d 432 (Fla. 1985), and specifically noted that the statute allows evidence regarding the victim's character only to show that the victim was unique in the community. Id. at 438.

In the case at bar, the daughter's testimony amounted to a mere pronouncement that her father was a good, decent person. She said that he didn't bother people and he loved everybody. (T1466). What makes him "unique" in the community? That

question cannot be answered because there was no testimony about the community or the "uniqueness" of any of its members, including PARRISH. To argue that being a good, loving person is a "unique" character trait is an unbelievable stretch, presupposing that the other members of the community are not good and not loving. Allowing such testimony does nothing but permit the jury to be swayed by sympathy for the good and loving victim. This violated the high court's admonition that death-penalty proceedings must "seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner." Proffit v. Florida, 432 U.S. 242, 252-253, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Because the testimony of the victim's daughter was a commentary on the good character of the victim rather than a demonstration of his unique value to his community, the victim impact evidence violated § 921.141(7), F.S., and was improperly admitted. Therefore, Appellant MOORE's death sentence should be reversed because his due process right to a fair trial was trounced by the admission of improper penalty phase evidence designed only to arouse sympathy for the victim.

ARGUMENT - ISSUE SEVEN

THE TRIAL COURT ERRED IN PERMITTING THE STATE DURING PENALTY PHASE TO UTILIZE MITIGATION AS NON-STATUTORY AGGRAVATION.

During closing argument of the penalty phase, the prosecutor made the following argument to the jury:

> I would submit to you that the Defense put on a lot of mitigation. They brought in, as I told you, all of the wonderful people who had known this defendant his entire life, who nurtured him, who loved him, who spent holidays with him, who said that he was treated just like their son, their brother, their cousin. That he did well in school. That he played football. That he had a normal life. And, ladies and gentlemen, it may sound like mitigation, but to me it's the most--well, I would submit to you that it's the most aggravating factor of all. That he alone--

(T1527).

At this point, defense counsel objected and asked to approach the bench, and the judge refused to allow it. (T1527). Defense counsel then asked to voice his objection at the end of the argument, which the judge allowed. (T1527).

Then, the prosecutor continued her argument to the jury as follows:

> Ladies and gentlemen, look at these photographs that the defense put in. they show a young man who was loved, they show a young man who gave love and got love. It could be mitigation that he was that type of person, but I would submit to you that is all the more reason that he should not have committed any of these crimes; because he did grow up in a decent, loving environment....

(T1527-1528).

Defense counsel again asked to approach the bench and was denied permission, and reserved his objection to the close of argument. (T1528-1529). Then, he vigorously

objected that the prosecutor's use of mitigation evidence as an aggravating factor, and the trial court overruled the objection. (T1549).

The prosecutor's comments constituted impermissible use of a non-statutory aggravating factor and severe prosecutorial misconduct as well.

The only aggravating factors the prosecutor may present and the jury and judge may consider are the statutory aggravating factors enumerated in §921.141(5), F.S. (1987). Aggravating factors to be considered in death cases are limited to those set forth in the statute. Vining v. State, 637 So.2d 921, 927 (Fla. 1994).

Here, the prosecutor took mitigation evidence presented by the defense and turned it into a non-statutory aggravating factor. This is clearly impermissible, since the only allowable aggravators are those listed in the statute. Thus, the prosecutor was arguing an invalid aggravating factor. The jury is not permitted to weigh an invalid aggravating circumstance because doing so violates the defendant's Eighth Amendment rights. Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854, 858 (1992). Even indirect weighing of an invalid aggravating factor creates the potential for arbitrariness in death cases. Id. at 120 L.Ed.2d 859.

Not only is it error for evidence of a non-statutory aggravator to be admitted, Walton v. State, 547 So.2d 622, 625 (Fla. 1989), cert. den. 110 S.Ct. 759, 493, U.S. 1036, 107 L.Ed.2d 775, but it also can indicate that the trial court failed to follow the correct weighing process, which requires a new sentencing. Barclay v. State, 470 So.2d 691, 695 (Fla. 1985). Considering the Defendant's good upbringing as an aggravating factor was an action by first the jury, and then the Court that "transcended the list of

aggravating factors set forth in the Florida statute and substituted its own judgment of what circumstances justify capital punishment for that of the Florida Legislature." Proffit v. Wainwright, 685 F.2d 1227, 1267 (U.S.Ct.App. 11th Cir., 1982). Doing so violated Appellant MOORE's Eighth Amendment rights. Id. at 1268. Accordingly, MOORE's death sentence must be reversed.

Finally, the prosecutor's remarks, attempting to turn mitigation into aggravation, were so clearly improper that they constitute clear prosecutorial abuse. An automatic reversal for re-sentencing is warranted when clear prosecutorial abuse exists. Bush v. State, 461 So.2d 936,942 (Fla. 1984), cert.den. 106 S.Ct. 1237, 475 U.S. 1031, 89 L.Ed.2d 345. Appellant MOORE's death sentence must be reversed due to the prosecutor's abuse.

CONCLUSION

In light of the multiple reversible errors committed by the trial court in this cause it is submitted and requested that this Honorable Court reverse the judgment and sentence of guilt entered against the Defendant in this cause and remand this cause back to the trial court for a new trial as to guilt and/or re-sentencing.

It is so prayed.

Respectfully Submitted,

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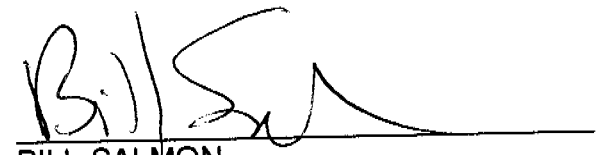
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: RICHARD MARTELL, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, by U.S. MAIL this **15th** day of **December**, 1995.

BY: 

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