IN THE SUPREME COURT
OF THE STATE OF FLORIDA

KENNETH M. TERRY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 83,002

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 17, 1992 Kenneth M. Terry, was indicted on charges of First Degree Murder and Armed Robbery for a robbery and murder which occurred July 14, 1994 (R[1] 107-108). On November 16, 1993 the State filed a Direct Information on Principal to Aggravated Assault (R 790). This charge was consolidated with the murder charge for trial (R 797).

The State moved for samples of blood for DNA testing (R 116). Appellant responded to the motion for blood samples, and the motion was denied (R 117-130, R 134). The State filed an Amended Motion to Take Blood (R 359-360). Appellant responded (R 361-364). The amended motion was denied without prejudice after a hearing on April 27, 1993 (R 398, 924-944). The State filed a Second Amended Motion to Take Blood (R 504-505). This motion was granted after a hearing on July 26, 1993 (R 565, 1167-1235)[2].

Appellant filed a Motion of Suggestion of Conflict alleging the Public Defender had a conflict of interest which precluded them from representing Demon Floyd, the co-defendant, through whom the State was expected to present adverse testimony (R 138-247). After

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[1]"R" refers to record on appeal and runs from page 1 - 1337, Volumes 1 through 8.
"T" refers to transcript of trial and runs from page 1 - 2110, Volumes 10 through Volume 22.
The depositions in Volume 10 will be referred to by volume, the name of the deposition and page number.
"SR" refers to the Supplemental Record. Depositions in the Supplemental Record will be referred to by volume, the name of the deposition and page number.

[2]Appellant filed a Petition for Writ of Certiorari in the Fifth District Court of Appeal on this issue, Case No. 93-2038. (R 1236)

a hearing on February 1, 1993, and February 2, 1994, this motion was denied with a finding the Appellant did not have standing to raise the issue (R 318, 825-869). Appellant also filed a Motion in Limine regarding the testimony of Demon Floyd (R 442-444). This motion was taken under advisement (R 528) and later denied (R 547).

Appellant filed a Motion to Suppress Evidence Obtained through an Unlawful Search and Seizure (R 255-312). The basis of the motion was that the search of Appellant's home was based on a search warrant obtained through deliberately or recklessly false statements. The motion was heard March 1 and March 26, 1993, and denied (R 400-406, SR 14-88, R 876-917). Appellant moved for rehearing (R 475), which was denied (R 544). At the hearing, Valerie Floyd testified that she did not consent to the search of her apartment on July 28, 1992 (SR 2-19). Detective Ladwig had prepared the search warrant based on information received from Audrin Butler (SR 2-22). Detective Ladwig did not know Butler and had only used him in this investigation (SR 2-23). The only crime on which Butler had provided information previously was a homicide. The information had been provided on this homicide to Dave Damore (SR 2-24-26). Detective Ladwig did not know whether Butler had ever testified in the case (SR 2-27). The details of the crimes about which Butler reported had been released to the public (SR 2-38). Butler received a $5,000.00 reward for the information regarding robberies (SR 2-46). Officer Wright did not know Butler, either (SR 2-81). Butler had been saving newspaper clippings and conducting his own investigation (SR 2-88). Audrin Butler

testified he had prior convictions (R 891). The trial judge found that the characterization of Butler (the informant) as a concerned citizen was not misleading or false, that the police did not have to establish Butler's reliability, and the failure of the search warrant affidavit to reveal the reward was not misleading or false (R 400-402). The trial judge found that Detective Ladwig's statements on the affidavit regarding knowledge of Butler were "at least" recklessly false and there was an error in the dates (R 403). However, the court found the information provided by Butler was not a "parroting" of information received from newspapers and other sources and the date did not render the search warrant defective; therefore, the erroneous statement could be set aside and the search warrant remain valid (R 404-406). At trial defense counsel objected to the admission of the items seized (T 1014, 1086).

Appellant filed a Motion to Compel Disclosure of the laboratory notes of FDLE analysts (R 395-397). The Motion was granted and the State ordered to provide the defense with copies of the laboratory notes of the FDLE analysts (R 399, 944). FDLE appeared through counsel and filed a Motion for Rehearing (R 480-481). Appellant moved to strike FDLE's motion for rehearing since FDLE was not a party to the cause (R 491-495). At a hearing on the Motion for Rehearing, the trial judge ruled the notes were not discoverable and sealed them in the record (R 1143). At trial, defense counsel objected when an FDLE expert referred to his notes (R 1390).

Appellant filed a Motion in Limine: Testimony Regarding Position of Victim Prior to Shooting which was granted as to Detective Ladwig and the Medical Examiner, Dr. Reeves (R 488-89, R 529, 1045). Due to Dr. Reeves' illness at the time of trial, Dr. Steiner was the acting Medical Examiner (T 904). Appellant later filed a Motion in Limine to prevent Dr. Steiner from testifying regarding the position of the body (R 570-571). At the hearing on the motion, defense counsel argued that the medical examiner who had a heart attack, could reach no conclusion nor could the FDLE analyst, yet Dr. Steiner simply reviewed Dr. Reeves' records and said he could reach a conclusion (R 1272-79). Neither Dr. Reeves nor Detective Ladwig could state conclusively whether the decedent was standing or kneeling (R 488-89). Dr. Steiner's testimony regarding the decedent's position at the time of the shooting was proffered (T 914-928). Dr. Steiner had reviewed Dr. Reeves' reports and the photographs of the crime scene. He admitted he was neither a blood spatter expert nor a ballistics expert (T 917). He "favored" the opinion Mrs. Franco was kneeling at the time she was shot; however, he could not be certain (T 922). Defense counsel argued the testimony should be disallowed on the basis the witness was not qualified to give an opinion on this issue and it would unfairly prejudice the Appellant (T 937-938). The trial judge allowed the testimony (T 942).

The case was tried by jury November 29 to December 3 and December 9 to 17, 1993. During the trial, Detective Ladwig stated that Audrin Butler had provided information on several robberies in

which Appellant was a suspect (T 1137). Defense counsel objected. The objection was sustained. Counsel moved for a mistrial. The mistrial was denied (T 1142). Defense counsel moved to exclude the testimony of Demon Floyd (T 997). Floyd testified he was not involved in the robbery and his prior statements and deposition were incorrect (T 1005-1008). Floyd was impeached by the State with prior inconsistent statements he made to the police (T 1010-23) to two prosecutors (T 1024, 1041) and in a deposition (T 1029-1031, 1036-1040).

As the State's last witness, the prosecutor wanted to call David Damore to testify as to what Demon Floyd told the grand jury (T 1522). The State wanted to offer this testimony as substantive evidence (T 1528). Defense counsel objected on the basis of hearsay and using hearsay as substantive evidence (T 1531-1532). After argument the trial judge ruled the testimony could be presented as both impeachment and substantive evidence (T 1550-51). Defense counsel then offered to stipulate the evidence could be used as substantive evidence, without waiving the prior objection on which the court already ruled, if the State did not call Mr. Damore (T 1551-52). Additionally, Mr. Floyd had never testified regarding what he told the grand jury, so there was nothing to impeach (T 1555). Regarding Appellant's confrontation objection, the court ruled the State would have to call Demon Floyd, then Mr. Damore to impeach (T 1557). The State did not want to delay the trial, so they accepted defense counsel's prior offer to stipulate (T 1559). Mr. Damore did not testify.

The jury retired for deliberations, was sequestered overnight, and reached a verdict on all counts the next day (R 1902-1919). Appellant was convicted of (1) First Degree Murder with a Firearm, (2) Armed Robbery with a Firearm and (3) Principal to Aggravated Assault (R 582-583).

Appellant filed motions relating to the Penalty Phase of the trial, including Motion to Declare the Death Penalty and Florida Statute 922.10 Unconstitutional, Motion for Use of Special Verdict Form, and Motion to Prohibit Reference to the Advisory Role of the Jury (R 407-439), Motion to Compel State to Furnish Penalty Phase Witness List, Motion for Statement of Particulars of Aggravating Circumstances, Motion for Additional Peremptory Challenges, Motion for Individual Voir Dire, Motion Directing State to Advise Defendant if Death Penalty would be Sought, Motion to Sequester Jury (R 445-468). These motions were heard July 2, 1993 and orders entered (R 527-529, 552-556).

Appellant filed a motion to declare Section 921.141(5)(b) unconstitutional when applied to a contemporaneous violent felony and requested the jury not be instructed on this aggravating circumstance (R 624-627, R 628). This motion was heard before the penalty phase and denied (T 1932, 1940-1962, 1972). The trial judge proceeded to adjudicate Appellant on the Principal to Aggravated Assault charge which occurred contemporaneously with the murder (T 1962).

Appellant moved in limine to preclude the instruction on Section 921.141(5)(f), as this aggravating circumstance duplicated

the "committed during a robbery" instruction (R 662). The trial court denied this request based on Castro v. State, 597 So.2d 259 (Fla. 1992) (R 665) (T 1931, 1938, 1973).

The penalty phase was held December 14 - 17, 1993. Defense counsel was precluded from arguing the Appellant could be sentenced to life imprisonment on the non-capital offenses (T 1982). During the testimony of Valerie Floyd the prosecutor asked her what she thought the decedent's children called her (T 2017). Defense counsel objected, the objection was sustained, and motion for mistrial denied (T 2018-2019). The jury's recommendation for a death sentence was eight to four (8-4) (R 706). After receiving sentencing memoranda (R 719-739), the trial judge sentenced Appellant to death on December 23, 1993 and filed written findings (R 740-753). As aggravating circumstances, the Trial judge found (1) the Appellant was previously convicted of a violent felony (the contemporaneous principal to aggravated assault conviction) which he gave "solid weight" and (2) the Appellant was engaged in a robbery and the murder was committed for pecuniary gain which he gave "strong weight" (T 748-750). The judge found the Appellant's age (21 years old) was not a mitigating circumstance (T 751). He noted there were four areas of nonstatutory mitigation: (1) emotional and developmental deprivation in adolescence; (2) poverty; (3) good family man; and (4) circumstances of this crime do not set this murder apart from the norm of other murders (T 751). The trial court summarily rejected each category finding these factors were not nonstatutory mitigation (T 751-753). In

rejecting (4) above, the judge found that since the other three factors were not mitigating circumstances and there were two aggravating circumstances, the Florida Supreme Court should review the death sentence for proportionality (T 753). On the armed robbery, Appellant was sentenced to nine years incarceration (three years mandatory) followed by twenty-one years probation consecutive to the sentence on the murder charge (R 754-765). On the Principal to Aggravated Assault, Appellant was sentenced to five years imprisonment concurrent to the sentence in the robbery charge (R 802-804). This appeal follows.

STATEMENT OF THE FACTS

The only undisputed fact in this case was that Mrs. Joelle Franco died on July 14, 1992 from a bullet wound to the head. (T[3] 973).

The State presented testimony from Abel Franco, the decedent's husband, that on July 14, 1992 he was working at the Mobil Station on Volusia Avenue in Daytona Beach with his wife, Joelle Franco (T 824). Mrs. Franco was in the office part of the station and Mr. Franco was in the bay (T 825). Mr. Franco looked up when he heard a voice say "Don't move or I shoot" (T 826). A black man in a red mask was pointing a small silver gun at him (T 826). Mr. Franco heard a scream, then 30 seconds later a shot (T 831). A second man, who was not wearing a mask, came out of the office (T 832-34). Mr. Franco looked him in the face (T 832). The second man was approximately 6'2", in his 20's or 30's (R 834, 841). Mr. Franco was shown a photo line-up at which time he identified Sean Mayo (T 838, 1171, 1174, 1178). Mr. Franco also attended a live line-up on August 4, 1992 at which time he failed to identify anyone (R 55) (T 839). By the time of the live line-up Mr. Franco had been advised Appellant had been arrested for the shooting (T 1619). The photos made from the videotape of the live line-up showed that the Defendant's hair was different from the other participant's hair and he "stuck out like a sore thumb" (T 850-52, 1170).

Both Detective Beres and Officer Dorman, who arrived at the

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[3] "T" refers to trial transcript, Volumes 6 to 22 which begin with Number 1. Please note reference to the pleadings are "R" which also begin with Number 1.

Mobil Station after the shooting, testified for the State. Officer Dorman and his canine attempted to track the suspects (T 855). The canine found a red ski mask on the east side of Jean Street (T 857-58). During the defense case, Debra Lightfoot, who was qualified as an expert in hair and fiber analysis testified the only hair in the red hat was Caucasian (T 1702). Detective Beres found a white knit cap with "Down with O.P.P." on the floor of the office (T 856). Debra Lightfoot later testified there was a Negroid hair in the hat, but the hair was not the Defendant's (T 1703-1704). Detective Beres found a $10.00 bill and a green and white Foot Action bag on the floor of the office (T 879).

Demon Floyd was called as a state witness. He had plead to first degree murder and armed robbery in this case, but had not been sentenced (T 1003, 1045). He had requested to withdraw his plea several times but the Sate would bring up the death penalty (T 1046). He testified at trial that he was home on the night of July 14, 1992 and did not see the Defendant that night (T 1004). Audrin Butler had threatened to kill Demon's sister (Audrin Butler's wife) unless Demon confessed to the murder (T 1005-1007). Demon told the police he and Appellant committed the robbery; however, it was actually Audrin Butler and a man named Amp (T 1008-1011). Demon had previously told the law enforcement officers he wore a red knit hat and Appellant wore a white knit hat (T 1019). Demon told the officers he was in the garage with Mr. Franco and Appellant was in the office with Mrs. Franco (T 1019).

A search warrant was executed at the Defendant's house on July

28, 1992 (T 1090-98). Over objection, Detective Beres testified that he found a .38 caliber gun and purple wool cap inside a bag in the closet (T 1089-91). A .25 caliber gun was under the mattress (T 1093). The guns were processed for prints, but the bag was not (T 1101 - 02). Audrin Butler had given Appellant the Taurus gun prior to July 14, 1992 (T 1318). However, Terry testified he had given it back to Butler prior to July 14, 1992 (T 1603). The Taurus was identified as having fired the fatal shot (T 1436). There were no identifiable prints on the gun (T 1386). The "Buffalino" shoes Appellant was wearing when he was arrested on July 28, 1992 were sent to the crime lab (T 1120-21). The shoes were processed and three small spots of human blood identified (T 1444, 1667). A DNA analysis revealed the blood was consistent with that of Mrs. Franco and inconsistent with that of the Defendant (T 1463, 1502). A latent impression comparison with a footprint on a plastic bag in the Mobil Station office revealed the Buffalino shoes were consistent with the impression (T 1399). Many other shoes could have made the impression (T 1685). The FDLE prints expert did not examine the shoes worn by Mrs. Franco (T 1691).

The State's other evidence was testimony from Joe Garca/Robin Morgan, a thirteen-time convicted felon under a twenty-five-year sentence, that Appellant said Mrs. Franco panicked and the gun just went off (T 1191, 1192, 1205). He also testified Demon Floyd told him they would not "burn" him since he did not pull the trigger (T 1199). Garca had used several aliases, and had testified for the State twice before in Volusia County (T 1216, 1217, 1232). Garca

had previously received a commutation of a sentence in Tennessee and had written the State Attorney in Daytona Beach requesting a modification of his Volusia County sentence (T 1218-23).

During his testimony regarding the cause of death, Dr. Steiner gave his opinion Mrs. Franco was kneeling at the time she was shot (T 964). In FDLE crime analyst Leroy Parker's opinion, there was no way to reach a scientifically reliable conclusion regarding the position of Mrs. Franco (T 1658-59).

During the defense case, Detective Ladwig testified there were fifteen suspects who had been cleared through alibi (T 1131-37). Audrin Butler was never investigated even though he had provided detailed information regarding the location of certain guns (T 1137, 1165). Butler received a $5,000.00 reward for giving information (T 1619). In his fourteen years of experience in law enforcement, Detective Ladwig knew of instances where the person who reported the crime was the one who committed it (T 1619). Sean Mayo, who Mr. Franco had identified positively, was cleared when his mother and girlfriend said he was watching T.V. (T 1179-80).

Valerie Floyd, Appellant's girlfriend, testified he was at home watching T.V. the night of the shooting (T 1573). Audrin Butler, who was her brother-in-law, had access to the house and before the shooting would visit three or four times per week (T 1571, 1575). Audrin Butler was 6'2" and Appellant was 5'5" (T 1571, 1601). At the time of the shooting, Kenneth Terry had inter-

weaved hair (T 1577)[4]. Appellant testified he was home watching a Van Damme move the night of the shooting (T 1600-1601). Audrin Butler gave him the Taurus gun for a few days, then took it back (T 1603). The nurse who extracted hair from Appellant head in jail testified it was interwoven (T 1624). Charles Badger, who had examined the Buffalino shoes, found no blood on the bottom or sides of the shoes (T 1679-81). There was no blood on the Taurus gun (T 1664).

The State presented no testimony at the penalty phase, but rather relied on all previous evidence (T 1993). The appellant presented testimony from his aunt, Bonnie Hawsley, that he lived in Virginia until he was two to four years old (T 1994). He moved to Florida, and in 1981 or 1982 when Appellant was twelve to thirteen years old, his mother divorced, lost a child, and lost her job (T 1994). In 1985, Appellant's mother went to prison on drug-related charges (T 1995).

Appellant went to live with Ms. Hawsley in Maryland (T 1995-1996). Appellant was a very withdrawn child, but did well in school and had a job at a fast-food restaurant (T 1996). Ms. Hawsley was single (T 1996). Appellant's older brother, Eric, went to live with Ms. Hawsley's older sister, Myra, and Myra's husband, Bobby, because neither Myra nor Ms. Hawsley could afford to have both boys (T 1996, 2004). Myra and Bobby had two sons (T 1997). Appellant related well to Myra's family and his Uncle Bob was a

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[4]Mr. Franco identified Sean Mayo from the photo line up. Mayo had close-cropped hair (T 1174).

role model (T 1997). Appellant appeared to be happy when he was with that family (T 1997). During the time Appellant lived with his mother, there were various men living with her off and on, but there was no stability (T 1997). Eric did well with Myra's family. He graduated from high school and joined the Navy. The difference between Eric and Appellant was that Eric had a father figure (T 1998).

Eight to nine months after Appellant went to live with Ms. Hawsley, he went back to Florida (T 2000). There were no family members in Florida, and she assumed he went to live with a family friend (T 2000). Appellant had been on his own since he was 15 years old (T 2001). Between the ages of 12 to 15, Appellant's environment changed and he became a product of his environment (T 2003). When Appellant moved back to Florida, he was a troubled child (T 2005).

Valerie Floyd, Appellant's girlfriend with whom he lived, and the mother of his child, testified that Appellant told her he was on his own from the time he was fifteen to sixteen years old (T 2010). Appellant lived in Ft. Lauderdale and had to sleep in abandoned cars, on balconies, or wherever he could (T 2010). He had to take care of himself because his mother was in and out of prison (T 2010). Appellant treated her well (T 2010). He maintained continuous contact with his son, Kenneth Terry, Jr. (T 2011) even while he was incarcerated. Appellant also treated her daughter as his own and played with her (T 2012). On cross-examination, the State elicited testimony that Ms. Floyd was

receiving A.F.D.C. because she did not have a job and that Appellant supported the children when he could (T 2014 - 2015). Appellant played video games at the mall with Demon Floyd and sometimes would be gone until after dark (T 2016).

SUMMARY OF ARGUMENTS

POINT 1: The affidavit for the search warrant pursuant to which evidence was seized from Appellant's residence was based on recklessly and deliberately false information. The trial judge found the information was at least recklessly false, but held the defective portions could be excised. This was error. The judge who issued the search warrant was misled by false information. Excising the false portions invalidates the entire warrant.

POINT 2: The trial judge allowed the State to take the defendant's blood without probable cause to believe there was a reasonable basis for this intrusive procedure. The State failed to establish the chain of custody from the tennis shoes seized and the pieces of material tested by the lab analyst. There was obvious tampering and the lab analyst could not testify the samples tested were from the tennis shoes seized.

POINT 3: The State stipulated to give defense counsel the lab analysts notes. FDLE then appeared through counsel and the court reversed his previous ruling. FDLE does not have standing to appear, and the trial court was wrong in denying counsel access to materials the analysts relied upon.

POINT 4: Dr. Steiner testified as to the position of Mrs. Franco at the time of shooting even though he was not an expert in this field, nor was his testimony based on scientifically reliable principles. Neither the FDLE analyst not Dr. Reeves, the medical examiner who conducted the autopsy, could reach a conclusion as to position. Yet Dr. Steiner, who simply reviewed photos and reports

was allowed to testify to a position he "favored".

POINT 5: Detective Ladwig introduced evidence of other crimes when he told the jury he was investigating other robberies in which appellant was involved. This was intentional and designed to taint the jury. The motion for mistrial should have been granted.

POINT 6: Appellant had standing to raise the conflict of interest between the codefendant and the Public Defender where the codefendant's testimony directly affected his rights.

POINT 7: The only testimony elicited from Demon Floyd which was favorable to the state was elicited through impeachment testimony. The State was aware Demon Floyd was recanting his testimony, yet was allowed to present the witness solely for the purpose of introducing otherwise inadmissable impeachment testimony.

POINT 8: Allowing the impeachment testimony of Demon Floyd to be used as substantive evidence was fundamental error. The trial court was clearly wrong in ruling David Damore could testify to what Demon Floyd told the Grand Jury when Floyd had not testified on this issue and there was nothing to impeach.

POINT 9: The trial judge should have granted the motions for judgment of acquittal. There was insufficient evidence of premeditated murder, felony murder, and that Appellant was involved in any way in the assault on Mr. Franco.

POINT 10: The theory of defense was that Audrin Butler committed the murder. The trial judge erred in restricted Appellant's closing argument regarding the State's failure to call

Audrin Butler, a material witness.

POINT 11: The trial judge instructed the jury there were three aggravating circumstance that could be considered. Although he gave a limiting instruction, this does not clarify the issue and only confuses the jury.

POINT 12: The aggravating circumstance of prior violent felony should not be applied to a contemporaneous felony, particularly where the defendant is not involved in the contemporaneous felony. Appellant was convicted of Principal to Aggravated Assault which conviction was used to aggravate his murder conviction. If this aggravating circumstance can be applied in this case, it renders aggravating circumstances meaningless.

POINT 13: The aggravating circumstance of prior violent felony as applied to this contemporaneous felony violates the Separation of Powers clause and is otherwise unconstitutional.

POINT 14: During the testimony of Valerie Floyd the prosecutor asked her what she though the victim's children called her. This was designed to inflame the passions of the jury in the penalty phase, and the trial judge should have allowed a new penalty phase. The commented tainted the jury recommendation.

POINT 15: Appellant's closing argument in the penalty phase was restricted and he was not allowed to address the jury regarding the potential length of incarceration. This restriction violated the Appellant's right to present nonstatutory mitigation.

POINT 16: The trial judge disregarded uncontroverted evidence presented on nonstatutory mitigating circumstances. The case

should be remanded for a new penalty phase.

POINT 17: Section 921.141, Florida Statutes, is unconstitutional on its face and as applied.

POINT 18: This case is proportional to other sentences which have been reversed for a life sentence. The appellant was 21 years old when this crime was committed. The only testimony which touched on the actual shooting was from Joe Garca who testified the shooting was an accident. The only aggravating circumstances are committed-during-a-robbery and the contemporaneous felony to which Appellant was a principal. This case is not the most aggravated or least mitigated of cases, and the death penalty is not warranted.

POINT 1

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION.

Appellant moved to suppress the two guns, plastic bag, cap, magazine, Florida driver's license, and Florida license plate seized pursuant to a search warrant executed at Appellant's home (R 258). The search warrant affidavit was prepared by Detective Ladwig, issued by Judge Hutcheson, and was based on information from a "concerned citizen" (Audrin Butler) (R 273-277, SR 2-22). The Affidavit stated:

> This concerned citizen has provided crucial information about **crimes** in the past which has been useful in the solving of **crimes** and has **provided truthful statements in open court** concerning the past information provided ... Additionally **on several occasions**, this citizen has provided details of these crimes **not available to the public** and in such depth and detail as to assure his credibility and knowledge of these crimes.

The affidavit also stated:

> These statements were made to the concerned citizen approximately ten hours after the incident. These facts **had not been released to the public**.
>
> . . .
>
> The facts related were such that only someone involved in this event could have known and related them to concerned citizen. This information is contained in the police report and **has not been made public**.

(R 274 - 276) (Defendant's Exhibit #1 filed March 1, 1993) (Emphasis supplied)

The basis of Appellant's motion to suppress was that the search of Appellant's home was based on a search warrant obtained through deliberately or recklessly false statements. The motion was heard March 1 and March 26, 1993, and denied (R 400-406, SR 14-88, R 876-917). Appellant moved for rehearing (R 475), which was denied (R 544).

At the hearing, Valerie Floyd testified that she did not consent to the search of her apartment on July 28, 1992 (SR 2-19). Detective Ladwig had prepared the search warrant based on information received from Audrin Butler (SR 2-22). Detective Ladwig did not know Butler and had only used him in this is investigation (SR 2-23). The only crime on which Butler had provided information previously was a homicide. The information had been provided on this homicide to Dave Damore (SR 2-24-26). Detective Ladwig did not know whether Butler had ever testified in the case (SR 2-27). The details of the crimes about which Butler reported had been released to the public (SR 2-38). Butler received a $5,000.00 reward for the information regarding robberies (SR 2-46). Officer Wright did not know Butler, either (SR 2-81). Butler had been saving newspaper clippings and conducting his own investigation (SR 2-88). Audrin Butler testified he had prior convictions (R 891).

The trial judge found the affiant's statements were <u>at least</u> recklessly false, but the false statements could be excised and the warrant remain valid (R 400-406)

Suppression is an appropriate remedy if the magistrate or

judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. United States v. Leon, 468 U.S. 897, 923 (1984), citing Franks v. Delaware, 438 U.S. 154 (1978)[5]; see also State v. Beney, 523 So.2d 744, 746 (Fla. 5th DCA 1988); State v. Robinson, 460 So.2d 440 (Fla. 5th DCA 1984). The evidence obtained through the execution of the search warrant should have been suppressed because, as the trial court found, the affiant resorted to the use of deliberately or recklessly false statements.

The allegations contained in the affidavit were not based upon Detective Ladwig's personal knowledge. Rather they were based upon the collective knowledge of a number of detectives. "[A]ffidavits for search warrants based on secondhand and third-hand information must be acknowledged..." Renckley v. State, 538 So.2d 1340, 1343 (Fla. 1st DCA 1989), citing Beney, supra. The Fifth District Court of Appeal in Beney held:

> While observations of other officers engaged in a common investigation are a reliable basis for a warrant applied for by one of their numbers, to comply with the requirement of particularity and to enable the magistrate to make an independent probable cause evaluation, the agent must state in his affidavit that he is relying upon other officers.

Id., 746 (citation omitted).

Not only did Detective Ladwig rely on information without

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[5]The courts of Florida "are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment..." ***Bernie v. State***, 524 So.2d 988, 990-91 (Fla. 1988).

attribution to other officers, but the assertions made in that regard were simply not true. Detective Ladwig knew of only one crime in which Butler had assisted the police, not a number of crimes as alleged. Furthermore, while he alleged that Butler had provided truthful statements in open court, he did not know whether Butler had testified in the other case.

Nor did Detective Ladwig know, as alleged, that the information regarding any of the crimes had not been made public. The reports were available to anyone through the public information officer. Members of the media routinely came in to the police station in the morning to check the reports from the preceding evening.

The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and disclose, to the issuing Magistrate. Maryland v. Garrison, 480 U.S. 79, 85 (1987). Stated otherwise"[s]earch warrants must be tested for legal vitality regarding probable cause solely on the affidavits themselves, or sworn testimony of the affiant reduced to writing. The warrant must stand or fall solely on the contents of the affidavit." State v. Gayle, 573 So.2d 968, 970 (Fla. 5th DCA 1991). See also Carlton v. State, 449 So.2d 250, 251 (Fla. 1984); Glass v. State, 604 So.2d 5 (Fla. 4th DCA 1992). [T]he fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error. Beney, supra.

The Supreme Court developed a good-faith exception to the

exclusionary rule for application in those cases "where the officer's conduct is objectively reasonable." Leon, supra, 3419. The exception is inapplicable in this case. The Court held that suppression is appropriate if, in issuing the warrant, the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. State v. Bonilla, 579 So.2d 802, 806 (Fla. 5th DCA 1991), citing Leon. Even when the benefit of any doubt is extended to affiant in this case, there was reckless disregard of the truth because he did not attribute information to other officers and made no effort to corroborate independently the trustworthiness of the informant or check with the public information officer to ascertain what information had been released an at what time.

The inquiry does not end here. Yet to be determined is whether there remain "sufficient allegations to demonstrate probable cause after [the] invalid allegations [are] excised from the affidavit upon which the search warrant was based." Finfrock v. State, 507 So.2d 1230, 1231 (Fla. 5th DCA 1987) (citation omitted); cf. State v. Panzino, 583 So.2d 1059, 1062 (Fla. 5th DCA 1991). After excising the allegations regarding the assistance given by Butler in the past and that the information had not been made public, there is no basis to determine probable cause existed to justify the issuance of the search warrant. What remains are unsubstantiated, conclusory statements regarding a number of robberies. A mere conclusory statement gives the magistrate

virtually no basis at all for making a judgment regarding probable cause. Illinois v. Gates, 462 U.S. 213, 239 (1983).

The affidavit also fails to establish the informant's credibility. Although dubbed "concerned citizen", Butler's motives were anything but altruistic. His primary expressed concern was obtaining a reward. Further, he told the police that he had obtained information from the newspapers, and the affiant had no personal knowledge of when or what information had in fact been made public. Moreover, the police fed him the details of the crimes which he parroted back. Corroboration of easily accessible information does not establish the credibility of an informant. Gillete v. State, 561 So.2d 4 (Fla. 5th DCA 1990).

The [exclusionary] rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. Leon, supra at 3412. If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. *Id.* at 3418.

Detective Ladwig misled Judge Hutcheson with information in the affidavit that he either knew was false or would have known was false except for his reckless disregard of the truth. The information that had been obtained from the other detectives was not attributed to them. The past involvement of "concerned citizen" was overstated, he had only contacted the police about one

other crime and the affiant did not know if he had appeared in court. The affiant neither had personal knowledge of "concerned citizen" nor did he even recall which officer had told him about Butler. There was no independent corroboration of Butler's accounts. Indeed, the police had told him particulars of the crimes. The affiant did not know what information regarding the crimes discussed in the affidavit had in fact been made public or when it had been released. When the improper allegations are excised from the affidavit, insufficient information remains to establish probable cause. By allowing the evidence to be admitted, the trial judge committed reversible error.

POINT 2

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO TAKE APPELLANT'S BLOOD SAMPLE AND PRESENT EVIDENCE REGARDING THAT SAMPLE IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I §12 OF THE FLORIDA CONSTITUTION.

The State moved for samples of blood for DNA testing (R 116). Appellant responded to the motion for blood samples, and the motion was denied (R 117-130, R 134). The State filed an Amended Motion to Take Blood (R 359-360). Appellant responded (R 361-364). The amended motion was denied without prejudice after a hearing on April 27, 1993 (R 398, 924-944). The State filed a Second Amended Motion to Take Blood (R 504-505). This motion was granted after a hearing on July 26, 1993 (R 565, 1167-1235)[6].

The defendant is not obliged under the rule to provide samples of his blood by mere virtue of the indictment. Rule 3.220 provides in material part:

> (1) After the filing of the indictment or information *and subject to constitution limitations*, a judicial officer may require the accused to:
>
> *****
>
> (vi) Permit the taking of samples of his blood, hair, and other materials of his body which involves no unreasonable intrusion thereof.

Fla.R.Crim.P. 3.220(c)(vii) [emphasis added]; see also Saracusa v. State, 528 So.2d 520, 521 (Fla. 4th DCA 1988).

The taking of blood constitutes a search under the Fourth

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[6]Appellant filed a Petition for Writ of Certiorari in the Fifth District Court of Appeal on this issue, Case No. 93-2038. (R 1236). This Petition was denied October 19, 1993.

Amendment of the United States Constitution. State v. Quartararo, 522 So.2d 42, 43 (Fla. 2d DCA 1988), citing Schmerber v. California, 384 U.S. 757 (1966). The Amendment, like its counterpart in the state constitution, requires a showing of probable cause to justify a search and seizure. U.S. Const. Amend. IV; Art. I, Section 12, Fla. Const. Florida Case law holds specifically that probable cause is required before a defendant may be ordered to submit to the withdrawal of blood. See Jones v. State, 343 So.2d 921 (Fla. 3d DCA), *cert. denied*, 352 So.2d 172 (Fla. 1977); Brown v. State, 493 So.2d 80 (Fla. 1st DCA 1986); Saracusa, supra.

At the hearing on the State's third motion, the State failed to establish the sample tested was taken from the Appellant's shoes. The only testimony presented was that a sample was tested by an FDLE analyst (R 1191) and a pair of shoes was seized from the Appellant on July 28, 1992, by a police officer (R 1182). The FDLE analyst had no direct knowledge of where the sample came from (R 1194 - 1199). She had two stains or pieces of material that she tested (R 1192). Defense counsel argued there was unexplained tampering and the State failed to establish the sample came from the tennis shoe (R 1208 - 1211).

It is a well established principle of Florida law that "[r]elevant physical evidence is admissible unless there is an indication of probable tampering." Peek v. State, 395 So.2d 492, 495 (Fla. 1981), *cert. denied*, 451 U.S. 964 (1981); see also Beck v. State, 405 So.2d 1365, 1367 (Fla. 4th DCA 1981); Parker v.

State, 456 So.2d 436, 443 (Fla. 1983); Dodd v. State, 537 So.2d 626 (Fla. 3d DCA 1989); Bush v. State, 543 So.2d 283, 284 (Fla. 2d DCA 1989), *rev. denied* 548 So.2d 663 (Fla. 1989); State v. Lewis, 543 So.2d 760, 767 (Fla. 2d DCA 1989), *rev. denied*, 549 So.2d 1014 (Fla. 1989); Walsh v. State, 559 So.2d 624, 625 (Fla. 3d DCA 1990); Robinson v. State, 561 So.2d 1264, 1265 (Fla. 3d DCA 1990); Pierre v. State, 579 So.2d 923 (Fla. 3d DCA 1991); Hutchinson v. State, 580 So.2d 257, 263 (Fla. 1st DCA 1991).

"[A] mere reasonable possibility of tampering is sufficient to require proof of the chain of custody." Dodd, supra at 628. The State below presented no evidence to establish a chain of custody. In any event, "[i]t is plain that [the two pieces of material tested] at the crime lab w[ere] *not* in the same condition as was testified to by the officer who seized the [tennis shoes]. *Id.* (Emphasis in opinion).

There is no nexus between the DNA testing done on two pieces of material and the tennis shoes that had been obtained from the Appellant. No one testified that there was blood on the tennis shoes. The crime lab analyst who had conducted DNA tests upon two pieces of material testified that she did not know the source of the material. Despite the irrefutable tampering (*i.e.*, from tennis shoes to two unspecified pieces of material), there was no chain of custody evidence presented to confirm either that the materials tested were from the Appellant's tennis shoes or that there had been no improper tampering. There was no basis in the evidence before it upon which the trial court cold have found probable cause

to believe that the Appellant was involved in the murder.

POINT 3

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL ACCESS TO THE FDLE ANALYSTS' NOTES WHICH WERE THE BASIS FOR THEIR OPINIONS AT TRIAL.

Appellant filed a Motion to Compel Disclosure of the laboratory notes of FDLE analysts (R 395-397). The Motion was granted and the State ordered to provide the defense with copies of the laboratory notes of the FDLE analysts (R 399, 944). FDLE appeared through counsel and filed a Motion for Rehearing (R 480-481). Appellant moved to strike FDLE's motion for rehearing since FDLE was not a party to the cause (R 491-495). At a hearing on the Motion for Rehearing, the trial judge ruled the notes were not discoverable and sealed them in the record (R 1143). At trial, defense counsel objected when an FDLE expert referred to his notes (R 1390).

At the hearing on July 8, 1992, the F.D.L.E. attorney argued that discovery rules protect the personal notes of a police agency, citing Geralds v. State, 601 So.2d 1157 (Fla. 1992) (R 1121).

The trial court found the notes were not discoverable (R 1144) and sealed the notes in the record (R 1146).

First, the trial court should not have allowed rehearing as the State had already agreed to provide the notes and the F.D.L.E. attorney had no standing to contest the agreement. Second, under discovery rules the prosecution is obligated to disclose:

> The statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or

> approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are complied.

Florida Rule of Criminal Procedure 3.220(b)(1)(B).

> Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

Florida Rule of Criminal Procedure 3.2209(b)(1)(J).

> [A]ny tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the accused.

Florida Rule of Criminal Procedure 3.220(b)(1)(K).

The laboratory notes, which the analysts used at trial, constituted "statements" which the prosecution was obligated to disclose. The notes, which were prepared in the laboratory, are unlike those of the analyst in Geralds v. State, 601 So.2d 1157 (Fla. 1992). The Supreme Court held that the notes were not discoverable because the F.D.L.E. lab analyst had compiled her notes at the crime scene and she was therefore viewed as "a police officer testifying to what she found at the scene of the crime." *Id.*, 1160.

Assuming that the lab analysts in this case could be viewed in the same manner despite the fact that their notes were complied in the lab rather than at the scene, discovery was nonetheless appropriate. "[I]n instances where a police officer's non-

eyewitness testimony is highly probative of the guilt or innocence of the accused, the report is discoverable." Downing v. State, 536 So.2d 189, 191 (Fla. 1988). The state relied heavily on forensic testimony: the blood stains on the shoes, the bullet, fingerprints, shoe impressions. Defense counsel was denied access to documents he was entitled to and thus rendered ineffective in his cross-examination of the F.D.L.E. experts.

POINT 4

THE TRIAL COURT ERRED IN DENYING THE MOTION IN LIMINE REGARDING DR. STEINER'S OPINION OF THE POSITION OF MRS. FRANCO AT THE TIME OF THE SHOOTING.

Appellant filed a Motion in Limine: Testimony Regarding Position of Victim Prior to Shooting which was granted as to Detective Ladwig and the Medical Examiner, Dr. Reeves (R 488-89, R 529, 1045). Neither Dr. Reeves nor Detective Ladwig could state conclusively whether the decedent was standing or kneeling (R 488-89). Due to Dr. Reeves' illness at the time of trial, Dr. Steiner was the acting Medical Examiner (T 904). Appellant later filed a Motion in Limine to prevent Dr. Steiner from testifying regarding the position of the body (R 570-571). At the hearing on the motion, defense counsel argued that the medical examiner who had a heart attack, could reach no conclusion nor could the FDLE analyst, yet Dr. Steiner simply reviewed Dr. Reeves' records and said he could reach a conclusion (R 1272-79).

Dr. Steiner's testimony regarding the decedent's position at the time of the shooting was proffered at trial (T 914-928). Dr. Steiner had reviewed Dr. Reeves' reports and the photographs of the crime scene. He admitted he was neither a blood spatter expert nor a ballistics expert (T 917). He "favored" the opinion Mrs. Franco was kneeling at the time she was shot; however, he could not be certain (T 922). Defense counsel argued the testimony should be disallowed on the basis the witness was not qualified to give an opinion on this issue and it would unfairly prejudice the Appellant (T 937-938). The trial judge allowed the testimony (T 942).

Section 90.401, of the Evidence Code, provides that relevant evidence is evidence tending to prove or disprove a material fact. The position of the victim was not relevant to any issue at trial. Furthermore, Section 90.403 of the Evidence Code provides that even if the evidence were relevant it is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. The sole reason for admitting this evidence was to inflame the jury. See Johnson v. State, 534 So.2d 1212 (Fla. 4th DCA 1988) (sounds of stabbing victim); State v. Smith, 573 So.2d 306, 313 (Fla. 1990) (autopsy photo). The testimony was completely unreliable, speculative at best, and should never have been allowed.

Even worse is the fact the trial judge allowed an expert witness to testify to something in which he had absolutely no experience or expertise. An expert witness may testify if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue. Here there was no fact at issue nor evidence that needed to be understood. Whether she was standing or kneeling was completely irrelevant, yet the court allowed expert testimony. Dr. Steiner was not qualified to give this opinion which was speculative.

> Section 90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105. First, the court must determine whether the subject matter is proper for expert testimony i.e., that it will assist the trier of fact in understanding the evidence or in determining a

> fact in issue. As a part of this decision, the court may be required to determine whether a reliable body of scientific or other specialized knowledge has developed to support the opinion testimony. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter.

Ehrhardt, Florida Evidence, 1994 Edition, p. 500.

Dr. Steiner admitted he was not qualified in the area of crime scenes, blood spatter or ballistics. He had not been to the crime scene nor had he attended the autopsy.

> A witness may only testify as an expert in the areas of his or her expertise. It is not enough that the witness is qualified in some general way. The witness must possess special knowledge about the discrete subject about which an opinion is expressed. When an expert goes beyond his or her expertise, the expert will not be allowed to testify in terms of expert opinion.

Ehrhardt, Florida Evidence, 1994 Edition, p. 505.

See Hall v. State, 568 So.2d 882 (Fla. 1990) (Religion professor not qualified to testify to the sanity of any individual); Gilliam v. State, 514 So.2d 1098, 1100 (Fla. 1987) (Medical examiner was not qualified as an expert in shoe patterns and it was error to permit him to testify that the defendant's sneaker left marks similar to those on the decedent); Sun Supermarkets, Inc. v. Fields, 568 So.2d 480, 482 (Fla. 3d DCA 1990), ***review denied*** 581 So.2d 164 (Fla. 1991) (Optometrist was not competent to give medical-type opinions as to the cause of the plaintiff's postoperative condition).

Further, Dr. Steiner's opinion was not based on scientifically reliable principles. Frye v. United States, 293 F.2d 1013 (D.C.

Cir. 1923); Stokes v. State, 548 So.2d 188, 193 (Fla. 1989); Ramirez v. State, 542 So.2d 352 (Fla. 1989). The trial court created reversible error in allowing Dr. Steiner to testify. This inadmissible evidence tainted not only the jury's guilty verdict but also the jury's recommendation of death.

POINT 5

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN DETECTIVE LADWIG INTRODUCED EVIDENCE OF OTHER CRIMES.

During the trial, Detective Ladwig stated that Audrin Butler had provided information on several robberies in which Appellant was a suspect (T 1137). Defense counsel objected. The objection was sustained. Counsel moved for a mistrial. The mistrial was denied (T 1142).

Evidence of other crimes, wrongs, or acts was not admissible in this case. There was no Williams[7] rule notice, nor did the State seek to introduce Williams rule evidence. This was an intentional statement by a State Attorney Investigator intended to taint the jury. The reference to similar crimes perpetrated by the Appellant was presumptively harmful error. Castro v. State, 547 So.2d 111 (Fla. 1989); See also Peek v. State, 488 So.2d 52 (Fla. 1986); Paul v. State, 340 So.2d 1249 (Fla. 3d DCA 1976).

The State cannot show beyond a reasonable doubt the error did not affect the verdict. State v. Lee, 531 So.2d 133 (Fla. 1988), State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986).

This evidence was not admissible for any legal purpose, and tended to prove only that Appellant had a propensity for robbery. The testimony was accordingly irrelevant and highly prejudicial. See Woods v. State, 436 So.2d 278 (Fla. 5th DCA 1983) (fact defendant told female battery victim he had once pushed another female victim off a roof irrelevant and excessively prejudicial;

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[7] *Williams v. State*, 110 So.2d 654 (Fla. 1959).

reversing). See generally Hawks v. State, 616 So.2d 1106 (Fla. 5th DCA 1993); Wilson v. State, 490 So.2d 1062 (Fla. 5th DCA 1986); Hodges v. State, 403 So.2d 1375 (Fla. 5th DCA 1981).

The Appellant's motion for mistrial based on that testimony, should have been granted. Pender v. State, 530 So.2d 391 (Fla. 1st DCA 1988) (reversing conviction where jury improperly made aware of unrelated pending charges; State failed to show error was harmless); D'Anna v. State, 453 So.2d 151 (Fla. 1st DCA 1984) (error to introduce evidence revealing defendant had prior unrelated arrests; error harmless where evidence was overwhelming); Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983) (jury made aware of prior arrests; defendant deprived of right to impartial jury). As the Florida Supreme Court has noted, "[o]nce the prosecutor rings that bell and informs the jury that the defendant is a career felon, the bell cannot, for all practical purposes, be 'unrung'." Geralds v. State, 601 So.2d 1157, 1162 (Fla. 1992).

The proof of the defendant's bad acts unrelated to the offenses charged was unfairly prejudicial, and denied the Appellant his right to an impartial jury. Section 90.403, Florida Statutes (1993); Wilding; U. S. Const., Amend. 6; Art. I, section 16, Fla. Const. The cumulative effect of the improper evidentiary rulings in this case denied the Appellant his right to due process of law. U.S. Const., Amend. 5; Art. I, section 9, Fla. Const.

Errors of this kind are presumptively harmful, Hawks, supra, 616 So.2d at 1108, and the error was harmful in this case. The focus of harmless error analysis is on the trier of fact. State v.

DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). The State's evidence in this case was neither "overwhelming" nor "clearly conclusive," cf. DiGuilio, supra, 491 So.2d at 1138 and State v. Murray, 443 So.2d 955 (Fla. 1984), and the error urged on this point should accordingly not be deemed harmless.

POINT 6

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR SUGGESTION OF CONFLICT IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 TO THE FLORIDA CONSTITUTION.

Appellant filed a Motion of Suggestion of Conflict alleging the Public Defender had a conflict of interest which precluded them from representing Demon Floyd, and requesting the court allow Floyd to withdraw his plea. After a hearing on February 1, 1993, and February 2, 1994, this motion was denied with a finding the Appellant did not have standing to raise the issue (R 318, 825-869).

The basis for the trial court's denial was lack of standing (R 867). Defense counsel made a proffer of the testimony he would have presented (R 869).

The Fifth District Court of Appeal has held that assistants to public defenders, as well as the elected public defender, may raise conflict of interest as an issue. Volk v. State, 436 So.2d 1064 (Fla. 5th DCA 1983). In so holding the court stated:

> When the trial court becomes aware of the existence of a conflict by virtue of a motion to that effect from an assistant public defender, it should give that information the same credence it would give to similar information from the elected public defender or *from any other credible source.*

Id., 1067 (emphasis added).

The comment to Florida Rule of Professional Conduct 4-1.7 provides "[i]n a criminal case ... [w]here the conflict is such as clearly to call in question the fair or efficient administration of

justice, opposing counsel may properly raise the question." Counsel for Floyd acted as an agent of the prosecution. The ineffective representation provided Mr. Floyd directly impacted adversely upon Appellant's interests and due process rights.

The Supreme Court of the United States addressed the standing of a third party to raise a constitution claim in Whitmore v. Arkansas, 495 U.S. 149 (1990). The Court instructed that "Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Id.*, S.Ct. at 1722-23 (citation omitted).

Appellant had standing to raise the conflict of interest issue under this standard. Appellant also had standing to advance the constitutional claim as the "next friend" of Mr. Floyd. The concept of next friend standing has long been an accepted basis for jurisdiction in certain circumstances. Most frequently, next friends appear in court on behalf of detained persons who are unable, usually because of mental incompetence or inaccessibility, to see relief themselves. Whitmore, S.Ct. at 1726. The trial court erred in holding defense counsel had no standing to raise the conflict issue which directly affected him.

POINT 7

THE TRIAL COURT ERRED IN DENYING THE MOTION TO EXCLUDE DEMON FLOYD'S TESTIMONY; THE STATE CALLED HIM FOR THE SOLE PURPOSE OF IMPEACHMENT

Appellant filed a Motion in Limine regarding the testimony of Demon Floyd (R 442-444). This motion was taken under advisement (R 528) and later denied (R 547). The basis of the motion in limine was the witness' testimony was unreliable and he had given inconsistent accounts. (R 442-444). At trial defense counsel again moved to exclude the testimony of Demon Floyd (T 997). Floyd testified he was not involved in the robbery and his prior statements were incorrect (T 1005-1008).

The State then impeached Floyd with the prior statements he had made to police officers and prosecutors (T 1010-1024). Through this impeachment testimony came vital details such as the green and white Foot Action bag, the red and white masks, and the types of guns. The sole reason for calling Floyd was to impeach him. The State had been aware since November 1992 Floyd was recanting his statements to law enforcement officers (SR 1, deposition of Demon Floyd, November 4, 1992).

Rule 608.1 Florida Evidence Code provides that a party may impeach his own witness. However, it is improper to call a witness solely to present impeachment testimony. This situation is discussed in Ehrhardt, Florida Evidence, 1994 Edition, Section 608.2. Federal Courts have condemned the practice of calling a witness for the primary purpose of placing impeachment testimony before the jury. Balogh's of Coral Gables, Inc. v. Getz, 778 F.2d

649 (11th Cir. 1985); United States v. Hogan, 763 F.2d 697 (5th Cir. 1985); U.S. v. Webster, 734 F.2d 1191 (7th Cir. 1984); U.S. v. Miller, 664 F.2d 94 (5th Cir. 1981); U.S. v. Morlong, 531 F.2d 183 (4th Cir. 1975). In Professor Ehrhardt's opinion, Florida Courts should preclude such testimony under either a "mere subterfuge" or "more prejudicial than probative" standard. See Ehrhardt, Florida Evidence, 1994 Edition, P. 381.

The present case illustrates the pitfalls of allowing this type of witness to testify. Through impeachment, the State was able to elicit extremely prejudicial evidence.

POINT 8

THE TRIAL COURT ERRED IN ALLOWING DEMON FLOYD'S TESTIMONY TO BE USED AS SUBSTANTIVE EVIDENCE.

The testimony of Demon Floyd was used as substantive evidence in violation of Florida Statutes, the Sixth Amendment to the U.S. Constitution, and Article I, Section 16 of the Florida Constitution.

The State wanted to call David Damore to testify regarding Demon Floyd's grand jury testimony and use the testimony as substantive evidence (T 1528). Appellant objected that this would violate his right to confrontation, it was hearsay, and could not be used as substantive evidence (T 1531-1532). The trial judge stated the evidence was admissible as substantive evidence if the State could overcome the hearsay situation (T 1532). The prosecutor argued the grand jury testimony was an exception to the hearsay rule, citing Section 90.801(2)(a) (T 1533). The trial judge ruled in relevant part:

> So Ehrhardt is of the position, as I understand, that you can do that by calling another person to say what that person said. And then Ehrhardt goes in to the proposition that you can use that both as impeachment and as substantive evidence, and doesn't further distinguish.
>
> So based upon my reading of the case law and Ehrhardt, it would be permitted and that is my ruling.

(T 1550-1551).

In other words, the judge was going to permit David Damore the lead prosecutor at the time to testify as to what Demon Floyd told

the grand jury. The problem with this is Demon Floyd had not testified at trial about anything he had said or not said to the grand jury (T 997-1082). Section 90.801(2)(a), Florida Statutes, provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. (Emphasis supplied)

Demon Floyd had not testified at the trial about the statement, therefore there could be nothing which was inconsistent with his testimony. The trial court ruling was clearly wrong.

Defense counsel then stated that he would stipulate to an instruction by the Court, **without waiving any objections**, that the evidence given by Demon Floyd could be considered for substantive purposes as well as for impeachment purposes. The only testimony Floyd had given was that he and Appellant did not commit the robbery and his statements to the police, the prosecutors, and depositions were wrong. None of this could be used as substantive evidence and allowing its use is fundamental error. State v. Clark, 614 So.2d 453 (Fla. 1992); State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986). The prosecutor did not wish to accept the stipulation, but when the judge said he had to recall Floyd to satisfy Appellant's right to confrontation, the stipulation was accepted (T 1556-1559).

The trial judge was simply wrong in his ruling. Mr. Damore

could not testify under the circumstances. Demon Floyd's impeachment testimony could not be used as substantive evidence. Although defense counsel made a stipulation after the trial judge's adverse ruling, he did so without waiving any previous objections. The erroneous admission of impeachment testimony as substantive evidence is fundamental error. State v. Clark, 614 So.2d 453 (Fla. 1992).

POINT 9

THE CONVICTIONS FOR FIRST DEGREE MURDER AND PRINCIPAL TO AGGRAVATED ASSAULT VIOLATE THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICTS.

Appellant moved for judgment of acquittal at the end of the state's case and at the end of all the evidence (T 1563, 1715). The motions were denied.

This case should be considered a circumstantial evidence case. The only direct evidence of Appellant's participation came through impeachment of Demon Floyd, who denied Appellant was involved. The standard in a circumstantial evidence case is that the evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631 (Fla. 1956). If this case were considered a direct evidence case, the defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence, but also admits every conclusion favorable to the adverse party. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). In the present case, there was not sufficient evidence for the judge to allow the case to go to the jury under either standard. Even if there were, the convictions cannot stand for lack of sufficient evidence to support the convictions.

The verdict on the first degree murder did not specify felony or premeditated murder. There was insufficient evidence of either. The only testimony there was a robbery came from Mr. Franco who could not explain how he arrived at the calculation there was money

missing (T 843-845). The crime scene was disturbed and the police did not even find the bags of money under the counter (T 840). There was no creditable proof anything was taken. The assailant who held Mr. Franco at bay did not ask for money.

There was no evidence of premeditation which could support a premeditated murder charge. In Jackson v. State, 575 So.2d 181, 196 (Fla. 1991) this Court held:

> Premeditation, as an element of first-degree murder,
>
> > is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA) *cert. denied*, 225 So.2d 913 ([Fla.] 1969.) Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA)[,] *cert. denied*, 277 So.2d 287 ([Fla. 1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958).
>
> Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982). The

> state relies on Sireci and Griffin v. State, 474 So.2d 777, 780 (Fla. 1985), *cert. denied*, 474 U.S. 1094 (1986), to argue that the murder here was premeditated. However, that reliance is misplaced. In Sireci, premeditation was proved with evidence that the defendant clubbed the victim over the head with a wrench, then stabbed and cut the victim fifty-five times in the chest, head, back, and extremities, and finally slit his throat. In Griffin, premeditation was supported by evidence that Griffin used a "particularly lethal gun"; the bullets were of a special type designed to have a "high penetrating ability"; there was no sudden provocation caused by the victim; and Griffin fired two shots into his victim at close range. Griffin, 474 So.2d at 780. Those facts are completely distinguishable from the instant case where there is no evidence to indicate an anticipated killing, and where all of the evidence is equally and reasonably consistent with the theory that Phillibert resisted the robbery, inducing the gunman to fire a single shot reflexively, not from close range, with an unidentified type of weapon and bullet. There is no evidence of a fully-formed conscious purpose to kill.

In the present case the only specifics regarding the actual shooting came from Joe Garca who said the decedent panicked and the gun went off.

The conviction of Principal to Aggravated Assault is particularly flawed. In order to be convicted as a principal, a person must **aid, abet, counsel, hire, or otherwise procure such offense to be committed.** §777.011 Fla. Stat. (1991) There is absolutely no evidence Appellant did any of the above. In fact, the only relevant testimony was impeachment testimony from Demon Floyd that he, Floyd, decided to hold Mr. Franco (T 1012). Mr. Franco's unequivocal testimony was that he did not see the second man until the assailants were leaving, and the second man did not

have a gun (T 832, 841). There was no showing the second man was involved at all in the assault on Mr. Franco.

While evidence of the intent of an aider and abettor may be circumstantial, it must exclude every reasonable inference the aider and abettor did not intend to participate in criminal activities. West v. State, 585 So.2d 439 (Fla. 4th DCA 1991); Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978); Gains v. State, 447 So.2d 719 (Fla. 1st DCA 1982); Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986); Brumbley v. State, 453 So.2d 381 (Fla. 1984); Davis v. State, 436 So.2d 196 (Fla. 4th DCA 1983). In order for one person to be guilty of a crime committed by another, he must not only have the conscious intent that criminal act be done, he must further that intent by some act or word. G. G. v. State, 407 So.2d 639 (Fla. 3d DCA 1981). Mere presence is not enough. See Perez v. State, 390 So.2d 85 (Fla. 3d DCA 1980); J. H. v. State, 370 So.2d 1219 (Fla. 3d DCA 1219); Lockett v. State, 262 So.2d 253 (Fla. 4th DCA 1972); J. L. v. State, 458 So.2d 61 (Fla. 3d DCA 1984); Hutchins v. State, 311 So.2d 198 (Fla. 3d DCA 1975).

Furthermore, as argued in Point 8, the only testimony which could even be construed as indicating Appellant participated in the assault of Mr. Franco came through impeachment testimony which should not have been considered as substantive evidence.

POINT 10

THE TRIAL COURT ERRED IN LIMITING DEFENSE COUNSEL'S CLOSING ARGUMENT REGARDING AUDRIN BUTLER IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION AND FLORIDA COUNTERPARTS.

The State did not call Audrin Butler as a witness even though he had supposedly received incriminating information from Appellant which the former then relayed to Detective Ladwig for preparation of the search warrant affidavit. During the defense case, Appellant called Butler as a witness, but he did not answer the page (T 1615-1616). Butler had been served with a subpoena (T 1616). The State asked the trial judge to issue a bench warrant (T 1616). Defense counsel did not want the court to issue a bench warrant (T 1618). Before closing argument, the State moved in limine to present defense counsel from arguing Audrin Butler failed to appear (T 1725). Defense counsel argued that the State's case was founded on Butler's information and the credibility of Butler was a primary issue in the defense case (T 1726-1727). Defense counsel had wanted the jury to hear Butler and had called him as a witness, but when he did not appear he proceeded with his case to not disturb the flow of the case (T 1732). The judge ruled he would not allow any testimony regarding the non-appearance of Butler (T 1742).

The theory of defense was that Audrin Butler committed the murder (T 1745). Appellant was precluded from commenting on the fact the State did not call Butler to testify. This undermined the defense and rendered counsel ineffective. This ruling was clearly

error. Appellant was entitled to comment on the fact the State did not call Butler whom Appellant allegedly told about the murder. In Amos v. State, 618 So.2d 157 (Fla. 1993) the State did not call a witness which the Defendant then called as their witness. The trial Court limited defense counsel's argument regarding the State not calling the witness. This court found error in that limitation. Commenting on the State's failure to call a material witness is a comment on the State's burden of proof which must be allowed. Furthermore, in this case, Butler's culpability was the theory of defense. By disallowing comment on the State's burden, the trial judge gutted Appellant's defense. See Pacifico v. State, 19 Fla.L.Weekly D2100 (Fla. 1st DCA Sept. 29, 1994); Taylor v. State, 19 Fla.L.Weekly D1946 (Fla. 3d DCA Sept 14, 1994); Sibley v. State, 636 So.2d 893 (Fla. 5th DCA 1994); Wade v. State, 610 So.2d 664, 666 (Fla. 1st DCA 1992) (all doubts as to the admissibility of evidence bearing on a theory of defense must be resolved in favor of the accused).

POINT 11

THE DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTIONAL COUNTERPARTS BECAUSE IT IS BASED ON A JURY RECOMMENDATION AND SENTENCE TAINTED BY DUPLICITOUS CONSIDERATION OF "DOUBLED" STATUTORY AGGRAVATING FACTORS.

Appellant moved in limine to preclude the instruction on Section 921.141(5)(f), as this aggravating circumstance duplicates the "committed during a robbery" instruction (R 662). The trial court denied this request based on Castro v. State, 597 So.2d 259 (Fla. 1992) (R 665) (T 1931, 1938, 1973). The jury was instructed:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: **one**, the defendant has been previously convicted of another capital offense or of a felony involving the use and/or threat of violence to some person. The crime of principal to aggravated assault is a felony involving the use and/or threat of violence to another person. The defendant's contemporaneous convictions of principal to aggravated assault may be considered -- and that should be conviction, singular -- of principal to aggravated assault may be considered to determine whether this aggravating factor has been established; **two**, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery; **three**, the crime for which the defendant is to be sentenced was committed for financial gain.
>
> The state may not relay upon a single aspect of the offense to establish more than a single aggravating circumstance; therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. The commission of a capital felony during the course of a robbery and done for financial gain relates to the same aspect of the offense

> and may be considered as being only a single aggravating circumstance. (T 2036-2037) (emphasis added)

Although the jury was given a limiting instruction this only confused the issue. The judge still numbered **three** aggravating circumstances. Although the trial judge attempted to comply with this court's mandates, this simply causes confusion. In Castro this court stated that when applicable, the jury may be instructed on two aggravating circumstances since it may find one but the other to exist. In the present case, there was no chance the jury would find the "during a robbery" circumstance inapplicable since they had just convicted on that charge. Allowing the double instruction accomplished exactly what this court wanted to avoid.

This Court has stated, "[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) (emphasis added). By authorizing the jury to attribute weight to two statutory aggravating factors which are really but one, the scales are tipped in favor of the death penalty.

In a weighing state, when a reviewing court strikes one or more of the aggravating factors on which the sentence relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis. Clemons v. Mississippi, 494 U.S. 738 (1990); Parker v. Dugger, 498 U.S. 308 (1991). However, where a defendant who has been sentenced to death

has been denied a fair jury recommendation to which he is entitled, no meaningful harmless error analysis or reweighing of factors can be performed by an appellate court due to the absence of specific findings by the jury.

Where constitutional error occurs, the burden is on the state to show beyond a reasonable doubt that the error did not contribute to the decision of the jury. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); Chapman v. California, 386 U.S. 18 (1976).

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

State v. DiGuilio, 491 So.2d 1129, 1136 (Fla. 1986). In the absence of findings by the jury other than a generic recommendation, in this case 8-4 in favor of death, it is impossible for the state to show that the additional weight the jurors may have afforded the improper-duplicitous statutory aggravating factor did not contribute to the death recommendation.

It is respectfully submitted that, because meaningful appellate review cannot be performed in the absence of specific findings by the jury, the jury's death recommendation in this case should be summarily disregarded and afforded no weight whatsoever when this Court performs its proportionality analysis of Appellant's crime as set forth in the last point of this brief.

POINT 12

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE AGGRAVATING CIRCUMSTANCE OF PRIOR VIOLENT FELONY AND IN FINDING THAT FACTOR AS AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE RESPECTIVE SECTIONS OF THE FLORIDA CONSTITUTION.

Appellant filed a motion to declare Section 921.141(5)(b) unconstitutional when applied to a contemporaneous violent felony and requested the jury not be instructed on this aggravating circumstance (R 624-627, R 628). This motion was heard before the penalty phase and denied (T 1932, 1940-1962, 1972). The trial judge proceeded to adjudicate Appellant on the Principal to Aggravated Assault charge (T 1962).

A statutory aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983).

This Court began by allowing the prior violent felony aggravating circumstance to be applied to a contemporaneous felony where there were multiple deaths. LeCroy v. State, 533 So.2d 750 (Fla. 1988). It appeared the court was carving out a narrow exception to the "prior" language used in the statute when there were multiple murders. This court recognized this aggravating circumstance should not be applied to a contemporaneous felony committed upon the murder victim. Perry v. State, 522 So.2d 817 (Fla. 1988); Schafer v. State, 537 So.2d 1314 (Fla. 1989).

However, the court extended the use of this aggravating circumstance to a felony committed upon a person other than the murder victim. Ellis v. State, 622 So.2d 991 (Fla. 1993) (J. Kogan concurring). As demonstrated by the present case, this extension can lead to ridiculous results.

In the present case Appellant obtained a conviction as principal to an assault committed by a co-felon. This was then used to aggravate Appellant's murder conviction to a death sentence. The present situation is analogous to that addressed by the Supreme Court in Tison v. Arizona, 481 U.S. 137 (1987). In Tison the Court addressed the situation in which a co-felon's culpability as adequate to deserve a death sentence. The reasoning in Tison applies here. Using a contemporaneous violent felony committed by a co-felon to aggravate another felon's conviction to a death sentence is unjust, unconstitutional, and violates the dictates of the statutory aggravating circumstance which requires a prior conviction.

Appellant requests this court revisit the situation in light of the present case and read the prior violent felony aggravating circumstance more narrowly. The way the law stands, this statutory aggravating factor is too indefinite to comport with constitutional requirements. The definitions of the terms do not provide any guidance to the jury or sentence. The inconsistent applications of this aggravating circumstance leads to arbitrary and capricious results. "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and

appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). "What is important . . . is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862 (1983). Because the prior violent felony statutory aggravating factor is itself vague, and the limiting construction used by this Court both facially and as applied is too vague and indefinite to comport with the Eight and Fourteenth Amendments as set forth in Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980); and Shell v. Mississippi, 498 U.S. 1 (1990) (See Point 13), the instant death sentence imposed in reliance on the prior violent felony factor must be vacated and the matter remanded for a new penalty phase before a new jury.

POINT 13

THE AGGRAVATING CIRCUMSTANCE OF PRIOR VIOLENT FELONY AND THE JURY INSTRUCTION THEREON ARE UNCONSTITUTIONAL.

The Supreme Court of Florida has consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate criminal episodes. Prado v. State, 563 So.2d 77, 80 (Fla. 1990). Nonetheless, use of this aggravator in such fashion violates the separation of powers clause under Article I, Section 3, of the Florida Constitution, which provides:

> **Branches of government.** - The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991).

Section 921.141(5)(b) Florida Statutes provides:

> (5) **Aggravating circumstances.**-Aggravating circumstances shall be limited to the following:
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

When a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense. Milazzo v. State, 377 So.2d 1161, 1162 (Fla. 1979). The statute at issue plainly reads "previously convicted", not "contemporaneously

convicted." Moreover, "Penal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed." Trotter v. State, 576 So.2d 691, 694 (Fla. 1990); cf. State v. Camp, 596 So.2d 1055, 1056 (Fla. 1992). The current construction is the result of precisely the opposite, that is, although the legislature did not provide for use of contemporaneous convictions to support this aggravator, the supreme court has added the word and uses the statute as construed to uphold use of this aggravator in death penalty cases such as this to the disadvantage of those who face the ultimate penalty.

Regarding construction of statutes in other cases, the Supreme Court of Florida has ruled otherwise:

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Perkins v. State, 576 So.2d 1310, 1313 (Fla. 1991) (citations omitted).

Other cases are in accord. "When the language of a penal statute is clear, plain and without ambiguity, effect must be given to them accordingly. Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning. Graham v. State, 472 So.2d 464, 465 (Fla. 1983). It is axiomatic that where the legislature has defined a crime in specific terms, the courts are without authority to define it differently. State v. Jackson, 526 So.2d 58, 59 (Fla.

1988). Specific, clear and precise statements of legislative intent control' and 'courts never resort to rules of construction where the legislative intent is plain and unambiguous. State v. Smith, 547 So.2d 613, 615 (Fla. 1989). Indeed, the Supreme Court of Florida has instructed that "[c]ourts should not add additional words to a statute not placed there by the legislature, especially where uncertainty exists as to the intent of the legislature." In re Order on Prosecution of Criminal Appeals, 561 So.2d 1130, 1137 (Fla. 1990).

The standard is the same under the federal constitution. See, e.g., Crandon v. United States, 110 S.Ct. 997 (1990). "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than clearly warranted by the test." *Id.*, 1002-1003.

The jury recommendation was unreliable since it was allowed to consider this factor which violates the due process clauses under the state and federal constitutions and the Eighth Amendment to the United States Constitution.

Allowing this aggravating circumstance to be applied in to the facts of this case demonstrates this statute is unconstitutionally vague. If this aggravating circumstance which applies to a conviction or a prior conviction can be applied to a contemporaneous felony which a co-defendant comment, it gives the sentence unlimited discretion.

The jury instruction on this circumstance is thus

unconstitutionally vague as it leaves the sentence without sufficient guidelines. See Espinosa v. Florida, ___ U.S. ___ 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), Hodges v. Florida, __ U.S. __ 113 S.Ct. 33, 121 L.Ed.2d 6 (1992); Jackson v. State, 19 Fla.L.Weekly S217 (Fla. April 21, 1994); Fennie v. State, 19 Fla.L.Weekly S370 (Fla. July 7, 1994).

POINT 14

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED HOW MRS. FRANCO'S CHILDREN REFERRED TO THEIR MOTHER.

During the penalty phase, the prosecutor asked Valerie Floyd, Appellant's girlfriend:

> Q. Okay. And you've testified to this jury about the loving relationship that this father has with his child and that your daughter, who really isn't his child, calls him Daddy.
>
> A. Yes.
>
> Q. What do you think Joelle Franco's children called her?

(T 2016).

Appellant objected and the objection was sustained (T 2017). Appellant moved for a mistrial. The judge ruled the question was inappropriate but "it is not something that this jury did not already realize" (T 2019). The judge gave a cautionary instruction that the question should be disregarded.

This is not a situation in which a witness innocently blurts out inflammatory testimony. This is a case where an experienced prosecutor intentionally posed a question designed to inflame the passions of the jury. This was a blatant attempt to place a nonstatutory aggravating circumstance before the jury and clear prosecutorial misconduct. See White v. State, 616 So.2d 21 (Fla. 1993); Taylor v. State, 583 So.2d 323 (Fla. 1991). Furthermore, this is impermissible victim impact evidence. Payne v. Tennessee, 501 U.S. 808 (1991). The case should be remanded for resentencing before a new jury.

POINT 15

THE TRIAL COURT ERRED IN LIMITING DEFENSE COUNSEL'S PENALTY PHASE ARGUMENT REGARDING THE SENTENCE WHICH COULD BE IMPOSED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Defense counsel was precluded from arguing the Appellant could be sentenced to life on the non-capital offenses (T 1982). The trial court's ruling resulted in a denial of his constitutional rights to due process and to a fair trial. Amendments V, VI, XIV, U.S. Constitution; Article I, §17, Florida Constitution.

A trial judge should exercise the broadest latitude in admitting evidence during the sentencing portion of a capital case. Messer v. State, 330 So.2d 137 (Fla. 1976). There should not be a narrow application or interpretation of the rules of evidence at the penalty hearing, whether in regard to relevance or an to another matter except illegally seized evidence. Alford v. State, 322 So.2d 533 (Fla. 1975) This Court should be especially wary of the exclusion of any evidence that a capital defendant proffers as nonstatutory mitigating evidence. Any limitation on the consideration of mitigating evidence renders a death sentencing procedure to be constitutionally infirm. See Hitchcock v. Dugger, 481 U.S. 393 (1987).

In Skipper v. South Carolina, 476 U.S. 1 (1986), the United States Supreme Court held that, in capital cases, the sentence may not refuse to consider or be precluded from considering any relevant mitigating evidence. See also Eddings v. Oklahoma, 455 U.S. 104 (1982) (evidence of sixteen-year-old defendant's troubled

family history and emotional disturbance).

At a sentencing hearing, the trial court must entertain submissions and evidence which are relevant to the sentence. If the trial court refuses to allow a defendant to present matters in mitigation, this may be cause for resentencing. Miller v. State, 435 So.2d 258 (Fla. 3d DCA 1983). The possible sentence is a factor the jury could consider in mitigation. See Power v. State, 605 So.2d 856 (Fla. 1992). The trial judge limited the mitigating circumstances, and the case should be remanded for a new jury recommendation.

POINT 16

THE TRIAL COURT ERRED IN FAILING TO GIVE WEIGHT TO THE NONSTATUTORY MITIGATING CIRCUMSTANCES.

The State presented no testimony at the penalty phase, but rather relied on all previous evidence (T 1993). The appellant presented testimony from his aunt, Bonnie Hawsley, that he lived in Virginia until he was two to four years old (T 1994). He moved to Florida, and in 1981 or 1982 when Appellant was twelve to thirteen years old, his mother divorced, lost a child, and lost her job (T 1994). In 1985, Appellant's mother went to prison on drug-related charges (T 1995). Appellant went to live with Ms. Hawsley in Maryland (T 1995-1996).

Appellant was a very withdrawn child, but did well in school and had a job at a fast-food restaurant (T 1996). Ms. Hawsley was single (T 1996). Appellant's older brother, Eric, went to live with Ms. Hawsley's older sister, Myra, and Myra's husband, Bobby, because neither Myra nor Ms. Hawsley could afford to have both boys (T 1996, 2004). Myra and Bobby had two sons (T 1997). Appellant related well to Myra's family and his Uncle Bob was a role model (T 1997). Appellant appeared to be happy when he was with that family (T 1997). During the time Appellant lived with his mother, there were various men living with her off and on, but there was no stability (T 1997). Eric did well with Myra's family. He graduated from high school and joined the Navy. The difference between Eric and Appellant was that Eric had a father figure (T 1998).

Eight to nine months after Appellant went to live with Ms. Hawsley, he went back to Florida (T 2000). There were no family members in Florida, and she assumed he went to live with a family friend (T 2000). Appellant had been on his own since he was fifteen years old (T 2001). Between the ages of twelve to fifteen, Appellant's environment changed and he became a product of his environment (T 2003). When Appellant moved back to Florida, he was a troubled child (T 2005).

Valerie Floyd, Appellant's girlfriend with whom he lived and the mother of his child, testified that Appellant told her he was on his own from the time he was fifteen to sixteen years old (T 2010). Appellant lived in Ft. Lauderdale and had to sleep in abandoned cars, on balconies, or wherever he could (T 2010). He had to take care of himself because his mother was in and out of prison (T 2010). Appellant treated her well (T 2010). He maintained continuous contact with his son, Kenneth Terry, Jr. (T 2011). Appellant also treated her daughter as his own and played with her (T 2012). On cross-examination, the State elicited testimony that Ms. Floyd was receiving A.F.D.C. because she did not have a job and that Appellant supported the children when he could (T 2014 - 2015). Appellant played video games at the mall with Demon Floyd and sometimes would be gone until after dark (T 2016).

Regarding nonstatutory mitigating circumstances, the trial judge found:

> 3. Non-statutory mitigating circumstances (Any other aspect of the defendant's character, record, or background, and any other circumstance of the offense). The

defense specifically raised four non-statutory mitigating circumstances: 1. Emotional and developmental deprivation in adolescence, 2. Poverty, 3. Good family man, and 4. Circumstances of the crimes do not set this murder apart from the norm of other murders.

Evidence showed that the defendant had a "pretty good/normal upbringing" for his first approximate thirteen years. During the next approximate year the defendant's mother had a miscarriage, obtained a divorce, lost her job, and eventually went to prison on a drug offense. This necessitated the defendant and his brother moving to Maryland and each living with a separate aunt. The defendant while living with his single aunt did well in school and maintained a job after school. The defendant being unhappy in Maryland, after eight or nine moths, at age fifteen (15) moved back to Florida and lived with a male friend of his mother's. It is unknown what kind of life the defendant had living with his mother's male friend. The defendant's girlfriend testified, that the defendant had told him that he has been on his own since age fifteen (15) or sixteen (16) and at some point lived on the street sleeping in abandoned cars.

Hearsay testimony showing that the defendant was living on his own since age fifteen and at some point lived on the street and slept in abandoned cars does not amount to a reasonable quantum of competent proof of a non-statutory mitigating circumstance of emotional and developmental deprivation in adolescence (even when considered in conjunction with the defendant's age).

The fact that the defendant's girlfriend and mother of his child was receiving Aid to Family's with Dependent Children, i.e., evidence of existence at a poverty level of the child and his mother and by implication the defendant, does not amount to a non-statutory mitigating factor. While the defendant's girlfriend testified that defendant provided financial support when able there were extended periods when the defendant had no job. She couldn't recall when the defendant's last job was. She also testified,

> on cross examination, that the defendant played video games at the mall for long periods of time (the logical inference being, and argued by the state, was that the defendant could have been working or at least looking for a job to support his family and combat any poverty).
>
> Evidence did show that the defendant loved his girlfriend and young son and treated them well and treated his girlfriend's daughter by another man as his own daughter. If the above makes the defendant a "good family man" it does not amount to a non-statutory mitigating circumstance.
>
> Lastly the defendant urges as a non-statutory mitigating circumstance the "circumstances of the crimes do not set this murder apart from the norm of other murders". Based on the two above described aggravating circumstances and no mitigating circumstances, the death penalty is the appropriate sentence. The defendant's proportionality argument is properly presented to the Florida Supreme Court when it reviews this sentence and considers the circumstances in the light of other decisions determining whether the death penalty is appropriate. See for example: Clark v. State, 613 So.2d 412 (Fla. 1992); Freeman v. State, 563 So.2d 73 (Fla. 1990); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Shriner v. State, 386 So.2d 525 (Fla. 1980); and Cook v. State, 581 So.2d 141 (Fla. 1991).

(R 750-753).

Nonstatutory mitigating circumstances can be any circumstance in the defendant's life. The trial judge categorized the testimony into four areas:

> 1. Emotional and developmental deprivation in adolescence;
>
> 2. Poverty;
>
> 3. Good family man;
>
> 4. Circumstances of the crimes to not set this murder apart from the norm of other

murders.

The evidence was uncontroverted that at the age of twelve or thirteen the Appellant was separated from his mother who spent the rest of his juvenile years in and out of prison, had no father, and was separated from his older brother who went to live with a loving family. Appellant went to live with an aunt and was a troubled child. He was allowed to move to Florida at the age of fifteen, with his mother in prison and no one knowing exactly who he was living with or where he was living. He lived in abandoned cars and balconies in Ft. Lauderdale. At some point he met Valerie Floyd and had a child. He was a good family man and cared for both his child and her child by another man. All this testimony was uncontroverted. The trial judge found that "hearsay" testimony did not amount to a reasonable quantum of competent proof of nonstatutory mitigation and therefore found there was no mitigation. Likewise, the trial judge found that because Ms. Floyd and his child lived in poverty, this was not mitigation. The judge conceded the Appellant loved his girlfriend, her daughter, and his son, but said that if this made him a good family man it did not amount to nonstatutory mitigation (R 752-753). The trial judge also refused to consider any argument this murder was not the most aggravated/least mitigated and thus undeserving of the death penalty (R 753).

In Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), this court noted the state trial judges experienced difficulty in uniformly addressing mitigating circumstances and provided

guidelines to clarify the issue. In setting these guidelines, this court cited Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) which states that:

> [j]ust as the State may not by statute preclude the sentence from considering any mitigating factor, neither may the sentence refuse to consider, as a matter of law, any relevant mitigating evidence....The sentence, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. (Emphasis supplied)

The Court then set the following guidelines:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant[8] to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. (Cites omitted).

The Court further stated:

> The court must find as a mitigating circumstance each proposed factor that is mitigating in nature[9] and has been reasonably

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[8]Court footnote 3: As with statutory mitigating circumstances, proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts. Examples of categories are contained in footnote 4.

[9]Court footnote 4: This is a question of law. A mitigating circumstance can be defined broadly as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Valid nonstatutory mitigating circumstances include but are not limited to the following:

1) Abused or deprived childhood.

2) Contribution to community or society as

> established by the greater weight of the evidence:[10] "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. (Emphasis supplied)

Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990).

This standard was reiterated in Nibert v. State, 574 So.2d 1059 (Fla. 1990) where, as here, the state presented no evidence to challenge any of the mitigating evidence. This court stated that where uncontroverted evidence of a mitigating circumstance has been presented, the trial court must find the mitigating circumstance has been proved unless the record contains competent substantial evidence to support the trial court's rejection of the mitigating circumstances. Nibert at 1062. Nibert cites to Pardo v. State,

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> evidenced by an exemplary work, military, family, or other record.
>
> 3) Remorse and potential for rehabilitation; good prison record.
>
> 4) Disparate treatment of an equally culpable codefendant.
>
> 5) Charitable or humanitarian deeds.

[10]Court footnote 5: This is a question of fact and the court's finding will be presumed correct and upheld on review if supported by "sufficient competent evidence in the record." ***Brown v. Wainwright***, 392 So.2d 1327, 1331 (Fla. 1981).

563 So.2d 77, 80 (Fla. 1990) which states this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law. In the present case, the evidence was completely uncontroverted and the trial judge simply ignored the mitigation. The trial judge erred by not assigning weight to the evidence presented.

Recently in Wournos v. State, 19 Fla.L.Weekly S455, fn. 6 (Fla. Sept. 22, 1994), this Court stated that a failure to rebut could justify the finder of fact in concluding that the State does not challenge the existence of the factor, provided the mitigating factor has not otherwise been controverted. The State did nothing to rebut the evidence presented, only argued against it. Argument in not evidence, and the evidence here is uncontroverted.

Being a good family man is mitigating. See Bedford v. State, 589 So.2d 245 (Fla. 1992); Thompson v. State, 565 So.2d 1311 (Fla. 1992); Harmon v. State, 527 So.2d 182 (Fla. 1988); Cherry v. State, 522 So.2d 817 (Fla. 1988).

Poverty is mitigating. Hegwood v. State, 575 So.2d 170 (Fla. 1991); Brown v. State, 526 So.2d 903 (Fla. 1988); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Lloyd v. State, 524 So.2d 396 (Fla. 1988); Spivey v. State, 529 So. 2d 1088 (Fla. 1988); Fead v. State, 512 So.2d 176 (Fla. 1987); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Amazon v. State, 487 So.2d 8 (Fla. 1986).

Appellant's deprived background should have been considered as

mitigation: See Trotter v. State, 576 So.2d 691 (Fla. 1991); Cochran v. State, 547 So.2d 928 (Fla. 1990).

These factors, together with the statutory mitigation of age should have been weighed not simply discarded. See Freeman v. State, 547 So.2d 125 (Fla. 1989) (age of 22); Songer v. State, 544 So.2d 1010 (Fla. 1989) (age of 23); Cherry v. State, 522 So.2d 817 (Fla. 1988) (age of 21); Derrick v. State, 581 So.2d 31 (Fla. 1991).

As in Spencer v. State, 19 Fla.L.Weekly S460 (Fla. Sept. 22, 1994), the trial judge erred in not finding and weighing uncontroverted mitigation. As in Santos v. State, 591 So.2d 160 (Fla. 1992) this case must be remanded for a new sentencing hearing before the trial court where the trial court failed to adhere to the procedure in Campbell, supra, and Rogers v. State, 511 So.2d 526 (Fla. 1987).

POINT 17

SECTION 921.141, FLORIDA STATUTES, IS UNCONSTITUTIONAL.

The following issues were preserved for review by the filing of pretrial motions. The motions, arguments and Constitutional violations are hereby incorporated herein for the sake of brevity, recognizing this court has rejected these arguments.

Prosecutorial Discretion. The prosecuting attorney has the ultimate discretion to seek the death penalty. Because of the lack of adequate guidelines, the decision to seek a death sentence depends on the whim of the individual prosecutor. Without legislatively enacted guidelines, this inevitably leads to arbitrary and capricious actions (R 407-410). United States ex. rel. Charles Silahy v. Peters, 713 F.Supp. 1246 (C.D. Ill. 1989).

Advisory Role of Jury. It is unconstitutionally impermissible to rest a death sentence on a determination made by a sentence who has been lead to believe that the responsibility for determining the appropriateness of the Defendant's death rests elsewhere. Caldwell v. Mississippi, 472 U.S. 320 (1985) (R 412-413).

Electrocution is Cruel and Unusual Punishment (R 414-415).

Committed During a Felony as an "Automatic Aggravator". (R 416).

Burden Shifting Instruction. (R 417, 436).

Application of the Death Penalty is Arbitrary and Capricious. (R 420, 437).

The Aggravating Circumstances of Heinous, Atrocious and Cruel and Cold, Calculated, Premeditated are Vague. (R 416-438).

Appellant further asserts the Florida Death Penalty is unconstitutional for the failure to provide the defendant with notice of aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of Due Process of Law. See Gardner v. Florida, 430 U.S. 349 (1977).

The Florida Standard Jury Instructions, as well as comments made by the prosecutor and the trial court, diminished the responsibility of the jury's role in the sentencing process contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985).

The exclusion of jurors who hold objections to the death penalty is unconstitutional. This results in a denial of Appellant's constitutional right to a fair trial.

The Florida statute is unconstitutional on its face, because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the finding of such evidence by the jury and the court. It thereby violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, the language of three statutory mitigators require "extreme mental or emotional disturbance," "substantial" impairment of ones ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and "extreme" to describe the level of duress. s. 921.141(6)(b)(e)(f), Fla. Stat. (1987).

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances

"outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., Concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views of capital punishment which unfairly results

in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

Section 921.141(5)(b), Florida Statutes (1985) (the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eight and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. 279 (1987) (dissenting opinion of Brennan, Marshall, Blackman and Stevens, J.J.)

This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

POINT 18

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

The jury recommended a sentence of death by a margin of eight to four (8-4). The trial court found two aggravating circumstances: (1) committed during a robbery/pecuniary gain; and (2) prior violent felony. As discussed in Point 9, there was insufficient evidence this murder occurred during a robbery, thus negating the first aggravating circumstance. There was no substantive evidence to support the conviction on the Principal to Aggravated Assault; therefore, the second aggravating circumstance cannot stand. Furthermore, the aggravating circumstance of Prior Violent Felony is inapplicable in this case, as argued in Points 12 and 13. The jury recommendation is unreliable because it was based on inapplicable aggravating circumstances and an instruction which was confusing at best and allowed them to consider both pecuniary gain and during-a-robbery as aggravating circumstances.

Assuming at least one of the aggravating circumstances is valid, this court has rarely affirmed a death sentence with only one aggravating circumstance. See McKinney v. State, 579 So.2d 80 (Fla. 1991); Klokoc v. State, 589 So.2d 219 (Fla. 1991); White v. State, 616 So.2d 21 (Fla. 1993). In fact, the only cases in which this court has affirmed a death sentence based on one statutory aggravating factor is where the murder was especially heinous, atrocious or cruel. See Arango v. State, 411 So.2d 172 (Fla.

1982); LeDuc v. State, 365 So.2d 149 (Fla. 1978); and Gardner v. State, 313 So.2d 675 (Fla. 1975).

Even if there were two aggravating circumstances, this death sentence is disproportionate where other defendants equally situated received life sentences rather than death sentences. In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that "[a]ny review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five aggravating circumstances, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence because "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes". Fitzpatrick, 527 So.2d at 811.

Like Fitzpatrick, this is not the most aggravated crime. Assuming Appellant committed the murder, there was scant evidence the murder was during a robbery. Even if it were, the robbery was already the basis of his felony murder conviction, and using this element to aggravate the crime gives double consideration to this aspect. The other aggravating circumstance of prior violent felony, even if applicable, can be given little or no weight. There is absolutely no evidence Appellant participated in any way in the assault of Mr. France. It is incomprehensible how this could be given any weight in aggravation or that the Legislature intended such an attenuated result. Further, it is already the basis for a separate conviction, just like the robbery. The facts

of the murder, taken in the light most favorable to the State, at most shows an accidental shooting during a robbery.

This court has described the "proportionality review" conducted in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of circumstances in a case, and to compare it with other capital cases.* It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060 (Fla. 1990) (citation omitted) (emphasis added).

This case is proportional to other cases in which this court has remanded for a life sentence. In Kramer v. State, 619 So.2d 274 (Fla. 1993) this court found the death sentence disproportional where the defendant systematically pulverized the victim to death and had a prior murder in which he beat the victim to the point he eventually died. See Kramer v. State, 619 So.2d at 278, J. Grimes dissent.

This case is proportional to Douglas v. State, 575 So.2d 165 (Fla. 1991) in which a victim was brutalized for four hours and finally shot. Although Douglas was classified as a "domestic" case, the felony murder should be considered as proportionate to the "domestic" distinction cases where, as here, there is a single shot and no showing of premeditation. The reason domestic cases are considered less-than-egregious is due to the heat of passion factor. In a felony murder situation there is a similar accident factor. In fact, in Nibert v. State, 574 So.2d 1059 (Fla. 1990)

this Court compared the spontaneous murder to domestic cases. A shooting can be entirely accidental yet the fact it occurred during a robbery elevates it to first degree murder. However, the murder such as the present is not a death case. See also Blakely v. State, 561 So.2d 560, (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985).

This case is proportional to Tillman v. State, 591 So.2d 167 (Fla. 1991) in which the victim was stabbed 59 times and the defendant was on parole at the time and to Jackson v. State, 575 So.2d 181 (Fla. 1991) which involved a robbery where the victim was shot once. In Jackson this court found the murder which was committed during a robbery was not premeditated and analyzed the situation as follows:

> Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder. Accord White v. State, 532 So.2d 1207, 1221-22 (Miss. 1988) (Enmund and Tison are not satisfied in murder case with multiple defendants and no eye-witnesses where all evidence is circumstantial and the actual killer is not clearly identified). To give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of Enmund and Tison, that the constitution requires proof of culpability great enough to render the death penalty proportional punishment, and it fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862 (1983).

Jackson, 575 So.2d at 193. There was absolutely no evidence

Appellant had a mental state culpable enough to rise to the level of reckless indifference. At most, the evidence showed the shooting was an accident.

This case is also proportional to Morgan v. State, 639 So.2d 6 (Fla. 1994) (Defendant brutally murdered older woman); Livingston v. State, 565 So.2d 1288 (Fla. 1988) (committed during a robbery and prior violent felony); Smalley v. State, 546 So.2d 720 (Fla. 1989) (felony murder of aggravated child abuse committed in a heinous, atrocious, and cruel manner); Knowles v. State, 632 So.2d 62 (Fla. 1993) (double murder, each of which was used to aggravate the other); Songer v. State, 544 So.2d 1010 (Fla. 1989) (murder of state trooper after defendant walked away from prison); Lloyd v. State, 524 So.2d 396 (Fla. 1988) (murder during a robbery); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (murder during a burglary); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (murder during a robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (murder during a robbery); Menendez v. State, 419 So.2d 312 (Fla. 1982) (felony murder); Welty v. State, 402 So.2d 1159 (Fla. 1981) (override of felony murder committed to avoid arrest); Penn v. State, 574 So.2d 1079 (Fla. 1991) (beat his mother to death while she was asleep); Farinas v. State, 569 So.2d 425 (Fla. 1990) (heinous, atrocious murder committed during a kidnapping). The case should be remanded for imposition of a life sentence.

CONCLUSION

Based upon the cases, authorities and policies cited herein, Appellant requests that this Honorable Court grant the following relief:

As to Points 1 through 10, reverse and remand for a new trial;

As to Points 11, 12, 13, 16, remand for the imposition of a life sentence or, in the alternative, a new penalty phase;

As to Points 14 and 15, remand for a new penalty phase;

As to Point 18, remand for the imposition of a life sentence; and,

As to Point 17, remand for the imposition of a life sentence or, in the alternative, declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to: Margene Roper, Assistant Attorney General, Capital Appeals Section, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida on this 28th day of December, 1994.

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