IN THE SUPREME COURT OF FLORIDA

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| RONNIE FERRELL, | : | |
| Appellant, | : | |
| vs. | : | CASE NO.: 83076 |
| THE STATE OF FLORIDA, | : | |
| Appellee. | : | |

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This is an appeal from the Fourth Judicial Circuit, in and for Duval County, Florida, in a criminal case in which the death penalty was imposed. Appellant was convicted of one count of first-degree murder, one count of a lesser included offense of unarmed robbery, and one count of a lesser included offense of unarmed kidnapping. (R-223).

Appellant had originally been charged by information with one count of second-degree murder, one count of armed kidnapping, and one count of armed robbery. (R-8). On July 25, 1991, the Duval County Grand Jury returned an indictment for first-degree murder, armed robbery, and armed kidnapping. (R-20).

The Office of the Public Defender had initially been appointed to represent appellant. On June 7, 1991, that office certified a conflict and filed a motion to withdraw from representation. (R-14). Private attorney Richard D. Nichols was appointed to represent appellant. (R-15).

On behalf of appellant, trial counsel filed the following pre-trial motions as to the death penalty:

(a) Motion to preclude death qualifications of jurors in the innocence or guilt phase . . . . and to utilize a bifurcated jury (R-52);

(b) Motion to dismiss and to declare sections 782.04 and 921.141, Florida Statutes unconstitutional for a variety of reasons (R-68);

(c) Motion to declare sections 921.141 and 922.10, Florida Statutes unconstitutional because electrocution is cruel and unusual punishment (R-81);

(d) Motion to declare section 921.141(5)(h), Florida Statutes unconstitutional (R-92); and

(e) Motion to declare section 921.141, Florida Statutes unconstitutional as applied because of arbitrariness in jury overrides in sentencing (R-100).

Trial counsel also filed a pre-trial motion for statement of aggravating circumstances (R-125), and a motion for special verdict (R-98). All of the motions described above were denied by the trial court.

The state filed a pre-trial motion in limine to preclude the defense from arguing regarding the state's failure to call any witness. (R-129). The trial court granted this motion. (R-129). Trial counsel objected to the admission of similar fact evidence that appellant was involved in a robbery of the decedent. (T-426).

A jury was selected on March 9, 1992; because appellant's trial counsel agreed to strike all of the jurors who voiced concerns over the death penalty, there was no litigation over challenges for cause. (T-178-404). Nor were there any challenges for improper racial bias manifested in peremptory strikes.

The case was tried on March 10 and 11, 1992, and appellant was convicted as described above. A penalty phase proceeding was held on March 20, 1992; one witness was called on behalf of the state and none was called for the defense. After deliberating for twenty-five minutes, the jury returned its verdict of an advisory recommendation of death, by a vote of seven to five. (R-218; T-1033; T-1036).

After the advisory recommendation of the jury, sentencing was

held. No testimony was presented at the sentencing hearing. The court made findings of fact and determined that the following statutory aggravating circumstances existed:

(1) the defendant has been previously convicted of a felony involving the use of and/or the threat of violence to some person;

(2) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping;

(3) the crime for which defendant is to be sentenced was committed for financial gain;

(4) the crime for which defendant is to be sentenced is especially heinous, atrocious, or cruel;

(5) the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R-227-39).

The trial court determined that the fact that the co-defendant was the "trigger" man and that appellant Ferrell's part was minor "may" be a mitigating circumstance, but assigned it "slight weight." (R-240). The trial court determined that because Ferrell had used "treachery" to betray his friend that Ferrell was therefore as culpable as the co-defendant trigger man Hartley. (R-241).

The trial court imposed the death sentence as to the charge of first-degree murder; a sentence of thirty years as a habitual felony offender as to the charge of unarmed robbery, to run consecutively to Count I; and a sentence of life imprisonment as a habitual felony offender on the count of unarmed kidnapping, to run consecutively to the imposed on the unarmed robbery charge. (R-242).

Appellant timely filed his notice of appeal. (R-248).

## STATEMENT OF THE FACTS

Gino Mayhew was a seventeen-year-old crack dealer at the Washington Heights Apartments complex in Jacksonville. (T-575-76). On April 22, 1991, Mayhew was selling crack out of his Chevy Blazer at Washington Heights Apartments. (T-576). Mayhew "employed" a "lieutenant" named Sidney Jones who operated with Mayhew to stop "other people from going to other buyers and buying crack cocaine," and to bring them to Mayhew. (T-577). Jones, who admitted to having five prior felony convictions and two prior convictions for shoplifting, testified that crack sales happened all the time at the Washington Heights Apartments. (T-573; T-577-78). Jones had been at the Washington Heights Apartments all day on April 22, 1991, selling drugs with Mayhew. (T-616). In return for Jones bringing Mayhew customers, Mayhew would sell Jones crack a little cheaper or he would sometimes pay Jones. (T-617).

On April 23, 1991, at about 7:00 o'clock in the morning, Officer Michael Duckworth of the Jacksonville Sheriff's Office found a 1988 Chevy Blazer parked in a field beside an elementary school. (T-475). Officer Duckworth discovered the body of Gino Mayhew slumped over the driver's side seat in the Blazer. (T-476; T-486). Mayhew had been killed by bullet wounds to the head, but the medical examiner was unable to say in what order the shots had been fired. (T-512-13).

Mayhew's henchman Jones testified that he knew appellant, Ronnie Ferrell, and codefendants Kenneth Hartley and Sylvester Johnson. (T-573-74). Jones testified that he saw Kenneth Hartley,

Sylvester Johnson, and Ronnie Ferrell huddled together near Gino Mayhew's Blazer on the evening Mayhew was killed. (T-581). Johnson further testified that just after he saw the three near Mayhew's Blazer that he [Jones] bought a "dime" of crack cocaine from Mayhew. (T-582).

Jones testified that he then walked about three or four car lengths away from the Blazer and inspected the rock of crack cocaine he had just purchased from Mayhew. (T-582). Jones realized that the rock was too small, and he turned around to go back to the Blazer to complain. (T-582). Jones testified that he then saw Kenneth Hartley standing at the door of Mayhew's Blazer with his left hand up on the door and "this hand right here" with a pistol stuck to Mayhew's head. (T-582). Jones testified that he went up to the Blazer, but because of threats from Hartley, walked away. (T-584). Jones claimed that at that time he was able to see appellant Ferrell at the front left side of the Blazer looking back and forth. (T-585). Jones testified that he saw Kenneth Hartley "force Mayhew up in the seat," and he [Hartley] climbed into the Blazer in the back seat directly behind Mayhew. (T-586).

Jones testified that he then saw Ferrell run in front of the Blazer and get into the passenger side of the Blazer and sit in the front seat. (T-586). Jones testified that the Blazer backed up, and he then saw Sylvester Johnson run up and start talking to Kenneth Hartley, who was still seated in the back seat directly behind Mayhew. (T-587). Jones testified that he then left the apartment complex itself, and walked to the area in front of the

complex where there were stores and a gameroom. (T-589). Jones testified that he was scared to tell anyone about what he had seen happen to Gino Mayhew. (T-589).

Jones claimed that he saw the Blazer coming out of the apartment complex at a high speed going "real, real fast." (T-589). Jones testified that as the truck left the apartment complex appellant Ferrell hollered out of the Blazer, "Gino will be back." (T-590).

Jones testified that after Mayhew's truck left the apartment complex he saw Steve Mitchell's purple truck drive out of the complex. (T-593). Jones testified that Sylvester Johnson was driving the purple truck. (T-593).

Robert Williams testified that he was a cell-mate of Ronnie Ferrell's at the Duval County Jail in 1991. (T-662). Williams testified that during the time he and Ferrell were cellblock-mates, they developed a "jail-house friendship." (T-663). Williams testified that he and Williams talked about their charges, and that Ferrell told him that Sylvester Johnson and Kenneth Hartley had previously robbed Gino Mayhew. (T-665). According to Williams, Ferrell also implicated himself in this previous robbery. (T-668). Williams claimed that Ferrell indicated the three of them had taken $1,700.00 from Mayhew on the Saturday before his death. (T-669). Williams testified that Ferrell told him that Sylvester Johnson and Kenneth Hartley had been recognized by Gino Mayhew. (T-669). According to Williams, Ferrell also told him that he himself had not been recognized by Gino Mayhew during the Saturday robbery.

(T-669).

Williams testified that Ferrell told him the three co-defendants had planned to murder Mayhew, and had concocted a scheme whereby Ferrell would pretend to purchase a large amount of cocaine from him. (T-673-74). According to Williams, the plan was to lure Mayhew to Sherwood Park, an isolated area without any witnesses. (T-675). According to Williams, Ferrell admitted that the three co-defendants robbed Mayhew of drugs and money, including taking a gold rope chain from around his neck, then Kenneth Hartley shot him four or five times in the head. (T-676). Williams testified that Ferrell indicated the gun that had been used "had a clip." (T-677). Williams also testified that Ferrell stated the three left drug paraphernalia on the front seat of Mayhew's vehicle. (T-678). No gold chain was ever recovered from appellant.

Williams admitted that he had four prior felony convictions, and a pending charge of dealing in stolen property. (T-682).

**WILLIAMS RULE**

On January 8, 1992, the state filed a notice of other crimes, wrongs, or acts evidence, alleging the following:

> Ronnie Ferrell on or about the 20th day of April, 1991, in the County of Duval, in the State of Florida, did unlawfully by force, violence, assault, or putting in fear, take money or other property, to-wit: drugs or money, the property of Gino Mayhew, as owner or custodian, from the person or custody of Gino Mayhew, and in the course of committing said robbery, carried a firearm, to-wit: a pistol, contrary to the provisions of Section 812.13, Florida Statutes.

(R-43).

No written response or motion to exclude the similar fact evidence was filed by the defense and no pre-trial hearing was held as to the admissibility of such evidence; however, immediately prior to opening statement, defense counsel lodged an oral objection to the admission of the similar fact evidence. (T-426). Appellant's trial counsel agreed that the state attorney could present the facts to the court in summary form. (T-427). According to the state, the deceased Mayhew had been robbed by appellant and his two co-defendants on Saturday, April 20, 1991--two days before the homicide. (T-427). The state postulated that after the robbery, the three co-defendants began to believe that Mayhew was going to retaliate against them in some fashion for the robbery, and at that time began to formulate their plan to murder him. (T-427).

Trial counsel stipulated that the facts as outlined by the prosecutor were sufficient for the court to base a decision upon. (T-429). The following ruling and objections were stated on the record:

> THE COURT: Based on the facts I just heard to which you were agree, I think it's admissible, Williams Rule evidence.
>
> MR. NICHOLS: Well, I think arguably is, but I just need to voice my objection.

(T-429).

In support of its Williams Rule claim, the state presented the testimony of Lynwood Smith. Smith testified that he was nineteen years old, and lived at the Washington Heights Apartments in April of 1991. (T-535). Smith testified he knew Gino Mayhew and co-

defendant, Kenneth Hartley. (T-526-37). Smith testified that on April 20, 1991, between 9:00 o'clock and 11:00 o'clock p.m., he was at home in his bedroom at apartment 137 at the Washington Heights Apartments. (T-537-38).

Smith further testified that on that evening he had seen Gino Mayhew running into his [Smith's] bedroom, looking upset. (T-538). Smith testified that Mayhew looked as if he had just been beaten up and was acting upset, angry and excited. (T-538). Smith testified that he saw a bleeding gash on Mayhew's forehead. (T-538).

Over defense objection, Smith was permitted to testify as to an "excited utterance" made by Mayhew to the effect that he had just been robbed by two guys and one of them looked like "Kip." (T-556). According to Smith, Mayhew told him that the other man involved in the robbery had a hat pulled down over his face. (T-557). Smith testified that Mayhew was unable to recognize the second man, and that Mayhew told him the robbers got money and drugs from him. (T-557). Smith also testified Mayhew told him he had been shot in the knee with a pistol by one of the robbers. (T-557).

On cross-examination, Smith admitted he had known appellant Ferrell and Mayhew since childhood, and that the two of them had known each other for that amount of time. (T-559). Smith admitted that Mayhew did not report to him that one of the robbers looked like appellant Ferrell. (T-559).

The state also presented testimony of a Gene Felton who testified that he was at the poolroom near the Washington Heights

Apartment complex on the night of April 20, 1991, and that he saw the appellant and co-defendant Sylvester Johnson on that same evening. (T-562-66). According to Felton, appellant and Johnson were discussing a fight they had had with Mayhew. (T-566). Felton testified he heard appellant say that he had beat Gino Mayhew and had taken his drugs and money. (T-567).

Defense counsel moved to strike Felton's testimony, inasmuch as he could place no date on the subject of appellant's and co-defendant Johnson's purported conversation. (T-569-70). The court denied the motion to strike. (T-571).

**SENTENCING**

On March 20, 1991, a penalty phase hearing was held. (T-967-1027). The state presented the testimony of Beverly Frazier, who testified that she had been a correctional officer in the Duval County Jail in 1988, when an altercation between inmates and officers had occurred. (T-972-82). Frazier testified that appellant was involved in a group of inmates who had made threats and demands to correctional officers and who refused to be subdued.

Frazier testified she had been slammed up against the wall and kicked and hit by the group of inmates. (T-981). This incident was the same incident from which the riot charge stemmed.

## SUMMARY OF ARGUMENT

**GUILT PHASE**

Appellant asserts that the trial court impermissibly allowed evidence of another crime to be admitted over defense objection. Appellant argues that the evidence of a purported robbery two days before the death of the victim was actually the feature of this trial, and was introduced solely to show appellant's propensity to commit crime.

Appellant also asserts that because there was insufficient evidence to convict him of first-degree murder and robbery that the trial court erred in denying his motions for judgment of acquittal.

Ferrell also objects to the trial court's spontaneous instruction to the jurors regarding the original Biblical origins of the Ten Commandments as a denial of his right to a fair trial.

**PENALTY PHASE**

Ferrell argues that there was insufficient evidence to prove the aggravators "cold, calculated and premeditated," "for pecuniary gain," and "heinous, atrocious and cruel" beyond a reasonable doubt, and that he therefore should be re-sentenced to life. Moreover, Ferrell asserts the trial court impermissibly doubled the factors "for pecuniary gain" and "during the course of kidnapping" because they were inextricably intertwined in the same criminal episode. Ferrell also argues the trial court's instructions as to "cold, calculated and premeditated were deficient and that the trial court erred in failing to require special verdicts.

## ISSUE I:

**THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO BIBLICAL ORIGINS OF THE COMMANDMENT "THOU SHALT NOT KILL"**

During voir dire, Assistant State Attorney George Bateh was questioning venirewoman Pollick regarding her personal views on the death penalty. (T-374). Venirewoman Pollick replied that she was recalling biblical sources to help her with her personal feelings on the death penalty. (T-374). At that time, the trial court interjected and stated the following:

> THE COURT: Let me add one thing here, counsel, every time this comes up we have different opinions about it.
>
> This is not the first time this has come up during the course of a jury selection in a capital case.
>
> Inquiry has been made over the last twenty or thirty years that both Hebrew and Christian scholars, they tell us--these are students who have been studying it for long years--they tell us in the original Bible, in Greek, Hebrew, and Arabic, the Ten Commandments say "Thou shalt not commit murder." It doesn't say anything about "Thou shalt not kill? [sic] It says, "Thou shall not commit murder? [sic] It does not say, "Thou shalt not kill."
>
> That translation of the Hebrew, Greek and Arabic Bible have [sic] translated it from "murder" to "Thou shalt not kill." But in the original Bible it is, "Thou shall not commit murder."
>
> And also when you say--when attorneys ask you, Can you sit in judgment, you are not talking about sitting in judgment of a person morally or socially or any other thing, but just make a determination of guilt or innocence. That is what you are asked to do, not with judgment.

With that proceed, Mr. Beteh [sic].

This spontaneous "instruction" to the jurors was wholly unauthorized, clearly not permitted by the Florida Standard Rules of Jury Instructions in capital cases, violates the Code of Judicial Conduct, and was extremely prejudicial to the jury. This comment by the trial court judge constituted a comment on the applicability of the death penalty as perceived in religious history, and was calculated to influence the positions of potential jurors as to societal acceptability of capital punishment. Such a comment was intolerable, unacceptable, wholly prejudicial to appellant, and should not be permitted. Because the trial court erred in stating such an unfounded, spontaneous biased comment calculated to influence the jury, in the presence of all the potential jurors, this cause should be reversed and a new trial required.

Canon Three of the Florida Code of Judicial Conduct states:

> B. Adjudicative Responsibilities
>
> * * *
>
> (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. . . .

Because the trial judge occupies such a dominant position in a jury trial and his comments overshadow the comments of litigants, witnesses and other court officers, the trial court should not make ill-considered misleading and erroneous remarks in t he presence of the jury. See Provence v. State, 337 So.2d 783 (Fla. 1976). Such gratuitous comments and interjections as made by the trial judge in this case deprive accused individuals of a fair trial. See Keane v. State, 357 So.2d 457 (Fla. 4th DCA 1978).

## ISSUE II.

### THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A COLLATERAL CRIME

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

In Williams v. State, 117 So.2d 473 (Fla. 1960), the court reaffirmed Williams v. State, 110 So.2d 654 (Fla. 1959), however, the court reversed the defendant's conviction because the state had made a collateral offense a *feature* of the trial.

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

> Similar fact evidence of other crimes, wrongs, or other acts is admissible when relevant to prove a material fact, an issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

This statute is a codification of the Florida law discussed above and the evidentiary rule is now commonly called the Williams Rule.

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

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

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

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

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

Finally, testimony concerning past crimes that do not involve the defendant cannot be introduced to demonstrate that the defendant committed the crime at issue. Hernandez v. State, 595 So.2d 1041 (Fla. 3d DCA 1992). In the instant case, there was only a scintilla of evidence to connect the defendant with the purported "collateral crime robbery" occurring some two days before the murder of the decedent in this case. The record established that the ***only*** evidence connecting defendant to that purported robbery was the questionable testimony of jailhouse snitch Robert Williams who claimed appellant admitted his complicity in that robbery. Even the state's own witness, Lynwood Smith, who testified that Gino Mayhew had come running into his apartment and said he had been robbed, admitted that Gino Mayhew could not place appellant at the place of that prior robbery. (T-559-61). Prior to evidence of an independent crime being admissible, it is ***essential*** to show that the former crime was in fact committed and was committed by the person on trial. Dibble v. State, 347 So.2d 1096 (Fla. 2d. DCA 1977), emphasis supplied, citing Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1963), and State v. Norris, 168 So.2d 541 (Fla. 1964).

Before evidence of a collateral offense can be legally admissible, "the points of similarity must have some special character or be so unusual as to point to the defendant." Edmond v. State, 521 So.2d 269 (Fla.2d DCA 1988), citing Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). The collateral offense "must be not only strikingly similar;" it must share some "unique characteristic or combination of characteristics which sets them apart from other offenses." Fulton v. State, 523 So.2d 1197 (Fla. 2d DCA 1988), citing Heuring v. State, 513 So.2d 122 (Fla. 1987) and Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979); Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985). Similar fact evidence is not admissible where the collateral crime is *merely similar* to the crime for which the defendant is on trial. See Smith, supra. In the instant case, the purported "similar" robbery was a garden variety robbery of a drug dealer, and the victim of the robbery alleged in the similar fact evidence incident did not identify appellant as one of the robbers, even though he had known him all his life. (T-559-61).

In Drake v. State, 400 So.2d 1217 (Fla. 1981), the state attempted to introduce into a first-degree murder trial evidence the fact that on two prior occasions the defendant had sexually assaulted two different women and (as with the victim of the murder case) had tied the victims' hands behind their backs. The material issue sought to be proved by this evidence was identity. The court reiterated the rule that proof of identity based on the "mode of operation theory" is "based on the similarity of and the unusual

nature of the factual situations being compared." 400 So.2d at 1219. Stating that "a mere general similarity will not render the similar facts legally relevant to show identity," the court noted

> (g)iven sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character to be so unusual as to point to the defendant.

400 So.2d at 1219. The court found the only similarity to be the binding of the hands and the fact all victims had left from a bar with the defendant. Noting that binding of the hands occurs in many crimes *involving many criminal defendants*, the court found the evidence not sufficiently unusual and ruled it inadmissible.

The requisite similarity to introduce evidence of a collateral crime was discussed by the First District Court of Appeal in Helton v. State, 365 So.2d 1101 (Fla. 1st DCA 1979). Helton was tried and convicted of sexual battery. The victim testified she was abducted and taken to a wooded area where the defendant choked her, threw her to the ground and forced her to participate in various sexual acts. She was subsequently able to get away and ran out to the highway nude, where she hailed a passing motorist. At the trial, another woman testified she had ridden home from work with Helton and that he drove to a wooded area where he told her he was going to rape her. She testified Helton ripped off her clothes, but then pushed her away stating, "Run before I kill you." She testified she screamed for help and was picked up by passing motorists. Helton had been convicted of simple battery for that offense. The First DCA rejected the testimony of the simple battery victim as being relevant to the sexual battery, and stated:

> The only similarities between the two incidents are that they occurred in wooded areas, the victims allegedly did not consent to the encounters, and the victim in each case hailed a passing car for help. There are numerous dissimilarities.

365 So.2d at 1102.

The First District also held in Flowers v. State, 386 So.2d 854 (Fla. 1st DCA 1980), that sufficient similarities did not exist to justify admission of collateral crimes. Both cases involved burglary and sexual battery, but the court found the only similarity to be the apartments were entered on the second floor via sliding glass doors. Noting that the incidents occurred six weeks apart in areas four to five miles apart, the court held the collateral evidence inadmissible, and reversed and remanded for a new trial.

Requisite similarity was also discussed in Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979). Again, identity was the issue sought to be proved. Both crimes involved a burglary and sexual battery. A window was used to gain entry into the homes of young women living alone. The crimes occurred within three weeks of each other, and happened about the same time of night. Additionally, money was taken from the victim in both cases. The court did note that the crimes occurred in different parts of the city, and the attitude of the assailant toward the victims varied significantly. The court did note that the crimes occurred in different parts of the city, and the attitude of the assailant toward the victims varied significantly. The court concluded there were not enough similarities between the two to justify admission of the collateral

crime, and reversed and remanded for a new trial.

In Brown v. State, 397 So.2d 320 (Fla. 2d DCA 1981), this court reviewed the similarities between two separate robberies, concluded the evidence showed "only a general similarity between the two crimes," and was therefore inadmissible, and reversed for a new trial. The state sought to introduce evidence of a bookstore robbery at the trial of a robbery of a market. The robberies were similar in that three men participated in each, money was put into a bag, and one man asked if an alarm had been set off. Additionally, in each robbery, one of the men had been described as large with red hair. The court ruled that the modus operandi of the two robberies were not unusual, and stated

> Unfortunately, robberies committed in the above-described manner are an everyday occurrence in our society.

397 So.2d at 323. The court held it was error to admit evidence of the bookstore robbery at the market robbery trial, and ordered new trials for each defendant. Under the rule of Brown, the robbery of Gino Mayhew was just another run of the mill, garden variety of a drug dealer.

Reiterating the rule that collateral crime evidence is "not admissible where the collateral crime is merely similar to the crime for which the defendant is on trial," this court considered the similarities between two burglaries in Crammer v. State, 391 So.2d 803 (Fla. 2d DCA 1980). Two burglaries were committed in the same duplex within eight days of the other. A tape player and can opener from one victim's apartment was found in the defendant's

home. A clock and a rug belonging to the other victim was also found at the defendant's home. A clock and a rug belonging to the other victim was also found at the defendant's home. Because there were only general similarities about the crimes *and nothing particularly unique*, the appellate court ruled the evidence inadmissible. The court relied on its previously announced rules in Davis v. State, supra, and Bradley v. State, infra.

Bradley v. State, 378 So.2d 870 (Fla. 2d DCA 1979), also stands for the proposition that "more than a mere similarity between the collateral crimes" and the main offense is necessary. 378 So.2d at 872. After reviewing the evidence the court concluded the only possible relevance of the collateral crimes evidence was to show bad character and criminal propensity of the part of the defendant. The state sought to introduce evidence of a prior burglary at defendant's trial on two subsequent burglaries. All three burglaries happened in the same neighborhood within two weeks of the other, similar "fabric marks" were found in each residence, and in each entrance entry was gained through a window. The court stated there was "no valid basis" for introduction of evidence of the initial burglary into the later trial. 378 So.2d at 872.

In Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985), the First District Court held that *arsenic poisoning* was "sufficiently unusual modus operandi to warrant the introduction of the collateral crime evidence." 464 So.2d at 1341. However, in Wilson v. State, 490 So.2d 1062 (Fla. 5th DCA 1986), the Fifth District Court of Appeal held that a prior undercover purchase of a $25.00

piece of cocaine should not have been admitted into Wilson's trial for sale/delivery of cocaine. Noting that "[n]o unusual circumstances or conditions were alleged or shown for either drug buy," the court held the admission error. 490 So.2d at 1064.

The Fifth District Court of Appeal stated in Wilson:

> A mere general similarity will not render the similar facts legally relevant. . . . In order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant. Peek v. State, 488 So.2d 52 (Fla. 1986); Drake v. State, 400 So.2d 1217, 149 (Fla. 1981). The admission of collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek, 488 So.2d at 55, quoting Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

490 So.2d at 1064.

In this case, the facts introduced by the state as similar fact evidence were dissimilar to the crime charged, did not implicate defendant in the collateral offense, and were not relevant to proof of any issue at trial.

This court has held that admission of improper collateral offense evidence is ***presumed*** harmful. Holland v. State, 636 So.2d 1289 (Fla. 1994), *citing* Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed. 2d 418 (1981). In Holland this court pointed out once again that "collateral crimes are relevant to proven material fact in issue such as motive, intent, absence of mistake, or identity;" and that "[e]vidence of collateral crimes or acts is not admissible to show

a criminal defendant's propensity." Holland, supra, at 1293.

Admission of irrelevant similar fact evidence is "*presumed* harmful error because of the danger that a jury will take the bad character or propensity . . . as evidence of guilt of the crime charged." Carr v. State, 578 So.2d 398 (Fla. 1st DCA 1991), citing Keen v. State, 504 So.2d 396 (Fla. 1987). The Fourth District Court of Appeal has correctly noted the power of similar fact evidence:

> Evidence of other crimes frequently predisposes the minds of jurors to believe the defendant guilty.

Cox v. State, 563 So.2d 1116 (Fla. 4th DCA 1990) (citations omitted).

Additionally, evidence of an uncharged criminal act is inadmissible when it merely shows bad character or propensity of the accused. Richardson v. State, 528 So.2d 981 (Fla. 1st DCA 1981); Brown v. State, 472 So.2d 475 (Fla. 2d DCA 1985); Diaz v. State, 467 So.2d 1061 (Fla. 3d DCA 1985).

The state sought to admit the Williams rule testimony solely to prove appellant's bad character or propensity to commit crime. In this case, there is no question that the probative value of the references to other purported robberies was outweighed by the unfair prejudice to appellant. See Coler v. State, 418 So.2d 238 (Fla. 1982); Carr v. State, 578 So.2d 398 (Fla. 1st DCA 1991).

Although Heuring v. State, 513 So.2d 122 (Fla. 1987) relaxes the standard of similarity of similar fact evidence pursuant to Section 90.404(2), there still exists the requirement that the

collateral evidence be relevant to some issue of the trial, whether identity, intent, motive, opportunity, plan, knowledge, absence of mistake or accident, or -- as now allowable under Heuring -- simply relevant to corroborate the victim's testimony. See also Calloway v. State, 520 So.2d 665 (Fla. 1st DCA 1988) (adopts Heuring standard and allow similar fact evidence as simply relevant simply to corroborate the victim's testimony). Such use of similar fact evidence to prejudice the defendant, to show propensity on the part of the accused to commit such a crime, and to confuse the jury, is impermissible. Because the trial court erred in admitting the similar fact evidence, appellant's convictions must be reversed and this cause remanded for a new trial.

Moreover, where the state's case is largely circumstantial, it is more difficult to say beyond a reasonable doubt that the verdict was not affected by evidence of collateral crimes. See Czubak v. State, 570 So.2d 925 (Fla. 1990). In Czubak, as in the instant case, the admission of the collateral crimes evidence was presumptively harmful.

As the First District Court of Appeal has stated in Saffor v. State, 625 So.2d 31 (Fla. 1993), in determining the admissibility of collateral crime evidence, the trial court must make two determinations:

> (1) whether the evidence is relevant or material to some aspect of the offense being tried, and
>
> (2) whether the probative value is substantially outweighed by any prejudice.

625 So.2d at 33.

The First District Court of Appeal held in Saffor that "[t]he standard of appellate review is whether the trial court abused its discretion in making these evidentiary determinations." 625 So.2d at 31. Because the trial court abused its discretion in admitting evidence of a purported collateral offense in the instant case, this cause should be reversed and remanded for a new trial.

## ISSUE III:

**THE TRIAL COURT ERRED IN ADMITTING A PURPORTED STATEMENT OF GINO MAYHEW TO LYNWOOD SMITH AS AN EXCITED UTTERANCE**

The state presented witness Lynwood Smith to testify that on a Saturday night two days before Mayhew's death, Mayhew ran into Smith's apartment claiming that he had just been robbed. (T-535-58). Smith testified that Mayhew had appeared "upset, angry and excited," and told him that he had been robbed by Kenneth Hartley. (T-556). Trial counsel objected to the admissibility of this testimony on the grounds that it was not an excited utterance as defined by the Florida Evidence Code.

An excited utterance is defined as "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Section 90.803(2), Florida Statutes. An excited utterance is admissible as an exception to the hearsay rule because a declarant does not have the reflective capacity necessary for conscious misrepresentation. Thus, statements made by someone who is excited are spontaneous and have sufficient guarantees of truthfulness. Rogers v. State, 20 F.L.W. S. 233 (Fla. 1995). In Rogers, this court stated:

> A statement qualifies for admission as an excited utterance when (1) there is an event starling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event.

20 F.L.W. at S. 234, *citing*, State v. Jano, 524 So.2d 660 (Fla. 1988).

Therefore, the important questions in this case are whether Mayhew's statement was made before he had time for reflection; and whether the statement was made while Mayhew was still under the stress of the excitement from the purported robbery. This court has held that "[t]he test regarding the time elapsed is not a bright-line rule of hours or minutes." 20 F.L.W. at S. 234. Where there is time enough to permit "reflective thought," the statement should be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process. Id. (Citations omitted.)

In this case, Mayhew clearly had sufficient time to cross the street and come to another apartment, make a telephone call, then discuss the purported robbery with Lynwood Smith. Under the Florida Evidence Code and under the rule of Rogers, supra, the time elapsed between the purported event and the excited utterance was sufficient to allow reflective thought. Therefore, under the rule of Rogers, Mayhew's purported statement to Lynwood Smith should have been excluded, and the trial court erred in allowing it into evidence. Appellant's conviction must therefore be reversed and remanded for a new trial.

## ISSUE IV:

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE FIRST-DEGREE MURDER**

This case is akin to Hall v. State, 500 So.2d 661 (Fla. 1st DCA 1986), where a conviction for first degree murder based solely on circumstantial evidence was reversed. Just as in Hall, the state herein failed to establish a prima facia case from which the jury could properly infer that Ferrell had committed first degree murder. In Hall, the defendant was charged with first degree murder of her friend, who was a night security officer at a bowling alley. Hall had been seen conversing with the security officer on the night in question, and was also seen driving off in the same direction after he left the bowling alley. Moreover, testimony revealed that Hall had asked the security officer if "he had picked up the night deposit yet," and later was overheard asking him for a loan. The security officer was, later that same evening, found shot to death, handcuffed to the inside of his truck in ditch off the highway.

A couple driving past stopped to render assistance and discovered the security officer. Hall drove up to the couple in a van and conversed with them about what had occurred; Hall placed the 9-1-1 call and gave pertinent information, but gave a fictitious name. Finally, Hall was later seen in the company of a co-defendant who was a prime suspect in the case.

Law enforcement never found the $1,200.00 of the night deposit money that the security guard was supposed to have been carrying, nor was the .38 revolver (one of the murder weapons) ever found. There was no evidence of Hall's fingerprints on the inside of the security guard's truck. Testimony revealed that all three individuals [the security guard, Hall and the co-defendant] knew each other.

The court stated:

> "The facts established do not constitute the offenses for which appellant is convicted . . . [H]ere the evidence is wholly insufficient to justify a verdict of guilt . . . . "

Here, just as in Hall, the state failed to establish that Ferrell was involved in the homicide, and wholly failed to establish that, if he had been, that there was any premeditation on his part. Without either of those elements of proof, the first degree murder conviction simply cannot stand. Where a conviction rests solely on circumstantial evidence, it is the appellate court's duty to review the legal sufficiency of the evidence. The appellate court must reverse the conviction when the evidence, even if strongly suggestive of guilt, fails to eliminate any reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989). If the dubious testimony of jail house snitch Williams is disregarded, this case becomes on of pure circumstantial evidence.

The Third District Court of Appeal has also found evidence to be legally insufficient of guilt of second degree murder in the case of Biggs v. State, 513 So.2d 1382 (Fla. 3rd DCA 1987). In Biggs, the appellate court stated:

> It has long been held in Florida, that "where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence" . . . It is the actual exclusion of the reasonable hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict.

513 So.2d at 1383 (citations omitted).

The Fifth District Court of Appeal has also had the opportunity to review a circumstantial evidence second-degree murder case. In Wilkes v. State, 541 So.2d 664 (Fla. 5th DCA 1989), rev. denied, 547 So.2d 1211 (Fla. 1989), the evidence showed that Wilkes and his co-defendant had known the victim for a short time and had socialized with her, and that the victim had offered both the co-defendant and Wilkes a sum of money to kill her. The Fifth District Court of Appeal noted that this fact perhaps provided a possible motive, but did not directly implicate Wilkes in the murder. Inasmuch as there was no other evidence against Wilkes, the Fifth DCA held that the trial court should have granted his motion for directed verdict or judgment of acquittal. 541 So.2d at 665.

This court has consistently held that mere suspicion that a defendant committed a murder is totally insufficient to sustain a conviction for first-degree murder. Scott v. State, 581 So.2d. 887 (Fla. 1991); Cox v. State, 555 So.2d. 352 (Fla. 1989).

Moreover, the evidence was insufficient to establish premeditation. It is clear that premeditation may be established by circumstantial evidence. Dupree v. State, 615 So.2d. 713 (Fla. 1st DCA 1993). In Dupree, the court stated:

> Evidence from which premeditation may be inferred includes the nature of the weapon used, the presence or absence of adequate provocation, previous problems between the parties, the manner in which the murder was committed, the nature and manner of the wounds inflicted, and the accused's actions before and after the homicide.

Dupree, *supra*, at 715, citing Preston v. State, 444 So.2d 939 (Fla. 1984), Sireci v. State, 399 So.2d 964 (Fla. 1981), and Smith v. State, 568 So.2d. 965 (Fla. 1st DCA 1990).

However, if the state relies on circumstantial evidence to prove premeditation, just as in any other circumstantial evidence issue, the evidence must be inconsistent with any reasonable hypothesis of innocence. Dupree, *supra*, at 715. The holding of Dupree is that there must be substantial, competent evidence to support the jury verdict; otherwise, the verdict will be reversed. Dupree, *supra*, at 715.

Premeditated design is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation and entertained in the mind both before and at the time of the homicide. Dupree, *supra*, at 715. *See also*, Jackson v. State, 575 So.2d. 181 (Fla. 1991).

This court has stated:

> 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 wound 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.

Holton v. State, 573 So.2d 284 (Fla. 1990), citing Larry v. State, 104 So.2d 352 (Fla. 1958), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2275, 114 L.Ed. 2d 726 (1991). See also Crump v. State, 622 So.2d 963 (Fla. 1993). See also Sireci v. State, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed. 2d 862 (1982).

This cause should be remanded with directions to discharge appellant from the charge of first-degree murder.

## ISSUE V:

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF ARMED ROBBERY**

The crime of robbery requires proof beyond a reasonable doubt of the following elements:

1. A taking

2. Of money or other property which may be the subject of larceny

3. From the person or custody of another

4. By force, violence, assault or putting in fear

Section 812.13(1), Florida Statutes; Butler v. State, 602 So.2d 1303 (Fla. 1st DCA 1992); see also, Schram v. State, 614 So.2d 646 (Fla. 2d DCA 1993). In order to convict a defendant of the charge of robbery, each of those elements must be proved beyond a reasonable doubt. Moreover, because the state alleged armed robbery with a deadly weapon, that element must also be proved beyond a reasonable doubt.

In the instant case, there was no proof of any of the requisite four elements of the offense of robbery, and the trial court erred in failing to grant the motion for judgment of acquittal as to that count. At best, the evidence established at best that a mere ***possibility*** existed that some jewelry had been taken from Gino Mayhew; and only at best established a speculation that cash may have been taken. There is absolutely no evidence to establish beyond a reasonable doubt, first that cash or jewelry was

taken; or, second that it was taken by force, violence, or putting Mayhew in fear; or, third, that Ferrell was involved.

To distinguish the offense of robbery from the offense of theft, force or threat must be used in an effort to obtain or retain the victim's property. Harris v. State, 589 So.2d 1006 (Fla. 4th DCA 1991), on appeal after remand, 619 So.2d 1043 (Fla. 4th DCA 1993), Here, where there is only speculation that property was missing and no evidence whatsoever that force or threat was used to obtain or retain the said property, the judgment of acquittal must be granted. Similarly, in the case of Butts v. State, 620 So.2d 1071 (Fla. 2nd DCA 1993), where the defendant at some point in time after a robbery has cash in his pockets, but no other evidence exists to connect him to the robbery, the court held a judgment of acquittal should have been granted.

If the dubious testimony of jail house snitch Williams is disregarded, the facts relied upon to prove robbery become wholly and totally circumstantial; where circumstantial evidence is relied upon to prove a crime, in order to overcome a defendant's motion for judgment of acquittal, the burden is on the state to introduce evidence which excludes every reasonable hypothesis except guilt. Atwater v. State, 626 So.2d 1325 (Fla. 1993); State v. Powell, 636 So.2d. 138 (Fla. 1st DCA 1994).

In Atwater, there was significantly more evidence against the defendant to sustain a conviction of robbery. There was evidence that the victim had cash in his *trousers* shortly before the killing, and when the victim's body was found, his pockets were

turned out and the only money found in the room was a few pennies on the floor. 626 So.2d at 1328. Unlike Atwater, the evidence in the instant case was extremely weak, and established no ***taking***. This case should be remanded with instructions to discharge Ferrell from the armed robbery count.

## ISSUE VI:

**THE TRIAL COURT ERRED IN SENTENCING APPELLANT AS A HABITUAL FELONY OFFENDER**

Appellant was sentenced in count two as a habitual felony offender to a term of thirty years. (R-226). The trial court also sentenced appellant as a habitual offender on count three, and sentenced him to an enhanced term of life imprisonment, said term to run consecutively to the sentence imposed in count two. (R-227). Because consecutive sentences cannot be imposed in habitual felony situations if the crime derives out of the same criminal episode, the trial court erred in imposing a consecutive sentence in count three. Hale v. State, 630 So.2d 521 (Fla. 1993); Trotter v. State, 20 F.L.W. D. 749 (Fla. 2d. DCA 1995).

Second, the record does not reflect that appellant's sentence of habitual felony offender was necessary for the protection of the public, as required by section 775.084(4)(c), Florida Statutes. This court should reverse the habitual felony classifications as to both counts and remand for re-sentencing without regard to the habitual felony enhancement statute.

## ISSUE VII:

**THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED MANNER"**

In his closing argument to the jury in the penalty phase, Assistant State Attorney George Bateh stated "If ever there was a murder committed in a cold, calculated and premeditated manner, it's this one." (T-1001-02). The actual facts of this case beg for a different conclusion. The facts of this case show at best a robbery gone awry, not a carefully planned and calculated murder. The facts upon which Assistant State Attorney Bateh relied to convince the jurors that the "cold, calculated, and premeditated" statutory aggravator existed are equally consistent with facts leading up to a robbery of the victim, rather than a homicide.

The trial court's written sentencing order set forth the facts which it determined to exist in connection with the "cold, calculated and premeditated" aggravator:

> (a) The defendants, Ferrell, Hartley, and Johnson, planned to kidnap, rob, and murder the 17-year-old Mayhew so he could not retaliate for defendant's earlier robbery of him and so there would be no witness to the present robbery. From the inception they planned to execute Mayhew.
>
> (b) There was heightened premeditation which required Ferrell to determine if Mayhew had money and drugs to put the plan in motion. Advance arrangements were made for Johnson to have a get-away car available after the murder.

> (c) Hartley was the trigger man with Hartley beside him during the kidnap, robbery, and murder. Mayhew was shot execution style--three bullets to the back of the head, one of which was fired by the defendant at a distance of one inch. There was no sign of resistance or struggle by Mayhew. This was a classic cold-blooded execution.

(R-239).

The facts as set forth above are not sustained by the record. The only evidence regarding any purported "plan" was from a questionable witness--Robert Williams, a "jailhouse snitch" with four prior felony convictions and a "deal" on a pending charge of dealing in stolen property. (T-682). The dubious nature of Williams' testimony is insufficient to establish beyond a reasonable doubt that the crime was committed in a cold, calculated and premeditated manner. There was simply no evidence in the record to sustain any finding that the three co-defendants had planned from the inception to murder Mayhew.

Moreover, the facts set forth in paragraph (c) above are wholly incorrect and in direct contradiction of the record. The trial court found in its third paragraph that one of the shots was fired by the defendant at a distance of one inch. Nothing could be further from the truth; in fact, the state attorney argued in both closing arguments that Ronnie Ferrell was *not* the trigger man. (T-837; T-989). Finally, there is absolutely no evidence in the record to sustain the trial court's finding that there was "no sign of resistance or struggle by Mayhew." The trial court's findings are not substantiated by the record and were clearly not proved beyond a reasonable doubt. Therefore, the trial court's finding of

"cold, calculated and premeditated" is in error.

The most recent pronouncement of this court regarding the statutory of "cold, calculated and premeditated," is found in Gamble v. State, 20 F.L.W. S 242 (Fla. May 25, 1995). In Gamble, this court, citing Jackson v. State, 648 So.2d 85 (Fla. 1994), noted that this aggravating factor is properly found when

> The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *and* that the defendant exhibited heightened premeditation (premeditated), *and* that the defendant had no pretense of moral or legal justification.

(20 F.L.W. S at 242). In Gamble, the evidence established days of advance planning and an elaborate scheme. This court has also recently stated that the heightened premeditation which is the element of this aggravator is "cool and calm reflection." Windom v. State, 20 F.L.W. S. 200 (Fla. April 27, 1995).

The rule of this court is that in order to prove the existence of the aggravator of "cold, calculated, and premeditated," the state must show a ***heightened*** level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. Sweet v. State, 624 So.2d 1138 (Fla. 1933). Moreover, where the evidence regarding premeditation is "susceptible to . . . divergent interpretations," the state fails to meet the burden of establishing beyond a reasonable doubt the statutory aggravator of cold, calculated, and premeditated. Geralds v. State, 601 So.2d 1157 (Fla. 1992). In Geralds, the facts, as in the instant case,

were equally susceptible of the planning of a burglary, rather than a homicide. In the instant case, the testimony of Sidney Jones and of Robert Williams could lead to the conclusion that appellant was involved only in the planning of a robbery, not a homicide.

This court has stated that the "heightened" premeditation required to prove this statutory aggravator does not apply when a perpetrator intends to commit an armed robbery . . . but ends up killing the store clerk in the process. Porter v. State, 564 So.2d 1060 (Fla. 1990). The facts in this case fail to rise to the level of heightened premeditation, and appellant does not fall within the narrow class of persons eligible for the death penalty by reason of this statutory aggravator. The trial court's finding of this aggravator flies directly in the fact of Zant v. Stevens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed. 2d (1983). In order to pass constitutional muster, the interpretation of this statutory aggravator must apply only to murders "more cold-blooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first-degree murder." Porter, supra, at 1064. Additionally, the mere fact that Mayhew may have been murdered "execution-style" cannot by itself support the cold, calculated and premeditated aggravator. Wyatt v. State, 641 So.2d 355 (Fla. 1994).

Where, as here, the record is void of the kind of evidence indicative of the heightened premeditation necessary for application of this aggravating circumstance, this court cannot sustain the trial court's findings. For example in Jackson v.

State, 498 So.2d 906 (Fla. 1986), where the appellant had planned the robbery and shot the victim, this court held that an intent to rob is not indicative of heightened premeditation. In the instant case, the facts presented by the state are equally susceptible of the conclusion that Ferrell intended only to participate in a robbery of Gino Mayhew, and did not intent to participate in a murder. In fact, the record shows the state's witness testifying that Ferrell yelled out of the window of the Blazer as it left the housing project, "Gino will be back." (T-590). Moreover, the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. See Harry v. State, 522 So.2d 817 (Fla. 1988); Hardwick v. State, 461 So.2d 69 (Fla. 1984), *cert denied*, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed. 2d 267 (1985).

Finally, where there is no basis in the record for a finding that the homicide was committed in a cold, calculated manner with a heightened sense of premeditation, the finding cannot be sustained. In Hamilton v. State, 547 So.2d 630 (Fla. 1989), this court took the extra step of discussing the application of statutory aggravators in a case which was reversed for error during the guilt phase. It is clear from this court's ruling that facts supporting the statutory aggravators must be proved beyond a reasonable doubt, and cannot be based on speculation. *See also* Schafer v. State, 537 So.2d 988 (Fla. 1989), and cases cited therein.

Because the trial court erred in determining that the statutory aggravator "cold, calculated and premeditated" had been proved beyond a reasonable doubt, this court should reverse the sentence of death and impose a life sentence.

## ISSUE VIII:

**THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING CIRCUMSTANCE OF THE "CRIME COMMITTED FOR FINANCIAL GAIN"**

The trial court, in its written sentencing order, determined that the crime for which defendant is to be sentenced was committed for financial gain. (R-237). In its order, the court stated:

> The defendant was convicted of kidnapping, robbery and first degree murder of Gino Mayhew. The gain of drugs and money was an integral part of defendant's plan. The defendant Ferrell confirmed that Mayhew had both money and drugs and reported this to the co-defendants Hartley and Johnson before the kidnap, robbery, and murder plan went forward.

(T-237).

There was insufficient evidence introduced at either the trial or the penalty phase to establish beyond a reasonable doubt that the "gain of drugs and money was an integral part of defendant's plan." Moreover, there was wholly insufficient evidence presented at either the trial or the penalty phase to prove beyond a reasonable doubt the statutory aggravating factor of "crime committed for financial gain." The eyewitness testimony presented by the state at trial consisted of the testimony of Sidney Jones. Jones testified that he knew appellant Ferrell, and the co-defendants Hartley and Johnson. (T-573-74). Jones testified that on the evening Mayhew was killed, he had seen Johnson, Hartley, and Ferrell huddled together near Mayhew's Blazer truck at the Washington Heights apartment complex. (T-581). No testimony was ever presented that Jones overheard any conversations between the

three codefendants and Mayhew, and there is no testimony from any of the codefendants as to the contents of any conversation that may have been held at that point in time.

The only testimony regarding physical violence was from Jones: he testified he saw Hartley standing at the door of Mayhew's Blazer with his left hand up on the door and "this hand right here" with a pistol stuck to Mayhew's head. (T-582). At this point in time, according to Jones, Hartley was on the left side of the Blazer, behind the open front door. Jones claimed that at the time he was able to see appellant Ferrell at the *front* left side of the Blazer. (T-585). No testimony established Ferrell's complicity or cooperation in the encounter between Hartley and Mayhew. The only comment that Jones could attribute to Ferrell was that "Gino will be back;" a comment as the Blazer was leaving the Washington Heights apartment complex area. (T-590).

The only testimony regarding a purported plan to rob Mayhew of money and drugs was from the "jailhouse snitch" Robert Williams. Williams, who had shared a cellblock with Ferrell, claimed that Ferrell told him about his involvement in the Mayhew case. (T-663-64). According to Williams, Ferrell admitted to him that Ferrell and the two co-defendants, Hartley and Johnson, had robbed Gino Mayhew the Saturday night preceding his death, and had stolen $1,700.00 from him. (T-669-70).

According to Williams, the three co-defendants then concocted a plan to "do away with" Mayhew because he had recognized Johnson and Hartley during the previous robbery. (T-672-73). There was no

testimony from Williams that the three co-defendants had planned to rob money, drugs, or anything else from Mayhew. In response to questions from Mr. Bateh, Williams testified as follows:

> Q: Did he tell you why they murdered Gino that Monday night?
>
> A: Yes.
>
> Q: What was his reason to you?
>
> A: He said Gino was tired of--in the beginning Kip and Kip, Kenneth Hartley, and Sylvester Johnson, robbing him of his money.
>
> A: All right. What else did he say?
>
> A: So the three of the got together once the--the name, I'm trying to think of the guy's name, Gino Mayhew, once that Mayhew was tired--got tired of them robbing him for his money, then he put out what they call a hit.
>
> Q: Who put out the hit?
>
> A: Gino did, this is what I was told.
>
> Q: And who told you this?
>
> A: Fish.
>
> Q: This defendant right here?
>
> A: Yes.
>
> Q: All right. Did he tell you who Gino put a hit out on?
>
> A: Yes.
>
> Q: And who was that?
>
> A: Sylvester Johnson and Kenneth Hartley.
>
> Q: Now did he explain to you what he meant by hit?
>
> A: No he didn't explain what he meant about hit but I knew what he meant about hit.

Q: What was that?

A: Hit means slang terms that we use to have somebody killed, contract on somebody's life.

Q: All right. Did the defendant tell you what happened once they found out about the hit that Gino had put out?

A: Yes, he did.

Q: What did he tell you?

A: He said the three of them got together and decided it would be to their best interest to get him first.

Q: Get who first?

A: Gino Mayhew.

Q: All right. Who were the three that got together and decided best to get Gino Mayhew?

A: Ronnie Ferrell, Sylvester Johnson, and Kenneth Hartley.

(T-670-72).

Williams further testified that Ferrell told him that the two co-defendants were initially involved in the planning of "getting Gino first." (T-672). Williams further testified that "they" discussed the plan, which was that Ferrell was to purchase a large amount of crack cocaine from Gino Mayhew in order to get him off to himself. (T-672). Williams further testified that the plan was then to kill Mayhew. (T-672). There was no testimony whatsoever that the plan included robbing Mayhew, or that the killing of Mayhew was to be committed for any kind of pecuniary gain. Moreover, there was no evidence to show that any of the co-defendants had received either money or jewelry from Mayhew. This court should not sustain a finding of the aggravator "of committed

for pecuniary gain" based on such a dearth of evidence.

## ISSUE IX:

**THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS OR CRUEL"**

The prosecution argued at the penalty phase hearing that the homicide of Gino Mayhew was especially heinous, atrocious or cruel. (T-996). In closing argument at the penalty phase, the state relied on the testimony of Sidney Jones as to the "look on Mayhew's face" at the time co-defendant Hartley pointed a gun at his head. (T-997). The prosecutor, George Bateh, went on to ask the jury to speculate as to what was "going through Gino's mind that night from the time the gun was pulled on him." (T-997). Assistant State Attorney Bateh argued repeatedly as to what might have been going through Gino Mayhew's head prior to the time of the homicide, but all of this argument was conjecture and speculation. (T-998-1000). Bateh argued that the murderer was consciousless, pitiless, and unnecessarily torturous, but admitted that appellant was not the trigger man. (T-1001).

Clearly, the record does not support these assertions, and the trial court's finding that the statutory aggravating factor of "heinous, atrocious and cruel" is wholly unsupported by the record. The facts of the case show that the decedent was killed immediately upon the firing of shots, and that there was no extended torture or beating of defendant prior to this death. (T-508-34). The facts showed that the victim was a drug dealer involved with the co-defendants charged in this case, and that he continuously dealt

in the nether-world of illegal activity, robbery and other crimes. There was absolutely no evidence introduced to establish that appellant had engaged in any torturous behavior. In fact, the state's own witness testified that he heard appellant say, "Gino will be back" as the Blazer drove out of the housing project. (T-590).

Generally speaking, in order for the record to sustain the finding of the statutory aggravating factor of "heinous, atrocious and cruel," there must be evidence of extreme and outrageous depravity exemplified by either the desire to inflict a high degree of pain or other indifference to or enjoyment of the suffering of the victim. Robertson v. State, 611 So.2d 1228 (Fla. 1993); Watts v. State, 593 So.2d 198 (Fla. 1992), citing Shere v. State, 579 So.2d 86 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); State v. Dixon, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974).

As this court stated in Watts:

> Where, as here, death results from a shooting that is ordinary in the sense that there are no additional acts to set the murder apart from the norm of capital felonies, this aggravating factor does not apply. See also Cochran v. State, 547 So.2d 928 (Fla. 1989)(death resulted from single gunshot following abduction at gunpoint); Jackson v. State, 502 So.2d 409 (Fla. 1986)(robbery victim died shortly after single fatal shot); *cert denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed. 2d 686 (1987); Lewis v. State, 398 So.2d 492 (Fla. 1981)(victim died instantly from multiple gunshot wounds); Fleming v. State, 374 So.2d 954 (Fla. 1979).

593 So.2d at 204. Clearly, no such evidence exists in this case,

where the facts establish only instantly fatal gunshot wounds to the victim.

This court has more recently, in the case of Street v. State, 636 So.2d 1297 (Fla. 1994), held that the "three-shot execution-type murder" of a police officer, as reprehensible as it was, did not meet the definition of heinous, atrocious, or cruel. In reaching this conclusion, this court relied on other cases where police officers were killed by multiple shots, including Rivera v. State, 545 So.2d 864 (Fla. 1989); and Brown v. State, 526 So.2d 903 (Fla. 1988). Additionally, in reaching the decision in Street, this court recognized the rule of Rogers v. State, 511 So.2d 526 (Fla. 1987), where a victim was killed by three shots during a grocery store robbery. This case is akin to Street and its predecessors.

Thus, the circumstance of "heinous, atrocious or cruel" is appropriately found only in torturous murders--those that evince extreme and outrageous depravity either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. McKinney v. State, 579 So.2d 80 (Fla. 1991). In this case, the facts do not nearly rise to the level of that required by this court in McKinney, and this court should find that the trial court improperly determined that the statutory aggravating factor of heinous, atrocious and cruel had been proved.

Similarly, in Bonifay v. State, 626 So.2d 1310 (Fla. 1993), the record failed to demonstrate any intent by the defendant to inflict a high degree of pain or to otherwise torture the victim.

Even though this court found the murder "vile and senseless," the court found that it did not rise to one that is especially cruel, atrocious and heinous as contemplated in State v. Dixon, Supra. The court went on to state that the fact that the victim begged for his life or that there were multiple gunshots is an ***inadequate*** basis to find this aggravating factor absent evidence that the defendant intended to cause the victim unnecessary and prolonged suffering. 626 So.2d at 1313 (emphasis supplied). Moreover, where the state has failed to show that a defendant directed or knew how the victim would be killed in a case where there are co-defendants, the finding of "heinous, atrocious and cruel" cannot be upheld. See Williams v. State, 622 So.2d 456 (Fla. 1993).

The trial court's determination that the statutory aggravating factor of "heinous, atrocious and cruel" exists is error and the sentence of death imposed in this cause should be reversed and this cause should be remanded for the imposition of a life sentence. This cause should not be remanded for a new sentencing hearing because the prohibitions against double jeopardy bar the re-trial of a sentencing hearing wherein the state has presented insufficient evidence to sustain an aggravating factor. Poland v. Arizona, 106 S.Ct. 1749, 476 U.S. 147, 90 L.Ed. 123 (19__).

## ISSUE X:

**THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED"**

At the penalty phase hearing, the trial court instructed the jury as to the statutory aggravating factor of cold, calculated and premeditated" as follows:

> And you may consider five, that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(T-1031). This instruction merely tracks the language of the penalty statute.

Because there was no credible and competent evidence to establish the aggravating circumstance of "cold, calculated and premeditate," the trial court erred in instructing the jury at all on this factor. See Hunter v. State, 20 F.L.W. S. 251 (Fla. June 1, 1995). Moreover, the instruction given is absolutely insufficient under the rule of the Florida Supreme Court in Jackson v. State, 648 So.2d 85 (Fla. 1994). In Jackson, the court declared the then-standard jury instruction unconstitutionally vague, and proposed an interim instruction. That suggested instruction is as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, calculated and premeditated, and that there was no pretense of moral or legal justification. "Cold" means

> the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normal required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

648 So.2d 85 (Fla. 1994).

The statutory language is subject to a variety of constructions; therefor, the absence of any clear standard instruction insures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987). See also Hodges v. Florida, 113 S.Ct. 33 (1992).

The jury may well have disregarded the tale recanted by the "jail-houses snitch" Williams as to defendant's intentions on the night of Mayhew's death because his testimony was so dubious. If the jury had been properly instructed, it may have concluded that "cold, calculated and premeditated" did not apply.

Because the trial court erred first in instructing the jury at all on the statutory aggravator, and erred as well in giving an insufficient instruction in this regard, the imposition of the death sentence based on the advisory verdict of the jury in this cause must be reversed and remanded for a new sentencing hearing.

## ISSUE XI:

### THE TRIAL COURT IMPERMISSIBLY DOUBLED THE STATUTORY AGGRAVATORS OF "KIDNAPPING" AND "PECUNIARY GAIN"

Because the trial court impermissibly "doubled" the two aggravating factors of "crime committed during the course of a kidnapping" and "crime committed for pecuniary gain," this cause should be reversed for a new sentencing hearing with a new jury.

It is clear that the statutory aggravators cannot be doubled when the aggravators refer to the same aspect of the crime. Castro v. State, 597 So.2d 259 (Fla. 1992); Provence v. State, 337 So.2d 783 (Fla. 1976). Because the kidnapping was such an essential part of the robbery under these facts, the finding of both these circumstances constitutes an improper doubling.

In dicta, this court has stated that where the sole purpose of a kidnapping is to facilitate a robbery, the possibility of impermissible doubling of aggravating factors exists. See, Green v. State, 641 So.2d 391 (Fla. 1994). Here, the trial court specifically found that the kidnapping was "an integral part of the defendant's plan to rob and murder Gino Mayhew." (R-237). Therefore, to instruct the jury that it may consider the kidnapping as a separate and aggravating factor when it is in fact actually an integral part of the criminal episode is a denial of defendant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

This court should reverse the trial court's imposition of the death penalty and remand for a new sentencing hearing before a new

jury. Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992).

## ISSUE XII:

**THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR SPECIAL VERDICTS**

The Florida death penalty statutory scheme provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the statute fails to require special verdicts. Worse yet, the trial court is unaware if the jury acquitted the defendant of felony murder or murder by premeditated design so a determination of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment to the United States Constitution.

In effect, the Florida death penalty statutory scheme makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstances violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting similar Sixth Amendment argument).

## CONCLUSION

Because the trial court erred in making improper comments to the potential jurors, and in admitting impermissible evidence at the trial of this cause, appellant's convictions should be reversed, and this cause remanded for a new trial. Second, the trial court erred in denying appellant's motion for judgment of acquittal; because the state failed to present a prima facie case as to the charge of first-degree murder and as to the charge of kidnapping, the motion should have been granted. Because the trial court erred in finding that statutory aggravating factors had been proved beyond a reasonable doubt, appellant should be re-sentenced to life.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, the Capitol, Tallahassee, Florida 32301; and to George Bateh, Office of the State Attorney, Duval County Courthouse, Jacksonville, FL, 32202, by regular United States Mail this 22nd day of June, 1995.

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