IN THE SUPREME COURT OF FLORIDA

JACK R. SLINEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,302

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The first three volumes of the original record on appeal herein contain 480 pages, consisting of documents from the circuit court file and transcripts of hearings held on August 17, 1993, October 29, 1993, and February 14, 1994, as well as the transcript of the penalty phase held on November 4, 1993. The remaining nine volumes of the original record (volumes four through twelve) contain 1,360 plus pages, consisting of the transcript of the guilt phase proceedings, the transcript of a hearing held on October 4, 1993, a list of exhibits, and copies of some exhibits. The clerk of the circuit numbered the pages in volumes one through three pages 1-480. The clerk numbered the pages in volumes four through twelve pages 1-1360. (The copies of the exhibits are lettered A-K=) References in this brief to pages in the first three volumes of the record on appeal will be designated by "R," followed by the page number. References to pages in the last nine volumes of the record on appeal will be designated by "T," followed by the page number. References to exhibits will be designated by the exhibit number. There is also a supplemental volume consisting of pages numbered 1-121. References to this supplement will be designated by "S," followed by the page number. References to the appendix to this brief will be designated by "A," followed by the page number.

STATEMENT OF THE CASE

On July 31, 1992, the State filed an information charging that Appellant, Jack Rilea Sliney, conspired with Keith Wittemen, Jr., to commit first degree murder. (R 1-2) The alleged victim was George Blumberg. (R 1) On September 3, 1992, a Charlotte County Grand Jury returned a three-count indictment charging Appellant and Keith Hartley Wittemen with premeditated and felony murder of Blumberg, as well as robbery of Blumberg with a deadly weapon. (R 4-5)[1]

Among the pretrial motions Appellant filed, through counsel, was a "Motion to Suppress Confession." (R 46-47) The motion was heard before the Honorable Donald E. Pellecchia on August 17, 1993, and denied. (R 52-55, 249-367)

This cause proceeded to a jury trial on September 27-October 1, 1993 with Judge Pellecchia presiding. (R 62-106, T 1-1340) Appellant's jury found him guilty as charged in all three counts of the indictment. (R 159-161, 165, T 1335)

Appellant subsequently discharged his retained counsel, and the public defender's office, which had represented Appellant originally, was appointed to represent him at penalty phase, which was set for November 4, 1993. (R 41-43, 162-163, 165, 169, T 1342-1359)

On October 25, 1993, Appellant moved for a continuance of the penalty phase (R 174-175), and moved for the appointment of a

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[1] The conspiracy charge was subsequently nolle prossed. (R 62, T 2)

capital case investigator/mitigation specialist. (R 176-177, 213) Judge Pellecchia heard the motions on October 29, 1993 (R 178-179, 452-460), and denied them. (R 178-179, 459)

Penalty phase was conducted as scheduled, on November 4, 1993. (R 180-186, 373-448) After receiving additional evidence from the defense, the jury returned a death recommendation by a seven to five vote. (R 181-186, 194, 445) The court ordered a presentence investigation, and set sentencing for December 10, 1993. (R 196)

Sentencing memoranda were submitted by both the State and the defense. (R 207-212, 214-220)

A hearing was held on December 10, 1993 at which Appellant presented additional evidence in mitigation in the form of letters that were sent to the court by several persons in support of Appellant as well as Appellant's own oral statement to the court, and the State presented victim impact testimony from George Blumberg's grandson, William George Blumberg, and both sides made legal argument. (R 221, 471, S 1-24) Appellant was actually sentenced at a hearing held on February 14, 1994. (R 228, 231-240, 462-480) With regard to the rabbery charge contained in Count III of the indictment, the sentencing guidelines called for a recommended sentence of five years in prison, with a permitted range of three and one-half to seven years, but the court departed therefrom and imposed a life sentence. (R 206, 228, 234, 238, 463-469) The court sentenced Appellant to death for the murder, finding in aggravation that the capital felony was committed while Appellant was engaged in the commission of a robbery and that the capital

felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape fromcustody. (R 222-224, 470-479) In mitigation, the court found the statutory factors of no significant history of prior criminal activity and Appellant's "youthful age" of 19 at the time of the offense, and found several nonstatutory mitigators as well. (R 224-227, 474-478)

Appellant filed a notice of appeal on March 2, 1994. (R 241-242)

STATEMENT OF THE FACTS

State's Case

Marilyn Blumberg and her husband, George, had a pawn shop in Charlotte County where they sold various items, including guns, tools, VCRs, fishing rods, new and used gold, diamonds, diamond rings, necklaces, and bracelets. (T 670-672, 675, 1039) Mrs. Blumberg bought all the gold for the shop, which opened at 10:00 and closed at 5:00. (T 670, 673) During the season, Mrs. Blumberg worked at the shop every day, but during the off season, she and her husband took turns working at the shop; one of them would work one day, and the other would work the next. (T 672) Mr. Blumberg worked on June 18, 1992, while his wife remained home. (T 674) He left for work at 9:30, and Mrs. Blumberg did not speak to him that day. (T 674) At 5:30, Mrs. Blumberg had prepared dinner and was waiting for George to come home. (T 674-675) He was very punctual, always arriving home between 5:15 and 5:30. (T 673-675) Mrs. Blumberg called the shop at a little after 5:30, but there was no answer. (T 675) She called again a few minutes later, and became concerned when there was no answer, because Mr. Blumberg had been very ill. (T 675) Marilyn Blumberg drove to the shop, arriving there between 5:45 and 5:50. (T 675) The closed sign was on the door, and the lights were out. (T 676) Her husband's white Pontiac was in the parking lot. (T 676) Mrs. Blumberg entered the shop with her key and called her husband's name. (T 676) She noticed that all the jewelry cases were empty and "kind of askew," and knew something was wrong. (T 676) She walked through a gate that went

behind the counter and saw her husband lying in the bathroom on the floor on his stomach. (T 677) His glasses and a hammer were on the floor beside his body. (T 677, 926) There was a big pair of scissors with orange handles sticking out of his neck, and a lot of blood. (T 677, 926-927) Mrs. Blumberg screamed and screamed, then put her purse on the counter and dialed 911. (T 677)[2]

Road deputies were dispatched to Ross's Pawn Shop at 5:52 p.m. (T 699-700) Deputy Joseph Marinola arrived two minutes later. (T 700) Mrs. Blumberg was standing in the parking lot with "her hands up at her head in distress." (T 700) She was yelling, screaming, crying, and shouting, "'He's on the floor in the back."' (T 700)[3] John Miller, a paramedic with Charlotte County EMS, entered the building immediately ahead of Marinola. (T 701, 708, 740-742) They observed Blumberg in the bathroom. (T 701, 742) He had been stabbed with scissors, which remained in his neck, and struck on the head. (T 701, 742) There was coagulated blood on the floor, and rigor had already set in; he had been dead for some time. (R 701, 742) Marinola secured the scene. (T 701-702)[4]

Gil Stovex, a crime scene technician with the Charlotte County Sheriff's Office, was dispatched to the pawn shop. (T 710-711)

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[2] A transcript of Marilyn Blumberg's 911 call was admitted into evidence and published to the jury over Appellant's objections as State's Exhibit Number 1A. (T 677-696)

[3] Marinola's testimony regarding what Marilyn Blumberg said at the scene was admitted over Appellant's hearsay objection. (T 700)

[4] During Deputy Marinola's testimony, the court admitted into evidence, over Appellant's objections, State's Exhibit Number 17, an enlarged photograph of the scene depicting the victim. (T 703-708)

Stover made a video tape of the scene, which was admitted into evidence as State's Exhibit Number 3 'and shown to the jury over defense objections. (T 719-726) He also attempted to lift latent fingerprints, and collected various items, including a red-handled hammer, a "flex cuff," and a camera lens, all of which he sent to the FBI Laboratory in Washington, D.C. (714, 716-718, 726-732) There were no prints matching either Appellant or Keith Witteman found on the hammer, scissors or camera lens. (T 1018-1019) The only fingerprint of value located on any item from the shop was a fingerprint of Keith Witteman on a mirror frame that had been on a counter near the swinging door. (T 1019)

The medical examiner for Charlotte County, Dr. R.H. Imami, went to Ross's Pawn Shop on the evening of June 18, 1992 after being contacted by the sheriff's office, and later performed an autopsy on George Blumberg's body. (T 754-758) Blumberg's right eye was swollen shut, and his nose was broken. (T 760-761) Some of the injuries to Blumberg's face, such as the broken nose, could have been caused by the camera lens found at the scene, which was in two pieces, while some of the other lacerations could not have been caused by this object. (T 763-764) On top of the back of the head were three semi-circular lacerations that were consistent with the end of the hammer found at the scene. (T 765-767) The cranial bone was fractured where these lacerations occurred. (T 772, 782) There were three stab wounds to the left side of the neck, including one in which the scissors remained impacted, until Dr. Imami removed them and turned them over to Detective Twardzik of

the Charlotte County Sheriff's Office. (T 767, 929) Internal examination of the body revealed that several ribs and the backbone were fractured. (T 770) These injuries were not consistent with a fall, and most likely occurred when Blumberg was lying face down, and some pressure was applied to his back, such as by someone hitting him with some heavy object or with a foot. (T 771-772) Dr. Imami opined that the facial injuries occurred first, followed by the neck injuries, then the head injuries, then the back and rib fractures. (T 772-773) The cause of death was stab wounds inflicted to the neck by the scissors and blunt trauma to the face, head, back and ribs. (T 773-774) The time of death was approximately 3:30 p.m. on June 18, 1992. (T 779)[5]

The following day, Kenneth Dale Dobbins learned that something had happened to Blumberg. (T 792) He spoke to a deputy in front of Ross's Pawn Shop, telling him that he (Dobbins) might have seen the two gentlemen who had something to do with Blumberg's death. (T 793) Dobbins was in the shop on the afternoon of June 18, looking at some tools. (T 789) He put the time at around 4:00 or 4:30, although it could have been earlier or later. (T 789-790) Blumberg was by himself when Dobbins arrived, but two "younger guys" came into the store when Dobbins was about to leave. (R 790) One of them "sort of looked at" Dobbins, and then turned his back to him, while the other "totally turned his back to" Dobbins as they were

[5] During Dr. Imami's testimony, State's Exhibit Number 2, a photograph of George Blumberg taken by the witness, State's Exhibit Number 5, hammer, and State's Exhibit Number 7, camera lens, were admitted into evidence over Appellant's objections and published to the jury. (T 774-778)

walking in. (T 790) The men started talking with Blumberg about a piece of jewelry they had discussed two or three days before. (T 791) Dobbins remained to see if Blumberg would give him some kind of sign to stay around, but when no such sign was forthcoming, Dobbins left. (T 791, 800) At the police station in Englewood, Dobbins and a detective prepared a composite of one of the men he had seen. (T 793-794) On June 27, Dobbins returned to the sheriff's department and viewed a photo lineup, from which he selected photograph number five as depicting one of the men who was in the pawn shop. (T 794-796) Dobbins identified Appellant in court as one of the men he saw in the pawn shop, the one who was depicted in the composite, and whose photo Dobbins picked out of the photo lineup. (T 798)

Stan McGinn was a road officer with the Punta Gorda Police Department in June of 1992. (T 801-802) A copy of the composite was distributed to the police officers at roll call, along with brief descriptions of the suspects. (T 802) McGinn's stepdaughter was dating a boy named Thaddeus from Englewood who was about the same age as the suspect depicted in the composite, and McGinn showed the composite to him on June 19 or 20. (T 803-804) Later that day, Thaddeus called McGinn, who subsequently called the detective in charge of the case and "advised him of Thaddeus knowing who it was. (T 804-805) The detective asked if McGinn "could get the two of them together," and he did so. (T 805)

Thaddeus Capeles was 19 years old at the time of Appellant's trial. (T 806) Capeles knew Appellant from Lemon Bay High School,

and from seeing him on the weekend' at Club Manta Ray, where Appellant was the manager. (T 807-808, 810) On approximately the 20th of June, Stan McGinn discussed the homicide with Capeles and showed him the composite and a picture of a gun. (T 809-810) About a day later, Capeles was in the office at the Club Manta Ray when Appellant said he had a gun for sale that he had had for months, and asked Capeles if he was interested. (T 810-811) Appellant later showed the gun to Capeles in his truck, which was a Chevy Sonoma pickup that Appellant improved around that time with new tires and rims, a stereo system, tinted windows. (T 811, 814) The gun was in the glove compartment. (T 812) It was a small .25 caliber, chrome with an ivory handle, and one barrel on top of the other. (T 812) Appellant wanted sixty dollars for it, and Capeles said he would let him know. (T 812) Capeles related this conversation to Stan McGinn. (T 813-814) On June 27, 1992, Capeles met with Sergeant Cary Twardzik of the Charlotte County Sheriff's Office and agreed to assist that office in its investigation. (T 815-817, 868-869, 943-945) Law enforcement personnel wanted Capeles to set up a meeting with Appellant to buy the gun. (T 869, 945-946) Capeles telephoned Appellant, and they agreed to meet that afternoon at Club Manta Ray. (T 869-877, 946) This conversation was taped, and the recording was played at Appellant's trial. (T 872-877) Sergeant Twardzik gave Capeles $100 and placed a "body bug" on him. (T 878, 946) Capeles then drove to Club Manta Ray, arriving there about 5:00. (T 879) Appellant was inside his truck,

and Keith Witteman[6] was outside. (T 879, 912) Capeles entered the truck and purchased the two-shot derringer from Appellant, who showed him how to load it. (T 880-881, 949) The conversation between Appellant and Capeles was taped, and the recording was played at Appellant's trial. (T 881-886, 947) At the direction of the Charlotte County detectives, Capeles called Appellant and set up another meeting to buy the remaining guns that same night at Club Manta Ray. (T 887-889, 952) This conversation was taped, and the recording was played at Appellant's trial. (T 890-893) Sergeant Twardzik again placed the listening device on Capeles, and gave him $600. (T 694, 952-953) Capeles arrived at Club Manta Ray about 11:15 or 11:30. (T 894-895) Appellant was in the office. (T 895) They went outside and entered the truck, where Capeles showed Appellant the money. (T 895) Appellant went home to get the guns,' while Capeles stayed at the club and talked to his friends. (T 895, 953) Appellant returned after about an hour, and Capeles entered the truck and gave him $500 and received three guns. (T 895-896, 907-909, 913, 953) The conversation between Appellant and Capeles was taped, and the recording was played at Appellant's trial. (T

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[6] The surname of Appellant's codefendant is spelled two different ways in the record: "Wittemen" and "Witteman." Appellant will employ whichever spelling appears in the record on the page being cited.

[7] During the earlier telephone conversation with Capeles, Appellant stated that Keith [Witteman] had the guns hidden, but that Appellant could get them. (T 892)

896-907)[8] After each purchase, Capeles turned the guns over to Sergeant Twardzik. (T 881, 896, 949, 953-955) Capeles was paid between $200 and $250 for his participation in the investigation. (T 909)

After obtaining the guns from Capeles, Twardzik checked their serial numbers against a firearms register that he had found in the pawn shop while investigating the incident, and found that they matched. (T 930-942, 950, 954)[9] Marilyn Blumberg identified the four derringers at trial as having been in the pawn shop on June 17, 1992 when she worked there. (T 1039-1040)

Appellant's vehicle was stopped an hour or two after the second firearms transaction, between 1:00 and 1:45 a.m., when Appellant left the Club Manta Ray, and he was arrested on the basis of probable cause. (T 955-959, 1025-1026) Keith Witteman and a female were with him. (T 956-957) Appellant was taken to an interview room at the sheriff's station in Englewood and read his Miranda rights. (T 959, 961-965) Sergeant Twardzik and a Corporal Sisk were present. (T 962) Appellant indicated that he understood his rights and wanted to talk to the detectives, but he did not sign the waiver of rights section at the bottom of the form being

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[8] The State proffered the audio recordings of the conversations between Appellant and Thaddeus Capeles, as well as the testimony of Capeles relating thereto, prior to introducing it in the presence of the jury. (T 827-862) This evidence was admitted over defense objections as to relevance, and prejudicial matters appearing on the tapes, namely, cursing and the use of a racial epithet. (T 862-864, 872, 882, 890, 897-898)

[9] The firearms register, State's Exhibit Number 33, was admitted into evidence at trial over Appellant's objections. (T 930-942)

used by them, as they became sidetracked from the form. (T 962-965) Twardzik did not notice any indication that Appellant was under the influence of any kind of intoxicants, nor did he detect any odor of alcohol about Appellant's person. (T 967) Appellant asked why he was there, and the detectives explained that they had received three weapons earlier that evening that were reported stolen, and that was why they brought him in. (T 965) Appellant told the detectives about going to the mall in Port Charlotte about three weeks prior, where he encountered a black male, and said that "he had basically been forced into purchasing these weapons and the jewelry at that time." (T 966) Twardzik left the interview room and returned about 10 minutes later. (T 966, 968) He told Appellant that he was having a hard time believing his story, because the guns were only taken nine or 10 days ago, and so Appellant could not have had them for three weeks. (T 968, 970) Appellant then looked at the detectives, said that he knew both of them, and asked for a pen. (T 970) Corporal Sisk gave him a pen and a pad, and Appellant wrote a statement. (T 970-975, State's Exhibit Number 37) When he was finished, Twardzik wrote the date at the top of the page, and wrote his name and identification number and "sworn and subscribed" at the bottom, even though Appellant had not, in fact, been placed under oath, nor sworn to the contents of the statement. (T 971-973) Appellant "was crying a little bit at that point, he said he was glad he had gotten it off his chest." (T 976) Twardzik got Appellant a cup of coffee, then took a taped statement from him, which began at 3:36 a.m. (T

976-977, 981, 1027) Twardzik read his Miranda rights to Appellant, and placed him under oath. (T 982-984) Appellant said that he and Keith Witteman went to the pawn shop between 10:30 and 2:00, and got into an argument with Blumberg over the price of a necklace. (T 985-988) Witteman said "Either you hit him or I hit him," and called Appellant a "pussy." (T 989, State's Exhibit Number 37) Appellant went through the little swinging door and grabbed Blumberg up by the shoulder, but did not squeeze him hard. (T 989-990) Blumberg tripped and fell, and Appellant fell on top of him. (T 990) Blumberg was face down, and blood was coming from under his head. (T 991) Appellant asked Witteman what to do, and Witteman said, "You have to kill him now, you have to kill him now." (T 991) Witteman was going through the cabinets and putting jewelry into a bag. (T 992) Appellant took a camera lens and hit Blumberg in the back of the head with it. (T 993) Appellant then grabbed a scissors from a drawer and pushed them into the side of Blumberg's neck. (T 992-996, State's Exhibit Number 37) Appellant then took a hammer from the same drawer as the scissors and hit Blumberg twice in the back of the head. (T 996) Appellant washed his hands in the sink. (T 996-997) Meanwhile, Witteman was "[s]tealing everything in sight." (T 997) He went through the money drawer and took the keys to the shop. (T 997-998) Witteman flipped the sign on the door to "closed" and locked the shop and they left. (T 998-999) They stopped on the way home and Witteman put the jewelry into a Lemon Bay [High School] gym bag and threw some other items away. (T 999-1000) They also disposed of

Appellant's shirt. (T 1000-1001) Upon arriving home, they put the items in a chest Appellant had in his house and both took showers. (T 1001-1002) They agreed not to tell anyone about what had happened. (T 1003) The two had not planned to rob or kill Blumberg. (T 1006-1008)

After the interview with Appellant, a search warrant was obtained for his residence, which was executed on the morning of June 28, 1992. (T 1010) Appellant had described a blue trunk in his room in which the detectives could find the Manta Ray gym bag with jewelry in it, and a .41 revolver. (T 1010)[10] Twardzik located the bag and turned it over to Gil Stover. (T 1010-1013, 1035-1036) Marilyn Blumberg identified the jewelry as coming from the pawn. shop; she could not state that it was there on June 18, 1992, but it was there when she worked the previous day [June 173. (T 1036-1038)

A second search warrant for Appellant's truck was executed, and the detectives recovered money from the cab, the serial numbers of which matched the serial numbers on the money that had been provided to Thaddeus Capeles for the purchase of the guns. (T 1016-1018) The truck was also sprayed with a chemical that reacts to the presence of blood, but there was no reaction. (T 1016-1017)

When the State rested its case, Appellant moved for a directed verdict, but the court denied the motion. (T 1041-1043)

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[10] There was no notation pertaining to this firearm on the register of guns allegedly stolen from the pawn shop. (T 1029-1030)

Appellant'8 Case

Prior to presenting his case to the jury, Appellant proffered the testimony of four witnesses to the court. (T 1047-1057) Codefendant Keith Witteman invoked his Fifth Amendment privilege against 'self-incrimination when asked by defense counsel to describe the events surrounding the death of George Blumberg on June 18, 1992, and again when asked to relate the sum and substance of any conversations he had with an inmate named Robert Ryan at the Charlotte County Jail. (T 1048-1049) George Morris Davis, III, was in the same cell with Keith Witteman at the Charlotte County Jail in early 1993. (T 1049-1050) Witteman had a pair of shoes that he was trying to swap with another inmate, Ty Powell, for cigarettes. (T 1050-1051) It was late at night, and Witteman was yelling, and inmate Robert Ryan asked him to shut up so that he (Ryan) could go to sleep. (T 1051) Witteman responded, "'Shut your f---ing mouth or I'll kill you like I did the other old bastard." (T 1050-1051) Robert Ryan testified that he was in cell B-l at the Charlotte County Jail when Keith Witteman was in cell B-2. (T 1053) Late one evening toward the end of February, 1993, after lockdown, Ty Powell, who was in cell 10, was trying to exchange cigarettes for tennis shoes with George Davis and Keith Witteman. (T 1054) They were keeping Ryan awake, and he said to Witteman that he was tired of hearing the noise and asked him to shut up so that he (Ryan) could go to sleep. (T 1055) Witteman asked, "Is that you, Ty?" (T 1055) Powell responded, "No, that's Ryan." (T 1055) Witteman asked, "Who's Ryan?" (T 1055) Powell answered, "Ryan is the old

dude in number eight." (T 1055) Witteman then said, "Shut up you old son of a bitch or I'll kill you like I did the other old bastard," (T 1055) Another inmate at the jail, William Washington, had a telephone conversation with Witteman within two weeks of his arrest. (T 1056) Washington had heard from his friends on the outside that Witteman confessed to his girlfriend, and so Washington picked up the phone and asked, "What it is you confessing to your girlfriend." (T 1057) Witteman responded that he "f---ed up." (T 1057) Washington said, "Yeah, you do so. Now keep your mouth closed. Don't tell your attorney anything, just be quiet." (T 1057)

The trial court ruled that the proffered testimony was inadmissible. (T 1057-1062) While ruling that Appellant had "certainly established that this statement is against the declarant's interest and the declarant is unavailable[,]" (T 1060), the court did not find sufficient indicia of trustworthiness to admit the evidence, noting inconsistencies in the testimony of Davis and Ryan. (T 1060-1062) The court and counsel later revisited the question of the admissibility of the proffered testimony during a recess in the proceedings. (T 1068-1074) With regard to George Davis, defense counsel told the court that Davis had confined the statement he overheard to the month of February, 1993, and that since disclosing the statement to Appellant, Davis had "received several direct verbal threats from Mr. Witteman regarding his future health, safety and welfare." (T 1072) The prosecutor told the court that Robert Ryan had a 1971 conviction for armed robbery

in South Carolina, George Morris Davis had five prior felony convictions for robbery with a deadly weapon, aggravated battery, robbery, burglary with assault and grand theft that arose in three separate cases, and William Washington had been convicted of eight felonies, namely, two burglaries while armed, three robberies with a firearm, grand theft, possession of cocaine and possession with intent to sell. (T 1072-1073) The court stated that the law was not "clear or definitive of the point" and said that it did not appear to be "that the State could examine the trustworthyness [sic] of these statements and investigate this matter to determine whether or not the statement is a trustworthy [sic] one or not, other than by judging the credibility of the witnesses, and only in that regard." (T 1073) The court sustained his earlier ruling that the statements would not be admitted because there had "not been a sufficient predicate established... as to the trustworthyness [sic] of those statements." (T 1073-1074)

Katie Louk testified for the defense in the presence of the jury that she had known Appellant for a little over a year. (T 1063) She saw him at the Club Manta Ray on the evening prior to his arrest. (T 1063-1064) Around 6:00 p.m. he was in the back office, drinking vodka and daiquiri. (T 1064) Louk saw him four or five times throughout the evening, and each time he had a drink in his hand, including the last time she saw him, around 11:45. (T 1064-1066) He was staggering, and Louk believed that he was drunk. (T 1065)

Tonya Mahoney also knew Appellant, and saw him drinking vodka

and Coke in the office at Club Manta Ray around 4:00 in the afternoon prior to his arrest. (T 1074-1076) Later, Appellant was drinking vodka and orange juice, and then Miller Genuine Draft Beer. (T'lO76, 1080) Mahoney saw him periodically throughout the evening, and each time he was drinking. (T 1076-1077) Mahoney had one or two drinks that Appellant mixed for her. (T 1080-1081) Appellant was drinking heavily and was drunk. (T 1077-1078) He occasionally had a hard time maintaining his balance, and "messed up" his words, or slurred his speech. (T 1078, 1081) Appellant was still impaired when Mahoney last saw him that evening, around 12:30 or 1:00 p.m. (T 1078)

A friend of Appellant's named Shannon Spielman saw him twice at Club Manta Ray in the hours preceding his arrest. (T 1083-1084) When she saw him in the afternoon around 3:00, he was drinking vodka. (T 1084, 1087) Later, about 12:30 a.m., she saw him staggering out of the bathroom arm in arm with another girl, and he had a bottle of beer in his hand. (T 1084, 1087) Appellant was not acting like he normally did when he had not been drinking. (T 1084-1087)

Trevor Wheeler, who went to school with Appellant, testified that he and Appellant had a lot of the same friends, and that Appellant's reputation for peacefulness among his friends and peers was that "[h]e was never known for getting into trouble. He was always a good kid. If anything, he would stop a fight, he would never start one." (T 1090-1091) However, this testimony was stricken-and the jury instructed to disregard upon request by the

prosecutor, who argued that the witness should not be allowed to state "specific instances as proposed [sic] to his reputation." (T 1091-1092) Defense counsel then attempted to ask Wheeler whether, based upon his discussion with people who knew Appellant, Wheeler had an opinion as to Appellant's reputation for peacefulness among his friends, but the court sustained a State objection that no predicate had been laid. (T 1092) Counsel for Appellant then asked Wheeler what types of things he did with Appellant, and the witness responded that they went fishing and bowling, whereupon a State objection on relevancy grounds was sustained. (T 1092-1093) Defense counsel then explained at the bench that he wished to ask Wheeler about a specific incident where Appellant was exposed to a very graphic scene and had such a weak stomach that he reacted to it, as part of the defense that Appellant was not capable of carrying out the instant homicide. (T 1093-1094) However, the court would not allow this testimony, stating that it was "improper character to establish the defense of a weak stomach which is not recognized in the state." (T 1094)

Michael Stewart had known Appellant since fifth grade. (T 1095) He testified that the improvements Appellant made to his truck--the new tires and rims, new stereo, molding, etc.--were done before George Blumberg died. (T 1096-1097) Appellant worked at Club Manta Ray, and always had money and wore jewelry, and had other nice things at home. (T 1097, 1100)

Appellant testified in his own behalf as the final defense witness. (T 1106-1167) Appellant was 19 years old at the time of

the incident at the pawn shop; he was 20 when he testified at his trial. (T 1106)

Appellant graduated from high school 22 days before the incident in question, and received a scholarship to go to college. (T 1108) He was half owner of the Club Manta Ray, and made about $500 per week on the average from his ownership interest and managerial duties. (T 1107) Appellant owned jewelry consisting of about three necklaces, three bracelets, a class ring. (T 1108) He owner a mint condition 1982 motorcycle and a new 1992 Sonoma Limited Edition maroon pickup truck. (T 1108) Window tinting was on the truck when Appellant bought it. (T 1109) He bought new tires and a stereo for truck before June 18, 1992. (T 1109-1110) The only improvement he made after the incident was an amp or something that had to do w/the stereo equipment. (T 1153-1154) Appellant had no outstanding large monetary obligations other than his truck payments. (T 1110) He was living with his parents on June 18, 1992. (T 1106-1107) Keith Witteman, who was two years younger than Appellant, lived there too, sharing a room with Appellant. (T 1138, 1150) His family kicked him out because he quit school, and Witteman had been sleeping in the bushes behind the club. (T 1137)

Appellant had been to Ross Pawn Shop between five and 15 times and had purchased things there, usually from Mr. Blumberg, whom he liked. (T 1111, 1136, 1142) He had also been in there shopping when Mrs. Blumberg was there. (T 1111) Appellant knew the other owner of the pawn shop, Ross, with whom he got along all right, and

his family. (T 1110-1111) He grew up with Ross's son, Richey, and had been to the Ross house many times. (T 1110)

On June 18, 1992, between 11:30 and 3:30, Appellant drove to Ross Pawn with Keith Witteman in Appellant's maroon pickup truck and parked right in front. (T 1112) There were businesses on both sides that were open, Blue Dolphin Car Wash and You Do It Car Wash. (T 1112-1113) Appellant went to the pawn shop to buy a chain for Witteman. (T 1113) Appellant had between two and three hundred dollars with him, plus his checkbook. (T 1114) When he went into pawn shop, he had no intention of harming anyone or removing any property without paying for it. (T 1113-1114) Witteman was looking at jewelry, and Appellant spoke to Blumberg about price. (T 1115-1116) Blumberg seemed a little agitated, but it was fine between Appellant and him. (T 1116) Appellant purchased a necklace for around $162 and paid cash. (T 1139-1140) Appellant then confronted Blumberg about his raising of the pride of the item. (T 1117) Blumberg got upset and there was a very heated argument. (T 1142) Appellant went through some swinging doors that went behind the counter and grabbed him on the shoulders. (T 1117-1118, 1143) They fell. (T 1118) When Appellant grabbed Blumberg, it was not his intention to harm him. (T 1118) After Blumberg fell halfway into bathroom, blood started coming out from both sides, he was unconscious, and Appellant stood up quickly. (T 1119, 1145) Appellant was about to get sick; he had had reactions like that to seeing blood many times before. (T 1119) After Appellant jumped up, he asked Witteman what he should do. (T 1120) Witteman

basically said he did not know. (T 1120) Appellant said they had to call 911, and went out to his truck, where he lay down in the bed because he was sick. (T 1120-1121) Appellant said he did not take pair of scissors from drawers in shop and put them in Blumberg's neck, did not remove a hammer and strike him on the back of the head, did not take camera lens and strike Blumberg about his head, did not strike Blumberg with his fist, did not strike him with a blunt instrument. (T 1120-1121) Other than when he fell on him, Appellant never touched or stuck Blumberg in any manner. (T 1127) Witteman eventually came out to check on Appellant. (T 1121) Appellant found out much later that Witteman took a pair of weight lifting gloves from the cab of the truck. (T 1121-1122) Witteman then reentered pawn shop, where he stayed for five or six minutes. (T 1122) Witteman came out and locked the door of the shop with the keys. (T 1123) He had on a tan sweater that had been hanging on a hanger in the shop. (T 1123-1124) He had something like a pillow case full of things, and a very large, black, .41 caliber gun in his pants that was later removed from Appellant's house by the sheriff's dept. (T 1124) Witteman said, get in, come on, let's drive. (T 1124-1125) Appellant did not inquire about Blumberg; he was scared and did not know what was going on. (T 1125) Witteman told him to drive to a secluded area almost by Rotonda, and Appellant did so. (T 1125) En route, Witteman threw out the keys. (T 1127) They stopped, and Witteman hid a blood-stained shirt and the pillow case in the bushes. (T 1125) Witteman kept some items on him, and some were sitting in truck. (T 1125-

1126) Appellant saw some necklaces and rings and "stuff like that." (T 1126) There were faur or five little guns, derringers, and the one large gun. (T 1126) Appellant then drove to another, secluded place at Witteman's direction, where the latter threw out the little platforms used for displaying jewelry. (T 1126-1127) They then went home. (T 1127) Appellant went to work that night. (T 1128)

Appellant did not know what Keith had done inside pawn shop until next day, when Appellant's mother showed him a newspaper article. (T 1152)

Witteman eventually put the jewelry into Lemon Bay bag that Appellant had in his truck. (T 1122, 1128) The .41 caliber gun was placed into chest. (T 1128) Witteman was carrying one of the little guns on his person. (T 1129) Later, Appellant saw Witteman with cash. (T 1128) Appellant never had any of that cash, and did not spend any of it on making improvements to his truck. (T 1129) Appellant sold firearms to Thaddeus Capeles, because he did not want them any place near him. (T 1129) He had to get them from Keith Witteman, who had them. (T 1159)

Witteman told Appellant that if he said anything, he, too, would get into trouble just because he was there. (T 1129) One or two days later, Witteman said that if Appellant went to the police or told anybody, his family would be in danger. (T 1129-1130) Keith maintained one of the firearms with him at all times, although he did not have it with him when they were arrested. (T 1130, 1154-1155) Appellant did not know if it was loaded. (T 1130)

The day before his arrest, Appellant went to work at Club Manta Ray. (T 1130) The club was nonalcoholic, but Appellant had alcoholic beverages in his office. (T 1131) Because he was upset, he was drinking a lot that day, vodka and beer, and was impaired. (T 1131-1132)

When Appellant was taken into custody, a car whizzed past him and blocked his path. (T 1132-1133) He was taken to a tiny room at the sheriff's department substation in Englewood, where he was handcuffed to a chair. (T 1133) When Detectives Twardzik and Sisk came in to talk to Appellant, he was feeling very sick, and did get sick many times. (T 1133-1134) Appellant did not actually remember giving the written statement, but he had seen it, and it was his writing, although his normal writing was usually fairly neat. (T 1134) Appellant remembered talking to the police, but did not remember the specifics of what he told them orally. (T 1134) With regard to the scissors in Blumberg's shop, Appellant did not have any idea what color they were; his mother owned a seamstress shop in which she had a pair of orange scissors. (T 1166)

From June 18, 1992 to present, it had never been Appellant's intention to assist Witteman in theft of property from Blumberg or Ross, nor had it ever been his intention to hurt Blumberg. (T 1135) Appellant denied killing or robbing Blumberg. (T 1135)

Penalty Phase

The State did not present any additional evidence at penalty phase. (R 383)

Jessie Burgess, who was retired from the Coast Guard, was called by the defense and testified that he lived across the street from Appellant, and had known him for about 13 years. (R 386) He characterized Appellant as "polite, courteous, well-mannered," and a "good neighbor," with whom he had never had any problems. (R 387) Burgess had only seen Appellant at home, and had not had any opportunity to observe him out in the community. (R 387)

Greg Krupa had been a teacher and coach in the Charlotte County School Systems for 11 years. (R 388) He had known Appellant for about three or four years, as Appellant ran track at Lemon Bay High School as a pole vaulter during his junior and senior years. (R 388) Appellant was a hard-working athlete who was never a discipline problem. (R 390)

William Strickland was principal of Lemon Bay High School, and had known Appellant for several years. (R 392-393) Appellant was involved in many school activities; was well-liked by his peers, and was not a particular discipline problem. (R 393) In his senior year, Appellant was one of the recipients of the Principal's Award, which was given to deserving students so that they might further their education. (R 393-394)

Timothy Shane Sliney, an Airborne Ranger stationed in Georgia, was Appellant's brother. (R 395) Appellant was very active in school and extracurricular activities, such as sporting events and student council. (R 397) Appellant was an above-average student, who was interested in the court system, and planning on a career in criminology. (R 396-397) Timothy recounted an incident when

Appellant helped an elderly woman he did not know change the tire on her car, and refused to take money for the deed. (R 396) Appellant also helped a neighbor who was ill and whose wife had died by mowing his lawn and buying groceries for him. (R 397-398) Appellant likewise assisted another man named Bill Smith, who was paralyzed from the waist down. (R 398) Smith was active in helping children participate in sports, and Appellant would help Smith by getting hot dogs and sodas for him, getting his paperwork out of the back, etc. (R 398) Timothy and his brother had a very good relationship, without any particular problems, and Timothy loved his brother very much. (R 398)

Appellant's father, Timothy James Sliney, testified that he had an extremely close relationship with Appellant. (R 400) The family always did things together, such as going to the beach, and were involved in many school activities, particularly sports, such as football, basketball, baseball and track. (R 400) Family vacations were based around the boys and water activities, and included trips to Busch Gardens and Wet N' Wild. (R 400) Appellant and his brother were well-behaved as children. (R 400) Everything was looking good for Appellant's future, and his family had the highest dreams for him and his career. (401) Appellant planned to live near his family. (R 401) Mr. Sliney was proud of Appellant's accomplishments, and loved him tremendously. (R 400-401)

Appellant's mother, Nancy Sliney, testified that Appellant was born on December 23, 1972, had a normal childhood and was a good son. (R 407-409) She identified some photographs that showed

Appellant in his Pop Warner football uniform, and showed him at a baseball all-star picnic, as well as one that showed Appellant in his high school graduation cap and gown, with his Principal's Award. (R 407, Defense Exhibits B, C, and D)[11] Mrs. Sliney was thrilled and very proud of her son, whom she loved, when he received the award. (R 409-410) She had high hopes for Appellant's career in his chosen field of criminology. (R 408-409)

Mrs. Sliney's own father had been murdered when she was four or five, and she had lived with her grandparents. (R 408) Her mother had been dead for 12 years, and Mrs. Sliney's husband and two sons were the only family she had left. (R 408)

A friend of Appellant's from basketball, Chris Weir, who had some kind of handicap, had been calling to find out how Appellant was doing. (R 409) Weir told the Slineys that Appellant had been very good to him, and that he really cared about Appellant. (R 409-410)

The final defense penalty phase witness was Corporal Michael Farmer of the Charlotte County Sheriff's Department, Corrections Division. (R 411) He had known Appellant since he was incarcerated in June, 1992. (R 412) Appellant always listened to directions that he was given by the jailers, and, despite having spent a considerable amount of his time in jail in B Block--a tough wing for "lock down" prisoners who had to be segregated because of the nature of their charges, behavioral problems etc.--he had not

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[11] Appellant attemptedtointroduce some additional photographs as a composite exhibit, Defense Exhibit A, but a State objection thereto was sustained. (R 404-406)

received any disciplinary actions whatsoever, which was especially unusual. (R 412-414)

SUMMARY OF THE ARGUMENT

The State failed to carry its burden of proving, from the totality of the circumstances, that Appellant's statements to law enforcement personnel were made freely and voluntarily. Appellant was but 19 years old when he was thrown into a tiny room at the police station, handcuffed to a chair, and held incommunicado for an extended period of time in the early morning hours with no sleep and no nourishment except cups of coffee. He had been drinking and was emotionally distraught during the interview with deputies whom he believed to be his friends, which deputies failed to obtain a written waiver of Appellant's Miranda rights. Furthermore, there were inconsistencies between Appellant's statements and the physical evidence which call into serious question the reliability of the confession, which may have been influenced by threats Codefendant Keith Witteman made against Appellant's family.

The transcript of Marilyn Blumberg's 911 call after she found the body of her husband in the pawn shop did not tend to prove or disprove any material fact in this case, and so was irrelevant. It should not have been presented to the jury, because it served only to show the jury how upset Blumberg was, thus prejudicing Appellant. If the transcript had any tenuous relevance, it was outweighed by the danger of unfair prejudice to Appellant's cause, and the needless presentation of cumulative evidence.

The tapes of conversations between Appellant and Thaddeus Capeles should not have been played for the jury without first having irrelevant portions containing profanity and racial epithets

excised therefrom. The tapes served only to portray Appellant in an unfavorable manner, which was particularly damaging in light of the fact that Appellant would later take the witness stand to testify in his own defense.

The firearms register that was retrieved by sheriff's deputies from Ross Pawn was hearsay, not admissible under any recognized exception. It was evidence that was critical for the prosecution, as it provided the link between the guns Appellant allegedly sold to Thaddeus Capeles and the guns taken from the pawn shop when George Blumberg was killed.

Appellant's jury should have been permitted to hear the testimony he proffered to show that Keith Witteman had admitted to killing the victim herein. This evidence was admissible under the hearsay exception for statements against interest, and was necessary to vindicate Appellant's right to present witnesses to establish his defense.

The court below should have granted Appellant's request for the appointment of a capital case investigator/mitigation specialist to assist the defense in preparing for second phase. Such an expert would be available to a defendant with sufficient funds to pay for his services, and should not be denied to Appellant merely because of his poverty. The court also should have granted Appellant's request for additional time to prepare for the penalty phase; one month was not sufficient.

The trial court erred in instructing Appellant's jury on, and finding in aggravation, that the homicide was committed while

Appellant was engaged in a robbery, and was committed to avoid or prevent a lawful arrest. There was no robbery, because the taking of items from the pawn shop was an afterthought, unconnected to the assault upon the proprietor, which resulted from a dispute over the price of a gold chain. Nor did the State carry its heavy burden of showing that the dominant or sole motive for the killing was to eliminate Blumberg (who was not a law enforcement officer) as a witness by showing that Appellant knew the victim from being a customer in his shop. Furthermore, there is an inherent tension between the two aggravating circumstances under the facts and circumstances of this case which should preclude a finding that they both exist.

Death is disproportionate punishment in this case. The aggravating circumstances were improperly found, and so there is no support for the ultimate sanction. Even if one or both of the aggravators was properly established, the mitigating evidence is more compelling. Appellant was only 19 at the time of the offense, with no significant prior criminal history. He had a loving and supportive family and a bright future. He exhibited exemplary behavior while in jail, and has all the potential in the world for rehabilitation. Furthermore, his codefendant received a life sentence for his participation in the same offenses. Appellant's sentence must be reduced to life.

The court erred in departing upward from the sentencing guidelines to impose a life sentence upon Appellant for the robbery. It is difficult to determine the basis for the court's

decision to depart, but it seems to be based largely on the force used. However, this is an inappropriate reason for departure where, as here, points were also scored on the scoresheet for victim injury, and where force is an inherent component of the offense. The fact that the victim was elderly, which the court also mentioned in his written reasons for departure, is also an improper reason, in and of itself, to depart.

The court should not have assessed a public defender's fee against Appellant without notifying Appellant of his right to a hearing to contest the amount thereof. Nor should the court have imposed costs without either providing the statutory basis therefore, if the costs were statutorily mandated, or providing Appellant with notice and an opportunity to be heard, if they were not.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS THE STATEMENTS APPELLANT MADE TO LAW ENFORCEMENT, AS THE STATE FAILED TO SUSTAIN ITS BURDEN OF SHOWING FROM THE TOTALITY OF THE CIRCUMSTANCES THAT THE STATEMENTS WERE MADE FREELY AND VOLUNTARILY.

On July 1, 1993, Appellant, through counsel, filed a "Motion to Suppress Confession." (R 46-47)

At the hearing of August 17, 1993 before the Honorable Donald E. Pellecchia on Appellant's motion, Appellant accepted the burden of going forward and called four witnesses, including Appellant himself. (R 252-295)

Tonya Sue Mahoney had known Appellant for about two years. (R 257) She saw him on June 27, 1992 at around 2:00 or 3:00 p.m. at the teen night club Appellant managed. (R 258, 261) He was drinking Miller Genuine Draft in a bottle and vodka and Coke and was "very drunk." (R 258) Mahoney stayed at the club until about 1:00 a.m. (R 259) Appellant was drinking alcoholic beverages throughout the entire time she was there. (R 259) Mahoney last saw Appellant at 1:15. (R 260) He was drunk, and at first she did not think he could drive. (R 260) Mahoney was also drinking that day; she had about four drinks. (R 261-263)

Katrina Louk had known Appellant for a little over a year. (R 266) She saw him on the evening before he was arrested at somewhere between 4:30 and 6:00 at the club. (R 266-267, 269) He was in the back office drinking vodka and daiquiri. (R 267, 269)

Louk saw Appellant three or four times during that evening. (R 268) The last time was shortly before midnight, when she saw him for 20-25 minutes. (R 268) Appellant was still drinking vodka and daiquiri, but this time he was outside. (R 268) He was drunk. (R 268) His speech was slurred, he was staggering, and he smelled "gross" from the alcohol. (R 268-269)

Shannon Spielman lived in the same neighborhood as Appellant, and they had been good friends for about four years. (R 270) On June 27, 1992, she saw him at the club around 2:30 or 3:00 p.m. (R 271) Appellant and Keith Witteman were eating chicken wings and drinking vodka and Mountain Dew. (R 271, 274) Appellant "wasn't acting himself." (R 271) Spielman stayed at the club for about an hour and a half. (R 271-272) During that time, Witteman and Appellant and other people that arrived at the club after Spielman were all talking and drinking. (R 271-272) [Spielman testified that she herself did not have anything to drink. (R 274)] Spielman had to go home and change, but Appellant told her to come back later. (R 272) Spielman returned to the club around 11:30 or 12:00 that night. (R 272) She saw Keith first, and he told her that Appellant was "really drunk," and that Spielman would not like what she saw if she went into the club. (R 272) She did go in, and saw Appellant walk out of the back room with a girl named Crystal; he had a beer in his hand. (R 272, 277) Appellant had always been nice to Spielman, but he acted as though he did not know her, and was really rude. (R 272-273) Appellant was "pretty drunk." (R 273) He was "barely walking," was stumbling, and did not act like the

same person Spielman knew. (R 273, 276) Spielman was "really mad," and only stayed at the club for about five minutes. (R 273) Keith came out and told her not to "worry about anything," because Appellant was "just really drunk." (R 273)

Appellant himself testified that while he was working at Club Manta Ray as manager on June 27, 1992, he was drinking "[m]ultiple drinks, "-beginning with vodka and various mixers, followed later by beer. (R 278-279, 282-283) Prior to midnight, he had "probably four" vodka drinks, and almost two 12-packs of beer, and was drunk when he was arrested about two and a half blocks from the club. (R 279-280, 287) He was taken to the substation in Englewood, where he was thrown into a tiny room[12] and handcuffed to a chair. (R 280, 290-291) Appellant got sick into a garbage can in that room as a result of the drinking. (R 281, 291) Because he was drunk during the entire time he was in the room, Appellant did not remember any officer of the Charlotte County Sheriff's Department reading him his Miranda rights, and did not remember giving a written or verbal statement to the officers. (R 280-282, 292-295) The handwriting on the written statement was sloppy and did not look anything like Appellant's handwriting. (R 292-293) Appellant was 19 years old at the time of his arrest. (R 283)

Cary Twardzik of the Charlotte County Sheriff's Office testified for the State that he was the lead investigator in the

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[12] At the guilt phase of Appellant's trial, Deputy Sheriff Cary Twardzik testified that the size of the room was "maybe, 10 by 10, a little smaller even probably," and had a desk and a couple of chairs in it. (T 1027)

instant case, and was involved in Appellant's arrest. (R 296-297, 301) Various law enforcement personnel set up surveillance on the club, and Appellant was arrested after he drove away between 1:00 and 2:00 a.m. (R 301) Twardzik's was the lead vehicle, and he turned his car in front of Appellant's to block his path. (R 301-302) Twardzik did not observe any erratic driving, etc. by Appellant that might indicate that he was under the influence of alcohol. (R 302) After Appellant was stopped, he was ordered to throw the keys out, reach his arms out the window and open the door from the outside and exit the truck. (R 303) He was then told to shut the door, turn around with his back to the officers who were giving the commands, and walk backwards toward the sound of their voices. (R 304) Appellant was then told to get on his knees, and he was handcuffed an put into a patrol car. (R 304) Appellant obeyed the commands without hesitation, and Twardzik did not notice any staggering, stumbling or falling. (R 304) Appellant was taken to the District I office, where Twardzik and Corporal Sisk placed escorted him into an interview room. (R 305) Twardzik read Appellant his Miranda warning. (R 305-308) Appellant said that he understood his rights and wished to talk to the deputies. (R 307) Although Appellant signed the tap portion of the Miranda form, he did not sign the bottom "waiver" portion. (R 308, State's Exhibit Number 46)[13] Twardzik explained that as soon as Appellant signed the top portion, he asked, "'What is this all about?"' (R 308)

[13] Appellant's codefendant, Keith Witteman, did execute the waiver portion of his Miranda rights form. (R 346)

Twardzik told him about the transactions involving the firearms that had been reported stolen, and said that they basically wanted to know where Appellant got the guns. (R 308) Appellant said that three weeks before his arrest, he had been at a mall in Port Charlotte when a black guy had forced him to buy the guns. (R 308-309) Twardzik left the room briefly. (R 309) When he returned, he told Appellant that he had a "real problem" with Appellant's story, because the guns were not taken until ten days ago, and so Appellant could not have bought them three weeks before. (R 309-310) At that point, Appellant looked at Twardzik and said, "'I know you.'" (R 310) He looked at Corporal Sisk and said, "'I know you. I know your son. I went to school with Shawn." (R 310) [Shawn was Sisk's son. (R 310)] Appellant's eyes began to well up with tears, and he asked Sisk for a pen and a pad of paper, and wrote out an inculpatory statement. (R 310-311, State's Exhibit Number 37) Appellant then cried for a short time. (R 312) Twardzik went to get coffee for both of them. (R 312) When he returned, he asked Appellant where the jewelry was that was taken in the robbery. (R 312) Appellant replied that it was in an orange and blue manta ray duffel bag in a chest in his room. (R 312-313) Corporal Sisk left to prepare the search warrants,[14] and Twardzik asked Appellant if he had any problem giving a taped statement. (R 312) Appellant said, "'I need to get this off my chest,"' and Twardzik took a taped statement from him, which was played for the

[14] When a search warrant was executed at Appellant's residence, jewelry was found where Appellant said it was located. (R 312-313)

court. (R 312-343) The statement began at approximately 3:36 a.m. and ended at approximately 4:09 a.m. on June 28, 1992. (R 315, 343)

Twardzik testified that during his interview of Appellant, he did not notice anything that would give him an indication that Appellant was under the influence of alcohol or drugs. (R 344) Twardzik did not detect the odor of alcohol, nor did he notice Appellant having any difficulty walking or talking. (R 344, 348) Twardzik denied using any pressure, coercion, physical threats, or violence in order to get Appellant to give his statement. (R 344) Twardzik concluded that Appellant gave the statement freely and voluntarily. (R 344)

Twardzik testified that he got several cups of coffee for Appellant during the time they were together, because "[i]t was late in the morning and everybody was a little tired." (R 347) However, when he was asked whether that included Appellant, Twardzik stated that he could not "make that assumption." (R 347-348)

Lloyd Sisk of the Charlotte County Sheriff's Office testified that he was present when Appellant was arrested upon probable cause for dealing in stolen property, and he did not notice anything unusual in Appellant's behavior that might indicate that he was under the influence of alcohol or any intoxicant. (R 351) Appellant had no problem following the specific orders that he was given when he was arrested. (R 351-352) After being taken to an interview room in the investigative unit of the District I office in Englewood, Appellant was read his Miranda rights. (R 352-354)

Appellant indicated that he understood his rights and did wish to speak with the deputies. (R 354) As for why the bottom portion of the rights form was not completed, Sisk explained that Appellant asked what the purpose of his arrest was and why he was there. (R 354) When the deputies told him he was there for dealing in stolen property, particularly the guns, Appellant "went into a spiel, just non stop talking," and recounted the story of how he had been forced to buy the guns by a black male at Town Center Mall approximately three weeks before. (R 354-355) They then stopped for another cup of coffee. (R 355) Twardzik left the room, returned, and confronted Appellant with the fact that the guns were in the shop when Blumberg was murdered. (R 355) That is when Appellant said that he knew Twardzik and knew Sisk and his son and asked for a pencil and paper. (R 355) Sisk sent over a yellow piece of paper and an ink pen, and Appellant wrote out a statement. (R 356, State's Exhibit Number 37) Sisk could smell no alcohol, and there was nothing in Appellant's behavior that indicated that he was under the influence of any drugs or narcotics. (R 356, 358) No threats, physical violence, or promises were directed to Appellant. (R 356-357) Twardzik took the taped statement from Appellant while Sisk prepared information for the search warrant. (R 357) Sisk was not sure whether Appellant got sick while he was in the interview room, however, he was crying and coughing. (R 359)

After hearing the evidence and arguments of counsel, the court denied the motion to suppress, finding Appellant's statement to have been "knowingly, voluntarily and freely made." (R 364)

Although the court did "not question that" Appellant had imbibed various alcohol beverages during the day (R 366-367), the court found that Appellant "was not so impaired by alcohol that [he] lacked the ability to exercise his free will." (R 364-365)

At trial, Appellant unsuccessfully renewed his objections to the admission of his statements when the State sought to introduce them through the testimony of Deputy Twardzik. (T 969-970)

Although Appellant accepted the burden of going forward with the evidence at the suppression hearing below, it was actually the State's burden to establish that Appellant's statements were made freely and voluntarily, and that he knowingly and intelligently waived his rights. Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Brewer v. State, 386 So. 2d 232 (Fla. 1980); Drake v. State, 441 so. 2d 1079 (Fla. 1983); Reddish v. State, 167 So. 2d 858 (Fla. 1964); Snipes v. State, 20 Fla. L. Weekly D331 (Fla. 2d DCA Feb. 1, 1995); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983); Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977). The determination as to the voluntariness of a confession must be arrived at by examining the totality of the circumstances that surrounded its making. Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); Traylor v. State, 596 So. 2d 957 (Fla. 1992); State v. Dixon, 348 So. 2d 333 (Fla. 2d DCA 1977); Roman; Snipes. A number of factors militated against the admissibility of Appellant's statements, and the court below should have found that

the State failed to carry its burden of proving that they should be admitted.

One must consider first Appellant's youthful age of 19 at the time of his interrogation, a factor the trial court later found in mitigation. Although Appellant technically was no longer a juvenile in the eyes of the law, he had barely reached the age of majority. Furthermore, he was taken to the police station, an inherently coercive setting for an interrogation, Drake, thrown into a tiny interrogation room (less than 10 by 10, according to Twardzik's testimony) with two deputies, and handcuffed to a chair. He was then questioned incommunicado for several hours in the pre-dawn, apparently without anything to eat, although he was plied with coffee (perhaps in an attempt to sober him up, although the deputies denied this, or perhaps to keep him from falling asleep). Appellant was not "given access to family, friends, or counsel at any point." Sims v. Georgia, 389 U.S. 404, 407, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967).

The Supreme Court emphasized the significance of this isolation at police headquarters in Miranda v. Arizona, 384 U.S. 436, 449-50, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> The "principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation." [Footnote omitted.]... "If at all practicable the interrogation should take place in the interrogator's office.... The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior.... Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmo-

> sphere suggests the invincibility of the forces of the law. [Footnote omitted.]"

Miranda v. Arizona, 384 U.S. 436, 449-50 (1966) (quoting police manuals). Miranda concluded

> that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Footnote omitted.] The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself.

Id. at 384 U.S. 457-58.

Accordingly, Miranda devised its now-famous procedures to combat the coercive effects of police interrogation at the station. These coercive effects, however, still exist even after the Miranda warnings are given. "It is beyond dispute that the giving of the warnings alone is not necessarily sufficient to protect one's privilege against self-incrimination." People v. Leonard, 397 N.Y.S. 2d 386, 393 (N.Y. App. Div. 1977). Furthermore, in Appellant's case, the State did not establish that Appellant ever executed a valid waiver of his Miranda rights. Particularly glaring is the inability of the deputies satisfactorily to account for their failure to obtain Appellant's signature on the bottom (waiver) portion of the Miranda rights warning form they were using. (Law enforcement officers were successful in obtaining a signed waiver from Appellant's codefendant, Keith Witteman.) Although they tried to explain this matter away by saying that Appellant launched into a "spiel" about purchasing the guns in question from a black male at a mall, which the deputies did not

wish to interrupt, they did not explain why Appellant's signature was not obtained after he finished his "spiel." See Travlor, 596 So. 2d at 966 ("where reasonably practical, prudence suggests [waiver of suspect's constitutional rights] should be in writing [footnote omitted]"). Miranda imposed a "heavy burden" upon the State. Breedlove v. State, 364 So. 2d 495, 497 (Fla. 4th DCA 1978).

> Miranda further recognized that after the required warnings are given the accused, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." [Citation omitted.]

Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197, 212 (1979). That burden was not met where law enforcement failed to obtain Appellant's written waiver under the facts and circumstances of this case.

Sleep deprivation may have been one factor which induced Appellant to make his statements, as it was in State v. Sawver, 561 So. 2d 278 (Fla. 2d DCA 1990). The interrogation began sometime after Appellant's arrest, which occurred between 1:00 and 2:00 a.m., and did not end until after 4:09, when the taped statement was concluded. Twardzik testified that he got several cups of coffee for Appellant during the time they were together, because "[i]t was late in the morning and everybody was a little tired." (R 347) See Spradley v. State, 442 So. 2d 1039, 1043 (Fla. 2d DCA 1983). ("In sum, [the appellant's] taped confession was extracted from her only after she was placed in the coercive atmosphere of a

station-house setting, was subjected to a barrage of questions during the pre-dawn hours, . . . was not afforded an opportunity to sleep, and was not permitted to eat.") See also United States v. Hernandez, 574 F. 2d 1362, 1368 (5th Cir. 1978), where the court noted that the fact that the suspect arrived at the station house around 5:00 a.m., whereupon questioning began, was one circumstance suggesting that Hernandez was "ripened for influence by the inherent pressures attendant to station house interrogation."

Another circumstance which bears strongly on the voluntariness of Appellant's statements is his consumption of alcohol and, intimately connected therewith, his mental and emotional state during the early-morning interrogation. Appellant's witnesses and Appellant himself testified that he consumed a large quantity of alcohol beverages (vodka and beer) in the hours leading up to his arrest, and that he was in a drunken state by the time he left the Club Manta Ray. Even the court below did not find that Appellant had not been drinking, and in fact noted that Appellant's testimony about the amount and type of beverages he had imbibed was not "necessarily refuted..." (R 366) One of the factors that indicates the extent of Appellant's intoxication is the fact that, during the taped statement, Appellant indicated that he did not know the meaning of the words "coercion" and "perjury" (R 318); at trial, Appellant testified that he did, in fact, know the meaning of those terms. (T 1134-1135) Appellant's written statement (which was admitted into evidence at trial as State's Exhibit Number 37) provides further evidence of the degree to which he was impaired;

the writing was so sloppy that Appellant could not recognize it as his own handwriting. (R 292-293) More to the point is the effect the alcohol had (in conjunction with all the other facts and circumstances) upon Appellant's mental and emotional state. [It apparently had a significant effect upon Appellant's physical condition, as he testified at the suppression hearing how he got sick into a garbage can. (R 281, 291)] Appellant essentially testified that, due to his state of intoxication while he was in the interrogation room, he did not remember any officer of the Charlotte County Sheriff's Department reading him his Miranda rights, and did not remember giving a written or verbal statement to the officers. (R 280-282, 292-295) Although Deputies Twardzik and Sisk testified, as might be expected, that they did not see signs of intoxication in Appellant, they could not directly refute Appellant's claim to an absence of memory, as they did not have the ability to read what was in Appellant's mind during the interview. See DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983). (Deputy's statement that he thought DeConingh understood her rights appeared to be nothing more than "mere unsupported speculation" when contrasted with other factors involved in the case.) Furthermore, Appellant was obviously distraught when he gave his statements. Twardzik testified at the suppression hearing that Appellant's "eyes began to well up with tears" immediately before he gave his written statement, and Appellant "cried for a short time" after he finished writing it. (R 310, 312) He had to regain his composure before the taped statement could be taken. (R 312) Sisk similarly

testified that Appellant was crying and started coughing while he was in the interrogation room. (R 359) See DeConingh, in which this Court determined that the appellant's statement was subject to suppression where she was distraught, crying and visibly upset. In Rickards v. State, 508 So. 2d 736, 7.37 (Fla. 2d DCA 1987), the court held that inculpatory statements should have been suppressed where they were taken from a suspect who was "crying and distraught." The court noted that "[a]n accused's emotional condition when giving such statements may have an important bearing on their voluntariness," 508 So. 2d at 737. In Reddish this Court stated the applicable principle more generally: "If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him." 167 So. 2d at 863. Appellant was so incapacitated due to his consumption of alcohol and the other factors discussed above, and his statements should not have been employed against him.

Another element present in this case, and one that was discussed in DeConingh, is Appellant's friendship, or at least his acquaintance, with the law enforcement officers who were questioning him. Immediately before writing out his initial inculpatory statement, Appellant said that he knew both Deputy Twardzik and Deputy Sisk, as well as Deputy Sisk's son, Shawn. Both deputies confirmed at the suppression hearing that they had, in fact, met Appellant previously, and Sisk confirmed that Appellant did know Shawn. (R 310, 355) The DeConingh Court found significance in the

appellant's friendship with the law enforcement officer who took her statement, noting her "obvious respect for the deputy personally and concern over what he thought of her," 433 So. 2d at 503, and this was a factor in the court's determination that the confession should be suppressed. Appellant similarly viewed Deputies Twardzik and Sisk as people in whom he could and should confide, and his friendship with them was a factor which precipitated his confession.

Finally, a word needs to be said regarding inconsistencies between Appellant's statements to law enforcement and the physical evidence which call into question the validity of his confession. For example, in Appellant's taped statement, he said that he hit George Blumberg in the back of the head with the camera lens. (R 328) However, the trial testimony of the medical examiner, Dr. Imami, indicated that the camera lens was consistent with certain injuries to the face of Blumberg, particularly, the broken nose, rather than any injuries to the back of the head. (T 763-764) Appellant also said in his statement that he pushed the scissors into Blumberg's neck and left them there. (R 329-330) Dr. Imami testified that there were three stab wounds, not just one. (T 767) Also, Appellant told the deputies that he thought he hit Blumberg with the hammer two times. (R 330) However, the medical examiner found three "concentric shaped lacerations" to Blumberg's head that were consistent with hammer blows. (T 765-767) Appellant's trial testimony offered an explanation for these and other discrepancies between the physical evidence and his confession: his confession

was false. It was given under duress because Appellant feared for his family's safety due to threats Witteman had made to the effect that if Appellant went to the police or told anybody, his family would be in danger. (T 1129-1130) (Witteman had the ability to make good on these threats; he carried a firearm with him at all times. (T 1130) In Frazier v. State, 107 So. 2d 16, 21 (Fla. 1958), this Court observed as follows:

> Unquestionably, to be admissible in evidence a confession, and statements in the nature thereof, must be freely and voluntarily made. This requires that at the time of the making the confession the mind of the defendant be free to act uninfluenced by hope or fear.

(Emphasis supplied.) In Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 2d 568 (1897), the Supreme Court of the United States reasoned that any degree of influence that is exerted upon the accused will render his subsequent confession inadmissible, because the law cannot measure the force of the influence used or decide upon its effect on the mind of the prisoner. The Fourteenth Amendment requires the choice to confess to be the "voluntary product of a free and unconstrained will." Haynes, 10 L. Ed. 2d at 521. Put another way, any incriminating statement that is to go before the jury must have been a "free will offering." Williams v. State, 188 So. 2d 320, 327 (Fla. 2d DCA 1966), modified, 198 So. 2d 21 (Fla. 1967). Appellant's statement could not have been the product of his unconstrained free will where it was influenced by fear for his family's safety as a result of the threats made by his pistol-packing codefendant.

Admission of Appellant's statement where the State failed to sustain its burden of proving that Appellant validly waived his rights to remain silent and to counsel, and failed to establish the voluntariness of the statement under the totality of the circumstances, violated Appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as Article I, Sections 9 and 16 of the Constitution of the State of Florida. As a result, Appellant is entitled to a new trial.

ISSUE II

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL A TRANSCRIPT OF THE 911 CALL MARILYN BLUMBERG MADE AFTER FINDING THE BODY OF HER HUSBAND IN THE PAWN SHOP.

The first witness to testify at the guilt phase of Appellant's trial was Marilyn Blumberg, the widow of the victim herein, George Blumberg. Marilyn Blumberg testified about becoming concerned when her husband failed to return home after work, and going to the pawn shop they had, where she discovered her husband's body. (T 670-677) The State sought to introduce a tape recording of the 911 call Marilyn Blumberg then made. (T 677-689) Appellant objected on relevancy grounds, but the prosecutor argued that the tape should be admitted under the "excited utterance" exception to the hearsay rule. (T 684-689) The court ruled as follows (T 687-688):

> First of all, it is hearsay. Secondly, it is an excited utterance and third, it is relevant. The issue in this case, however, is whether it's relevance is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice under section 90.403 of the evidence code. What makes this statement or this tape probative's [sic] value weak is the nature of the commentary.
>
> First of all, the tape is not excited utterances because a question and answer session begins towards the later part of the tape in an attempt to gain information, although, it is answered in an excited fashion, so I'm going to have to read the transcript and go through it. Now, the unfair prejudice comes from the excited voice of the victim [sic] in this case which is eliminated by the use of the transcript, so I will admit a transcript in evidence of that conversation, but I will not admit the tape because I think

it may unfairly prejudice the Defendant under 90.403 and it's [sic] probative value is outweighing [sic] its relevance.

The court did agree to a defense request to eliminate from the transcript words such as "screaming" and "crying" because they were irrelevant. (T 688)[15] The prosecutor subsequently read to the jury the transcript of Marilyn Blumberg's 911 call, as follows (T 692-696) :

CT is the call taker and CA is Marilyn Blumberg.

"CT: 911.
CA: 911, please. 2655. It's Ross's Pawn Shop South McCall Road. My husband dead.
CT: Ma'am. Ma'am.
CA: Please.
CT: Please calm down a minute and tell me the name of your street. What is the--
CA: 26--I'm so sorry.
CT: That's okay. 2655.
CA: 2655 South McCall Road. We're in between Englewood Collision and Quick Lube.
CT: Okay. What?
CA: My husband on the floor and he's, he's-- 1 think he's dead. I think somebody held the shop up and killed him.
CT: Okay. Calm.
CA: Hurry.
CT: Ma'am, now are you at home?
CA: No.
CT: Did you just come home? Hello?
CA: Oh, hurry, please.
CT: Ma'am, are you at home?
CA: No. I'm at the shop, 2655 South McCall Road. Please.
CT: What's the name of the shop?
CA: Ross Pawn.
CT: What?
CA: It's a pawn shop.
CT: It's a pawn shop?

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[15] Later, during the testimony of one of the sheriff's deputies who responded to the scene, Joseph Marinola, the court admitted over defense hearsay objections testimony that, when Marinola arrived at the pawn shop, Marilyn Blumberg "was yelling, screaming, crying" and shouting, "'he's on the floor in the back."' (T 700)

CA: Yes.
CT: Hold on a second. Just hold on a second.
CA: Please get me help. Get me help. Get me help. Oh, get me help. God. No. No. No.
CT: Okay, ma'am.
CT: Ma'am?
CA: Yes.
CT: Hold on, ma'am, please. Is he bleeding?
CA: I can't. They hit him on the head with a hammer.
CT: Okay. Listen to me, we're--we're sending a deputy. We're sending an ambulance.
CA: Please.
CT: But you have to calm down and answer a few questions for me.
CA: Oh, God.
CT: Have you been robbed there? Were you there with him when this happened?
CA: No. No. He didn't come home from work and--he didn't come home. I decided to get in the car and come and see what was wrong because I kept calling and nobody answered, so I drove over and he's laying in the bathroom and the whole bathroom is full of blood and there's a hammer lying on the floor.
CT: Okay. Hold on. Hold on. Hold on.
CA: Please. oh, God.
CT: Okay, ma'am. I know it's upsetting, but you--help is on the way. Okay. They'll be there shortly.
CA: Okay.
CT: And give me--give me the name of pawn shop.
CA: There's a great, big, huge, yellow sign outside and it says pawn. It says pawn. That's all it says.
CT: Okay. That's all it says. Okay.
CA: It's a great big billboard, yellow sign.
CT: Okay. They're on their way. Now, listen, just calm down. They're on their way.
CA: There's Blue Dolphin Car Wash and then there's Quick Lube and then there's us and then Englewood Collision.
CT: Okay.
CA: We're right here and there's a red car sitting out front and a blue and white one.
CT: Okay. I think they'll see a big

yellow sign there. They're probably familiar with that area.

CA: Yes. Oh, please.

CT: And now they're on the way, ma'am. It's going to take them a few minutes to get there, but there will be somebody with you very, very shortly.

CA: Okay.

CT: I would like you to stay on the line with me.

CA: I have to call my son. I've got to call my son.

CT: Okay. Hold on a minute.

CA: Please, I have to call my son. Oh, he's dead. I know he's dead. He's dead.

CT: Are you the only person in the building?

CA: Yes. I'm the only one here. Oh, please. Oh, I got to call my son.

CT: Okay. Just--just a second.

CA: I need my boy. Oh, God. Oh.

CT: Is your husband conscious at all?

CA: I don't know. He's--the blood is everywhere.

CT: She doesn't know.

CA: I think he's bled to death.

CT: Does he talk? Will he talk to you? Is he mumbling?

CA: No. No. I think he's dead. Please get somebody here.

CT: They're on the way, ma'am. Please, I know it's upsetting, but just calm down. The deputy is on the way, the ambulance is on the way, okay?

CA: Please. I want to call my husband--oh, my son.

CT: Okay. Okay. Just calm down a second.

CA: Please Oh, I'm going to hang up. I'm going to hang up. I got to call. I got to call.

CT: Okay. Okay.

The trial court and counsel recognized that the transcript of Marilyn Blumberg's telephone call was hearsay. The court's resolution of this issue is somewhat unclear, in that he initially stated that the contents of the transcript constituted an "excited

utterance," but then said that the tape was "not excited utterances because a question and answer session begins towards the later part of the tape..." (T 687) Despite the internal contradictions in the court's monologue on this issue, he apparently found the transcript to be admissible under the exception to the hearsay rule codified in section 90.802(2) of Florida's Evidence Code.

Counsel for Appellant identified perhaps the more fundamental problem with the transcript, that it was simply not relevant. The prosecutor below did not even address the question of relevance in arguing for the admissibility of the tape of the call. The trial judge merely ruled that the transcript was relevant, in conclusory terms, without stating why and how it was relevant. At best the transcript was cumulative to the testimony Marilyn Blumberg had already given, and added nothing admissible to the State's case.[16] All it accomplished, which was likely the prosecutor's intention, was to inject into the proceedings the prejudicial matter of how upset Mrs. Blumberg was when she placed the 911 call. The call taker had to tell her to calm down no less than six times. Mrs. Blumberg invoked the name of the Deity on several occasions, expressed denial in the form of the word "no" many times, and expressed her felt need for the comfort of her son. The court

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[16] The State was not permitted to use the transcript of the 911 call as a prior consistent statement to bolster the credibility of its witness. Caruso v. State, 645 So. 2d 389 (Fla. 1994); Van Gallon v. State, 50 So. 2d 882 (Fla. 1951); Hollidav v. State, 389 So. 2d 679 (Fla. 3d DCA 1980); Lamb v. State, 357 So. 2d 437 (Fla. 2d DCA 1978); Brown v. State, 344 So. 2d 641 (Fla. 2d DCA 1977). Therefore, to be admissible, the transcript had to serve some other purpose.

apparently recognized that Marilyn Blumberg's excited state of mind was not something that the jury should consider; this recognition was the reason for using the transcript instead of the tape itself, and for excising terms such as "screaming" and "crying" that had been inserted by the transcriber. Yet the jury must have been unmistakably aware of the impact the discovery of her husband's body had upon Marilyn Blumberg from the transcript that was read to them, and the prejudice was not sufficiently dissipated by the steps the court took.

> Generally, the test for the admissibility of evidence is relevance. § 90.402, Fla.Stat. (1991). Relevant evidence is defined as "evidence tending to prove or disprove a material fact." § 90.401, Fla.Stat. (1991). "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." § 90.403, Fla.Stat. (1991).

Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994). The transcript of Marilyn Blumberg's 911 call did not tend to prove or disprove any material fact that was in issue in Appellant's case. It went only to show her distraught condition when she placed the call, which was not an element of the crimes that the State had to prove. And any possible, tenuous relevance the transcript might conceivably have had was far outweighed by its prejudicial nature, and the fact that it was merely cumulative to testimony the jury had already heard from Mrs. Blumberg. Furthermore, the impact of the transcript on the jury may have been exacerbated by the fact that it was admitted during the testimony of the very first witness for

the prosecution; all subsequent testimony was received with the knowledge that the victim's widow had been emotionally traumatized by what she found in the pawn shop, which knowledge may have colored the jurors' perceptions of that evidence.

Appellant was deprived of a fair trial by the improper admission of the 911 transcript. As a result, he must be granted a new trial.

ISSUE III

THE COURT BELOW ERRED IN ADMITTING PORTIONS OF THE TAPES OF CONVERSATIONS BETWEEN APPELLANT AND THADDEUS CAPELES WHICH CONTAINED IRRELEVANT AND PREJUDICIAL MATERIAL.

During the testimony of Thaddeus Capeles, the State sought to introduce into evidence audio cassette recordings of several conversations between the witness and Appellant. These tapes involved telephone calls in which Capeles set up meetings with Appellant, as well as tapes of the meetings themselves, at which Capeles allegedly purchased firearms from Appellant that had been taken from Ross Pawn. The prosecutor initially proffered the recordings out of the presence of the jury. (T 827-862) Appellant objected to the tapes and testimony from Capeles regarding his purchase of the guns on relevancy grounds, and further objected specifically to "expletives and the references to black gentlemen in a derogatory manner," which were "so inflammatory that they may prejudice the jury in this particular case." (T 862) Appellant asked that the objectionable portions be deleted if the court ruled the tape recordings to be relevant. (T 862) The court overruled the objections (T 864), and the tapes were played for the jury. (T 872-907) To conserve space and time, Appellant will not reproduce the contents of the tape recordings here, but has placed a copy of the record pages containing the transcripts of the recordings in an appendix to this brief, for quick reference by the Court. (A 1-36) As the Court can see, the transcripts are laced with profanity, including several invocations of the "f" word, and contain racial

slurs demeaning to Americans of African descent.

Relevance is the basic test for evidentiary admissibility. § 90.402, Fla. Stat. (1993); Craig v. State, 510 So. 2d 857 (Fla. 1987). To be relevant, evidence must tend to prove or disprove a material fact in issue. § 90.401, Fla. Stat. (1993); Stano v. State, 473 so. 2d 1282 (Fla. 1985). The parts of the tapes to which defense counsel specifically objected did not meet this basic test for admissibility. The use of curse words and racial epithets by Appellant and Capeles had absolutely no probative value with regard to any issue involved in this case, and served merely to case Appellant in a bad light before the jury. There was no reason why the offensive material could not have been edited out before the jury heard the tapes.

It was particularly critical here that the jury not be permitted to consider such inflammatory matters, as Appellant would be taking the stand in his own defense during the guilt phase, and the jury would called upon to assess his credibility. Such an assessment may have been skewed against Appellant by the jury's receipt of the irrelevant material, which may well have caused the esteem in which Appellant was held in the eyes of the jury to have been lessened, resulting in a negative view of Appellant's believability as a witness.

Appellant's trial was rendered unfair by the court's admission of the tape recordings in unexpurgated form. Appellant therefore is entitled to be tried again.

ISSUE IV

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT NUMBER 33, A FIREARMS REGISTER TAKEN FROM ROSS PAWN, AS THIS DOCUMENT CONSTITUTED INADMISSIBLE HEARSAY.

During the testimony of Deputy Sheriff Cary Twardzik of the Charlotte County Sheriff's Office, the State sought to introduce into evidence a firearms register that the witness obtained from the victim's pawn shop. (T 930-942) Appellant objected on grounds of hearsay and a discovery violation. The court overruled the objections, and the document was admitted as State's Exhibit Number 33. (T 931, 938-942) Although Appellant's discovery concerns were apparently satisfactorily resolved, the document should not have been admitted, as it constituted hearsay.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801 (l)(c), Fla. Stat. (1993). An unverified out-of-court writing attempted to be introduced for the purpose of establishing the truth of the matters contained therein, such as the document at issue here, constitutes hearsay in exactly the same manner as an out-of-court oral declaration. Auletta v. Fried, 388 So. 2d 1067 (Fla. 4th DCA 1980). The prosecutor below introduced the firearms register to prove that the guns listed therein were in the shop, and this document provided the vital link the State needed between guns that were in the pawn shop and the guns that Appellant sold to Thaddeus Capeles.

State's Exhibit Number 33 was not admissible under any exception to the hearsay rule. After it came into evidence during Twardzik's testimony, the prosecutor apparently had some concerns about its admissibility, as he recalled Marilyn Blumberg and questioned her concerning the document. She testified that the exhibit was the firearms record and was in her husband's handwriting. Perhaps the State was attempting to qualify the register for admissibility as a business record' pursuant to the hearsay exception set forth in section 90.803(6) of the Florida Statutes. If so, this effort was woefully inadequate. A party moving a document into evidence under the business records exception must first lay a proper foundation by establishing that the record was "1) made at or near the time of the event recorded, 2) by, or from information transmitted by, a person with knowledge, 3) kept in the course of a regularly conducted business activity, and 4) it was the regular practice of that business to make such a record." Saul v. John D. and Catherine T. MacArthur Foundation, 499 So. 2d 917, 920 (Fla. 4th DCA 1986). See also Phillips v. State, 621 So. 2d 734 (Fla. 3d DCA 1993) and Snellins and Snellins, Inc. v. Kaplan, 614 So. 2d 665 (Fla. 2d DCA 1993). Mrs. Blumberg's testimony did not come close to laying a proper foundation for admission of the firearms register as a business record in accordance with the requirements of the Evidence Code.

State's Exhibit Number 33 was hearsay, and no exception to the hearsay rule justified its admission. It was extremely damaging to Appellant, as it provided the connection the State needed between

the guns that were in the pawn shop and the guns that were involved in the transactions between Appellant and Thaddeus Capeles. The admission of the firearms register was harmful error, and Appellant must therefore be granted a new trial.

ISSUE V

THE TRIAL COURT ERRED IN PREVENTING APPELLANT'S JURY FROM HEARING THE PROFFERED TESTIMONY OF APPELLANT'S WITNESSES, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND BY ARTICLE I, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A DEFENSE.

Before presenting his case to his jury, Appellant proffered for the court the testimony of four witnesses. Appellant's codefendant, Keith Witteman, invoked his constitutional privilege against self-incrimination and refused to testify concerning the events at Ross Pawn and any conversations he had with an inmate named Robert Ryan at the Charlotte County Jail. (T 1048-1049) Thereafter, George Morris Davis, III, Robert Ryan, and William Washington told the court about inculpatory statements they heard Witteman make when he was incarcerated. (T 1049-1057) The court ruled that the proffered testimony did not bear sufficient indicia of trustworthiness to be admissible (T 1057-1062), and Appellant's jury never heard from these witnesses, The evidence in question was critical to Appellant's defense, and his jury should have been permitted to consider it.

In order for testimony such as that proffered by Appellant to be admissible under the hearsay exception for statements against interest, three requirements must be met: (1) the declarant must be unavailable; (2) the evidence must tend to expose the declarant

to criminal liability; and (3) the statement must be corroborated by circumstances showing trustworthiness. § 90.804(2)(c), Fla. Stat. (1993).[17] The proffered testimony of at least Davis and Ryan met these requirements, and should have been admitted. See Maugeri v. State, 460 So. 2d 975 (Fla. 3d DCA 1984); Brinson v. State, 382 So. 2d 322 (Fla. 2d DCA 1979). The trial judge recognized that the declarant, Keith Witteman, was unavailable to testify (he invoked the Fifth Amendment), and that the statements in question were against his interests, but found that they did not meet the fourth requirement cited above as to trustworthiness. The court referred to "inconsistencies" between the testimony of Davis and Ryan, but actually their testimony was quite consistent. Both men testified that late one night in early 1993, Keith Witteman was yelling to another inmate in an attempt to arrange a swap of tennis shoes for cigarettes. (T 1050-1051, 1053-1054) Both men testified that Ryan asked Witteman to be quiet so that he (Ryan) could go to sleep. (T 1051, 1055) Both men testified that Witteman told Ryan to shut up, or "I'll kill you like I did the other old bastard." (T 1050-1051,

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[17] The civil procedure counterpart to this rule does not require corroboration. See § 90.804(2)(c), Fla. Stat. (1993); Peninsular Fire Insurance Co. v. Wells, 438 So. 2d 46 (Fla. 1st DCA 1983). This distinction irrationally gives civil litigants more protection than criminal defendants. It cannot be constitutionally acceptable to place an obstacle in the path of an accused in a criminal trial who seeks to exculpate himself by showing that another person has confessed to the crime, when no such obstacle would be in the path of a civil litigant who sought to introduce the same evidence. This violates Appellant's Sixth Amendment right to present evidence to support his defense, which right is discussed in more detail below, as well as violating the equal protection doctrine by affording more protection to civil litigants.

1055) Significantly, both men quoted the operative statement made by Witteman about "killing the old bastard" in exactly the same words. Thus the testimony of Ryan corroborated the testimony of Davis, and vice versa. Furthermore, it is ironic indeed that the State would argue below that the statement did not bear sufficient indicia of trustworthiness (T 1057-1059) when the State had already charged Keith Witteman with the exact same offenses with which Appellant had been charged. The State should be estopped from arguing that a statement admitting a killing made by one whom the State has charged with murder is unreliable. One wonders whether the State might itself have sought to introduce the testimony in question at Keith Witteman's own trial for the murder and robbery of George Blumberg. If this Court had granted in full Appellant's Motion for Leave to Supplement the Record on Appeal, we would know the answer to this question, as the transcript of Witteman's trial would be part of the record in the instant case; unfortunately, however, this Court refused to allow the transcript of the guilt phase of Witteman's trial to be included in the instant appellate record.

Apart from whether the proffered evidence was strictly admissible under the hearsay exception discussed above, Appellant was entitled to present the testimony to vindicate his constitutional rights to present witnesses on his own behalf and to establish his defense. ". . .[T]he right to present evidence on one's won behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of

law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 so. 2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984), rehearing denied, 744 F. 2d 97 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 s. ct. 1775, 84 L. Ed. 2d 834 (1985). See also Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994) (defendant was entitled to present testimony relevant to his defense). As the Supreme Court of the United States noted in Washington v. Texas, 388 U.S. at 19:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982), the court observed:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. [Citations omitted.]

Furthermore, a person accused of a crime has a basic right to introduce evidence in his defense to show that the crime may have been committed by someone else, which is what Appellant was attempting to do below. Chambers v. Mississippi, supra; Pettijohn v. Hall, 599 F. 2d 476 (1st Cir. 1979); Lindsay v. State, 69 Fla. 641, 68 So. 932 (Fla. 1915); Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982); Moreno ; Siemon v. Stoushton, 440 A. 2d 210 (Conn. 1981); State v. Harman, 270 S.E. 2d 146 (W. Va. 1980). "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of the defendant." State v. Hawkins, 260 N.W. 2d 150, 158-159 (Minn. 1977). The testimony need not be absolutely conclusive of the third party's guilt; it need only be probative of it. Pettiiohn; Harman; Siemon.

The third party confession is probably the most direct link that can be presented between the third party and the crime. Where another person has made an out-of-court statement admitting his own guilt of the crime for which the defendant is on trial, such a statement is obviously of crucial importance to the accused's defense that he was not the person who committed the crime. Chambers. In this situation (and especially where the defendant is on trial for his life), the constitutional right to present one's defense must take precedence over exclusionary rules of evidence, and "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers, 35 L. Ed. 2d at 313. See also Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738

(1979); Pettiiohn. Appellant was attempting to show below that, while he was present at the pawn shop on the day of the incident, his codefendant was the person responsible for the death of the proprietor, George Blumberg. Admitting the proffered testimony would have gone a long way toward establishing this defense, and the trial court should have allowed it. The proffered evidence also was extremely relevant to the sentence to be imposed upon Appellant. Obviously, whether it was Appellant who actually killed George Blumberg, or whether it was Keith Witteman, as he indicated in his jailhouse confession, could have had a major bearing on the penalty recommendation of the jury. See Ragsdale v. State, 609 So. 2d 10, 13-14 (Fla. 1992). [In rejecting Ragsdale's argument that the jury did not know that it could consider his codefendant's life sentence as nonstatutory mitigating evidence, this Court noted that there was evidence in the record "that Ragsdale stated that he committed the murder." (Emphasis supplied.)] This Court's recent admonition in Guzman v. State, 644 So. 2d 966, 1000 (Fla. 1994) is particularly pertinent here:

> We are...concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

(Emphasis supplied.)

Appellant was unduly hampered in the presentation of his defense by the trial court's ruling excluding his proffered

evidence. As a result, Appellant was deprived of a fair trial, and must be granted a new one.

ISSUE VI

APPELLANT WAS PREVENTED FROM ADEQUATELY DEVELOPING AND PRESENTING MITIGATING EVIDENCE FOR THE JURY AND THE TRIAL COURT TO CONSIDER BY THE COURT'S REFUSAL TO APPOINT A CAPITAL CASE INVESTIGATOR/MITIGATION SPECIALIST TO ASSIST THE DEFENSE AND DENIAL OF ADEQUATE TIME FOR APPELLANT TO PREPARE FOR PENALTY PHASE.

At a hearing held on October 4, 1993 before Judge Pellecchia, after guilt phase, on the day penalty phase was scheduled to begin, Appellant discharged his retained counsel, and the public defender's office was appointed to represent him, over the protests of Assistant Public Defender Mark Cooper that he did not think it was proper for his office to be appointed at that paint, and did not think it was in Appellant's best interest to switch attorneys. (T 1341-1359) Penalty phase was set for just one month later, November 4, 1993. (T 1358)

On October 25, 1993, defense counsel filed a motion for continuance of the penalty phase (R 174-175) and a motion for the appointment of a an independent capital case investigator/ mitigation specialist. (R 176-177) These motions were heard by Judge Pellecchia on November 29, 1993, and denied. (R 213, 450-460) The motions should have been granted.

The motion for appointment of the investigator/mitigation specialist specifically asked the court to appoint Roy D. Mathews and Associates, Inc., and set forth a number of areas in which defense counsel needed the assistance of this expert, such as, identifying and interviewing defense witnesses, investigating and

developing Appellant's background and life history, effectively rebutting aggravating circumstances, presenting statutory and nonstatutory mitigating services, cross-examining the State's witnesses, etc. (R 176-177) The motion noted that Appellant was indigent, and that counsel would have retained the services of the expert if it were not for Appellant's poverty. (R 177) The motion also noted that the assistance of a competent capital case investigator/mitigation specialist was critical to defense counsel's ability to properly prepare for the penalty trial, and that counsel was "wholly unable to adequately prepare for this matter without the assistance of a Capital Case Investigator/ Mitigation Specialist." (R 176)

The denial to the indigent Appellant of the assistance of the expert he sought denied him due process of law under the principles expressed in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), and also denied him equal protection of the laws, and the effective assistance of counsel for his defense, and subjected him to cruel and unusual punishment. See also section 914.06 of the Florida Statutes, which requires the court to award reasonable compensation to an expert witness whose opinion is relevant to the issues of the case when an indigent defendant (or the state) requires his services. It was particularly important that such expert assistance be provided here, where the defense had so little time to prepare for penalty phase. See Cade v. State, 19 Fla. L. Weekly D790 (Fla. 5th DCA April 8, 1994) with regard to criteria a trial judge should use when deciding whether to appoint

an expert to assistance the defense.

The motion for continuance set forth specific reasons why counsel did not have adequate time to prepare for penalty phase (R 174): 1) Counsel needed more time to read and digest the 1359-page transcript of the proceedings that had already taken place, which transcript was not delivered until October 18, 1993. [At the October 4, 1993 hearing, counsel asked that he be allowed to order an expedited transcript of the first phase, which request was granted. (T 1353-1354)] 2) Counsel planned on calling 10 mitigation phase witnesses and needed more time to contact and interview them. 3) Counsel needed more time to-do legal research to object to the State's proposed aggravating factors. Furthermore, if the motion to appoint an expert to assist the defense had been granted, that expert would have required adequate time to provide his assistance. (R 453) These were all reasonable grounds for seeking additional time to prepare for something as important as the penalty phase of a capital proceeding. There is no indication in the record that the State would have been prejudiced in any way had a reasonable delay in the proceedings been granted [although the State made a general argument that it would be prejudiced by any delay (R 452-456)]. It is instructive to look at what actually happened at the penalty phase in ascertaining whether defense counsel had adequate time to prepare. Although the motion for continuance asserted that 10 witnesses were planned, only seven were actually called. Significantly, not one of them was an expert witness. As this Court noted in Scull v. State, 569 So. 2d 1251,

1252 (Fla. 1990), in holding that Scull's due process rights had been violated by the expedited manner in which he was resentenced to die in the electric chair, "Haste has no place in a proceeding in which a person may be sentenced to death."

It must be remembered that Appellant's jury recommended death by but a one-vote margin; the vote was seven to five. If he had had the expert assistance he needed, and the time to adequately prepare his penalty defense, Appellant might well have been able to persuade-at least one more juror that his life should be spared, thus obtaining a life recommendation.

Because Appellant was denied the assistance of a necessary expert for his defense, and not given adequate time to prepare his second phase defense, his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution were violated. He must therefore be granted a new penalty trial.

ISSUE VII

THE COURT BELOW ERRED IN INSTRUCTING APPELLANT'S JURY ON, AND FINDING IN AGGRAVATION, THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY AND WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The trial court instructed Appellant's jury on two aggravating circumstances, committed during a robbery [section 921.141(5)(d), Florida Statutes] and avoid arrest [section 921.141(5)(e), Florida Statutes], and found these same two aggravators to exist in his sentencing order. (T 439, R 222-223, 472-474) The evidence was insufficient to support the application of either of these factors to Appellant's cause. Furthermore, there is an inconsistency in applying both factors to Appellant under the facts and circumstances of this case.

A. During a robbery[18]

The court found as follows as to this aggravating circumstance (R 222-223, 472-473):

> 1. "The capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of, or attempt to commit the crime of robbery. ..."
>
> The Defendant was charged and convicted of committing robbery. The evidence established that the Defendant and Co-Defendant, Keith Wittemen, entered Ross' Pawn Shop, the business establishment of

[18] Appellant asks the Court to consider his argument as to the robbery not only as it pertains to the aggravating circumstance, but also as an argument that Appellant's guilt-phase motion for a directed verdict as to the robbery should have been granted.

> George Blumberg and took gold jewelry and firearms from George Blumberg.
>
> The Defendant's confession clearly established that the Defendant knocked the victim to the floor injuring him. The Defendant further elaborated that while he was attacking the victim, repeatedly stabbing him in the neck with a pair of scissors and ultimately striking the victim in the head with a hammer, inflicting the fatal wounds, Co-Defendant, Keith Wittemen, was cleaning out the victim's display cases of jewelry and firearms. The Defendant later sold the firearms taken from the victim's pawn shop. Further, the gold jewelry taken at the robbery was recovered from the Defendant's bedroom at his residence.
>
> The capital felony was committed while the Defendant was engaged in the commission of a robbery. This aggravating circumstance was proved beyond a reasonable doubt.

The above-quoted findings do not show that George Blumberg was killed during a "robbery," which is defined as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.13(1), Fla. Stat. (1993). The findings describe a taking of property, as well as violence applied to Blumberg, but do not demonstrate that the purpose of the violence was to accomplish the taking. In both Appellant's statements to law enforcement authorities and his trial testimony, he disclaimed any intention to rob Blumberg when he and

Keith Witteman entered the pawn shop. (R 341-342, T 1006-1008, 1135) Appellant thought Witteman started taking the jewelry, etc. because "[w]hile he was there, he might as well take everything" (R 342, T 1008), thus indicating that there was no intent to attack or kill Blumberg in order to take the property, but it was rather something that occurred as an aside or an afterthought to the assault.

Several cases are instructive. In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), this Court agreed with Clark's contention that the trial court erred in finding that the murder was committed during a robbery and stated:

> While there is no question that Clark took Carter's [the victim's] money and boots from his body after his death, this action was only incidental to the killing, not a primary motive for it. No one testified that Clark planned to rob Carter, that Clark needed money or coveted Carter's boots, or that Clark was even aware that Carter had any money. There is no evidence that taking these items was anything but an afterthought. Accordingly, we find that the State has failed to prove the existence of this aggravating factor beyond a reasonable doubt.

Similarly, here the fact that items were taken from the pawn shop subsequent to the assault on Blumberg did not establish that the attack was motivated by a desire to obtain property. In this regard, one must remember that Appellant was gainfully employed, and had no particular need for money. Of similar importance is Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) where, again, this Court refused to accept the trial court's finding that the murder was committed during a robbery and stated:

> Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects....This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor. must be based. [Citation omitted.]

In Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993) the defendant took his father's truck after killing his father and another person. Because there was "no evidence that Knowles intended to take the truck from his father prior to the shooting, or that he shot his father in order to take the truck, the aggravating factor of committed during the course of a robbery" could not be permitted to stand. Similarly, here the aggravator cannot be upheld where there was no evidence that Appellant intended to take property from the pawn shop prior to the assault on Blumberg, and no evidence that he assaulted Blumberg in order to take items from the shop. Where, as here, the facts that are known are susceptible to other conclusions than that an aggravating factor exists, that factor will not be upheld. Peavy v. State, 442 So. 2d 200 (Fla. 1983). Here, as in Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984), "In the absence of any material evidence in the record which would unequivocally support a finding that a robbery occurred, [this Court] must disallow this aggravating factor." See also Hill v. State, 549 So. 2d 179 (Fla. 1989) (pecuniary gain not proven where money could have been taken as an afterthought); Scull v. State, 533 So. 2d 1137 (Fla. 1988) (taking of victim's car insufficient to prove pecuniary gain was primary motive for killing where it was

possible case was taken to facilitate escape); Simmons v. State, 419 so. 2d 316 (Fla. 1982) (proof beyond a reasonable doubt of a pecuniary motivation for homicide cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance). See also Moody v. State, 418 So. 2d 989 (Fla. 1982) (record failed to support finding that capital felony was committed while Moody was fleeing the scene after committing arson in deceased's trailer where it was clear that arson was committed after victim was killed).

B. Avoid arrest

The court found as follows as to this aggravating circumstance (R 223, 473-474):

> 2. "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."
>
> Clear proof was adduced at trial establishing that the Defendant's dominant or only motive for the killing of George Blumberg was to eliminate him as a witness. The Defendant confirmed in, his written and taped confessions that after knocking the victim, George Blumberg, to the floor of his establishment, Ross' Pawn Shop, he turned to his Co-Defendant, Keith Wittemen, and asked what he should do? Wittemen replied: "'You've got to kill him now! We can't, you know, just leave now.' He said something about 'identifying us' or something. He goes 'we gotta kill him, we gotta do this."' Thereafter the Defendant left the victim and found a pair of scissors with which he repeatedly used to stab George Blumberg in the

> neck, leaving them ultimately buried in the victim. Since the victim was still making sounds, the Defendant left him, found a hammer and returned to repeatedly strike blows to the victim's skull. The Defendant persisted in beating the victim, breaking the victim's back and fracturing several ribs. In addition, the Defendant in his own testimony during the trial confirmed that George Blumberg was familiar with the Defendant as a result of the numerous times he'd been to Ross' Pawn Shop prior to the date of this crime. This aggravating circumstance was proved beyond a reasonable doubt.

There appear to be at least two factual inaccuracies in the above finding. The court states that Keith Witteman said "something about 'identifying us' or something" in conjunction with his statement that they had to kill George Blumberg. The record actually reflects, however, that, in his taped statement, Appellant told the sheriff's deputies that Witteman said, ""Somebody will find out or something.'" (T 1006) Also, the court states that Appellant went to get a hammer to strike Blumberg because "the victim was still making sounds." However, the record reflects that, while Blumberg was "still just moving and stuff" before the hammer was obtained, he was not "talking or making any noises or anything." (T 994, 996) Another problem with the court's finding is that he fails to identify what Blumberg was a witness to that caused the perpetrators to want to eliminate him. That is, did they kill him because he was a witness to the assault, or did they kill him so that he would not be a witness to the alleged robbery that was going to occur, or something else?

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983); Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, the State must clearly show that the dominant or only motive for the killing was the elimination of a witness. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Dufour v. State, 495 So. 2d 154 (Fla. 1986); Doyle v. State, 460 so. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 so. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). The fact that the victim might have been able to identify Appellant was insufficient to establish this aggravator, Floyd, nor did the State prove this factor merely by showing that the defendant and the victim knew each other, as customer and proprietor, even for a number of years. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Caruthers. The evidence adduced at trial was not sufficient to fulfill these stringent requirements for finding a witness-elimination murder, and the court erred in instructing the

jury on this factor and finding it to exist in his sentencing order.

C. Inconsistency

Under the facts and circumstances of this case, if the court was justified in finding any aggravating circumstances, then he should have found one, but not both, of the above. If George Blumberg was killed as part of a robbery, then it would appear that the robbery simply got out of hand, and his killing was not an intended witness-elimination murder. Hansbroush. See also Jackson v. State, 502 So. 2d 409 (Fla. 1986) (where there is more than one possible explanation for the homicide, the aggravator of witness elimination has not been proven beyond a reasonable doubt, and cannot be allowed to stand). If, on the other hand, Blumberg was killed to eliminate him as a witness to the assault, the initial grabbing of his person, then that killing was separate and distinct from the taking of the property that subsequently occurred, and the homicide cannot legitimately be said to have taken place during the course of the robbery. Even if this Court believes that one aggravator is supported by the evidence, the inherent tension between the two that were found by the trial court should lead to the elimination of one of the aggravating circumstances.

ISSUE VIII

THE TRIAL COURT ERRED IN SENTENCING JACK SLINEY TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddinss v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1, 9 (1982). This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring), that application of the death penalty must be reserved for only the most aggravated and least mitigated of most serious crimes. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Jack Sliney's cause does not qualify for the death penalty under these principles,

As discussed in Issue VII above, the aggravating circumstances

found by the trial court should not have been found, and so there is no basis on which Appellant's sentence of death can stand. Amoros v. State, 531 So. 2d 1256 (Fla. 1988). Even if one or both of the aggravators was properly found, Appellant's death sentence cannot be upheld, in light of the weakness of the aggravation, and the strength of the mitigating evidence.[19]

The first aggravator found by the court below--that the capital felony occurred during the course of another felony (robberyj is particularly weak, as the section 921.141(5)(d) aggravating circumstance is inherent in every felony-murder prosecution, and so does little to set the crime apart from others that do not merit the ultimate sanction. This Court has implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-341 (Fla. 1984), wherein the Court reduced a death sentence to life imprisonment where the underlying felony was the only aggravator, even though there were no mitigating circumstances and the jury recommended death. This Court has consistently reduced to life in cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Proffitt v. State, 510 so. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982).

[19] This Court has upheld death 'sentences supported by one aggravating circumstance only in cases involving nothing or very little in mitigation. McKinney v. State, 579 So. 2d 80 (Fla. 1991).

As for mitigation,[20] the court below found two statutory mitigating factors, no significant history of prior criminal activity, which he afforded substantial weight, and Appellant's youthful age of 19 at the time of the offense, which he afforded little weight. (R 224) Under the category of nonstatutory mitigation, he recognized the testimony from Appellant's family and friends regarding Appellant's good character, but afforded it little weight. (R 225) Evidence of this nature has served as a basis for a life sentence in a number of cases. See, for example, Caruso v. State, 645 So. 2d 389 (Fla. 1994) (life recommendation could legitimately have been based on Caruso's age of 21, that he was known by family members as loving, nonviolent, and a good worker, and that he had no history of violent criminal behavior); Washington v. State, 432 So. 2d 44 (Fla. 1983) (positive traits/family testimony); Thompson v. State, 456 So. 2d 444 (Fla. 1984) (same); Perry v. State, 522 So. 2d 817 (Fla. 1988) (same). The court also found that Appellant had been gainfully employed, which he gave little weight, and that Appellant had exhibited good conduct in jail, which the court gave some weight. (R 226) The latter factor is particularly significant, in that it goes to Appellant's potential for rehabilitation, which is "[u]nquestionably... a significant factor in mitigation. [Citations omitted.]"

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[20] When one considers mitigation, it must be kept in mind that Appellant likely could have developed additional mitigating evidence apart from what he actually presented at his penalty trial if the defense had been given adequate time to prepare and had been provided with the requested services of a capital case investigator/mitigation specialist. Please see Issue VI in this brief.

Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). See also McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Carter v. State, 560 So. 2d 1166 (Fla. 1990); McCray v. State, 582 So. 2d 613 (Fla. 1991). The overall picture that emerges from the defense case at penalty phase is that of a young man with a loving and supportive family, with no substantial history of criminal behavior who had everything going for him, a high school graduate with a scholarship to continue his education and prepare for a career in his chosen field of criminology, a responsible individual capable of holding gainful employment and fulfilling his financial obligations (payments on his truck), who, for some unknown reason, perhaps under the influence of the wrong companion (Keith Witteman), became involved in a single very unfortunate episode. It is not for persons such as Appellant that the capital sentence is intended.

Justice Kogan's opinion concurring in part and dissenting in part in Lowe v. State, 20 Fla. L. Weekly 5121, 5124 (Fla. March 9, 1995), in which the defendant was sentenced to death pursuant to a nine to three jury recommendation, is instructive. Justice Kogan noted the "relatively weak" case for aggravation, which consisted of a prior violent felony conviction and the robbery associated with the homicide. He found the fact that Lowe had adapted well to life in prison and was capable of rehabilitation there to be particularly persuasive mitigation. Justice Kogan determined that death was disproportionate, citing "the general policy that death should not be imposed where the evidence supporting a potential for

rehabilitation is strong." 20 Fla. L. Weekly at S124. Here, the case for aggravation is similarly weak. The evidence supporting Appellant's potential for rehabilitation, including his exemplary conduct while in jail, and the other factors discussed above, is compelling, and should persuade this Court that he must be given a sentence of life imprisonment.

While on the subject of proportionality, one must discuss the fact that Appellant's codefendant, Keith Witteman, was tried separately and convicted of the same offenses as Appellant, but received a life sentence.

In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), this Court addressed the principal of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

In Slater, the defendant was the accomplice; the triggerman had entered a plea of nolo contendere to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So. 2d at 543.

In Craig v. State, 510 so. 2d 857, 870 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed. 2d 680 (1988), the Court explained:

> the degree of participation and relative culpability of an accomplice or joint perpe-

> trator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

There, because the defendant was the planner and the instigator of the murders, rather than the accomplice, whose help had been solicited by the defendant, the disparate treatment afforded the accomplice was not a factor that required the court to accord a life sentence. See also Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994). ("A codefendant's sentence may be relevant to a proportionality analysis where the codefendant is equally or more culpable; [Citations omitted.]")

Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992); Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989.); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988); Cailler v. State, 523 So. 2d 158 (Fla. 1988); DuBoise v. State, 520 So. 2d 269, 266 (Fla. 1988); Brookings v. State, 495 So. 2d 135, 142-143 (Fla. 1986); Mallov v. State, 382 So. 2d 1190 (Fla. 1979).

The principles expressed in Slater and subsequent opinions of this Court are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the roles played by his cohorts. See

Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

There is little in the record of the instant case to establish definitively the respective roles played by Appellant and Witteman in the incident at the pawn shop. (There would likely be more information about this matter if the Court had granted in full Appellant's motion for leave to supplement the record on appeal, which was served on December 29, 1994, in which Appellant sought to have the transcript of Witteman's trial, including the guilt phase, made a part of the record of this case. The court granted the motion as to the penalty phase of Witteman's trial, but refused to include the guilt phase. Appellant hereby renews his motion to have the transcript of the guilt phase of Keith Witteman's trial included as a supplement to the record on appeal in Appellant's case.) Appellant's trial testimony indicated that Witteman was by far the more culpable of the two, as Appellant vacated the pawn shop as soon as George Blumberg went down. However, even in Appellant's version of what happened that he gave to the deputy sheriffs when he was interrogated, Witteman was the instigator of the homicide. When Blumberg fell, Appellant looked to Witteman for guidance by asking what to do, and Witteman said, "You have to kill him now, you have to kill him now." (T 991) In Heath v. State, 648 So. 2d 660, 666 (Fla. 1994), this Court noted that it

> has approved the imposition of the death sentence "when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime." [Citations

omitted.]

In light of the fact that Keith Witteman, at the very least, precipitated the killing by egging Appellant on, it can hardly be said that Appellant was the "dominating force behind the homicide." He should not be sentenced more harshly than his codefendant.

Proportionality analysis is not based an the number of aggravating and mitigating factors, but on the quality of the circumstances presented. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) and Livingston v. State, 565 So. 2d 1288 (Fla. 1988). This Court's analysis of Jack Sliney's cause must lead it to conclude that the quality of Appellant's evidence in mitigation far outweighs the case the State presented in aggravation. The death penalty is not warranted for this Appellant and this crime, and it cannot stand without violating the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. Jack Sliney's death sentence must be replaced by one of life imprisonment.

ISSUE IX

THE TRIAL COURT ERRED IN DEPARTING UPWARD FROM THE SENTENCING GUIDELINES WITHOUT PROVIDING CLEAR AND LEGITIMATE REASONS FOR DOING SO.

The sentencing guidelines scoresheet prepared herein on the armed robbery for which Appellant was convicted called for a recommended sentence of five years, with a permitted range of three and one-half to seven years. (R 206)[21] The trial court departed from the sentence recommended under the guidelines and sentenced Appellant to the maximum possible sentence for the robbery, life in prison. (R 228, 229, 234, 238, 463-469) The court filed a written "Sentencing Order Count III Robbery With A Deadly Weapon," which reads (R 228):

> This Court is departing from the sentencing guidelines in its sentence and as a basis for departure from the guidelines, the Court finds that this Defendant has committed first degree murder during the commission of the robbery. The Defendant clearly utilized more force in committing the offense of robbery than was necessary to commit the offense. The defendant murdered an elderly man. The evidence clearly established that the Defendant attacked his victim, repeatedly stabbing him in the neck with a pair of scissors. Additionally, having failed to kill his victim with the scissors, the Defendant found a hammer, struck several blows to his victim's skull and further beat his victim, breaking the victim's back and fracturing several of his ribs. In light of these facts, the Court finds that a guideline sentence in this case would not be appropriate, and therefore sen-

[21] The original scoresheet gave a total points score of 115, but this scoresheet was subsequently corrected to yield a total score of 105; this correction did not change the recommended sentence or the permitted range. (R 206, 229, S 4-6)

tences the Defendant to life imprisonment.

Generally, a defendant should be sentenced within the guidelines; departures are not favored. Florida Rule of Criminal Procedure 3.701(d)(11); Wemett v. State, 567 So. 2d 882 (Fla. 1990). The order entered by the court below does not meet the test of providing clear and convincing reasons that would justify aggravating Appellant's sentence. Lerma v. State, 497 So. 2d 736 (Fla. 1986). Although the court recites several facts of the case in the above-quoted order, it is extremely difficult to cull from this recitation the precise reason or reasons upon which the court relied to justify his upward departure. He appears to have relied primarily upon the fact that the victim, George Blumberg, was exposed to a certain amount of violence during the incident, as a result of which he was injured and died. However, the scoresheet that was prepared in this case includes the maximum number of points for victim injury, 21, for severe injury or death, and so the fact that Blumberg was seriously injured and expired cannot also be used to justify departure; this kind of "double-dipping" is prohibited. Mathis v. State, 515 So. 2d 214 (Fla. 1987); Vanover v. State, 498 So. 2d 899 (Fla. 1986); Lerma; State v. Mischler, 488 so. 2d 523 (Fla. 1986); State v. McCall, 524 So. 2d 663 (Fla. 1988); Rall v. State, 517 So. 2d 692 (Fla. 1988); Barron v. State, 647 So. 2d 225 (Fla. 2d DCA 1994). Furthermore, force, violence, assault, or putting the victim in fear is an inherent component of robbery under section 812.13(1) of the Florida Statutes, and an inherent component of the offense cannot be used to support

departure. Hansbroush v. State, 509 So. 2d 1081 (Fla. 1987); Casteel v. State, 498 So. 2d 1249 (Fla. 1987); McGouirk v. State, 493 So. 2d 1016 (Fla. 1986); State v. Cote, 487 So. 2d 1039 (Fla. 1986); Vanover. The court's order also mentions that Blumberg was "elderly," but age is not in itself a valid departure reason. Wemett . When one views the order as a whole, it appears that the trial court essentially merely felt that the sentence recommended under the guidelines was not commensurate with the seriousness of the offense; however, this is not a legitimate basis for departing upward. Hansbrough.

Where, as here, there is any doubt as to the applicability of a departure reason, that doubt must be resolved in favor of the defendant. Wilson v. State, 567 So. 2d 425, 427 (Fla. 1990). The court below failed to clearly articulate any proper reason for sentencing Appellant to life when the guidelines mandated a much less severe sentence. As a result, Appellant's robbery sentence must be vacated, and his cause remanded for resentencing within the guidelines.

ISSUE X

THE TRIAL COURT ERRED IN ASSESSING A PUBLIC DEFENDER'S FEE IN THE AMOUNT OF $3700 AGAINST APPELLANT WITHOUT ADVISING HIM OF HIS RIGHT TO A HEARING TO CONTEST THE AMOUNT OF THE LIEN. THE COURT ALSO ERRED IN ASSESSING $280 IN COSTS WITHOUT CITING TO THE STATUTORY AUTHORITY FOR DOING SO, OR PROVIDING APPELLANT WITH NOTICE AND AN OPPORTUNITY TO BE HEARD.

At Appellant's sentencing hearing of February 14, 1994, the court assessed a fee against Appellant for the services of the public defender's office (which did not represent Appellant at guilt phase, but did represent him before he retained private counsel, and at his penalty phase, after private counsel was discharged) in the amount of $3,700, which the court said would "be reduced to judgment." (R 467) This fee is reflected on one of the sentencing documents as well. (R 232) The record does not reflect that Appellant was notified of his right to a hearing to contest the amount of the lien for attorney's fees, as required by law, and the assessment must therefore be stricken. Fla. R. Crim. P. 3.720(d)(1); § 27.56(7), Fla. Stat. (1993); Platty. State, 647 so. 2d 993 (Fla. 2d DCA 1994); Wilson v. State, 20 Fla. L. Weekly D674 (Fla. 2d DCA March 17, 1995) (which involved the circuit court judge who also sentenced Appellant); Bain v. State, 20 Fla. L. Weekly D118 (Fla. 4th DCA Jan. 4, 1995); In the Interest of L.B., 20 Fla. L. Weekly D668 (Fla. 4th DCA March 15, 1995); Smith v. State, 622 So. 2d 638 (Fla. 5th DCA 1993); Moore v. State, 20 Fla. L. Weekly D634 (Fla. 5th DCA March 10, 1995); Ashford v. State, 20

Fla. L. Weekly D744 (Fla. 5th DCA March 24, 1995). See also Bull v. State, 548 So. 2d 1103 (Fla. 1989). Although Appellant was informed of his general right to appeal as to Count III (the robbery charge) (R 467-468), this did not fulfill the notice requirement. Peterson v. State, 645 So. 2d 1028 (Fla. 4th DCA 1994).

The court also orally assessed court costs against Appellant at the sentencing hearing in the amount of $280, which the court said would "be reduced to judgment." (R 467) These costs do not appear in the written documents pertaining to sentencing (R 230-240), except for a notation, "Costs Reduced To Judgment." (R 232) The judge did not state the statutory basis, if any, for the costs he imposed. Although a criminal defendant is presumed to have notice of statutorily mandated costs, State v. Beaslev, 580 So. 2d 139 (Fla. 1991), Bradshaw v. State, 638 So. 2d 1024 (Fla. 1st DCA 1994), Hunter v. State, 20 Fla. L. Weekly D690 (Fla. 1st DCA March 14, 1995), Nank v. State, 646 So. 2d 762 (Fla. 2d DCA 1994), Sutton v. State, 635 So. 2d 1032 (Fla. 2d DCA 1994), the court must nevertheless cite to the appropriate statutory authority or provide an explanation on the record to support his imposition of these costs. R.L.A. v. State, 649 So. 2d 324 (Fla. 1st DCA 1995); Samuels v. State, 649 So. 2d 272 (Fla. 5th DCA 1994); Bradshaw; Nank; Sutton. A defendant is entitled to notice and an opportunity to be heard before discretionary costs, those that are statutorily permitted but are not statutorily mandated, are assessed against him. Jenkins v. State, 444 So. 2d 947 (Fla. 1984); Chittv v.

State, 20 Fla. L. Weekly D76 (Fla. 2d DCA Dec. 28, 1994). Priest v. State, 20 Fla. L. Weekly D84 (Fla. 2d DCA Dec. 28, 1994); Sutton. Failure to provide the required notice and opportunity to be heard constitutes fundamental error. Wood v. State, 544 So. 2d 1004 (Fla. 1989).

Because the court below did not cite statutory authority for imposing $280 in costs against Appellant, and the record does not reflect that Appellant was given notice and a chance to be heard before the costs were imposed, the costs must be stricken.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authority, your Appellant, Jack R. Sliney, prays this Honorable Court to reverse his convictions and sentences and remand for a new trial on the murder charge and for discharge on the robbery charge. In the alternative, Appellant asks for vacation of his death sentence and remand for imposition of a life sentence, or, if that is not forthcoming, for a new penalty trial. If Appellant's robbery conviction is not reversed or vacated, Appellant requests reversal of his sentence and remand for resentencing within the guidelines. Appellant also asks that the attorney's fees and costs assessed against him be stricken.

INDEX TO APPENDIX