IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,612

MERRIT ALONZO SIMS,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

Counsel for Appellant

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INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, entered following a jury trial before the Honorable Thomas Carney of the Eleventh Judicial Circuit of Florida, in and for Dade County. In this brief, the clerk's record on appeal is cited as "R.," the supplemental record as "S.R.," and the transcript of the proceedings as "T." The documents reproduced in the appendix hereto are cited as "App."

STATEMENT OF THE CASE AND FACTS

On June 11, 1991, Miami Springs police officer Charles Stafford was fatally shot on the exit ramp from State Road 112 to N.W. 27th avenue in Dade County. Appellant, Merrit Sims, admitted shooting officer Stafford but asserted from the outset that he had done so in self-defense, only after officer Stafford choked him and threatened repeatedly to kill him.

The Guilt/Innocence Phase

On Saturday, June 8, 1991, Sam Mustipher loaned his white Cadillac Coupe de Ville to his cousin, Merrit Sims, after the two went together to the Goombay Festival in Coconut Grove. (T. 906, 908, 914-15, 1226) On Monday, June 10, Mustipher reported the car stolen because he had not heard from Sims and was concerned about him. (T. 916) Mustipher later told the police that Sims had not stolen the car. (T. 923)

On Tuesday, June 11, at around 8:30 or 8:45 p.m., Sims stopped at a Subway sandwich shop at N.W. 36th street, near the Miami airport. (T. 930, 932-33, 1227) He did not have enough money in his pocket to pay for the sandwiches, so he returned to the car, opened the passenger side door, took out some change, and went back to pay for the sandwiches. (T. 933, 1228) Sims then left the sandwich shop, heading eastbound on N.W. 36th street toward state road 112. (T. 933, 1228) Officer Charles Stafford of the Miami Springs Police Department, who was on patrol that evening, followed Sims as he got onto state road 112. (T. 933-35, 949-50)

Stafford radioed the Miami Springs dispatcher and asked her to run the license tag number, GYJ 40G, of Mustipher's Cadillac. (T. 949-50) The dispatcher responded that the car had been reported stolen. (T. 952-53) When the officer signalled Sims to stop, he pulled over on the exit ramp from state road 112 to N.W. 27th avenue. (T. 1229) Stafford radioed the dispatcher that the car was stopping on the exit ramp to 27th avenue. (T. 956-57, 960) Two other Miami Springs units radioed that they were en route to assist Stafford. (T. 957-58)

Sims testified that he stopped, got out of his car, hooked his thumbs in his pockets so that his hands were in view, and walked toward the police car.[1] (T. 1229-30) Stafford told Sims to put his hands on the car and stepped out of the police car with his gun drawn. (T. 1230) Stafford said to Sims, "I thought you was going to run. You going to run? You want to run?" (T. 1230) Sims responded, "I don't want to run. From what? I don't want to run." (T. 1230) Stafford was looking at Sims and pointing the gun at him in an angry manner that frightened Sims. (T. 1230) Stafford then remarked, "You niggers like to steal Cadillacs." (1230-31) Sims told Stafford the car belonged to Sims' cousin. (T. 1231)

As Stafford approached, Sims was frightened and backed up toward his cousin's car; he placed his hands on the back of the Cadillac. (T. 1231) Stafford was pointing his gun at Sims, "like he wanted to shoot me or something. So I didn't want to give him any reason. I wanted to show my hands at all times. And as I was backing up, I was trying to explain the reason I didn't stop and this is my cousin's car. And I am explaining myself to him because [of] the words he's saying to me, 'You like to steal cars, huh, boy?'" (T. 1231) Sims attempted to explain that the car belonged to his cousin, but Stafford responded, "Don't lie to me" and "kept saying 'shut up. Shut up.'" (T. 1231-32)

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[1]The physical layout of the crime scene, on the exit ramp from state road 112 to N.W. 27th avenue, is depicted by state's exhibits 6 and 7, which are reproduced in the appendix, (S.R. 10, 12; App. 1-2), along with the legend describing the objects found at the crime scene and their locations, (S.R. 14, 16; App. 4-5), measured from the west curb of the exit ramp and from N.W. 39th street, at the southern end of the ramp. (App. 1-5) The appendix also contains an enlargement (reproduced at page 52, *infra*) of the immediate crime scene depicted on exhibit 7, with the objects labeled in accordance with the legend. (App. 3) Based on a puddle ("C" on exhibit 7), assumed to be condensation from an air conditioner, the crime scene technician drew a rectangle labeled "V1" to represent the location of Stafford's vehicle, which was moved before the technician arrived at the scene. (T. 844-47; S.R. 12; App. 2-4) Based on a tire trench ("A" on exhibit 7), the technician drew a rectangle labeled "CAD" to represent the location of Sims' vehicle. (T. 843-44, 891-92; S.R. 12; App. 2-4) "V2" on exhibits 6 and 7 depicts a second police car which arrived on the scene after the shooting and was parked on the grass. (T. 848-49, 1019-20; S.R. 12; App. 2-4) The triangle (delta symbol) and "V," representing the defendant and the victim, were drawn on exhibit 7 by the prosecutor, purportedly based on Mr. Sims' testimony. (T. 1341-42; App. 2-3) The label depicting the location of Officer Stafford's body is based on the testimony presented at trial. (T. 998-99, 1000-01, 1009-10, 1019-20)

Stafford's attitude toward Sims "was like he hated me." (T. 1232) Sims was afraid Stafford would shoot him but could not stop himself from talking because he was so frightened. (T. 1232) He "hop[ed] that maybe somebody would hear me or pass by and stop." (T. 1232) Sims "felt a blow to my mouth, and then I felt a hand go around my throat." Sims "tried to get the hand off me when he first did it. I tried to look at him, and I couldn't because of the position of my head. . . . When he went to put pressure on me, I couldn't breathe. So I went to try and get his hand off from around my neck, and I was moving at the time, trying to back out of it, but I couldn't. . . . [H]e was too big, I couldn't get him off me.[2] And he had me pinned against like the side panel of the car, and his hand was across my neck. I couldn't breathe. I pushed. I tried to push off on him. I couldn't see exactly what I was pushing, but I was trying to get the pressure off me so I could breathe." (T. 1232-33) Sims thought Stafford was "[t]rying to kill me. I couldn't breathe and he wouldn't stop. I couldn't get him off me." Sims "just frantically started reaching, moving my hand. I felt something. I didn't know what it was. I couldn't see because it was just my hand. I was reaching for something and I grabbed it, which I now understand it was the radio. And I swung overhand and hit him somewhere in his head. And when I did that, he let me go." (T. 1233)

After Stafford let him go, Sims stumbled because he was dizzy. (T. 1233) Sims didn't want Stafford to shoot him, so he turned his back to Stafford, and put his hands in the air. (T. 1234) He could not recall if he dropped the radio or if Stafford took it. (T. 1234) Stafford was infuriated. He told Sims, "'You're fucking dead. You're one fucking dead nigger. You're fucking dead, boy.' And I felt a hand behind the back of my neck, and he was squeezing my neck. He said, 'You're fucking dead.' And I felt something. He was like touching me in the back of my head. I didn't know what it was. He said, 'You're fucking dead. You're fucking dead, boy.'" (T. 1234-35) Sims pleaded, "hollering out" to Stafford not to kill him, just to take him to jail. (T. 1235)

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[2]Stafford was 6'1" and 263 pounds; Sims is 5'8" and 180 pounds. (T. 1218, 1233)

Fraid Batule, an employee of the Miami Herald, exited State Road 112 at 27th Ave NW at about this time. (T. 961-62) As he rounded the curve on the exit ramp, Batule saw a police car on his right with its red and blue emergency lights on and, as he got closer, saw a car in front of the police car. (T. 963-64) Batule slowed down and went to the left to get around the police car, which was parked in the roadway. (T. 964) Batule saw two people standing outside the Cadillac[3] on the driver's side, one was a uniformed policeman, a white male who was tall and "kind of bald;" the other man was a civilian, black, and shorter than the policeman. (T. 965-66). The black man had his hands on the Cadillac. (T. 967, 973-74) The officer had a "dot" on his forehead, and his face was covered with blood. (T. 969) The officer had his left hand on the back of the other man's neck, (T. 966-67), and had a gun in his right hand, which he was aiming at the back of the other man's head, moving the gun back and forth toward the man's head. (T. 968-69) Batule heard the black man say in an emotional, pleading tone, "okay, you got me man." (T. 969, 976) The police officer looked at Batule and returned his gun to the holster. (T. 975-76) Sims hoped the car would stop, but it didn't. (T. 1236) Batule drove on. (T. 975)

Once Batule passed, Sims felt a handcuff being put on his arm and felt relieved because he thought Stafford would take him to jail, but Stafford began to squeeze the cuff as hard as he could. (T. 1235-36) The pressure forced Sims down on one knee; he had one hand on the car; Stafford was squeezing and shaking Sims' arm; when Sims pleaded that it hurt, Stafford told him to "'Shut up.'" (T. 1236) Sims felt an arm go around his neck in a choke hold, and Stafford lifted him up. (T. 1236-37) Sims couldn't breathe; Stafford repeated, "You're fucking dead, boy," and Sims thought he was going to die. (T. 1237) Sims didn't know where the gun was at that point; he couldn't see Stafford. Sims couldn't get Stafford's hand from around his neck because "he was too strong." (T. 1237) Sims started reaching again for something to hit Stafford with to "make him stop choking me again. And I reached back, and I was just

[3]Batule initially testified the two men were at the police car but revised his testimony after looking at his statement to the police to refresh his recollection. (T. 965, 967-68, 973-74) Blood was found only on the Cadillac. (T. 1060)

reaching for anything . . . I just grabbed something" -- Sims later realized it was the gun. (T. 1237-38)

Stafford let Sims go, and Sims turned around. (T. 1238) Sims was standing between the two cars, facing Stafford, with the rear of the Cadillac "more to my right side." (T. 1312-13, 1320) Before Sims could say anything, in a "split second," Stafford stepped back and charged at him. (T. 1238, 1312) Sims and Stafford were about five feet apart; Stafford was bent over, in a "down position," "coming at me with his hands up." (T. 1238, 1313) Sims "put [his] hand out to try and stop [Stafford] from getting to me. And I heard an explosion and the gun went off. I heard one explosion then, and he didn't stop. He just kept coming at me. And by the time he put his hand on me, it went off again one or two more times." (T. 1238) Sims did not aim; "I just reacted and throwed my hand up to stop him from grabbing me or choking me or killing me." (T. 1239) Everything "happened so fast," Sims could not remember the exact position of his hand or how he held the gun. (T. 1315-16) Nor was Sims certain where Stafford fell; he "just fell back." He "fell to the side backward" -- "more toward the right side." (T. 1239, 1317, 1321) Sims "panicked." (T. 1239) He jumped in the car and left "real fast," almost running into another car. (T. 1240-41) Batule was waiting at a red light at 38th street when the Cadillac passed him at a high rate of speed and ran the red light. (T. 970-71)

Another motorist, Gilda Castano, happened by the scene; she saw a police car in the roadway with its red and blue lights on and the driver's side door wide open. (T. 993-95) Castano saw a white and black Cadillac parked further down the exit ramp, two to three car-lengths in front of the police car. (T. 996-97). Castano saw a policeman "on the floor." (T. 997) His body was approximately three feet from the police car; his legs were in the roadway, and his torso was on the grass. (T. 998-99, 1000-01) Castano got out of her car and tried to move Stafford; he was still alive. (T. 998-99) She did not see the Cadillac leave. (T. 1000) Two days later, Castano identified Sims, in a photo lineup, as the man she saw in the Cadillac. (T. 982-83, 1004-05)

Miami Springs police sergeant Pessolano was the first officer to arrive at the scene. He radioed that an officer was down and asked the dispatcher to send for Fire-Rescue; he reported that the second vehicle was "GOA" -- gone on arrival. (T. 959-60) Miami Springs police officer Sharon Kumm arrived next; she saw Stafford lying in the road in front of his car. (T. 1009-10) Stafford was lying on his right side, Sergeant Pessolano was kneeling next to him, and a lady was holding his hand. (T. 1009) Jeff Clark, the third Miami Springs officer to arrive at the scene, saw Stafford lying on the ground with Pessolano beside him. (T. 1018) Stafford's car was directly behind his body, half in the road and half on the grass. (T. 1019-20) Clark parked on the grass, parallel to Stafford's car. (T. 1019; App. 2-3) Stafford was still alive, and Clark held him on his side to keep his airway clear while Pessolano got a blanket. (T. 1020-21) Kumm moved Stafford's vehicle so the Fire-Rescue team could get more easily to Stafford. (T. 1009-10) Kumm then marked off the scene with yellow tape. (T. 1010) Clark removed Stafford's belt and gun belt when the Fire-Rescue team arrived; he noticed then that Stafford's holster was empty and his handcuffs were missing. (T. 1021-22)

Stafford was pronounced dead at Jackson Memorial Hospital at 9:52 p.m. on June 11. (T. 980) He died from two gunshot wounds. One bullet, fired from a distance of approximately 6-12 inches, had entered the left side of the base of Stafford's neck and angled downward, lodging in Stafford's back about five inches lower than the entrance wound. (T. 1158-59, 1203, 1209, 1213) The second bullet, fired from approximately 12-18 inches away, had entered the right upper part of Stafford's chest and traveled to the right, lodging in the right side of the chest, about 2 & 1/2 inches below the entrance wound. (T. 1158-59, 1210, 1213) Stafford also had a 1 & 1/2 inch laceration on the left side of his forehead behind his hairline, a small abrasion next to it, and a small bruise and a few small abrasions on his left hand. (T. 1202) Associate Medical Examiner Roger Mittelman believed the laceration on Stafford's head was consistent with his having been struck on the head by a police radio, because the wound "has a wavy component consistent with the pattern on the radio." (T. 1215-16) The abrasion on Stafford's hand and the scrapes on his neck were consistent with injuries caused by

fingernails during a struggle. (T. 1219) The two casings[4] recovered from the scene were consistent with having been fired from a Glock 17 semi-automatic pistol of the type Stafford carried. (T. 1139-40, 1148-49) The two 9 millimeter caliber bullets recovered from Stafford's body had rifling marks normally produced by a Glock pistol and were consistent with having been fired from the same gun. (T. 1150-52)

After the shooting, Sims went to his cousin Sam's house, but no one was home. (T. 1241) After driving around, Sims parked the car, got out and started walking. (T. 1241-42) Only when he returned to the car did Sims realize that the gun was on the seat. Sims drove to a park and threw the gun in the river. (T. 1242) He then drove to an apartment complex where he parked the car, balled himself up, and sobbed until he fell asleep (T. 1242) Sims woke very early the next morning and changed his clothes. (T. 1242-43) He tried to call Sam from a pay phone, but he wasn't home. (T. 1243) Sims then called his mother. (T. 1243-44) Sims found a friend who helped cut the handcuff off of his arm and drove him to the bus station in Coral Gables. (T. 1244-45) Sims took the bus to Sacramento, California; he was afraid to turn himself in in Miami and wanted first to see his son and a daughter who had been born after he left Sacramento. (T. 1245)

Mustipher's Cadillac was found at the Hampton House apartment complex on June 12. (T. 1054, 1058) There was blood on the handle of the driver's side door, along the back portion of the side panel and on the trunk. (T. 1060) The car was towed to the Medical Examiner's Office for processing. (T. 1062)

Otis Robinson, a part-time driver for Society Cab, testified that he had picked up a passenger at the Hampton House Apartments between 7 and 8 a.m. on June 12 and took him to N.W. 16th St. and 13th Court. (T. 1038-39, 1041) Robinson said the passenger asked him if he had heard about the policeman being killed; Robinson responded he had not. (T. 1041-42) The passenger, who said he was from Jacksonville, told Robinson the car used in the crime

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[4]Casings are the outer portion of the cartridge, in which the bullet, powder, and primer are enclosed. (T. 1145-46) Casings are ejected from the chamber of a semi-automatic pistol when it is fired. (T. 1147)

had been found in the complex and that it had blood on it. (T. 1042-44) As they left the complex, police cars began arriving, but the cab was not stopped. (T. 1043) The passenger said he was glad the police did not check him out. (T. 1043)

On June 17, 1991 Robinson picked Sims' photo out of a lineup and identified him as the passenger he had picked up the morning of June 12.[5] (T. 1037, 1045-46) Robinson acknowledged, however, that he had seen Sims' photograph in the newspaper and on television before he was shown the photo lineup. (T. 1046) Although Robinson had looked at his passenger's face and mouth as they conversed, he did not notice any gold teeth in the passenger's mouth. (T. 1047, 1050) Nor did he notice handcuffs on the passenger's arm, either in the cab or when the passenger got out of the car. (T. 1048-49, 1050) Robinson also did not recall a scar on the passenger's face. (T. 1051) Sims had had gold teeth for almost ten years, and a scar on the left side of his face since he was two. (T. 1244)

Sims arrived in Sacramento four days later. (T. 1245) It took him another two days to locate his girlfriend, Renee, who had moved since Sims had lived in Sacramento. (T. 1246-48) Renee picked Sims up late Sunday night. (T. 1248) Sims spent the next day with Renee and the children. (T. 1249) He did not tell Renee what had happened in Miami. (T. 1249) Sims testified that he intended to turn himself in the following day, but panicked when the police arrived early that morning. (T. 1249-50) After looking for a way out the back of Renee's apartment, Sims told Renee to let the police in. (T. 1250, 1335) He lay spread-eagled on the floor as the police entered. (T. 1170, 1250, 1335-36) Sims was questioned in Sacramento by a Metro-Dade police officer, confessed to the crime and waived extradition. (T. 1251-52) Sims subsequently told Metro-Dade police where he had thrown Stafford's gun. (T. 1253) The police were unable to recover the weapon from the river. (T. 1190)

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[5]Sims denied taking a taxi from the Hampton House apartments. (T. 1243-44)

Mr. Sims was indicted on July 17, 1991 for first degree murder, armed robbery, and possession of a firearm by a convicted felon. (R. 1-3) The latter charge was severed before trial. (T. 381)

The case proceeded to trial before Judge Carney on January 3, 1994. (T. 378) The prosecution filed a motion in limine that day to preclude the defense from introducing evidence of Sims' arrest a week before the shooting, during which Sims had been cooperative with the police. (R. 230-33) The prosecution asserted in part that the prior incident was irrelevant because, the prosecution would show, Sims was in possession of drugs when he was stopped by Stafford and therefore had a motive to kill Stafford that did not exist in the earlier encounter. (T. 383-84, R. 232-33) The defense asserted vigorously that there was *no* evidence Sims had been in possession of drugs. (T. 384) The trial judge granted the state's motion, noting that he had not considered in his ruling whether the evidence would show Sims had been in possession of drugs. (T. 385)

During its case in chief, the prosecution called Scott Silva, an officer with the Metro Dade Narcotics K-9 Unit, who had conducted a search of the Cadillac with his dog "Jake" the evening of June 13. (T. 1079, 1081-82) On his second pass through the passenger compartment of the car, Jake "alerted" to the front passenger seat, at the junction of the seat and back. (T. 1083-85) According to Silva, Jake could have alerted to the scent of marijuana, cocaine, hashish, or heroin, or to some combination of those substances.[6] (T. 1081, 1086) Silva did not find any "measurable amount of narcotics" -- of any kind -- in the car. (T. 1087-88) Silva did not know if the area to which the dog alerted had been tested for narcotics residue. (T. 1089) Silva also acknowledged that "there is no way to tell" from the dog's alert *when* narcotics were in the car; Silva therefore could not establish that the scent originated during the time Sims was driving the car. (T. 1087)

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[6]Silva also acknowledged that Jake could have alerted to the scent of prescription medication that contained a narcotic substance or to the scent of something contaminated by a narcotic. (T. 1088-89)

Predicated specifically on Silva's testimony, the state called Sims' parole officer, Essie Lynn, to testify that Sims had been on control release at the time of the shooting and that the possession or transportation of narcotics would violate a condition of Sims' release. (T. 1090, 1093-94) The defense objected that the state had not listed Lynn as a witness. (T. 1090) The prosecution asserted there had been no discovery violation, or, if there had been one, it was inadvertent. (T. 1092-93) The trial court apparently concluded that a violation had occurred and that it was inadvertent rather than wilful. (T. 1097) The court did not inquire, however, whether the defense had been prejudiced by the violation. (T. 1097)

The prosecution contended Lynn's testimony was relevant to the state's theory of premeditation and motive -- that Sims shot Stafford to avoid revocation of his parole for transporting drugs. (T. 1094, 1096; R. 456-57) The defense argued that the state had failed utterly to establish that Sims had possessed or transported drugs and that proof of his parole status was therefore not only highly prejudicial but totally irrelevant. (T. 1096, 1103-04) The trial court stated, however, that Silva's testimony was sufficient "to go to the jury on the presence of drugs in that car" and ruled that Lynn's testimony would be admitted. (T. 1096, 1104)

Lynn proceeded to testify that Sims had been released from state prison on parole on April 19, 1991; that she had reviewed the guidelines for control release with Sims; that possession, transportation or use of any narcotic or drug would be a violation of the terms of his release; and she had advised Sims that, if he violated the terms of release, he could be returned to state prison. (T. 1106-09, 1111) On cross-examination, Lynn testified that she had administered two random drug tests to Sims, on April 19, 1991 and June 3, 1991, and both were negative. (T. 1112-13) Defense counsel then sought to question Lynn about Sims' arrest a week before the shooting and the violation affidavit regarding that incident. (T. 1113-14) The prosecution objected, insisting that the court adhere to its earlier order in limine, excluding evidence of the prior arrest. (T. 1115) Defense counsel argued that Silva's and Lynn's testimony had made evidence of the prior encounter relevant to contradict the prosecution's

theory of Sims' state of mind at the time of the shooting. (T. 1114-15) The trial court sustained the prosecutor's objection, and defense counsel was not allowed to elicit any testimony regarding Mr. Sims' prior arrest. (T. 1116) The state subsequently sought and obtained a specific ruling prohibiting Mr. Sims from testifying about the prior arrest. (T. 1194)

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After Sims testified, the prosecution recalled as rebuttal witnesses the firearms examiner, Jess Galan, and the medical examiner, Roger Mittelman.

While examining Galan, the prosecutor asked him to assist in demonstrating the ejection of casings from a Glock 17. (T. 1341) The prosecutor then purported to demonstrate how Sims had held the gun and asked Galan where the casings would eject. (T. 1341) Galan said they would eject in a generally right direction. (T. 1341) Based on this demonstration of how the gun was held and the prosecutor's representation of where Sims said he was standing, Galan concluded that Sims' testimony regarding his position at the time of the shooting was not consistent with the location of the casings at the crime scene. (T. 1342-43)

During Mittelman's rebuttal testimony, the prosecutor enlisted his assistant to perform another demonstration for the jury. (T. 1349-50) The prosecution depicted the defendant as holding the gun parallel to the ground, with Stafford "lung[ing] at him" in an upright position. (T. 1350-51) Defense counsel objected that the demonstration mischaracterized Sims' testimony. (T. 1350) The trial judge overruled the objection, stating that he could not comment on the evidence. (T. 1350) Based on this demonstration, Mittelman concluded that the defendant's testimony was inconsistent with the angle of the gunshot wounds. (T. 1351) Mittelman testified on cross-examination, however, that the angle of the gunshot wounds was consistent with Stafford being shot while lunging at Sims in a "bent over" position. (T. 1352)

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At the close of the state's case, defense counsel moved for a judgment of acquittal on the robbery count and on premeditated murder. (T. 1222-23) Both motions were denied.

(T. 1223) The motions were renewed at the close of all the evidence, and they were again denied. (T. 1354)

The prosecution's theme in closing argument was that Sims had been transporting drugs when Stafford pulled him over and that Sims had shot Stafford to avoid returning to prison. (T. 1419-20, 1422, 1435-36, 1440) The prosecutor repeatedly emphasized Sims' parole status. (T. 1417, 1419, 1419-20, 1420, 1435, 1436, 1440, 1442) He also repeatedly referred to Sims as a "liar" and characterized his testimony as "lies." (T. 1416, 1419, 1424, 1425, 1430, 1433, 1438, 1442) And he expressed his personal opinion of Sims' veracity, based on his experience as a prosecutor: "And you know what? You want to know what I get real tired hearing, in the 12 years I have been doing this, that every officer says, 'I am going to kill you. I am going to kill you.'" (T. 1428)

After over four hours of deliberation, the jury inquired whether it was necessary to distinguish between felony murder and premeditated murder. (T. 1477; R. 38) The court answered the question in the negative, and a few minutes later, the jury returned verdicts of guilty on the charges of first-degree murder and armed robbery. (T. 1477-78; R. 38)

The Sentencing Phase

The defense filed several pretrial motions challenging the constitutionality of specific aggravating circumstances enumerated in section 921.141, Florida Statutes, the statute as a whole, and the standard penalty phase jury instructions, including the following: (1) the statute permits imposition of the death penalty upon the recommendation of a bare majority of the sentencing jury (R. 117-19); (2) the standard instructions fail to provide adequate guidance to the sentencing jury (R. 183-94), and appellate review of death sentences is inadequate (R. 92-115); (3) the statute precludes the sentencer's consideration of mitigating evidence by imposing improper burdens of proof and persuasion (R. 167-74); and (4) the felony murder aggravating circumstance, § 921.141(5)(d), Fla. Stat., fails to guide the jury's discretion because it duplicates an element of the underlying offense (R. 159-65, 450-55). All of these motions were denied. (T. 362-66)

The sentencing phase of the case was held on February 4, 1994. The state submitted a certified copy of the defendant's prior conviction for armed robbery and recalled Sims' parole officer, Essie Lynn, to testify that the defendant was on control release, and still under sentence of imprisonment, at the time of the shooting. (T. 1493-97; R. 512-18)

The defense presented testimony from a childhood friend of Sims', Mervin Simmons (T. 1497-1500); Sims' three sisters, Patricia Speights (T. 1500-05), Cathy Sims (T. 1513-17), and Brenda Sims (T. 1520-24); his mother, Annie Lee Sims (T. 1525-33); his former girlfriend, Tranae Rogers (T. 1507-11); and the family's minister, Reverend Johnny W. Cooper, (T. 1536-39). Sims also testified at the penalty phase. (T. 1542-54)

Simmons, who had known Sims since junior high school, testified that "everybody" in the neighborhood knew Sims and liked him. (T. 1498-99) Sims did not get into trouble in high school. (T. 1498) And he was a loving father to his children. (T. 1500) Sims' sisters and mother testified that theirs was a close family, that Sims had been a well-behaved child, had not gotten into trouble in school, and had worked at McDonald's as a teenager. (T. 1502, 1516-17, 1521-22, 1527, 1531) Sims had been very close to his father who died in June 1989, while Sims was living in California, and Sims had deeply regretted that he did not have a chance to say good-bye to their father. (T. 1516, 1523) They also testified that Sims was a good and loving father to his children, who frequently stayed with him. (T. 1516, 1522) Tranae Rogers also testified that Sims was a good father to their children and that the children missed him. (T. 1509-11) The family's minister, Reverend Johnny W. Cooper, testified that Sims had come to him to be baptized in 1989. (T. 1536).

Sims expressed his remorse for the loss of Officer Stafford's life. (T. 1543, 1545) He reiterated that he did not intend to kill Stafford but had been afraid for his own life; he said he would respond differently to Officer Stafford if he had it to do over again but had been unable to think logically under the stress of the situation. (T. 1543, 1545) Sims also reiterated that he never intended to avoid responsibility for his actions; he confessed both to lift the burden of guilt he felt and also to provide resolution for the officer's family. (T. 1545-46)

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During the charge conference, the defense requested a limiting instruction on the avoiding arrest aggravating circumstance, § 921.141(5)(e), Fla. Stat., stating that it could not be inferred solely from the victim's status as a law enforcement officer. (T. 1557-60; R. 541) The defense also requested an instruction on the victim participation mitigating circumstance, § 921.141(6)(c), Fla. Stat., on the ground that the jury should be permitted to consider the evidence of self-defense -- even if not sufficient to justify the homicide -- in mitigation. (T. 1562-65) The trial court denied the requested instructions. (T. 1557, 1565) The trial court also rejected the defendant's request to instruct the jury on the statutory mitigating circumstance of the defendant's age at the time of the crime, § 921.141(6)(g), Fla. Stat. (T. 1561-62)

The jury was instructed on five aggravating circumstances: (1) the defendant was under sentence of imprisonment; (2) the defendant had a prior violent felony conviction; (3) the murder was committed in the course of another felony -- armed robbery; (4) the murder was committed to avoid arrest; and (5) the victim was a law enforcement officer. (T. 1595-96) The jury was instructed that it could consider as mitigating circumstances (1) whether the defendant acted under extreme duress or substantial domination of another person and (2) "any other aspect of the defendant's character or record, and any other circumstance of the offense." (T. 1597) The jury recommended death by a vote of eight to four. (T. 1600; R. 540)

The trial court imposed sentence and issued a written order on March 18, 1994. (T. 1607; R. 551-56) The trial court found all five of the aggravating circumstances the state had argued to the jury and found the additional aggravating circumstance that "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws," §921.141(5)(g), Fla. Stat. (R. 552) This circumstance was merged with the avoiding arrest and law enforcement officer aggravators. (R. 552) With respect to mitigating circumstances, the sentencing order states that the defense had alleged only the statutory mitigating circumstance of "extreme mental or emotional disturbance," and held that the evidence did not support it. (R. 553) The court rejected all other statutory mitigating

circumstances. (R. 553-54) The judge refused to consider self-defense or lack of premeditation in mitigation because he found "these factors" to be "examples of a 'lingering doubt' argument and as such are invalid mitigating circumstances." (R. 554) Concluding that the aggravating circumstances "far outweigh" the mitigating circumstances, the trial judge sentenced Merrit Sims to death. (R. 555-56)

SUMMARY OF ARGUMENT

Guilt/Innocence Phase

The trial court committed three related errors when it permitted Mr. Sims' parole officer, Essie Lynn, to testify at the guilt/innocence phase of the trial:

First, the trial court failed to conduct an adequate *Richardson* hearing when the state surprised the defense by calling Ms. Lynn as a witness without providing the 10-day notice required by section 90.404(2)(b), Florida Statutes, or listing her as a witness as required by Florida Rule of Criminal Procedure 3.220(b). This omission permitted the state to conceal until mid-trial its theory that Mr. Sims had shot Officer Stafford to avoid revocation of his parole and materially hindered the defense in its trial preparation and strategy.

Second, Ms. Lynn's testimony was not properly admissible under any evidentiary standard. Because Mr. Sims parole status was not relevant, by itself, to establish a motive for the shooting, the state specifically predicated the admissibility of Ms. Lynn's testimony on its "evidence" that Mr. Sims was transporting drugs when he was stopped by Officer Stafford. This evidence, however, consisted solely of an uncorroborated alert by a narcotics detection dog to the passenger seat of the car Mr. Sims had borrowed from his cousin and had been driving for only three days; no drugs were found; and the state's witness conceded the dog alert could not establish that drugs were actually in the car while Mr. Sims was driving it. Since the state failed utterly to establish the factual predicate for Ms. Lynn's testimony, this totally irrelevant and highly prejudicial evidence should not have been admitted.

Third, the trial court compounded its error by refusing to allow Mr. Sims to bring out on cross examination of Ms. Lynn or through his own testimony that he had been arrested a week before the shooting and had been fully cooperative with the police. This evidence was relevant and admissible to rebut the state's theory that Mr. Sims' fear of parole revocation provided a motive for murder; the trial court's refusal to allow it violated both Mr. Sims' right to full and fair cross-examination and his right to present a defense.

As a result of these errors, the jury was precluded from fairly evaluating Mr. Sims' testimony of self-defense and instead convicted Mr. Sims' of first-degree murder and robbery based on the state's wholly unsubstantiated characterization of him as a paroled drug dealer.

Mr. Sims' right to a fair trial was further undermined by the prosecution's misrepresentations of his testimony during the state's rebuttal case to create false inconsistencies with the physical evidence. In reality, the state's evidence failed to rebut Mr. Sims' testimony of self-defense and is insufficient as a matter of law to sustain convictions for first-degree murder and robbery (for taking the officer's gun during their struggle). Finally, the prosecutor's assertion in closing argument that, based on his 12 years of experience, he found that defendants frequently fabricate claims of self-defense, coupled with his attacks on defense counsels' integrity, constituted fundamental error. The prosecutor's remarks were calculated to undermine the heart of the defense in a close case that turned solely on the defendant's credibility and vitiated Mr. Sims' right to a fair trial.

Penalty Phase

Mr. Sims' convictions and sentences should be reversed because the trial court improperly excused venireperson Hightower for cause, on grounds that she was biased against the death penalty, when that conclusion was based on the state's erroneous characterization of her voir dire answers and is not supported by the record.

Alternatively, Mr. Sims' sentence must be vacated because the jury was precluded from considering, and the trial court refused to consider, imperfect self-defense or provocation in mitigation at the penalty phase. The trial court refused to instruct the jury that it could consider

Officer Stafford's participation in the altercation that led to his death as a mitigating circumstance, and the prosecution argued that the jury's guilty verdict foreclosed consideration of imperfect self-defense at the penalty phase. The trial judge similarly failed to understand that imperfect self-defense is a circumstance of the offense that bears directly on the defendant's moral culpability and erroneously characterized it as "lingering doubt" evidence that could not, as a matter of law, be considered at the penalty phase.

The trial court also erred in refusing to instruct the jury, and preventing defense counsel from arguing, that Mr. Sims' age (24) at the time of the offense could be considered as a mitigating circumstance, thereby precluding the jury from considering relevant mitigating evidence. The trial court erred further in refusing to give the requested limiting instruction on the avoiding arrest aggravating circumstance, which would have required proof of motive, and in submitting the felony murder aggravating circumstance to the jury when that aggravator fails to genuinely narrow the class of death-eligible defendants. In addition, the trial judge's sentencing order is so replete with errors, including misstating the aggravating and mitigating circumstances submitted by the parties and failing to make the requisite findings regarding mitigating circumstances, as to preclude adequate appellate review by this Court and to cast doubt on the reliability of the trial judge's decision to impose the death penalty.

Lastly, appellant submits that Florida's capital sentencing statute is unconstitutional because it (1) permits imposition of the death penalty upon the recommendation of a bare majority of the jury; (2) fails to provide adequate guidance to the jury and does not require any written findings by the jury, thereby permitting arbitrary and effectively unreviewable imposition of the death penalty; and (3) creates a constitutionally impermissible presumption in favor of the death penalty.

GUILT PHASE ISSUES

I.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF THE DEFENDANT'S PAROLE OFFICER AT THE GUILT/INNOCENCE PHASE OF THE TRIAL AND IN REFUSING TO ALLOW THE DEFENSE TO REBUT THAT TESTIMONY, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV.

The trial court committed three related errors regarding the admission of the parole officer, Ms. Lynn's, testimony: It (1) failed to conduct an adequate *Richardson* hearing when the state surprised the defense by calling Ms. Lynn as a witness at the guilt/innocence phase of the trial; (2) allowed Ms. Lynn to testify to the defendant's parole status, ostensibly to establish motive, even though the state failed to prove by clear and convincing evidence that Mr. Sims had violated his parole, and Mr. Sims' parole status was not independently admissible; and (3) prevented the defense from eliciting testimony to contradict the state's theory that Mr. Simshad a pervasive fear of parole revocation. As a result of these errors, Mr. Sims was denied a fair trial. This case turned solely on the credibility of Mr. Sims' testimony of self-defense, and the state's evidence in contradiction was very weak. The improperly admitted evidence invited the jury to convict Mr. Sims of capital murder based on an entirely speculative and factually unsupported theory of motive and prevented the jury from *fairly* evaluating Mr. Sims' testimony.

A.

THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE *RICHARDSON* INQUIRY IN RESPONSE TO THE STATE'S FAILURE TO NOTIFY THE DEFENSE OF ITS INTENTION TO CALL THE DEFENDANT'S PAROLE OFFICER AS A WITNESS AT THE GUILT/INNOCENCE PHASE OF THE TRIAL.

Because the prosecution in this case both failed to provide notice to the defense under section 90.404(2)(b), Florida Statutes,[7] that it intended to prove Mr. Sims' parole status at the guilt/innocence phase of the trial and omitted to list Mr. Sims' parole officer, Essie Lynn, as

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[7]The state's contention at trial that Ms. Lynn's testimony was "inseparable crime evidence," not subject to the notice requirements of section 90.404(2)(b), (T. 1095), is incorrect, as discussed in the following section.

a witness, the defense was taken by surprise when the state called Ms. Lynn during its case in chief. Defense counsel promptly objected that Ms. Lynn had not been listed as a witness. (T. 1090) Although the trial court purported to hold a *Richardson*[8] hearing, its inquiry was insufficient to support the decision to allow Ms. Lynn's testimony. Moreover, it is apparent from this record that the underlying discovery violation "materially hindered the defense." *State v. Schopp,* 20 Fla. L. Weekly S136, S138 (Fla. March 23, 1995).

Section 90.404(2)(b), Florida Statutes, requires the state to provide the defendant with written notice, at least 10 days before trial, that it intends to offer proof of prior offenses or acts and to describe those acts with the particularity required of an indictment or information. The state is also under a continuing obligation to disclose to the defense the witnesses it intends to call at trial. Fla. R. Crim. P. 3.220(b) & (j); *e.g., Richardson,* 246 So. 2d at 774; *Pisegna v. State,* 488 So. 2d 624, 625 (Fla. 4th DCA 1986); *McDonnough v. State,* 402 So. 2d 1233, 1235 (Fla. 5th DCA 1981). When a violation of section 90.404(2)(b) or Rule of Criminal Procedure 3.220(b) is asserted, the trial court must conduct a *Richardson* hearing. *Barbee v. State,* 630 So. 2d 655, 656 (Fla. 5th DCA 1994); C.W. EHRHARDT, FLORIDA EVIDENCE § 404.20, at 185 (1993 ed.). The trial court must first determine whether a discovery violation has occurred, and, if there has been a violation, must inquire "whether the state's violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, . . . it [had] on the ability of the defendant to properly prepare for trial." *Richardson,* 246 So. 2d at 775. The purpose of *Richardson*, and the discovery rules it implements, is to prevent "trial by ambush." *Barrett v. State,* 19 Fla. L. Weekly S627, S268 (Fla. Nov. 23, 1994); *accord Donahue v. State,* 464 So. 2d 609, 611 (Fla. 4th DCA 1985); C.W. EHRHARDT, *supra,* § 404.20, at 186.

The prosecution in this case failed to comply with its obligations under either section 90.404(2)(b), Florida Statutes, or Rule 3.220(b). Contrary to its contention below, the state's oblique assertion, in an entirely separate motion in limine filed on the first day of trial, that the

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[8]*Richardson v. State,* 246 So. 2d 771 (Fla. 1971).

defendant was "a parolee, in possession of drugs" (R. 230) was not sufficient to apprise the defense of the state's intention to prove Mr. Sims' parole status during the guilt/innocence phase of the case. (T. 1093) During the hearing on the state's motion in limine, the prosecution indicated an intention to produce evidence that the defendant was transporting drugs at the time of the shooting but said nothing about calling Mr. Sims' parole officer to establish his parole status. (T. 384-86) Indeed, the trial judge appeared to be just as surprised as defense counsel when the prosecution asserted that it intended to prove Mr. Sims' parole status at the guilt/innocence phase of the trial. (T. 1093) Nor was the defense sufficiently apprised of the state's intention to call Ms. Lynn by the production in discovery of control release papers bearing her signature. (T. 1092) The state is not excused from its discovery obligations merely because the defense is independently aware the witness exists. *Hahn v. State,* 626 So. 2d 1056, 1057-58 (Fla. 4th DCA 1993); *accord McDonnough,* 402 So. 2d at 1234.[9]

The trial court properly recognized that a *Richardson* hearing was required as a result of the state's failure to list Ms. Lynn as a witness. (T. 1091) *Ward v. State,* 477 So. 2d 66, 67 (Fla. 3d DCA 1985), *approved,* 502 So. 2d 1245 (Fla. 1987).[10] The trial court apparently concluded that a violation had occurred and that it was inadvertent rather than wilful. (T. 1097) The court never addressed, however, the significance of the violation or inquired how it had prejudiced the defendant's ability to prepare for trial. The prosecutor attempted to elicit a ruling as to procedural prejudice and obtained an ambiguous response, which was not

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[9]The state asserted that the defense at one point had listed a different parole officer as a witness, and that witness informed both the state and the defense that Ms. Lynn was Mr. Sims' parole officer. (T. 1092) The state is also obligated to inform the defense when it decides to call as its own witness a person listed by the defense. *Hahn,* 626 So. 2d at 1057-58.

[10]*Accord Johnson v. State,* 416 So. 2d 1237, 1238 (Fla. 4th DCA 1982), *review denied,* 426 So. 2d 28 (Fla. 1983); *McDonnough,* 402 So. 2d at 1234-35 (Fla. 5th DCA 1981); *Moore v. State,* 411 So. 2d 335 (Fla. 5th DCA 1982); *Boynton v. State,* 378 So. 2d 1309, 1310 (Fla. 1st DCA), *cert. denied,* 386 So. 2d 642 (Fla. 1980).

premised upon any query to defense counsel.[11] The trial court's inquiry in this case was insufficient to satisfy the requirements of *Richardson*.[12]

Moreover, it cannot be concluded from this record that the underlying discovery violation was harmless. *See Schopp,* 19 Fla. L. Weekly at S138. Defense counsel's "trial preparation or strategy" necessarily "would have been materially different had the violation not occurred." *Id.* The remedy offered by the state and the trial judge -- an opportunity to depose Ms. Lynn before she testified[13] (T. 1097) -- was patently inadequate to remedy the state's failure to inform the defense before trial, as it was obligated to do, that it intended to call Ms. Lynn as a witness. The procedural prejudice to the defense did not result from its inability to determine what Ms. Lynn would say, but rather from the fact that her testimony changed the entire tenor of the case. Only after calling Ms. Lynn as a witness did the prosecution make clear that its theory of the case was that Mr. Sims killed Officer Stafford to prevent the revocation of his parole. (T. 1094, 1096, R. 456) If defense counsel had had proper notice of the state's intention to call Ms. Lynn, they could have been prepared to rebuff the state's speculative and prejudicial theory of motive.

As discussed further below, the admissibility of Ms. Lynn's testimony was predicated on the state's "evidence" that Mr. Sims had been transporting drugs at the time of the shooting. (T. 1094, R. 456) This evidence consisted of the testimony of Officer Scott Silva, of the Metro-Dade K-9 narcotics unit, that his dog had alerted to the front passenger seat of the car Mr. Sims had been driving the night of the shooting. (T. 1085) The car belonged to Mr. Sims' cousin, Sam Mustipher, who had loaned it to him the night of June 8. (T. 906, 914-

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[11] "MS. LEHNER: But as far as procedural [prejudice], there is no argument and the Court finds there is none?

THE COURT: No." (T. 1097)

[12] *See Barrett,* 19 Fla. L. Weekly at S628; *Weary v. State,* 644 So. 2d 156, 157 (Fla. 4th DCA 1994); *Mondo v. State,* 640 So. 2d 1232, 1234 (Fla. 4th DCA 1994); *Walker v. State,* 573 So. 2d 1075 (Fla. 4th DCA 1991); *Lee v. State,* 538 So. 2d 63, 65 (Fla. 2d DCA 1989); *McDonnough,* 402 So. 2d at 1235; *Boynton,* 378 So. 2d at 1310.

[13] Defense counsel declined the offer. (T. 1097)

15, 1226-27). No drugs were found in the car; nor did the state establish the presence even of narcotics residue. (T. 1087-89) Not knowing of the state's intention to call Ms. Lynn as a witness, the defense obviously believed it could demonstrate the patent weaknesses in the state's "evidence" by cross-examination alone. Once told that Mr. Sims was on parole, however, the jury would be far more likely to disregard those weaknesses.

If the defense had known of the state's intention to call Ms. Lynn as a witness, it could have changed its strategy accordingly, taking such measures as demanding a separate hearing, outside the jury's presence, on the admissibility of the dog-alert testimony; the defense could have called its own witnesses to challenge the reliability of the dog-alert and to demonstrate that a dog alert could not scientifically establish that drugs had actually been present in the car during the time Mr. Sims was driving it.[14] Such evidence might have persuaded the trial judge to exclude both the dog-alert testimony and Ms. Lynn's testimony, which was admitted based on the trial court's erroneous conclusion that Officer Silva's testimony presented a jury question regarding Mr. Sims' possession of drugs at the time of the shooting. The state's discovery violation caused the defense to be caught off-guard and ill-prepared to respond to the state's motive theory. Because, as discussed further below, the state's entire case turned on this theory, "a change in trial tactics" plainly "could have benefited the defendant by resulting in a favorable verdict." *Schopp,* 20 Fla. L. Weekly at S138.

[14]The sufficiency of the dog-alert evidence is addressed in detail in the following section.

B.

THE TESTIMONY OF THE DEFENDANT'S PAROLE OFFICER WAS NOT PROPERLY ADMISSIBLE UNDER FLORIDA LAW BECAUSE THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT WAS TRANSPORTING DRUGS AT THE TIME OF THE SHOOTING, AND HIS PAROLE STATUS WAS RELEVANT ONLY TO ESTABLISH BAD CHARACTER AND CRIMINAL PROPENSITY.

As discussed above, the prosecution disclosed, upon calling Ms. Lynn as a witness, that its theory of the case was that Mr. Sims shot Officer Stafford to prevent revocation of his parole for transporting illegal drugs. (T. 1094, 1096, R. 456) The state's motive theory required two elements of proof: (1) that the defendant was on parole and (2) that he was engaged in conduct at the time of the shooting that violated his parole. (T. 1093-95; R. 456) As the state conceded at trial, Mr. Sims' purported possession of drugs was the critical link between his parole status and his alleged motive for killing Officer Stafford. (R. 456) The state therefore specifically predicated the admissibility of Ms. Lynn's testimony on its "evidence" that Mr. Sims was transporting drugs at the time of the shooting. (R. 456) As defense counsel argued vigorously at trial, however, the state's "evidence" that Mr. Sims possessed drugs did not establish a sufficient predicate for Ms. Lynn's testimony. (T. 1096, 1103-04) Her testimony, which established that Mr. Sims was a recently-released parolee, was therefore inadmissible either as *Williams*[15] Rule evidence under section 90.404(2), Florida Statutes, or as "inseparable crimes" evidence.[16]

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[15]*Williams v. State,* 110 So. 2d 654 (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

[16]The state argued below that evidence that the defendant was "a parolee with drugs in his car" should be treated as "inseparable crime evidence," rather than extrinsic crimes evidence subject to the standards of the *Williams* Rule, section 90.404(2), Florida Statutes. (R. 456-57) This so-called "res gestae" exception applies when the evidence regarding the charged and uncharged crimes is so interwoven, "it is impossible to give a complete or intelligent account of the crime charged without reference to the other crime." C.W. EHRHARDT, *supra,* § 404.17, at 175 (quoting *Nickels v. State,* 90 Fla. 659, 106 So. 479, 489 (Fla. 1925)); *see also* 1 MCCORMICK ON EVIDENCE § 190, at 799-800 (4th ed. 1992); IA WIGMORE ON EVIDENCE § 218 (Tiller's rev. ed. 1983 & 1994 Supp.); E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 6.27, at 68 (1985 & Supp. 1994); *Tumulty v. State,* 489 So. 2d 150, 153 (Fla. 4th DCA), *review denied,* 496 So. 2d 144 (Fla. 1986).

(continued...)

1. The state's evidence was insufficient to establish that the defendant was transporting drugs in violation of his parole.

Before evidence of a collateral crime may be admitted against a defendant under section 90.404(2), the state must establish that the evidence is relevant to a material issue in the case. § 90.404(2), Fla. Stat. (1994). The defendant's possession of drugs and the further fact that such possession violated his parole are indisputedly relevant, *if true,* to establish motive. In this case, however, the state failed to prove that the alleged parole violation even occurred.

In Florida, the state must establish by clear and convincing evidence that the collateral crime was committed and that it was committed by the defendant; "mere suspicion is insufficient." *State v. Norris,* 168 So. 2d 541, 543 (Fla. 1964).[17] This standard of proof ensures the reliability and relevance of evidence admitted pursuant to the *Williams* Rule.[18] *Norris,* 108 So. 2d at 543. The necessity of such a standard is apparent when the prosecution claims that an uncharged crime provided the motive for the charged offense. This theory posits a cause-and-effect relationship between the two offenses, which need not be "similar" in their

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[16](...continued)
Mr. Sims' parole status was not "inextricably intertwined" with the charged offense; its connection to the offense was entirely contingent on the state's allegation that Mr. Sims was transporting drugs at the time of the shooting. *See Griffin v. State,* 639 So. 2d 966, 968-69 (Fla. 1994), *petition for cert. filed* (Jan. 4, 1995). Since the state failed to establish this predicate fact, as demonstrated below, there was no connection between Mr. Sims' parole status and the charged offense. Mr. Sims' parole status, by itself, was inferential evidence of another crime that was completely separate "in time and circumstances" from the charged offense. *See Erickson v. State,* 565 So. 2d 328, 333 (Fla. 4th DCA 1990), *review denied,* 576 So. 2d 286 (Fla. 1991).

[17]*Accord Audano v. State,* 641 So. 2d 1356, 1358-59 (Fla. 2d DCA 1994); *Rozier v. State,* 636 So. 2d 1386, 1389 (Fla. 4th DCA 1994); *Phillips v. State,* 591 So. 2d 987, 989 (Fla. 1st DCA 1991); *Elkin v. State,* 531 So. 2d 219, 220 (Fla. 3d DCA 1988); *Long v. State,* 407 So. 2d 1018, 1019 (Fla. 2d DCA 1981); *Dibble v. State,* 347 So. 2d 1096, 1097 (Fla. 2d DCA 1977).

[18]"Inseparable crimes" evidence, like evidence of collateral crimes, is inadmissible if not sufficiently connected to the defendant. *See Chapman v. State,* 417 So. 2d 1028, 1031-32 (Fla. 3d DCA 1982) (testimony regarding contemporaneous, uncharged rape not admissible to establish factual context of crime where record was "devoid of evidence" defendant had been the perpetrator); *West v. State,* 579 So. 2d 288, 289 (Fla. 3d DCA 1991) (evidence that get-away car driven by defendant's companion was stolen should not have been admitted absent evidence defendant had committed or aided in commission of theft). Evidence that cannot adequately be linked to the defendant in the first place can hardly be considered "inseparable" from the charged offense.

facts. E. IMWINKELRIED, *supra,* §§ 3.15-.16, at 36, 38; *see also State v. Richardson,* 621 So. 2d 752, 757 (Fla. 5th DCA 1993). While such evidence can be highly probative of motive, its probative value depends entirely on whether the defendant actually committed the uncharged crime. E. IMWINKELRIED, *supra,* § 3.16, at 39. For example, in a prosecution for bank robbery, it would be proper to admit, as evidence of motive, testimony that the defendant tried to purchase $1,000 worth of heroin shortly after the robbery. However,

> [b]ecause the act of misconduct *was* the evidence of motive, the proof of motive depended essentially on the premise that the act of misconduct actually took place. If [the defendant] did not in fact solicit the purchase of heroin, no motive was proved. In such circumstances, our rules quite properly require that the misconduct be proved by clear and convincing evidence. If the testimony leaves substantial room for doubt that the misconduct took place, its probative value is sharply diminished, and the danger that the jury will be prejudiced by it requires that it be kept from them.

United States v. Byrd, 771 F.2d 215, 221 (7th Cir. 1991).[19]

In this case, the state's "evidence" that Mr. Sims was in possession of drugs when stopped by Officer Stafford consisted solely of testimony that, on his second pass through the passenger compartment of the Cadillac, a narcotics detection dog alerted to the front passenger seat. (T. 1083-85) It was undisputed that the car did not belong to Mr. Sims; he had borrowed it from his cousin Sam Mustipher and had been driving it for only three days. (T. 908, 914-15, 1226-27) No drugs were found in the car. (T. 1087-89) Officer Silva conceded that it was impossible to determine whether the scent of narcotics had even originated during the time Mr. Sims had been using the car. (T. 1087) Although both Sam Mustipher and his

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[19]The United States Supreme Court has since held that the clear and convincing evidence standard is not applicable under Federal Rule of Evidence 404(b). *Huddleston v. United States,* 485 U.S. 681, 688-89, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988). However, as Professor Ehrhardt has emphasized, *Huddleston* contemplates that Rule 403 will be applied to ensure that the prosecution does not present to the jury potentially prejudicial evidence of collateral crimes "that have been established or connected to the defendant only by unsubstantiated innuendo." *Id.* at 689; C.W. EHRHARDT, *supra,* § 404.9, at 157-58; *Phillips,* 591 So. 2d at 989 n.1. As discussed further below, if the state's evidence that the defendant committed the uncharged crime is weak, the probative value of that evidence is substantially diminished, if not destroyed, and should be outweighed by the potential for unfair prejudice. *See* § 90.403, Fla. Stat.; *see also United States v. Fortenberry,* 860 F.2d 628, 632-33 (5th Cir. 1988) (evidence of collateral crimes should have been excluded under Rule 403 where government presented only weak circumstantial evidence that defendant committed the uncharged offenses).

sister Carol denied that they or their friends had used or carried drugs in the car, this testimony did not identify Mr. Sims as the source of the scent. (T. 919-21, 1035) The Mustiphers' testimony did not preclude the possibility that friends of theirs had carried drugs in the car without their knowledge and had inadvertently imparted the scent of narcotics to the passenger seat. Moreover, neither of them testified that Sims used drugs or was involved with drugs. Indeed, the state did not produce a single witness to testify that Merrit Sims used drugs or was involved in the sale or transportation of drugs at the time of the shooting, or at any other time.[20] This evidence not only fails to satisfy the clear and convincing evidence standard, it was not, contrary to the trial court's ruling, legally sufficient to present a jury question regarding Mr. Sims' possession of drugs.[21]

To establish possession of a controlled substance in Florida, the state must prove "a conscious and substantial possession by the accused, as distinguished from a mere involuntary or superficial possession." *Lord v. State,* 616 So. 2d 1065, 1066-67 (Fla. 3d DCA 1993) (quoting *State v. Eckroth,* 238 So. 2d 75 (Fla. 1970)). Accordingly, "the mere presence of trace amounts" of a controlled substance on an object commonly used for legitimate purposes is legally insufficient to sustain a conviction for possession. *Id.* at 1067. Because "trace amounts of drug 'lint' or 'dust' . . . , we are told, now adhere to almost everything in South

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[20]The only other "evidence" the state cited was a purported inconsistency between Sims' testimony that he had to get change from his car to pay for his sandwiches at the Subway store and the fact that he had enough money to buy a bus ticket to California the next day. Sims simply testified, however, that the total came to "more that [sic - than] I had *in my pocket at the time* . . . So I went back out into the car and I went into the passenger side and got some change out of the car, and came back and paid for the sandwiches." (T. 1228) (emphasis added) Mr. Sims testified on cross-examination that he had enough money left from what his mother and sisters had previously given him to pay for the bus ticket. (T. 1293) Since Mr. Sims had stayed in a hotel the previous night and had personal belongings, including clothing, in the trunk of the car, it is at least equally reasonable to infer that the remainder of his cash was in the car. (T. 1243, 1334) His purchase of the bus ticket therefore does not constitute sufficient circumstantial evidence from which to infer that Sims obtained money for the ticket by selling drugs.

[21]The less demanding federal standard for proving the commission of uncharged collateral crimes is whether the prosecution's evidence would survive a motion for directed verdict, the federal equivalent of a judgment of acquittal. *Fortenberry,* 860 F.2d at 632 n.6. The trial judge erroneously purported to apply this more lenient standard to the state's evidence. However, as demonstrated below, the state's evidence failed to satisfy even the federal standard.

Florida," the presence of such residue cannot, by itself, give rise to a presumption that the defendant is knowingly in possession of the "drugs." *Id.* at 1066 (quoting *Jones v. State,* 589 So. 2d 1001, 1002 (Fla. 3d DCA 1991)).[22]

The dog alert in this case was not even corroborated by chemical tests establishing the existence of "trace amounts" of a narcotic. The state's evidence therefore did not preclude the possibility that the dog's alert was false.[23] At best, the state's evidence demonstrated the existence of an unidentified scent, of undetermined origin[24] and duration, perceptible only to a drug detection dog.[25] This scent was "found" on an "object" -- a car -- that is commonly used

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[22]The pervasiveness of cocaine residue on currency has caused a number of courts to reconsider the probative value of dog alerts. *See United States v. $30,060,* 39 F.3d 1039, 1041-44 (9th Cir. 1994); *United States v. $53,082,* 985 F.2d 245, 250 n.5 (6th Cir. 1993); *United States v. $639,558,* 955 F.2d 712, 714 n.2 (D.C. Cir. 1992); *Jones v. D.E.A.,* 819 F. Supp. 698, 721 (M.D. Tenn. 1993); *United States v. $80,760,* 781 F. Supp. 462, 475-77 (N.D. Tex. 1991), *aff'd,* 978 F.2d 709 (5th Cir. 1992).

[23]Although Silva testified that he had worked with Jake for six years and that Jake had done "thousands" of searches, he did not relate Jake's reliability record. (T. 1080-82) Such testimony ordinarily is a necessary predicate for a dog alert to be accepted as probable cause for a search or arrest, let alone as substantive evidence of guilt. *See Horton v. Goose Creek Indep. Sch. Dist.,* 690 F.2d 470, 482 (5th Cir.), *on denial of rehearing,* 693 F.2d 524, 525 (5th Cir. 1982), *cert. denied,* 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983); *United States v. Florez,* 871 F. Supp. 1411, 1417-18 (D.N.M. 1994) (collecting cases); *State v. Foster,* 390 So. 2d 469, 470 (Fla. 3d DCA 1980); *see also Green v. State,* 641 So. 2d 391, 394 (Fla. 1994) (dog tracking evidence properly admissible on issue of identity where character and dependability of dog established and evidence was corroborated), *cert. denied,* ___ U.S. ___, 115 S.Ct. 1120, 130 L.Ed.2d 1083 (1995).

[24]Officer Silva also acknowledged that the dog would alert to a prescription medication that contained or had been contaminated by a narcotic substance. (T. 1088-89) Further, the sniff search was conducted on the night of June 13 (T. 1082) -- two days after the shooting and a day and a half after the car had towed to the medical examiner's office. (T. 1054, 1062) There was no testimony presented regarding who had been in the car while it was impounded. Thus, the state's evidence also did not preclude the possibility that the car seat had been inadvertently contaminated while impounded. *See United States v. Dickerson,* 873 F.2d 1181, 1184 (9th Cir.1988) (dog alert to carpet in aircraft's cargo space did not establish probable cause that plane was used to transport drugs where government failed to establish plane was secured while impounded and handler testified that dog would alert to scent of drugs left by anyone who had been on plane while it was impounded).

[25]A number of factors undermine the reliability of a dog alert as substantive proof of possession. For example, the "adhesiveness" of cocaine allows minute traces -- sufficient to cause a dog to alert -- to be easily transferred onto and from currency. Thus, the dog could have alerted to a microscopic trace of cocaine innocently transferred to the car seat. Similarly, the odor of marijuana is so "pungent and long-lasting" that a dog may alert to it "months after (continued...)

for legitimate purposes and was not used exclusively by Mr. Sims. *See id.* No reasonable jury could have concluded, based on this evidence, that Mr. Sims was in possession of drugs at the time of the shooting.[26] *See Weary v. State,* 644 So. 2d at 157 (jury should not have been permitted to draw inference that defendant was guilty of possessing cocaine simply because dog alerted to traces of narcotics on currency which had earlier been in defendant's possession).[27]

The state's evidence that Mr. Sims was in possession of drugs at the time of the shooting amounted to no more than "unsubstantiated innuendo." *Huddleston,* 485 U.S. at 689. The state therefore should not have been permitted to present the remainder of its evidence

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[25](...continued)
the removal of the marijuana." Judith Dennison, *In re One Hundred Two Thousand Dollars: Cash-Friendly Civil Forfeiture,* 1993 UTAH L. REV. 971, 978. The dog alert, without any corroborating evidence that Sims' had drugs in the car, was therefore insufficient to permit the jury to infer that Sims possessed drugs.

[26]Indeed, the state's evidence would not even be sufficient to establish probable cause, under the federal forfeiture standard, that the car had been used to transport drugs. *Dickerson,* 873 F.2d at 1185 (dog alert to carpet in aircraft's cargo space did not establish probable cause that plane was used to transport drugs where scent of drugs could have been transferred to plane after it was impounded); *United States v. One Gates Learjet,* 861 F.2d 868, 871-72 (5th Cir. 1988) (dog alert and subsequent recovery of microscopic quantities of cocaine in aircraft insufficient to establish probable cause that aircraft was used to transport drugs -- trace amounts could have been inadvertently tracked into plane); *$80,760,* 781 F. Supp. at 476-77 (dog alert to currency insufficient to establish probable cause for forfeiture absent evidence claimants were responsible for contamination); *United States v. Property at 2323 Charms Road, Milford Township,* 726 F. Supp. 164, 168 (E.D. Mich. 1989) (dog alert to aircraft did not establish probable cause that aircraft was used to violate drug trafficking laws).

[27]*See also Watts v. State,* 569 So. 2d 889, 889-90 (Fla. 1st DCA 1990) (evidence of defendant's fingerprints on beer cans converted to crack pipes was legally insufficient to sustain conviction for possession of cocaine where state could not establish when defendant's fingerprints were placed on cans); *Harris v. State,* 501 So. 2d 735, 736 (Fla. 3d DCA 1987) (defendant's presence in truck over which he did not have exclusive control was not sufficient to establish constructive possession of cocaine transported in truck); *Falin v. State,* 367 So. 2d 675, 676 (Fla. 3d DCA 1979) (defendant's joint possession of hotel room legally insufficient to establish his guilt when there was no direct proof he had even been in room at same time as drugs much less had knowledge of and control over them); *Dean v. State,* 406 So. 2d 1162, 1164 (Fla. 2d DCA 1981) (defendant's knowledge and control of drugs may not be inferred where defendant shares joint possession of premises on which drugs are found), *review denied,* 413 So. 2d 877 (Fla. 1982); *Harvey v. State,* 390 So. 2d 484, 485 (Fla. 4th DCA 1980) (same); *Goble v. State,* 324 So. 2d 97, 98 (Fla. 4th DCA 1975) (same).

regarding Mr. Sims' purported parole violation.[28] Ms. Lynn's testimony added nothing to the state's evidence that Mr. Sims had *actually* violated his parole by possessing drugs but only established that such conduct *would* have been a violation of his parole. Her testimony was therefore rendered irrelevant and inadmissible by the state's inability to present credible -- let alone clear and convincing -- evidence that Mr. Sims had committed the uncharged offense. *Cf. Wells v. State,* 492 So. 2d 712, 717 (Fla. 1st DCA) (additional testimony in support of state's motive theory should not have been admitted when its relevance was predicated on erroneously-admitted hearsay), *review denied,* 501 So. 2d 1283 (Fla. 1986).

2. Evidence of the defendant's parole status was not independently admissible.

While this Court has often held that evidence of a parole or probation violation, an outstanding arrest warrant, or recent commission of another crime is admissible to establish a motive to avoid arrest or apprehension, in none of those cases was it disputed that the defendant had committed the uncharged crime or act that allegedly provided his motive.[29]

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[28]The relationship between Officer Silva's testimony and Ms. Lynn's testimony is analogous to a case in which the state proffers two witnesses to testify to a collateral crime: Witness A, whose testimony is supposed to establish that the defendant committed the crime and Witness B, whose testimony will add relevant details regarding the crime itself but is not probative of whether the defendant committed it. If witness A's testimony proves to be legally insufficient to establish that the defendant committed the prior crime, witness B's testimony may not be admitted.

[29]*See Grossman v. State,* 525 So. 2d 833, 835, 837 (Fla. 1988) (defendant had stolen gun in a burglary, in violation of his probation, and pleaded with police officer not to turn him in), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); *Craig v. State,* 510 So. 2d 857, 860, 863 (Fla. 1987) (defendant's theft of employer's cattle relevant to establish motive for killing employer; evidence included defendant's statement that employer must be killed because he had discovered thefts), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988); *Jackson v. State,* 498 So. 2d 406, 410 (Fla.) (defendant's statement that she killed police officer because "she wasn't going back to jail" was relevant and admissible to show motive), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987); *Heiney v. State,* 447 So. 2d 210, 213-14 (Fla.) (at time of charged murder defendant was on the run after learning authorities in Texas wanted to question him regarding a shooting there -- no dispute defendant involved in earlier shooting), *cert. denied,* 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Washington v. State,* 432 So. 2d 44, 47 (Fla. 1983) (where defendant shot deputy who questioned him about guns he was selling, state could introduce as evidence of motive that guns were stolen); *Reddish v. State,* 167 So. 2d 858, 860-61 (Fla. 1964) (evidence of prior shooting admissible to show motive where deputy was shot while serving defendant with warrant for previous shooting); *Johnson v. State,* 130 So. 2d 599, 600 (Fla. 1961) (state could show that defendant had escaped from prison and was illegally at large when he killed police (continued...)

Thus, to appellant's knowledge, this Court has never held that a defendant's parole status, by itself, is relevant and admissible to establish motive.

Given the state's failure to prove that Mr. Sims had been transporting drugs, its theory was nothing more than suspicion and speculation, of the kind this Court has found insufficient to justify the admission of collateral crimes evidence.[30] *See Drake v. State,* 400 So. 2d 1217, 1218-19 (Fla. 1981) (state's theory that defendant's "pervasive fear of revocation" had motivated him both to kill present rape victim and to halt attack on prior victim was too speculative to justify admission of evidence of prior sexual assault in subsequent murder trial), *appeal after remand, Drake v. State,* 441 So. 2d 1079, 1082 (Fla. 1983) (state's theory that victim would not have gone with defendant voluntarily because she knew he was on parole was too speculative to allow admission of defendant's parole status), *cert. denied,* 466 U.S. 978, 104 S.Ct. 2361, 80 L.Ed.2d 832 (1984); *see also Garron v. State,* 528 So. 2d 353, 357-58 (Fla. 1988) (state's hypothesis of motive held too tenuous to justify admission of defendant's prior sexual misconduct with stepdaughters in prosecution for murder of wife and one stepdaughter); *Headrick v. State,* 240 So. 2d 203, 205 (Fla. 2d DCA 1970) (evidence should

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[29](...continued)
officer); *Mackiewicz v. State,* 114 So. 2d 684, 687-88 (Fla. 1959) (state could introduce evidence of robbery defendant had committed earlier that evening to show motive for killing police officer; evidence included defendant's admission to cell-mate that he killed officer because he was afraid officer suspected him of earlier robbery), *cert. denied,* 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960); *McVeigh v. State,* 73 So. 2d 694, 696 (Fla. 1954) (state could introduce as evidence of motive for killing police officer that defendant had violated his probation in California and had an outstanding bench warrant), *appeal dismissed,* 348 U.S. 885, 75 S.Ct. 210, 99 L.Ed. 696 (1954); *see also State v. Escobar,* 570 So. 2d 1343, 1344-46 (Fla. 3d DCA 1990) (state could present evidence that defendants were wanted in California when they shot Miami police officer; evidence included one defendant's statement that he would shoot if stopped by the police to avoid going back to jail), *cause dismissed,* 581 So. 2d 1307 (1991).

[30]The introduction of highly prejudicial evidence that has only speculative relevance to the charged offense is also contrary to the purpose of the "*res gestae*" rule, which is intended to allow the prosecution to paint an "accurate picture of the events surrounding the crimes charged" and thereby enhance the truth-seeking function of the trial. *Griffin,* 639 So. 2d at 970; *accord* E. IMWINKELRIED, *supra,* § 6.31, at 83. In this case, as demonstrated below, the prosecution used both the dog alert evidence and Ms. Lynn's testimony to paint a false and misleading picture of the circumstances of the shooting.

not be admitted when "the asserted relevance is illusory, fancied, supposititious, or insubstantial").

Indeed, the state's evidence of motive in this case cannot pass the final hurdle to the admissibility of any evidence -- the balancing test required by section 90.403,[31] because, as defense counsel asserted below, the negligible probative value of Ms. Lynn's testimony was greatly outweighed by the danger of unfair prejudice. *See Kelvin v. State,* 610 So. 2d 1359, 1364-65 & n.5 (Fla. 1st DCA 1992) (rejecting as "speculative" state's theories that defendant engaged in shoot-out with police because: (1) he was a convicted felon and did not want to be caught in possession of a firearm, (2) he did not want to be deported, and (3) he was on bond for another arrest and was afraid his bond would be revoked; dubious probative value of such evidence to establish motive was "far outweighed" by its prejudicial effect).[32]

A defendant's parole status, by itself, has little if any probative value in establishing motive in this type of case, because it tells us nothing about the specific defendant's fear of apprehension. It is probative of motive only on the theory that persons on parole are, as a class, more likely to fear apprehension by the police and therefore are more likely than other

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[31]"Inseparable crimes" evidence, like all other evidence, is subject to the balancing test of section 90.403. *See Griffin,* 639 So. 2d at 970; *Gorham v. State,* 454 So. 2d 556, 558 (Fla. 1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985). Even evidence that is "inextricably intertwined" with the facts of the case must be excluded if it has only minimal or speculative probative value to the charged offense and poses a substantial danger of unfair prejudice. *See, e.g., State v. McClain,* 525 So. 2d 420, 422 (Fla. 1988) (proper in trial for vehicular manslaughter to exclude evidence of trace amount of valium in defendant's blood where expert could not say it had any effect on defendant's driving); *Sosa v. State,* 639 So. 2d 173, 174 (Fla. 3d DCA 1994) (error to admit gun cartridges found in defendant's car where not connected to charged crime); *Dorsey v. State,* 613 So. 2d 1368, 1369 (Fla. 2d DCA 1993) (error to admit photos of property in defendant's home where state never proved property in photos was stolen); *State v. Sawyer,* 561 So. 2d 278, 284 (Fla. 2d DCA 1990) (defendant's hair found in victim's apartment properly excluded in capital murder case where not sufficiently probative of defendant's presence in apartment); *West v. State,* 553 So. 2d 254, 255 (Fla. 4th DCA 1989) (error to admit evidence of trace amount of valium in defendant's blood where expert testified it had no effect on defendant's driving).

[32]The court did find that evidence of the defendant's involvement in a drug business was admissible to establish both the factual context of the crime and the defendant's motive for firing on the officers. *Kelvin,* 610 So. 2d at 1365. The state had direct testimony, however, regarding the defendant's involvement with drugs. *Id.* at 1362-63.

persons to kill a police officer.[33] The state may not, however, establish a particular defendant's guilt by inviting the jury to draw such "prejudicial and misleading inferences" from the "behavior patterns" of "certain classes of criminals in general." *Lowder v. State,* 589 So. 2d 933, 935 (Fla. 3d DCA 1991), *cause dismissed,* 598 So. 2d 78 (Fla. 1992); *accord Nowitzke v. State,* 572 So. 2d 1346, 1355-56 (Fla. 1990); *Hernandez v. State,* 595 So. 2d 1041, 1042 (Fla. 3d DCA 1992), *review denied,* 605 So. 2d 1266 (Fla. 1992); *Dawson v. State,* 585 So. 2d 443, 445 (Fla. 4th DCA 1991).

For example, a defendant's drug use is not admissible to establish his motive to commit robbery or theft unless the prosecution can establish a connection between the two, such as demonstrating that the defendant's drug habit required financial resources beyond his means. *See United States v. Madden,* 38 F.3d 747, 752 (4th Cir. 1994). Without this link, the prosecution's motive theory amounts to "the per se assertion that all drug use provides a motive for bank robbery" -- that is, drug users as a class are more likely to rob banks because they need money for drugs. *Id.* The rules of evidence do not permit "inferential leaps" of this magnitude, which are thinly disguised efforts to establish the defendant's bad character and criminal disposition. *Id.; accord Machara v. State,* 272 So. 2d 870 (Fla. 4th DCA) (rejecting as "too remote" state's argument that defendants' drug addiction was relevant to show motive for arson because "as a matter of common knowledge it takes money to supply the drug habit"), *cert. denied,* 277 So. 2d 535 (1973).

The only purpose of disclosing Mr. Sims' parole status at the guilt/innocence phase of this case was to invite the jury to draw precisely such prejudicial and misleading inferences regarding the general characteristics and propensities of persons on parole. Moreover, the information that a defendant has recently been released from prison and is on parole is

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[33]This theory is, moreover, logically flawed. Unless a defendant is in the process of committing a serious violation of his parole, his parole status would give him every incentive to be as cooperative as possible with the police.

independently prejudicial.[34] Far more than a felony conviction from some unspecified point in the defendant's past, parole suggests the defendant has a criminal disposition, that his crime was serious (because it resulted in prison time), and that he was not adequately punished for the prior crime.[35] It invites the jury to assume that the defendant is a bad man, thereby diminishing their sense of responsibility in determining his guilt or innocence of the charged offense.[36] As argued below, the error in this case could not have been harmless.

C.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO ELICIT TESTIMONY THAT WOULD HAVE CONTRADICTED THE STATE'S THEORY REGARDING THE DEFENDANT'S STATE OF MIND AT THE TIME OF THE SHOOTING, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV.

The trial court compounded its error in admitting Ms. Lynn's testimony by thereafter refusing to allow defense counsel to elicit testimony on cross examination, or on direct examination of Mr. Sims, that would have contradicted the state's contention that Mr. Sims' parole status supplied a motive to kill Officer Stafford. Once the state was allowed to pursue this theory, elementary fairness required that the defense be permitted to elicit evidence to contradict it.

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[34]The prosecution would not have been permitted to elicit this information on cross-examination of Mr. Sims. *See, e.g., Gore v. State,* 573 So. 2d 87, 90 (Fla. 3d DCA) (prosecutor may inquire only whether defendant has previously been convicted of felony and may go no further), *review denied,* 583 So. 2d 1035 (Fla. 1991).

[35]Emphasis of the defendant's status as a parolee is, of course, also prejudicial because it suggests to the jury that he will not be adequately punished if convicted of the instant crime, thereby predisposing the jury to convict the defendant of the most severe offense possible.

[36]*See, e.g., United States v. Tumblin,* 551 F.2d 1001, 1004-05 (5th Cir. 1977) (error to allow prosecutor to emphasize defendant's frequent incarceration and recent release from prison -- such inquiry did not merely attack defendant's credibility but implied he was a "bad seed"); *Fitzgerald v. State,* 227 So. 2d 45, 46-47 (Fla. 1969) (error for prosecutor to argue defendant had "spent the better part of his life in jail"); *State v. Bain,* 575 P.2d 919, 923-24 (Mont. 1977) (trial court properly excluded evidence of defendant's parole status, proffered to show motive, where defendant had already conceded he failed to stop for police because he was driving stolen car and parole status would therefore tend to prove only bad character).

At the outset of the trial, the state obtained an order in limine that prevented the defense from presenting any evidence that Mr. Sims was arrested a week before the shooting and had been cooperative with the police. (T. 383-85, R. 230-33) During cross-examination of Ms. Lynn, defense counsel attempted to inquire about the prior arrest and Ms. Lynn's discussions with Mr. Sims regarding it. (T. 1113-14) The state objected that the questions were irrelevant and exceeded the scope of direct examination. (T. 1113, 1115) The trial court initially overruled the objection but then acceded to the state's assertion that the line of questioning was precluded by the court's original order in limine. (T. 1115-16) Defense counsel argued that the order in limine should be reconsidered in light of the state's evidence regarding the defendant's parole status, but the trial court refused to alter its ruling. (T. 1115-16) The prosecution subsequently sought and obtained a specific ruling prohibiting Mr. Sims from testifying about the prior arrest. (T. 1194)

The state argued that the circumstances surrounding the two incidents were so different as to render the prior arrest irrelevant, primarily because "[t]here is evidence that drugs were in the [defendant's] car" when he was stopped by Officer Stafford. (R. 232) Setting aside the legal insufficiency of the state's "evidence" that there were drugs in the car, the state certainly could not require the trial court to accept this disputed fact as true in determining the admissibility of evidence proffered by the defense. The jury was, at a minimum, entitled to reject the dog alert "evidence." In that event, as discussed above, the jury would be left to infer that Mr. Sims' parole status alone supplied a motive to kill Officer Stafford. Evidence of Mr. Sims' arrest only a week earlier, which was without incident, would have contradicted that inference, and it would have caused the jury to focus more specifically on the sufficiency of the state's "evidence" that Mr. Sims was transporting drugs. The prior arrest was therefore relevant to contradict the state's theory regarding Mr. Sims' state of mind at the time of the shooting.[37]

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[37]Contrary to the state's suggestion, the evidence was not being elicited to prove Mr. Sims' general character for peacefulness by a specific act of conduct. (R. 230-31) It was being (continued...)

In *Street v. State,* 636 So. 2d 1297, 1300 (Fla. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995), this Court held that the state had properly been permitted to present evidence regarding a prior encounter between the defendant and the police to rebut a voluntary intoxication defense to a charge of first degree murder:

> In essence appellant's defense in this case was that his actions against the victim resulted from an isolated and temporary mental breakdown. In considering the validity of such an assertion *we believe the jury was entitled to know that the appellant had engaged in virtually the identical conduct on a prior occasion.* This evidence, of course, may give rise to differing inferences. . . . Regardless of these possibly conflicting inferences, however, we cannot accept the appellant's contention that the prior act was not relevant to a determination of his mental state at the time of the subsequent act.

Id. (quoting *Rossi v. State,* 416 So. 2d 1166, 1168 (Fla. 4th DCA 1982)) (emphasis added). Mr. Sims sought in this case to do precisely what the state was permitted to do in *Street* and *Rossi* -- contradict a theory regarding his mental state by presenting evidence of a previous, virtually identical encounter. As in *Street* and *Rossi*, the jury could draw different inferences from the evidence, but it was entitled to know about the prior arrest. If the jury believed the state's contention that there were significant differences between the two incidents which caused Mr. Sims to be compliant in the first encounter but not in the later encounter with Officer Stafford, they could give the evidence little weight. On the other hand, the jury should have been permitted at least to consider the contrary inference -- that Mr. Sims was not predisposed because of his parole status to resist arrest (but rather had every incentive to be cooperative) and that the critical difference between the two encounters was not Mr. Sims' behavior or state of mind but that of Officer Stafford.

The questions defense counsel propounded to Ms. Lynn were not only relevant, they were well within the permissible scope of cross-examination. The scope of cross-examination "is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the

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[37](...continued)
offered to illustrate that Mr. Sims' did not have the desperate fear of parole revocation that the state contended was a motive for murder.

facts testified to in chief by the witness on cross [*sic* - direct] examination." *Coco v. State,* 62 So.2d 892, 895 (Fla. 1953) (internal quotation omitted).[38] Moreover, "[t]he rule which prohibits proof of defensive matters upon cross-examination never applies where by such cross-examination the adverse party simply seeks to disprove, weaken, or modify the case against him which the witness himself has made." *Id.* (internal quotations and citations omitted). This Court has cautioned that "where a criminal defendant in a capital case, while exercising his sixth amendment right to cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." *Coxwell v. State,* 361 So. 2d 148, 152 (Fla. 1978); *accord Coco,* 62 So.2d at 894-95.

Because restrictions of the right to cross-examination, "call[ ] into question the ultimate integrity of the fact-finding process," they are particularly suspect when they prevent the defense from countering a potentially misleading inference raised by the state's direct examination. *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973) (internal quotation omitted); *see Zerquera v. State,* 549 So. 2d 189, 192 (Fla. 1989) (defendant improperly prevented from asking questions on cross-examination which would have tended to show that bullets were found in co-defendant's belongings, thereby supporting defense theory that co-defendant was triggerman and rebutting state's implication that bullets belonged to defendant); *Coxwell,* 361 So. 2d at 152 (defendant improperly precluded from questioning contract killer about discussions with co-defendant which might have supported defense theory that victim was killed pursuant to co-defendant's plan and rebutted "accusatory implication" that killer acted pursuant to defendant's plan); *Coco,* 62 So. 2d at 897 (defendant improperly precluded from asking police lieutenant about memorandum stating that the prints taken from

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[38]*Accord Haager v. State,* 83 Fla. 41, 90 So. 812, 815 (1922); *Rivera v. State,* 462 So. 2d 540, 544 (Fla. 1st DCA), *review denied,* 469 So. 2d 750 (Fla. 1985); *Elmore v. State,* 291 So. 2d 617, 620 (Fla. 4th DCA 1974), *overruled on other grounds, Milton v. State,* 342 So. 2d 501 (Fla. 1977); *C.A.W. v. State,* 295 So. 2d 329, 330 (Fla. 1st DCA 1974); *Frost v. State,* 104 So. 2d 77, 80 (Fla. 2d DCA 1958).

the murder weapon were *not* those of the defendant where answers would have contradicted state's fingerprint expert and corrected impression that lieutenant had also identified prints as defendant's).

In this case, the prosecution's successful efforts to limit the scope of cross-examination resulted in a one-sided presentation of the facts that invited the jury to draw misleading and prejudicial inferences which the defendant was "barred from refuting." *Coxwell,* 361 So. 2d at 152. The prosecution brought out through Ms. Lynn the specific aspects of Mr. Sims' control release that tended to support its theory of his state of mind and invited the jury to infer that Mr. Sims had a pervasive fear of parole revocation, sufficient to provide a motive for murder. The defense sought to inquire about other aspects of Mr. Sims' control release, including his prior arrest, which contradicted the state's theory and would have supported Mr. Sims' contention that he struggled with and shot Officer Stafford only in self-defense. The questions propounded by defense counsel were therefore "both germane to" Ms. Lynn's "testimony on direct examination and plausibly relevant to the defense." *Coxwell,* 361 So. 2d at 152.

Moreover, the trial court not only prevented the defense from eliciting evidence of Mr. Sims' prior arrest on cross-examination of Ms. Lynn, it also precluded Mr. Sims from testifying about it. (T. 1194) The error therefore violated not only Mr. Sims' right to full and fair cross-examination of prosecution witnesses but also denied him "a meaningful opportunity to present a complete defense" and "to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky,* 476 U.S. 683, 690-91, 106 S.Ct. 2142, 2146-47, 90 L.Ed.2d 636 (1986) (internal quotations omitted).[39] The denial of this right is most egregious where, as here, the state maneuvers successfully to prevent the defendant from presenting evidence that would contradict the state's theory of the case. *See Simmons v. South Carolina,* ___ U.S. ___, 114 S.Ct. 2187, 2194, 129 L.Ed.2d 133 (1994)

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[39]*Accord Taylor v. Illinois,* 484 U.S. 400, 408-09, 108 S.Ct. 646, 652-53, 98 L.Ed.2d 798 (1988); *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

(where prosecution relied on theory of future dangerousness at sentencing phase of capital case, "elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal"). When the state prevails upon the trial court to exclude relevant exculpatory evidence, the truth-seeking function of the trial is subverted.[40] This could be no clearer than in the instant case, where the trial court erroneously permitted the state to proceed with an inflammatory and factually unsupported theory of the defendant's motive while simultaneously tying the hands of the defense to rebut it.

D.

THE IMPROPER DISCLOSURE OF THE DEFENDANT'S PAROLE STATUS AT THE GUILT/INNOCENCE PHASE OF THE CASE AND THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENDANT TO ELICIT TESTIMONY TO CONTRADICT THE STATE'S THEORY OF THE CASE DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

The erroneous admission of collateral crimes evidence is presumptively harmful. *E.g., Castro v. State,* 547 So. 2d 111, 115 (Fla. 1989). In this case, the presumption of harm cannot be rebutted. If the trial court had properly excluded Ms. Lynn's testimony based on the state's failure to establish by competent evidence that Mr. Sims was transporting drugs, the jury could have been instructed to disregard Silva's testimony, thereby controlling the damaging effects of the dog alert "evidence." *See Huddleston,* 485 U.S. at 1501-02. Once the trial court permitted the state to proceed with its specious motive theory and admitted Ms. Lynn's testimony, however, the damage could not be undone. Indeed, it was exacerbated by the trial court's refusal to allow the defense to elicit testimony to rebut the state's theory regarding Mr. Sims' state of mind.

Mr. Sims' purported possession of drugs while on parole was not merely a "feature" of the case, it essentially *was* the state's case. Characterized in closing argument as an

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[40]*Cf. Garcia v. State,* 622 So. 2d 1325, 1330-31 (Fla. 1993) (state violated due process by withholding evidence which would have corroborated defendant's claim that another participant in robbery was the triggerman and rebutted state's contention that defendant's claim was fabricated).

established fact, the state's drug possession/parole violation theory dominated the prosecutor's closing argument:

> Now, of course Mr. Pitts is going to tell you Essie Lynn is not important, forget her. Why does she come on? Why is she here? A smoke screen. Because the defendant is on parole. Mr. Pitts knows why she's on, and I will tell you why she testified. Because there is a difference. There is a difference in if you have some drugs in the car and you're going to be arrested. *But between that and being on parole from state prison where you had been released just five weeks earlier and now you're transporting drugs, those are two different things, way different.* (T. 1419-20) (emphasis added)
>
> . . . .
>
> Well, I don't know, maybe he didn't want Officer Stafford walking up to the driver's window. If Officer Stafford walked up there with that flashlight, he is able to see in the car. This defendant didn't want to give Officer Stafford that opportunity. (T. 1422) (emphasis added)
>
> . . . .
>
> He [defense counsel] doesn't want you to know *the dog sniffed out the car and finds*[41] *narcotics*. He didn't want you to know the defendant is on parole and specifically, on the form, it tells him he can't possess, transport or use narcotics. (T. 1435) (emphasis added)
>
> . . . .
>
> I proved to you why this defendant acted the way he did, though, by Essie Lynn. By forms. By drug dogs. *I proved to you that while you're on parole from state prison, just being released, transporting, possession of drugs is going to violate your parole. You can go back to state prison.* You can go back to state prison. (T. 1436) (emphasis added)
>
> . . . .
>
> But the fact that this defendant was not going to stop for any one officer, be him white, be him black, be him Hispanic. *He wasn't going to violate parole and go back to prison for transporting drugs*. (T. 1440) (emphasis added)

The prosecution therefore constructed its entire theory of the case on a single factual claim that was wholly unsupported by the evidence: that Mr. Sims was transporting drugs when he was stopped by Officer Stafford. Based on this nonexistent evidence, the prosecution painted Mr. Sims in closing argument as a ruthless, paroled drug dealer -- a portrait guaranteed to appeal to almost any juror's biases and prejudices.[42]

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[41]Of course, as discussed above, the drug detection dog did not "find" any narcotics in the Cadillac; he merely responded to the scent of an unidentified narcotic substance, which may have been in the car at some undetermined point in the past.

[42]The prosecutor further capitalized on this image by invoking Mr. Sims' parole status to attack his credibility. (T. 1417, 1418-19, 1442)

In reality, the prosecution had no evidence of motive in this case -- other than Mr. Sims' own explanation of self-defense. Without the improperly admitted evidence, the jury might well have acquitted or convicted Mr. Sims of a lesser offense than first-degree murder.[43] Mr. Sims testified that Officer Stafford had used excessive force in arresting him, had repeatedly used racist epithets conveying a profound hatred of African-Americans, threatened repeatedly to kill him, and choked him until he couldn't breathe. Mr. Sims groped wildly, while Officer Stafford was choking him, for something to defend himself. He grabbed the gun and shot instinctively when Officer Stafford lunged at him. As discussed further below, the state's permissible evidence was equally or more consistent with Mr. Sims' testimony than with the state's theory of the case. Moreover, given that Officer Stafford had every reason to believe Mr. Sims was driving a stolen car, and that Sims did not know the car had been reported stolen, Sims' explanation of Stafford's hostile attitude and his own fearful response is entirely plausible.

The state's fabricated motive theory was a "deliberate obfuscation" of the facts of this case that irreparably undermined the truth-seeking function of the trial. *Garcia,* 622 So. 2d at 1331. The jury was invited to, and did, return a verdict of guilty on charges of capital murder and robbery based on pure speculation. *See Mayo v. State,* 71 So. 2d 899, 904 (Fla. 1954). Because the jury was not permitted to evaluate Mr. Sims' testimony of self-defense *fairly* against the prosecution's case as it really was, weaknesses and all, Mr. Sims did not receive a fair trial.

II.

THE PROSECUTOR'S MISREPRESENTATIONS OF THE DEFENDANT'S TESTIMONY DURING THE STATE'S REBUTTAL CASE DENIED THE DEFENDANT A FAIR TRIAL, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV.

The reliability of the jury's verdict in this case was further undermined by the prosecutor's misrepresentations of Mr. Sims' testimony during the examination of its rebuttal

[43]As discussed further below, the state relied on the drug possession/parole violation hypothesis as the premise for both its premeditated murder and felony murder theories.

witnesses, the firearms examiner, Jess Galan, and the associate medical examiner, Roger Mittelman. During Dr. Mittelman's rebuttal testimony, the prosecutor enlisted his assistant to "demonstrate" Mr. Sims' testimony for the jury. (T. 1349-50) The prosecutors depicted Mr. Sims as holding the gun parallel to the ground, and Officer Stafford "standing upright" as he lunged at Mr. Sims. (T. 1350-51) The defense objected that the demonstration was not an accurate representation of Mr. Sims' testimony. (T. 1350) The trial court overruled the objection, stating that he could not comment on the evidence. (T. 1350) Based on the prosecutors' inaccurate demonstration, Dr. Mittelman concluded that Mr. Sims' testimony was inconsistent with the angle of the gunshot wounds. (T. 1351)

The trial court's failure to sustain defense counsel's objection was error. The prosecutor was not merely presenting a hypothetical to Dr. Mittelman; he expressly purported to demonstrate Mr. Sims' testimony. (T. 1350) The law is clear that a prosecutor may not misrepresent the evidence, either in closing argument or in the examination of witnesses. *United States v. Drummond,* 481 F.2d 62, 64 (2d Cir. 1973) (prosecutor improperly misrepresented defendant's testimony in closing argument); *see also United States v. Valentine,* 820 F.2d 565, 570-71 (2d Cir. 1987) (prosecutor misrepresented grand jury testimony at trial); *Nowitzke,* 572 So. 2d at 1353-54 (prosecutor repeatedly misstated testimony of defense witnesses and sought to mislead jury); ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standards 3-5.8(a) (3d ed. 1993). Misleading "demonstrations" during trial may be particularly prejudicial. *See, e.g., United States v. Gaskell,* 985 F.2d 1056, 1060-61 & n.2 (11th Cir. 1993) (expert witness improperly permitted to "demonstrate" shaken baby syndrome by vigorously shaking rubber doll where government failed to establish that conditions were substantially similar).

Mr. Sims expressly testified that Officer Stafford was "bending over," in a "down position coming at me with his hands up."[44] (T. 1238) Although the prosecutor questioned

[44]During cross-examination of Mr. Sims, the prosecutor apparently demonstrated Officer Stafford's "lunge" in a generally accurate manner, (T. 1317), but proceeded during Dr. Mittelman's testimony to depict Officer Stafford in an "upright" position. (T. 1350-51)

Sims intently on cross-examination regarding the position of his arm and of the gun, Sims emphasized repeatedly that the events "happened too fast" for him to remember how he held the gun. (T. 1238-39, 1314-16) Since Mr. Sims could not remember the position of his hand or the gun, the prosecutor could not possibly demonstrate how Mr. Sims' said he held the gun. The prosecution's reenactment of the shooting therefore misrepresented Mr. Sims' testimony with respect to both the position of his hand and Officer Stafford's posture as he lunged at Mr. Sims.

While examining Mr. Galan, the prosecutor similarly purported to demonstrate how Mr. Sims held the gun. (T. 1341) Based on this demonstration, Mr. Galan said the casings would eject in a generally right direction. (T. 1341) The prosecutor then purported to represent Mr. Sims' description of where he was standing by drawing a triangle on state's exhibit 7, a sketch of the crime scene, showing Mr. Sims at the rear corner of the Cadillac, facing the exit ramp roadway. (T. 1341-42; App. 2-3) Based on the demonstration of how the gun was held, and the representation of where Sims said he was standing, Galan concluded that Sims' testimony was not consistent with the location of the casings at the crime scene. (T. 1342-43) As discussed above, however, Mr. Sims could not remember how the gun was held. Moreover, Mr. Sims testified that, after Officer Stafford let him go, he stumbled backward and was not standing exactly at the corner of the Cadillac; he was between the two cars, about five feet from Officer Stafford. (T. 1313-14, 1319-20; App. 3) Mr. Galan's opinion that Mr. Sims' testimony was inconsistent with the location of the casings was not, therefore, based on Mr. Sims' actual testimony but rather on the prosecutor's mischaracterization of it.

Both misrepresentations of Mr. Sims' testimony were harmful. The prosecution's reenactment of the "lunge" depicted 5'8" Mr. Sims holding the gun, parallel to the ground, as 6'1" Officer Stafford, standing upright, reached for him. Obviously, this was inconsistent with the two gunshot wounds, inflicted at a downward angle, to Stafford's upper body.[45] The

[45]Dr. Mittelman acknowledged on cross-examination that the angle of the wounds was consistent with Officer Stafford being shot while lunging at Sims in a "bent over" position, as (continued...)

prosecutor repeated this reenactment during closing argument and asserted that Mr. Sims' testimony could not be reconciled with the medical evidence. (T. 1424-25, 1431-32) Similarly, based on Mr. Galan's testimony, the prosecutor maintained in closing argument that Mr. Sims' testimony was inconsistent with the location of the casings at the crime scene. (T. 1425) Because, as discussed in the following section, the state's evidence essentially did *not* contradict Mr. Sims' testimony of self-defense, the prosecution's efforts to create inconsistencies by mischaracterizing his testimony during its rebuttal case was especially prejudicial and undermined Mr. Sims' right to a fair trial.

III.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTIONS FOR ROBBERY AND FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO DISPROVE THE DEFENDANT'S TESTIMONY OF SELF-DEFENSE.

The state's evidence in this case failed as a matter of law to disprove Mr. Sims' explanation of self-defense. The state also failed as a matter of law to establish the specific intent required for either robbery or escape, the felonies alleged as predicates for the state's felony murder theory. Although the state contended below that Mr. Sims, who allegedly was transporting drugs in his car, intentionally stole Officer Stafford's gun and shot him to escape from custody, that theory was nothing more than unsubstantiated speculation, insufficient as a matter of law to rebut Mr. Sims' testimony.

A.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A FINDING OF PREMEDITATED MURDER BECAUSE THE STATE FAILED TO DISPROVE THE DEFENDANT'S TESTIMONY OF SELF-DEFENSE.

In a prosecution for homicide, the defendant has the burden of producing evidence of self-defense. When the defendant satisfies that burden, the state must prove beyond a

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[45](...continued)
Sims had testified. (T. 1238, 1352) In closing argument, however, the prosecutor ignored both this testimony and the defense objection to his demonstration.

reasonable doubt that the defendant did *not* act in self-defense.[46] Similarly, "[w]hen circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of innocence." *Mayo v. State,* 71 So. 2d 899, 904 (Fla. 1954); *accord State v. Law,* 559 So. 2d 187, 188 (Fla. 1989); *Driggers v. State,* 164 So. 2d 200, 203 (Fla. 1964). "In applying the standard, *the version of events related by the defense must be believed if the circumstances do not show that version to be false." Fowler v. State,* 492 So. 2d 1344, 1346 (Fla. 1st DCA 1986) (emphasis in original) (quoting *McArthur v. State,* 351 So.2d 972, 976 n.12 (Fla. 1977)), *review denied,* 503 So. 2d 328 (Fla. 1987).[47] Thus, although the state "is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence," it must "introduce competent evidence which is inconsistent with the defendant's theory of events" in order to sustain a conviction. *Law,* 559 So. 2d at 189 (quoting *State v. Allen,* 335 So. 2d 823, 826 (Fla. 1976)).

In *Mayo, supra,* this Court found the state's evidence insufficient to sustain a conviction of second-degree murder where the state had failed as a matter of law to disprove the defendant's explanation of self-defense. 71 So. 2d at 904. In *Mayo,* as here, the charges arose from an altercation between the defendant and a police officer. According to the defendant, he and the victim, Constable Coram, began to argue after Coram had arrested Mayo and his brother for drunk driving. *Id.* at 900. Mayo testified that Coram had agreed to release the two men but threatened to lock them up if they returned to the area. Mayo asserted that he

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[46]*Sneed v. State,* 580 So. 2d 169, 170 (Fla. 4th DCA 1991); *Andrews v. State,* 577 So. 2d 650, 652 (Fla. 1st DCA), *review denied,* 587 So. 2d 1329 (Fla. 1991); *K.L.T. v. State,* 561 So. 2d 338 (Fla. 5th DCA 1990); *Rodriguez v. State,* 550 So. 2d 81, 82 (Fla. 3d DCA 1989), *review denied,* 562 So. 2d 347 (Fla. 1990); *Hernandez-Ramos v. State,* 496 So. 2d 837, 838 (Fla. 2d DCA 1986); *Brown v. State,* 454 So. 2d 596, 598 (Fla. 5th DCA 1984), *review denied,* 461 So. 2d 116 (Fla. 1984); *Harper v. State,* 411 So. 2d 235, 236 (Fla. 3d DCA 1982); *Diaz v. State,* 387 So. 2d 978, 980 (Fla. 3d DCA 1980), *review denied,* 397 So. 2d 779 (Fla. 1981).

[47]*Accord State v. Bobbitt,* 389 So. 2d 1094, 1098 (Fla. 1st DCA 1980), *rev'd on other grounds,* 415 So. 2d 724 (Fla. 1982), *as stated on remand,* 420 So. 2d 362 (Fla. 1st DCA 1982), *review denied,* 429 So. 2d 7 (Fla. 1983); *Ferguson v. State,* 379 So. 2d 163, 165 (Fla. 3d DCA 1980); *Neveils v. State,* 145 So. 2d 883, 885 (Fla. 1st DCA 1962).

and his brother "could go any place they pleased," and began to exit the car. *Id.* Coram then shot at Mayo who grabbed his own gun and returned fire. Mayo took Coram's gun and fled the scene with his brother. *Id.* Despite the essentially unrefuted evidence that the police officer had been the aggressor, and Mayo had shot him in self-defense, Mayo was convicted of second degree murder. *Id.* The state's theory of the case was that Mayo had been nursing a grudge against Coram, had managed to replace the bullets in Coram's gun with blanks while riding in his police car, and provoked Coram to fire first in order to create a false claim of self-defense. *Id.* at 901-03. The state argued on appeal that the jury was entitled to believe the prosecution's theory. *Id.* at 901. This Court disagreed, finding that the record evidence was too thin to support the inferences on which the state's "blank shell theory" was based, and that the theory amounted to "no more than speculation and guess work." *Id.* at 904.

Similarly, in *Fowler, supra,* the court of appeal reversed the defendant's conviction for first-degree felony murder, concluding that the state's evidence was insufficient as a matter of law to disprove Fowler's explanation of self-defense. 492 So. 2d at 1352. The state's theory at trial was that Fowler had shot and robbed the victim, Jerkins, who had given Fowler a ride. *Id.* at 1345. According to Fowler, Jerkins -- who was angry and quite intoxicated -- had attempted to sexually assault him. *Id.* at 1348-49. Jerkins threatened Fowler with a gun, Fowler grabbed it and, as the two men struggled, the gun went off. *Id.* at 1349. Fowler moved Jerkins' body off the road and drove away in Jerkins' car. *Id.* Fowler stated that he discovered Jerkins' wallet on the floorboard of the car as he was driving. *Id.* He later abandoned Jerkins' car but kept the wallet. *Id.* at 1349-50. Although the state theorized that Fowler had shot Jerkins in the back while he was on his hands and knees and had taken Jerkins' wallet from his person, the medical evidence was more consistent with Fowler's explanation than with the state's theory. *Id.* The court concluded that the state had "failed to present competent testimony or physical evidence to impeach or directly controvert Fowler's explanation of what happened." *Id.* at 1352.

In this case, the state similarly failed to controvert with competent testimony or physical evidence Mr. Sims' explanation of what transpired between him and Officer Stafford on June 11, 1991.

1. The defendant's testimony.

Mr. Sims testified that he pulled over when signalled to do so by Officer Stafford, got out of the Cadillac, and approached the police car. (T. 1229-30) Stafford told Sims to put his hands on the car and stepped out of the police car with his gun drawn. (T. 1230) Stafford taunted Sims, "I thought you was going to run. You going to run? You want to run?" (T. 1230) Sims responded that he didn't want to run. (T. 1230) Stafford pointed the gun at Sims in an angry manner and remarked, "You niggers like to steal Cadillacs." (1230-31) Sims told Stafford the car belonged to Sims' cousin. (T. 1231) As Stafford approached, Sims was frightened and backed up toward the Cadillac; he put his hands on the back of the Cadillac. Stafford was pointing his gun at Sims, "like he wanted to shoot me." (T. 1231) Sims continued to explain that the car belonged to his cousin, but Stafford responded, "Don't lie to me" and kept telling Sims to "shut up." Sims was afraid Stafford would shoot him, but could not stop himself from talking. (T. 1231-32)

Stafford hit Sims on the mouth and put his hand around Sims' throat. Sims tried to remove Stafford's hand but couldn't. Stafford increased the pressure around Sims' neck until Sims couldn't breathe. Stafford, who was 6'1" and 263 pounds pinned Sims, who is 5'8" and 180 pounds, against the side panel of the car. (1218, 1232-33) Sims was struggling to breathe and could not push Stafford off of him. (T. 1232-33) Sims thought Stafford was trying to kill him and "just frantically started reaching." He couldn't see what he grabbed, but it was the police radio. Sims swung and hit Stafford on the head. Stafford let Sims go, and Sims, who was dizzy, stumbled. (T. 1233) Afraid that Stafford would shoot him, Sims turned his back to Stafford and put his hands in the air. (T. 1234) Stafford was infuriated. He told Sims, "You're fucking dead. You're one fucking dead nigger. You're fucking dead, boy." Sims felt a hand behind his neck. Stafford squeezed Sims' neck and repeated, "You're fucking

dead." Sims felt something else touching the back of his head but didn't know what it was. Stafford continued to threaten him, "You're fucking dead. You're fucking dead, boy." (T. 1234-35)

Sims pleaded with Stafford not to kill him, just to take him to jail. (T. 1235) At this point, a car drove by. Sims hoped it would stop, but it did not. (T. 1236) Once the car passed, Sims felt a handcuff being put on his arm and felt relieved because he thought Stafford would take him to jail, but Stafford began to squeeze the cuff as hard as he could. (T. 1235-36) The pressure forced Sims down on one knee; Stafford was squeezing and shaking Sims' arm. When Sims pleaded that it hurt, Stafford told him to "Shut up." (T. 1236) Sims felt an arm go around his neck in a choke hold, and Stafford lifted him up. (T. 1236-37) Sims again couldn't breathe and couldn't get Stafford's hand from around his neck. (T. 1237) Sims thought Stafford was trying to kill him and started reaching again for something to hit Stafford with to make him stop. Sims "just grabbed something" and later realized it was Stafford's gun. (T. 1237-38)

Stafford let Sims go, and Sims turned around. (T. 1238) Sims was standing between the two cars, facing Stafford. (T. 1312-13, 1320) Before Sims could say anything, in "a split second," Stafford stepped back and charged at him. (T. 1238, 1312) Sims and Stafford were about five feet apart; Stafford was bent over, in a "down position," "coming at me with his hands up." (T. 1238, 1313) Sims threw his hand up to try and stop Stafford and heard an explosion. (T. 1238) Stafford didn't stop, and by the time he put his hand on Sims, the gun went off again. (T. 1238) The events happened so quickly that Sims could not remember the exact position of his hand. (T. 1315-16) Nor was he certain where Stafford fell, only that he "fell to the side backward." (T. 1239, 1317, 1321) Sims panicked, jumped in the car and left "real fast," almost running into another car. (T. 1239-41)

2. The state's evidence.

The state's theory of the case, again, was that Mr. Sims was transporting drugs when he was stopped by Officer Stafford and that he struggled with the officer, stole his gun, and

shot him, to avoid being returned to prison for violating his parole. As discussed above, however, the state's theory that Sims was transporting drugs was "no more than speculation and guess work" and was not sufficient as a matter of law to contravene Sims' testimony. *Mayo,* 71 So. 2d at 904; *see also Law,* 559 So. 2d at 189 (state must introduce "competent evidence" to contradict defendant's theory of events); *Chaudoin v. State,* 362 So. 2d 398, 402 (Fla. 2d DCA 1978) (circumstantial evidence insufficient to contradict defendant's hypothesis of innocence where state's theory required "impermissible succession of inferences").

The state presented no evidence that Sims had given contradictory accounts of his encounter with Officer Stafford. *See Fowler,* 492 So. 2d at 1352. Sims was not once impeached with his original, uncounseled, confession, given only a week after the shooting. Indeed, although the prosecutor cross-examined Sims aggressively and, at times, with outright hostility, there were no material inconsistencies in his testimony. Nor did the state present any direct testimony to support its theory of what transpired between Officer Stafford and Mr. Sims. *See Ferguson,* 379 So. 2d at 165. The one witness presented by the state who observed the two men interacting corroborated Mr. Sims' testimony that he had surrendered to Officer Stafford after fending off Stafford's first attempt to choke him.

Fraid Batule testified that, as he exited State Road 112 at N.W. 27th avenue on the evening of June 11, 1991, he rounded the curve on the exit ramp and saw a police car on his right with its red and blue emergency lights on and, as he got closer, saw a car in front of the police car. (T. 961-64) Batule slowed down to pass the police car, which was parked in the roadway. (T. 964) Batule saw Sims with his hands on the Cadillac. (T. 973-74) Stafford had a "dot" on his forehead, and his face was covered with blood. (T. 969) Stafford had his left hand on the back of Sims' neck, (T. 966-67), and had a gun in his right hand, which he was aiming at the back of Sims' head, moving the gun back and forth. (T. 968-69) Batule heard Sims say in an emotional, pleading tone, "okay, you got me man." (T. 969, 976) Stafford looked at Batule and returned his gun to the holster. (T. 975-76) Batule drove on. (T. 975)

The state disputed Mr. Sims' testimony that Officer Stafford had hit and choked him, based on (1) the testimony of the police officers who arrested Mr. Sims in California a week later that they did not observe any injuries on Mr. Sims and (2) photographs taken after Mr. Sims' arrest in California which did not show bruises on Mr. Sims' wrists or neck. (T. 1172, 1182-84) Since Mr. Sims is a dark-skinned African-American man, bruises on his skin would not be readily obvious -- particularly one week after the injuries were inflicted. Accordingly, this evidence was not "probative that no physical struggle occurred." *Andrews,* 577 So. 2d at 653 & n.3.

Although the state contended at trial that Sims' testimony was inconsistent with the physical evidence, that claim is belied by the record. First, the prosecutor argued that Sims' testimony was inconsistent with the medical evidence. Stafford received two gunshot wounds. One bullet, fired from a distance of approximately 6-12 inches, had entered the left side of the base of Stafford's neck and angled downward, lodging in Stafford's back about five inches lower than the entrance wound. (T. 1158-59, 1203, 1209, 1213) The second bullet, fired from approximately 12-18 inches away, had entered the right upper part of Stafford's chest and traveled to the right, lodging in the right side of the chest, about 2 & 1/2 inches below the entrance wound. (T. 1158-59, 1210, 1213) Stafford also had an abrasion on his hand and scrapes on his neck, consistent with injuries caused by fingernails during a struggle. (T. 1219) Based on the downward angle of the wounds, the associate medical examiner testified that Stafford's body would have had to be lower than the barrel of the gun. (T. 1218) The prosecutor elicited an opinion that Sims' testimony was inconsistent with the angle of the wounds, but this was based on the inaccurate "demonstration" of Sims' testimony, discussed in the previous section. (T. 1350-51)

On cross-examination, the medical examiner acknowledged that the angle of the gunshot wounds was consistent with Stafford being shot while lunging at Sims in a "bent over" position, as Sims had testified. (T. 1238, 1352) While the prosecutor hypothesized during closing argument that Stafford was kneeling when he was shot, (T. 1431-32, 1442), the state

presented no evidence to support this claim -- such as marks on Stafford's knees or trousers. The medical evidence was therefore consistent with Mr. Sims' testimony, and the state's theory that Stafford was kneeling -- rather than lunging -- while also consistent with the angle of the wounds was not supported by anything in the record. Since the medical evidence did not contradict Mr. Sims' testimony, it was insufficient to present a jury question. *See McArthur,* 351 So. 2d at 977-78 (angle of bullet wounds and blood pattern on wall equally consistent with defense and prosecution theories); *Fowler,* 492 So. 2d at 1350 (angle of bullet wound more consistent with defense theory than state's theory); *Ferguson,* 379 So. 2d at 164 (powder burn evidence consistent with defendant's testimony).

Second, contrary to the prosecutor's assertion in closing argument, Mr. Sims' testimony is more consistent with the location of the casings at the crime scene than the state's theory. As shown in Figure 1 below, the casings ("I" and "J" on exhibit 7) were found on the grass, between approximately 3 and 5 feet north of the rear of the Cadillac. The firearms examiner, Jess Galan, testified that casings eject from a Glock 17 in "a generally right direction" and would end up "to the shooter's right."[48] (T. 1341) The state argued in closing that Officer Stafford's position -- lying 3 feet in front of the police car with his torso on the grass and his legs in the roadway -- "cries out" that he was shot in front of the police car with Mr. Sims facing the grass. (T. 998-99, 1000-01, 1438) Since the casings were found to the *left* of Officer Stafford's body, the state's theory is fundamentally inconsistent with the location of the casings. (App. 3)

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[48]He did not specify whether the casings eject forward, directly to the side, or to the rear. The prosecutor elicited Galan's testimony while purporting to demonstrate the position of the gun, presumably held parallel to the ground as he later "demonstrated" Mr. Sims' testimony in questioning the medical examiner. (T. 1341, 1351) Mr. Sims testified, however, that he could not remember how he held his hand. (T. 1315-16) The angle at which the gun is held would affect the angle at which the casings ejected and the distance they traveled. For example, if the shooter's hand is tilted sideways, the gun's ejector would be pointing upward, rather than sideways. Moreover, because a number of variables affect where casings ultimately land, including weather conditions and the amount of movement at the scene, the location of casings cannot be used to pinpoint the shooter's location with any degree of precision. *See Nicholson v. State,* 570 P.2d 1058, 1065 (Alaska 1977) (shell ejection test properly admitted only for limited purpose of establishing direction and air distance traveled and not to establish where defendant was standing).

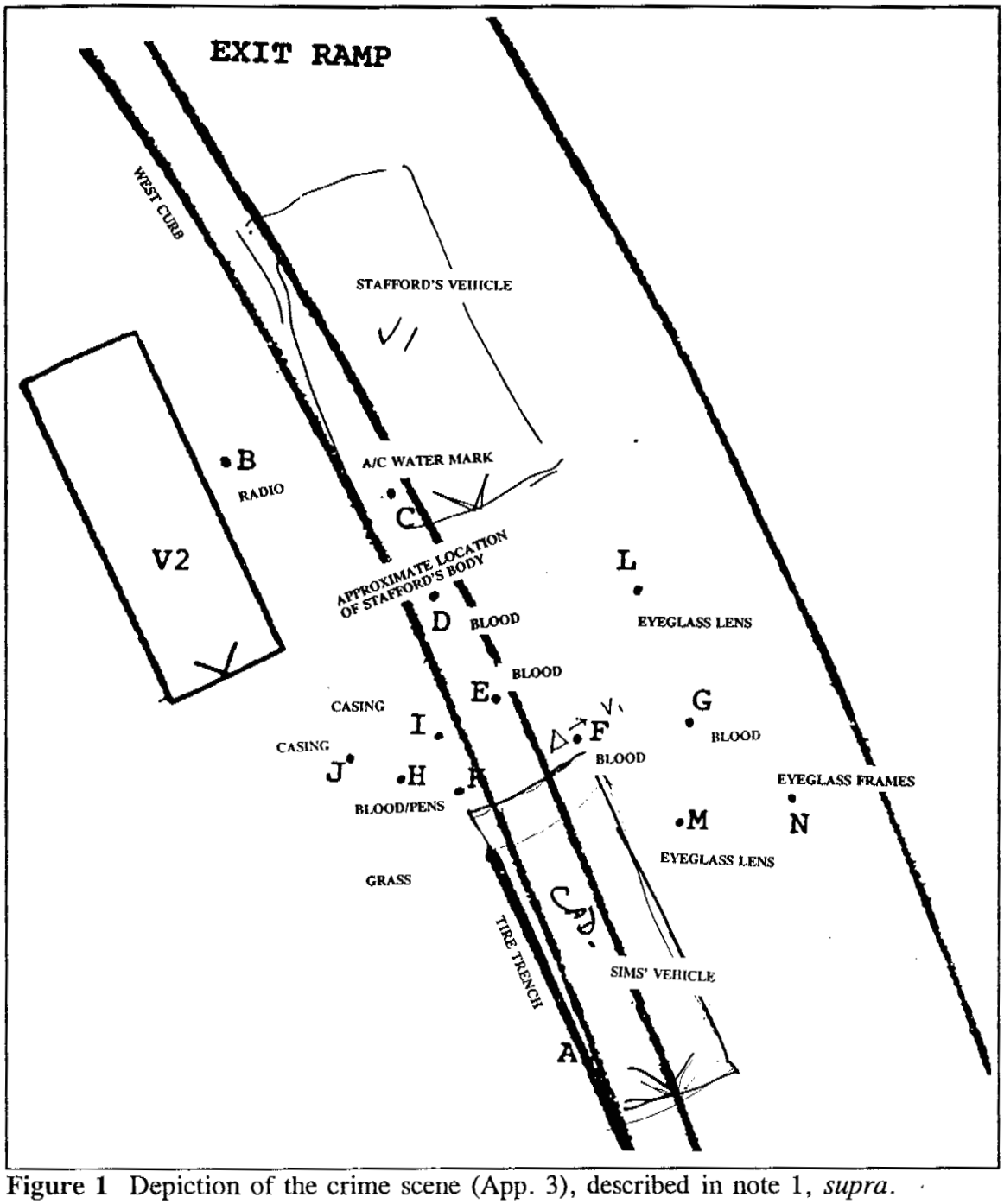

Figure 1 Depiction of the crime scene (App. 3), described in note 1, *supra*.

Mr. Sims testified simply that he was standing between the two cars, with the rear of the Cadillac to his right, about five feet from Officer Stafford. Although the prosecutor claimed Mr. Sims' testimony would place him near "F," (T. 1341-42), Sims' testimony is more consistent with his being near "E" on Exhibit 7 and Officer Stafford being near "F." (T. 1312-

14, 1319-20; App. 3) The location of the casings, to the right of "E" is not, therefore, inconsistent with Mr. Sims' testimony.

Moreover, the location of the drops of blood ("G", "F," "H," "E," and "D" on exhibit 7), ranging from the roadway near the Cadillac to the ultimate location of Officer Stafford's body (App. 3);[49] the presence of blood on the rear of the Cadillac (T. 1060); and the casings' location near the rear of the Cadillac (App. 3), are all consistent with Officer Stafford having been shot near the rear of the Cadillac, as Sims testified, regaining his footing, and making his way back toward the police car -- as he would logically try to do -- before falling there.[50] The physical evidence therefore does not contradict Mr. Sims' testimony, but does establish a fundamental, internal inconsistency in the state's theory that Officer Stafford was shot while kneeling in front of the police car. *See McArthur,* 351 So. 2d at 977 (physical evidence at crime scene equally consistent with defense and state theories); *Fowler,* 492 So. 2d at 1350 (medical evidence did not present jury question when it was consistent with defendant's testimony and inconsistent with state's theory).

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The crux of the state's case -- as is clear from the prosecutor's closing argument -- was the drug possession/parole violation theory. Like the "blank shell theory" in *Mayo*, however, the evidentiary foundation on which the state's theory was built is too weak to support a conviction of premeditated murder. Evidence of "premeditated design ought to be supported

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[49]Some of the drops of blood, particularly "F" and "G" may have come from the cut on Officer Stafford's head. Mr. Batule testified that Officer Stafford had blood on his face when he was holding Sims at gunpoint at the rear of the Cadillac. (T. 969) Sims testified that he struck Stafford with the radio at the rear quarter of the Cadillac. (T. 1232-33, 1307) The glasses frame and lenses in the roadway ("L", "M", and "N" on exhibit 7) are consistent with the first struggle occurring in that area. (App. 3)

[50]The prosecutor insisted that Sims' testimony would put Stafford's body in the middle of the street. (T. 1318, 1321) Sims could not remember, however, where Stafford ultimately fell, only that he fell backward and to the right, (T. 1239, 1317); he was certain he did not step over Stafford to get back to his car. (T. 1318-19) Sims testimony is therefore also consistent with Stafford falling initially toward the rear of the Cadillac, regaining his footing and making his way to the police car. Officer Stafford was still alive when Ms. Castano and other Miami Springs officers arrived at the scene. (T. 980, 998-99, 1020)

by something more than guess work and suspicion, especially where the account of the homicide, as given by the accused, indicates a slaying in mutual combat under circumstances not making out a case of premeditation." *Mayo,* 71 So. 2d at 904 (quoting *Jenkins v. State,* 120 Fla. 26, 161 So. 840 (1935)); *see also Hall v. State,* 403 So. 2d 1319, 1320-21 (Fla. 1981).

B.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN CONVICTIONS FOR ROBBERY OR FELONY MURDER BECAUSE THE STATE FAILED TO ESTABLISH THE REQUISITE INTENT FOR ROBBERY OR ESCAPE, AND THE KILLING WAS NOT COMMITTED IN FURTHERANCE OF ANY FELONY.

In this case, the defendant's testimony of self-defense presented a reasonable hypothesis of innocence with respect to felony murder as well as premeditated murder. In support of its alternative felony murder theory, the state submitted both escape and robbery as predicate felonies. (T. 1453-54) The very conduct the state claimed was a felony was asserted by the defendant, however, to be an act of self-defense. The shooting of Officer Stafford, in other words, was *either* in furtherance of self-defense *or* in furtherance of a felony.[51] Thus, if the state's evidence was legally insufficient to establish that Mr. Sims did *not* act in self-defense, then it was also legally insufficient to establish the necessary specific intent for robbery or escape.

1. Robbery

Robbery is broadly defined in Florida as "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking, there is the use of force, violence, or putting in fear." § 812.13(1), Fla. Stat. (1991). The use of violence or intimidation may occur "prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking

[51]This case therefore does not fall within the purview of section 776.041(1), Florida Statutes (1991), which makes self-defense unavailable when the defendant is in the process of committing an independent felony.

constitute a continuous series of acts or events." *Jones v. State,* 20 Fla. L. Weekly S29, S30 (Fla. Jan. 12, 1995). Robbery, however, requires the specific intent to steal, and "it is imperative that the intent to steal exist at the time of the taking." *Stevens v. State,* 265 So. 2d 540, 541 (Fla. 2d DCA 1972); *accord Bailey v. State,* 199 So. 2d 726, 727 (Fla. 1st DCA 1967); *see also Bell v. State,* 394 So. 2d 979, 980 (Fla. 1981); *Montsdoca v. State,* 84 Fla. 82, 93 So. 157, 159 (1922). Moreover, to support a conviction for felony murder, the killing must be in furtherance of the alleged felony. *Bryant v. State,* 412 So. 2d 347, 350 (Fla. 1982); *see also* 2 W. LAFAVE & A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5(4) (1986 & Supp. 1995) (must be causal connection between killing and alleged felony); *accord Rodriguez v. State,* 617 So. 2d 1101, 1102 (Fla. 2d DCA 1993); *Gomez v. State,* 496 So. 2d 982, 983 (Fla. 3d DCA 1986).

Accordingly, where the state's circumstantial evidence fails to exclude a reasonable hypothesis of innocence that the defendant did not have the intent to steal at the time of the killing and that the killing was for another purpose, the evidence is insufficient to support a conviction for robbery or felony murder.[52] Thus, in *Fowler,* the state's evidence was sufficient to establish the separate offense of grand theft, because the defendant retained the victim's wallet, which he said he found after the shooting. 492 So. 2d at 1349, 1352. However, because the circumstantial evidence could not exclude Fowler's hypothesis of innocence that the killing was an act of self-defense and not in furtherance of the theft, there was no robbery and no felony murder. *Id.* at 1352. Similarly, when a defendant is charged with taking a weapon from another but claims he did so in self-defense, self-defense may negate the specific intent

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[52]*Compare Knowles v. State,* 632 So. 2d 62, 66 (Fla. 1993) (homicide was not committed during the course of a robbery where there was no evidence that defendant intended to take truck prior to shooting or that he shot his father in order to take the truck) *with Jones,* 20 Fla. L. Weekly at S30 (posthumous taking sufficient to support felony murder where state presented evidence defendant formed intent to steal prior to killing); *Bruno v. State,* 574 So. 2d 76, 80 (Fla.) (state presented evidence of defendant's pre-existing intent to steal), *cert. denied,* 502 U.S. 834, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991); *Roberts v. State,* 510 So. 2d 885, 888 (Fla. 1987) (only logical inference to be drawn from scenario was that defendant killed one victim in furtherance of his intent to rape the second), *cert. denied,* 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988).

to steal required for robbery.[53] *See Bailey*, 199 So. 2d at 727; *Jones v. Com.*, 1 S.E.2d 300, 301-02 (Va. 1939); *Kennedy v. State*, 93 So. 822, 822-23 (Ala. 1922).[54]

In this case, as in *Fowler*, the defendant testified that he shot the victim, not to obtain his property, but in self-defense. Mr. Sims' only intention when he grabbed Officer Stafford's gun during the struggle was to defend himself. Sims did not realize that he had taken the gun from the scene until sometime later and then threw the gun into the river. (T. 1242) Thus, any intent to "steal" the gun did not arise until after the homicide -- when Mr. Sims realized he still had the gun and discarded it. *See Fowler*, 492 So. 2d at 1352; *see also Knowles*, 632 So. 2d at 66.

2. Escape.

Escape is also a specific intent crime, requiring the intention to avoid lawful confinement. *State v. Knox*, 557 So. 2d 127 (Fla. 3d DCA 1990); *Muro v. State*, 445 So. 2d 374, 376 (Fla. 3d DCA 1984). It fails as a predicate offense for felony murder in this case for the same reasons that robbery fails. Fraid Batule's testimony corroborated Sims' testimony that he had surrendered to Stafford after fending off Stafford's first attack. Batule did not observe

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[53]A contrary rule would substantially eviscerate the right of self-defense, for this is one of the most common factual scenarios in self-defense cases. On this theory, Fowler would be guilty of felony murder for attempting to "steal" Jerkins' gun during their struggle, because he would have had the intent to temporarily deprive Jerkins of his weapon. *See Perkins v. State*, 576 So. 2d 1310, 1314-15 (Fla. 1991) (Kogan, J., concurring) (over-broad interpretation of § 776.041, Fla. Stat., could violate Fla. Const. art. I, § 2, establishing fundamental right of self-defense).

[54]*See also State v. Holley*, 480 So. 2d 94, 96 (Fla. 1985) (Boyd, J., concurring in part and dissenting in part) (where defendant claimed to have disarmed agricultural inspector in self-defense, and jury was erroneously instructed that force was never justified to resist arrest, jury might also have been misled as to application of defense to negate specific intent to steal inspector's weapons); *accord People v. Dillard*, 284 N.E.2d 490, 493 (Ill. App. 5th Dist. 1972) (where circumstantial evidence was equally or more consistent with defendants' contention that they shot garage owner and took his gun in self-defense rather than in perpetration of robbery, evidence could not sustain felony murder conviction); *State v. Campbell*, 214 N.W.2d 195, 198 (Iowa 1974) (evidence did not support armed robbery conviction where state did not contradict defendant's testimony that he took off-duty officer's gun in self-defense); *cf. State v. Froais*, 653 N.E. 2d 735, 738 (R.I. 1995) (if defendant's use of force to deprive victim of his gun was for the purpose of self-defense, jury could have acquitted him of robbery); *State v. Newman*, 605 S.W.2d 781, 786 (Mo. 1980) (same); *State v. Lunsford*, 49 S.E.2d 410, 411 (N.C. 1948) (same).

Sims resisting Stafford; he heard Sims plead with Stafford, "okay, you got me man." (T. 975) Again, Sims' testified that his sole intention in grabbing the officer's gun and shooting was self-defense, in response to Stafford's renewed use of excessive force and Sims' fear for his life. Although Sims panicked and fled the scene after the shooting, it was not his intention when he shot Officer Stafford to avoid lawful confinement, nor was the shooting in furtherance of such a purpose. To the contrary, Sims had begged Stafford to take him to jail. (T. 1235-36) *Compare Jackson,* 498 So. 2d at 410 (jury could have convicted defendant of felony murder based on her escape from arrest where defendant admitted she shot officer so she would not have to go back to jail).

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The state relied on the same theory to establish the specific intent for escape and robbery that it relied on to establish premeditation -- the drug possession/parole revocation theory. According to the state's theory, Mr. Sims had the requisite intent to avoid lawful confinement from the outset of the encounter, because he was transporting drugs when he was stopped by Officer Stafford and did not want to go back to prison for violating his parole. Similarly, according to the state's theory, Mr. Sims took Officer Stafford's gun, not to defend himself, but for the purpose of effecting an escape from custody. The circumstantial evidence, however, was insufficient to support the inferences the state drew from it, and did not exclude Mr. Sims' explanation that he shot Officer Stafford in self-defense and not in furtherance of any felony. At a minimum, the evidence in this case is insufficient to support the convictions returned by the jury after a trial permeated by error.

IV.

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT DEPRIVED THE DEFENDANT OF A FAIR TRIAL, IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 16 AND 17.

The prosecutor's closing argument in this case was replete with improper comments. Because these remarks injected improper considerations into the jury's evaluation of Mr. Sims'

testimony in a close case that turned solely on the defendant's credibility, the argument vitiated the fairness of the trial and constitutes fundamental error.

The prosecutor referred repeatedly to Mr. Sims as a "liar" and characterized his testimony as "lies." (T. 1416, 1419, 1424, 1425, 1430, 1432, 1438, 1442) He then invoked his personal experience as a prosecutor to substantiate his contention that Mr. Sims' claim of self-defense was false, telling the jury that he was "real tired" of "hearing, in the 12 years I have been doing this, that every officer says 'I am going to kill you.'" (T. 1428) He continued:

> Well, you know what, ladies and gentlemen, if Officer Stafford was ever going to kill that defendant, that's when he should have done it. And there is not a thing any one of us would have said about it. You're being attacked by him with a radio, that's when he should have killed him. That's when he should have pulled out the Glock 17 *and this defendant should be dead.* (T. 1428) (emphasis added).

The prosecutor also insinuated that defense counsel had coached Mr. Sims' purportedly false testimony:

> I am lucky I didn't ask him his name over because what would his answer have been to me? "He was choking me and I didn't intend to kill him."
>
> But he wanted you to believe -- because I asked him specifically, Did you rehearse this? Did you go over it? His testimony was, "I never went over this. I never went over it." Yet in almost every answer to me, "He was choking me; I didn't intend to kill him." (T. 1417)
>
> . . . .
>
> I don't get it. Did you not rehearse the defendant long enough to give the right answers? (T. 1437)

He accused defense counsel of misleading the jury and "adding" things to the evidence. First, with respect to Otis Robinson's identification of Mr. Sims, the prosecutor argued:

> Now, I gather [defense counsel] also, when he gets up here, *wants to add his own evidence like [defense counsel] did yesterday.* And we will talk about that. And I don't recall any witness during this trial that ever said this defendant's picture was in the newspaper or on T.V. prior to the photographic lineup being shown to either witness [Robinson and Castano].
>
> Well, that's what Mr. Carter did to you yesterday; no real evidence of this, but I will argue it to you anyway. *That's what misleading is.* There is no evidence of that.
>
> . . . .

> Mr. Robinson and Ms. Castano picked out photographs in a photographic lineup. If these two gentlemen thought they were wrong, they had an opportunity to get up and cross-examine them and show you they were wrong. Did either one of these two lawyers do that? No.
>
> Yet, in closing statement -- because he tells you he is not arguing with you. In closing statement, *he tells you evidence which has not even been brought out in the trial that he's going to tell you to help you out.* (T. 1423-24) (emphasis added).

Later in his argument, the prosecutor again asserted:

> Otis identified him [Mr. Sims] in the photographic lineup.
>
> If Otis is wrong, when he cross-examined him, why didn't they ask him, "You're not really sure about this picture." Ask him, "You had seen him in the newspaper before." Ask him, "You had seen him on TV before." Why don't you ask him that? (T. 1435)

In fact, defense counsel *did* ask Mr. Robinson if he had seen Mr. Sims' photo in the newspaper and on television before identifying him in a photo lineup. Mr. Robinson conceded that he had.[55] (T. 1046) Second, the prosecutor accused defense counsel of misleading the jury by arguing that Mr. Sims had turned his back on Officer Stafford to avoid being shot:

> . . . -- and I really find it interesting that Mr. Pitts told you that the reason the defendant turns his back to Officer Stafford after he hits him on the head with the radio -- and now this is new too because [the] defendant never said this, but Mr. Pitts, *who doesn't want to mislead you*, tells you this is so Officer Stafford couldn't shoot him in the back.
>
> . . . .
>
> Remember, he told you that "I just turned around to beg for my arrest." He never said -- he never said, "I turned around so I wouldn't be shot in the back." *That's Mr. Pitts not wanting to mislead you.* No evidence of that either. (T. 1437) (emphasis added)

Again, Mr. Sims specifically did testify that he turned around so Stafford wouldn't shoot him. (T. 1234) Finally, the prosecutor vouched for his own integrity and credibility:

> You know, in the courtrooms of this building there is usually something which sits over the Court's head in the bigger courtrooms. It's in real big letters, and it says, "We who labor here seek only the truth." *We who work here* want you to decide what the truth is.
>
> *I can't make up evidence. I have not stood up here and misled you. I have not told you anything which I did not present to you. I have done my job.* (T. 1441) (emphasis added).

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[55]The prosecutor's argument may have been a fair response to defense counsel's argument with respect to Ms. Castano (T. 1407) but was patently incorrect with respect to Mr. Robinson.

The prosecutor's argument went well beyond fair comments on the evidence. In particular, his assertion that, in his personal experience as a prosecutor for 12 years, he found that defendants frequently fabricate claims of self-defense against police officers exceeded all bounds of proper argument. The Florida Bar's Rules of Professional Conduct explicitly prohibit expressions of personal opinion regarding the credibility of witnesses or the guilt of a defendant. Fla. Bar R. Prof. Conduct Rule 4-3.4(e). The appellate courts in this state have expressed growing frustration for over a decade with violations of Rule 4-3.4(e) and its predecessors, Fla. Bar Code Prof. Resp. EC7-24 and DR7-106(C)(3)-(4), emphasizing that "[a]rguments in derogation of [this rule] will not be condoned" by the appellate court, "nor should they be condoned by the trial court, *even absent objection.*" *Schreier v. Parker,* 415 So. 2d 794, 795 (Fla. 3d DCA 1982) (emphasis in original).[56]

While expressions of personal opinion and references to matters not in evidence are forbidden to all lawyers, such conduct is, if anything, more egregious when indulged in by prosecutors. The American Bar Association standards for the prosecution function also provide that a prosecutor "should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant" and "should not intentionally refer to or argue on the basis of facts outside the record." ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standards 3-5.8 & 3-5.9 (3d ed. 1993). (hereinafter "ABA STANDARDS").[57] A prosecutor's violation of these rules "is a matter of special concern because

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[56]*Accord Walt Disney World Co. v. Blalock,* 640 So. 2d 1156, 1157 (Fla. 5th DCA), *review dismissed,* 649 So. 2d 232 (Fla. 1994); *Davies v. Owens-Illinois,* 632 So. 2d 1065, 1067 (Fla. 3d DCA), *review denied,* 641 So. 2d 1346 (Fla. 1994); *Kaas v. Atlas Chemical Co.,* 623 So. 2d 525, 526 (Fla. 3d DCA 1993); *Pippen v. Lotosynski,* 622 So. 2d 566, 568-69 (Fla. 1st DCA 1993); *Silva v. Nightingale,* 619 So. 2d 4, 5-6 (Fla. 5th DCA 1993); *Venning v. Roe,* 616 So. 2d 604, 605 (Fla. 2d DCA 1993); *Riley v. Willis,* 585 So. 2d 1024, 1028-29 (Fla. 5th DCA 1991); *Stokes v. Wet 'n Wild, Inc.,* 523 So. 2d 181, 182 (Fla. 5th DCA 1988); *S.H. Investment & Dev. Corp. v. Kincaid,* 495 So. 2d 768, 772 (Fla. 5th DCA 1986), *review denied,* 504 So. 2d 767 (Fla. 1987); *Borden, Inc. v. Young,* 479 So. 2d 850, 851-52 (Fla. 3d DCA 1985), *review denied,* 488 So. 2d 832 (Fla. 1986).

[57]*Accord Pacifico v. State,* 642 So. 2d 1178, 1183-84 (Fla. 1st DCA 1994); *Singletary v. State,* 483 So. 2d 8, 10 (Fla. 2d DCA 1985); *see also Landry v. State,* 620 So. 2d 1099, 1102 (Fla. 4th DCA 1993) (improper comment on excluded evidence); *State v. Ramos,* 579 So. 2d (continued...)

of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office." *Id.* Standard 3-5.8, Comment; *see also Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 655 (1935) (noting prosecutor's special obligations in criminal justice system).[58] It is therefore "particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction." *United States v. Garza,* 608 F.2d 659, 663 (5th Cir. 1979).[59]

In a close case, where the state's evidence is far from overwhelming and "whatever chance the defendant had to be acquitted depended upon the jury believing his testimony," impeaching the defendant's credibility with matters outside the record fundamentally undermines the reliability of the jury's verdict. *Singletary,* 483 So. 2d at 9-10 (where defendant testified shooting was accidental, it was reversible error for the prosecutor to call defendant a liar and to argue to the jury, "You know as well as I do that he certainly intended to harm . . . [the victim] with that gun."); *see also Bass v. State,* 547 So. 2d 680, 681-82 (Fla. 1st DCA) (where case turned on defendant's testimony against that of police officer he allegedly had assaulted, it was reversible error for prosecutor to argue that, in his "many years" of experience, he

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[57](...continued)
360, 362 (Fla. 4th DCA 1991) (improper expression of personal belief in veracity of state witness); *Duque v. State,* 498 So. 2d 1334, 1337 (Fla. 2d DCA 1986) (improper expression of personal opinion of defense witness); *Dukes v. State,* 356 So. 2d 873, 876 (Fla. 4th DCA 1978) (same).

[58]*Accord United States v. Young,* 470 U.S. 1, 18-19, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985); *The Florida Bar v. Schaub,* 618 So. 2d 202, 204 (Fla. 1993); *Garron v. State,* 528 So. 2d 353, 359 (Fla. 1988) (citing ABA Standard 3-5.8 (1980)); *Bertolotti v. State,* 476 So. 2d 130, 133 (Fla. 1985); *Wilson v. State,* 371 So. 2d 126, 128 (Fla. 1st DCA 1978); *Gonzalez v. State,* 97 So. 2d 127, 128 (Fla. 2d DCA 1957).

[59]*Accord Hall v. United States,* 419 F.2d 582, 587-88 (5th Cir. 1969); *Hill v. State,* 477 So. 2d 553, 556 (Fla. 1985) (prosecutor improperly asked jury to consider him a "thirteenth juror"); *Cummings v. State,* 412 So. 2d 436, 437 (Fla. 4th DCA 1982) (prosecutor improperly advised jury that state attorney's office "does not deal with people that commit violent crimes"); *Reed v. State,* 333 So. 2d 524, 525-26 (Fla. 1st DCA 1976) (improper argument that "[t]he state doesn't prosecute someone because of their religion or their race or their nationality. We prosecute them because we believe they are guilty of crimes.")

continued to be "flabbergasted by the fact" that in "literally every trial somebody" lies under oath, and to assert that the defendant was guilty), *review denied,* 553 So. 2d 1166 (Fla. 1989); *Jones v. State,* 449 So. 2d 313, 314-15 (Fla. 5th DCA 1984) (fundamental error for prosecutor, in close case, to accuse defendant and defense witnesses of lying and to suggest, without evidentiary basis, that defendant had procured the absence of prosecution witnesses), *review denied,* 456 So. 2d 1182 (Fla. 1984); *Pacifico,* 642 So. 2d at 1183-84 (reversible error for prosecutor to repeatedly characterize defendant as a liar, employ other epithets, and opine about characteristics of rapists in general).

In this case, as in *Pacifico*, *Jones,* and *Bass*, the prosecutor bolstered his attacks on the defendant's credibility by expressing his personal views and knowledge of extra-record matters. As in *Pacifico,* he invoked his expertise with the very type of crime at issue; and, as in *Bass,* he advised the jury that it was his personal experience that people like the defendant often lied in court. As in each of these cases, there was no evidence in the record to support the prosecutor's assertion that false claims of self-defense against police officers are common. Further, if such evidence existed, it would not have been admissible to impeach Mr. Sims' testimony, and the prosecutor certainly would not have been permitted to testify to it.[60] The prosecutor's argument interjected a consideration (what defendants do in other cases) that had no proper place in the jurors' deliberations and invited the jury to resolve any reasonable doubts against Mr. Sims based on the prosecutor's personal assurance that Mr. Sims was just one more defendant falsely claiming a police officer had threatened to kill him.[61] The prosecutor also improperly capitalized on the status of his office by invoking the motto "We

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[60]*See, e.g., Dorsey v. State,* 350 A.2d 665 (Md. 1976) (prosecutor could not elicit testimony from arresting officer that 80% of 1,000 people he had arrested in his career denied involvement in the crime), *cited in, Lowder,* 589 So. 2d at 935; *see generally,* Fla. Bar R. Prof. Conduct Rule 4-3.7 (lawyer may not testify in case in which he or she is an advocate).

[61]*See Hall,* 419 F.2d at 585 (improper for prosecutor to argue "I get a little tired of the police and the F.B.I. being the whipping boys of criminals and liars" and to vouch for agent's character). The prosecutor also expressed his opinion that "this defendant should be dead." (T. 1428) *See Newlon v. Armontrout,* 885 F.2d 1328, 1335 (8th Cir. 1989) (prosecutor improperly asked jurors to "kill him now"), *cert. denied,* 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990).

who labor here seek only the truth" and asserting that he -- in contrast to the defendant and his lawyers -- "can't make up evidence" and had "not stood up here and misled you."[62] This concerted attack on the defense obviously was intended to compensate for the weaknesses in the state's own motive theory by reassuring the jury that it could disregard Mr. Sims' explanation as a fabrication.

Although the arguments were not objected to, they were so egregious in the circumstances of this case that they deprived Mr. Sims of a fair and impartial trial and constitute fundamental error. *See King v. State,* 623 So. 2d 486, 488-89 (Fla. 1993); *Wilson v. State,* 294 So. 2d 327, 328 (Fla. 1974); *Jones,* 449 So. 2d at 315. First, the prosecutor's expression of personal opinion and knowledge regarding the frequent fabrication of self-defense claims was not a minor transgression in a gray area of the law, it was a clear violation of one of the most basic ethical rules that govern the conduct of lawyers in the courtroom. Second, the prosecutor's remarks did not concern merely a collateral matter but were calculated to undermine the credibility of Mr. Sims' testimony of self-defense in a case where Mr. Sims' very life depended on whether the jury believed him or not -- as the prosecutor himself observed, "If you believe him to be a liar, this case is over."[63] (T. 1430) Third, as discussed

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[62]"[A]ttacks on the personal integrity of opposing counsel" similarly "are wholly inconsistent with the prosecutor's role." *Redish v. State,* 525 So. 2d 928, 931 (Fla. 1st DCA 1988); *accord Adams v. State,* 192 So. 2d 762, 764 (Fla. 1966); *Valdez v. State,* 613 So. 2d 916, 918 (Fla. 4th DCA 1993); *Jenkins v. State,* 563 So. 2d 791 (Fla. 1st DCA 1990); *Fuller v. State,* 540 So. 2d 182, 184-85 (Fla. 5th DCA 1989); *Ryan v. State,* 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984), *review denied,* 462 So. 2d 1108 (Fla. 1985); *Briggs v. State,* 455 So. 2d 519, 521 (Fla. 1st DCA 1984); *Peterson v. State,* 376 So. 2d 1230, 1234 (Fla. 4th DCA 1979), *cert. denied,* 386 So. 2d 642 (Fla. 1980).

[63]*Compare Davis v. Zant,* 36 F.3d 1538, 1549-50 & n.17 (11th Cir. 1994) (improper prosecutorial argument constituted due process violation where calculated to undermine defendant's credibility and "whole defense hinged" on credibility determination); *United States v. Rios,* 611 F.2d 1335, 1343 (10th Cir. 1979) (defendant denied fair trial where credibility was "controlling issue" and prosecutor improperly expressed personal belief in defendant's guilt and insinuated defense investigator contrived testimony); *Garza,* 608 F.2d at 666 (prosecutor's improper vouching for government witnesses constituted plain error where they were "expressly intended to influence . . . critical credibility choice" between government witnesses and defendant's alibi witnesses) *with O'Callaghan v. State,* 429 So. 2d 691, 696 (Fla. 1983) (improper argument not fundamental error where it concerned a collateral matter).

in the preceding section, the prosecution's evidence in contradiction of Mr. Sims' claim of self-defense was circumstantial and extremely weak.[64]

Moreover, the purported inconsistencies between Mr. Sims' testimony and the physical evidence, asserted in the prosecutor's closing argument, were based on mischaracterizations of Mr. Sims' testimony. The prosecutor insisted that Mr. Sims' testimony regarding where he was standing when he shot Officer Stafford was inconsistent with the location of the casings:

> And you remember I left the blackboard drawn up. And you remember what the defendant said? We all remember the direction he says he is facing. I asked him a number of times because I wanted to make sure we were right. He is at the back of this car, he is facing this way. Toward 112.
>
> Well, you know he is lying. And you know he is lying because Jess Galan took the stand, said that the casings are over here. If the defendant is facing this way, and the gun is facing this way, then the casings eject to the right. (T. 1425)

For Mr. Sims to be facing state road 112, to the north, as the prosecutor argued, his back would have to be to the Cadillac, which would cause the casings to eject to the east, into the exit ramp roadway. (App. 3) Mr. Sims testified specifically, however, that his back was *not* to the Cadillac; he was between the two cars, with the rear of the Cadillac to his right, which means he was facing east, not north. (T. 1313, 1320; App. 3) The prosecutor himself had drawn a diagram, purportedly based on Mr. Sims' testimony, which placed him facing east, toward the exit ramp -- not north as the prosecutor asserted in closing. (T. 1341-42; App. 2-3) The prosecutor's misrepresentation of Mr. Sims' testimony therefore conveyed falsely to the jury that his testimony was irreconcilable with the location of the casings, when it was (as discussed above) more consistent with the physical evidence than the state's theory of the case.

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[64]*Compare Davis*, 36 F.3d at 1550-51 (evidence was insufficient to outweigh prosecutorial misconduct where it was unclear what actually happened in motel room and who actually killed victim); *United States v. Murrah,* 888 F.2d 24, 28 (5th Cir. 1989) (prosecutor's improper references to matters outside the record and attacks on integrity of defense counsel substantially affected defendant's right to fair trial where "government's case was based largely on circumstantial evidence, subject to varying reasonable inferences") *with State v. Murray,* 443 So. 2d 955, 956-57 (Fla. 1984) (improper arguments did not constitute reversible error where evidence of defendant's guilt was overwhelming).

The prosecutor also argued that Mr. Sims must have been lying because "He told you that officer Stafford falls backwards . . . into the street," but Stafford was "found with his head in the grass and [his] body this way," extending into the street. (T. 998-99, 1000-01, 1430-31, 1439) Although Mr. Sims' did testify that he thought Officer Stafford fell backwards and to the right side (T. 1317), he emphasized repeatedly that he didn't know where Officer Stafford ultimately fell. (T. 1321, 1323) As discussed in the preceding section, the physical evidence is more consistent with Stafford having been shot near the Cadillac, as Mr. Sims testified, and stumbling to the police car before falling than with the state's theory that Stafford was shot in front of the police car, while Sims was facing the grass. Finally, the prosecutor argued that Mr. Sims' testimony was inconsistent with the angle of the gunshot wounds, and dropped to his knees to demonstrate his hypothesis of Stafford's position.[65] (T. 1424-25, 1431, 1442) As discussed above, there was no evidence to support the prosecutor's contention that Officer Stafford was kneeling. Moreover, the state's own expert acknowledged that the angle of the gunshot wounds was consistent with Officer Stafford being shot while lunging in a "bent over" position, as Mr. Sims had testified. (T. 1238, 1352)

The prosecutor's closing argument mischaracterized the evidence, invited the jury to rely on his personal experience and opinion that persons in Mr. Sims' position frequently fabricate claims of self-defense, attacked defense counsels' integrity, and improperly capitalized on the prestige of the state attorney's office. This misconduct was plainly calculated to undermine the very heart of the defense and deprived Mr. Sims of a fair trial.

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[65]The prosecutor ignored the fact that the defense had objected to his demonstration during the rebuttal testimony of Dr. Mittelman and claimed that Mr. Sims had agreed to a demonstration of Officer Stafford's position that could not be reconciled with the downward angle of the gunshot wounds. (T. 1350, 1424-25) The prosecutor's "demonstration" of the lunge is separately asserted as error in section II, *supra*.

In this case, in which the evidence -- if it presented a jury question at all -- was so closely in equipoise, any one of the errors asserted above, and certainly all of them collectively, was sufficient to tip the scales improperly in favor of the state. The errors asserted here were not mere technical violations but went to the heart of the jury's ability to *fairly* evaluate Mr. Sims' testimony -- without the diversion of speculative and inflammatory evidence, misleading demonstrations of the defendant's testimony, or improper arguments by the prosecutor.

PENALTY PHASE ISSUES

V.

THE TRIAL COURT ERRED IN EXCUSING VENIREPERSON HIGHTOWER FOR CAUSE, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV.

Over defense objection, the trial court granted the state's motion to excuse venireperson Wilma Hightower for cause on the ground that she could not vote for the death penalty in this case.[66] (T. 779-80) The trial court's ruling requires reversal because it is not supported by the record but rather was based on the prosecution's mischaracterization of Ms. Hightower's voir dire responses.

When the trial court asked the venire about their views on the death penalty, Ms. Hightower did not indicate that she had any scruples against the death penalty. (T. 629-33) When asked whether she would have difficulty convicting the defendant of first-degree murder knowing that he would then be eligible for the death penalty, Ms. Hightower stated unequivocally that she would not. (T. 649-51) Similarly, although Ms. Hightower had previously seen Mr. Pitts in court and thought him to be a good lawyer, she stated clearly that

[66]Although reversal on this ground would require a new trial, not only a new sentencing hearing, it is included in the penalty phase section of the brief because it concerns the death qualification of a juror.

this would not cause her to be biased in favor of the defense. (T. 623, 702-03, 725-26) On the second day of voir dire, Ms. Hightower and a second juror recognized Mr. Sims' sister in the courtroom. Ms. Hightower indicated that Mr. Sims' sister had worked temporarily in the same department at HRS. (T. 743) The following colloquy occurred regarding Ms. Hightower's acquaintance with Mr. Sims' sister:

> MR. ROSENBERG: I appreciate you telling us this, Ms. Hightower. The one thing I wanted to ask you, this job as a juror is difficult enough, as you realize, without knowing any of the parties involved. Now that you realize this, do you think it may have an effect on you when you go back there and decided whether the defendant is guilty of first-degree murder?
>
> MS. HIGHTOWER: I don't think so.
>
> MR. ROSENBERG: You still think you can do it, whether you know her or not?
>
> MS. HIGHTOWER: Yes.
>
> MR. ROSENBERG: That would not affect you in any way?
>
> MS. HIGHTOWER: No.
>
> MR. ROSENBERG: Let's go to the second step. Do you know only one of his sisters?
>
> MS. HIGHTOWER: Yes, only one.
>
> MR. ROSENBERG: Now, let me take you to the second step. If I prove to you the defendant committed first degree murder, are you going to be able to sit in a death-penalty phase knowing that you know a family member? And if I prove the aggravating circumstances outweigh the mitigating, would you be able to vote for the death of this defendant?
>
> MS. HIGHTOWER: I am not sure.
>
> MR. ROSENBERG: I have nothing else.

(T. 743-44). Ms. Hightower was not questioned further by the court or by either party. Subsequently, when the state asked to excuse Ms. Hightower for cause, the prosecutor argued that Ms. Hightower had said "that she doesn't think that she could vote for death knowing a family member, even if she could find him guilty of first-degree murder" and argued that the response "'I don't think so' is enough for being struck for cause on the death penalty." (T. 780) Defense counsel correctly pointed out that Ms. Hightower had *not* said "what she could

or couldn't do" but had merely "said she didn't know." (T. 780) The trial judge excused Ms. Hightower over defense objection. (T. 780)

A juror is not "death-qualified," and may be properly excused for cause, if the record demonstrates that "the juror's views [on the death penalty] would 'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). Similarly, the "test for determining juror competency" in general "is whether the juror can lay aside any bias or prejudice and render [her] verdict solely upon the evidence presented and the instructions on the law given to [her] by the court." *Lusk v. State,* 446 So. 2d 1038, 1041 (Fla.), *cert. denied,* 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). This Court has held that "[i]t is the duty of a party seeking exclusion to demonstrate, through questioning, that a potential juror lacks impartiality." *Trotter v. State,* 576 So. 2d 691, 694 (Fla. 1990). When the trial court excuses a prospective juror for cause, the question on appeal is whether the trial court's findings "are fairly supported by the record." *Id.*

In the instant case, the prosecutor asserted that Ms. Hightower said she "didn't think" she could vote for the death penalty -- words that convey a definite bias against the death penalty and which would have been proper grounds to excuse her for cause. *See Randolph v. State,* 562 So. 2d 331, 335-36 (Fla.), *cert. denied,* 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); *Lara v. State,* 464 So. 2d 1173, 1178-79 (Fla. 1985). The record establishes, however, that Ms. Hightower responded, "I am not sure" -- an answer that does not convey bias but only a slight hesitation. This response, without more, is not disqualifying.[67] The

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[67]*Compare Foster v. State,* 614 So. 2d 455, 462 (Fla. 1992) (prospective juror who said she did not believe she could vote for death penalty in any case other than murder in a prison setting and was not sure she could set aside her feelings if murder was sufficiently aggravated was properly excused for cause), *cert. denied,* ___ U.S. ___, 114 S.Ct. 398, 126 L.Ed.2d 346 (1993), *and Trotter,* 576 So. 2d at 694 (where venireperson answered "'I don't know' or otherwise equivocated ten times" regarding his ability to follow the law, he was properly excused for cause). In both of these cases, the record as a whole supported the conclusion that the juror could not be impartial. In this case, the prosecution seized upon a single less-than-certain response, which was not followed up by further questioning, in a record that otherwise clearly demonstrated the prospective juror's ability to set aside her personal feelings and follow (continued...)

prosecution failed to demonstrate through its questioning that Ms. Hightower could not disregard her passing acquaintance with Mr. Sims' sister and follow the law in the penalty phase. *Trotter,* 576 So. 2d at 694. Because the trial court's decision to excuse Ms. Hightower for cause was based on the prosecution's erroneous characterization of her voir dire responses, and is not supported by the record, this case should be remanded for a new trial.

VI.

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE JURY WAS PRECLUDED FROM CONSIDERING, AND THE TRIAL JUDGE REFUSED TO CONSIDER, EVIDENCE OF IMPERFECT SELF-DEFENSE AS A MITIGATING CIRCUMSTANCE, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Mr. Sims' testimony of self-defense was not only the central issue at the guilt/innocence phase of the case, it was also the most powerful evidence offered to support a sentence less than death. The trial court refused, however, to instruct the jury on the one statutory mitigating circumstance that would have given the jurors a vehicle to consider this evidence in mitigation at the penalty phase, and the instructions that *were* given did not adequately inform the jurors that they could consider imperfect self-defense as a mitigating circumstance. The jury was therefore precluded from giving effect to relevant mitigating evidence in violation of the state and federal constitutions. This error was repeated when the trial judge expressly refused to consider any evidence of self-defense in his independent weighing of aggravating and mitigating circumstances, improperly dismissing it as "lingering doubt" evidence.

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[67](...continued)
the law. *See also Hoefert v. State,* 617 So. 2d 1046, 1049 (Fla. 1993) (venireman who "stated unequivocally that he would automatically vote against imposition of the death penalty in all cases without regard to the evidence shown or the instructions of the court" was properly excused for cause); *Sanchez-Velasco v. State,* 570 So. 2d 908, 915 (Fla. 1990) (prospective jurors who "indicated unequivocally" they could not set aside personal views and vote for death penalty properly excused for cause), *cert. denied,* 500 U.S. 929, 111 S.Ct. 2045, 114 L.Ed.2d 129 (1991); *Robinson v. State,* 487 So. 2d 1040, 1042 (Fla. 1986) (venirepersons who placed themselves in the "'end zone with the death penalty opponents'" properly excused for cause); *Cave v. State,* 476 So. 2d 180, 183-84 (Fla. 1985) (venirepersons who "unequivocally stated that their opposition to the death penalty would not permit them to apply the law or view the facts impartially" properly excluded for cause), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986).

A.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE REQUESTED JURY INSTRUCTION ON THE STATUTORY MITIGATING CIRCUMSTANCE OF VICTIM PARTICIPATION, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

During the charge conference at the penalty phase, the defense requested an instruction on the mitigating circumstance that "[t]he victim was a participant in the defendant's conduct or consented to the act," § 921.141(6)(c), Fla. Stat., on the ground that the jury should be permitted to consider the evidence of self-defense -- even if not sufficient to justify the killing -- in mitigation. (T. 1562-65) The state argued that the defense was not entitled to the instruction because the jury had already rejected self-defense at the guilt phase and asserted that the victim participation mitigator applies only to killings of a co-felon. (T. 1563, 1565) The trial court denied the requested instruction. (T. 1565)

The trial court's refusal to give the requested instruction was error. A defendant in a capital case is entitled to have the jury instructed on any statutory mitigating circumstances supported by the evidence. *Bryant v. State,* 601 So. 2d 529, 533 (Fla. 1992); *accord Stewart v. State,* 558 So. 2d 416, 420 (Fla. 1990); *Robinson v. State,* 487 So. 2d 1040, 1042-43 (Fla. 1986); *Toole v. State,* 479 So. 2d 731, 733-34 (Fla. 1985); *cf. Bowden v. State,* 588 So. 2d 225, 231 (Fla. 1991) (where "evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required"), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992). The evidence need not conclusively establish the mitigating circumstance; the trial judge must give the requested instruction, even if the evidence is subject to debate or the judge is personally skeptical of its sufficiency. *Robinson,* 487 So. 2d at 1043; *see also Bowden,* 588 So. 2d at 231 (trial judge properly instructed jury on aggravating circumstance he ultimately did not find applicable); *Williams v. State,* 588 So. 2d 44, 45 (Fla. 1st DCA 1991) (defendant entitled to instruction on his theory of defense even if supported only by his own testimony).

Contrary to the state's contention, the victim participation mitigator is not expressly limited to the circumstance of killing a co-felon. The plain language of the statute permits its application to a case in which the victim was "a participant in the defendant's conduct" by provoking the altercation that led to the killing.[68] *Cf. Wilson v. State,* 436 So. 2d 908, 912 (Fla. 1983) (trial court did not err in failing to find victim participation mitigator where there was no evidence victim had "instigated the criminal episode"), *death sentence vacated on new appeal*, 433 So. 2d 1019 (Fla. 1986); *Chambers v. State,* 339 So. 2d 204, 208-09 (Fla. 1976) (England, J., concurring) (jury could have found victim consented to act causing death by "voluntarily shar[ing] a long-standing sado-masochistic relationship which included severe and disabling beatings").[69]

There was ample evidence in the record to support the requested instruction. Mr. Sims testified at the guilt/innocence phase that Officer Stafford choked him, used racist epithets demonstrating a profound hatred of African-Americans, and threatened to kill him, causing Mr. Sims to fear for his life and to struggle in self-defense. Moreover, contrary to the state's contention and the trial court's sentencing order, the jury did not, by returning a guilty verdict, necessarily reject Mr. Sims' testimony. The state proceeded on alternative theories of felony

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[68]The mitigating circumstances enumerated in the sentencing guidelines statute, which are patterned largely after those in the capital sentencing statute, make this interpretation explicit. The sentencing court in a non-capital case may consider that, "[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident." § 921.0016(4)(f) (1993). A capital defendant is surely entitled to an equally broad interpretation of the analogous statutory mitigating circumstance. To the extent that the language of the capital sentencing statute is more ambiguous, it must be construed in the defendant's favor. § 775.021(1), Fla. Stat. (1993). Significantly, Florida's statute, unlike those of some other states, does not require the victim to have been a participant "in the defendant's *homicidal* conduct." *See* Ill. Ann. Stat. ch. 720 § 5/9-1(c)(3) (1993); N.C. Gen. Stat. § 15A-2000(f)(3) (1993); 42 Pa. Cons. Stat., § 9711(6)(e) (1982 & Supp. 1994).

[69]Inverting the facts of *Chambers* demonstrates the propriety of applying this mitigating circumstance to cases of imperfect self-defense. If the victim, Connie Weeks, had instead shot Chambers, after years of abuse, and was convicted of first-degree murder (despite asserting battered woman's syndrome as a defense), Weeks, like Chambers, would be properly entitled to an instruction on the victim participation mitigator. Chambers was equally a participant in the battering relationship and, indeed, appeared to be the instigator of the violence. Although other statutory mitigating circumstances could capture the psychological aspects of Weeks' history of abuse, only the victim participation mitigating circumstance would give the sentencing jury a vehicle to consider Chamber's conduct as a factor bearing on Weeks' moral culpability.

murder and premeditated murder, and the jury was instructed that self-defense was not available if Mr. Sims was engaged in a felony at the time of the killing.[70] (T. 1412-13, 1452-53, 1463)

The catch-all instruction that the jury could consider in mitigation "[a]ny other aspect of the defendant's character or record, and any other circumstance of the offense," was insufficient in this case to cure the trial court's error in refusing the victim participation instruction. (T. 1597) Although defense counsel argued self-defense and lack of premeditation as mitigation, (T. 1585-86), the prosecutor argued that, by convicting Sims of first-degree murder, the jury had necessarily found Mr. Sims' testimony of self-defense to be false and had accepted the state's theory of the case: "Why did this defendant kill Officer Charles Stafford? To get away, to escape. He does not want to be arrested. You have already found him guilty of first degree murder," (T. 1576-77); "And you know what? You have already found him to be a liar. You have found his story, by convicting him of first degree murder, to be untruthful to you." (T. 1579) When defense counsel asked the jury to consider Officer Stafford's "participat[ion]" in the offense, the prosecutor objected, and the trial court sustained the objection, thereby placing the court's imprimatur on the state's erroneous contention that Officer Stafford's actions could not, as a matter of law, be considered in sentencing.[71] (T.

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[70]Moreover, a self-defense claim could founder on any one of the numerous technical requirements for the defense without the jury rejecting the defendant's testimony in its entirety. For example, the jury could have concluded that Mr. Sims should have retreated once he obtained Officer Stafford's gun. The prosecutor maintained in closing argument that Mr. Sims must have formed a conscious decision to kill in that moment. (T. 1412) This should not preclude the jury from considering the full context of the struggle in mitigation at the penalty phase.

[71]Although defense counsel did refer again to Officer Stafford's "participa[tion]" as an instigator of the altercation, without objection, the prior objection to the same argument had already conveyed to the jury that this was not a proper mitigating circumstance. (T. 1593) When defense counsel argued that the jury should consider that Mr. Sims was only 25 at the time of the crime, the prosecutor objected, "it's not a mitigating factor," and the judge sustained the objection. (T. 1588) Almost immediately thereafter, on the next page of the transcript, the prosecutor stated, in response to defense counsel's question, "What did Officer Stafford do to participate in this thing?", "I object to this too" thus conveying to the jury that Officer Stafford's conduct similarly was "not a mitigating factor." (T. 1589) The trial court's ruling, sustaining the objection, necessarily endorsed the prosecution's position.

1589) The prosecutor's argument and the trial court's ruling therefore conveyed to the jury that self-defense and provocation were *not* among the circumstances of the offense the jury could consider at the penalty phase of the trial.

The catch-all instruction did not resolve the conflicting arguments of counsel, since it does not tell the jurors *what* "other circumstance[s] of the offense" they may consider in mitigation. Thus, on this record, there is a reasonable likelihood that the jury did not understand it could consider imperfect self-defense or provocation as a mitigating circumstance. *See Mills v. Maryland,* 486 U.S. 367, 375-76, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988).[72] Indeed, the reasonableness of appellant's interpretation of the jury instructions in this case is demonstrated by the trial court's own sentencing order, which concluded erroneously that a conviction of first-degree murder foreclosed consideration of self-defense in mitigation at the penalty phase. *See id.* at 381 (reasonableness of petitioner's interpretation of jury instructions demonstrated by state appellate court's divided decision regarding the "natural" meaning of the instructions).

As discussed further in the following section, evidence of self-defense or provocation by the victim, though not sufficient to justify or excuse the underlying offense, is core mitigating evidence under the eighth amendment. Not only is a capital defendant constitutionally entitled to present such evidence to the sentencing jury, but "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry,* 492 U.S. at 319.[73] Whether "interposed by statute . . .; by the sentencing court . . .; or by evidentiary ruling," a barrier that prevents the jury from considering or giving effect to

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[72]*See also California v. Brown,* 479 U.S. 538, 546, 107 S.Ct. 837, 842, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring) (prosecutor's argument, in combination with instructions, created ambiguity regarding the factors actually considered by the jury); *Penry v. Lynaugh,* 492 U.S. 302, 326, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256, 283 (1989).

[73]*Accord Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma,* 455 U.S. 104, 113-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1980); *Skipper v. South Carolina,* 476 U.S. 1, 4-8, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986); *Hitchcock v. Dugger,* 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Copeland v. Dugger,* 565 So. 2d 1348, 1349-50 (Fla. 1990); *Downs v. Dugger,* 514 So. 2d 1069, 1070-71 (Fla. 1987).

mitigating evidence requires resentencing, because "[t]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" *Mills,* 486 U.S. at 375, 376-77 (citations omitted) (quoting *Lockett,* 438 U.S. at 605); *accord Penry*, 492 U.S. at 328.

In this case, "[i]n light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that [Sims] did not deserve to be sentenced to death based upon his mitigating evidence" of self-defense. *Penry,* 492 U.S. at 326; *see also State v. Lawrence,* 541 N.E.2d 451, 457 (Ohio 1989) (jury reasonably could have concluded that it could not give effect to mitigating evidence of defendant's mental illness where trial court failed to correct prosecutor's suggestion that finding of mental-state mitigating circumstances was foreclosed by jury's rejection of insanity defense and trial court applied same, incorrect, standard in its independent weighing of aggravating and mitigating factors). As discussed further below, a new sentencing proceeding before a jury is therefore required.

B.

THE TRIAL COURT ERRED IN CHARACTERIZING THE EVIDENCE OF SELF-DEFENSE AS "LINGERING DOUBT" EVIDENCE AND REFUSING TO CONSIDER IT IN MITIGATION, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The likelihood that the jury did not understand that it could give effect to the evidence of self-defense as a mitigating circumstance is underscored by the trial judge's explicit refusal to consider such evidence as mitigation. *See Hitchcock,* 481 U.S. at 398-99; *accord Copeland,* 565 So. 2d at 1349-50; *Downs,* 514 So. 2d at 1071-72. Apparently accepting the state's improperly narrow interpretation of the victim participation mitigating circumstance, the trial court refused to consider it, asserting that no evidence had been presented "about [this] factor." (R. 553-54) Further, under the heading of "nonstatutory mitigating factors" the sentencing order states that Mr. Sims' asserted lack of premeditation and claim of self-defense are

"examples of a 'lingering doubt' argument and as such are invalid mitigating circumstances. Franklin v. Lynaugh, [487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 2320] (1988)."[74] (R. 554) The trial court thus interpreted the term "lingering doubt" to encompass any evidence of self-defense or lack of premeditation insufficient to constitute a full defense to the homicide. This reflects a fundamental misunderstanding of the nature and function of mitigating evidence in a capital case as explained by both this Court and the United States Supreme Court.

The trial court erroneously equated imperfect self-defense with a failed alibi or mistaken identity claim. Only the latter type of evidence -- which refers to the degree of certainty with which the state has proved the defendant "indeed committed the murder" -- is properly categorized as "lingering doubt." *See Burr v. State,* 466 So. 2d 1051, 1054 (Fla.), *cert. denied*, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); *accord Buford v. State,* 403 So. 2d 943, 953 (Fla. 1981), *cert. denied,* 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1982); *Franklin,* 487 U.S. at 188 (O'Connor, J., concurring). An incomplete claim of justification or excuse relates to the defendant's moral culpability for the crime (not to *whether* he committed it) and is therefore constitutionally protected mitigating evidence. Thus, while it is true that this Court has held that "lingering" or "residual doubt" is not a proper mitigating circumstance,[75] it has never defined that term, as the trial court did here, to preclude consideration of an incomplete claim of justification or excuse as a mitigating circumstance at the penalty phase. To the contrary, this Court has held repeatedly that mitigating circumstances include precisely such evidence. *E.g., Dixon v. State,* 283 So. 2d 1, 10 (Fla.

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[74]The trial judge misconstrued *Franklin* as holding that residual doubt is an "invalid mitigating circumstance." *Franklin* merely held that a capital defendant is not constitutionally *entitled* to consideration of residual doubt as a mitigating circumstance. 487 U.S. at 173.

[75]*Preston v. State,* 607 So. 2d 404, 411 (Fla. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); *Hitchcock v. State,* 578 So. 2d 685, 690 (Fla. 1990), *vacated on other grounds,* ___ U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); *Tafero v. Dugger,* 520 So. 2d 287, 289 n. 1 (Fla. 1988); *White v. Dugger,* 523 So. 2d 140 (Fla), *cert. denied,* 488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988); *Aldridge v. State,* 503 So. 2d 1257, 1259 (Fla. 1987); *King v. State,* 514 So. 2d 354, 358 (Fla. 1987), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988); *Burr,* 466 So. 2d at 1054; *Buford,* 403 So. 2d at 953.

1973), *cert. denied sub nom Hunter v. Florida,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); *accord Morgan v. State,* 639 So. 2d 6, 13 (Fla. 1994); *Knowles v. State,* 632 So. 2d 62, 67 (Fla. 1993); *Campbell v. State,* 571 So. 2d 415, 418-419 (Fla. 1990); *Huckaby v. State,* 343 So. 2d 29, 33 (Fla.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).

Mitigating factors include any evidence that tends to "extenuat[e] or reduc[e] the degree of moral culpability for the crime committed." *See Cheshire v. State,* 568 So. 2d 908, 911 (Fla. 1990) (quoting *Rogers v. State,* 511 So. 2d 526, 534 (Fla. 1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)); *accord Maxwell v. State,* 603 So. 2d 490, 491 n.2 (Fla. 1992); *see also* Carol Steiker & Jordan Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing,* 102 YALE L.J. 835, 846-47 (1992). It is axiomatic that mitigating evidence need not rise to the level sufficient to justify or excuse the underlying offense.[76] In *Eddings, supra,* the Supreme Court held that both the trial court and the Oklahoma Court of Criminal Appeals had violated the eighth amendment by refusing to consider as mitigation the defendant's emotional disturbance and childhood abuse because such evidence did not "support a legal excuse from criminal liability," 455 U.S. at 109-10, 113. This Court has accordingly made clear that a jury's rejection of a defense of insanity or voluntary intoxication at the guilt/innocence phase of the trial "does not preclude consideration of statutory and nonstatutory mental mitigation" based on the same evidence. *Knowles,* 632 So.2d at 67; *accord Morgan,* 639 So. 2d at 13-14; *Campbell,* 571 So. 2d at 418-19; *see also Holsworth v. State,* 522 So. 2d 348, 354 (Fla. 1988) (jury's life recommendation could have been properly based on evidence of defendant's intoxication despite rejection of voluntary intoxication defense at guilt phase); *Amazon v. State,* 487 So. 2d 8, 12-13 (Fla.) (jury's life recommendation could have been properly based on combination of guilt phase "depraved

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[76]The dictionary definition of "[m]itigating circumstances" is, "[s]uch as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." BLACK'S LAW DICTIONARY 903 (5th ed. 1979); *accord Tucker v. Zant,* 724 F.2d 882, 891 (11th Cir. 1984); *Spivey v. Zant,* 661 F.2d 464, 467-72 (5th Cir. Unit B 1981), *cert. denied,* 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982).

mind" defense and other mitigating evidence), *cert. denied*, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986). It is therefore improper for the trial court to rely on the jury's guilty verdict as grounds for refusing to consider such evidence in mitigation. *Morgan,* 639 So. 2d at 13.

Evidence of imperfect self-defense or victim provocation, no less than evidence of an incomplete or imperfect mental state defense, bears directly on the defendant's moral culpability. Like evidence of a defendant's relatively minor participation in the crime or his domination by a co-defendant, it manifestly concerns the "circumstances of the offense" and the defendant's state of mind -- "a critical facet of the individualized determination of the culpability required in capital cases." *Jackson v. State,* 575 So. 2d 181, 190 (Fla. 1991) (quoting *Tison v. Arizona,* 481 U.S. 137, 156, 107 S.Ct. 1676, 1687, 95 L.Ed.2d 127 (1987)); *see also Downs v. State,* 572 So. 2d 895, 899 (Fla. 1990) (evidence tending to show defendant was not the triggerman was relevant to nature and circumstances of the offense), *cert. denied*, 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); *Cooper v. Dugger,* 526 So. 2d 900, 902-03 (Fla. 1988) (refusal to allow evidence to support claim of domination by co-defendant violated *Lockett* and *Hitchcock*). While this Court has addressed imperfect self-defense at the penalty phase primarily as it operates to rebut the "CCP" aggravating circumstance -- that the killing "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," § 921.141(5)(i), Fla. Stat. -- it has recognized the independent mitigating significance of such evidence.[77] Thus, in *Christian v. State,* 550 So. 2d 450, 452

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[77]Six states list the defendant's reasonable belief in a moral justification for his conduct as a separate statutory mitigating circumstance. Cal. Penal Code §190.3(f) (1988 & Supp. 1995); Colo. Rev. Stat. § 16-11-103(4)(j) (Supp. 1994); Ky. Rev. Stat. § 532.025(2)(b)(4) (Supp. 1994); La. Code Crim. Proc. art. 905.5(d) (1984 & Supp. 1994); N.M. Stat. Ann. § 31-20A-6.F (1990 & Supp. 1993); Tenn. Code Ann. § 39-13-204(j)(4) (1991 & Supp. 1994). Five others list provocation by the victim as a statutory mitigating circumstance. Md. Ann. Code art. 27, § 413(g)(3) (1992 & Supp. 1994); Ohio Rev. Code Ann. § 2929.04(B)(2) (1993 & Supp. 1994); Ore. Rev. Stat. § 163.150(1)(b)(C) (1993) (special issue -- whether "the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased"); S.C. Code. Ann. § 16-3-20(C)(b)(8) (Supp. 1993); Tex. Crim. Proc. Code Ann. § 37.0711(2)(b)(3) (Supp. 1995) (for offenses committed prior to September 1, 1991, third special question asks whether defendant's conduct was unreasonable (continued...)

(Fla. 1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990), although the trial judge found three aggravating circumstances in addition to CCP, and no mitigating factors, this Court held that the evidence of provocation and threats by the victim was not only sufficient to constitute a "pretense of moral or legal justification," rendering the CCP aggravator inapplicable, but was also sufficient mitigation to support the jury's life recommendation. *See also Banda v. State,* 536 So. 2d 221, 224-25 (Fla. 1988) (where victim had threatened defendant prior to killing, evidence established "at least a pretense of moral or legal justification" rendering CCP aggravator inapplicable and death sentence disproportionate), *cert. denied*, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989); *Cannady v. State,* 427 So. 2d 723, 730-33 (Fla. 1983) (where defendant asserted repeatedly in his confession that he shot victim only because victim jumped at him, evidence established "at least a pretense of moral or legal justification" negating CCP aggravating circumstance and, coupled with other mitigating evidence, supported jury's life recommendation); *Gilvin v. State,* 418 So. 2d 996, 998-99 (Fla. 1982) (where defendant testified that victim made sexual advances to him and physically assaulted him, although evidence was sufficient to sustain conviction of premeditated murder, it was also sufficient to support jury's life recommendation); *Jacobs v. State,* 396 So. 2d 713, 718 (Fla. 1981) (jury's life recommendation could have been based in part on defendant's perception that her actions were "a necessary measure to protect her family"). A capital sentencer therefore may not properly refuse to consider such evidence in mitigation at

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[77](...continued)
in response to provocation, if any, by the victim). The enumeration of (incomplete) justification, including provocation, as a *statutory* mitigating circumstance demonstrates its location at the core of "constitutionally indispensable" mitigating factors -- those that tend to reduce the defendant's moral culpability for the offense. *See* Steiker & Steiker, *supra,* at 848-51.

Ten other states, while not listing incomplete justification or provocation separately, have a victim participation mitigating circumstance that is worded, like Florida's, broadly enough to encompass imperfect self-defense and provocation. Ala. Code §13A-5-51(3) (1994); Ind. Code Ann. § 35-50-2-9(c)(3) (1986 & Supp. 1994); Miss. Code Ann. § 99-19-101(6)(c) (1994); Mo. Rev. Stat. § 565.032.3(3) (Supp. 1994); Mont. Code Ann. § 46-18-304(5) (1993); Neb. Rev. Stat. § 29-2523(2)(f) (1989 & Supp. 1993); Nev. Rev. Stat. Ann. § 200.035.3 (1992 & Supp. 1993); N.J. Rev. Stat. § 2C: 11-3c(5)(b) (Supp. 1994); Va. Code Ann. § 19.2-264.4B(iii) (1990 & Supp. 1994); Wyo Stat. § 6-2-102(j)(iii) (Supp. 1994).

the penalty phase. *See State v. Fierro,* 804 P.2d 72, 87-88 (Ariz. 1990) (trial court erred in failing to consider, as mitigation, evidence that defendant felt his life was in danger and did not specifically intend to kill victim, though evidence was insufficient to justify or excuse the crime).[78]

In this case, as in *Morgan*, it is apparent from the sentencing order that the trial judge labored under the mistaken belief that the jury's verdict at the guilt/innocence stage of the trial precluded him from considering Mr. Sims' most important mitigating evidence at the penalty phase. Nowhere in the sentencing order did the trial judge address the substance of Mr. Sims' testimony. Thus, "the trial judge did not evaluate the evidence [of self-defense] in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Eddings,* 455 U.S. at 113 (emphasis in original). As this Court has admonished, the sentencer in a capital case "may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from . . . consideration." *Campbell,* 571 So. 2d at 419 (quoting *Eddings,* 455 U.S. at 114-15); *accord Dailey v. State,* 594 So. 2d 254, 259 (Fla. 1991); *Brown v. State,* 526 So. 2d 903, 908 (Fla.), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988); *Downs,* 514 So. 2d at 1070-71.

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[78]*See also Sumner v. Shuman,* U.S. 483 U.S. 66, 79 n.7, 107 S.Ct. 2716, 2724 n.7, 2725, 97 L.Ed.2d 56 (1987) (mandatory death penalty for "life-term" inmates unconstitutional because it does not permit consideration of mitigating circumstances such as victim provocation or belief in a moral justification for the killing); *Roberts v. Louisiana,* 431 U.S. 633, 641, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977) (mandatory death penalty for murder of police officer unconstitutional because it does not permit consideration of mitigating circumstances, including reasonable belief in moral justification); *Jurek v. Texas,* 428 U.S. 262, 272 n.7, 96 S.Ct. 2950, 2956 n.7, 49 L.Ed.2d 929 (1976) (noting with approval that third special issue in Texas statute could encompass claims of imperfect self-defense), *followed in Evans v. State,* 601 S.W.2d 943, 946 (Tex. Ct. Crim. App. 1980) (expressly construing third special issue to encompass imperfect self-defense claims); *Chambers v. Armontrout,* 907 F.2d 825, 832-33 (8th Cir.), (trial attorney's ineffective assistance of counsel in failing to present evidence of self-defense prejudiced defendant as to both guilt and penalty phases of trial), *cert. denied*, 498 U.S. 950, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990).

C.

THE MITIGATING EVIDENCE OF IMPERFECT SELF-DEFENSE AND VICTIM PARTICIPATION IS CRITICAL TO THE WEIGHING PROCESS.

The likelihood that the jury was misled as to its ability to consider the evidence of self-defense in mitigation, and the trial court's express refusal to do so, require a new sentencing proceeding in this case or, alternatively, the imposition of a life sentence. Here, as in cases involving *Hitchcock* error, the combination of the improperly limited jury instructions on mitigation and the trial judge's explicitly-stated belief that he could not legally consider the evidence of self-defense at the penalty phase denied Mr. Sims the full consideration of mitigating evidence required by the state and federal constitutions. *Maxwell,* 603 So. 2d at 492-493; *Copeland,* 565 So. 2d at 1349-50; *Cooper,* 526 So. 2d at 903; *Mikenas v. Dugger,* 519 So. 2d 601, 602 (Fla. 1988); *Foster v. Dugger,* 518 So. 2d 901, 902 (Fla. 1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 945 (1988); *Downs,* 514 So. 2d at 1072.

On the record in this case, it cannot be assumed that these errors were "harmless beyond a reasonable doubt or had no effect on the jury or the judge." *Cooper,* 526 So. 2d at 903 (citing *Hitchcock, supra*). To the contrary, when *all* the mitigating evidence is considered in this case, the sentence of death is disproportionate. As discussed with respect to the guilt phase issues, Mr. Sims' explanation of how the shooting occurred was not rebutted by any contrary, direct testimony, nor was it inconsistent with the physical evidence. Moreover, as discussed above, it cannot be concluded from this record that the jury found Mr. Sims' testimony incredible. Even if the four[79] aggravating circumstances found by the trial court are

[79]The trial judge found as aggravating circumstances (1) that Mr. Sims was under sentence of imprisonment at the time of the shooting, § 921.141(5)(a), Fla. Stat.; (2) that Mr. Sims had previously been convicted of a felony involving the use or threat of violence to the person, *id.* § 921.141(5)(b); (3) that the capital felony was committed while Mr. Sims was engaged in the commission of a robbery, *id.* § 921.141(5)(d); and (4) that the capital felony was committed for the purpose of avoiding arrest and to disrupt or hinder the enforcement of laws, and the victim was a law enforcement officer, *id.* §§ 921.141(5)(e), (g) & (j). The trial court properly treated the three aggravating circumstances related to Officer Stafford's status as a law enforcement officer as a single aggravator. The propriety of two of those findings is, however, disputed below.

upheld on appeal, the improper limitation on the consideration of mitigating evidence at least requires resentencing before a jury. As this Court has emphasized, the weighing process required by Florida's capital sentencing statute "is not a mere counting process . . . but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." *Dixon,* 283 So. 2d at 10; *accord Bates v. State,* 465 So. 2d 490, 493 (Fla. 1985).

The jury in this case recommended death by a vote of only 8 to 4. (T. 1600, R. 540) If the trial court had properly instructed the jurors that they could consider as a mitigating circumstance Officer Stafford's participation in the altercation that led to his death, the outcome of the weighing process could well have been different. The evidence of imperfect self-defense and victim provocation, if properly considered, would not only have had independent mitigating significance but would also have reduced the weight of the proposed aggravating circumstances and increased that of the other mitigating evidence.

First, the significance of the felony murder aggravating circumstance, which was premised on the underlying robbery conviction, could be given little weight because there was no *independent* felony, and the gun was taken in a struggle initiated by Officer Stafford. Second, the fact that the victim was a law enforcement officer could be given less weight in light of the evidence that he had used excessive force against Mr. Sims, and the avoiding arrest aggravating circumstance should be negated entirely based on evidence of a contrary motive for the shooting. Third, the aggravating circumstances that Mr. Sims was under sentence of imprisonment (because he was on control release) and had a prior conviction for armed robbery would have less significance if the jury was properly permitted to consider the extenuating circumstances of the instant offense.

The evidence of imperfect self-defense also adds weight to the additional mitigating evidence presented at the penalty phase. This evidence established that Mr. Sims was a good and loving father to his children, and a loving son and brother (T. 1500, 1508-09, 1511, 1516, 1522, 1523, 1531) He had been well-behaved throughout his youth, was not violent or

bullying, was well-liked in the neighborhood, and worked after school. (T. 1498, 1499, 1502-03, 1516, 1517, 1518, 1521-22, 1527) Mr. Sims also expressed remorse for Officer Stafford's death; he testified that he had confessed voluntarily to the crime both to lift the burden of guilt he felt and also to provide resolution for Officer Stafford's family. (T. 1543, 1545-46) Mr. Sims' family expressed their belief that he had shot Officer Stafford in self-defense. (T. 1505, 1524) The positive testimony about Mr. Sims' background and character, and his genuine remorse for Officer Stafford's death, demonstrated Mr. Sims' capacity for rehabilitation. *Combined* with the evidence that Officer Stafford initiated the struggle with Mr. Sims, this mitigating evidence presents an entirely different picture of Mr. Sims and of the offense than that presented by the state.

Even if Officer Stafford's conduct did not justify or excuse his shooting, it is a critical factor in assessing Mr. Sims' moral culpability and determining whether the proper punishment is life imprisonment without parole or death. The evidence the jury was told to disregard, and that the trial court refused to consider, is the evidence that makes all the difference in whether Mr. Sims was perceived as a ruthless killer beyond rehabilitation, as the state suggested, or as a flawed human being, with redeeming qualities, who tragically overreacted to a police officer's use of force against him -- conduct that, even if it was sufficiently culpable to warrant a conviction of first-degree murder, does not warrant the death penalty.

The evidence of self-defense, combined with the additional mitigating evidence presented here, plainly could have outweighed the aggravating circumstances and supported a sentence of life imprisonment, *if* it had properly been considered in mitigation. *See Cooper v. State,* 581 So. 2d 49, 51 (Fla. 1991) (sufficient nonstatutory mitigation to outweigh four aggravating circumstances in killing of police officer); *Hallman v. State,* 560 So. 2d 223, 226-27 (Fla. 1990) (sufficient nonstatutory mitigation, particularly concerning circumstances of the killing, to outweigh four aggravating circumstances in shooting of security guard); *Christian,* 550 So. 2d at 452; *Brown v. State,* 526 So. 2d 903, 907-08 (Fla. 1988) (sufficient mitigation to outweigh three valid aggravating circumstances in shooting of police officer); *see also*

O'Callaghan v. State, 542 So. 2d 1324, 1326 (Fla. 1989) (exclusion of one nonstatutory mitigating circumstance from jury's consideration required resentencing despite presence of four valid aggravating circumstances), *discussed in Maxwell,* 603 So. 2d at 493. When *all* the mitigating circumstances are properly considered in this case, it is not one of "the most aggravated and unmitigated" of capital murders.[80] *See Dixon,* 283 So. 2d at 7. Mr. Sims' sentence of death should therefore be vacated and, at the least, remanded for a new sentencing proceeding before a properly instructed jury.[81]

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[80]For example, in most of the cases involving killings of law enforcement officers in which the death penalty has been imposed and upheld on appeal, the defendant was committing or fleeing from the commission of an independent felony. *See Pietri v. State,* 644 So. 2d 1347 (Fla. 1994) (defendant escaped from prison, burglarized home and shot officer after chase in stolen truck); *Hill v. State,* 643 So. 2d 1071 (Fla. 1994) (defendant shot officer attempting to arrest co-defendant following bank robbery); *Armstrong v. State,* 642 So. 2d 730 (Fla. 1994), (officer shot during robbery of restaurant), *petition for cert.* filed (Feb. 24, 1995); *Griffin v. State,* 639 So. 2d 966 (Fla. 1994) (defendant fleeing after hotel burglary shot officer who stopped car), *cert. denied,* ___ U.S. ___, 63 U.S.L.W. 3658 (Mar. 6, 1995); *Valdes v. State,* 626 So. 2d 1316 (Fla. 1993) (defendants shot officer during escape attempt), *cert. denied,* ___ U.S. ___, 114 S.Ct. 2725, 129 L.Ed.2d 849 (1994); *Johnson v. State,* 608 So. 2d 4 (Fla. 1992) (defendant who had killed and robbed two civilians shot investigating officer), *cert. denied,* ___ U.S. ___, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); *Patten v. State,* 598 So. 2d 60 (Fla. 1992) (defendant who had been driving stolen car fled on foot, waited in alley, and shot pursuing officer), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1818, 123 L.Ed.2d 448 (1993); *Cruse v. State,* 588 So. 2d 983 (Fla. 1991) (defendant shot officers who responded after he opened fire in shopping center), *cert. denied,* ___ U.S. ___, 112 S.Ct. 2949, 119 L.Ed.2d 572 (1992); *Jones v. State,* 580 So. 2d 143 (Fla.) (defendants, who had escaped from prison, shot officer who stopped car), *cert. denied,* 502 U.S. 878, 112 S.Ct. 221, 116 L.Ed.2d 179 (1991); *Van Poyck v. State,* 564 So. 2d 1066 (Fla. 1990) (same as *Valdes, supra*), *cert. denied,* 499 U.S. 932, 111 S.Ct. 1339, 113 L.Ed.2d 270 (1991); *Kennedy v. State,* 455 So. 2d 351 (Fla. 1984) (defendant, a prison escapee, was caught burglarizing house and shot officer and civilian), *cert. denied,* 469 U.S. 1197, 105 S.Ct. 981, 83 L.Ed 2d 983 (1985); *Sims v. State,* 444 So. 2d 922 (Fla.) (defendant shot sheriff who entered pharmacy during robbery), *cert. denied,* 467 U.S. 1246, 104 S.Ct. 3525, 82 L.Ed.2d 832 (1984); *Ford v. State,* 374 So. 2d 496 (Fla. 1979) (defendant shot officer during robbery of restaurant), *cert. denied,* 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Raulerson v. State,* 358 So. 2d 826 (Fla. 1978) (defendant, who had robbed restaurant and raped customer, shot officer who arrived at scene), *cert. denied,* 439 U.S. 859, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978); *see also Reaves v. State,* 639 So. 2d 1 (Fla.) (defendant shot officer who had responded to 911 call and attempted to confiscate defendant's gun), *cert. denied,* ___ U.S. ___, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994); *Grossman v. State,* 525 So. 2d 833 (Fla. 1988) (defendant in possession of gun stolen in burglary when stopped by officer), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); *Provenzano v. State,* 497 So. 2d 1177 (Fla. 1986) (defendant opened fire in courtroom, killing one bailiff and injuring two others), *cert. denied,* 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987).

[81]Appellant alternatively submits that, because death is not a proportionate penalty when all the mitigating circumstances are considered, this Court should impose a sentence of life imprisonment.

VII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE REQUESTED JURY INSTRUCTION ON THE STATUTORY MITIGATING CIRCUMSTANCE OF THE DEFENDANT'S AGE AT THE TIME OF THE CRIME AND IN FINDING THIS CIRCUMSTANCE INAPPLICABLE IN THIS CASE, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The trial court also refused to instruct the jury on the statutory mitigating circumstance of Mr. Sims' age (24) at the time of the crime. (T. 1561-62) As discussed above, a capital defendant is entitled to have the jury instructed on any statutory mitigating circumstance that is supported by the evidence. *Bryant,* 601 So. 2d at 533; *Stewart,* 558 So. 2d at 420; *Robinson,* 487 So. 2d at 1042-43; *Toole,* 479 So. 2d at 733-34. The trial judge's ultimate conclusion that the circumstance is not warranted in a particular case does not render an instruction to the jury improper. *See Bowden,* 588 So. 2d at 231 (trial judge properly instructed jury on aggravating circumstance he ultimately did not find applicable)

Whether the defendant's age between twenty and twenty-five years constitutes a mitigating factor is a matter within the fact-finder's discretion, depending on the circumstances of each individual case. *Hill v. State,* 643 So. 2d 1071, 1074 (Fla. 1994) (considering defendant's age of 23 as a statutory mitigating circumstance); *Scull v. State,* 533 So. 2d 1137, 1143 (Fla. 1988) (trial court's finding that defendant's age of 24 was mitigating circumstance was not an abuse of discretion); *Smith v. State,* 492 So. 2d 1063, 1067 (Fla. 1986) (age of 20 or older can be mitigating circumstance); *Randolph v. State,* 463 So. 2d 186, 193 (Fla. 1984) (trial court considered defendant's age of 24 as a mitigating circumstance), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985). In these circumstances, the defendant should therefore have "the benefit of the standard instruction," and the jury should be allowed at least to consider the defendant's age as a mitigating factor. *Smith,* 492 So. 2d at 1067.

Here, the trial judge not only refused to instruct the jury that they *could* consider Mr. Sims' age as a mitigating circumstance, he effectively advised them they could *not* consider it.

When defense counsel argued that the jury should consider that Mr. Sims was "only 25 [sic]"[82] at the time of the crime, the prosecutor objected, "[i]t's not a mitigating factor," and the judge sustained the objection, again putting the court's imprimatur on the prosecutor's erroneous contention that the jury could not, as a matter of law, consider Mr. Sims' age in mitigation. (T. 1588) The trial court's refusal to give the requested instruction, and its subsequent agreement with the state's objection to any argument about Mr. Sims' age, improperly prevented the jury from considering relevant mitigating evidence in violation of the eighth amendment. *Eddings; Hitchcock, supra.*

Although the trial judge purported to consider Mr. Sims' age in his sentencing order, he rejected it as a mitigating circumstance based solely on his observations of Mr. Sims at the trial, *which was held over two and a half years after* the offense. That Mr. Sims appeared to be mature in January 1994, at the age 27, is not probative of his maturity in June of 1991 at the age of 24. Persons in their early twenties often exhibit less judgment and caution than they subsequently exhibit in their late twenties, particularly when they have spent the intervening period incarcerated and facing the death penalty. The trial court's reason for rejecting Mr. Sims' age as a mitigating circumstance was therefore insufficient.

VIII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE REQUESTED LIMITING INSTRUCTION ON THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE AND IN APPLYING IT TO THIS CASE, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The trial court further refused defense counsel's request for a limiting instruction on the aggravating circumstance that "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." § 921.141(5)(e), Fla. Stat. (T. 1559) The proffered instruction would have advised the jury that: "The mere fact of a death of a law enforcement officer is not sufficient to establish this factor without

[82]Defense counsel subsequently advised the trial court that Mr. Sims' age at the time of the crime was 24, not 25, as he had tried to argue to the jury. (T. 1609)

proof of the requisite intent to avoid arrest and detection." (R. 541) The state opposed the proffered instruction, arguing that the jury had already concluded Mr. Sims was avoiding arrest and that no proof of motive is required when the victim is a law enforcement officer. (T. 1557, 1559)

Although this Court has suggested, primarily in dicta in cases involving civilian victims,[83] that the victim's status as a law enforcement officer alone could support this aggravating circumstance, it properly applied a narrower standard in *Cruse, supra,* a case involving the shooting deaths of two police officers. While concluding that the evidence in *Cruse* was sufficient to establish the defendant's intention to avoid arrest, the decision suggests that this aggravating circumstance would not be applicable, even when the victim is a police officer, if there is sufficient evidence of contrary intent or lack of intent.[84] *Cruse,* 588 So. 2d at 993. Since the legislature amended the capital sentencing statute to create a separate aggravating circumstance for killing a law enforcement officer ("LEO") in the performance of his or her official duties, the avoiding arrest aggravator no longer serves a narrowing function, absent proof of motive, in cases involving the death of a police officer. Rather, it merely duplicates the LEO aggravating circumstance and skews the weighing process unfairly in favor of death. *See Stringer v. Black,* 503 U.S. 222, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992); *Provence v. State,* 337 So. 2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

The trial judge ultimately found that the two aggravating factors were supported by the same aspect of the offense. In support of both, the sentencing order recited the following:

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[83]*E.g., Robinson v. State,* 610 So. 2d 1288, 1291 (Fla. 1992), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994); *Menendez v. State,* 368 So. 2d 1278, 1282 (Fla. 1979).

[84]In cases involving civilian witnesses, this court has consistently construed the avoiding arrest aggravator to apply only when it is "clearly shown that the dominant or only motive for the murder" was to avoid arrest. *See, e.g., Oats, v. State,* 446 So. 2d 90, 95 (Fla. 1984); *Menendez,* 368 So. 2d at 1282. Since all murders necessarily involve the elimination of a potential witness to the crime, this limiting construction ensures that the aggravator actually narrows the class of death-eligible defendants.

> Charles Stafford was a sworn police officer with the Miami Springs Police Department. While on duty, in full uniform and driving a clearly marked police vehicle he encountered the efendant [sic]. The defendant was driving a car belonging to his cousin. His cousin had previously reported the car as stolen, since the defendant did not return it as he promised. By computer and radio response Officer Stafford was informed of the stolen status of defendant's car.
>
> As Officer Stafford was handcuffing the defendant, he struck the officer in the head with his police radio, robbed him of his police pistol, and shot him in the chest. The officer died of his wounds.
>
> The defendant's obvious purpose was to either prevent his arrest or to escape from custody.

(R. 552). While this account of the facts supports the conclusion that Officer Stafford was a law enforcement officer engaged in the performance of his official duties, it does not establish the motive necessary for the avoiding arrest aggravator. The state expressly conceded at trial that the car's "stolen status" could not have been Mr. Sims' motive for the shooting, since "[h]e knew it wasn't stolen." (T. 1094) The trial court's cursory conclusion that Mr. Sims' "obvious purpose" was to avoid arrest is therefore based solely on Officer Stafford's status as a law enforcement officer.

While merging the aggravating circumstances may render harmless the trial judge's error in finding the avoiding arrest aggravator, it does not cure the refusal to give a limiting instruction to the jury. The anti-doubling instruction given here, (T. 1596), while it lessens the risk of skewing the balancing process does not eliminate it. The proffered limiting instruction would have clarified the distinct meanings of the two aggravating circumstances and further assured that they would not be given individual weight unless separately established by independent evidence. Absent the requested instruction, the danger remained that the jury's ultimate recommendation was tainted by consideration of duplicative aggravating circumstances. *See Espinosa v. Florida,* ___ U.S. ___, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992); *Jackson v. State,* 19 Fla. L. Weekly S215, S217 (Fla. Apr. 21, 1994); *Provence,* 337 So. 2d at 786.

IX.

THE Felony murder AGGRAVATING CIRCUMSTANCE SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY IN THIS CASE BECAUSE IT FAILS TO GENUINELY NARROW THE CLASS OF THOSE ELIGIBLE FOR THE DEATH PENALTY, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Defense counsel moved before trial to preclude the state from relying on the aggravating circumstance that "[t]he capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit, or flight after committing . . . any robbery" on the ground that it duplicates an element of the underlying offense and fails genuinely to narrow the class of defendants subject to the death penalty. § 921.141(5)(d), Fla. Stat. (1994); (R. 159-65, 450-55). The trial court denied defense counsel's motion. (T. 363-64) Although this Court has previously rejected challenges to this aggravating circumstance,[85] appellant respectfully submits that those decisions should be reconsidered.

The Supreme Court has emphasized that "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps,* 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988) (quoting *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)). Although the Supreme Court held in *Lowenfield* that there was no constitutional violation in permitting a death sentence to rest on a single aggravating circumstance that duplicated the elements of the underlying offense, that conclusion was premised on the unique features of Louisiana's capital sentencing scheme, which the Court expressly distinguished from Florida's statute. 484 U.S. at 245-46. *Lowenfield* therefore does not bar a similar challenge to Florida's use of the felony murder aggravating circumstance.

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[85] *See, e.g., Stewart v. State,* 588 So. 2d 972, 973 (Fla. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992); *Mills v. State,* 476 So. 2d 172, 178 (Fla. 1985), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986); *Squires v. State,* 450 So. 2d 208, 212 (Fla.), *cert. denied,* 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984).

As this Court has recognized with respect to the CCP aggravating circumstance, an "aggravating" factor that merely repeats an element of the underlying offense cannot, by definition, serve the constitutionally-required narrowing function.[86] *See Porter v. State,* 564 So. 2d 1063-64 (Fla. 1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991) (citing *Zant v. Stephens, supra*). In holding the CCP aggravator and its standard jury instruction unconstitutionally vague in *Jackson*, this Court emphasized that its infirmity lay precisely in the danger that juries would automatically apply it to every premeditated murder case and recognized that submission of such a flawed aggravating circumstance to the jury in a weighing state such as Florida skews the balancing process itself toward death. *Jackson,* 19 Fla. L. Weekly at S217 (citing *Stringer*, 112 S.Ct.at 1137). That is, unlike in a non-weighing state such as Louisiana, a duplicative or vague aggravator in Florida not only fails to perform a narrowing function and to guide the sentencer's discretion, it also interferes with the jury's ability to give effect to mitigating evidence.[87]

The same concerns that have prompted this Court's careful interpretation of the CCP aggravator compel reevaluation of the felony murder aggravating circumstance. Indeed, the double-counting of the predicate felony in a felony murder case should be particularly suspect given the increasingly large number of cases that can be tried on a felony murder theory, based on the broad statutory definitions of felonies such as burglary, robbery and kidnapping.[88] In this case, for example, the state was able to bootstrap a case that might well have resulted in an acquittal or conviction of a lesser offense into first degree felony murder based on an

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[86]"Aggravation" is defined as "[a]ny circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime or tort itself.*" BLACK'S LAW DICTIONARY 60 (5th ed. 1979) (emphasis added).

[87]In a non-weighing state, such as Louisiana, the jury does not weigh aggravating circumstances *against* mitigating circumstances. Consequently, a duplicative aggravating circumstance does not necessarily interfere with the jury's ability to give effect to mitigating evidence. *See Stringer,* 112 S.Ct. at 1139 (describing effect of invalid aggravating circumstance on the weighing process).

[88]For an analysis of the effect of the felony murder doctrine on capital sentencing, see Daniel Givelber, *The New Law of Murder,* 69 IND. L.J. 375 (1994).

expansive interpretation of the crime of robbery.[89] On this evidence, Mr. Sims was not only convicted of first-degree murder, but he entered the sentencing phase with one strike automatically against him, making it more difficult to overcome the aggravating circumstances with mitigating evidence. *See Provence,* 337 So. 2d at 786 (requiring merging of robbery and pecuniary gain aggravators to ensure that defendants convicted of robbery do not enter sentencing process with two strikes automatically against them).

At least three states have now concluded that the felony murder aggravating circumstance fails to perform a narrowing function, and therefore may not be used at sentencing, when the defendant was convicted of first-degree murder on a felony murder theory. *See State v. Bigbee,* 885 S.W.2d 797, 814-16 (Tenn. 1994); *Engberg v. Meyer,* 820 P.2d 70, 89-91 (Wyo. 1991); *State v. Cherry,* 257 S.E.2d 551, 567 (N.C. 1979), *cert. denied,* 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). Appellant submits that, based on *Jackson*'s rationale, the felony murder aggravating circumstance should be similarly limited in Florida and should not have been submitted to the jury in this case.

X.

THE TRIAL COURT'S SENTENCING ORDER IS REPLETE WITH ERRORS, PROVIDING AN INADEQUATE BASIS FOR APPELLATE REVIEW AND DEMONSTRATING THE UNRELIABILITY OF THE COURT'S DECISION TO IMPOSE THE DEATH PENALTY, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The sentencing order in this case contains numerous errors which not only preclude adequate appellate review but also call into question the reliability of the trial court's findings and its ultimate decision to impose the death penalty.

When the trial court imposes a sentence of death, section 921.141(3), Florida Statutes, requires the judge to "set forth in writing [the] findings upon which the sentence of death is

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[89]Contrary to the state's contention during the penalty phase, (T. 1559), it is impossible to determine whether the jury accepted the prosecution's theory that Mr. Sims shot Officer Stafford with the intent to escape from lawful confinement. No charge of escape was separately submitted to the jury, and the jury was not required to specify the basis for its conviction of felony murder.

based." This Court has emphasized repeatedly that the trial court's "findings in support of a death penalty must be of 'unmistakable clarity.'" *King,* 623 So. 2d at 489 (citation omitted); *Mann v. State,* 420 So. 2d 578, 581 (Fla. 1982). The trial judge must specify the aggravating circumstances found to apply. *Bouie v. State,* 559 So. 2d 1113, 1116 (Fla. 1990). And must "expressly evaluate . . . each statutory and nonstatutory mitigating circumstance proposed by the defendant." *Ferrell v. State,* 20 Fla. L. Weekly S74, S75 (Fla. Feb. 16, 1995). The trial court "must exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances." *Lucas v. State,* 417 So. 2d 250, 251 (Fla. 1982); *accord King,* 623 So. 2d at 489; *Bouie,* 559 So. 2d at 1116; *Van Royal v. State,* 497 So. 2d 625, 628 (Fla. 1986). And the results of the weighing process "must be detailed in the written sentencing order and supported by sufficient competent evidence in the record." *Ferrell,* 20 Fla. L. Weekly at S75; *Campbell v. State,* 571 So. 2d 415, 419-20 (Fla. 1990). The failure to comply with these requirements "deprives this Court of the opportunity for meaningful appellate review." *Ferrell,* 20 Fla. L. Weekly at S75; *accord King,* 623 So. 2d at 489; *Van Royal,* 497 So. 2d at 628; *Mann,* 420 So. 2d at 581.

In this case, in addition to erroneously refusing to consider imperfect self-defense or provocation in mitigation, the trial judge made several mistakes in his evaluation of aggravating and mitigating circumstances. For example, he found as an aggravating circumstance that "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." (R. 552) The state never contended, however, that this aggravating circumstance should be applied in this case, and the jury was not instructed on it. Although the trial judge merged this aggravating circumstance with the other two that relate to the victim's status as a law enforcement officer, its erroneous inclusion in the sentencing order suggests a lack of care that is antithetical to the decision to sentence a person to death. *See Lucas,* 417 So. 2d at 251.

Similarly, the trial judge erroneously asserted that "[t]he defendant alleged only one statutory mitigating factor, to wit; The capital felony was committed while the defendant was

under the influence of extreme mental or emotional disturbance." (R. 553) He then concluded, "The Court finds no evidence of this factor and the Court rejects it as a mitigating factor in this case." (R. 553) In fact, the one statutory mitigating circumstance on which the jury was instructed was not mental or emotional disturbance but duress.[90] (T. 1597) The trial court declined to consider the duress mitigator, along with all the other statutory mitigating circumstances, on the ground that "[n]o evidence was presented about these factors." (R. 554)

Further, although the trial judge included in his sentencing order a brief synopsis of the mitigating evidence presented at the penalty phase and a list of 25 nonstatutory mitigating circumstances submitted by the defense, the sentencing order simply concludes with regard to nonstatutory mitigating circumstances:

> The Court has considered each of them carefully.
>
> The Court finds little to no weight to each of them.
>
> This Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances.

(R. 556) This conclusory evaluation of the nonstatutory mitigating circumstances submitted by defense counsel does not comport with the guidelines this Court has set forth for the consideration of mitigating circumstances:

> [T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Rogers v. State, 511 So.2d 526, 534 (Fla. 1987); *accord Ferrell,* 20 Fla. L. Weekly at S75; *Santos v. State,* 591 So. 2d 160, 164 (Fla. 1991); *Campbell,* 571 So. 2d at 419; *Lamb v. State,* 532 So. 2d 1051, 1054 (Fla. 1988). Although the trial judge apparently concluded that at least some of the proposed nonstatutory mitigating circumstances were entitled to *no* weight, his

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[90]Moreover, as discussed above, defense counsel alleged the existence of two other statutory mitigating circumstances -- victim participation and the defendant's age.

reasons for so concluding cannot be divined from this order. The trial judge did not identify which of the proposed mitigating circumstances he found to be supported by the evidence or which he believed to be mitigating in nature, let alone provide his reasons for rejecting those he (apparently) did reject. Thus, notwithstanding the judge's assurance that he considered "carefully" each of the proposed nonstatutory mitigating circumstances, there is no evidence of such consideration in the order itself.

The trial judge's confusion over which statutory aggravating and mitigating circumstances had been submitted by the parties, combined with his cursory evaluation of the proposed nonstatutory mitigating circumstances, strongly suggests that this sentencing order was not the product of the "reasoned judgment needed to support a death sentence." *See Bouie,* 559 So. 2d at 1116. Moreover, this Court obviously cannot review a judgment that is premised not only on misapprehensions of the law (the failure to consider imperfect self-defense or provocation) but also on misapprehensions of the record. Accordingly, if this Court declines to order a new sentencing hearing before a jury, this case must at least be remanded for a new sentencing hearing before the trial judge. *See, e.g., Santos,* 591 So. 2d at 164; *Scull,* 533 So. 2d at 1143-44.

XI.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

Defense counsel below raised a number of challenges to the constitutionality of Florida's capital sentencing statute, including (1) the imposition of the death penalty by a bare majority vote (R. 117-19), (2) the lack of guidance provided to the sentencing jury and the inadequacy of appellate review (R. 92-115, 183-94), and (3) the statutory presumption that death is the proper punishment (R. 167-74). Each of these challenges was rejected by the trial court. (T. 362-66) Although this Court has previously rejected similar challenges to the constitutionality of Florida's capital sentencing statute, appellant respectfully submits that those decisions are in error and should be reconsidered.

A.

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL BECAUSE IT PERMITS IMPOSITION OF THE DEATH PENALTY BASED UPON A BARE MAJORITY VOTE BY THE SENTENCING JURY.

This Court has held that there is no constitutional infirmity in permitting the advisory jury under Florida's capital sentencing statute, § 921.141, Fla. Stat., to recommend a sentence of death based upon a simple majority. *James v. State,* 453 So. 2d 786, 791-92 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); *Alvord v. State,* 322 So. 2d 533, 536 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Florida is the only state in which the jury plays a role in sentencing in which a simple-majority vote is sufficient to impose the death penalty.[91] Mr. Sims was sentenced to death

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[91]Of the 37 jurisdictions, including federal, that retain a death penalty, four provide for sentencing by the court alone. Ariz. Rev. Stat. Ann. § 13-703 (1994); Idaho Code § 19-2515 (1987 & Supp. 1994); Mont. Code Ann. § 46-18-301 (1993); Neb. Rev. Stat. § 29-2520 (1989 & Supp. 1994).

Of the remaining jurisdictions, 29 provide for sentencing by the jury; all of these states require a unanimous vote to impose a death sentence. Ark. Code § 5-4-603 (1994); Cal. Penal Code §190.3-190.4 (1988 & Supp. 1995); Colo. Rev. Stat. § 16-11-103 (Supp. 1994); Conn. Gen. Stat. Ann. § 53a-46a (1994); Ga. Code Ann. §§ 17-10-30 to -32 (Supp. 1994) (*see also Miller v. State,* 229 S.E. 2d 376 (Ga. 1976)); Ill. Ann. Stat. ch. 720 § 5/9-1 (Supp. 1994); Ky. Rev. Stat. § 532.025 (1990 & Supp. 1994) (*see also Skaggs v. Com.*, 694 S.W. 2d 672 (Ky. 1985), *cert. denied,* 476 U.S. 1130 (1986)); La. Code Crim. Proc. art. 905.8 (Supp. 1994); Md. Ann. Code art. 27, § 413 (1992 & Supp. 1994); Miss. Code Ann. § 99-19-101 (1994); Mo. Rev. Stat. § 565.030.4(4) (Supp. 1994); Nev. Rev. Stat. Ann. §§ 175.554, 556 (1992 & Supp. 1993); N.J. Rev. Stat. § 2C: 11-3 (Supp. 1994); N.H. Rev. Stat. Ann. §630.5 (Supp. 1994); N.M. Stat. Ann. § 31-20A-3 (1990 & Supp. 1993); N.C. Gen. Stat. § 15A-2000 (Supp. 1994); Ohio Rev. Code Ann., § 2929.03 (1993 & Supp. 1994); Okla. Stat. Ann. tit. 21, § 701.11 (1983 & Supp. 1995); Ore. Rev. Stat. § 163.150 (1993); 42 Pa. Cons. Stat., § 9711 (1982 & Supp. 1994); S.C. Code. Ann. § 16-3-20 (Supp. 1993); S.D. Codified Laws Ann. § 23A-27A-4 (1988 & Supp. 1994); Tenn. Code Ann. § 39-13-204 (1991 & Supp. 1994); Tex. Crim. Proc. Code Ann. § 37.071 (Supp. 1995); Utah Code Ann. §76-3-207 (1993); Va. Code Ann. § 19.2-264.4 (1990 & Supp. 1994); Wash. Rev. Code Ann. § 10.95.060 (1990 & Supp. 1995); Wyo Stat. § 6-2-102 (Supp. 1994); 21 U.S.C.A. § 848 (Supp. 1994).

Of the four states in which the jury is advisory, only Florida clearly permits a bare majority to recommend death. Indiana requires a unanimous vote for a death recommendation, Ind. Code Ann. § 35-50-2-9 (Supp. 1994), and does not require the trial judge to defer to a death recommendation, *Daniels v. State,* 561 N.E.2d 487 (Ind. 1990). Alabama requires a majority of at least 10 jurors to recommend death. Ala. Code §13A-5-46 (1994). Although Delaware recently amended its statute to make the jury's vote advisory and to eliminate the unanimity requirement, the validity of a bare-majority vote does not appear to have been tested yet. Del. Code Ann, tit. 11, § 4209 (1979 & Supp. 1994).

upon an eight to four vote by the sentencing jury, a margin that would have resulted in a life sentence or life recommendation in any other state.

The slimmest margin the United States Supreme Court has permitted under the Sixth Amendment for determining a defendant's guilt is a 9 to 3 majority. *Johnson v. Louisiana,* 406 U.S. 356, 363, 92 S.Ct. 1620, 1625, 32 L.Ed.2d 152 (1972); *compare Apodaca v. Oregon,* 406 U.S. 404, 411-12, 92 S.Ct. 1628, 1633, 32 L.Ed.2d 184 (1972) (11-1 and 10-2 votes upheld) *and Burch v. Louisiana,* 441 U.S. 130, 139, 99 S.Ct. 1623, 1628, 60 L.Ed.2d 96 (1979) (five-person majority of six-person jury not constitutionally permissible). Although the Supreme Court has held that the sixth amendment right to a jury trial does not extend to capital sentencing proceedings, *Spaziano v. Florida,* 468 U.S. 447, 458-59, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984), principles of due process and eighth amendment requirements of reliability compel adherence to similar standards of certainty in a jury's verdict in a capital sentencing proceeding. Since the trial judge is required to give "great weight" to the jury's recommendation under *Tedder v. State,* 322 So. 2d 908 (Fla. 1975), and *Smith v. State,* 515 So. 2d 182 (Fla. 1987), *cert. denied,* 485 U.S. 971, 108 S.Ct. 1354, 99 L.Ed.2d 447 (1988), Florida's simple-majority rule allows a bare majority of the jury to render a death sentence that may be overridden only in extraordinary circumstances. Like improper jury instructions, the simple-majority rule undermines the reliability of the ultimate verdict of the trial judge. *Cf. Espinosa,* 112 S.Ct. at 2928; *Jackson,* 19 Fla. L. Weekly at S217.

B.

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL BECAUSE IT PROVIDES INADEQUATE GUIDANCE TO THE SENTENCING JURY AND DOES NOT REQUIRE ANY WRITTEN FINDINGS BY THE JURY, PRECLUDING ADEQUATE APPELLATE REVIEW.

It is axiomatic that "[b]ecause of the uniqueness of the death penalty, . . . it [may] not be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (citing *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33

L.Ed.2d 346 (1972)). Notwithstanding the Supreme Court's decision in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), Florida's capital sentencing statute can no longer be assumed to satisfy these constitutional requirements.

The statute provides no guidance as to *how* the jury should determine the existence of the sentencing factors or weigh them against each other. It does not state whether the jurors must find individual sentencing factors unanimously, by majority, by plurality, or individually. It establishes no standard of proof regarding mitigating circumstances and does not require the jury to specify any of their findings other than their ultimate recommendation whether the defendant should be sentenced to death or life. The statute therefore fails to give the jury adequate guidance in finding and weighing the aggravating and mitigating circumstances and provides no assurance that the weighing process was properly conducted, thereby undermining the reliability of the jury's recommendation. *See Parker v. Dugger,* 498 U.S. 308, 111 S.Ct. 731, 735, 112 L.Ed.2d 812 (1991); *McKoy v. North Carolina,* 494 U.S. 433, 440, 110 S.Ct. 1227, 1232, 108 L.Ed.2d 369 (1990); *Mills,* 486 U.S. at 375-77. Because the trial judge is required to give "great weight" to the jury's recommendation under *Tedder* and *Smith, supra,* the constitutional flaws in the procedure by which the jury renders its "advisory" verdict also taint the ultimate decision of the trial judge.[92] *Espinosa,* 112 S.Ct. at 2928; *Jackson,* 19 Fla. L. Weekly at S217. Moreover, the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing precludes adequate appellate review.

C.

THE FLORIDA CAPITAL SENTENCING STATUTE CREATES AN UNCONSTITUTIONAL PRESUMPTION IN FAVOR OF THE DEATH PENALTY.

Appellant also submits that Florida's capital sentencing statute is unconstitutional because it does not require the state to prove beyond a reasonable doubt that aggravating

[92]The reliability of the jury's recommendation is further undermined by the standard instructions, which fail to advise the jury of the weight of their verdict under *Tedder,* in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

circumstances outweigh mitigating circumstances before a sentence of death can be imposed, but rather creates an unconstitutional presumption that *death* is the appropriate penalty and requires the defendant to overcome that presumption by proving that the mitigating circumstances outweigh the aggravating circumstances.

The capital sentencing statute requires both the sentencing jury and judge to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b), Fla. Stat. (1994); *see also id.* § 921.141(3)(b) (trial judge to determine whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances"). Thus, the statute creates a presumption that, once one aggravating circumstance is established, death is the appropriate penalty, and the burden of persuasion lies with the capital defendant to demonstrate that mitigating circumstances outweigh aggravating circumstances. *See Dixon*, 283 So.2d at 9. This presumption and the corresponding allocation of the burdens of proof and persuasion do not comport with state or federal principles of due process and interfere with the jury's ability to give effect to mitigating evidence in violation of the state and federal constitutions. *See Jackson v. Dugger,* 837 F.2d 1469, 1473-74 (11th Cir.), *cert. denied,* 486 U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988); *cf. Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982) ("burden-shifting" instruction might violate due process under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), but instructions *as a whole* did not violate due process because jury was later properly instructed that it could recommend death only "if the state showed the aggravating circumstances outweighed the mitigating circumstances"), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982).[93]

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[93]*Blystone v. Pennsylvania,* 494 U.S. 299, 305, 110 S.Ct. 1078, 1082, 108 L.Ed.2d 255 (1990), and *Boyde v. California,* 494 U.S. 370, 376, 110 S.Ct. 1190, 1195-96, 108 L.Ed.2d 316 (1990), are distinguishable. In both cases, the statute at issue required the state to prove that aggravating circumstances outweigh mitigating circumstances before a death sentence may be imposed. The Court therefore concluded that in neither case was the jury's ability to give effect to mitigating evidence impaired.

Appellant further submits that, contrary to the decision in *Ford v. Strickland*, 696 F.2d 804, 817-18 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), the reasonable doubt standard should be applied to the weighing process as a whole. The fifth and fourteenth amendments to the Constitution "protect[ ] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same standard of proof is constitutionally required to establish any fact upon which a death sentence is to be based, for the "qualitative difference" between death and lesser criminal penalties requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976) (plurality opinion); *Elledge v. State*, 346 So.2d 998, 1003 (Fla. 1977) (applying heightened standard of review when "a man's life is at stake"); *see also Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209, 1211-12, 18 L.Ed.2d 326 (1967) (due process protections are required where "a new finding of fact ... that was not an ingredient of the offense charged" must be made in order to support a particular sentencing outcome).

* * *

Florida's capital sentencing statute is therefore inconsistent with the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and article I, sections 9, 16, 17, and 22 of the Florida Constitution.

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences for first-degree murder and robbery must be reversed and the case remanded for a new trial. Alternatively, appellant's sentence of death must be vacated and the case remanded for a new sentencing proceeding before a jury.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

BY: Christina Spaulding
CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Post Office Box 013248, Miami, Florida 33101 this 5th day of April, 1995.

Christina Spaulding

CHRISTINA A. SPAULDING
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,612

MERRIT ALONZO SIMS,

Appellant,

-vs-

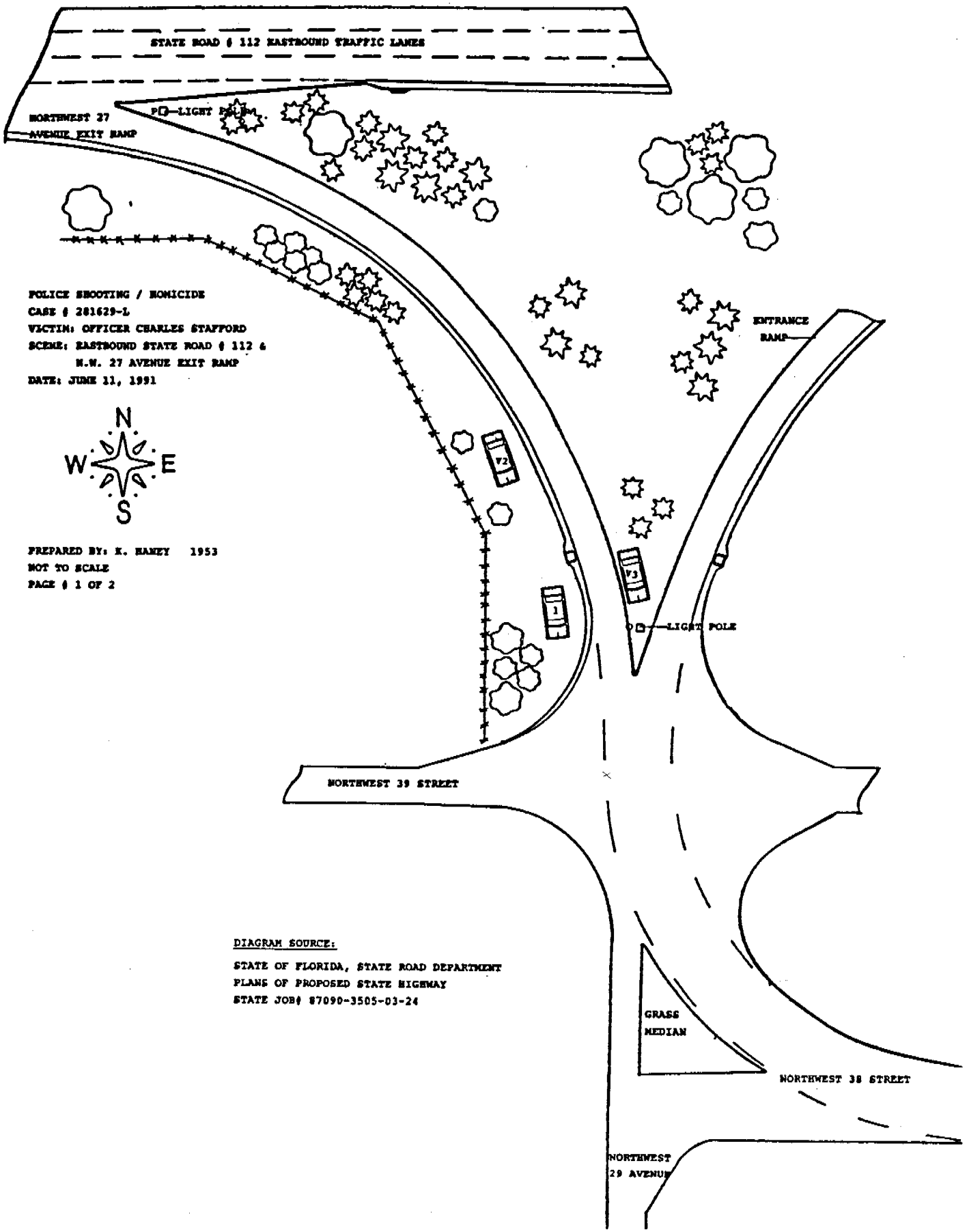
THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

APPENDIX

1. State's exhibit 6 (S.R. 9-10).
2. State's exhibit 7 (S.R. 11-12)
3. Enlargement of state's exhibit 7 with crime scene objects labeled, as described at p.3 n.1, *supra.*
4. State's exhibit 8 (S.R. 13-14)
5. State's exhibit 9 (S.R. 15-16)



POLICE SHOOTING / HOMICIDE
CASE # 281629-L
VICTIM: OFFICER CHARLES STAFFORD
SCENE: EASTBOUND STATE ROAD # 112 &
N.W. 27 AVENUE EXIT RAMP
DATE: JUNE 11, 1991

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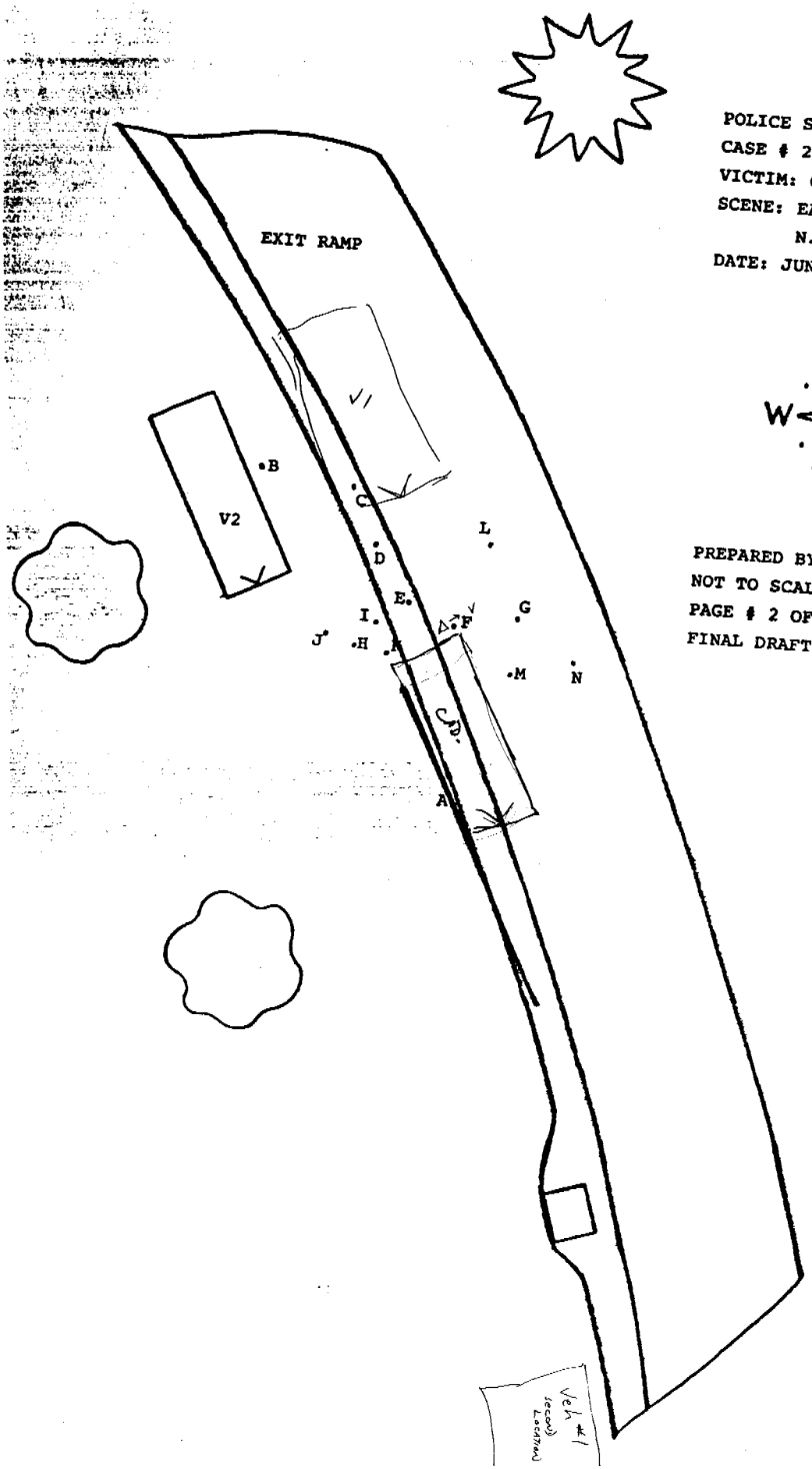
PREPARED BY: K. HANEY 1953
NOT TO SCALE
PAGE # 1 OF 2

DIAGRAM SOURCE:

STATE OF FLORIDA, STATE ROAD DEPARTMENT
PLANS OF PROPOSED STATE HIGHWAY
STATE JOB# 87090-3505-03-24



POLICE SHOOTING/HOMICIDE
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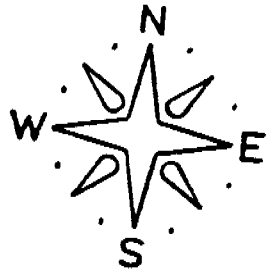

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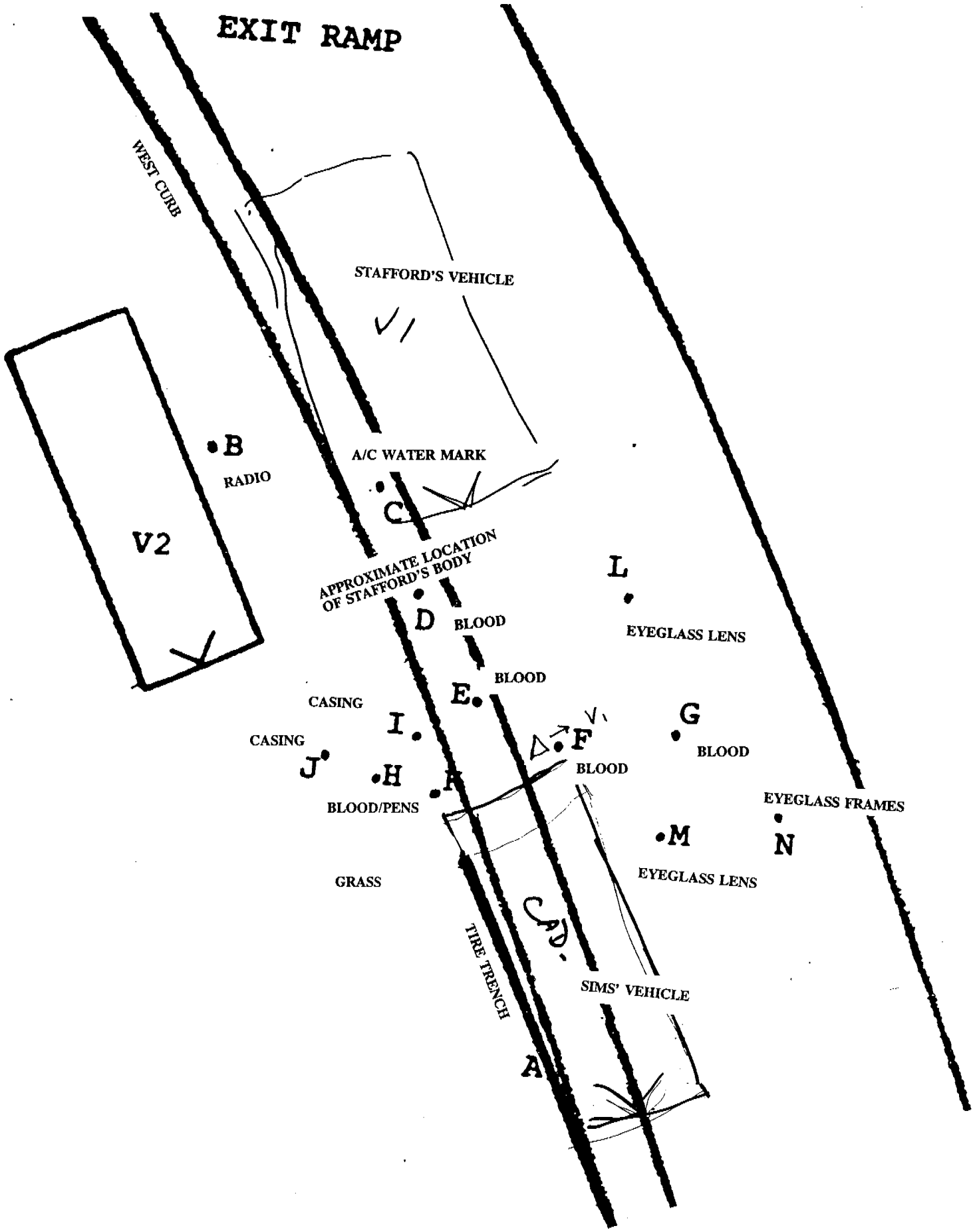
EXIT RAMP
WEST CURB
STAFFORD'S VEHICLE
V1
V2
B
RADIO
A/C WATER MARK
C
APPROXIMATE LOCATION OF STAFFORD'S BODY
D
BLOOD
L
EYEGLASS LENS
E
BLOOD
CASING
I
CASING
J
H
BLOOD/PENS
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BLOOD
G
BLOOD
EYEGLASS FRAMES
M
N
EYEGLASS LENS
GRASS
TIRE TRENCH
CAD.
SIMS' VEHICLE
A

POLICE SHOOTING / HOMICIDE
CASE# 281629-L
LEGEND

V1 - VEHICLE # 1:	LEFT FRONT BUMPER STAFFORD's VEHICLE 95'0" N OF NLL OF N.W. 39 STREET 7'0" W OF WEST CURB OF EXIT RAMP
	LEFT REAR BUMPER 111'11" N OF NLL OF N.W. 39 STREET 6'0" W OF WEST CURB OF EXIT RAMP
V2 - VEHICLE # 2:	LEFT FRONT BUMPER CLARK's VEHICLE 176'9" N OF NLL OF N.W. 39 STREET 6'3" W OF WEST CURB OF EXIT RAMP
	LEFT REAR BUMPER 193'4" N OF NLL OF N.W. 39 STREET 5'11" W OF WEST CURB OF EXIT RAMP
V3 - VEHICLE # 3:	RIGHT FRONT BUMPER (SERGEANT PESSOLANO'S) 106'9" N OF NLL OF N.W. 39 STREET 20'9" E OF WEST CURB OF EXIT RAMP
	RIGHT REAR BUMPER 122'3" N OF NLL OF N.W. 39 STREET 19'3" E OF WEST CURB OF EXIT RAMP
A - TIRE TRENCH:	33'6" IN LENGTH (DIRT & GUTTER)
	NORTH END OF TIRE TRENCH 165'3" N OF NLL OF N.W. 39 STREET 1'0" W OF WEST CURB OF EXIT RAMP
	SOUTH END IN DIRT (AT CURB) 140'3" N OF NLL OF N.W. 39 STREET
	SOUTHERN MOST END (IN GUTTER) 0'8" E OF WEST CURB OF EXIT RAMP
B - RADIO:	186'5" N OF NLL OF N.W. 39 STREET 4'5" W OF WEST CURB OF EXIT RAMP
C - AIR CONDITIONER WATER MARK	182'0" N OF NLL OF N.W. 39 STREET 1'9" E OF WEST CURB OF EXIT RAMP
D - BLOOD # 4:	176'0" N OF NLL OF N.W. 39 STREET 1'8" E OF WEST CURB OF EXIT RAMP
E - BLOOD # 3:	170'6" N OF NLL OF N.W. 39 STREET 2'3" E OF WEST CURB OF EXIT RAMP
F - BLOOD # 2:	165'8" N OF NLL OF N.W. 39 STREET 5'0" E OF WEST CURB OF EXIT RAMP
G - BLOOD # 1:	164'11" N OF NLL OF N.W. 39 STREET 10'0" E OF WEST CURB OF EXIT RAMP
H - BLOOD / PENS:	168'0" N OF NLL OF N.W. 39 STREET 3'3" W OF WEST CURB OF EXIT RAMP

AP

I - CASING # 1: 169'11" N OF NLL OF N.W. 39 STREET
0'9" W OF WEST CURB OF EXIT RAMP

J - CASING # 2: 168'10" N OF NLL OF N.W. 39 STREET
5'5" W OF WEST CURB OF EXIT RAMP

K - BELT KEEPER: 165'8" N OF NLL OF N.W. 39 STREET
1'1" W OF WEST CURB OF EXIT RAMP

L - EYEGLASS LENS (INTACT):
172'3" N OF NLL OF N.W. 39 STREET
10'9" E OF WEST CURB OF EXIT RAMP

M - EYEGLASS LENS (BROKEN):
159'0" N OF NLL OF N.W. 39 STREET
8'0" E OF WEST CURB OF EXIT RAMP

N - EYEGLASS FRAMES: 157'10" N OF NLL OF N.W. 39 STREET
13'9" E OF WEST CURB OF EXIT RAMP

O - LIGHT POLE: NUMBER 554-2
HO 36
32 02 06 07
100

P - LIGHT POLE: NUMBER 751-1
HO 11
32 02 04
150

DISTANCE BETWEEN O & P APPROXIMATELY 290'

KH / KH
(CORRECTED COPY)