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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br.," appellee's answer brief as "Answer Br.," and the supplemental record on appeal as "Supp. R." All other citations are as in the initial brief. Specific points raised in the initial brief but not addressed in the reply brief are not waived.

GUILT/INNOCENCE 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.

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.

Appellee maintains that the defense was necessarily on notice, before Ms. Lynn was called as a witness, that the prosecution's theory of the case was that Mr. Sims shot officer Stafford to avoid revocation of his parole for possessing illegal drugs, based on the state's pre-trial motion in limine regarding evidence of Mr. Sims' arrest a week before the incident with Officer Stafford. The motion in limine alleged only in passing, however, that Mr. Sims was "a parolee, in possession of drugs" and emphasized that the prior arrest was factually distinguishable from the encounter with Officer Stafford because the state intended to prove "that drugs were in the car" when Mr. Sims was stopped by Officer Stafford, thereby establishing his "motive and opportunity to kill Officer Stafford." (R. 230, 232) Similarly, at the hearing on the motion in limine, defense counsel protested that the state's motion was inaccurate because "[t]here is no evidence in this case that my client was in possession of drugs." (T. 384) A discussion then ensued regarding the state's evidence, or lack thereof, regarding the presence of drugs in the car and what could be said about it in opening argument. (T. 385-87) Mr. Rosenberg, the lead prosecutor, asserted repeatedly that "[t]here will be evidence that there were drugs in that car" and that this evidence "will be part of the state's theory that the reason for the murder of Officer Stafford is that the defendant was transporting drugs at the time." (T. 385-86) At no time during this discussion did the prosecution disclose that it intended to call Mr. Sims' parole officer as a witness. Thus, contrary to appellee's contention, it was not "clearly evident" from these pre-trial proceedings that the state intended to pursue the theory that Mr. Sims killed Officer Stafford to

avoid revocation of his parole.[1] Answer Br. at 27. Rather, the prosecution's pre-trial representations, *combined* with its failure to list Ms. Lynn as a witness, gave defense counsel every reason to believe that the state's motive theory was simply that Mr. Sims shot Officer Stafford to avoid the discovery of illegal drugs in the car.

Appellee's further contention that the prosecution's discovery violation could not have prejudiced the defense in its response to the drug possession "evidence" because the defense had notice of this evidence and did not object to it at trial is similarly without merit. Answer Br. at 27-28. The defense was prejudiced precisely because it did not know that this evidence was being elicited *as a predicate for* evidence of the defendant's parole status.[2] As discussed in appellant's initial brief, if the defense had known the state's intention, it could have altered its trial preparation and strategy to respond more effectively to the prosecution's motive theory.[3] For this reason, the remedy of deposing Ms. Lynn before she testified was -- contrary to appellee's contention -- manifestly inadequate to remedy the procedural prejudice to the defense.[4] Initial Br. at 22-23. Thus, to the extent the trial court's remarks can be characterized as a finding of no procedural prejudice, (T. 1097), that ruling is unsupported by the record.

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[1] Contrary to appellee's claim, Answer Br. at 26-27, the disclosure of Mr. Sims' control release papers in discovery similarly did not provide notice of this theory since defense counsel would logically have assumed that the state intended to introduce the documents at a penalty phase proceeding. Only by listing Ms. Lynn as a witness would the defense have been properly alerted to the possibility that the state intended to call her at the guilt/innocence phase of the trial.

[2] Appellee's assertion that the parole status evidence could, in any event, be premised on "the fact that the defendant was in possession of a stolen vehicle," Answer Br. at 28, is erroneous because, as discussed further in section I.D. below, the prosecution expressly conceded at trial that this could not provide a predicate for Ms. Lynn's testimony because Mr. Sims "knew [the car] wasn't stolen," (T. 1094), and did not know it had been reported stolen. (R. 461-62)

[3] The existence of procedural prejudice is further underscored by the fact that the state now asserts on appeal that two decisions by defense counsel, which were directly attributable to the state's discovery violation, constituted waivers of later objections relating to the parole revocation theory. *See* sections I.B.1 and I.C. *infra*.

[4] For the foregoing reasons, *Cooper v. State,* 336 So. 2d 1133 (Fla. 1976), *cert. denied,* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), on which appellee principally relies, is factually distingushable.

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.

Appellee answers that (1) this issue is not preserved for appellate review; (2) the clear and convincing evidence standard does not apply to a dissimilar collateral crime offered to prove motive; and (3) the state's evidence was sufficient to allow the jury reasonably to conclude that Mr. Sims' was transporting drugs at the time of his arrest and, therefore, established a proper predicate for Ms. Lynn's testimony. For the reasons set out below, each of these contentions is erroneous.[5]

1. Error Preservation

Appellee's contention that this issue was not properly preserved is premised upon a fundamental mischaracterization of appellant's argument. The state asserts that appellant's challenge to the admissibility of Mr. Sims' parole status is in reality an attack on the admissibility of Officer Silva's testimony regarding the drug detection dog's alert to the car Mr. Sims had been driving and then argues that *this* issue was not preserved because defense counsel did not object to or move to strike Officer Silva's testimony. Answer Br. at 30-31.

The admission of Officer Silva's testimony is not asserted as error in this appeal. The issue presented on appeal -- and in the trial court below -- is the entirely distinct question whether his testimony was a sufficient factual predicate for Ms. Lynn's prejudicial testimony. Defense counsel could not have objected contemporaneously to Officer Silva's testimony on this ground because the state, in clear violation of the discovery rules, did not disclose its intention to call Ms. Lynn as a witness until *after* Officer Silva had testified.[6] (T. 1090) Only then did it become

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[5] As noted above and discussed in section I.D. below, appellee's final claim, Answer Br. at 34-35, that any error was harmless because Ms. Lynn's testimony could alternatively have been predicated on Mr. Sims' being in a "stolen" car is without merit. (T. 1094; R. 461-62)

[6] For the same reason, defense counsel's failure to object contemporaneously to the *admissibility* of Officer Silva's testimony under the clear and convincing evidence standard cannot

apparent that the state intended to use Officer Silva's testimony as a predicate to admit independently prejudicial evidence of Mr. Sims' parole status. (T. 1093-95) At that point, defense counsel properly objected to the admissibility of Ms. Lynn's testimony on the ground that the state had failed to establish that Mr. Sims was transporting drugs at the time of his arrest and that Mr. Sims' parole status was therefore irrelevant and its probative value, if any, was outweighed by the danger of unfair prejudice. (T. 1096, 1103-04) The trial court overruled this objection, holding that the evidence was sufficient, and allowed Ms. Lynn to testify. (T. 1096, 1104) Since the trial court's ruling eliminated any grounds for a motion to strike Officer Silva's testimony, such a motion obviously would have been futile and was not necessary to preserve the issue for appeal. *See, e.g., Simpson v. State,* 418 So. 2d 984, 986 (Fla. 1982) (no motion for mistrial necessary when trial court has overruled objection, thereby eliminating grounds for mistrial), *cert. denied,* 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1004 (1983).

The dog alert evidence is the "focus" of appellant's argument, Answer Br. at 30, because the sufficiency of the state's evidence that Mr. Sims possessed illegal drugs at the time of his arrest is dispositive of the question whether his parole status was admissible at the guilt/innocence phase of the trial. This issue was properly raised below, argued by the parties, and ruled on by the trial court and is therefore preserved for appellate review.

2. Proper Legal Standard & Sufficiency of the Predicate

Appellee next asserts that the sufficiency of the state's evidence that Mr. Sims was transporting drugs need not be evaluated under the clear and convincing evidence standard

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possibly be construed as a waiver of any future argument regarding the *sufficiency* of that evidence as a predicate for Ms. Lynn's testimony. Answer Br. at 31. At the time Officer Silva testified, defense counsel could reasonably have believed that it was not necessary to object to the admissibility of his testimony because it was too weak to be prejudicial to the defense. As discussed in appellant's initial brief, defense counsel might well have altered this strategy *if* they had been properly informed of the state's intention to call Ms. Lynn as a witness. Initial Br. at 22-23. Consequently, while an objection to the admissibility of Officer Silva's testimony should not, in any event, be required to preserve the separate issue of the admissibility of Ms. Lynn's testimony, it would be particularly inappropriate to impose such a requirement here, because it would effectively reward the state for violating its discovery obligations.

required by *State v. Norris*, 168 So. 2d 541 (Fla. 1964), and its progeny because evidence of Mr. Sims' purported parole violation is not "similar fact" evidence and therefore is not within the scope of the *Williams*[7] rule. This Court has recently reiterated, however, that the *Williams* rule is not limited to "similar fact" evidence and encompasses evidence of a *dissimilar* collateral crime offered to prove motive. *Finney v. State,* 660 So. 2d 674, 681-82 (Fla. 1995).[8] Appellee's contention that the state is not required to prove by clear and convincing evidence that the defendant actually committed the collateral crime when it is dissimilar to the charged offense is therefore erroneous. Answer Br. at 31-32. The reasons for imposing the clear and convincing evidence standard apply equally whether the uncharged crime is similar or dissimilar to the charged offense. In either case, the uncharged offense is not probative of the defendant's motive to commit the charged offense if the defendant did not, in fact, commit the uncharged offense. Initial Br. at 25-26. Significantly, appellee makes no attempt to argue that the state's "evidence" of Mr. Sims' purported drug possession was clear and convincing. Consequently, under *Finney* and *Norris*, this Court must conclude that Ms. Lynn's testimony was improperly admitted at trial and, for the reasons discussed further below, reverse and remand for a new trial.

It is, however, unnecessary for this Court to decide whether the clear and convincing evidence standard applies to this case because, as argued in appellant's initial brief, Ms. Lynn's testimony was not properly admissible under *any* evidentiary standard. Whether evaluated under the clear and convincing evidence standard that applies to *Williams* rule evidence or under the prima facie evidence standard that is the minimum standard for the predicate to any conditionally relevant evidence, the prosecution's evidence that Mr. Sims was transporting drugs at the time of

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

[8] *Accord Williams v. State,* 621 So. 2d 413, 414 (Fla. 1993); *Bryan v. State,* 533 So. 2d 744, 746 (Fla. 1988), *cert. denied,* 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); C.W. EHRHARDT, FLORIDA EVIDENCE § 404.9, at 158 (1995 ed.); *see also* Initial Br. at 25-26 (citing cases).

his arrest was legally insufficient.[9] Ms. Lynn's testimony that such conduct *would* have been a violation of Mr. Sims' control release therefore failed to meet the threshold requirement of relevance under sections 90.401 and 90.402 and even more clearly failed to satisfy the balancing test of section 90.403.

Appellee contends that the dog alert evidence, and the testimony of Mr. Sims' cousins -- denying that they or their mother had used or transported illegal drugs in the car -- was sufficent for the jury reasonably to infer that Mr. Sims was transporting illegal drugs in the car at the time of his arrest and that such an inference is all that was necessary for Ms. Lynn's testimony to be admissible. Answer Br. at 33. "[A]n inference recognizable in law," however, "cannot be based upon evidence that is so uncertain or speculative as to raise merely a conjecture or possibility." *Sirmons v. Pittman,* 138 So. 2d 765, 770 (Fla. 1st DCA 1962). Consequently, evidence that requires the jury to build inference upon inference to reach a conclusion of fact is insufficient to establish a prima facie case. *See State v. Snyder,* 635 So. 2d 1057, 1057-58 (Fla. 2d DCA 1994) (where undisputed facts would require pyramiding of inferences to establish defendant's constructive possession of illegal drugs, defendant's motion to dismiss information was properly granted); *Moffatt v. State,* 583 So. 2d 779, 781 (Fla. 1st DCA 1991) (constructive possession of drugs could not be established by pyramiding of inferences).[10]

As defense counsel argued at trial, the jury could reach the factual conclusion that Mr. Sims possessed illegal drugs at the time of his arrest only by such an impermissible pyramiding of inferences. (T. 1103) Because no "measurable amount of narcotics" of any kind were actually

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[9] *See* § 90.105(b), Fla. Stat. This general standard of conditional relevance applies to the admissibility of collateral crimes evidence in federal court. *Huddleston v. United States,* 485 U.S. 681, 688-89, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988); Initial Br. at 27-28.

[10] *Accord Currelly v. State,* 644 So. 2d 139, 140 (Fla. 2d DCA 1994); *I.F.T. v. State,* 629 So. 2d 179, 180 (Fla. 2d DCA 1993); *Weeks v. State,* 492 So. 2d 719, 722 (Fla. 1st DCA 1986), *review denied,* 503 So. 2d 328 (Fla.1987); *Collins v. State,* 438 So. 2d 1036, 1037-38 (Fla. 2d DCA 1983); *Gaidymowicz v. Winn-Dixie Stores, Inc.,* 371 So. 2d 212, 214 (Fla. 3d DCA 1979); *see also Voelker v. Combined Ins. Co.,* 73 So. 2d 403, 407 (Fla. 1954); *Keys v. State,* 606 So. 2d 669, 673 (Fla. 1st DCA 1992); *Sirmons,* 138 So. 2d at 770.

found in the car, (T. 1087-88); the dog's alert was not corroborated by chemical tests establishing the presence even of narcotics residue, (T. 1089); and there was no direct evidence whatsoever that Mr. Sims either used drugs or was involved with drugs, the jury would have to infer the following from the state's circumstantial evidence: (1) the scent to which the dog alerted was created by the actual presence of illegal drugs in the car at some prior point in time; (2) that Mr. Sims had knowledge of the presence of drugs in the car; and (3) that drugs were actually in the car at the time of Mr. Sims' arrest.

This series of inferences was contradicted by the following evidence at trial: (1) Officer Silva conceded that the dog could have alerted to the scent of a prescription medication which contained or was contaminated by a controlled substance, (T. 1088-89); (2) although Carol and Sam Mustipher testified that neither they nor their mother had used or carried illegal drugs in the car, (T. 919-21, 1035), this testimony did not preclude the possibility that someone other than Mr. Sims had carried drugs in the car without their knowledge;[11] and (3) since Officer Silva acknowledged that it was impossible to conclude from the dog's alert *when* drugs had been in the car, (T. 1087), the dog's alert could not establish that drugs had been in the car during the time Mr. Sims was driving it, let alone at the time of his arrest.[12] Further, because microscopic quantities of cocaine residue, sufficient to cause a dog to alert, can be easily and innocently

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[11] Specifically, Sam Mustipher testified that he had never carried drugs in his car and that neither his mother nor his sister used drugs or, to the best of his knowledge, had carried drugs in the car. (T. 920-21) Mr. Mustipher also testified, however, that he did not know who might have been in the car or borrowed it while he was away at college (he had returned home for the summer approximately two weeks before this incident). (T. 906, 924) He did not see Mr. Sims put any drugs in the car during the time they were together. (T. 924) Mr. Mustipher was not asked about any other friends of his who might have been in the car in the period leading up to the crime. Carol Ann Mustipher testified that she sometimes had friends ride in the car but no one had used drugs in the car in her presence; she did not use drugs; and she had never seen her brother or mother use drugs. (T. 1035)

[12] Thus, contrary to appellee's contention, the prosecution did not establish that "[g]iven the time frame," Mr. Sims "was the only party accountable for the drug scent," Answer Br. at 34, because the dog's alert did not, in fact, establish any "time frame" for the purported presence of drugs in the car.

spread,[13] a jury cannot *as a matter of law* infer knowing possession of an illegal drug solely from a dog's alert, or the chemical detection of cocaine residue, on an object commonly used for legitimate purposes.[14] *Weary v. State,* 644 So. 2d 156, 157 (Fla. 4th DCA 1994); *Lord v. State,* 616 So. 2d 1065, 1066-67 (Fla. 3d DCA 1993); Initial Brief at 28-29 & nn.22-26 (collecting cases). Ms. Lynn's testimony -- which required the jury to draw the further inference that Mr. Sims feared violation of his parole for possessing illegal drugs -- should therefore have been excluded simply on the ground that the prosecution failed to establish an adequate connection between Mr. Sims' parole status and the charged offense.[15]

Even if Ms. Lynn's testimony was not irrelevant as a matter of law, it was inadmissible under section 90.403. The "chain of inference" necessary to connect Mr. Sims' parole status and his purported motive to kill Officer Stafford was too attenuated by the patent weaknesses in the state's evidence that Mr. Sims possessed drugs for Ms. Lynn's testimony to have any appreciable probative value. *State v. McClain,* 525 So. 2d 420, 422 (Fla. 1988).[16] At the same time, her

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[13] Appellee contends that appellant has improperly raised for the first time on appeal the possibility that the dog alerted falsely or alerted to the scent of innocently transferred narcotics residue. Answer Br. at 34. Appellant, however, has simply relied upon factually similar, reported decisions involving the use of dog alerts to establish possession or the presence of controlled substances at some prior point in time. Initial Br. at 28-29 & nn.22-26. Such cases are manifestly relevant to the question presented on appeal in this case.

[14] It is therefore not surprising that appellee does not cite a single case in which "evidence" of the kind presented below has been held sufficient to establish a prima facie case of drug possession.

[15] *See, e.g., State v. Lee,* 531 So. 2d 133, 135 (Fla. 1988) (where connection between charged offense and later bank robbery was purely speculative, evidence of bank robbery was not relevant to establish factual context of crime and did not tend to prove material fact in issue); *United States v. Veltmann,* 6 F.3d 1483, 1499 (11th Cir. 1993) (where government failed to present sufficient evidence under *Huddleston* standard that defendants set two prior fires on their property, evidence failed to meet threshold requirement of relevance); Initial Br. at 25 n.18.

[16] *Accord Denmark v. State,* 646 So. 2d 754, 757 (Fla. 2d DCA 1994) (inseparable crimes evidence inadmissible under section 90.403 to show factual context where not sufficiently connected to defendants for probative value to outweigh danger of unfair prejudice); *State v. Sawyer,* 561 So. 2d 278, 284 (Fla. 2d DCA 1990) (pubic hair found in victim's apartment properly excluded in murder case where expert could say only that hair was consistent with defendant's and could not exclude possibility that hair was transferred innocently); *see also*

testimony posed a substantial danger of *unfair* prejudice -- not ordinary prejudice as appellee suggests -- in the classic sense that it suggested an improper, emotional basis for the jury's verdict. *Id.* Evidence of Mr. Sims' parole status did not add legitimately to a theory that he shot Officer Stafford to avoid the consequences of engaging in illegal activity, but rather improperly bolstered the state's wholly speculative evidence of motive with criminal propensity evidence and allowed the prosecution to capitalize on wide-spread public antipathy toward early release of prisoners.[17] *See United States v. Bradley,* 5 F.3d 1317, 1320-21 (9th Cir. 1993) (evidence inadmissible under *Huddleston* standard where connection to defendants was weak so that evidence tended to prove motive by propensity rather than legitimate means); Initial Br. at 31-34.

Appellee's citation to other cases in which this Court has held that evidence of a defendant's parole status was properly admitted is unavailing. In those cases, the connection between the collateral crime or the defendant's parole status and his motive were either established by the defendant's own statements,[18] or the defendant's commission of the collateral crime was established by direct evidence[19] or was otherwise not disputed.[20] *See also* Initial Br. at 30 n.30.

Huddleston, 485 U.S. at 689 & n.6 (weaknesses in evidence that defendant committed uncharged crime should be weighed under Federal Rule of Evidence 403); *Bell v. State,* 650 So. 2d 1032, 1035 (Fla. 5th DCA 1995) (*Williams* rule evidence inadmissible under sections 90.404 and 90.403 where insufficient proof defendant committed uncharged crime); Initial Br. at 31-32 &.

[17] For example, at the time of trial, a proposed constitutional amendment to require prisoners to serve 85 percent of their sentences was a major issue in the gubernatorial campaign. *See* Tom Fiedler, *Bush Wants to Expand Prisons Without Tax Hike,* MIAMI HERALD, Jan. 11, 1994, at 5B.

[18] *Grossman v. State,* 525 So. 2d 833, 835, 837 (Fla. 1988) (defendant pleaded with officer not to turn him for violating his probation), *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 told witness that victim must be killed to prevent apprehension), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988); *Mackiewicz v. State,* 114 So. 2d 684, 687-88 (Fla. 1959) (defendant admitted 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); *State v. Escobar,* 570 So. 2d 1343, 1344-46 (Fla. 3d DCA 1990) (defendant told witness he would shoot if stopped by the police to avoid going back to jail), *cause dismissed,* 581 So. 2d 1307 (1991).

[19] *Heiney v. State,* 447 So. 2d 210, 213-14 (Fla.) (direct testimony defendant fled from authorities in Texas who wanted to question him regarding a shooting there), *cert. denied,* 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Reddish v. State,* 167 So. 2d 858, 860-61 (Fla.

This Court has never approved the admission of a defendant's parole status based upon a factual predicate as manifestly inadequate as the state's "evidence" in this case.[21] To the contrary, this Court has consistently refused to allow the prosecution to use such speculative theories of motive as a vehicle for the introduction of otherwise irrelevant and highly prejudicial evidence. *See Garron v. State,* 528 So. 2d 353, 357-58 (Fla. 1988); *Drake v. State,* 400 So. 2d 1217, 1218-19 (Fla. 1981), *appeal after remand, Drake v. State,* 441 So. 2d 1079, 1082 (Fla. 1983), *cert. denied,* 466 U.S. 978, 104 S.Ct. 2361, 80 L.Ed.2d 832 (1984); Initial Br. at 31-32. This case falls squarely within the ambit of *Drake I and II* and *Garron.*

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.

1. Restriction on Scope of Cross

With respect to the trial court's refusal to allow defense counsel to question Ms. Lynn on cross-examination about Mr. Sims' arrest a week before the shooting, appellee first answers that Ms. Lynn had no personal knowledge of the incident and that "it would be hearsay for her to relate what the officers told her." Answer Br. at 38. Defense counsel stated, however, that he intended to elicit from Ms. Lynn whether "Merritt Sims also knew that he could be revoked for driving while his license was suspended?" and whether Ms. Lynn had filed a violation affidavit alleging that Mr. Sims' had been arrested for driving without a valid driver's license. (T. 1114)

1964) (testimony regarding previous shooting for which deputy/victim was arresting defendant).

[20] *Washington v. State,* 432 So. 2d 44, 47 (Fla. 1983) (where defendant shot deputy who questioned him about selling guns, apparently undisputed evidence that guns were stolen admissible to show motive); *McVeigh v. State,* 73 So. 2d 694, 696 (Fla. 1954) (apparently undisputed evidence defendant violated his probation in California admissible to show motive for killing police officer), *appeal dismissed,* 348 U.S. 885, 75 S.Ct. 210, 99 L.Ed. 696 (1954).

[21] Contrary to appellee's suggestion, appellant does not contend that evidence of a defendant's parole status should be inadmissible whenever the defendant disputes the facts of the alleged violation. Answer Br. at 34 n.9. Rather, appellant maintains -- consistent with well-established precedent -- that the admissibility of such evidence requires more than the "unsubstantiated innuendo" on which the state relied in this case. *Huddleston,* 485 U.S. at 689.

These questions did not require Ms. Lynn to provide details of the incident itself as to which she had no first-hand knowledge. Nor did defense counsel indicate that he had any intention of asking Ms. Lynn to testify to information related to her by the arresting officers. That the prior arrest was without incident could be established by non-hearsay testimony that Mr. Sims was charged *only* with driving with a suspended license and not with resisting arrest or escape.

Appellee's argument regarding the factual dissimilarities between the two incidents is pertinent to the weight of the evidence, not its admissibility. Initial Br. at 35-36. Moreover, defense counsel's concession *before* trial that the incidents were dissimilar in some respects cannot plausibly be construed as a waiver of all future argument regarding the admissibility of this evidence. Answer Br. at 39. Defense counsel did not know at the time of argument on the state's motion in limine that evidence of Mr. Sims' parole status would be admitted at the guilt/innocence phase of the trial, because the prosecution, in violation of its discovery obligations, had not listed Mr. Sims' parole officer as a witness. Once the prosecution made Mr. Sims' purported fear of parole revocation a central issue in the case, the prior arrest became extremely relevant, as defense counsel argued, to contradict the state's theory of Mr. Sims' state of mind. (T. 1114-15)

Citing *Steinhorst v. State,* 412 So. 2d 332, 337 (Fla. 1982), appellee further asserts that the proposed questions were improper because they would not discredit Ms. Lynn's testimony on direct examination or impeach her credibility but rather would have used the cross-examination "as a vehicle for presenting defensive evidence." Answer Br. at 40. As *Steinhorst* notes, however, "questions on cross-examination must *either* be relevant to credibility *or be* germane to the matters brought out on direct examination." *Id.* (e.s.) The questions propounded to Ms. Lynn were, as demonstrated in appellant's initial brief, "germane to" the matters brought out on her direct examination. Initial Br. at 36-38. The questions concerned the same subject matter -- the conditions of Mr. Sims' control release -- and the closely related matter of his prior arrest while on parole, which was relevant to supplement and clarify the information to which Ms. Lynn had testified on direct examination. *See Zerquera v. State,* 549 So.2d 189, 192 (Fla. 1989). Most

importantly, the questions would have corrected the misleading inference raised by Ms. Lynn's "abridged testimony" -- that Mr. Sims had a desperate fear of parole revocation, sufficient to provide a motive for murder. *Id.*; *See* Initial Br. at 37-38.

2. Mr. Sims' Testimony

Appellee's contention that the defense waived any objection to the exclusion of Mr. Sims' testimony about the prior arrest is equally without merit. During the debate on Ms. Lynn's testimony, the defense argued that the prior arrest was relevant to refute the state's motive theory and, as discussed above, specifically noted that the trial court's earlier ruling on the state's motion in limine had preceded the admission of Mr. Sims' parole status as evidence of motive. (T. 1114-15) The prosecutor subsequently re-renewed its motion in limine, to clarify that Mr. Sims was also precluded from testifying about the prior arrest. (T. 1194) At this juncture, the trial judge was thoroughly familiar with the parties' positions and had already made clear his intention to adhere to his original ruling on the motion in limine. Renewed argument on the relevance of the evidence would therefore have been futile and was not necessary to to preserve the issue for appeal. *See, e.g., Hunt v. State,* 613 So. 2d 893, 898 n.4 (Fla. 1992); *Thomas v. State,* 419 So. 2d 634, 636 (Fla. 1982).

Similarly, the purpose of requiring a proffer is to ensure that "the substance of the evidence was made known to" the trial court and is adequately reflected in the record for purposes of appellate review. *See Woodson v. State,* 483 So. 2d 858, 859 (Fla. 5th DCA 1986). In this case, the prosecution had summarized the substance of the evidence in its motion in limine. Additional details were brought out during the discussion of Ms. Lynn's testimony. It is apparent from the record that the disputed evidence simply included the fact that Mr. Sims had been stopped for a traffic violation, approximately one week before the shooting, was arrested for driving with a suspended license, and made no attempt to resist arrest or escape although he was on parole at the time. Since both the prosecution and the trial court were aware of the testimony that would have been elicited, and its substance is reflected in the record, the absence of a more

formal proffer does not preclude appellate review. *Somerville v. State,* 584 So. 2d 200, 201 n.2 (Fla. 1st DCA 1991); *accord Seeba v. Bowen,* 86 So. 2d 432, 434 (Fla. 1956); *Hansen v. State,* 585 So. 2d 1056, 1059 n.5 (Fla. 1st DCA), *review denied,* 593 So. 2d 1052 (Fla.1991); *Reaves v. State,* 531 So. 2d 401, 403 (Fla. 5th DCA 1988); *see also Angrand v. Key,* 657 So. 2d 1146, 1150 (Fla. 1995) (Grimes, J., concurring in part and dissenting in part) (substance of excluded evidence adequately before court in opposing party's motion in limine).

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 state answers that appellant has exagerrated the significance of the drug possession/parole violation theory to the prosecution's case; that "proof of motive was not an essential aspect of the case;" and that, in any event, "the parole revocation/motive theory is independently tied in to the defendant's fear of being caught in a stolen car" so that any error in admitting Ms. Lynn's testimony was harmless. Answer Br. at 45. Each of these contentions is flatly contradicted by the record.

In arguing for the admissibility of Ms. Lynn's testimony, the prosecutor asserted:

> Now, what I am entitled to prove, what I am entitled to prove as part of my case-in-chief is that this defendant had a reason to kill Officer Stafford, because I did charge premeditation.
>
> What's his reason to kill? Well, up to now, they may have some indication that he is either transporting, possessing or using drugs. *You think to yourself, So what? You also may think to yourself, and they are going to argue to the jurors, a stolen-car case isn't enough reason to kill a police officer.*
>
> But if you're carrying or possessing narcotics and when you're released from state prison on controlled release, Ms. Lynn has a form which the defendant signed upon his release indicating that if you either possess, use or have narcotics, you're in violation of your controlled release from state prison.
>
> What happens, he is told that if he violated his controlled release, where is he going to go? He is going to go back to state prison.
>
> I am entitled in my case-in-chief to give the jury a motive for the murder of a police officer. It's the same in Charles Street, as the Court recalls.

> The evidence in Charles Street was, as a prisoner, he was told at state prison if he commits another violent felony, you're going back to state prison.
>
> All that came out because the State is entitled to prove motive on premeditated murder. *That's our theory.* I am entitled to show the reason, and I am going to argue the reason why he killed Officer Stafford. *Forget the stolen car. He knew it wasn't stolen. That's not the reason.*
>
> He killed Charlie Stafford because Charles Stafford was going to find that he is using his cousin's car to transport drugs and he is going to go back to state prison for it.

(T. 1093-95) Similarly, in its written memorandum regarding the admissibility of Ms. Lynn's testimony,[22] the prosecution asserted: "It is the State's theory of the case that the defendant's motive for killing Officer Stafford was to avoid going back to prison, and that he, as a parolee with drugs in his car was risking just that. The State shall argue that rather than face this consequence, the defendant shot and killed Officer Stafford." (R. 456) The memorandum also conceded that, since Mr. Sims "was seemingly unaware that his cousin had reported the car stolen," the state needed an alternative theory of motive, or "[t]he jury could erroneously conclude that there was no motive for the defendant to act as he did or that he did not intend to kill when he shot and murdered Officer Stafford." (R. 461-62) The prosecution, as it had promised, thereafter argued in summation that the jury should reject Mr. Sims' testimony of self-defense because he had a motive to kill Officer Stafford: to prevent revocation of his parole for transporting illegal drugs.[23] (T. 1419-20, 1422, 1435, 1436, 1440)

These "mere five references" to the drug possession/parole violation theory in the prosecutor's closing argument can hardly be dismissed as inconsequential since they embodied the prosecution's self-described "theory of the case." Answer Br. at 44-45. Moreover, given the prosecution's candid acknowledgment at trial that it needed evidence of motive to contradict the

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[22] Following the oral argument quoted above, the trial court requested a written memorandum on the admissibility of Ms. Lynn's testimony. (T. 1095)

[23] Contrary to appellee's suggestion, appellant does not claim that the prosecutor's argument was improper, only that it demonstrates the significance of the improperly-admitted evidence to the prosecution's case. Answer Br. at 44.

defendant's anticipated testimony of self-defense, the state's contention on appeal that evidence of motive was *not* essential to the prosecution's case is not credible. Appellee's repeated assertion that Mr. Sims' parole status could have been admitted on the alternative ground that Mr. Sims knew he was driving a stolen car is similarly untenable since the prosecution conceded at trial that Mr. Sims' "knew [the car] wasn't stolen" and was not aware that his cousin had reported it stolen. The prosecution accordingly did not rely on the stolen car theory either as evidence of Mr. Sims' motive to kill Officer Stafford or as a predicate for Ms. Lynn's testimony.[24] (T. 1094; R. 461-62) Finally, although the prosecution relied exclusively on the dog-alert evidence as the predicate for Ms. Lynn's testimony, it also conceded that this evidence, without proof of Mr. Sims' parole status, was not necessarily sufficient to establish motive. (T. 1094)

The record establishes that the prosecution considered evidence of Mr. Sims' parole status to be so essential to its case that it feared it could not obtain a conviction of first degree murder without it. Given that Mr. Sims' testimony of self-defense was equally or more consistent with the remainder of the state's evidence, this fear was well founded. It is, however, fundamentally inconsistent with a criminal defendant's right to a fair trial for the state to compensate for weaknesses in its case with inflammatory evidence which is truly relevant only to establish the defendant's criminal propensity. Mr. Sims must therefore be given a new trial and the opportunity to present his testimony of self-defense to a jury not improperly inflamed by such evidence.

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[24] Sam Mustipher testified that, although Mr. Sims had told him he "would probably be back" with the car the following day, Mr. Mustipher had not given Mr. Sims any specific date or time to return the car. (T. 922) Mr. Mustipher reported the car stolen "[n]ot because I thought that he [Mr. Sims] stole it, [but] because I didn't hear from him and I was worried." (T. 916, 923) At trial, the prosecution obviously recognized, quite properly, that Mr. Sims had no reason to fear that his parole would be revoked for driving his cousin's car.

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.

Appellee answers that appellant's two related claims regarding the prosecutor's misrepresentations of Mr. Sims' testimony at trial are (1) not preserved and (2) were not, in fact, misrepresentations. First, appellee asserts that defense counsel's objection during the rebuttal testimony of the medical examiner, Dr. Mittelman, did not relate specifically to the prosecutor's demonstration of Officer Stafford's position and, therefore, did not preserve the issue for appeal. Defense counsel did, however, object unambiguously to the prosecutor's representation of how Mr. Sims held the gun. Moreover, the prosecutor at trial understood defense counsel's objection to encompass his demonstration of *both* the position of the gun *and* Officer Stafford's position because he responded to the objection by stating, "I made him [Mr. Sims] stand up." (T. 1350) As indicated in the portions of the record cited in appellee's brief, Answer Br. at 47, the prosecutor asked Mr. Sims to step down from the witness stand to show "[h]ow . . . he [Officer Stafford] lunge[d] at you." (T. 1316-17) Only *after* the prosecutor's response did the trial court overrule the objection, remarking that he could not comment on the evidence. (T. 1350) By so ruling, the trial court declined to entertain *any* objection regarding the accuracy of the prosecutor's representations of Mr. Sims' testimony, in the mistaken belief that to sustain such an objection would be a comment on the evidence. Further argument or objection by defense counsel would therefore have been futile. *See Hunt,* 613 So. 2d at 898 n.4.

The prosecutor could *not* have accurately demonstrated Mr. Sims' testimony regarding the position of the gun, because Mr. Sims said repeatedly that he could not remember how he held the gun.[25] Initial Br. at 42-43; (T. 1238-39, 1314-16) The prosecutor, however, depicted Mr.

[25] While Mr. Sims stated that the gun was in front of him, and his hand was "up," as appellee quotes in its brief, the remainder of his answer states "I don't know how I put it up. When he came at me, I put my hand up to stop him from grabbing me." (T. 1315)

Sims as holding the gun in the "usual position . . . with the barrel parallel to the ground." (T. 1351) Similarly, the prosecutor's demonstration of Officer Stafford "standing upright" (T. 1351) flatly contradicts Mr. Sims' testimony that the officer was "bending over," in a "down position coming at me with his hands up." (T. 1238) The fact that the prosecutor used the word "lunge" to describe his depiction of Officer Stafford's position does not cure the factual inaccuracy in how he demonstrated the "lunge" for the medical examiner.[26]

Appellant acknowledges that there was no objection to the prosecutor's demonstration of Mr. Sims' testimony during the rebuttal testimony of the firearms examiner, Jess Galan, but rather contends that this error was fundamental when considered in conjunction with the error that occurred during Dr. Mittelman's testimony. With respect to the merits of this issue, it is apparent that Mr. Galan's testimony regarding the location of the casings was, contrary to appellee's assertion, based at least in part on how Mr. Sims purportedly was holding the gun. The position of the gun is necessarily relevant to the trajectory the casings would follow upon being ejected and therefore is critical to the reliability of any effort to pinpoint the shooter's position based on the location of casings at the crime scene. *See* Initial Br. at 51 n.48. Appellee also asserts, with respect to Mr. Sims' location, that "the defendant clearly agreed with the prosecutor's depiction of his location on the diagram, which was susbsequently shown to the firearm examiner." Answer Br. at 51. The diagram referenced during Mr. Sims' cross-examination is not, however, the same diagram that was shown to Mr. Galan. During the quoted portions of Mr. Sims' cross-examination, the prosecutor refers to drawing an "X" on a diagram. (T. 1320) This diagram apparently was drawn on a blackboard and is not included in the record on appeal. (T. 1425) During Mr. Galan's rebuttal testimony, the prosecutor drew a triangle and a "V" to represent the

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[26] Appellee infers from the cross-examination of Mr. Sims, during which the prosecutor also demonstrated Officer Stafford's position and Mr. Sims agreed to its accuracy, that the prosecutor's later demonstration must also have been accurate. Answer Br. at 48. There is no indication whatsoever in the record, however, that the prosecutor during the first demonstration depicted Officer Stafford as standing "upright."

positions of Mr. Sims and Officer Stafford on a chart which was introduced into evidence as exhibit 7 and is reproduced in the appendix to appellant's initial brief. (T. 1341-42; App. 2-3) Mr. Sims, therefore, did not adopt the representation of his testimony on exhibit 7, which was shown to Galan.[27]

Even if this Court finds that the inaccuarate representations were either not preserved or do not rise to the level of reversible error, they seriously undermine the legitimacy of the rebuttal testimony of these two witnesses in assessing whether the state, in fact, presented evidence legally sufficient to rebut Mr. Sims' testimony of self-defense.

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.

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.

Appellee's answer to the sufficiency issue is predicated upon a number of erroneous readings of the record, each of which is addressed in turn below.

1. The 75-second time frame.

Appellee's central contention is that the dispatch tape establishes that only 75 seconds elapsed between the time that Officer Stafford radioed that he was on the ramp and the time that a second officer radioed for assistance. Answer Br. at 52-53. This assertion is based on an error in the transcription of the dispatch tape, which is apparent from the testimony of the dispatcher at trial. The transcription of the dispatch tape reflects the following exchange:[28]

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[27] As discussed in appellant's initial brief, and illustrated in the supplemental appendix, the prosecutor's depiction of Mr. Sims' position on exhibit 7 is probably erroneous by only a matter of a few feet; those few feet, however, show that Mr. Sims' testimony is *not* inconsistent with the location of the casings. *See* Initial Br. at 52-53 & Figure 1.

[28] Corrections indicated in brackets are based upon listening to a copy of the tape. The bold, bracketed numbers correspond to the dispatcher's chronology presented at trial and discussed

[1] Speaker #1: 3821. We have a stop on the exit ramp to 27 Avenue off of State Road 112.

[2] Speaker #5: QSL, 3800. The [sic -- He's got a] vehicle stopped on the exit ramp of State Road 112 and 27 Avenue. Do you have a unit who can 15?

[3] Speaker #2: They should be en route. The tag is Golf, Yankee, Juliett, 40 G/Golf.

Speaker #5: QSL. Is the 15 in the area, or do you want to try [sic -- me to start] FHP?

[4] Speaker #1: [(unintelligible). 3820] I am on the ramp now (unintelligible) [-- approaching 27].

[5] Speaker #5: 3821 [sic - 3820] on a 15 (unintelligible). Midwest (unintelligible). Attention all units, 3821 has a 22 occupied stop on the exit ramp to 27th Avenue and State Road 112. I have a 15 arriving in the area. Clear 20:54. [Pause] 3820. 3820.

Speaker #4: QSK.

Speaker #2: Are you with the unit now?

[6] Speaker #4: (Unintelligible). [-- exit ramp.] [Pause] 3820, emergency.

Speaker #4: Officer is down. Send rescue. Vehicle GOA.

(Supp. R. 5) Based on the court reporter's identification of the voices on the tape, appellee counts 75 seconds from the second response attributed to Speaker #1. Answer Br. at 52. At trial, however, the Miami Springs dispatcher identified this voice as belonging to Sergeant Pessolano, not to Officer Stafford. The chronology of calls, according to the dispatcher, was as follows: **[1]** Officer Stafford tells the Midwest District dispatcher that the vehicle is stopping on the exit ramp (T. 956-57); **[2]** The Midwest dispatcher asks if the Miami Springs dispatcher has already radioed for backup (T. 957); **[3]** The Miami Springs dispatcher tells her a unit is en route (T. 957); **[4]** Sergeant Pessolano radios in that he is responding to assist (T. 958);[29] **[5]** The Midwest dispatcher

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below. If appellee disagrees with these corrections, it may be necessary to relinquish jurisdiction to resolve any factual conflicts with the assistance of trial counsel and the trial court. This Court should not be required to resolve such matters on appeal.

[29] On the tape, this speaker can be heard identifying himself as "3820." This is consistent with the dispatcher's testimony at trial. (T. 958) The dispatcher identifies "3820" as Sergeant Pessolano. (T. 958) The court reporter also appears to have made a mistake in the Midwest

summarizes and says "Clear 20:54" (T. 958); **[6]** Sergeant Pessolano radios that he has an emergency; an officer is down (T. 959). The dispatcher also testified that "last time we hear on any tape from Officer Stafford is at the present time he says the car is pulling off on 27th Avenue" -- this is the *first* call attributed to Speaker #1 on the transcription. (T. 960) By appellant's count, a period of at least two minutes -- not 75 seconds -- elapsed from Officer Stafford's last transmission to the point when Sergeant Pessolano radios "emergency."[30]

Mr. Sims testified that the encounter with Officer Stafford happened very quickly. (T. 1239, 1312, 1314, 1315-16) As a matter of common sense, it takes much longer to describe a two-minute struggle in detailed, blow-by-blow terms than it does for the events themselves to unfold. Moreover, Fraid Batule's testimony specifically corroborates the two stages of the struggle Sims described. Batule observed the two men at the point after Sims had struck Stafford on the head with the radio and had surrendered to him. Initial Br. at 49. Stafford resumed choking Sims when Batule passed and Sims sought again to defend himself, this time grabbing Stafford's gun, shooting as Stafford lunged at him, then fleeing in a panic. Initial Br. at 48. There is no dispute that this last series of events transpired extremely quickly.

2. Physical Evidence

a. The medical examiner's redirect rebuttal testimony

During Dr. Mittelman's redirect rebuttal testimony, on which appellee relies, Answer Br. at 53, the prosecutor asked Dr. Mittelman to agree that, if "[t]he defendant's hands are in *this position*," (T. 1353), Officer Stafford would not be "lunging, but his body has to bent in this

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dispatcher's response, which on the tape confirms that "3820" is on a "15" -- an assist. (T. 958)

[30] Appellant must emphasize, however, that it would be inappropriate for this Court to make factual findings regarding the timing of the incident, when no specific time frame was established or argued by the prosecution below. The state's lack of emphasis on this issue below presumably was a deliberate tactical choice which necessarily would have affected the trial strategy of the defense. For example, it is significant that the prosecution did *not* call Sergeant Pessolano to testify about his arrival at the crime scene but called him only for the limited purpose of establishing that Officer Stafford had done the roll call on the night of the shooting and objected successfully to defense counsel's attempt to ask Pessolano about the crime scene. (T. 1027-28)

position in order for those bullets to go straight down." (T. 1353) Thus, based on yet another misrepresentation of Mr. Sims' testimony,[31] the prosecutor elicited Dr. Mittelman's agreement that he would not characterize Officer Stafford's position as a "lunge." This semantic distinction, premised on a misrepresentation of Mr. Sims' testimony, in no way undermines Dr. Mittelman's testimony on cross-examination that the angle of the wounds would be consistent with Officer Stafford "coming forward" in a "bent over" position, as Mr. Sims' had testified. (T. 1238, 1352)

b. The position of the casings.

Appellee's contention that Mr. Sims agreed expressly with the prosecutor's representation of his testimony on exhibit 7 is refuted above. Appellant's initial brief sets out in detail the record support for the argument regarding Mr. Sims' position at the time of the shooting. Initial Br. at 51-53. For the sake of clarity, this argument is also illustrated graphically in the supplemental appendix. Moreover, appellee makes no attempt to reconcile the *prosecution's* theory of how the shooting occurred -- that Officer Stafford knelt in front of the police car while Mr. Sims faced the grass -- with the fact that the casings were found to the *left* of Stafford's body. Initial Br. at 50-51.

c. The position of the body.

The theory that Officer Stafford moved after being shot is not only a fair inference from the evidence -- since Mr. Sims did not see where Officer Stafford's body ultimately came to rest (T. 1317) -- it is a necessary inference since, as noted above, the location of the casings is fundamentally *in*consistent with Stafford's having been shot in front of the police car.

3. Purported inconsistencies with other witnesses.

a. Sam Mustipher

Appellee asserts that Mr. Mustipher "directly refuted" Mr. Sims' testimony by stating that "Sims knew he had to bring the vehicle back at least two days before the crime." Answer Br. at

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[31] As discussed above, Mr. Sims could not recall how he held the gun.

55. Mr. Mustipher actually testified, however, that although Mr. Sims had indicated that "he would probably be back tomorrow," Mr. Mustipher had not given Mr. Sims any specific date or time to return the car. (T. 922-23, 927) This was entirely consistent with Mr. Sims' testimony that Mr. Mustipher had not imposed a specific time limit on the loan of his car. (T. 1226-27)

b. Fraid Batule

(i) Mr. Batule could not have observed Mr. Sims' split lip since Mr. Sims was facing away from him as he drove past. (T. 973)

(ii) Mr. Batule did not ovehear Officer Stafford's threats because, as Mr. Sims testified, Officer Stafford lowered his voice as Batule passed. (T. 1235)

(iii) Contrary to appellee's assertion, Mr. Batule did not "merely" see Officer Stafford reholstering his gun. Answer Br. at 56. Mr. Batule specifically testified that he saw Officer Stafford "aiming" his gun at the back of Sims' head and moving it back and forth.[32] (T. 968-69, 974-75) Stafford apparently reholstered the gun when he realized he was being observed. (T. 975-76)

(iv) Mr. Batule specifically testified that Mr. Sims' words "Okay, you got me man" sounded to him like an emotional plea and that Mr. Sims had his hands up on the car and was not making any effort to get away. (T. 975-76) This vernacular expression is, moreover, perfectly consistent with fear when considered in the context of Mr. Sims' testimony that he was pleading with the officer not to kill him and just to take him to jail (T. 1235) -- *i.e.,* there's no need to kill me, you've *got* me, just take me to jail.

c. Otis Robinson

It is not surprising that Mr. Robinson did not observe any injuries on Mr. Sims, Answer Br. at 57, because the state did not clearly establish that Mr. Sims was ever in Mr. Robinson's cab. Mr. Robinson's identification of Mr. Sims was discredited at trial when it was disclosed

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[32] This was consistent with Sims' testimony that he felt something touching the back of his head as Batule passed by. (T. 1235)

that, prior to picking Mr. Sims out of a photo line-up, Mr. Robinson had seen his picture both on television and in the newspaper. (T. 1046) Although Mr. Robinson subsequently identified Mr. Sims in court, (T. 1042), he had also spent the morning in the court room, observing the trial, in violation of the witness sequestration rule. (T. 1025-26) Moreover, although Mr. Robinson claimed that he had looked at his passenger's face and mouth as they conversed, he did not notice gold teeth in the passenger's mouth or a scar on the passenger's face. (T. 1047, 1051) Sims has had conspicuous gold teeth for almost ten years, and a scar on left side of his face (which would have been facing the driver) since he was two. (T. 1244). Robinson also did not notice handcuffs on the passenger's arm, either in the cab or when the passenger got out of the car. (T. 1048-49, 1050) Further, the passenger's remarks, related by Robinson, did not include any admissions, nor any details of the crime that only the killer would know. Indeed, the remarks were consistent with information the passenger could have learned from whomever in the complex had reported the car to the police.[33] (T. 1041-43)

d. Carol Mustipher

Carol Mustipher testified that she told Mr. Sims over the phone that the car had been involved in a shooting, and he had not responded. (T. 1034) Mr. Sims' testimony that Ms. Mustipher asked him repeatedly about the car, but he could not *recall* whether she told him the car was involved in a shooting is not inconsistent. (T. 1275-76)

4. Flight

There is no dispute that Mr. Sims' subsequent flight from the scene and from the state reflect a consciousness of guilt insofar as Mr. Sims obviously realized he had shot a police officer and was overwhelmed by the implications of that act. His flight does not, however, undermine the credibility of his testimony of self-defense. Given the historically poor relationhip between

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[33] Robinson said the passenger asked him if he had heard about the policeman being killed and told Robinson the car used in the crime had been found in the complex and that it had blood on it. (T. 1041-43) 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)

the police and the African-American community in Miami,[34] it can hardly be considered unreasonable -- as appellee suggests -- for a young African-American man (1) to take seriously an angry police officer's threats to kill him or (2) to fear, after shooting a police officer, that his assertions of self-defense would not be believed, no matter how legitimate.[35]

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Appellee's contention that the state persuasively rebutted Mr. Sims' testimony of self-defense fails on a fair reading of the record in this case. Appellee, moreover, offers no answer at all to the fundamental inconsistency between the prosecution's theory of how the shooting occurred and the physical evidence. At the very least, this discussion underscores that this was an extraordinarily close case, in which the prosecution's pursuit of an improperly speculative and inflammatory theory of motive cannot be deemed harmless beyond a reasonable doubt.

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.

Appellee does not dispute that self-defense was dispositive of the state's felony murder theory as well as its theory of premeditation[36] and simply argues that taking the gun from the scene is inconsistent with Mr. Sims' belief that he had acted in self-defense. Answer Br. at 59. Mr. Sims testified, however, that he fled the scene in panic and did not realize he had taken the gun with him until later. (T. 1242) Moreover, Mr. Sims subsequently attempted (unsuccessfully) to assist the police in locating the gun. (T. 1188, 1252-53)

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[34] *See generally* ALEJANDRO PORTAS & ALEX STEPICK, CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI (1993).

[35] While Mr. Sims' aborted attempt to flee the police in California exhibited poor judgment, it also does not detract from the credibility of his testimony. Mr. Sims thereafter confessed to the killing and was described by the police as very cooperative. (T. 314-15, 334-35, 338, 1188)

[36] As appellee acknowledges, *Kearse v. State,* 20 Fla. L. Weekly S300 (Fla. June 22, 1995), on which it relies, did not involve a claim of self-defense and is therefore inapposite if this Court finds that the prosecution failed as a matter of law to disprove Mr. Sims' defense.

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.

Appellee answers that there were "few improprieties" in the prosecutor's closing argument and "none of a fundamental nature." Answer Br. at 43. Appellee's responses are addressed in turn below.

1. Comments on matters outside the record.

Appellee properly makes no attempt to defend the prosecutor's most egregious misconduct during closing argument -- the assertion that, in his 12 years of experience as a prosecutor, defendants frequently fabricate claims of self-defense. Appellee instead asserts that such argument could not have been fundamental error. Answer Br. at 60. In this case, however, the prosecutor's improper remarks were aimed at the very heart of the defense in a case that "involved substantial factual disputes." *Hill v. State,* 477 So. 2d 553, 557 (Fla. 1985); Initial Br. at 60-64. Appellee's contention that such misconduct must be overlooked in a *capital* case, absent objection, is particularly ironic since, in the *civil* context, this type of improper argument is considered to so seriously undermine the reliability of the jury's verdict that reversal is required whether or not there has been an objection below. *E.g., Schreier v. Parker,* 415 So. 2d 794, 795 (Fla. 3d DCA 1982); Initial Br. at 60 n.56 (collecting cases).

2. Calling defendant a liar.

The prosecutor's repeated references to Mr. Sims as a liar were asserted to be error only in connection with the above remarks. Even if referring to a criminal defendant as a "liar" can, in some circumstances, constitute fair comment on the evidence, it ceased to be so here when the prosecutor interjected his personal opinions and experience into the case.

3. Attacks on defense counsel.

Although defense counsel did refer repeatedly to "smoke screens" erected by the prosecution, the prosecutor exceeded the scope of a proper invited response. While defense

counsel argued that the prosecution was diverting the jury with irrelevant facts, the prosecutor insinuated that defense counsel had coached Mr. Sims to give false testimony. (T. 1417, 1437) Moreover, two of the prosecutor's accusations of misleading statements by defense counsel were demonstrably false. Appellee concedes that, contrary to the prosecutor's argument, "there was evidence that" Otis Robinson had seen Mr. Sims' picture before he identified him, but nevertheless implies that the prosecutor was not entirely incorrect in asserting that no witness ever stated that Sims' picture had appeared "in the newspaper or on T.V." (T. 1423) before the photo lineups were shown to Robinson or Castano. Answer Br. at 63-64. In fact, Mr. Robinson testified as follows on cross-examination:

> Q Mr. Robinson, before you picked the photograph out, you had seen his picture in the newspaper. Is that correct?
>
> A Yes, I had.
>
> Q And you had also seen him on TV also; is that right?
>
> A Yes, I had.

(T. 1046)[37] Appellee also asserts that the prosecutor was "entirely correct" in arguing that Mr. Sims never said he had turned his back to Officer Stafford, after striking him with the radio, to deter Stafford from shooting him. Answer Br. at 64. Appellee's own statement of facts, however, recites that "Sims then turned around, with his back to the officer, and his hands in the air, *as he did not want to be shot.*" Answer Br. at 13 (e.s.). Appellee's statement of facts, not the argument in its brief, is correct. (T. 1234)

4. Remark that Stafford should have shot Sims.

Appellee contends that the prosecutor's remark that Officer Stafford "should have pulled out the Glock 17 *and this defendant should be dead"* (T. 1428) was merely a "somewhat

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[37] Appellee apparently is suggesting that the remarks were fair response as to Robinson because defense counsel had referred during closing argument to Sims' photo being in the newspaper and on television "on the day after the murder" and Robinson had not specified a day. Answer Br. at 63-64. Appellant conceded in the initial brief that the prosecutor's remarks may have been fair response as to Castano. Initial Br. at 59 n.55.

exagerrated" statement, intended to make the point that Officer Stafford did not overreact. Answer Br. at 65. As record support for this conclusion, appellee relies on the testimony of Fraid Batule, asserting that Mr. Batule testified that when he drove by "[t]he officer was no longer even holding his gun on the defendant." Answer Br. at 65. As discussed in the preceding section, this is wrong. Batule specifically testified that he saw Stafford "aiming" his gun at the back of Sims' head, moving it back and forth. (T. 968-69, 974-75) While Stafford did reholster his gun, it appears that he did so precisely because he was aware that he was being observed. (T. 975-76) Appellee's attempt to excuse the prosecutor's remark as a legitimate comment on the evidence is therefore unpersuasive. *See Oropesa v. State,* 555 So. 2d 389, 390-91 (Fla. 3d DCA 1989) (prosecutor's remark that he "wish[ed] to God" victim had had a gun so that defendants "would have gotten what they deserved" was improper), *review denied,* 562 So. 2d 346 (Fla.1990).

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For the reasons set out in appellant's initial brief, the cumulative effect of these improper arguments was so prejudicial as to deny Mr. Sims a fair trial.

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.

Contrary to appellee's assertion, this issue was properly preserved for appellate review. Answer Br. at 69. This Court has not extended *Joiner v. State,* 618 So. 2d 174 (Fla. 1993), to the improper dismissal of jurors for cause under *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). Moreover, even if applicable, *Joiner* does not preclude review in this case. In *Joiner,* this Court construed defense counsel's affirmative acceptance of the jury panel as a waiver of a prior *Neil*[38] objection, because it was "reasonable to conclude"

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[38] *State v. Neil,* 457 So. 2d 481 (Fla. 1984).

from the record "that events occurring subsequent to" the objection "caused [defense counsel] to be satisfied with the jury about to be sworn." *Id.* at 176. In this case, a total of five lines in the transcript separate defense counsel's last objection to Ms. Hightower's dismissal and final acceptance of the panel. (T. 780) It would not be "reasonable to conclude" from the intervening selection of one final juror that defense counsel had abandoned the objection he made only seconds before. *Joiner,* 618 So. 2d at 176. Finally, this issue is not, contrary to appellee's suggestion, subject to harmless error analysis. *Gray v. Mississippi,* 481 U.S. 648, 668, 107 S.Ct. 2045, 2056-57, 95 L.Ed.2d 622 (1987).[39]

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.

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.

Apellee's first contention, that the victim participation mitigating circumstance is inapplicable to evidence of imperfect self-defense and victim provocation, is addressed fully in appellant's initial brief.[40] Initial Br. at 71. Appellee argues further that any error was harmless because the jury was instructed on the duress and catch-all mitigating circumstances, and defense counsel argued provocation to the jury. Appellee accordingly tries to minimize the significance

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[39] Appellee erroneously implies that only a plurality of the Supreme Court reaffirmed in *Gray* that such error is not subject to harmless error analysis. Justice Powell stated expressly in his concurrence that he "continue[d] to believe that an improper exclusion of a juror in a capital case on these grounds should not be subject to a harmless-error analysis." 481 U.S. at 669 (Powell, J., concurring).

[40] Appellee adds that even if the jury's verdict was based solely on the felony-murder theory, it necessarily required complete rejection of Mr. Sims' testimony of self-defense. Answer Br. at 72. As appellant noted, however, a claim of self-defense can founder on a number of factors, such as the duty to retreat, without the defendant's testimony being rejected in its entirety. Initial Br. at 72 n.70.

of the prosecution's successful objection to defense counsel's closing argument. Answer Br. at 73. Placed in context, however, the exchange underscores the prejudice to the defense. First, defense counsel attempted to argue Mr. Sims' age in mitigation:

> [Defense Counsel] . . . I think you have to give some consideration to his youth also. He was only 25 years old at the time of this crime. That's also a mitigating factor.
>
> [Prosecutor] I object. It's not a mitigating factor.
>
> THE COURT: Sustained.

(T. 1588) Only 21 lines later in the transcript, defense counsel attempted to argue victim participation:

> [Defense Counsel] Now, did he act under extreme duress? I would say yes. Was Officer Stafford a participant in this conduct? If you believe what he said -- and we have to believe some of it anyway, because no one else was there but him. What did Officer Stafford do to participate in this thing?
>
> [Prosecutor] I object to this too.
>
> THE COURT: I will sustain the objection.

(T. 1589) The import of the trial court's ruling was clear: Officer Stafford's participation in the struggle, like Mr. Sims' age, was not, *as a matter of law*, "mitigating."[41] This Court cannot say beyond a reasonable doubt that either defense counsel's later reference to Officer Stafford's participation, (T. 1593), or the instructions on the duress and catch-all mitigating circumstances dispelled the impression that Officer Stafford's conduct was not a permissible consideration at sentencing.[42] Rather, the combined effect of the trial court's rulings, the arguments of counsel,

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[41] This case is therefore distinguishable from *Cave v. State,* 476 So. 2d 180, 187-88 (Fla. 1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986), in which this Court found that, despite the trial court's refusal to give requested instructions on two mitigating circumstances, the catch-all instruction and arguments of counsel permitted the jury to consider the evidence in mitigation. Here, by sustaining the prosecutor's objection, the trial judge effectively removed this issue from the jury's consideration.

[42] Contrary to appellee's implication, this Court has not adopted a per se rule that the catch-all instruction cures every erroneous refusal to instruct the jury on a statutory mitigating circumstance. *See, e.g., Stewart v. State,* 558 So. 2d 416 (Fla. 1990).

and the instructions that were given, was at best confusing and poses the unacceptable risk that at least some of the jurors failed to consider the defendant's most important mitigating evidence. Because the jury recommended death by a vote of only eight to four, the trial court's error cannot be found harmless. *See* Initial Br. at 73-74, 80-83.

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.

Appellee's contention that lingering doubt includes any argument that "reassert[s] the same evidence which was proffered as a defense against the conviction," Answer Br. at 75, is directly contrary to the decisions of this Court, which properly recognize the distinction between residual doubts regarding whether the defendant "indeed committed the murder" (*i.e,* failed defenses of alibi or mistaken identity) and incomplete or imperfect claims of justification or excuse which are quintessentially constitutionally-relevant mitigating evidence. *Compare*, e.g., *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), *and Morgan v. State,* 639 So. 2d 6, 13 (Fla. 1994); Initial Br. at 75-77. Similarly, appellee's contention that imperfect self-defense may be considered in mitigation *only* to the extent that it rebuts the CCP aggravating circumstance is both inconsistent with the requirements of the eighth amendment and not supported by this Court's decisions. *See Christian v. State,* 550 So. 2d 450, 452 (Fla. 1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990); Initial Br. at 75-79.

Appellee maintains that *Christian* is distinguishable because the evidence of imperfect self-defense found by this Court to constitute valid mitigation had not been submitted in support of a self-defense claim at the guilt phase of the trial and therefore was not rejected by the jury. Answer Br. at 77. Appellee would therefore erect a conclusive presumption that a guilty verdict rejects every fact submitted to the jury in support of a claim of justification or excuse, effectively compelling capital defendants to choose between presenting such a guilt-phase defense and arguing

the same evidence in mitigation at the penalty phase. This Court, however, has properly declined to employ such a presumption, holding expressly, for example, that the jury's rejection of a guilt-phase defense of intoxication or insanity does not preclude consideration of the same evidence as mitigation at the penalty phase.[43] *E.g., Morgan,* 639 So. 2d at 13; *Knowles v. State,* 632 So. 2d 62, 67 (Fla. 1993); *Campbell v. State,* 571 So. 2d 415, 418-419 (Fla. 1990); Initial Br. at 75-77. Because the trial court in this case refused even to *consider* the evidence of self-defense in mitigation,[44] this case must, at the least, be remanded for a new sentencing before the judge. Initial Br. at 78-79.

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.

Appellee answers that any error in refusing to instruct the jury on age as a mitigating circumstance was harmless because the jury nevertheless was permitted to consider Mr. Sims' age under the catch-all instruction and "the defense was not prevented from arguing age to the jury." Answer Br. at 83. As noted above, however, the following transpired when defense counsel attempted to argue Mr. Sims' age as mitigation:

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[43] Just as a jury may find that a defendant's intoxication or mental illness does not fully excuse the crime, it may find the victim's provocation insufficient or the defendant's response too extreme to fully justify the crime -- without in either case rejecting every fact alleged in support of the guilt-phase defense.

[44] Appellee implies that appellant's initial brief intentionally misrepresented *Eddings v. Oklahoma,* 455 U.S. 104, 113-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1980), as involving self-defense. Answer Br. at 75-76. The facts and holding of *Eddings*, however, are fully set forth on page 76 of appellant's initial brief; the quotation on page 79, including the bracketed words ("of self-defense"), to which appellee objects, was intended to describe the trial court's error in *this* case, using *Eddings'* language. In both cases, "the trial judge did not evaluate the evidence 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 it." *Id.* at 113.

> [Defense Counsel] . . . I think you have to give some consideration to his youth also. He was only 25 years old at the time of this crime. That's also a mitigating factor.
>
> [Prosecutor] I object. It's not a mitigating factor.
>
> THE COURT: Sustained.

(T. 1588) Appellee suggests that the prosecutor's objection, and the trial court's ruling, were intended only to ensure that defense counsel did not mislead the jurors into believing that they would be *required* to find Mr. Sims' age of 25 as a mitigating factor. Answer Br. at 84 n.19. Since the standard jury instructions make abundantly clear that jurors are not required to find any particular mitigating circumstance to exist, and may assign whatever weight they feel is appropriate to those they do find to exist, defense counsel's argument could not possibly have been misleading. Rather, it is apparent that the prosecution was enforcing, through objection, the trial court's earlier, erroneous ruling that Mr. Sims' age could not, as a matter of law, have "any significance" as mitigation. (T. 1562) Nor is it plausible that the jury could have construed this exchange as anything less than a de facto instruction to disregard Mr. Sims' age as a factor in sentencing.

Unlike *Cave*, on which appellee relies, the jury in this case was precluded from considering the defendant's age as either statutory or non-statutory mitigation, in clear violation of the eighth amendment. Initial Br. at 85. Moreover, the trial court also improperly "invade[d] the province of the jury" under Florida's capital sentencing statute to find and weigh aggravating and mitigating circumstances in the first instance. *See Stewart,* 558 So. 2d at 420-21.

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.

In its answer, appellee contends that it is "obvious" from the trial court's sentencing order that the judge gave "little weight" to the family background and remorse mitigation and "equally

obvious" that the court gave "no weight" to those factors enumerated by defense counsel "which are either not valid mitigation or as to which no evidence was presented." Answer Br. at 91. The trial court's order, however, after briefly summarizing some of the testimony and listing the nonstatutory mitigating circumstances submitted by defense counsel, states simply that "The Court finds little to no weight to each of them [mitigating circumstances]." (R. 555) Appellant submits that the trial court's evaluation of the nonstatutory mitigation is far from "obvious" from this conclusory sentence and that it would utterly defeat the purposes of *Campbell v. State,* 571 So. 2d 415 (Fla. 1990), for this Court to conduct appellate review based upon the state's attempted reconstruction of the trial court's reasoning.[45] To determine whether the death penalty has been properly imposed, this Court must be able to determine whether the *sentencing court* followed the law in evaluating nonstatutory mitigation. *See Larkins v. State,* 655 So. 2d 95, 100-01 (Fla. 1995); *Crump v. State,* 654 So. 2d 545, 547 (Fla. 1995); Initial Br. at 92-93.

While appellee similarly attempts to excuse the trial court's erroneous finding of an aggravating circumstance that was not submitted by the prosecution and its evaluation of the wrong statutory mitigating circumstance,[46] the cumulative errors in the trial court's order necessarily undermine the reliability of the court's ultimate sentencing decision.

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[45] With respect to the state's effort to infer a reasoned, individualized assessment of the nonstatutory mitigation, appellant respectfully requests this Court to take judicial notice of the sentencing order in *Martinez v. State,* no. 85,450 (R. 352), in which the same trial judge uses precisely the same formulaic language in assessing the nonstatutory mitigation.

[46] Contrary to appellee's implication, the trial court did not individually address the duress mitigator and find "there was no evidence to support it," Answer Br. at 89, but rather -- after listing *all* of the statutory mitigating circumstances other than emotional disturbance -- concluded "No evidence was presented about these factors and the Court will not consider them." (R. 553-54)

CONCLUSION

For the foregoing reasons, and those state in appellant's initial brief, 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,

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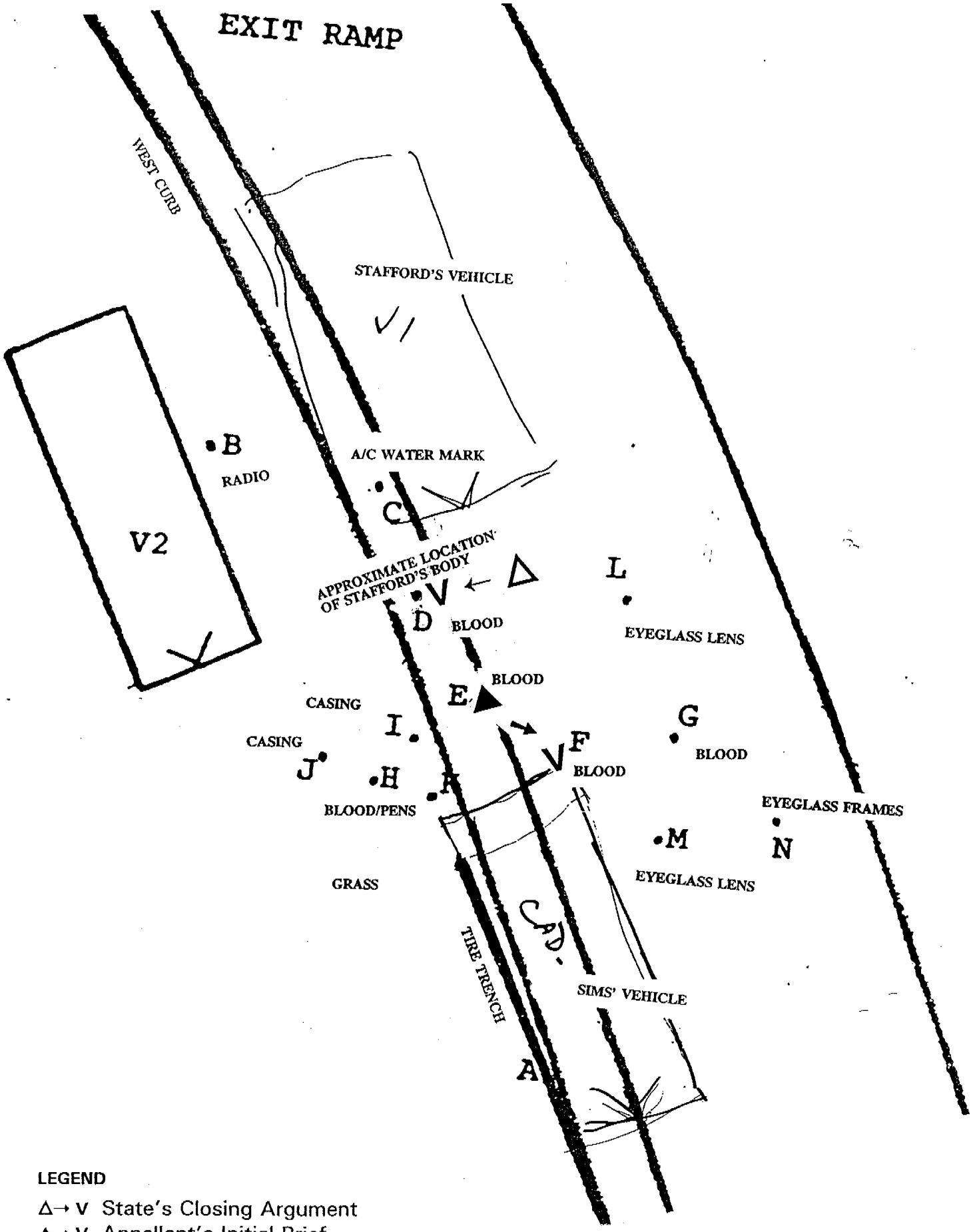
CERTIFICATE OF SERVICE

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 13th day of November, 1995.

Christina Spaulding
CHRISTINA A. SPAULDING
Assistant Public Defender

SUPPLEMENTAL APPENDIX



LEGEND

Δ→ V State's Closing Argument

▲→ V Appellant's Initial Brief

This is a graphic representation of the argument presented in appellant's initial brief, at pages 51-53.