IN THE SUPREME COURT OF FLORIDA

KEYDRICK JORDAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 84,252

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

(T) -- the 14 volumes which include the transcript of the trial proceedings consisting of the guilt phase held on July 19-27, 1993, and the penalty phase held September 21-28, 1993, totaling 2,808 pages.

(R) -- the 21 volumes which include motion hearings, pleadings, and sentencing hearings totaling 1,989 pages.

(SR) -- the 3 volume supplemental record filed in September, 1995, consisting of the transcripts of two hearings, the pleadings filed in State v. Jordan, 630 So.2d 1171 (Fla. 5th DCA 1993), and three depositions, totaling 177 pages.

The Appellant, Keydrick Jordan, will be referred to as the Appellant, the defendant, or by his proper name. The government will be referred to as the State or the prosecutor.

STATEMENT OF THE CASE

On August 17, 1992, the spring term grand jury of the Ninth Judicial Circuit, Orange County, Florida, returned a two-count indictment charging Keydrick Deon Jordan with the first-degree murder and attempted armed robbery of Ann Mintner. (R901-2)

On September 3, 1992, Appellant filed notice of intent to participate in guilt phase discovery. (R918)

Appellant filed numerous motions attacking the constitutionality of Section 921.141, Florida Statutes. One motion attacked the "pecuniary gain" aggravating circumstance and the standard jury instruction thereon.[1] (R951-58) Another attacked the constitutionality of the aggravating factor and instruction relating to prior violent felony convictions.[2] (R959-66)

Appellant also filed a variety of attacks on victim impact evidence and also attempted to limit any such evidence. (R978-82) [ex post facto]; (R983-87) [limit victim impact to court only]; (R988-1006) [constitutional attack on victim impact evidence and argument]; (R1007-1011) [limit evidence]; and (R1012-30) [exclude evidence or argument designed to create sympathy for deceased].

Appellant requested a list of aggravating circumstances and moved to dismiss the indictment due to lack of notice in this regard. (R1031-40) Appellant also challenged the

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[1] § 921.141(5)(f), Fla. Stat. (1991).

[2] § 921.141(5)(b), Fla. Stat. (1991).

constitutionality of Section 921.141(5)(a), Florida Statutes (1991) [the capital felony was committed by a person under sentence or on community control]. (R1057-63) He also challenged the constitutionality of the circumstance and standard instruction dealing with felony murder.[3] (R1077-84)

On October 30, 1992, Appellant filed a motion to preclude a first-degree felony murder theory of prosecution. (R1073-76) Appellant also attacked the constitutionality of Florida law allowing a bare majority of jurors the ability to recommend the death sentence. (R1064-66) Jordan also attacked the improper burdens of proof required for consideration of certain mitigating circumstances. (R1103-10) Appellant also challenged the statute based on its failure to provide adequate guidance for the jury in finding both aggravating and mitigating circumstances. (R1139-51) Jordan also challenged the statute based on inadequate appellate review. (R1011-38)

Appellant sought an evidentiary hearing in order to establish grounds to preclude imposition of the death sentence due to racial discrimination. (R1205-17) Jordan also sought to disqualify the prosecutor. (R1218-42)

Following a trial, the jury returned with verdicts of guilty as charged of first-degree murder and attempted armed robbery with a firearm. (R1773-75)

Prior to the penalty phase, the trial court allowed defense counsel to engage in limited discovery in Appellant's quest to

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[3] § 921.141(5)(d), Fla. Stat. (1991).

expose racial bias on the part of the State in seeking the death penalty in this case. (R1778-87,1790-92,1806-20,1829-31)

A penalty phase commenced on September 21, 1993. (R1836-41) Following deliberations, the jury returned with a recommendation (8 to 4) that the trial court impose the death penalty. (R1869) On October 7, 1993, Appellant filed a motion for new penalty phase. (R1874-76)

Appellant renewed his attempts to compel discovery regarding the State's racist motives. The State maintained their resistance. (R1879-88,1891-96) Ultimately, the State successfully sought a writ of mandamus precluding any further discovery on the race issue. (SR131-77; R1897-1901); State v. Jordan, 630 So.2d 1171 (Fla. 5th DCA 1993).

On May 9, 1994, the trial court conducted a sentencing hearing where further evidence was presented. (R1907-8) On July 22, 1994, the court adjudicated and sentenced Keydrick Jordan to die in Florida's electric chair. (R1917-33) On July 27, 1994, the trial court rendered a corrected order sentencing Jordan to die. (R1941-50) The court sentenced Jordan to seven years imprisonment for the attempted armed robbery. (R1951) The trial court ultimately denied Appellant's August 12, 1994, motion for reconsideration of sentence and objection to sentencing order. (R1954-61) Jordan filed a notice of appeal on August 19, 1994. (R1962) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

GUILT PHASE

On August 8, 1992, Ann Mintner was taking her morning stroll around Lake Davis in downtown Orlando. As was her usual practice, Mintner walked with Mary Rosensweig. (T1169-73) As they walked, Mintner realized that she had her change purse with her. She decided to put it in her car for safekeeping. Mintner walked to her car as Rosensweig kept walking. (T1173-74) As she glanced back at Mintner, Rosensweig saw a young black male standing next to Mintner by the car. She heard the man instruct Mintner to, "Give me your key." (T1174-75) Mintner broke and ran toward Rosensweig. Rosensweig heard shots ring out as Mintner began to run. (T1174-77) Stunned, Rosensweig focused on Mintner as she ran towards Rosensweig while the shooting continued. When Mintner fell in front of her, Rosensweig noticed the assailant standing right next to them as he shot Mintner one final time.[4] (T1177) Rosensweig then noticed the silver gun. (T1177) The attacker then turned and ran. (T1177-78) A resident of the neighborhood saw a young black male flee the scene shortly after the shooting. (T1197-1202) Neither Rosensweig, the neighbor, nor a motorist who saw a suspicious black male on a nearby street could identify Keydrick Jordan as the shooter.

Ann Mintner died from massive hemorrhage in the chest and

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[4] The assailant never appeared to acknowledge Rosensweig's presence. (T1177-78)

abdominal cavities, caused by six gunshot wounds. (T1276-93) The medical examiner believed that the shots were fired from a distance of at least two to three feet.[5] (T1293-97)

Police recovered a bicycle at the crime scene. (T1215-30, 1247-48) Crime scene technicians lifted thirty-five latent fingerprints from the bicycle. (T1242-43,1272-75) Some of the prints matched Keydrick Jordan while others matched Sam Tory's. (T1300-7)

Keydrick Jordan was staying with his girlfriend Michelle Daniels on Friday, August 7, the day before the murder. (T1433-37) Michelle went to bed early that evening with Jordan beside her. (T1435-37) Apparently, after Michelle fell asleep, Keydrick went over to another woman's (Vicky Myers) apartment. (T1307-11) Several days before the shooting, Vicky Myers had introduced Keydrick to her uncle, Sam Tory. Earlier in the week, Jordan and Tory had attempted to repair a bicycle.[6] (T1312) Jordan and Tory arrived at Myers' apartment together that evening. (T1309-11,1331) Jordan and Myers stayed up all night talking.[7] Tory eventually went to sleep in Myers' daughter's room. (T1309-11,1326-27) Jordan left the apartment between 6:00 and 6:30 Saturday morning. He told Myers that he was going to,

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[5] The firearms expert agreed with this conclusion. (T1488-91)

[6] That bike was found at the crime scene.

[7] Myers denied that they drank any alcohol or imbibed in any narcotics. (T1309-11,1329)

"rob someone."[8] (T1311-13) Myers testified that Jordan did not leave on a bike, nor did he have a gun that morning. (T1312-13)

At the time of his trial testimony, Sam Tory was incarcerated in the Orange County Jail still facing a violation of probation.[9] (T1335-36,1347) Tory corroborated his niece's testimony, but admitted that he and Jordan shared a dozen beers that night. (T1340-41,1353) Tory also admitted that he and Vicky drink Cisco.[10] (T1353-54) When Tory saw Jordan later that weekend, Jordan confessed that he'd "popped someone."[11] (T1341-44) Tory did not take Jordan seriously until he saw a news report of the murder. (T1344-45) When he saw the bicycle on television, he knew that his fingerprints would turn up on the bike. (T1345) For that reason, and the $1,000.00 reward,[12] Tory called Crime Line and pointed the police toward Keydrick Jordan. (T1345-46) Tory collected the $1,000.00 reward. (T1346) He denied seeking any assistance from the prosecutor on

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[8] Both Tory and his niece denied that Tory went with Jordan that morning.

[9] Tory's substantive charge for battery was dismissed three days before he testified against Jordan. (T1348) He had been sitting in jail for three months. Tory hoped to be released the following month, and admitted that his lawyer was working toward that goal. (T1348-49)

[10] Cisco is a high alcohol, cheap wine.

[11] Slang for "shoot someone." There was much confusion concerning Jordan's exact words to Tory. (T1368-76) Tory's testimony was inherently conflicting. However, viewed in a light most favorable to the State, Tory claimed that Jordan admitted shooting someone.

[12] A substantial sum of money to Tory, who worked on lawn maintenance when he was not incarcerated. (T1350-51)

his pending battery charge. (T1346) Tory also denied any participation in the robbery, even denying his presence at the scene. (T1376)

On August 11, 1992, Keydrick Jordan voluntarily accompanied two officers to the Criminal Investigation Division of the Orlando Police Department. (T1348-49) Jordan initially denied involvement or knowledge regarding Mintner's shooting. Later that night, Jordan admitted that he went to Lake Davis that morning with Sam Tory, attempted to rob Mintner, and accidently shot her. (T1224-42; State's Exhibit No. 17; Defense Exhibit Nos. 1 and 2) Jordan told police where they could find the gun. Police seized a handgun from Michelle Daniels' apartment while detectives continued to interview Jordan.[13] (T1434-41) Ballistic tests revealed that the five fired projectiles found at the scene of the murder had been fired by the seized gun.

PENALTY PHASE

Aggravation

In 1987, when Keydrick Jordan was fourteen, he entered an apartment where he molested a six-year-old girl. Jordan admitted to the investigating officer that he used his finger to penetrate the girl's vagina. A medical examiner found no evidence of penetration. The child showed no signs of injury. Jordan subsequently pleaded guilty to lewd assault. (T1673-80)

In late 1991, Jordan robbed Ronnie Goodman of his car.

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[13] The handgun was a semi-automatic requiring a simple pull of the trigger to fire. The trigger pull was of average weight. (T1484-85)

During the encounter, an unarmed Jordan knocked Goodman's glasses from his face. Police returned Goodman's car within sixteen hours of its theft. (T1684-1702)

The State also relied on Jordan's plea of guilty to the first-degree murder of Thelma Reed. (T1702-15; State's Exhibit #3) Although the State dropped charges of sexual battery and arson in exchange for Jordan's plea to the murder, the jury heard testimony from the medical examiner concerning the sexual battery of Thelma Reed. Reed suffered a significant amount of genital trauma. (T1706-10) Reed died as a result of strangulation. (T1709-12) Reed's strangulation was not "classic", in that pressure was only applied to the front of her neck. (T1711-12) The strangulation was consistent with a control mechanism to keep a sexual battery victim in place during commission of the act. (T1712) The medical examiner conceded that Reed possibly died during a rape without any intent to kill. (T1712)

In an unsuccessful attempt to convince the judge and the jury that Mintner's murder was especially heinous, atrocious and cruel, Samuel Strang, a gerontologist, testified that Mintner, an elderly woman who had previously been victimized by street crime, was probably in "abject terror" when Jordan accosted her. (T1812-17) Carol Brown, a therapist, testified that Keydrick Jordan most likely enjoyed the suffering that he inflicted on his victims. Brown called Keydrick Jordan a sociopath without conscience who experienced euphoria from his aggressive behavior. (T1792) Brown expressed her opinion without any personal

examination of Keydrick Jordan. Brown read about Jordan's upbringing and of his crimes. Brown also read much "literature" on which she based her opinion.

Mitigation

A. Keydrick's Childhood

Gloria Woods gave birth to Keydrick Jordan. That biological act was the only way she earned the right to be called "mother." Keydrick's mother never learned how to raise children.[14] As a result of her own mother's alcoholism and Gloria's responsibility for the caring of her younger siblings, Gloria dropped out of school at the age of fourteen. (T2221-22) When truancy proceedings began against Gloria, she responded by becoming pregnant with her first child, Nevada Jordan, Jr. (T2222) Shortly after the birth of her first son, she became pregnant with Keydrick.[15] Feeling totally inadequate for the job of parent, Gloria at first attempted to terminate the pregnancy that eventually resulted in Keydrick's birth. (T2222-23)

Keydrick Jordan's childhood was a real horror show.[16] Keydrick grew up with his sister Ta-tanisha Davis (who was two years younger), his brother Nevada Jordan (one year older), and

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[14] Keydrick never had an opportunity to participate in scouting or little league. He never had a birthday party in his life. (T1958-59)

[15] Nevada Jordan, Sr., Keydrick's father, had only brief contact with the boys and played no role in either one's life. (T2222)

[16] Even the prosecutor finally admitted that the physical abuse of Keydrick Jordan was "excessive." (R676)

his youngest sister, Nakosha Nugent. (T1888-90) Keydrick and his siblings were raised with four aunts and uncles. All seven children were close in age. People referred to them as the seven musketeers.[17] (T1889-91,1896,1899)

Even as an infant, Keydrick was neglected by his caretakers. Hospital records reveal that when he was four months old, Keydrick was hospitalized when he became ill, malnourished, and dehydrated. (T2224) As a youngster, Keydrick was hit by cars on two separate occasions. (T2225) When Keydrick was two, Gloria took him and the other kids along when she went and attacked her estranged husband with a razor. Doctors used 140 stitches to repair Gloria's damage. (T2224)

Gloria Woods disciplined Keydrick and the other musketeers harshly on a daily basis.[18] (T1907) Gloria learned from her own mother, Minnie Pearl Dickins,[19] not to whip anything that was purchased with her hard-earned money. Hence, the children were forced to strip before beatings. (T1908,2229-30) Gloria beat the children with electrical cords, belts, switches, coat

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[17] Joining Ta-tanisha Davis, Nevada Jordan and Keydrick Jordan in the group were Aunts Tonja Willis and Detra Mike, and Uncles Terrance and Roderick Gaines. (T1896) At the time of the trial, Terrance Gaines was in prison for raping a child. (T1891, 2192-93) An older uncle, Theophilus Woods, was in a New York prison for homicide. (T1891)

[18] The children were frequently left alone. (T1899-1900)

[19] Minnie Pearl **Dickins** sometimes appears in the transcript as Minnie Pearl **Jenkins**, but this is a clerical/phonetic error. Her actual name is Minnie Pearl **Dickins**, and counsel will use that name in this brief.

hangers, shoes, and paddles.[20] (T1906-7) If a child attempted to flee, Gloria would stand on their back to facilitate the beating.[21] (T1909-10,1971,2230) Gloria seemed to derive perverse pleasure in carrying out the whippings. (T2233) After the beatings, Gloria frequently applied alcohol or forced the children to bathe. This added pain to the open cuts. (T1908-9,2229-30) Gloria once beat Keydrick with a broom and then attempted to strangle him with it. (T1907)

Nevada, Jr., described how Keydrick, who had a strong need for attention, would seek it from his mother without success. (T2237) Most of the family members felt that Keydrick was the "target child" of Gloria. (T2237) He received more abuse and anger than the other children. (T2237)

The most "stable" father-figure in Keydrick's life was Gloria's illiterate, Jamaican husband, Fitzroy Nugent.[22] (T1854, 2200) Nugent used his voodoo practices to win money gambling to support the family. (T1830-37) Nugent slaughtered chickens, bathing in and sometimes drinking the blood. (T1846) Nugent also bathed Keydrick and the other children in chicken

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[20] Gloria denied using electrical cords while administering the beatings, but admitted to most of the other instruments of torture. (T2225-26)

[21] Gloria once swore that she would continue beating Roderick until he cried or Gloria would "die trying." It was an extended battle of wills, that resulted in a brutal flogging. (T1970-71,2230)

[22] Nugent was a part of Keydrick's life for eleven years. (T1877-78)

blood to "keep the evil spirits away."[23] (T1903-4,2201) He tried to teach voodoo to Keydrick. (T2242)

Gloria had once abandoned Nugent and the children. Unable to care for the children, Nugent dumped the brood off at Grandma Dickins' house. (T2199,2226-27) One therapist called Gloria's abandonment, "a significant detriment to Keydrick's development." (T2200)

Various adults acted as the children's temporary caretakers. Assorted older cousins lived with the children for a time. (T1892) Gloria's mother (Keydrick's grandmother), Minnie Pearl Dickins, also took care of the children. (T1892) In addition to living with Dickins for a time,[24] all seven of the children were shuttled back and forth between Gloria and Minnie Pearl. (T1892-93,2198-99)

Grandma Dickins was a strict disciplinarian.[25] When **any** of the children misbehaved (even slightly), she ordered the children to line up, disrobe, and lie prone on the floor. Starting with the youngest, Grandma Dickins whipped the naked children with

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[23] For the voodoo to be effective, the children had to go to bed soaked in chicken blood. They could rinse it off only the next morning. (T1904)

[24] Keydrick's mother was attempting to extricate her and the children from reliance on Fitzroy Nugent. Gloria had discovered that Nugent was sexually molesting Ta-tanisha Davis from age six to nine. (T1893,1902) Nugent also beat the children with belts and extension cords, breaking the skin. (T1893-96,2201) Although the beatings left marks, the children wore clothing to hide the marks from school officials. (T1894)

[25] Gloria learned her brutal methods of discipline from her own mother who used similar techniques. (T2225)

electrical cords, brooms, brushes, or shoes. If one child was "bad", **all** received severe beatings. Each child usually received at least fifty lashes. (T1896-99,1967-69,2000) Grandma Dickins was an alcoholic who frequently left the children alone to go to bars.[26] She would return home drunk, only to whip the children later. (T1900-2000,2194-95) The beatings were administered sometimes without apparent reason. (T1999-2000, 2195,2233)

Sharon Moses, an adolescent cousin, sometimes babysat for the seven musketeers. Cousin Sharon would make the children have sex with each other. She would watch and laugh, while she directed the action. If the children resisted, she beat them. If any child attempted to help another, Sharon only made it worse for the victim. (T2241-42) Sharon also sexually abused Keydrick, one-on-one. (T2241)

Leroy Woods, Keydrick's uncle, was another occasional babysitter for the seven musketeers. While watching the kids, Woods took the opportunity to sexually molest his younger sister, Detra.[27] (T1982-83)

When Uncle Terrance Gaines watched the children, he also beat them. (T2240) If Terrance was in charge, the children sometimes chose to sleep in the car or a dumpster rather than go back in to face him. (T2240)

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[26] Dickins sometimes left the children alone all weekend. (T1964) The children fed themselves as best they could. (T1967)

[27] The molestation started when Detra was five and continued until she was twelve. (T1982)

B. Keydrick Witnesses a Murder

When Keydrick was six years old, Gloria was estranged from her husband, Joe Evans.[28] She was involved in a relationship with Clyde Presley. Both men were important father figures in Keydrick's life. (T2038-39,2215) One night, Joe Evans came by the house while Gloria and Presley slept. At Evans' request, Keydrick fetched a butcher knife from the kitchen. (T2216) Evans took the knife, went into Gloria's bedroom, and stabbed Presley as he slept. (T2038,2215-16) Presley staggered out of bed, mortally wounded. (T2216) As he fell to the floor bleeding, Presley grabbed six-year-old Keydrick who was nearby watching. (T2216) Keydrick ultimately freed himself from Presley's grasp and, at Gloria's command, led the other children from the home. (T2217) Evans was subsequently convicted of murder and died in prison. (T2038-39,2220)

After witnessing the murder, Keydrick became very withdrawn. He began to have nightmares and hallucinations of blood on walls and bushes. (T2039) He was afraid of the dark. (T2217-18) In an attempt to obliterate the hallucinations, Keydrick began setting fires. (T2037,2042,2218) He seemed to blame himself for the incident. (T2039) Keydrick's mother admitted that she was too busy to even discuss the problems with him, much less seek professional intervention. (T2218-19)

One therapist called Keydrick's witnessing of the murder "a

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[28] Gloria believed that Evans had significant mental health problems. He was physically and verbally abusive and had previously murdered someone else. (T2219-20)

major distinction" that separated him in terms of childhood influences. (T2238) As a result of his role in the incident, Keydrick felt guilt and betrayal. The incident was extremely traumatizing and had an immediate impact.[29] (T2238-39)

C. Keydrick's Adolescence

The Department of Health and Rehabilitative Services referred Keydrick Jordan for mental health screening and therapy when he was fourteen years old. (T2034-37) Ms. Wenstrand, Keydrick's therapist, described him as emotionally delayed. He had severe learning disabilities, depression, hopelessness, and little affect.[30] Based on Jordan's low intellectual functioning, Wenstrand rejected a sociopathic diagnosis.[31] (T2050)

In 1987, Keydrick ended up at Dozier Training School for Boys, even though Ms. Wenstrand strongly believed that Dozier was clearly the wrong facility for Keydrick.[32] (T2014) She described Dozier as a setting for young adults with extensive

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[29] In addition to setting fires, Keydrick began wetting his bed. (T2239)

[30] Developmentally, Keydrick was only ten years old. (T2037-2045)

[31] Wenstrand expressed surprise that Jordan tested in the 90's on an IQ test. She pointed out that people with higher IQ's may still lack impulse control. (T2050)

[32] Based on Keydrick's symptoms, Ms. Wenstrand believed that he would develop sexual problems and violent behavior without substantial intervention. Believing Keydrick to be a high-risk case, she strongly recommended long-term residential psychiatric care. (T2042-44)

history of violence.[33] (T2044-45)

After leaving Dozier Training School, Keydrick ran afoul of the law forcing him to leave the state. (T2213-14) Gloria, Keydrick's mother, dumped Keydrick into a living arrangement with, Willie C. Woods, her father, a man she knew to have a violent nature.[34] (T2213-14) Woods made Keydrick live in a separate, dark shack. This exacerbated Keydrick's recurring nightmares. (T2214-15) Keydrick sought solace from Bertha West, his great-grandmother. She took advantage of his fear by sexually abusing him. (T2302-3)

Woods had sexually abused his stepdaughter, Connie Woods-Kelley. (T2191) Woods had been incarcerated for the murder of Connie's mother. (T2191-92) After his release, Woods began molesting the female children in the family.[35] Woods fathered one child with Connie's sister and another with her half-sister. (T2192) Willie C. Woods also impregnated Connie Woods, which led to an abortion. (T2192)

D. Keydrick's Siblings

Keydrick and his siblings' brutal upbringing caused problems for Keydrick's siblings as well. Only one graduated from high

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[33] Wenstrand believed that Dozier would make Keydrick (a non-street wise kid who was easily influenced) more aggressive. Additionally, there were rumors of abuse by both the children and staff at Dozier. This ultimately resulted in a federal lawsuit. (T2045-46)

[34] Gloria felt that she had no choice.

[35] After his release from prison, Willie C. Woods was more **sexually** abusive to the females in the family and more **physically** abusive to the male members. (T2212)

school. (T2234) All had difficulty holding a job. (T2234)

At the time Ta-tanisha Davis testified, she suffered from significant mental health problems, was unemployed, on AFDC, and food stamps. (T1910-11,2236) The state paid for her housing. She suffered breakdowns and acted out in a violent manner. (T1910-11) Davis had attempted suicide. She also tried to kill her mother,[36] her stepfather, and her little sister. She had threatened a judge during a juvenile proceeding. (T1911) Davis also threatened to kill her psychiatrist. (T2236) Davis had worked as a prostitute and a drug dealer. (T1912) She was banned from public school in the eighth grade after she repeatedly stabbed a fellow student. (T1905-6) Davis had other problems with the law as well. (T1906) Davis admitted that she had received more help than Keydrick in dealing with the problems arising from her upbringing. (T1911-14)

Davis described her other brother, Nevada, as "losing it. He's off. He's very violent." (T1955) Nevada could not hold a job. (T1955) This, despite the fact that Ta-tanisha described Nevada as their mother's "favorite." (T1956) Nevada, Jr., dealt with his child abuse by disassociating himself from his family. (T2230-31) He had been accused of beating his wife. (T2230) A therapist described Nevada Jordan, Jr., as dysfunctional and very disturbed. (T2231-32)

Roderick became an alcoholic drug abuser. He suffered from

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[36] Gloria had only recently told her daughter Ta-tanisha, for the first time ever that she loved her. (T2236-37)

homicidal/suicidal ideation and had been involuntarily hospitalized because of his mental problems. (T2234) He engaged in criminal activity. (T2234) Detra Mike also distanced herself from the family. She suffered from substance abuse, depression, and abusive relationships. (T1984,2233)

E. The Family Structure Expert

The defense presented the expert testimony of Kevin Sullivan, a licensed clinical social worker and therapist. (T2102-14) Mr. Sullivan specialized in human development with emphasis on family systems analysis.[37] Mr. Sullivan explained at great length the importance of having mentally and emotionally stable caretakers in a family. (T2124-33) Sullivan discovered that Keydrick had been a victim of childhood sexual abuse. (T2184) It was therefore no surprise that Keydrick had, as an adolescent, sexually assaulted a young female.[38] (T2185) Keydrick's bloody hallucinations and incidents of arson indicated a serious underlying emotional disturbance. (T2185-86)

Sullivan attempted to explain the impact of Keydrick's upbringing, which Sullivan described as a "reign of terror." (T2236) A child in that environment becomes preoccupied with survival which, for younger children, is impossible. (T2247) If no one teaches a child what it's like to be cared about and

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[37] In addition to testifying for the defense in other cases, Mr. Sullivan had also testified for the State of Florida in the prosecution of sexual offenders. (T2124)

[38] Sullivan explained that since adolescent sex offenders are usually associated with dysfunctional families, effective intervention requires familial interaction. (T2188)

valued, the child never learns how to do so with other people. (T2248) Children in a chronically violent and unpredictable environment can never feel safe because, in fact, they usually never are. (T2248)

F. The Forensic Psychiatrist

Dr. Robert Phillips, M.D., Ph.D., and forensic psychiatrist, testified for the defense.[39] (T2306) At first blush, Dr. Phillips thought Jordan suffered from antisocial personality disorder.[40] Delving deeper, Phillips discovered a five-year-old who witnessed a murder and set fires to "make the blood go away." The issues appeared to be more complex than originally thought. (T2340-45)

Dr. Phillips explained that the effects of child abuse never go away. (T2332) One can only try to give adaptive skills to abused individuals in an attempt to enable them to deal with their traumatic experiences and continue their lives. (T2333)

Dr. Phillips found Keydrick to be a person of average to below-average intellectual functioning. Due to deficits in adaptive functioning, Keydrick lacked social skills, responsibility, and interpersonal relationship skills. (T2337-38) These problems were compounded by his environment, the long-

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[39] At the time of his testimony, Dr. Phillips was employed as the deputy medical director of the American Psychiatric Association. (T2306) He was also an assistant professor at Yale. (T2308) Dr. Phillips had degrees from Boston College, Harvard, Tufts University, University of Iowa, and Mayo Medical School. (T2307-8)

[40] Setting fires is a prime criteria.

standing physical and sexual abuse, and chronic substance abuse.[41] (T2338) Dr. Phillips concluded that Keydrick's personality diagnosis was a particularly complex area. Keydrick suffers from a mixed personality disorder in that he meets the criteria for several personality disorders. (T2339-40) These included antisocial personality, immature personality, self-defeating personality, and a personality with dependent features. (T2340)

Based on Keydrick's history, his confession, and interviews, Dr. Phillips determined that it was clear that Keydrick was intoxicated at the time he shot Ann Mintner. The intoxication impaired his judgment. (T2347) Dr. Phillips also diagnosed an explosive impulse-control disorder. (T2348) Phillips stated without equivocation that, at the time of the Mintner murder, Keydrick's capacity to conform his conduct to the requirements of the law was substantially impaired. (T2348) Dr. Phillips also opined that the crime was committed while Keydrick was under the influence of extreme mental or emotional disturbance. (T2350) Keydrick was not delusional at the time, however, his judgment was impaired from alcohol which, coupled with his nonexistent socialization skills and his emotional disturbance, limited his capacity to conform his behavior. (T2351)

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[41] Keydrick began drinking when he was approximately six. Fitzroy Nugent, a stepfather, drank quite a bit and furnished alcohol to the children. (T1914) Keydrick was a full-blown alcoholic at age thirteen suffering blackouts. (T1914-15) When Keydrick was fourteen, he had to be rescued from a drinking binge when he choked on his own vomit. (T1915)

Dr. Phillips concluded that, unlike most individuals with antisocial personality disorders, Keydrick exhibited remorse, guilt, sadness, and sorrow. (T2353,2415-17,2450-51) While he intended to rob Mintner, Jordan did not set out to kill her. (T2452) Although Keydrick needed intervention long ago, Dr. Phillips believed that he could respond to intense and appropriate clinical intervention, even at this late date.[42] (T2353) Dr. Phillips also found that, unlike most sociopaths, Keydrick did **not** experience any sense of euphoria or excitement as a result of committing the murder. (T2353-54) To the contrary, Keydrick did not intend the behavior and was very uncomfortable as a result.[43] (T2354) Rather than being cold and indifferent, Keydrick was anxious, paranoid, and remorseful. (T2354-55)

G. Jordan's Lack of Parole Eligibility

Prior to the Mintner trial, Jordan was already serving a life sentence for the murder of Thelma Reed. The sentence carries a mandatory minimum of twenty-five years without parole eligibility. During the mandatory minimum, Jordan receives no gain time. After twenty-five years, Jordan would be eligible for parole, but could still remain incarcerated for his lifetime. If the trial court sentenced Jordan to a consecutive life sentence

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[42] Phillips agreed that there were significant points in Keydrick's life where intervention would have resulted in a higher probability of providing a positive outcome. (T2361)

[43] Dr. Phillips opined that Keydrick did not derive pleasure in acts of aggression. (T2377-78)

for Mintner's murder, Jordan would be ineligible for parole consideration for a total of fifty calendar years. (T2461-69)

Mitigation Evidence Presented Only to the Trial Court[44]

Michelle Davis and Keydrick lived together and had a relationship in the summer of 1992. (R583-84) Keydrick and Nichole, Michelle's twelve-year-old daughter, had a wonderful relationship. Keydrick was a father figure to the girl, yet sometimes they acted like peers. (R584-86) In fact, many of the neighborhood children came over and Keydrick would play in the mud with them. (R586)

During the time of Keydrick's trial, he and Nichole corresponded and talked on the phone. (R586-87) Nichole idolized Keydrick. (R590) At the time of the penalty phase, Nichole was seeing a psychiatrist and a clinical psychologist on a weekly basis. She had told her doctor that if Keydrick were executed, she would kill herself. (R587-89) Nichole's attitude was causing much concern in the family. (R588-89)

When the prosecutor attempted to point out to Michelle that Keydrick was not a proper role model for her daughter, Michelle replied:

> Mr. Ashton, you don't understand this but you're saying haven't I realized that he's a bad influence. The way we knew him, he was a good influence. We don't know him as you're describing him. We know him in a totally different light. He was never like that with us.
>
> I mean we never saw any signs of anything like

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[44] On May 9, 1994, after the jury's recommendation, the trial court heard additional evidence in mitigation. (R555-67)

> that. I mean he was good to our neighbors. He was good to us. He never did anything like that when he was with us. So she won't know him as you're describing. It's like you're talking about a different person.

(R601)

The defense also presented evidence of the extreme shortcomings of society in providing for the care and development of needy children. (R603-51) States are ranked according to indicators such as infant mortality, teen violent death rate, birth to single teens, percentage of teens not in school or the labor force, percentage of children in poverty, childhood death rate, percentage of children in single families, youth violent arrest rate, and percentage of students who graduate high school. (R607-8) As a state, Florida ranked 48th in the nation. The best ranking for Florida in the six previous years was 42nd. (R608) Although Florida ranked 19th in income per capita, we are a dismal 48th in terms of "youth outcomes." (R623)

Several studies demonstrated that "front-loading" the system (spending money on prenatal health care, immunization, and early quality child development programs) resulted in more law-abiding, taxpaying adults. (R610-12) Between 1985 and 1986,[45] the Orange County waiting list for services relevant to children at risk was between four and six thousand in number. (R628) Between 1984 to 1986, the waiting list for help in children's mental health surpassed one thousand. (R629-30) In the mid-

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[45] The mid-1980's were the critical years for Keydrick Jordan.

1980's, cuts in mental health services, including drug and alcohol treatment, as well as residential services, slashed available programs. (R632-33) The cuts were compounded by Florida's population growth.[46] (R633) Appellant proffered evidence that only Louisiana, Mississippi, and the District of Columbia trailed Florida in terms of providing services for children.[47] (R648-49)

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[46] These were the boom years in population growth in Orange County which grew an **additional** 10%. (R630)

[47] Although Mississippi's and Louisiana's rankings corresponded with their "per capita income ranking," Florida's ranking was extremely disparate.

SUMMARY OF THE ARGUMENT

Point I: At the penalty phase, the trial court allowed a "therapist" who never examined the Appellant to give her expert opinion that Jordan is a sociopath without conscience who enjoyed the suffering that he inflicted on his victims. The trial court also allowed a gerontologist to testify that the victim was probably in "abject terror" during the crime. The evidence was completely irrelevant to any aggravating factor. Additionally, the experts were unqualified and the opinions were based on insufficient factual predicate. Furthermore, the testimony, especially that of the gerontologist, invaded the province of the jury.

Point II: The trial court was convinced that Jordan made a preliminary showing that racial prejudice might have entered into the decision to seek death. The trial court allowed Jordan to engage in discovery in an attempt to expose the racism involved. The prosecution ultimately succeeded in obtaining an extraordinary writ from the Fifth District Court of Appeal which ended any further discovery. The decision from the district court misconstrued the facts and the law. Keydrick Jordan should have been allowed the opportunity to expose the racism of the prosecution.

Point III: Since Assistant State Attorney Jeffrey Ashton participated in the extraction of Jordan's confession to the murder, Ashton should have been disqualified from prosecuting the case. Ashton affirmatively denigrated defenses and mitigating

circumstances during his interview of Jordan. By appearing on the taped interview of Jordan introduced at trial, Ashton appeared as a non-testifying witness. An accused has a right to a "disinterested" prosecutor. Ashton had a conflict of interest and lacked objectivity in prosecuting Keydrick Jordan.

Point IV: Sam Tory, a key State witness, testified that Jordan admitted that he shot someone. During a second conversation the next day, Jordan reaffirmed that he had shot someone but added that the gun kept firing and that he did not mean to kill anyone. The trial court limited Appellant's cross-examination of Tory, ruling that it was beyond the scope. The trial court also limited Appellant's subsequent attempt to elicit the same evidence during the cross-examination of a policeman who interviewed Tory.

Point V: Over objection, the prosecutor argued both premeditated and felony murder. The trial court instructed the jury on both theories. The jury was obviously confused, as evidenced by their question. The evidence supports felony murder but not premeditated murder. Since the jury's verdict is ambiguous as to theory, it must be set aside. Additionally, double jeopardy proscribes convictions for both felony murder and the underlying felony.

Point VI: The trial court improperly limited Jordan's questioning of the jury panel. Additionally, the court failed to conduct individual and sequestered voir dire despite Jordan's request to do so. Due to the sensitive nature of the

proceedings, especially in light of Jordan's prior capital murder conviction, individual and sequestered voir dire was necessary. The group questioning undoubtedly tainted the jury panel.

Point VII: The trial court erroneously denied Appellant's motion for exculpatory evidence at the penalty phase. The trial court mistakenly concluded that, since neither side elected to participate in discovery, the State was not obligated to reveal exculpatory evidence relating to the penalty. Brady v. Maryland, 373 U.S. 83 (1963), applies regardless of a defendant's election.

Point VIII: Over objection, the trial court allowed the State to present evidence that the legislature might, in the future, change the law. This could result in Jordan's release from prison if he were sentenced to life. Not only was this speculative, the testimony was incorrect. The court also erred in restricting Jordan's argument concerning his lack of parole eligibility.

Point IX: Jordan's death sentence is constitutionally infirm for several reasons. The State failed to prove that Jordan's juvenile disposition for lewd assault was a crime of violence. The evidence indicated otherwise. In rejecting the statutory mitigating factor that Jordan was under the influence of extreme mental or emotional disturbance, the trial court erroneously rejected unrefuted evidence to the contrary. The doctor clearly concluded that Jordan's capacity to conform his behavior was severely impaired. The trial court also erred in its consideration of Jordan's abusive childhood. The court

inappropriately focused on the fact that Jordan's crime was not retaliatory, since the victim had nothing whatsoever to do with the suffering inflicted on Jordan as a child. Furthermore, the court erroneously considered Jordan's good conduct during trial as nonstatutory aggravation. The trial court also committed a Grossman[48] error where the court rendered an invalid order, then entered a "corrected order" five days later without notice to counsel. The court also improperly restricted Jordan's presentation of mitigation evidence. The court also erred in excluding consideration of a polygraph examination. Jordan's death sentence is constitutionally infirm in that the jury considered nonstatutory aggravation, i.e., that Jordan had several discipline problems in the county jail while awaiting trial. The prosecutor used this evidence in final summation and improperly called Keydrick Jordan a "demon."

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[48] Grossman v. State, 525 So.2d 833 (Fla. 1988).

ARGUMENT

Keydrick Jordan discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

ALLOWING IRRELEVANT, PREJUDICIAL, AND INCOMPETENT EVIDENCE TAINTED THE JURY'S RECOMMENDATION OF DEATH.

The jury vote for the ultimate sanction was a relatively close one (8 to 4). (T2801) The trial court found only three aggravating circumstances, neither very compelling. (R1941-42) The trial court found myriad factors in mitigation. (R1943-50) The penalty issue was indeed a close one.

At the penalty phase, the trial court erroneously allowed the jury to hear the testimony of two witnesses, Carol Brown and Samuel Strang. Strang, a clinical gerontologist, testified that Mintner, an elderly woman who had previously been victimized by street crime, was in "abject terror" when Jordan accosted her. (T1812-17) Additionally, Carol Brown, a therapist, testified that Keydrick Jordan enjoyed the suffering that he inflicted on his victims. Brown called Keydrick Jordan a sociopath without conscience who experiences euphoria from his aggressive behavior. (T1792) Following a proffer of both witnesses' testimony (T1717-48), the trial court allowed the testimony of both witnesses over strenuous defense objection. (T1749-63)

After pointing out "low lights" of Keydrick Jordan's background and family life, Carol Brown told the jury about "various theories" concerning people raised in that type of environment. Brown explained that some experts opine that people raised under those circumstances eventually turn into offenders who gain pleasure from violence. (T1779-80)

> There are various theories, but it would be akin to a parachutist that likes to sky dive, who turns the fear into a pleasurable event so that the excitement and the adrenaline they receive from committing the violent act is turned over into a drug-like substance in the brain, like opium, so they become addicted to the adrenaline flow, raises the endorphins in the mind to produce a calmness following the act.

(T1779) Brown stated her opinion, as an expert witness qualified by the court (T1764-73), that Keydrick Jordan appeared to fit the "profile" of an offender who experiences pleasure from committing violent acts. (T1780) Brown concluded that Jordan enjoyed the suffering that he inflicted upon Ann Mintner as he shot and killed her. (T1781) Brown also discussed Jordan's prior conviction for the murder of Thelma Reed.

> There having been previous murder [sic] that he had done, from the material I read, where he not only raped, but had cut and strangled his victim, which...seemed to be beyond the call for raping a person,...there were several things that took place, therefore, indicating there was something being derived from that.

(T1782) In discussing the Mintner murder, Brown added:

> [I]t would seem to me that six shots went beyond what would be required to injure or even kill. And therefore, the motivation for another five would be something other than to accomplish the injury or whatever is involved.

(T1784) The prosecutor also elicited testimony that Brown's

opinion was based on "other acts of aggression," that did not result in convictions. (T1784-85)

> Q. I want to establish your opinion is not just based on a few criminal convictions?
>
> A. No.
>
> Q. Is that scenario consistent with the studies of other people who have had abused childhood and grew to be violent and then enjoy violence?
>
> A. Yes.
>
> Q. Is that relationship between growing up with abuse and becoming abused is a documented relationship in the mental health literature?
>
> A. Yes, yes, it is.

(T1785)

On cross-examination, defense counsel attempted to point out the differences in Keydrick Jordan's felony-murder of Ann Mintner during a robbery attempt.

> Q. You see there is a fundamental difference in your premise if someone tortures someone over an extended period of time and kills them as opposed to someone who kills them within a few seconds?
>
> A. I'm not sure where you're going or what it is you want from me on these statements.
>
> I maintain that, and I have from the beginning, **this man is a sociopath without conscience, and he has killed,** and he experienced some terrible things in his childhood and he's transferred those into his own behavior, and **he experiences a euphoria from his aggressive behavior.**

(T1792) (Emphasis added). On redirect, the prosecutor asked Brown to describe Keydrick Jordan from a psychological perspective.

> He's a sociopath. He has no conscience. He has lied. He has stolen. He's been violent. He's

murdered. And **it is my feeling this has become an addiction** for him, euphoria and excitement that he receives from the aggression and violence has become **something he fantasizes about and thinks about and will repeat.**

Q. Will that ever change for as long as Keydrick Jordan lives?

A. **All of the literature states that it's unlikely** that we do any good whatsoever in trying to treat sociopaths.

Q. ....Is the threat of punishment effective with sociopaths?

A. No.

(T1804) (Emphasis added). Defense counsel objected vehemently and repeatedly to Brown's testimony on a variety of grounds. See, e.g., (T1805-8)

After establishing that Ann Mintner traveled less than thirty yards from the car where she was first accosted to the spot where she fell down dead, the State then presented the testimony of Samuel Strang, a clinical gerontologist. (T1808-12) Strang explained that, contrary to popular belief, elderly people are no more concerned about street crime than is the general populous. (T1814) The three exceptions to that general rule are (1) elderly women; (2) elderly women who are approached in the street; and (3) elderly women who have been previously victimized by crime. (T1814) Strang told the jury that Ann Mintner fell into all three of these categories. (T1815) She was (1) an elderly woman; (2) who had been burglarized twice (most recently resulting in "devastating" damage to her home; and (3) had previously worked at Jordan Marsh where she had to walk

unescorted to her car at night. Mintner once told her son that, if approached by a criminal, she would refuse to relinquish possession of her car and would probably end up dead. (T1815) Over strenuous defense objections, the prosecutor was allowed to ask and Dr. Strang was permitted to answer:

> Q. What is your opinion as to the level of anxiety that Miss Mintner would have experienced from the beginning of this crime until she fell unconscious, can you describe it for us?
>
> * * *
>
> A. **I would assume that she was in abject terror**, that this was probably her worst nightmare come true.

(T1816-17) (Emphasis added). Even though the trial court assured Appellant that he had adequately preserved the issue (T1816-17), defense counsel persisted in objecting, moving to strike the testimony, and moving for mistrials. (T1827-28,2665-67,2689-92)

The trial court ostensibly allowed the evidence so that the State could attempt to prove to the jury that the murder was especially heinous, atrocious or cruel.[49] (T1759-63) The State then presented testimony of both Brown and Strang. (T1764-1829) Defense counsel continued to object throughout the presentation of the offending testimony. (T1768-72,1779-85,1805-8,1816-17) After once again denying Appellant's motion to strike the irrelevant and prejudicial testimony of Brown and Strang, the trial court reserved ruling as to whether the State had met the threshold of proof as to the applicability of the aggravating

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[49] § 921.141(5)(h), Fla. Stat. (1993).

factor relating to heinousness. (T1827-28) At the charge conference the trial court, in essence, directed a verdict for the defendant on this particular aggravating circumstance. The jury was therefore **not** instructed on this particular aggravating factor. (T2589-93) The court denied Appellant's renewed motion to strike the testimony of Brown and Strang and also denied Appellant's request for a mistrial. (T2647-52,2665-68) The trial court ruled that Dr. Strang's testimony had a bearing on the circumstances of the murder and specifically was relevant to the "catch-all" mitigating circumstance.[50] (T2690-91) Therefore, the trial court denied Appellant's motions for mistrial and to strike the testimony of Brown and Strang. (T2667) During final summation, defense counsel objected numerous times to the prosecutor's use of Brown and Strang's testimony. The trial court overruled the objections.[51] (T2724-25,2727-28)

A. The Testimony of Ms. Brown and Dr. Strang was Irrelevant and Prejudicial.

The State offered the evidence in an unsuccessful attempt to prove that Mintner's murder was especially heinous, atrocious or cruel. Subsequently, the trial court correctly ruled that the State failed to make even a threshold showing that this aggravating factor applied. Once the trial court correctly

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[50] Fla. Std. Jury Instr. (Crim.) Penalty Proceedings -- Capital Cases.

[51] Appellant's motion for a new penalty phase was also based, in part, on this offensive testimony. (R1874-76)

determined that Ann Mintner's murder was **not** heinous, atrocious or cruel, the testimony of Carol Brown and Samuel Strange was clearly irrelevant. The testimony clearly did not apply to **any** aggravating circumstance. The trial court's ruling that Dr. Strang's testimony was relevant to the "catch-all" mitigating circumstance was clearly erroneous. The State is not in a position to offer evidence of mitigating circumstances. Nor should the State anticipatorily rebut mitigating factors.

There is no doubt that the trial court correctly found that the evidence did not support even an instruction on the heinous, atrocious or cruel aggravating factor. Jordan accosted Mintner at gunpoint in an attempt to rob her. As Mintner fled less than thirty yards toward her waiting friend, Jordan followed, shooting Mintner six times. (T1169-79,1288) All six shots were fired in rapid succession. (T1183,1190) The shooting was over within a "few seconds." (T1203) From all accounts, Mintner died quickly. (T1178,1191,1293) The killing was clearly not heinous, atrocious or cruel. See, e.g., Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) ["a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel."].

The testimony was not relevant to any aggravating circumstance. At the penalty phase, the State is limited to evidence that is relevant to the enumerated aggravating factors. § 921.141, Fla. Stat. (1993). Evidence of nonstatutory aggravating factors has been specifically disapproved by this

Court. See, e.g., Mikenas v. State, 367 So.2d 606 (Fla. 1978). Dr. Strang's testimony did nothing more than to unfairly evoke sympathy for Ann Mintner.[52] Florida has consistently excluded evidence designed to create sympathy for the deceased. Jones v. State, 569 So.2d 1234 (Fla. 1990). See also Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

Ms. Brown's testimony accomplished nothing less than unfairly painting Keydrick Jordan as a psychopathic killer who enjoyed the suffering of his victims. The complained of testimony is not relevant under any theory. The testimony is not even of the type allowed as "victim impact" evidence[53] under Section 921.141(7), Florida Statutes (1993). See also Windom v. State, 20 Fla. L. Weekly S200 (Fla. April 27, 1995). The testimony was irrelevant and highly prejudicial.

B. Carol Brown Was Not Qualified to Express Her Opinion Which Was Without Sufficient Predicate

Carol Brown obtained her bachelor's degree in psychology and her masters degree in counselor's education. As a nationally certified counselor, licensed in mental health for the state of Florida, Brown had been in private practice for nine years working almost exclusively with sex offenders. (T1732-34) She had done approximately five hundred evaluations of offenders at

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[52] Appellant filed a pretrial "Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased." (R1012-30)

[53] Prior to trial, Appellant also attacked the admissibility and constitutionality of this type of evidence on a variety of grounds. (R978-1030)

court request. (T1732) Brown had previously been qualified in court approximately thirty-five times. (T1732-33) Brown primarily evaluated offenders in terms of whether or not they would re-offend. (T1735-36) Brown had never testified in a death penalty case.[54] (T1736)

In preparation of her testimony, Brown read everything that she could find pertaining to criminal offenders who were exposed to trauma at an early age, focusing on their treatability. (T1736-37) Brown also reviewed materials that covered Keydrick Jordan's life from 1978. (T1738-39) Brown reviewed school records, psychological evaluations, as well as Jordan's criminal history. (T1767-68)

Based on her review of Keydrick Jordan's history and review of the "literature," Brown opined that Keydrick Jordan enjoyed the suffering of his victims. Brown admitted that she could not be **certain** that Jordan enjoyed Mintner and Reed's suffering. She could only state that, "according to the literature, this is most times what takes place." (T1743) Brown admitted that she could not testify as to Jordan's state of mind at the time of the crime. (T1737-38) Over Appellant's objection, the trial court qualified Carol Brown as an expert. (T1769-70) When Appellant raised a question as to the **area** of expertise, the court stated:

> I find that she is able to -- better able than a

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[54] Following the proffer, Brown testified that she performed an evaluation in a case where the death penalty **might** have been a possibility. (T1766) Brown appears to base this conclusion on the fact that the defendant received seventy years for a serious felony.

> lay person to testify in the area of mental health, and that her -- she is qualified to render the opinions that we heard in the proffer.

(T1770) When defense counsel pointed out that Brown admitted that she could not testify with a reasonable degree of certainty that Keydrick Jordan enjoyed killing Mintner, the court overruled the objection and allowed Brown to testify as an expert. (T1770)

The trial court stamped Brown's testimony with an imprimatur when the court told the jury:

> Ladies and gentlemen, I find Miss Brown to be qualified to testify as an expert witness.
> And I would ask you to recall the instruction on the consideration of expert witness testimony that you previously have.

(T1772-73) The trial court took the position throughout trial that he need not qualify expert witnesses in any particular "field." This also was error. A witness may only testify as an expert in the areas of his or her expertise. Ehrhardt, Florida Evidence, § 702.1, p. 515. It is not enough that the witness is qualified in some general way. Id. The witness must possess special knowledge about the discrete subject about which an opinion is expressed. Id. An expert will not be allowed to testify in an area beyond his expertise. See, e.g., Hall v. State, 568 So.2d 882 (Fla. 1990) (Religion professor not qualified to "testify to the sanity of any individual.")

How can an expert witness testify without any specified area of expertise? He cannot! Brown testified as an unspecified expert. The court's instruction gave Brown's testimony undue and undeserved weight. At least the court was consistent. The judge

also refused to qualify Jordan's expert, Mr. Sullivan, in any particular area. Despite the fact that Sullivan is a licensed social worker and therapist, and despite Appellant's urging, the court refused to identify for the jury Sullivan's area of expertise. (T2114-20,2137) By refusing to do so, the court improperly denigrated Sullivan's expert testimony. Conversely, the court improperly stamped Brown's testimony with a label it did not deserve.

Appellant also objected to Brown's testimony based on the lack of a sufficient predicate for the "expert" opinion. (T1770-71) Counsel referred to the:

> extraordinary, speculative and factually unfounded conclusion that he meets a certain profile and that as a result of that profile without any facts to substantiate it, enjoyed or purposely contributed to the suffering of Ann Mintner. This is so far fetched.

(T1771) Counsel pointed out that Brown was about to tell the jury that Keydrick Jordan was a "bad, nasty person." (T1771) Counsel warned that the jury would quickly lose sight of the ostensible purpose of Brown's testimony and "simply deal with the label she assigns to him that characterizes him as one of the sociopathic types." (T1772)

Brown proceeded to explain to the jury that the "literature" contains "various theories" that people raised in abusive environments frequently became adults who take pleasure from acts of violence. (T1779) Brown explained that the adrenaline rush is turned "into a drug like substance in the brain, like opium, so they become addicted to the adrenaline flow, raises the

endorphins in the mind to produce a calmness following the act." (T1779) Defense counsel objected to the testimony, pointing out that Brown was not qualified as an expert in brain chemistry or as a neurologist. (T1779) The prosecutor agreed, but claimed that Brown was not giving an opinion, only relating literature. (T1780) Defense counsel asked that the testimony "be relevant to this case rather than just quoting from literature." (T1780) The trial court overruled the objection.

> Q. In looking at Mr. Jordan's -- all the information you've been given, does he appear to fit that profile of offender who has come to gain pleasure from violence?
>
> A. Yes.

(T1780) The trial court overruled Appellant's objections (based on qualification and predicate), and denied Appellant's motion to strike the testimony. The court ignored Appellant's contention that "profile testimony" was a general characterization based on insufficient evidence rather than a specific diagnosis of Keydrick Jordan. (T1780-81) The prosecutor continued:

> Q. Do you have an opinion today as to whether the circumstances of this particular case Mr. Jordan enjoyed the suffering that inflicted upon Miss Mintner in this case?
>
> A. Yes, I believe he did.

(T1781) **Amazingly enough, Brown based this conclusion on the perceived brutality of the Thelma Reed rape and murder.** (R1781-82) Brown pointed out that Jordan not only raped, but also cut and strangled Thelma Reed. At this point, defense counsel strenuously objected to Brown's testimony concerning Appellant's

state of mind during the prior murder, arguing that the Reed murder had now become a feature of the trial. (T1782-83) The trial court overruled the objection and Brown continued. She explained that, in her opinion, six shots constituted overkill. Therefore, the motivation for the five additional shots must be explained somehow. Brown had also found "other acts of aggression" in Jordan's past that indicated [to Brown at least] that he gained pleasure from acts of aggression. This was consistent with the "literature." (T1784-85)

After Brown concluded her testimony, defense counsel moved to strike it. Counsel pointed out that Brown's conclusions were without foundation, she was unqualified, there was an inadequate basis to label Keydrick Jordan a sociopath, Brown's testimony was gratuitous, unresponsive, and prejudicial. Brown described Keydrick Jordan as conscienceless and untreatable. Defense counsel called Brown's testimony a bastardized psychological profile which amounted to nothing more than a character assassination. The trial court denied Appellant's motion for mistrial and renewed motion to strike. (T1805-8) Defense counsel also requested a limiting instruction, pointing out that the court had admitted the testimony for a very limited purpose. The trial court denied that request as well.[55] (T1807-8)

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[55] Subsequently, during Jordan's case for mitigation, the trial court refused to allow Dr. Phillips to pass judgment on Brown's testimony, threatening sanctions on defense counsel for some imagined violation of the rule of sequestration of witnesses. (T2351-52) This constituted a restriction on Jordan's presentation of evidence and denied him the constitutional right to a fair trial.

A determination that a witness is qualified as an expert in a particular field does not necessarily mean that the expert opinion sought to be elicited should be admitted. Gulley v. Pierce, 625 So.2d 45 (Fla. 1st DCA 1993). Additionally, an expert's opinion which is based on incorrect or incomplete hypothetical questions cannot constitute competent substantial evidence. Sabre Marine v. Feliciano, 461 So.2d 985 (Fla. 1st DCA 1984). Expert testimony amounting to mere speculation should not be given **any** weight. Rodriguez v. Pino, 634 So.2d 681 (Fla. 3d DCA 1994).

The admission of expert testimony is judged using four factors: (1) the expert opinion must aid the trior of fact; (2) the expert must be qualified at such; (3) the opinion must be applicable to evidence presented at trial; and (4) the danger of unfair prejudice must not outweigh the probative value of the opinion. Glendening v. State, 536 So.2d 212 (Fla. 1988). Appellant contends that Brown's testimony fails each of the four factors.

As previously argued, the testimony was not relevant to any aggravating factor and, therefore, was of no help to the jury. Carol Brown was not qualified to express her opinion. She was a therapist who evaluated sexual offenders and dealt, in small part, with domestic violence. Additionally, she based her conclusion, not on her training and expertise, but rather on merely reading "literature." She had never examined Keydrick Jordan. See Hall v. State, 568 So.2d 882 (Fla. 1990). Brown

relied **completely** on reviewing material provided by the prosecutor and reading learned articles and treatises.

The State never even showed that Brown possessed any expertise in the area of concentration to which the articles pertained. All Brown did was read literature. We don't even know if she did so with comprehension and understanding.[56] A trial judge is required to exclude expert testimony where the expert has insufficient knowledge of the facts of the case at hand. See, e.g., Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971). Experts with insufficient personal knowledge of the facts of the case should not be permitted to testify. Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983).

Although an expert witness is entitled to render an opinion premised on inadmissible evidence when data is the type reasonably relied on by experts on the subject, a witness may not serve merely as a conduit for presentation of inadmissible evidence. Smithson v. V.M.S. Realty, Inc., 536 So.2d 260 (Fla. 3d DCA 1988). "Where the expert's actual opinion parallels that of the outside witness, then the outside witness should be produced to testify directly." Sykes v. Seaboard Coastline R.R., 429 So.2d 1216, 1223 (Fla. 1st DCA 1983). Rather than have Brown

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[56] The undersigned counsel could have read all the information provided to Brown by the State. Counsel then could have done research in the library, reading all articles pertaining to the offender who enjoys his victims' suffering. Counsel then could have testified at Keydrick Jordan's trial. The point is, Carol Brown's training bore no relationship to her qualifications and testimony as an expert. The only connection was that both related **somewhat** to the broad subject of psychology.

simply relay to the jury theories printed in various treatises, the State should have presented the expert who actually devised the theory.

The State also questioned Brown (over objection) regarding Jordan's fitting the "profile" of an offender who has come to gain pleasure from violence. (T1780) Florida courts have condemned the use of "offender profile testimony" as substantive evidence of guilt. See, e.g., Gay v. State, 607 So.2d 454 (Fla. 1st DCA 1992) ("pedophile profile" testimony is not admissible as substantive evidence of guilt).

Additionally, Brown's testimony that Jordan experienced an "adrenaline rush" during the murder was, in essence, expert opinion testimony concerning a new or novel scientific principle. As such, additional criteria apply to its admissibility. First, the trial judge must determine whether the expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the expert's testimony meets the Frye[57] Standard. Ramirez v. State, 651 So.2d 1164 (Fla. 1995). Next, the trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Fourth, the judge may

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[57] The Frye Standard is whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). When a novel type of opinion is offered, the proffering party must demonstrate the requirements of scientific acceptance and reliability. Robert James Brim v. State, 654 So.2d 184 (Fla. 2d DCA 1995).

then allow the expert to render an opinion, and the jury is entitled to determine the credibility of the expert's opinion. Id.

As previously discussed, Brown's testimony did not assist the jury in determining **any** fact in issue. Secondly, the State failed to establish that Brown's testimony was a generally accepted scientific principle. Frye, supra. Nor did the trial court even inquire into this issue. Nor was Brown qualified to express her opinion in this regard. Defense counsel objected on these grounds. (T1779) The prosecutor even agreed, but claimed that Brown was not giving an opinion, only relating literature. (T1780) The trial court overruled Appellant's subsequent objection on the same grounds. (T1780)

Nor was Brown's opinion applicable to the evidence presented at Jordan's trial. Brown admitted that she could not **know** what Jordan's state of mind was at the time of the murder. She could only testify that many offenders with Jordan's domestic background did enjoy their victims' suffering.[58] Brown's opinion was absolutely irrelevant to any issues at trial. Finally, the unfair prejudice clearly outweighed any **slight** probative value. Brown told the jury that Keydrick Jordan was **probably** (according to the literature) an untreatable sociopath who became euphoric when his victims suffered. The unfair

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[58] Brown's shaky "opinion" was called even more into question, when Brown admitted that an unintended act is inconsistent with her conclusion that Jordan may have enjoyed Mintner's "suffering." (T1790-91)

prejudice became even more pronounced when Brown testified about the Thelma Reed murder. (T1781-84) The prejudice became even more unfair and more compounded when Brown testified about other, convictionless "acts of aggression." (T1784-85) The trial court allowed the offensive evidence despite the fact that Jordan clearly made no claim to "no significant criminal history."[59]

Brown's testimony was of dubious probative value, completely speculative, and highly inflammatory. The trial court clearly erred in allowing the testimony. Garron v. State, 528 So.2d 353 (Fla. 1988) [Error to allow prosecutor to testify that appellant did not appear to be insane at the first appearance hearing conducted the day after the shooting. Prosecutor's lack of contact with defendant rendered the opinion testimony invalid.]; Fassi v. State, 591 So.2d 977 (Fla. 5th DCA 1991) [Error to admit handwriting examiner's conclusion that spray-painted graffiti matched hand-written letter. Comparison was too speculative and lacked sufficient indicia of reliability.].

C. Strang's Testimony was Based on Insufficient Predicate and It Invaded the Province of the Jury.

Samuel Strang, a clinical gerontologist, testified that Ann Mintner, an elderly woman and prior crime victim who was approached in the street was probably in abject terror during the crime. Strang based his conclusion on studies that indicated that, contrary to popular belief, elderly people are no more concerned about street crime then the general population.

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[59] § 921.141(6)(a), Fla. Stat. (1991).

(T1814) The three exceptions to that general rule are (1) elderly women; (2) elderly women who are approached in the street; and (3) elderly women who have previously been victims of crime. (T1814) Ann Mintner fell into all three of these categories. (T1815) She was (1) an elderly woman; (2) who had been burglarized twice; and (3) had previously worked at a mall where she had to walk to her car at night. Strang had consulted with Mintner's son who revealed that Mintner once told him that, if she were approached by a carjacker, she would probably resist and end up dead. (T1815)

Anybody would have been afraid under the circumstances. Dr. Strang's testimony dealt with an abstract concept of general fear of crime. Ann Mintner was not simply walking along worrying about crime in general. Rather, street crime invaded Ann Mintner's world in an immediate and real way. A young male pointed a gun at her and demanded her property. **Anyone** would have been afraid.

Strang's testimony was of no help to the jury. Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986), warned that an expert's testimony should usually be received only where the disputed issue for which the evidence is offered is beyond the jury's understanding. Kruse, 483 So.2d at 1385 [citing Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980)]. Anyone can understand the fear that Ann Mintner must have felt when accosted by a stranger with a gun. This was not a disputed issue. The admissibility of Strang's testimony resulted in unfair prejudice

that outweighed its probative value. The jury undoubtedly heard this expert testimony and unfairly and erroneously concluded that Ann Mintner was more afraid than another person would have been under the same circumstances. This is simply not true.

The testimony of Dr. Strang exceeded the limitations of expert testimony and invaded the province of the jury. Florida law allows an expert witness to testify if specialized knowledge will assist the jury in understanding the evidence or in determining a fact in issue, provided the testimony can be applied to the evidence at trial. Johnson v. State, 438 So.2d 774 (Fla. 1983) (expert testimony in area of eyewitness identification properly excluded since jury fully capable of assessing witness' ability to perceive and remember); § 90.703, Fla. Stat. (1991). See also Gamble v. State, 644 So.2d 1376 (Fla. 5th DCA 1994) (error to allow expert in street level drug transactions to testify that 5.3 grams of cocaine was inconsistent with personal use and was, therefore, intended for sale); Seropian v. Forman, 652 So.2d 490 (Fla. 4th DCA 1995) (abuse of discretion to allow political scientist to render an opinion on hidden defamatory meanings in common words well within ordinary understanding); and Gurganus v. State, 451 So.2d 817 (Fla. 1984) (clinical psychologist's opinion that defendant's actions were closer to "depraved mind" than to premeditated plan was properly excluded as an issue solely within the province of the jury).

D. The Cumulative, Prejudicial Effect Of The Objectionable Testimony Became A Feature Of The Penalty Phase.

The State's case at the penalty phase focused on improper evidence that portrayed Keydrick Jordan as a sociopath who experiences euphoria from his aggressive behavior. When Jordan accosted Ann Mintner, she was in "abject terror." The jury undoubtedly focused on the compelling, albeit improper, testimony of Brown and Strang. The prosecutor certainly used the improper testimony during final summation:

> ...Well, Ann Mintner was terrified.... Anybody else would have run, but not Keydrick Jordan. Because giving pain and giving horror is what he likes. He feels good... [defense objection overruled]... Because to him, making someone suffer is the most important thing....[objection overruled]...

(T2724-27) The State's emphasis on the objectionable testimony culminated in the prosecutor referring to Jordan growing up to become the **DEMON** that he feared. (T2728)

Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury. § 90.403, Fla. Stat. (1993). While the rules of evidence are relaxed at the penalty phase, the State is not without limits on the type or extent of evidence. See, e.g., Rhodes v. State, 547 So.2d 1201 (Fla. 1989). To make an analogy, collateral crimes evidence cannot become "a feature of the trial instead of an incident...." Ashley v. State, 265 So.2d 685, 693 (Fla. 1972). Appellant submits that the extent of the objectionable evidence resulted in a cumulative error effect which resulted in a denial of Jordan's

constitutional right to a fair trial. See, e.g., Royster v. State, 643 So.2d 61 (Fla. 1st DCA 1994).

POINT II

THE GRANTING OF THE STATE'S PETITION FOR WRIT OF CERTIORARI PREVENTED KEYDRICK JORDAN FROM ESTABLISHING THAT THE PROSECUTOR'S DECISION TO SEEK THE DEATH PENALTY IN THIS CASE WAS BASED, AT LEAST IN PART, ON RACIST MOTIVES.

In the past century, no judicial responsibility has laid greater claim on the moral and intellectual energies of the federal courts than "the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. 229, 239 (1976). In the criminal justice system in particular, the Court has articulated a "strong policy...of combating racial discrimination," Rose v. Mitchell, 443 U.S. 545, 558 (1979), as discrimination in this area "strikes at the fundamental values of our judicial system and our society as a whole." Rose v. Mitchell, 443 U.S. at 556. The United States Supreme Court long has held that in order for an equal protection violation to be found, the challenged law or action "must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. at 240. Racial animus need not be the only motivation, nor even the dominate purpose, to trigger the Court's scrutiny. Rather, the defendant need prove only that race "has been a motivating factor in the decision." Arlington Heights v. Metro. Housing Corp., 422 U.S. 252, 266 (1976). Determining whether a defendant has met the requisite burden of proof demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," Arlington Heights v. Metro. Housing Corp., 422 U.S. at 266, "including the fact, if

it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. at 242.

In McCleskey v. Kemp, 481 U.S. 279 (1987), the United States Supreme Court rejected a constitutional/racial discrimination challenge to Georgia's capital sentencing scheme. The challenge was based on a statistical study, the Baldus study, which indicated disparity in the imposition of Georgia's death penalty based on the race of the victim and the race of the defendant. The Court rejected the statewide statistical sweep explaining that a statistical study would be relevant if it was narrowed to encompass only a single entity -- like a district attorney in a particular county.

In Foster v. State, 614 So.2d 455 (Fla. 1992), this Court rejected a challenge similar to the one in McCleskey v. Kemp. Foster's statistical study revealed that from 1975 to 1987, the Bay County State Attorney's Office pursued capital prosecution much more vigorously and fully in cases involving white victims compared to those involving black victims. Foster v. State, 614 So.2d at 463. This Court found that, much like McCleskey, Foster's claim was deficient in that he failed to prove that the decision makers in **his** case acted with discriminatory purpose. Id.

The Foster trial court declined to hold an evidentiary hearing on the claim of racial discrimination which was based on the statistical study. This Court rejected Foster's argument that he had met a threshold burden in focusing solely on the

practices of one prosecutor's office. Foster contended McCleskey did not control, since McCleskey's statistics focused on a statewide "policy" of discrimination. This Court found that Foster's figures did not constitute "exceptionally clear proof" of discrimination.

> ...Foster's figures do not account for any of the myriad of nonracial variables that could explain the disparity. See McCleskey, 481 U.S. at 295, n.15, 107 S.Ct. at 1769, n.15 ("decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations....").

Foster v. State, 614 So.2d at 464.

Keydrick Jordan's case presents the **perfect** opportunity to focus on a single prosecutor's decision to seek death while isolating some of the "infinite factual variations" that affect this type of decision. The trial court saw a unique opportunity. He had a laboratory where many of the variables were the same: the same defendant, the same prosecutor, the same defense lawyer, the same judge, the same county, the same crime, similar victims (women in their 70's). Both victims' families wanted Jordan executed.

The defendant was willing to plead as charged to both murders, receive consecutive sentences and spend the rest of his life in prison. When the State rejected Jordan's offer, Jordan offered to plead guilty to one murder. He did not care which. The prosecutor chose to accept a plea and life sentence for the Thelma Reed (black victim) murder. The State persisted in its quest for a death sentence for the Ann Mintner (white victim) murder.

After the plea negotiation, defense counsel understandably became concerned that race may have played a part in the State's decision. In addition to the victim's racial differences, the Reed murder (rape and strangulation during a burglary followed by arson to destroy evidence) appears much more egregious than the Mintner murder (garden-variety shooting in the course of an attempted robbery). Jordan requested an evidentiary hearing in order to establish grounds to preclude imposition of the death penalty due to racial discrimination. (R1205-17) Jordan claimed a violation of the equal protection guarantees of both the federal and state constitutions. (R1205) The trial court apparently agreed that racism might have crept into the decision making process, and agreed to hold a hearing. (R235-56) After the guilt phase, defense counsel attempted to delve into the prosecutor's thought process. (R348-65)

The trial court obviously agreed that Jordan had made a threshold showing of **potential** racism. The court agreed to allow a hearing and, in preparation thereof, allowed Jordan to engage in limited discovery on the issue. Although the court granted the State's Motion to Quash Subpoenas, he did order the State to respond to Jordan's interrogatories. (R366-76,793-823,1778-87, 1790-92,1802-20,1829-31,1879-88,1895-96) The State disagreed with the trial court's rulings allowing discovery and eventually filed a Petition for Writ of Certiorari in the Fifth District Court of Appeal. (SR131-42) The Fifth District Court of Appeal granted the petition and quashed the trial court's discovery

order. State v. Jordan, 630 So.2d 1171 (Fla. 5th DCA 1993) (SR168-70) The decision of the appellate court asserted that Jordan accepted the benefit of a plea bargain and then attempted to disavow that bargain.

> Here, the defendant expressly agreed to let the State decide in which case to pursue the death penalty and accepted the benefit of a life sentence in the other case. The defendant cannot now renege on that bargain by seeking to preclude the State from pursuing the death penalty. The only way in which both the defendant and the State could be restored to the status quo at this point would be the vacation of the plea and sentence in the Reed case.
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> * * *
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> It may be that the prosecutor was naive in failing to perceive that a strategic trap was being laid for him by Jordan's offer, which was obviously designed to pave the way for an allegation of racial discrimination. When the prosecutor accepted the offer, Jordan exercised his "Gotcha!" But the prosecutor's naivete and Jordan's duplicitous strategy should not rebound to the latter's benefit in his attempt to escape the death penalty for the commission of two first degree murders.

State v. Jordan, 630 So.2d at 1172-73.

The appellate court completely missed the point. Jordan's guilty plea in the Reed case had no bearing on the resolution of the Mintner case. Jordan **tried** to plead guilty to both cases in a "package deal" that would have netted him consecutive life sentences, with a combined mandatory minimum of fifty years without possibility for parole. The State rejected that offer. Jordan chose to plead guilty as charged to **one** of the murder counts. The State chose to accept Jordan's offer in the Reed case (black victim), still seeking death in the Mintner case (white victim). Contrary to the Fifth District Court of Appeal's

opinion, Jordan did not exercise any "Gotcha!" Jordan had no "Gotcha!" to play.[60] The State held all the cards. When the State accepted Jordan's offer in the Reed case (still choosing to seek death in the Mintner case) then, and only then, did the prosecutor's racism surface.

Once the appellate court acted, the trial court ended any further discovery by Jordan on the racism issue. (R387-407) The trial court did eventually conduct a hearing on Jordan's motion to disallow the death penalty on the basis of racial bias. (R442-553) The State stipulated to most of the facts as set forth in Jordan's motion. (R442-47) Both of Thelma Reed's daughters testified that the prosecutor permitted them to have little, if any, input in the resolution of their mother's murder case. (R450-59,489-91) One daughter admitted that she wanted the Appellant sentenced to death **in her mother's case**. (R450-59) The prosecutor told Reed's daughter that the evidence was weak. Another daughter testified that the prosecutor **announced** that he was allowing Jordan to plead to a life sentence in the Reed case. (R489-91)

The trial court relied on three depositions in lieu of live testimony. One revealed that the State had DNA evidence as well

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[60] After Jordan pointed out the appellate court's misconstruction of the facts in a Motion for Rehearing (SR160-70), the State agreed, in its reply, that Jordan did not "snare an unwary, naive prosecutor." In fact, the prosecutor accurately anticipated the prospect of a racial challenge in the Mintner case. Additionally, the State agreed that the plea resolution of the Reed case had no bearing on the resolution of the Mintner case. (SR171-76)

as incriminating statements Jordan made regarding Reed's murder. The others established that Mintner's relatives also wanted Jordan dead. (SR103-30) The prosecutor did not consult Mintner's relatives much either. (SR44-102)

As a result of the appellate ruling, the trial court felt that its hands were tied and limited Jordan's evidence. The court denied Jordan's request to call four members of the State Attorney's Office as witnesses. (R514-15) The court denied Jordan's renewed request to call Jeffrey Ashton, the prosecutor, as a witness. (R516-17) The trial court also rejected Jordan's statistical evidence as unreliable. (R460-88) In a situation analogous to State v. Neil, 457 So.2d 481 (Fla. 1984), the trial court asked the prosecutor to state a "race neutral" reason for pursuing death in the Mintner case rather than the Reed case. (R515) The prosecutor cited the "difference in the quantum of evidence in the Thelma Reed case as compared to the Ann Mintner case, coupled with the reality...that once pled, the murder of Thelma Reed would be able to be used as an aggravating circumstance in the penalty phase of Ann Mintner and the reality that any defendant can only be executed once." (R516) At the conclusion of the hearing, the trial court denied Jordan's motion. (R544-49)

Racism, which pervades our society, is difficult and sometimes impossible to prove. Where a defendant's life is at stake, every procedural safeguard is observed. Gregg v. Georgia, 428 U.S. 153 (1976). This Court has recognized that even to this

day, racism is still present in our society. Powell v. Allstate Insurance Co., 652 So.2d 354 (Fla. 1995). No court in this state has addressed the question of what must be proved to establish racial discrimination under our state constitution.[61] Applying the analysis set forth in Traylor v. State, 596 So.2d 957 (Fla. 1992), Article I, Section 2 of the Florida Constitution should be construed as prohibiting systematic racial bias in the criminal justice system, whether conscious or unconscious. In Foster, three members of this Court relied on studies of unconscious racism to conclude that statistical evidence should be accepted as proof of discrimination in the death penalty context. In recent years, this Court has committed itself to exposing and eradicating racial bias in the administration of criminal justice. See Report and Recommendation of the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990 and 1991). The Bias Report decries the persistence of racial disparities throughout the criminal justice system and concludes that these disparities result, at least in part, from racial bias which, though conceivably unconscious, have the same impact as a conscious intent to discriminate.

Recently, the New Jersey Supreme Court rejected the McCleskey conclusion and applied a higher standard under the New Jersey Constitution. State v. Marshall, 613 A.2d 1059 (N.J. 1992). The Marshall court concluded that a statistical showing

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[61] Only the dissenting opinion in Foster v. State, 614 So.2d 455 (Fla. 1992), addressed the state constitutional claim.

of racial disparities in capital sentencing could establish systematic racial discrimination for which the state constitution would provide a remedy.

The most important factor in Jordan's case is that the trial court apparently believed that Jordan had made a preliminary showing that racism may have been involved in the prosecutor's decision to seek the death penalty. As Justice Barkett pointed out in her Foster dissent, "the trial court is in the best position to evaluate whether a party has demonstrated sufficient evidence of discrimination to warrant an inquiry." Foster, 614 So.2d at 467-68. Jordan's trial judge had authorized interrogatories propounded to the State Attorney and his assistant pursuant to Florida Rule of Criminal Procedure 3.220(f). **Only as a result of the intervention by the Fifth District Court of Appeal did Jordan's discovery end.** As Jordan previously pointed out, the opinion in State v. Jordan, supra, completely misconstrued the facts and clearly missed the point. This Court must now answer the question urged by Appellant in his Motion for Rehearing/Rehearing En Banc/Motion for Certification filed in the Fifth District:

> In a death penalty case where the trial court has decided to hold an evidentiary hearing on a defendant's claim that the State is seeking the death penalty on a racially discriminatory basis, does the trial court have the authority to order the prosecutor to answer questions regarding the effect of race on his decision to seek the death penalty?

(SR166) The trial court was in the best position to decide the issue. The judge clearly believed that further inquiry was

warranted. This Court should, at the very least, remand for further discovery proceedings on the role that racism played in the prosecutor's decision to seek the ultimate sanction.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE PROSECUTOR.

On July 12, 1993, Appellant filed a motion to disqualify Assistant State Attorney Jeffrey Ashton, from participating in the trial. (R1218-23) Appellant pointed out that Mr. Ashton consulted with Investigator Parks and remained outside the interview during the initial questioning of Keydrick Jordan, a suspect at that time. After Parks took a taped statement from Jordan, Ashton entered the interview room and personally interrogated Jordan. During the interview, Ashton asked specific questions about Jordan's prior record. (Defense Exhibit #2 -- Suppression Hearing -- p.13) Ashton also asked specific questions to eliminate affirmative defenses. (Defense Exhibit #2 -- Suppression Hearing -- pp.13-15; R1238-40) Ashton also elicited information that helped prove aggravating circumstances and tended to denigrate mitigating circumstances. See, e.g., (R1231-33,1238-40) After hearing argument on July 12, 1993, the trial court denied the motion to disqualify Ashton. (R216-27)

Appellant would like to make clear that this issue does not involve the disqualification of the **entire** Office of the State Attorney. See, e.g., Castro v. State, 597 So.2d 259 (Fla. 1992) and Schwab v. State, 636 So.2d 3 (Fla. 1994). Appellant sought to disqualify **only** Assistant State Attorney Jeffrey Ashton from participating in Jordan's prosecution. The essence of Appellant's claim is that Jeffrey Ashton had an inherent and actual bias, since Ashton participated in Jordan's interrogation

shortly before Jordan's arrest. Not only did Ashton participate, he affirmatively denigrated defenses and mitigating circumstances and elicited information that helped establish aggravating circumstances. In fact, by appearing on an audiotaped interview of Jordan that the jury heard at trial, Ashton, in effect, appeared as a non-testifying witness at Jordan's trial. Additionally, Ashton's conduct throughout the proceedings demonstrates the conflict. Additionally, Ashton's improper behavior adds to the problem.

Under the due process clause, an accused has a right to a "disinterested" prosecutor. See, e.g., People v. Superior Court of Contra Costa County, 19 Cal.3d 255, 561 P.2d 1164, 137 Cal.Rptr. 476 (1977) (disqualifying the district attorney from prosecuting a charge of murder when victim's mother was in his employ and was embroiled in custody litigation with victim's ex-wife who was one of the defendants). See also United States v. Heldt, 668 F.2d 1238, 1274-78 (D.C. Cir. 1981). A state attorney may be disqualified from advising and participating in the duties of a grand jury. In Re Standard Jury Instructions, 575 So.2d 1276, 1281 (Fla. 1991).

Wright v. United States, 732 F.2d 1048 (2d Cir. 1984), involved a claim of prosecutorial conflict of interest where the prosecutor's wife was a political opponent of the defendant. Wright alleged that he was prosecuted for reasons of political and ideological differences rather than as a result of an **objective** analysis of his conduct. Wright had originally moved

for dismissal of the indictment against him on the ground of a prosecutorial conflict of interest. The issue was decided adversely to Wright on direct appeal. United States v. Wright, 588 F.2d 31 (2d Cir. 1978). During post-conviction proceedings, Wright presented new evidence that another assistant United States attorney would have declined prosecution in the matter based on the lack of merit. Wright ultimately lost once again on appeal based in large part on the more onerous burden required during collateral attack rather than some point earlier in the proceedings.

In dealing with the issue the Wright court couched Wright's claim as a deprivation of his entitlement to a "disinterested" prosecutor. 732 F.2d at 1056. The court pointed out that this phrase states the problem better than the usual reference to conflict of interest.

> ...In cases like this, where there is no basis for a claim that the prosecutor did not believe the defendant to be guilty, the claim is not that the prosecutor had an interest in opposition to his proper one in securing an indictment and a conviction; **it is rather that he had an additional and impermissible reason in forwarding the prosecution.**

732 F.2d at 1056, n.7. The Wright court pointed out that the concept is not altogether easy to define.

> ...True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury -- not the prosecutor. It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged.

732 F.2d at 1056.

Rule 4-3.7 of Professional Conduct prevents a lawyer, with limited exceptions, from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. Additionally, Rule 4-3.8 enumerates special responsibilities of a prosecutor in a criminal case. Conventional wisdom dictates that a lawyer should avoid even the **appearance** of professional impropriety.[62]

In State v. Clausell, 474 So.2d 1189, 1190 (Fla. 1985), this Court found:

> ...no inherent prejudice in allowing an assistant state attorney **who is not prosecuting the case** to testify on behalf of the State.

(Emphasis added). In so holding, this Court implies that there is inherent prejudice in allowing an assistant state attorney who **is prosecuting** the case to testify on behalf of the State. Although Jeffrey Ashton did not take the oath and sit in the witness box during trial, his appearance on the audiotaped interview of Keydrick Jordan amounted to testimony. More importantly, by appearing as an "uncalled witness for the State," Ashton was, in essence, **vouching** for the State's case. Vouching occurs when the prosecution places the prestige of the government behind a testifying witness. United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). Ashton's "appearance" denied Keydrick

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[62] Canon 9 under the old Florida Code of Professional Responsibility provided as such. However, the current Rules of Professional Conduct omits that particular provision. A telephone call to the Florida Bar ethics hotline confirmed this writer's inability to locate the now deleted provision.

Jordan his constitutional rights to due process of law and to a fair trial.

Jordan argued below and persists on appeal that Ashton's vigorous prosecution of Jordan was based, at least in part, on improper racist motives. See Point II. Jordan's allegation of Ashton's racism understandably became very personal. At the hearing on the issue, defense counsel, **once again**, pointed out that someone besides Ashton should be litigating this case. (R543) Additionally, Mr. Ashton "pushed the envelope" of propriety throughout these proceedings. Ashton did not feel obligated to turn over exculpatory evidence that related to the penalty phase (R9-21); during closing argument, Ashton called Keydrick a "demon" and urged his elimination (T2724-31; R426-30); Ashton resisted all efforts to end his participation in the case; and presented the extremely speculative and highly prejudicial testimony of Brown and Strang (see Point I). Even the trial court disapproved of the position taken by Ashton and his office in that they frustrated attempts to inquire into the decision-making process (R547). Even in the opening statement, Ashton painted a picture of an idyllic neighborhood where elderly women felt safe enough to stroll around a picturesque lake. (T1151-53) Jordan's motion for mistrial was denied but the trial court cautioned the prosecutor to move on to other matters. Ashton clearly implied that the pastoral scene was shattered by evil oozing from the projects.

Perhaps most telling is the dispute that arose at trial

concerning the actual wording of Jordan's taped statement during his interview by Ashton immediately following the arrest. This was a point of great contention at trial. Ashton contended that Jordan was not under the influence of any substance during the crime. He argued that to the jury despite the overwhelming evidence to the contrary. Ashton relied heavily on the interrogation that Ashton conducted of Jordan. On rebuttal in the penalty phase, the State called John Parks over vehement defense objection. (T2456-57,2482-95) Jordan correctly pointed out that Parks, who participated with Ashton in Jordan's interrogation, was not a proper rebuttal witness. Nor was the introduction of the taped interview.[63] During the interview, Ashton asked Jordan:

> Q. Well, you said you drank beer too. The...the robbery happened at 7:00...close to 6:30-7:00. Between 2 o'clock in the morning and 6:30 to 7:00 o'clock in the morning did you do any other drugs or drink any alcohol?
>
> A. No.
>
> Q. No. So, you weren't drunk or stoned or high or anything.
>
> A. I was pretty tore up by that...you know, so I don't know. I don't remember.

(R1240) Appellant contended that the first "no" in answer to

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[63] The State contended that the tape rebutted Dr. Phillips' testimony that the shooting was unintentional. According to the State, the tape proved that Jordan was not intoxicated at the time of the shooting. Appellant astutely pointed out that Dr. Phillips testified that the shooting was **not planned** in that the murder was incidental to the robbery and resulted from Jordan's explosive personality disorder. (T2483-87) Appellant renewed his motion to disqualify Ashton. The trial court denied the motion to disqualify and allowed the tape to be played.

Ashton's question was spoken by Jeffrey Ashton himself, not Keydrick Jordan. (T2490) Ashton objected to Appellant's question, further attempting to obscure the issue from the jury. (T2490) On surrebuttal, Jordan called an audio expert and introduced an enhanced portion of Ashton's interview of Jordan. (T2501-8; Defense Exhibit #5) The actual content of the taped interview, Jordan's sobriety, and the extent of Jordan's deliberateness in the shooting were hotly contested issues during final summation.

> Defense Counsel: ...At that point on the tape you'll hear Mr. Ashton's voice saying, no. You'll then hear him say, so you weren't drunk or stoned or high or anything and you will hear Keydrick Jordan say I was pretty tore up by that, you know, so I don't know. I don't remember. Then you'll hear Mr. Ashton change the focus. He wasn't getting the information he wanted because Keydrick was going to tell him about drinking and about being pretty tore up.

(T2761-62) At that point, Ashton objected alleging (1) an attack on counsel, and (2) asking the jury to speculate. (T2762-63) The trial court ultimately sustained Ashton's objection.

The issue reached a head again following the penalty phase during a hearing where the trial court heard evidence immediately prior to sentencing. (R555-667) The prosecutor successfully fought Jordan's attempt to present polygraph results which would have confirmed that Jordan told Ashton that he was intoxicated at the time of the offense ("all tore up"). (R651-58) Ashton disputed that interpretation of the tape. Defense counsel pointed out the difficulty in Ashton insisting on "personally prosecuting this case even though he was directly involved in the

interrogation...and then turn that around and in argument and say there wasn't convincing evidence that he wasn't under the influence of alcohol at the time of the murder, notwithstanding the testimony of Dr. Robert Phillips and others." (R654) Ashton went so far as to call a witness to review jail intake sheets to address alcohol history and consumption. (R654; T2472-80)

Prosecutors, in an adversary system, "are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). However, Jordan's prosecution presents the spectacle of a prosecutor's using the "awful instruments of the criminal law," McNabb v. United States, 318 U.S. 332, 343 (1943) (Frankfurter, J.), not for purpose of private gain, but to personally validate a prosecution and resulting death sentence. Death is different. Beck v. Alabama, 447 U.S. 625 (1980). Heightened due process applies. Id.

Keydrick Jordan stood ready, willing, and able to plead guilty to both counts of first-degree murder that he faced as well as assorted other felonies. The assistant state attorney rebuffed Jordan's willingness to spend the rest of his life in prison. The prosecutor's decision might have been based on inappropriate racial considerations. See Point II. Or the prosecutor's decision could have been based on his own participation in the investigation of Keydrick Jordan. Either reason is unjustified and improper. Ashton's personal participation in prosecution gave the State's case undue

credibility. Ashton was present during Jordan's taped interrogation. Ashton knew who said what. Ashton's closing argument assured the jury that Jordan was not under the influence of any substance. Ashton's participation in the trial and actions throughout the proceedings ultimately changed the focus of the jury. Instead of a proper weighing of aggravating circumstances and mitigating evidence, Ashton urged the jury to focus on the elimination of evil. No matter how abusive Keydrick's childhood was, Ashton argued that Keydrick Jordan was a lost cause. **We should kill him.** Even if Ashton's improper behavior and argument changed only two votes, that was enough to make the difference. "[T]he integrity of the judicial process has...been brought into question." Castro v. State, 597 So.2d 259, 260 (Fla. 1992). The resulting denial of due process of law mandates a new trial. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

POINT IV

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S CROSS-EXAMINATION OF SAM TORY WHERE APPELLANT LATER EXPLAINED THAT HE DID NOT INTEND TO KILL THE VICTIM.

Sam Tory was a critical state witness. Tory was with Jordan the night before the crime. (T1340-41) Appellant and Tory co-owned the bicycle abandoned at the murder scene. (T1337) The defense theory at trial was based on the contention that Sam Tory was a participant in the robbery and felony murder. (T1376, 1533-49) Tory called Crime Line, snitched on Jordan, denied any involvement himself, and received a $1,000.00 reward. (T1345, 1376) Tory also testified that the day after the murder, Jordan admitted to Tory that he had "popped"[64] somebody. (T1341-44, 1368-76,1378-1400) Tory expressed some confusion about when Jordan made the comment to him. Tory finally concluded that Jordan made the incriminating statement on Sunday morning, one day after the murder. (T1387-1400) After seeing the news reports of the murder on Monday, Tory called Crime Line. During a second conversation with Jordan on Monday night, Jordan reaffirmed that he had "popped someone" but claimed that he did not mean to kill the victim. (T1380-1400) The trial court refused to allow defense counsel to cross-examine Tory about Jordan's statement that the gun "just kept going off" and that he did not intend to kill Ann Mintner. The trial court ruled that, since the "accidental" statement was made during a second

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[64] In street vernacular, "popping someone" refers to shooting and killing a person.

conversation, it was beyond the scope of cross-examination. The court obviously accepted the State's argument that, since the exculpatory statement was an admission, the statement was admissible only by a party-opponent. (T1381-82) Defense counsel argued that the statement was important to "put it in the right context." The statement was "something the jury ought to consider." (T1382) The State chose to pick and choose parts of Jordan's conversations with Tory. The State excised the exculpatory portions of Jordan's statements contrary to Section 90.108, Florida Statutes (1993).

The trial court also rebuffed Appellant's subsequent attempt to elicit this evidence during the cross-examination of John Parks, an Orlando policeman. (T1460-63) Parks interviewed Sam Tory concerning his knowledge of the crime and Jordan's involvement. (T1453,1458-59) Defense counsel attempted to cross-examine Parks concerning Tory's statement that Jordan told Tory that it was an accident. (T1460-62) Appellant argued unsuccessfully that the entire statement from Tory should be the subject of cross-examination, because Appellant needed to "put it in context." (T1461) Both the limitation of Tory's cross-examination and Parks' cross-examination constituted a denial of Jordan's constitutional right to a fair trial.

A recent case is right on point. In Johnson v. State, 653 So.2d 1074 (Fla. 3d DCA 1995), the defendant gave an informal statement to the police at the time of his arrest and a second formal statement at the police station. The State introduced the

first statement and the trial court refused to allow defense counsel to cross-examine the detective concerning the second, exculpatory, formal statement. Citing Section 90.108, Florida Statutes (1993), the appellate court held that the trial court abused its discretion in limiting defendant's cross-examination.

> Although a defendant's out-of-court, self-serving exculpatory statements are usually considered inadmissible hearsay, "where the State has opened the door by eliciting testimony as to part of the conversation, defendant is entitled to cross-examine the witness about other relevant statements made during the conversation." Guerrero v. State, 532 So.2d 75, 76 (Fla. 3d DCA 1988).

Johnson, 20 Fla. L. Weekly at D910. The appellate court pointed out that, "standing alone, the earlier statement left the jury without a complete picture of the defendant's behavior." Id.

Appellant's case is indistinguishable from the one presented in Johnson. The State chose to introduce only a portion of the second conversation Tory had with Jordan about the crime. This evidence would have supported Appellant's statement made to the police that the gun went off accidentally and kept firing. The jury should have been allowed to hear this pertinent and admissible cross-examination. The limitation of cross-examination denied Keydrick Jordan of his constitutional right to a fair trial. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE, ALLOWING THE STATE TO ARGUE BOTH PREMEDITATION AND FELONY MURDER, AND THIS COURT SHOULD ADDITIONALLY VACATE THE CONVICTION AND SENTENCE FOR ATTEMPTED ROBBERY ON DOUBLE JEOPARDY GROUNDS.

Prior to final summation, Appellant moved in limine to prevent the State from arguing that the jury need not be unanimous regarding the theory of murder, either felony murder or premeditated murder.[65] Defense counsel contended that the jury must be unanimous in convicting on either theory. (T1525-28) The trial court disagreed citing Haliburton v. State, 561 So.2d 248 (Fla. 1990). During closing argument, the prosecutor argued both theories of murder, felony murder (T1559-60) and premeditated murder (T1557-58). Defense counsel, in essence, argued that Jordan did not premeditate the murder. (T1533-49, 1562-68) Defense counsel attempted to argue that Jordan abandoned the robbery attempt and, therefore, no felony murder occurred. (T1566) The trial court instructed the jury on both theories of murder. (T1570-72) As fate would have it, the jury interrupted their deliberations with a question:

> Is there a difference in sentencing or any other area if first degree murder is determined via premeditation or felony murder?

(T1596-1602; R1772) The parties agreed on an answer and, after deliberating for another hour, the jury returned with verdicts of guilty as charged. (T1596-1607; R1773-74) The jury's verdict

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[65] The trial court had previously denied Appellant's "Motion to Preclude First Degree Felony Murder Theory of Prosecution." (R233-35,1073-75)

was a general one finding Jordan guilty of "murder in the first degree." (T1773) The jury was never given a choice of premeditated or felony murder on the written verdict.

In Mills v. Maryland, 486 U.S. 367, 376 (1988), the United States Supreme Court stated:

> With the respect of findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. [Citations omitted]. In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds...

This Court cannot be certain which of the two theories (premeditated versus felony murder) the jury relied upon in reaching the verdict. The evidence establishes that the crime was a classic case of felony murder. The evidence does not support a conviction for premeditated murder.

Defense counsel attempted to limit the State's argument in this regard. (T1525-28; R233-35,1073-76) The jury's question clearly indicates that they were torn between the two theories. (T1596-1602; R1772) The prosecutor expressed concern that the jury's question revealed that the jury may have misunderstood that they need not be unanimous as to which theory was proven. (T1599)

The jury's question also clearly reveals that they were considering matters, namely sentencing, that were inappropriate. That fact in and of itself should result in a new trial. Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978). Under either

argument, it is clear that Keydrick Jordan's trial was not fair. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

Additionally, recent caselaw indicates that Jordan cannot be convicted of both felony murder and the underlying felony. In Boler v. State, 654 So.2d 603 (Fla. 5th DCA 1995), the lower court certified the following question to this Court:

> After United States v. Dixon, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), may a defendant, in Florida, be separately convicted and sentenced for the felony murder and qualifying felony even in the same prosecution?

Boler v. State, 654 So.2d at 604. This issue is currently pending before this Court and may be raised for the first time on appeal. This Court should vacate the conviction and sentence for the attempted robbery.

POINT VI

ERRORS IN JURY SELECTION RESULTED IN A DENIAL OF JORDAN'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

Limitation of Voir Dire

On several occasions, the trial court limited Appellant's voir dire of the panel. (T182-83,284,570-75,581-84,783,882,991-93,1033-37) This was error.

Voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b). Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause." Keene v. State, 390 So.2d 315, 319 (Fla. 1980). "Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed prejudgments by perspective jurors which will not yield to the law as charged by the court, or to the evidence." Jones, 378 So.2d at 798. Wide latitude should be allowed during the examination of jurors. Cross v. State, 103 So. 636, 89 Fla. 212 (1925). Voir dire examination should be as varied and as elaborate as is necessary to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967).

Denial of Individual and Sequestered Voir Dire

Appellant requested individual voir dire. (T222-23) The trial court stated that it would consider Appellant's request over night, but never allowed individual voir dire. In

requesting individual voir dire, Appellant was merely asserting his constitutional right to a fair trial, by "a panel of impartial 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). It must be said that there is no case which holds that -- under federal law, in **every** capital case, without exception -- "individualized segregated voir dire is constitutionally required." Berryhill v. Zant, 858 F.2d 633, 643 (11th Cir. 1988) (Clark, J., concurring).[66] However, "[g]iven the pervasiveness modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).[67]

In high-profile murder cases such as this one, it is clear that "[a] searching voir dire is a necessary incident to the right to an impartial jury." United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). In such a case, "[t]he defendant...has the right to 'probe for the hidden prejudice of the jurors...'" Silverthorne v. United States, 400 F.2d 627, 640

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[66] Of course, the fact that federal courts have only recognized that individual sequestered voir dire is vital to a fair trial in limited circumstances should not preclude this Court from recognizing the right under our own constitution. See, e.g., Traylor v. State, 596 So.2d 957 (Fla. 1992).

[67] Normally, much of the potential prejudice in a high-profile case may be eviscerated by a change of venue. In this case, Mr. Jordan chose to be tried in the county where the crime occurred, as was his right under the United States Constitution as well as the Constitution of Florida. Art. I, § 16, Fla. Const.

(9th Cir. 1968). In order for the defense to successfully and completely ferret out hidden prejudices, counsel must be allowed to ask pointed questions. Doing so in front of the entire jury venire risks contaminating other perspective jurors. Berryhill v. Zant, 858 F.2d at 642 (Clark, J. concurring). Additionally, people **never** like to admit that they will be "unfair", much less before a gathering of their peers. See Williams v. Griswald, 743 F.2d 1533, 1540 n.14 (11th Cir. 1984) (the juror may be reluctant to admit any bias in front of his peers"). Indeed, "'going through the form of obtaining the jurors' assurances of impartiality is insufficient...'" Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968); see also Irving v. Dowd, 366 U.S. 717, 728 (1961) (jurors' statements of their own impartiality to be given "little weight."

In the instant case, defense counsel asked extremely pointed questions. Counsel was candid and probing concerning the venire's reaction to Keydrick Jordan's prior murder conviction. See e.g. (T293,396,578-81) In addition to that hurdle, defense counsel was faced with a shocking murder that shook the community. Several of the potential jurors expressed open hostility toward the Appellant. See e.g. (T35) One potential juror knew of the victim and expressed her concern about her ability to be impartial. (T253-57) Additionally, several of the potential jurors made outrageous statements which undoubtedly tainted others in the venire. Veniremen Burnham and McCollum stated their adamant refusal to consider an abused childhood as

mitigation. (T78-85,106-10) Veniremen Fluke, McCollum, and Myers opined that age should not be considered in mitigation.[68] (T106-10,133,149-52) Venireman Eatmon would not consider age either. (T467) All of the things being equal Venireman Fluke insisted that he would punish a thirteen-year-old the same as a thirty-year-old. (T133) Venireman Henderson favored death in all murder cases because the law lets too many criminals "get away with murder." (T172-73) Prison overcrowding was a factor in Venireman Bruens' support of the death penalty. (T271-72) Several potential jurors maintained that they would automatically vote for the death penalty in all murder cases, no matter what the evidence showed. (T279-80,338-39,396,965-67) Venireman Beauchaine favored the death penalty for all premeditated murders. (T404-6) Venireman Cobb would have shifted the burden of proof and required the Appellant to prove that the death penalty was **not** appropriate. (T547-48)

Jurors learned of other prejudices and misconceptions from the open voir dire and, very likely, decided many were fine ideas. Venireman Kafka admitted that he was **highly** skeptical of mental health professionals. (T565-66)[69] Kafka and Hart would consider drug use as aggravation rather than mitigation. (T589-90) Even in a civil case, where there is a high probability that

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[68] Myers conceded that he could consider age as mitigation **only** if an expert witness testified that age mattered. (T149-52)

[69] The record demonstrates that mental health professionals made up the lion's share of Keydrick Jordan's case for mitigation.

a probing voir dire in the presence of all the jurors exposed prejudicial matters, this Court has reversed. See, e.g., Blanton v. Butler, 81 So.2d 745, 746 (Fla. 1995). Keydrick Jordan's trial was one of the rare instances where individual, sequestered voir dire was required. "A small amount of time would be involved, when compared to the possibility of a new trial." United States v. Starks, 515 F.2d 112, 125 (3d Cir. 1975).

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR EXCULPATORY EVIDENCE AT THE PENALTY PHASE.

Although Appellant participated in discovery as to the guilt phase, Appellant deliberately elected not to participate in discovery as to the penalty phase. (T9-21; R918) At a December 8, 1992 hearing, the trial court granted Appellant's motion for exculpatory evidence pursuant to Brady v. Maryland.[70] (T1-21; R1167-69,1184) The State has a duty to produce Brady material even where a defendant chooses not to engage in reciprocal discovery. Brady v. Maryland, supra. The trial court evidently misconstrued this aspect of law and denied Appellant's request. (T9-21; R1184) However, the trial court denied Appellant's Brady motion as to the penalty phase. (T1-21; R1184)

The trial court's ruling was clearly in error. As a result of the trial court's ruling, Appellant cannot show prejudice. When this Court reverses on one of the grounds argued on appeal, this Court should instruct the trial court that Appellant's request for exculpatory evidence should be granted, even at the penalty phase, even where a defendant chooses not to participate in discovery.

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[70] Brady v. Maryland, 373 U.S. 83 (1963).

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE THAT FUTURE LEGISLATION MIGHT RESULT IN JORDAN'S RESULT FROM PRISON IF JORDAN WERE SENTENCED TO LIFE.

In an effort to show the jury that Keydrick Jordan would, in all likelihood, never be released from prison, Merle Davis from probation and parole explained Florida's capital sentencing process. (T2461-65) Davis explained that a life sentence with a mandatory minimum of twenty-five years without possibility of parole meant exactly that. On cross-examination, over defense objection, Davis admitted that all laws are subject to change by the legislature. (T2466-68) The trial court should have sustained Appellant's objection that such testimony was "speculation." In fact, the testimony was flat out wrong. See McKendry v. State, 641 So.2d 45 (Fla. 1994). The jury and the trial court were trying and sentencing Keydrick Jordan for first-degree murder under today's law. Future action by the legislature would have no effect on Keydrick Jordan's sentence. The clear implication of the testimony was that, unless this jury sentenced Jordan to death, he might subsequently be released by a change in the law. This is clear error. See, e.g., Teffeteller v. State, 439 So.2d 840 (Fla. 1993).

Additionally, the trial court erred in restricting Jordan's attempt to assure the jury that he would never be released from prison. When counsel attempted to point that fact out during opening statement of the penalty phase, the prosecutor's objections were sustained. (T1663-66) Counsel subsequently

raised this error again in requesting a new penalty phase. (R422,1874-76) This was error. Jones v. State, 569 So.2d 1234 (Fla. 1990).

The trial court also erred in denying Jordan's request for a jury instruction on this issue. (T2583-86) The trial court also erred in restricting Jordan's closing argument on a sentencing scheme that would guarantee Jordan spent the rest of his life in prison. (T2778-82) Id., but see Marquard v. State, 641 So.2d 54 (Fla. 1994).

POINT IX

KEYDRICK JORDAN'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM.

A. THE SENTENCING ORDER

Appellant concedes that, as capital sentencing orders go, Judge Adams was extremely thorough in his analysis. However, the trial court did make mistakes. The court used an incorrect standard[71] and considered nonstatutory aggravation. In light of the trial court's exhaustive analysis of the evidence, Appellant is quite sure that the trial court would want to reconsider the evidence using the correct standard and without weighing the

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[71] The trial court erroneously believed that this Court reverses a high percentage of cases in which the judge refuses to follow the jury recommendation (even if a judge overrides a death recommendation and sentences a defendant to life). (R552-53) As this Court is well aware, a life sentence imposed over a jury's death recommendation would not be subject to reversal. Since the trial court thus obviously gave the jury's recommendation **too** much weight, this Court should reverse and remand for reconsideration by the trial court with a proper understanding of the process. See, e.g., Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995).

nonstatutory aggravation.

(1) Jordan's Nonviolent Juvenile Disposition

In finding that Jordan had previously been convicted of another capital felony or of a felony involving the use or threat of violence[72] the court wrote:

> On August 6, 1987, the defendant, Keydrick Deon Jordan, was convicted of Burglary Of A Dwelling and Lewd Assault Upon A Child, in Case No. JU87-1338 in this circuit.

(R1942) The only evidence concerning Jordan's 1987 "convictions" was State's Exhibit Number 1 at the penalty phase (HRS commitment) and the testimony of Orlando police officer Robert Casslen. (T1673-83) Casslen's testimony revealed that, when Jordan was fourteen, he entered an apartment window. Once inside, he took a six-year-old girl into a bedroom, removed her clothes, removed his clothes, and vaginally penetrated her with his finger. (T1674) The girl also claimed that Jordan attempted to penetrate her vaginally with his penis. (T1674) Casslen took a statement from Jordan who admitted the digital act but denied the other. (T1675) A physical examination of the child revealed no evidence of any physical injury that indicated penetration. (T1678) In fact, there was no evidence of any injury to the child. (T1680) Jordan was subsequently committed to HRS for lewd assault.

The State completely failed in their attempt to prove that Jordan's juvenile disposition for lewd assault was a crime of

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[72] § 921.141(5)(b), Fla. Stat. (1993).

violence. Aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court has interpreted the language in this aggravating circumstance to mean "life-threatening crimes." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); see also Ford v. State, 374 So.2d 496 (Fla. 1979). The crime of lewd assault is clearly non-violent on its face. The State attempted to prove, as allowed by law, that the crime involved violence. See Johnson v. State, 465 So.2d 499 (Fla. 1985). The State completely failed in this regard. The State did not even prove a **threat** of violence. Johnston v. State, 497 So.2d 863 (Fla. 1986).

Additionally, it is abundantly clear that the trial court relied on a juvenile adjudication rather than a criminal conviction. Section 921.141(5)(b), Florida Statutes (1993), clearly requires a **conviction** rather than an **adjudication**. It is thus clear that the trial court **and the jury** improperly considered nonstatutory aggravation, namely Jordan's **nonviolent juvenile disposition**.[73]

Appellant concedes that the State proved other, prior violent felony convictions. However, the trial court's error cannot be deemed harmless. Judge Adams' order is so meticulous, that it is clear he would want the chance to reweigh the aggravating and mitigating circumstances in light of any error, however small. Appellant submits that this particular error

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[73] This Court currently has this issue before it in Troy Mercke, Jr. v. State of Florida, Case Number 83,063.

would not be viewed as a small one by Judge Adams, nor should it be so viewed by this Court.

(2) The Court's Rejection of Unrefuted Mental Mitigation

In rejecting the statutory mitigating factor that Jordan committed the crime while under the influence of extreme mental or emotional disturbance, the trial court rejected unrefuted evidence to the contrary. Dr. Phillips was the only psychiatrist who evaluated Keydrick Jordan. Dr. Phillips concluded that Mintner's murder was committed while Jordan was under the influence of extreme mental or emotional disturbance. (T2350) The State presented no witness or evidence to refute Dr. Phillips' conclusion. The doctor's opinion was not shaken by cross-examination.

The trial court apparently inappropriately focused on Dr. Phillips' qualification of his opinion on this issue. Dr. Phillips admitted that Keydrick was not **delusional**. However, Keydrick's emotional disturbance and nonexistent socialization skills, coupled with his alcohol-impaired judgment, severely limited his capacity to conform his behavior. Although the two statutory mental mitigating circumstances are sometimes inextricably intertwined, the trial court clearly confused the evidence in rejecting one, but finding the other. (R1943-45) In concluding that Jordan was under the influence of a mental or emotional disturbance, but not an extreme one, the trial court stated:

> Although his diagnosis was inconclusive, Dr. Phillips was clear that Mr. Jordan was not delusional,

> psychotic, or in a clinical state that should distance him from criminal responsibility for his actions.

(T1944) The trial court is obviously employing the standard for insanity rather than the lesser standard required for the establishment of mitigating circumstances. A defendant need not be delusional, psychotic, or in a "clinical state" for this mitigating circumstance to apply. Eddings v. Oklahoma, 455 U.S. 104 (1982) (error to consider as mitigating evidence only that which would tend to excuse criminal liability); Knowles v. State, 632 So.2d 62 (Fla. 1993) (rejection of insanity and voluntary intoxication defenses does not preclude finding this mitigator).

Jordan's case is distinguishable from Ponticelli v. State, 493 So.2d 483 (Fla. 1992), where the trial court merely referred to "M'Naghten criteria" in rejecting mental mitigators. Jordan's trial court clearly focused on the fact that Jordan was not delusional or psychotic. (R1944) In light of the fact that Appellant presented **uncontroverted** evidence of this mitigating circumstance, the trial court **must** find it and give it weight. Nibert v. State, 574 So.2d 1059 (Fla. 1990).

Jordan's case is indistinguishable from Spencer v. State, 645 So.2d 377 (Fla. 1994). The Spencer trial court erred in refusing to find both mental mitigators where a reasonable quantum of competent, uncontroverted evidence had been presented. (Defense experts conducted a battery of psychological tests, clinical interviews, examined the evidence, reviewed defendant's life history, school records, and military history.) The trial court erred in rejecting the mitigation as "speculative" and

"confusing." At Jordan's trial the only witness presented by the State on this issue was Carol Brown, a therapist, who had not even examined Keydrick Jordan. Most of her time and effort was spent reading "studies" in the "literature." When compared to the sweeping, in-depth work of Dr. Phillips, Brown's testimony fades into deserved obscurity.[74]

(3) The Court's Rejection of Jordan's Abusive Childhood

The trial court made a similar error in its consideration of the nonstatutory mitigating factors relating to Keydrick's family background and childhood abuse.

> The testimony...detail[ed] a pattern of abuse and neglect that evokes heart-wrenching sympathy for the child raised in that environment. The Court finds ample evidence for each of these non-statutory mitigating factors. However in weighing these factors the Court notes two points which diminish their impact. First, the violence in this case was not retaliatory, the victim in this case had nothing whatsoever to do with the suffering inflicted on young Keydrick Jordan. Second, the other children raised in that same home, while struggling emotionally, have managed to function without being driven to take the lives of others.

(R1947) The trial court concluded by allegedly giving "substantial weight" to all [36] of these factors. (R1948) Even though the trial court stated that he gave "substantial weight" to these mitigating circumstances, the court did not accord the evidence its **proper** weight. The trial court's statement that

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[74] The State's offer of Ms. Brown's testimony was very limited in scope. The State attempted to use Ms. Brown to establish that Jordan enjoyed killing Mintner, thereby satisfying one prong of the HAC aggravating circumstance. Additionally, Appellant challenges even the consideration of Brown's testimony in light of her lack of qualifications and the speculative nature of her testimony. See Point I.

Jordan's crime was not retaliatory (since Mintner played no part in his childhood abuse) is reminiscent of Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990).

> ...Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find that analysis inapposite. The fact that a defendant has suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Similarly, Jordan's trial court would assign great weight to an abusive childhood **only** if the abused child grew up and committed first-degree murder of one of his abusers. Such treatment of the evidence makes no sense. The uncontroverted evidence produced at Jordan's penalty phase portrayed a "reign of terror" upbringing that is the worst that undersigned counsel has seen in handling approximately thirty capital appeals. The trial court's diminishment, however slight, of this mitigating circumstance for the reasons stated cannot be tolerated. Likewise, mitigation cannot be denigrated based on the fact that Jordan's siblings had not yet committed capital murder. (R1947) People are different. Some have more enduring psyches than others. The other musketeers certainly were not coping very well. While none had apparently committed murder, they had significant mental health problems, had attempted suicide, had

attempted murder, abused substances, and engaged in criminal activity. (T1905-6,1910-14, 1955-56,2230-34,2236) The trial court gave this important category of nonstatutory mitigating circumstances insufficient weight based on a misapprehension of the law.

(4) The Trial Court's Improper Consideration of Jordan's Courtroom Demeanor

In considering Jordan's good conduct after his release from prison and his good conduct during the trial, the court wrote:

> There is no doubt that the defendant's good conduct can be a mitigating factor. Of his conduct in visiting Orange Halfway House, the evidence is uncontroverted. His appropriate conduct in court is a matter of record and his demeanor has always been pleasant. The Court finds these non-statutory mitigating circumstances to exist. What this shows however is that Mr. Jordan has the capacity to conform his conduct to societal norms when it suits him. In assessing the weight of these circumstances, it must be noted that their weight, although not great, diminishes the weight of statutory mitigating circumstances 2.

(R1931-32,1949-50) The trial court took valid nonstatutory mitigating evidence and turned it on its head. The court turned mitigating evidence into nonstatutory aggravating evidence. Keydrick Jordan was penalized for his good behavior rather than rewarded. His behavior clearly shows potential for rehabilitation. His efforts show remorse. These are assets and should not be a detriment. It is improper for the State to comment on a defendant's trial demeanor. See, e.g., Pope v. Wainwright, 496 So.2d 798 (Fla. 1986). Similarly, a trial court should not be allowed to use a defendant's good behavior against a defendant in sentencing him to death.

B. THE GROSSMAN[75] ERROR

The trial court actually entered two sentencing orders. The court filed the first order on July 22, 1994. (R1923-32) However, the trial court erroneously stated that Jordan pled nolo contendere to sexual battery and first-degree arson in addition to the murder of Thelma Reed. (R1924) The prosecutor immediately pointed out that the State dropped the sexual battery and arson charges at the time of Jordan's plea. (T729-51) The trial court agreed that the order was incorrect. Five days later, without notice to counsel, the trial court entered a corrected sentencing order omitting any reference to the arson and sexual battery. (R1941-50) Appellant's counsel objected to the trial court's action of rendering the order without prior notice to counsel. (T755-60) The trial court overruled that objection. Appellant subsequently filed a "Motion for Reconsideration of Sentence/Objection to Sentencing Order." (R1954-61) The trial court denied the motion. (R761-92)

In its first sentencing order, the trial court improperly weighed prior violent felony convictions which did not in fact exist. The trial court characterized that action as "clerical errors." The new sentencing order simply omitted any mention of the arson and sexual battery convictions that the trial court had previously listed, and undoubtedly weighed in sentencing Keydrick Jordan to death. Appellant contends on appeal that the trial court's action in subsequently rendering a "corrected" sentencing

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[75] Grossman v. State, 525 So.2d 833 (Fla. 1988).

order five days after sentencing violates the dictates of Grossman v. State, 525 So.2d 833 (Fla. 1988). See also Bouie v. State, 559 So.2d 1113 (Fla. 1990). The trial court submitted an inaccurate, invalid sentencing order when he sentenced Keydrick Jordan to death. **Five days later** the trial court rendered the sentencing order at issue on this appeal. Appellant submits that the order was not rendered contemporaneously with the death sentence imposed in this case. This Court must therefore vacate Jordan's death sentence and remand for imposition of life imprisonment. § 921.141(3), Fla. Stat. (1993); Grossman, supra; and Bouie, supra.

C. THE TRIAL COURT RESTRICTED PRESENTATION OF EVIDENCE

During the penalty phase, the trial court restricted the evidence which Appellant wished to present to the jury. The trial court also restricted evidence Appellant wanted to present to the judge following the penalty phase. Specifically, the trial court refused to allow the jury to hear extensive evidence about Fitzroy Nugent's voodoo practices during the years that he acted as Keydrick Jordan's stepfather.[76] (T1846-57) Appellant contended below and maintains on appeal that the fact that a primary caretaker practices voodoo is inextricably intertwined in the raising of a child under that person's care. (T1852) Defense counsel promised (and subsequently made good that promise) to present testimony of an expert witness who explained

[76] The court allowed voodoo evidence only if Jordan had seen it.

that, in order to understand an individual, one must understand the family system and the individual members who comprise it.[77] (T1848)

The trial court also improperly excluded other evidence. Ta-tanisha Davis had difficulty identifying a photograph of Joe Evans. (T1917-20) When defense counsel pointed out that the name was on the mug shot, the State objected and the trial court refused to allow Ta-tanisha Davis to identify the photograph. The particular exhibit was never admitted due to this lack of predicate. (Defense Exhibit F) Defense counsel properly refreshed Davis' memory and the trial court erred in excluding the testimony and subsequent evidence. § 90.613, Fla. Stat. (1993); Peoples Gas Sys., Inc. v. Hotel Ocean 71 Associates, Ltd., 479 So.2d 203, 204 (Fla. 3d DCA 1985) ("[T]rial court committed no reversible error in allowing a witness to refer to certain notes which the witness had prepared prior to trial for the stated purpose of refreshing his recollection.")

The trial court also excluded Defense Exhibit J for identification, a photograph of a child with body marks resulting from a beating. (T1972-73) Detra Mike explained how Gloria, using an electrical or telephone cord, beat the children. The beatings were so brutal that marks were left on the children's bodies. (T1970-72) Since the family did not have an in-house

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[77] A licensed clinical social worker/therapist explained that the jury could not understand an individual in isolation from his family. One must look at **every** family member in order to get the complete picture. (T2111-13,2140)

photographer memorializing the children's injuries, defense counsel tried to present a photograph of a child with similar marks from a beating. (Defense Exhibit J for identification) Defense counsel used the testimony of Detra Mike to lay the proper predicate, namely that the marks in the photograph accurately represented the **type** of marks that she observed on Keydrick after a beating from Gloria. (T1972-73) Despite the fact that the photograph was relevant, demonstrable, accurate, and **potent** evidence, the trial court excluded the exhibit. This was error. See Metropolitan Dade County v. Zapata, 601 So.2d 239, 244 (Fla. 3d DCA 1992) (In wrongful death action arising from a drowning accident, a posed photograph taken from a lifeguard tower showing a man in distress is admissible, with a limiting instruction. The photograph was a fair and accurate representation of a person in distress.)

Defense counsel also attempted to present the testimony of Connie Woods Kelley about her father, Willie Woods. (T1985-96) Connie was to testify about the sexual and physical abuse she suffered at the hands of her father, Willie Woods. Gloria Gilmore, placed Keydrick Jordan under the care of Willie Woods, her father and Keydrick's grandfather, when Keydrick was approximately fifteen. The trial court excluded the testimony of Connie Woods Kelley based on the fact that Willie Woods' abuse of Connie occurred prior to Keydrick's birth. Appellant contends, as he did below, that the jury had the right to hear this pertinent and relevant testimony. Expert testimony established

that the sum and substance of an individual is greatly affected by that person's upbringing. Part of that upbringing is the **character** of the primary caretakers. Connie's testimony would have corroborated the testimony of the defense experts, i.e., that Willie Woods abused Keydrick. Appellant pointed out the vagaries of experts' note-taking. Additionally, the jury had a right to hear the evidence without filtering by a professional witness.

The trial court also improperly limited the cross-examination of Ronnie Goodman. (T1691-98) Goodman's testimony established an aggravating circumstance (prior violent felony conviction) and Jordan's cross-examination of Goodman should not have been restricted. (R422)

After the trial court allowed Jordan's sister to testify, over defense objection, that Gloria often visited Keydrick in jail following his arrest, defense counsel attempted, on redirect, to ask the sister if Gloria would state that she "loved" Keydrick. The trial court sustained the State's objection (speculative). Once the State opened the door, the trial court should have allowed the testimony. (T1935-36,1957-58)

The trial court also restricted some evidence relating to Keydrick's familial/ancestral background. See, e.g., (R261-72, 2151-57) As Jordan's expert witnesses established, such evidence is potent and necessary to an understanding of Jordan's being.

The trial court also improperly excluded Sally Wenstrand's

testimony detailing the shortcomings of the Department of Health and Rehabilitative Services in dealing with Keydrick's problems. (T2046-47) The trial court concluded that an indictment of HRS had no bearing on Keydrick Jordan. Defense counsel contended that the jury needed to know what resources were available at the time and what could have been done to help Keydrick with his problems. The trial court excluded this evidence. (T2046-47) The trial court subsequently heard a great deal of this evidence at a sentencing hearing. The jury had a right to hear the evidence also.

At the sentencing hearing, the trial court also refused to consider Jordan's successful completion of a polygraph examination. (R651-58) The polygraph examination indicated that (1) Jordan did not intend to shoot Mintner; (2) the robbery was Sam Tory's idea; (3) in the five hours prior to the shooting, Jordan drank at least nine beers and two bottles of high alcohol wine; (4) that Tory was with Jordan during the robbery; and (5) the shooting was accidental. (R1910-14) Evidentiary rules are relaxed to some degree at the penalty phase. § 921.141(1), Fla. Stat. (1993). Even so, Appellant did not attempt to introduce the polygraph results until after the penalty phase. Appellant simply wanted the trial court to consider the evidence at the sentencing hearing with no jury present. The polygraph is critical for its value at sentencing. In Green v. Georgia, 442 U.S. 95 (1979), the Supreme Court held that state evidentiary rules cannot be employed to restrict admission of information

suggesting that the defendant's sentence should not be death. See also Dutton v. Brown, 812 F.2d 593, 599-602 (10th Cir. 1987) (en banc) (unconstitutional to exclude any evidence in capital sentencing indicating that death should not be imposed, irrespective of any applicable state procedural rules).

D. THE JURY CONSIDERED NONSTATUTORY AGGRAVATION IN RECOMMENDING THE DEATH PENALTY.

Aside from the fact that the jury heard the testimony of Brown and Strang (see Point I, infra), the jury also heard other evidence and argument concerning nonstatutory aggravation. Over objection, the State elicited evidence that Keydrick Jordan was a discipline problem in jail while awaiting trial. (T2275-80,2284) The State succeeded in pointing out that Keydrick Jordan was dysfunctional in a prison society, much as he was in a free society. (T2279-80,2284,2365-72,2440-42) Appellant objected contending that the State was offering evidence of nonstatutory aggravating circumstances. (T2280-84) The trial court overruled the objection stating that the jury could draw **other** inferences from the evidence. The court promised not to allow the prosecutor to **argue** that Jordan might "act out" in prison, if he were not electrocuted. (T2280-84) Dr. Sullivan finally admitted that Keydrick Jordan would **never** change. (T2284)

Furthermore, the State was allowed, over objection, to establish during cross-examination of Mr. Sullivan, that Jordan was a sadistic rapist (T2266-68), and that he lacked remorse (T2289-95). Mr. Sullivan was not competent to testify as to these matters. Additionally, the evidence constituted

nonstatutory aggravation.

Additionally, the trial court allowed into evidence, over objection, Jordan's indictment on the Reed murder/sexual battery/arson. (T1714-15) Counsel pointed out that the sexual battery and arson counts were dropped by the State. Hence, they did not qualify as prior violent felony convictions and were therefore nonstatutory aggravation. The trial court ruled that the jury already heard testimony regarding these offenses. Counsel pointed out they heard testimony of only a fire, not arson. The evidence was nonstatutory aggravation and should have been excluded.

During closing argument the prosecutor argued, over objection, that Jordan experienced euphoria as a direct result of the pain he caused his victims. (T2724-25) "[M]aking someone suffer is the most important thing [to him]." (T2727) The prosecutor also told the jury that Keydrick Jordan "became the **demon** that he feared..." (T2728) (emphasis added) Vilifying an accused without good cause is not appropriate argument. Darden v. State, 329 So.2d 287 (Fla. 1976) (calling Darden an animal not reversible error where defense counsel was first to call the perpetrator of these vile acts "a vicious animal.") Arguments solely calculated to arouse emotion are improper. A.H. Robins Co. v. Ford, 468 So.2d 318, 319 (Fla. 3d DCA 1985). The prosecutor's reference to Keydrick Jordan as a "**DEMON**" was clearly solely calculated to arouse the jury's emotion. The resulting death sentence is constitutionally infirm.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant requests the following relief:

As to Points III, IV, V, and VI, vacate the convictions and sentences and remand for a new trial;

As to Point II, vacate the death sentence and remand for further discovery on the issue of racism; and

As to Points I, VII, VIII, and IX, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Mr. Keydrick Jordan, #138294 (43-1192-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 22nd day of September, 1995.

CHRISTOPHER S. QUARLES
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