IN THE SUPREME COURT OF FLORIDA

MEMWALDY CURTIS, :

Appellant, :

v. : CASE NO. 84,293

STATE OF FLORIDA, :

Appellee. :

_____/

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

The Record on Appeal consists of twenty-three (23) volumes. Volumes I-IV contain the record, and references to pages there shall be made as "R". Volumes V-XXIII contain transcripts of the proceedings, and references there shall be made as "T#".

STATEMENT OF THE CASE

A grand jury indicted appellant Memwaldy Curtis on charges of first-degree murder (Count I), attempted first-degree murder with a firearm (Count II), and armed robbery with a firearm (Count III). All the offenses took place on December 21, 1992, in Duval County, Florida. Curtis was born March 12, 1975, making him 17 years old at the time. R9-11; T1212-13, 1236.

A jury trial was held June 6-9, 1994 before The Honorable L. Page Haddock. The jury found Curtis guilty as charged. T1144-45; R321-25. The penalty phase was held before the same jury on June 24, 1994, and the jury recommended death by a vote of 9-3. T1341;

R378. At sentencing July 28, 1994, the judge adjudicated Curtis guilty on all three counts, imposing consecutive sentences of death on Count I and guidelines departure sentences of life imprisonment on Counts II and III. T1423-25; R401-18. Curtis timely filed a notice of appeal on August 25, 1995. R705.

STATEMENT OF THE FACTS

This case is about an armed robbery and the shooting of two store clerks that took place at 11:30 p.m., December 21, 1992, in the Safeco Food Store, Duval County. One clerk, Fouad Taaziah, was shot in the stomach and survived. The other clerk, Najwan Khair-Bek, died. The State and the defense agreed from the very beginning of the trial that appellant's co-defendant Anthony Howard -- who plead guilty to first-degree murder in exchange for a life sentence -- fired first, then fired more shots, shot both clerks, and killed Khair-Bek. The State and the defense also agreed that Memwaldy Curtis, 17 at the time, was in the store with Howard but did not fire the shot that killed Khair-Bek. T445, 454-55, 459-60, 984, 1001-06, 1037-39, 1053. The State's theory was felony murder, and the defense's theory was that Curtis was under duress. By the time the case went to the jury, the issue boiled down to conflicting evidence about whether, and to what extent, Curtis voluntarily participated, and what punishment, if any, is warranted.

The trial took place after the judge denied defense counsel's motion for a continuance because the defendant personally did not want it even though the judge found "well taken" counsel's

uncontroverted averment that he was not prepared for trial. See Issue I, infra. Also, the judge forced Curtis to be judged by a juror whom Curtis had peremptorily challenged. See Issue II, infra.

According to the State's evidence, Taaziah and Khair-Bek were kneeling behind a 3-3½-foot-tall counter pricing wine when Taaziah heard the door open and two black males enter, one behind the other. Taaziah and Khair-Bek stood and raised their hands. The first male wore a green jacket and had metal on his teeth. He walked toward and faced Taaziah holding a handgun pointed toward the middle of Taaziah's body. The second, shorter male, walked toward the cash register. The first male (later shown to be Howard) had both hands on a silver handgun. Taaziah did not get a good look at the second male (later shown to be Curtis), who was obscured from view by a Marlboro display, and he did not see him carrying a gun. Taaziah said the first male took the lead, demanded money, and Khair-Bek walked to the register. Taaziah said he heard the second male demand money. Khair-Bek pulled money out of the register and handed it over. Taaziah heard the second male demand more money, so Khair-Bek pulled out food stamps and handed them over. Taaziah said the first male shot Taaziah in the stomach. Taaziah fell to the floor behind the counter from which vantage point he could not see anything else that happened. But he did hear two more shots that sounded alike, and saw that Khair-Bek had been struck. He did not see who fired those two shots. Khair-Bek spoke briefly and then immediately lapsed into unconsciousness. When the two males fled,

Taaziah pushed a silent alarm button, walked outside, and called the police. T483-506; 509, 511-12; 515-17; 521-23. Taaziah said it was clear that the first male was giving the orders and shot him in the stomach. T518. The bullet is still in his body. T506. Taaziah was never able to identify the robbers, T507, 774, 811, yet he said they were regular customers. T816.

The State theorized that Curtis got up on the counter and fired a shot at Khair-Bek, but Taaziah gave conflicting testimony about whether the second male had gotten up onto the counter by the register. He said the second robber "put all of hisself [sic] on the counter," T531, yet he also said if someone had jumped up or kneeled on the counter, he would not have been able to see it, T528. No prints lifted from the store established that either defendant had gotten on the countertop. Neither fingerprints nor footprints were lifted from the cash register drawers and the Formica counter top even though it is possible to recover prints from that Formica. Numerous other forensic scientific means could have been used to find prints on the Formica counter, but investigators did not even try to use them. No identifiable prints found in the store matched Curtis or Howard. No fingerprints were recovered from the shell casings, either. T550-55, 572-76, 592-95, 597-600, 773, 805-09. A casting of a shoe print was made, but no match was ever found. T578, 584.

Medical examiner Peter Lipkovic found evidence that two gunshots had penetrated Khair-Bek. The first (in the record as

wound number one) was to the left chest, penetrating the heart and liver on a slightly downward course toward the back of the body, where a .32-caliber full metal jacket projectile was recovered. T606-08, 612. This was the fatal shot. T620, 635-36. The shot had been fired from more than two feet away. T616-17. Unconsciousness would have occurred within ten to thirty seconds. T640, 646.

The second penetrating gunshot (in the record as wound number three) struck the instep of Khair-Bek's left foot. It too was not a close-range wound, the shot fired from more than two feet away. The projectile caused entrance and exit wounds to the foot, passing all the way through. It was not a fatal wound. The projectile could have slowed after passing through the foot. T628-30, 645.

A non-penetrating wound (in the record as wound number two) was discovered on the exterior surface of Khair-Bek's chest. It "merely caused the contusion or a bruise on the outside of the skin. It never penetrated," Lipkovich said. Most probably, it was the kind of wound that would have scabbed over and healed even if left untreated. It could have resulted from a dud or from a shot that hit an intermediate target like a not very solid window, a window screen, or a door screen. The projectile that caused the superficial wound was a .32-caliber full metal jacket bullet, which was found between layers of clothing and did not penetrate the inner lining of his warmup suit. Lipkovic did not know what kind of weapon had fired it. T621-22, 636, 637-39.

Asked if the shooter of the fatal shot would have been taller

than the victim, Lipkovic said not necessarily because there are many possible explanations. For example, if the shooter and victim were the same height and the weapon was held at eye level shooting toward the chest, the trajectory would have been downward. If the victim had been leaning forward, the trajectory would be different regardless of the position of the shooter's arm. A slight downward trajectory also could have been caused if the shooter was significantly taller and firing from hip or shoulder level, or if the same height firing from eye level. T612, 616, 642-44. Khair-Bek was 5'9" tall. T643. Curtis is 5'4", and Howard is closer to 6'. T872, 812.

Over objection, Lipkovic was asked to give his opinion about the order in which the shots were fired assuming that the victim had been standing when shot, and that the person or persons who shot him were standing at essentially the same level. He said the Khair-Bek was first struck by the fatal shot to the left chest. After falling to the ground, his left foot or both feet, would have come up in the air. Then the second shot would have struck him in the foot, losing momentum as it passed through. He could not estimate the time between shots, but said because the victim would have been unconscious in seconds, he would have been unable to keep his feet up for long, so the second shot to the foot could not have come long after he went down. The third wound to the chest could have been inflicted after he was down and unconscious and after the bullet had struck an intermediate target. T630-35, 641-42, 648.

Taaziah said the gun Howard shot him with resembled a semi-automatic pistol with a clip, not a revolver with a cylinder. T491. No bullet holes were found in the store. T569, 829. An evidence technician found two shell casings the night of the shooting, one by the front door of the store and one behind the counter. T555. A few weeks later, the proprietor of the store found a third shell casing. T557-58. Firearms examiner Thomas Pulley said all three casings came from the same .32-caliber weapon. T562, 655-57, 672. The casings had some of the firing characteristics of a Davis P.32 semi-automatic pistol, and although he could not be sure of the particular weapon, the casings most likely had been ejected from a .32-caliber semi-automatic pistol. T657-58. Pully compared the projectile recovered from the fatal wound and the one found in the victim's clothing. He said the two had not come from the same weapon. T661. The projectile recovered from the fatal wound had been fired by the .32-caliber semi-automatic pistol, possibly a Davis or a Colt, which normally holds six rounds at a time. T662-64, 669. The one that caused the superficial chest wound had been fired from a .32-caliber revolver, possibly a Smith & Wesson, Iver Johnson, or Herrington & Richardson, which do not eject casings when fired. T664-65, 669, 675. Pulley could not tell if both weapons had been fired by a single individual. T670.

Albert Fountain testified that he talked to Curtis and Howard after the shooting. Fountain is a six-time convicted felon who did not tell the police anything until he was arrested on December 7,

1993, and he testified only after getting police to promise to go easy on him on an unrelated unarmed robbery charge in exchange for information about the Safeco robbery. He pleaded guilty to unarmed robbery on a promise of a 15-year cap and no habitual offender classification before testifying against Curtis. T698-705, 722-26, 731, 742-43. Fountain characterized the relationship between Curtis and Howard as real tight friends. T684-85, 857.

On December 17, 1992, Curtis and Howard had been living in separate apartments at the Kinard Apartments complex, close to the Safeco. Two or three days before Christmas 1992, on the same night as the robbery, Fountain said he had a conversation with Curtis and Howard at about 2 a.m. outside the apartment complex. Fountain said he went there after babysitting to buy crack cocaine from Curtis, and that he had been using drugs throughout the period of December 1992-December 1993, yet he claimed he had not consumed drugs that day and was not under the influence of drugs at the time. He also said crack cocaine is merely "just a speed, just makes you do things faster than you would normally do," without affecting memory or other senses. T687-89, 706, 720-21, 729-30, 733, 738.

Fountain said Curtis talked about the Safeco and wanted him to explain some things based on Fountain's "street experience":

> A He told me that he had bust one of them, somebody. And "Bust one" means when you shoot somebody, you shot somebody. He told me he shot somebody during the armed robbery at Safeco station, and that B-Love that was with him -- which is Anthony Howard -- said that he shot somebody in there also.

> And he says that B-Love shot the guy that was over by the potato chip rack further down what you call the counter, and he shot the guy that was by the cash register.

T689-90, 730. Fountain said Curtis said he and Howard robbed the store "[b]ecause they owed somebody. They owed somebody else for drug monies on the drugs that they had messed up on, they owed somebody else, so they had to go and get the money." The "somebody" was an unidentified supplier. T691. Fountain said Curtis told him the robbery was Curtis's idea. T690. Howard went into the store first, finding two clerks present. "He said that Anthony Howard went to the rear of the counter, and he stood to the front of the counter by where the cash register drawer was and where the door was at." The shorter of the two clerks was over by the potato chip rack and "flinch[ed]", which "means like buck, like he was going against something." Howard felt the clerk may have been attacking him, so Howard shot him. T691-93, 711. Without a doubt, Curtis told him that Howard shot the first clerk, then Howard shot the clerk behind the register. T711-12.

> He said at that time that he demanded the money from the guy that was in front of the cash register.
>
> The guy took the money out of the cash register, placed it on the counter, and he attempted to go and get it, but he said he backed up and he told Anthony Howard to go and get it because the man had pushed the money onto the floor.
>
> And when Anthony Howard went over there to pick up the money, the man looked like he was going to flinch at Anthony Howard, like try to grab the gun or grab him, so he shot him.
>
> Q The defendant told you that he had shot the clerk by the register?
>
> A Yes, sir.

Q Did the defendant tell you where he thought that the clerk by the register had been shot, what part of his body?

A He just said the upper part of his body, the upper part of the body means from the hip on up.

T692-93. After the shooting, Fountain said Curtis and Howard had run from the store to the apartment complex. They got about $50. T696-97. Curtis asked Fountain to take him to Orange Park so he could hide out, and to tell him how to get rid of the gun. T698.

Howard did not disagree with any of Curtis's statements, Fountain said. Howard described the incident, saying "It was fucked up," T697, and "I thought you said it would be more money than that." T719-20, 735-36.

Fountain said Howard had a gun with him that night, a silver .32-caliber semi-automatic pistol. Fountain said the semi-automatic had belonged to Curtis but Curtis had given it to Howard. T695-96, 716. Howard always keeps that semi-automatic on him and had it in his possession a lot prior to that night. T716. Curtis never said that he had given Howard the semi-automatic on the grounds of the school near the store, at the store, or anything like that. T716. Howard later admitted to having shot both clerks with a semi-automatic handgun, saying he shot Taaziah in the chest, shot at but missed Khair-Bek, and fired a third time, hitting Khair-Bek in the chest. T777-780.

Fountain said Curtis also had a gun that night, a .32-caliber revolver. He had seen Curtis with the gun before. T693-94. Fountain smelled the revolver and noticed that it had been fired

within a couple of hours, and it had two empty casings. T695-96, 736-37. Curtis later testified he had fired a single shot in the store, T790-91, but it was not a revolver -- it was a semi-automatic Howard gave to him and told him was empty, T870-71, 879, 885.

Over objection, detective Robinson testified about what Fountain told him immediately after officers arrested Fountain for unarmed robbery. See Issue IV, infra. He said Fountain told him he had talked to the two guys who committed the Safeco crime, and he identified them as Anthony Howard and Memwaldy Curtis. Robinson arrested Howard on December 14, 1993. Howard had two silver caps on the front of his teeth. T781. Robinson then arrested Curtis, who did not attempt to run. T758-62.

Howard made numerous statements introduced through investigators without Howard testifying. At first he said he had participated in the crime but only had a blank gun; that Curtis "was there with him"; and that he was afraid of Curtis. T763-64, 767, 769, 776. Later Howard admitted he shot both clerks in the chest with a semi-automatic handgun. He said:

> "A couple of days before Christmas in 1992, Wally and I, Anthony Howard, were at my house. Wally had came over and asked me to go for a walk. While Wally and I, Anthony Howard, were walking, I, Anthony Howard, saw that Wally had had two guns. Wally gave me a chrome semi-auto .32 caliber handgun, and he kept a black .32 caliber handgun."
>
> "Wally wanted to jack the store at Bunker Hill and Edgewood. Wally asked me, Anthony Howard, to be the lookout. I, Anthony Howard, went into the store first and stood by the chips. Wally came in behind me and pulled his gun and went to the counter."
>
> "Wally told both store clerks to give it up.

I, Anthony Howard, stood back with my gun drawn out being the lookout. One of the clerks standing by the cash drawer was giving Wally the money when some of it fell on the floor."

"I, Anthony Howard, saw one of the clerks move, so I, Anthony Howard, shot, hitting him in the chest and stomach area and fell. I then saw the other clerk move, so I shot at him but missed, hitting the wall."

"I, Anthony Howard, was starting toward the door as Wally was starting to rise back up from picking the money off of the floor. Wally began to shoot, and I shot once more at the clerk by the cash register, hitting him in the chest."

"I, Anthony Howard, heard Wally shooting some more as I, Anthony Howard, ran down the school -- down to the school yard where we split the cash."

"I, Anthony Howard, got $25 in cash and $7 in food stamps. Wally took both guns, and I, Anthony Howard, went to a friends house."

T779-80, 827-28. Howard never said anything about owing Curtis drug money. T830-31.

Curtis also made a statement. After advising Curtis of his rights, Hinson informed him that Howard had implicated him in the Safeco robbery. Hinson brought over Howard, and Howard said to Curtis, "I've told him, man, now you tell him." T781-89. Curtis never denied his involvement. T843. Hinson said:

A He informed me that they were going out and they were going up to rob the store, and that Mr. Howard had given him the gun and that he had a darkish-colored revolver and that Mr. Howard had a silver or a shiny chrome semi-automatic handgun.

He said they went in the store and that Mr. Howard had fired the gun immediately upon entering the store and then had taken a position away from the door and across from the clerk that was furthest from the door behind the counter.

He stated that he had gone up to the front of the cash register where we knew Mr. Khair-Bek later to have been standing. He said at that point in time he was getting the money when he saw Mr. Howard

shoot the first victim, which we later found out to be Mr. Taaziah.

At that point in time, some of the money fell on the floor and Mr. Howard stated that he was picking up the money, he saw or heard Mr. Howard shoot at the second --

Q Can I interrupt you for one moment?

A Correction, sorry.

Q Which one said that they saw the money fall to the ground?

A Mr. Curtis was by the register and was picking the money up.

Q Okay. Then what happened, what did he say after that?

A He stated that as he was picking the money up, he heard the shot and pulled up and shot, himself, from his handgun because his partner had shot and then he ran out the door.

Q Now, what kind of a gun did the defendant say he had?

A A darkish, grayish-colored revolver.

Q And what kind of a gun did the defendant say that Anthony Howard had?

A A shiny or chrome semi-automatic.

Q Did the defendant say where they went after they committed -- he and Anthony Howard committed this robbery and the shooting at the Safeco Store?

A They ran through the school yard down to where Mr. Howard's address or where they were staying at on Kinard Street which was a short distance away.

Q Did the defendant ever tell you how much money they got during the course of this robbery?

A During the oral confession, yes.

Q What did he say?

A $25 in cash and $7 in food stamps.

T790-92. Curtis put the statement in writing as well:

"I, Memwaldy Curtis, having been advised of my rights do give this written statement of my own free will. I, Memwaldy Curtis, have asked Det Robert Hinson to write my statement out for me. A couple of days before Christmas in 1992 'Love' and I, Memwaldy Curtis, were up by the Safeco at Bunker Hill and Edgewood Avenue. 'Love' wanted to rob the store and he and I, Memwaldy Curtis, both had handguns on us at the time. 'Love' went in first

> and he shot at the clerks right off. I, Memwaldy Curtis, came in and saw him shoot the clerk standing away from the register in the chest/side area. I, Memwaldy Curtis, saw that clerk fall and the other clerk (standing by the cash register) started giving us the money. As the money was being passed to us some fell off the counter and I, Memwaldy Curtis, began to pick it up. I, Memwaldy Curtis, heard and saw 'Love' shoot the other clerk in the chest area. 'Love' told me, Memwaldy Curtis, he shot him for dropping the money. 'Love' and I, Memwaldy Curtis, were going out the door and my gun went off. I, Memwaldy Curtis, do not know nor was I trying to hit anyone. I, Memwaldy Curtis, had a greyish/dark colored handgun. I, Memwaldy Curtis, got my gun from Love earlier that night. We went back to his house and split the money up.

R712-13; T799-801. Hinson said Curtis did not indicate that he just went up to the store with Howard without knowing what was going to happen, and he did not indicate that he did not participate in the robbery. T801. Curtis did not say anything at the time about going to the store for potato chips and not to do a robbery. T844. Hinson also said he could not exclude the possibility that one shooter used two guns and fired all the shots, although he did not believe that happened. T817. Curtis admitted his gun went off, but he did not say that he fired a shot at Taaziah, and he did not say that he went to the store to kill anybody. T844, 837, 846-47.

Based on the evidence, Hinson concluded that Howard entered the store first and shot Taaziah in the chest right off, causing him to fall to the ground. Khair-Bek began emptying the register and as money was being passed, some fell on the floor. While Curtis was picking up the money, Howard killed Khair-Bek because Khair-Bek had dropped the money. T830-36.

At the close of the State's case, the judge denied Curtis's motion for judgment of acquittal. T848-49. Curtis then testified. He has an eleventh grade education and comes from a family with five sisters and two brothers. In December 1992, he was living with his mother in an apartment on Kinard Street. Howard lived in a different apartment in the same complex. While Curtis was watching television, Howard came to the apartment and asked Curtis to go with him to get Pringles potato chips. They walked together to the Safeco. Curtis had no guns and did not see any on Howard. They entered and walked to the potato chip aisle. Khair-Bek told Howard that they did not have Pringles, so the two left. Curtis went straight home. T856-63, 911.

Later that night, Howard came to his apartment again and asked Curtis to go back to the store to pick up the chips they had in stock. Before they got to the Safeco, they went into a filling station across the street looking for Pringles, which were not in stock. As they left heading to the Safeco, Howard said "'I ain't coming here to get no chips, I came here to rob the store because my momma needed some money,' and he needed some money." That surprised Curtis, and he said nothing. "I just kept walking because at that time he had one gun, right here, in his hand pointed down and the other one pointed at me, walking facing me, and I was walking facing him kind of slanted." T863-67. Until that point he had not seen a gun. T894. When they were by the phone booth outside, Howard handed him a dark grayish gun and kept a silver one for himself. He

identified the gun Howard gave him from the State's diagram as a semi-automatic. "[H]e threatened me," Curtis said. "He told me if I didn't help him rob the store, he would kill me. And after he finished robbing the store, if I told anybody, he would kill me." Curtis did not turn and run because "I was scared." T867-71. He had done nothing to provoke Howard. T895.

Howard told Curtis "'Go in the store, go up to the front cash register and get the money,' that was it." He led Curtis to believe the gun Howard gave him was empty:

> He say because when he was telling me he would kill me, I told him I could not do that to nobody and he told me, 'You don't have to worry about that because your gun's blanked up, it is empty.'
>
> Q He told you the gun is what?
>
> A Blanked up, it's empty.
>
> Q What did that lead you to believe it meant?
>
> A It is empty.

T870. At Howard's demand, Curtis followed Howard into the store. "And as I was going in the store, he went in the store first and shot right off at the living victim, but the shot missed. So when it missed he shot off again and hit the victim," Taaziah, in the chest. T872-73. "Then after he shot him, he fall. And at that time I am at the cash register and the man is giving me the money." Howard got behind Curtis. T873. "Then I am getting the money out of the counter, then some of it falls on the floor. So when I finish getting the money off the counter, I go down on the floor and that is when I hear two shots," Curtis said. Curtis did not run because he was afraid of getting shot by Howard who was standing

right behind him where Curtis could not see him. T874, 898-99. While he was bending down to get the money, he heard two shots. As he came up, he saw Khair-Bek laying back, holding his chest behind the cash register. T874.

> Q What did you do?
> A After he shot him I came up and saw that, as we was running out of the store, my gun went off. You know, I had the gun in my hand and, you know, as you running, you ball up your hand and it went off. (Defendant indicating.)
> Q Okay. Were you aiming the gun at anybody?
> A No, sir.
> Q You had your back towards Mr. Khair-Bek where he was last seen and your were running out the store?
> A Yes, sir.
> Q And the gun went off?
> A Yes, sir.
> Q Did you hit anything?
> A I don't know.
> Q Okay. Did you ever shoot at Mr. Taaziah, the fellow by the lotto machine or by the chips?
> A No, sir.
> Q Did you ever shoot at Mr. Khair-Bek?
> A No, sir.
> Q How many times did Anthony Howard shoot that semi-automatic weapon that he had that night in the store?
> A Well, I really couldn't say that, because once he got behind me, I don't know what type of gun he may have had behind me.
> Q All right. You ran out of the store --
> A Yes, sir.
> Q -- and what happens then?
> A We run out of the store and we go right. And then as we get to the end of the section where the store is at, we make another right, and that is when we jumped the fence.
>
> And I'm in front of him and I try to pull away without him noticing me where he wouldn't shoot me, that is when he told me to, "Hold up."
>
> So once we run through the school yard, we go through the baseball diamond, then we get back on Kinard Street and we make a left at the apartments called Lake Forest Apartments.

Q Did you ever stop and split up the money in the school grounds?

A No, sir.

Q Did you need money?

A No, sir.

Q All right. So what happens when you get to the -- where did you stop, did you say?

A I stopped where I say we cut through the baseball diamond, then we go through the dugout. And as we come out of the dugout, we are on Kinard Street, we go left as the street breaks off to the left where Lake Forest Apartments are at.

That is where I tried to take my own route, again to get away from him, but he told me to, "Hold up," and go to his house.

So I go to get to his house, and I cut through the back of Lake Forest Apartments and we go to his house.

Q Okay. What happened, was it your idea to go to his house or how did it happen?

A He demanded me to go to his house.

Q Why was that?

A That is his demand.

Q Okay. Did you believe that unless you followed his demands that he will shoot you?

A Yes, sir, after I seen how he did both of the clerks.

Q Sir, are you upset about what happened at the Safeco?

A Yes, sir.

Q When you got to Mr. Howard's house or apartment, what happened?

A I gave him back the gun, then we went in and went in his room. He locked the door. I was sitting on one bed, he was sitting on the other one, and that is where I noticed three guns.

Q What kind of guns did you notice; I mean, were they revolvers, were they semi-automatics, what did you notice? We know that he used the silver semi-automatic; is that correct?

A Yes, sir.

Q And you had a darkish semi-automatic?

A Yes, sir.

Q And did you see a black revolver at that time?

A On the bed.

Q Okay. And what happened when you saw that?

A Again, I say I fixing to go home, and he

say, "No, you can go home in the morning." That is when -- after that when he said that, he had done divided the money up, he said, "Here, take it."

Q Okay. Did you want the money?

A No, sir.

Q What did you tell him about the money?

A I ain't tell him nothing.

Q Were you able when you were in the store and you were running out and your gun went off, was that an accident?

A Yes, sir.

Q Were you able to determine what happened with the gun in terms of if you had a semi-automatic?

A Yes, sir.

Q Do you know whether or not the shell casing ejected?

A Well, no, sir, because when I got to the house, I noticed that it was stuck back and you could see one shell trying to come out and one in the barrel, so it was jammed.

Q Okay. So it did not eject the shell?

A No, sir.

Q Did you spend the night at Anthony Howard's?

A Yes, sir.

Q That was against your will?

A Yes, sir.

Q You left the next morning?

A Yes, sir.

Q Did you ever meet up, sir, with Albert Fountain at 2:00 o'clock in the morning outside Kinard Street?

A No, sir.

T875-79, 908. Curtis took part of the money at Howard's demand, but he did not keep it; he threw it away. T909-10.

Curtis voluntarily turned himself in when he learned a detectives were looking for him. He said he hadn't turned himself in sooner because Anthony Howard had threatened him. T880-81. He said he gave a statement to detective Hinson only after Hinson told him, "'If I ever wanted to see my little girls again, I better

cooperate.'" T882, 905-06. Curtis never told detectives that he used a revolver that night. T885.

> Q Mr. Curtis, you never shot anybody inside the Safeco Food Store on December 21st, 1992?
> A No, sir.
> Q And there was no way that you could have gotten out or anything?
> A No, sir.
> Q Did you intend to go there to rob anybody?
> A No, sir.
> Q Did you ever make any statements to Mr. Khair-Bek or Mr. Taaziah, "We need money, give me the food stamps," or anything of that nature demanding the money?
> A No, sir.
> Q Who did that?
> A Anthony Howard.

T886. Curtis had no bad blood with Fountain, who is Howard's brother (having the same mother). T888-89.

Curtis was the only defense witness in the guilt phase. After he testified, the judge denied Curtis's renewed motion for a judgment of acquittal. T915. The jury deliberated the next day, June 9, and found Curtis guilty as charged. T1144; R321.

The penalty phase took place on June 24 with four defense witnesses presenting mitigating evidence. Andrea Jones, 17, is Curtis's fiancée and the mother of their two children, Memwanisha Curtis, 2, born March 29, 1992, and Brittany Curtis, 1, born January 15, 1993. Andrea and Curtis plan to be married. They've known each other for six years and lived together from June 1993 until his arrest. During that period of time, he never displayed any kind of violent temper toward her or anyone else in her presence. She also had never known him to possess any guns. T1194-97, 1209.

Curtis is a good father. "[H]e expresses his feelings a lot," she said. "He is a good father. He takes the children to play or he takes them with him everywhere," such as the park. "He treat[s] me with respect and with love." He spends time with the children, they enjoy their time with him, and she wants the children to know their father. T1194-98. Jones is a team manager with AT&T at $6.85 an hour working on computers, telemarketing, and answering questions. She would be able to provide for their children even without him around. T1198-99.

Jones had seen Curtis six times since his arrest. He seemed to be adapting well, showed no anger toward anybody, and "settled to it." Curtis's mother, Debra Baker, also visits with the children. During that time, Curtis expressed remorse about this case. Since moving in with him in June 1993, she noticed that he had sleeping problems, waking up crying and experience nightmares about every two nights. T1199, 1204-05. "He is a good person," she said. "[H]e has two children. He has me. He has his family and also, he has hisself. And if he had to spent that time in prison, that is better than death, and I would ask that y'all recommend life instead of death." T1206. After the judge ruled that defense counsel had opened the door, the State was permitted to attempt to impeach Jones by telling the jury that Curtis had been arrested for an unrelated March 1993 armed robbery of a Krystal's restaurant. T1207-08. See Issue X, infra.

Marvin Curtis, Curtis's father, a welder, said Curtis was born

when he was 22 and Curtis's mother was 20. Curtis was born out of wedlock on March 12, 1975. Curtis's parents were poor and lived together for most his first five years. They lived in a rooming house, and there were no other children during that time. His mother was the disciplinarian. After Curtis turned five, his father left home for as much as eight months at a time, going around the country from job to job. Before that time, they were "pretty much like a family," but when he left, "things got slack around here." They tried to resume a normal family life around 1984-86, but things were "heated" in the house, and normal family life failed. Marvin left for good in 1975 when Curtis was 11, and Curtis took it "pretty bad." He wanted to stay with his father, but he stayed with his mother instead. Marvin was "in and out" of Curtis's life thereafter. Marvin said he tried to teach Curtis and his older brother "the things they needed out of life, being in life, being black and having the odds stacked against you, and the things that you could do with the odds stacked against you, to that effect, no matter what, and have a way to make it, you know, just don't resort to the wrong things." T1210-18.

Curtis was shaken up when his mother moved away in 1989 when Curtis was about 14. He moved in with his father. Marvin worked and tried to keep things "pretty stable," but they lived in an environment filled with drugs and other such things. T1219-20. Nonetheless, Marvin's situation was "unstable," so in 1991, when Curtis's mother returned, Curtis, then about 16, went back to live

with her on Kinard Street. Marvin spent little time with Curtis thereafter. "But from what I seen and I know of him, that I do know he have remorse, you know. I didn't see it during the period in between that, not knowing what had happened, but looking back in between that, I can see it, you know, as far as where he tried to commit suicide and different things," Marvin said. "After finding out what had happened here at the convenience store, I could look back and see a lot of problems he had in between that time, and I know and feel in my heart that he really is remorseful and he -- I feel like didn't intend for -- to be there or for things that happened the way they did, for them to be that way." T1221-23. Though Curtis did not specifically tell his father he was remorseful, his father could see it in him, reflecting back to the period before Curtis was arrested. "I reflected back after that point to a lot of his actions and the things he was doing, like I say, like the suicide, which was an attempt which was in April, and other things, I started putting it all together, that I considered that being what his problem was, being remorseful and having a lot of problems inside of his own self about what happened." T1227.

Marvin described some of Curtis's good qualities, saying, "he worked. I know he would take a job. His manner, as far as I ever seen, he was respectful of people that was his elders, you know, or above him and all, you know. He would answer them properly and different things, never been a total disrespectful individual." T1221-27. He thought Curtis may have shown some defiance toward his

mother due to "the problems they had about me being out of the home," T1226, but Curtis's mother disagrees, T1258. Marvin continued, saying "I know that he love his two kids and do everything he could for them, provide. I know the times when they had been sick and everything, and I know he really want to be with them, but this situation that took him away from it. And I know in his heart, he is going to be striving with the last breath in him to get back to them." T1225. Marvin said he would visit Curtis in prison. T1222.

Curtis's mother, Debra Baker, is a hospital housekeeper and has never been married. She said Curtis has two brothers, Marvin Curtis, Jr., and Keenan Curtis, and five sisters, Consuela Wright, Mara Baker, Naomi Baker, Napora Curtis, and Nandi Curtis, who range from 21 years of age to 11 months. T1236-37.

Debra testified that Curtis and his father were "great together" during his first five years, his father teaching him good morals and how to become a responsible adult, and they experienced no major disciplinary problems. They attended the First Baptist Church, and Curtis went to pre-school. When Curtis got to the public school system, he tried to stay to himself, but he was "a little square kid" and got picked on if he didn't do what other kids wanted him to do. "[H]e is not a leader, because he just basically stayed to hisself all of the time. So he was never out there trying to lead anything." T1237-40.

Debra and Marvin had a "normal relationship" and he was a

"great father." T1241. Although Curtis was allowed to advance from kindergarten to first grade, and from first to second grade, he "always had problems in school" and was forced to repeat a couple of grades. "Well, the problem was not basically as far as learning, though, it was just that the interference with the children harassing him all of the time from time to time would interfere with him learning as well as he would have." T1241-42.

His parents' breakup "took a very tremendous hold on Memwaldy's character. He withdrew within himself. It caused him to come to a point where he would just basically stay in his room all of the time with his windows closed, his room closed. He didn't want to have a whole lot to do with anyone at the time because me and his father was not together." At one point he stopped going to school, and his problems with school continued during his teens. He dropped out in the tenth grade, but his parents enrolled him in a skills center to finish his education and receive a certificate of completion of a trade, something in electronics. T1243-44. He did not graduate high school but planned on going for more schooling. T1246, 1248.

He once came to the aid of a fellow student on crutches who had been jumped and was being beaten by two or three other guys. T1245. "Memwaldy is always trying to help someone," Debra said. "There has also been an occasion where he was driving my car, and he offered a ride to some associate of his. And at that point, apparently, they wanted to get involved into something; Memwaldy rejected, and they took my car from him at gun point." T1245-46.

After she moved back from Miami Beach, Curtis helped her move in. "He is a very supportive kid," she said. If there was anything that he could do to help his brothers and sisters, he would offer to do so. "He is just moral. He carries out moral behaviors to the extreme, if life will let him, I will say it that much. He always tries to direct someone else to go the right way instead of doing something wrong, and that has just always been his character. Even with his sisters and brothers, he would get on them about little things, also." T1246-48.

Debra said Anthony Howard lived next door to them and he frequently came to their house. She would not allow drugs or guns in her home. She also visits quite often with Curtis' fiancée, Andrea Jones. Debra characterized Curtis as a "very good" father. "He has been very supportive of the children. There have been occasions where Andrea has been in the hospital or seeing a doctor. He would take it upon himself to take the children to the pediatrician. He would babysit for her. Whatever it is that he could do, he would." T1248-50.

Around September 1992, before the Safeco robbery, Curtis had been working at a Krystals restaurant doing various things. In the months immediately following the Safeco robbery, Debra "noticed during that time that Memwaldy had become somewhat withdrawn within himself, again. I could tell something was going on, but I could also tell that -- I would question him as to, say, 'You know, what is going on with you, Son; do you got a problem, you need to talk to

me?' And he would say, 'Well, Mom, not really, it is okay, you know, I will be all right,' in that state of mind." Curtis is not the kind to burden other people with his problems. T1250-51.

"[H]e is a kid that has very strong moral values," Debra said. "I taught him to come up right and be straightforward and honest and a good child. He has never been a burden child to me. He has been one of my joyous childs (sic.) in my life, as far as giving birth to him and continuing on in his lifetime. He has two small children that needs to get to know him. He has an 11-month-old sister who hasn't learned to love him just yet, and she needs to learn how, even if it is from behind bars, you know. I don't think his life should be taken, and take other things from others who have not yet been able to give him love yet." T1251-52.

She has visited him twice a week for six months and has never known him to have gotten in trouble while incarcerated. Even while in jail he had been helping people, assisting "some of the guys who wanted to call home to talk to a girlfriend or their mother and father, I would accept the calls through my line and do so for him," she said. T1252. "Memwaldy is not a threat to the public at all," she said. "He is my one and only son, please don't take him from me." T1252-53. Curtis was neither rebellious nor defiant. T1258. On cross-examination, she said she had not become aware that Howard has emotional problems and never noticed anything wrong with him.

Howard's plea agreement shows that he pleaded guilty to first-degree murder, attempted first-degree murder, and armed robbery with

a firearm, with the understanding that he would receive a life sentence without eligibility for parole for 25 years for the murder, but with no understanding as to the sentence on the other charges. R718-20; T1220. Curtis also introduced his own school records from Kindergarten through the sixth grade. R721-35; T1228.

The State presented one rebuttal witness, David Hall, who is Anthony Howard's probation officer. Over objection, he testified that he wrote in his report of Howard that he found from a Duval County school evaluation that Howard "is educably mentally handicapped," and has "some severe problems, emotional problems, and he has an I.Q. of 70 to 72, in that area." T1265. See Issue XI, infra.

The jury returned a recommendation of death by a 9-3 vote, R378; T1341, and the judge imposed the death sentence, R401; T1424. In his written order,[1] he merged two aggravating circumstances, i.e., committed while engaged in an armed robbery and committed for pecuniary gain; and found that Curtis had been convicted of another felony involving violence, specifically the attempted murder of Fouad Taaziah. R410-11; T1412-14.

As statutory mitigation he found that Curtis was 17 at the time of the offense, but gave it "very little weight" because he believed the crime had been committed in "a very mature and adult manner"; that Curtis "was more mature than his biological age at the time of

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[1] The sentencing order, R409-16, is attached as Appendix 1.

the offense"; and that because he had fathered one child and was expecting another when the offense occurred, he "chose to bring children into this world and become a father, and was in every way conducting himself as an adult." R411-12; T1415. The judge rejected as statutory and nonstatutory mitigating circumstances the following: Curtis was an accomplice in the offense for which he is to be sentenced, the offense was committed by another person and the defendant's participation was relatively minor; Curtis was under extreme duress or the substantial domination of another person; lack of significant history of prior criminal activity; the fact that co-defendant Anthony Howard pleaded guilty to this murder and received a life sentence; the fact that Curtis did not fire the fatal shot; Curtis's poor grades and test scores while in school; and that Curtis is a good father. The judge was ambiguous about whether he rejected or found but gave very little weight to the following: Curtis is remorseful; Curtis helped a schoolmate involved in a fight and helped another inmate make a telephone call; and Curtis has adjusted well while incarcerated. R411-16.

SUMMARY OF ARGUMENT

The judge erroneously denied defense counsel's motion for a reasonable continuance before trial even though the judge had found counsel's uncontroverted averments so well taken that he tried to convince counsel's client to go along. The court had no discretion to allow the client to overrule defense counsel's routine strategic and tactical decision to seek a continuance, and even if it did, the

court abused its discretion by disregarding the well taken motion.

The judge erroneously denied Curtis's presumptively non-discriminatory peremptory challenge of a juror who is white. The court first required Curtis to explain his challenge even though the State failed to establish any prima facie evidence of racial discrimination. The court then rejected Curtis's reason for the challenge even though the reason was race neutral. Elliott v. State.

The conviction for attempted first-degree felony murder must be vacated because it is not a crime in Florida. State v. Gray.

The State was permitted to improperly bolster the testimony of its key witness by presenting his prior, consistent out-of-court statement made after he had asked the State for a deal in exchange for inculpating Curtis. Jackson v. State.

The court erroneously prevented the defense from commenting in closing argument on the State's failure to present the testimony of Howard, who was not equally available to the defense because he was completely under the State's thumb. Jackson v. State.

The prosecutor's improper argument included pleas for victim sympathy; facts not in evidence; that jurors are the criminal justice system and must convict to protect society; comment on right to remain silent after arrest; comments impugning Curtis's character as a liar; and comments demeaning the reasonable doubt standard. Pacifico v. State.

The court erred by not issuing a judgment of acquittal on premeditated murder since there was no evidence of premeditation,

premeditation was not charged, and the State conceded that premeditation did not apply. Consequently the court erred again by instructing the jury on premeditation. Mungin v. State.

The court erroneously let the State introduce evidence to show that Curtis was a drug dealer when such character evidence was wholly irrelevant and unduly prejudicial, designed to cast him in a negative light. Craig v. State.

The judge should have conducted an in camera interview of a juror who had improperly discussed the case with a non-juror prior to the end of deliberations. Street v. State.

The court erroneously permitted the State to introduce nonstatutory aggravation in the form of impeachment evidence about a charged but unconvicted felony. Geralds v. State.

The court erroneously permitted the State to introduce unreliable, irrelevant, multiple hearsay about the co-defendant's pre-sentence investigation report after the State invited the error itself. Randolph v. State; Mendyk v. State.

The court erred by refusing to allow Curtis to present evidence of the conditions upon which co-defendant Howard pleaded for lesser treatment to the same charges. The evidence was relevant to establish the reason why Howard got lenient treatment, which goes to the heart of the mitigating circumstance of disparate treatment of co-defendants. Downs v. State.

The court erroneously found aggravation based on a nonexisting crime, State v. Gray; Johnson v. Mississippi, erroneously found

pecuniary gain as an aggravating circumstance, and erroneously failed to merge all the aggravating circumstances as one because all involved the same aspect of the crime. Provence v. State.

The court erroneously attributed very little weight to the fact that Curtis was a minor of 17 when the crime occurred. Eddings v. Oklahoma, Ellis v. State. The Court erroneously rejected mitigation for disparate treatment of an equally or more culpable co-defendant. Downs v. State. The judge should have found mitigation in remorse, Curtis's poor educational background, and the fact that he is a good father. Nibert v. State; Campbell v. State.

The death penalty is disproportional punishment where this 17-year-old did not kill, the actual killer was more culpable but got a lighter sentence, only one valid aggravating circumstance exists, and other mitigating evidence should have been found. Thompson v. State; Jackson v. State; Slater v. State.

ARGUMENT

ISSUE I: THE COURT ERRED BY FORCING DEFENSE COUNSEL TO GO TO TRIAL UNPREPARED SOLELY BECAUSE THE DEFENDANT DID NOT WANT A CONTINUANCE EVEN THOUGH THE COURT FOUND COUNSEL'S REQUEST FOR A CONTINUANCE TO BE SO WELL TAKEN THAT IT OPENLY TRIED TO PERSUADE CURTIS TO ACCEPT THE CONTINUANCE

On April 26, 1994, defense counsel advised the court that he would not be prepared for trial June 6, but when questioned by the judge, Curtis said wanted to go to trial on June 6 anyway. T46-48. At the pretrial conference June 3, counsel moved for the first and only continuance, stating numerous specific grounds in good faith

why a continuance until the next reasonable trial date was in Curtis's best interests and was needed to enable Curtis to receive a fair trial with adequate counsel. See infra at 41-42; T62-67.[2] The State opposed the motion primarily because Curtis himself did not want it. The judge then addressed Curtis personally, attempting to persuade Curtis to go along with the motion, but Curtis refused. The court then denied the continuance solely because Curtis did not want it. T69-73. Defense counsel reasserted his motion before jury selection, and the judge again denied the motion after Curtis again said he wanted to go to trial even though his lawyer was not ready. T168-69. When defense counsel raised the continuance issue again post-trial in his motion for a new trial, the judge revealed that he believed the motion for continuance had been so meritorious that the judge himself had tried to persuade Curtis into going along with counsel's wishes, stating "I tried to talk Mr. Curtis into going along with Mr. Eler's motion, personally, because I thought it was well taken."[3] T1353-54.

The judge erred in misapprehending the respective roles of counsel and the client. It was the province of counsel, not the

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[2] Appendix 2A-B, attached, contains the relevant continuance discussions found at T62-73 and T1352-54.

[3] A legal point "well taken" is one that has merit and prevails, while a point "not well taken" gets no relief. E.g., Engle v. Dugger, 576 So. 2d 696, 699 (Fla. 1991); State v. Simpson, 554 So. 2d 506, 512 n.3 (Fla. 1989); Grant v. State, 390 So. 2d 341, 344 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S. Ct. 1987, 68 L. Ed. 2d 303 (1981); State v. Harris, 356 So. 2d 315, 317 (Fla. 1978).

client, to decide when the defense was ready for this capital murder trial. By allowing Curtis to overrule his lawyer's decision, the trial court misapplied the law, depriving Curtis of due process and a fair trial with effective assistance of counsel. U.S. Const. amends. V, VI, XIV; art. I, §§ 9, 16, Fla. Const.

A. The decision to seek a continuance was a routine strategic or tactical decision solely within defense counsel's purview; this represented defendant had no authority to overrule counsel's decision, and the court erred as a matter of law because it had no discretion to disregard counsel's meritorious motion solely to acquiesce to Curtis's personal wishes

Tactical decisions and procedural determinations are solely the responsibility of defense counsel, and the client is bound by those decisions. Faretta v. California, 422 U.S. 806, 820-21, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (client with appointed counsel delegates to counsel management decisions including authority to make binding strategy decisions in many areas); Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (appointed appellate counsel has sole discretion to raise issues and is not required to raise all colorable claims urged by client); Wainwright v. Sykes, 433 U.S. 72, 91, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring) (contrasting the few decisions that must be made personally by defendant from lawyer's responsibility to make decisions for client in all other matters). The American Bar Association, following precedent and public policy, recently reiterated that save a few specific decisions, all decisions in directing a case are left to counsel's discretion even when the

defendant expressly disagrees:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
>
> (i) what pleas to enter;
>
> (ii) whether to accept a plea agreement;
>
> (iii) whether to waive jury trial;
>
> (iv) whether to testify in his or her own behalf; and
>
> (v) whether to appeal.
>
> (b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.
>
> (c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

ABA Standard for Criminal Justice 4-5.2 (3d Ed. 1993); see also John Wesley Hall, Jr., Professional Responsibility of the Criminal Lawyer §§ 3.7, 3.8, 5.18 (Lawyer's Ed. 1987 & Supp. 1994) (counsel makes all decisions other than the few reserved to client). Experts with the American Law Institute also says certain decisions are left exclusively to counsel and "may not be overridden by an agreement or an instruction from the client":

> § 34. Authority Reserved to Lawyer
>
> As between client and lawyer, a lawyer retains the authority, which may not be overridden by an agreement or an instruction from the client:
>
> (1) To refuse to perform, counsel or assist future or ongoing acts that the lawyer reasonably believes to be unlawful;

(2) To make decisions that law or an order of a tribunal requires the lawyer to make; and

(3) To decide what should be done on behalf of the client when law or an order of a tribunal requires an immediate decision without time to consult the client.

Restatement of Law Governing Lawyers ch. 2, § 34 Tent. Draft No. 5 1992) (emphasis supplied); id. Comment (c) (subsection (1) "authorizes a lawyer to perform an act the lawyer reasonably believes to be legally required, despite a client's instructions not to do the act"). The decision to go to trial when the lawyer reasonably believes he is unprepared, will be ineffective, and will not get his client a fair trial, is left exclusively to the lawyer under subsections (1) and (2). The decision to file a routine strategic or tactical motion to seek a continuance to serve a client's best interest is left exclusively to counsel under subsections (2) and (3). See also id. § 33 (criminal client has authority as to pleading, jury trial, testifying, and appealing).

Florida adheres to these general rules. State ex rel. Gutierrez v. Baker, 276 So. 2d 470 (Fla. 1973) (client bound by public defender's decision to briefly waive speedy trial rule's 180-day period for murder trial even without consulting client about waiver because public defender believed in good faith the delay would benefit his client); Jones v. State, 484 So. 2d 577, 579 (Fla. 1986) (defense counsel's role involves making tactical decisions and procedural determinations affecting rights of client who is bound by counsel's decisions made within the scope of representation,

including waiver of necessarily included offense instructions to noncapital charges); Sanborn v. State, 474 So. 2d 309, 312 (Fla. 3d DCA 1985) ("power to decide questions of trial strategy and tactics ultimately rests with counsel," and counsel cannot be compelled by a client to make a particular tactical decision); R. Reg. Fla. Bar. 4-1.2(a) (counsel shall abide by client's decision after consultation as to plea, waiving jury trial, and client's testifying); id. comment ("a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer did so.... In questions of means, the lawyer should assume responsibility to technical and legal tactical issues..."). Only in rare instances when the very objective of representation is at issue does Florida law defer to the personal decision of a represented defendant. Farr v. State, 656 So. 2d 448, 449 (Fla. 1995) (client entitled to control "overall objectives of counsel's argument," specifically waiver of penalty phase mitigation); R. Reg. Fla. Bar 4-1.2(a) ("lawyer shall abide by the client's decisions concerning the objectives of representation" subject to limitations imposed by other rules); cf. Blanco v. State, 452 So. 2d 520, 524 (Fla. 1984) (defendant's choice to call witnesses even though lawyer disagrees), cert. denied, 419 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 953 (1985).

Thus, a judge has no discretion to defer to counsel when the defendant disagrees about a critical decision concerning the very objective of representation that is sure to have a direct and

immediate impact on the process and result. Likewise, a judge has no discretion to disregard counsel's meritorious, well-taken tactical and strategic decision to seek a continuance to protect his client's constitutional rights simply because the judge wishes to, or believes he is compelled to, defer to the client's personal wishes. For example, counsel makes decisions to waive speedy trial to protect a client's constitutional rights, State ex rel. Gutierrez v. Baker, 276 So. 2d at 470; to waive discovery in a capital case, Landry v. State, 20 Fla. L. Weekly S486, 488 & n.10 (Fla. Sept. 21, 1995); to waive jury instruction on necessarily lesser included crimes to noncapital charges, Jones v. State, 484 So. 2d at 577; to waive appeal of a potentially meritorious issues even though the client expressly disagrees, Jones v. Barnes, 463 U.S. at 745; Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990); to bypass the contemporaneous objection rule for strategic reasons, Henry v. Mississippi, 379 U.S. 443, 451, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965); and to argue the appeal of a capital sentence, Hill v. State, 656 So. 2d 1271 (Fla. 1995).

Legal, practical, and ethical considerations weigh heavily in favor of barring courts from second-guessing and disregarding counsel's routine strategic and tactical decision to seek a continuance. The complexities inherent in the criminal justice system are too great to weigh on the shoulders of lay defendants without the utmost certainty of protection. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Faretta. Trial

courts have a fundamental need to maintain order and avoid chaos in the conduct of criminal proceedings. Landry v. State, 20 Fla. L. Weekly at S487 ("[A]n accused cannot control the court's docket by filing spurious demands for a speedy trial for which the accused is not prepared."); Jones v. State, 449 So. 2d 253, 259 (Fla.) ("the right to appointed counsel, like the obverse right to self-representation, is not license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by willy-nilly back and forth between the choices"), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205 (1984). A judge's ability to control proceedings would be severely jeopardized when two conflicting voices speak for the same party. Who is the judge to listen to each and every time a defendant stands up to disagree with his lawyer's decision in the course of a trial, especially when routine strategic and tactical decisions are at issue? Must every defendant be advised of the right to expressly contest every one of counsel's decisions? Moreover, if trial judges have the discretion to choose between the word of defense counsel or defendant, the door will be opened to judicial micromanagement of the defense's case, thus putting judges, defendants, and defense counsel in untenable positions. As this Court just held, tactical decisions such as forgoing discovery in favor of speedy trial are subjective in nature and are left to the trial counsel after consulting the client, and a court is not allowed to "substitute[] it's judgment as to proper trial strategy for that of defense

counsel." Landry, 20 Fla. L. Weekly at 488. This rule applies with equal force to continuance motions. Otherwise, trials will be slowed down; decisions regarding procedural matters like setting the trial calendar will be subjected to the personal whims of defendants; litigation will proliferate; courts will be compelled to interfere with the attorney-client relationship and intrude upon privileged communications; defendants will be encouraged to fight with their lawyers and take charge of their cases contrary to the attorney's professional judgment and their own best interests; and attorneys' ethical responsibilities will be mired in ambiguity.

Curtis never asked to represent himself or share in representation. Moreover, a defendant's disagreement with counsel does not constitute grounds to replace counsel, so a client who disagrees with counsel is left with counsel and counsel's decisions as a matter of law. See, e.g., Smith v. State, 641 So. 2d 1319 (Fla. 1994), cert. denied, 115 S. Ct. 1129, 130 L. Ed. 2d 1091 (1995).

"When an accused is represented by counsel, affording him the privilege of addressing the court or the jury in person is a matter for the sound discretion of the court." State v. Tait, 387 So. 2d 338, 340 (Fla. 1980). But a trial judge cannot have the discretion on an issue-by-issue basis to choose who finally speaks for the defense when a defendant and his lawyer disagree on the routine strategic or tactical decision of seeking the first and only continuance of a capital trial, and the judge here had no discretion to disregard counsel's meritorious motion solely out of deference to

the client's wishes. This was an error as a matter of law. See Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992) (court's misapplication of law constitutes error as a matter of law and is not subject to abuse of discretion standard of review).

B. If abuse of discretion applies at all, the court abused its discretion by disregarding what it found to be a well-taken continuance motion even though a reasonable delay could have been provided to ensure due process and a fair trial with effective representation

Counsel's motion for continuance was directed to preserve Curtis's constitutional rights to a fair trial and to effective assistance of counsel, and counsel specifically stated the defense would be constitutionally deficient if forced to go to trial. Counsel stated numerous reasons demonstrating why he was unprepared for trial. The trial judge later admitted that after hearing those reasons, he became convinced the motion was "well taken" denying the motion solely out of deference to Curtis's personal wishes. This Court's continuance cases have applied the abuse of discretion standard to ascertain whether the trial court properly exercised its discretion finding defense counsel's reasons for seeking a continuance insufficient, and reversing when the reasons were sufficient. E.g. Valle v. State, 394 So. 2d 1004 (Fla. 1981). If the trial court had any discretion to exercise, it abused its discretion by disregarding what it found to be the well taken merits of counsel's motion.

Here the reasons to grant the motion were more than adequate; they were compelling and attributable in large part to the State's

actions: (1) counsel had not yet been able to depose two or three police officers who were potentially exculpatory witnesses because they did not show up for deposition, and counsel wanted to either re-subpoena them or have time to contact them to find out what exculpatory information they had; (2) counsel had not yet been able to locate at least three other potentially exculpatory witnesses, including Lamar Blount, Michael McKendrick, and a fellow named Boa or Boo, who had been suspects in the case but who had not yet been found with addresses provided by the State; (3) one of those witnesses apparently had moved to Georgia and counsel needed time to have his investigator track down that person;[4] (4) defense counsel had only just been advised by the State days before trial that he definitely would have to defend against the death penalty in the event of a conviction, thus causing defense counsel shortly before trial to substantially alter trial preparation strategy in a complex capital case involving twenty to thirty listed state witnesses and detailed ballistic evidence; (5) until shortly before trial defense counsel erroneously had been led by the State to believe that he would be preparing to defend a entirely different and unrelated armed robbery charge rather than the present murder case, thus diverting counsel's defense efforts and causing depositions and other preparation to begin too late to adequately prepare for trial;

[4] On June 6, when counsel renewed his motion to continue, he said he had just been advised that the State located a witness and potential suspect in Warner Robbins, Georgia, and defense counsel needed time to depose and/or speak with him. T168.

(6) counsel had been unable to investigate an alleged drug conspiracy cited by the State because of the vagueness of the Williams[5] rule notice the State filed just one week before trial, which without specificity said that Curtis and Howard had conspired to sell cocaine between January 1 and December 21, 1992; (7) defense counsel had not yet deposed co-defendant Howard, whose statements to officers were pivotal evidence against Curtis; and (8) counsel would need time to investigate the alleged drug conspiracy and any other leads flowing from Howard's deposition, which was to take place later that day. T62-67; R41. The State did not deny these averments, saying only that the death penalty motions were standard. Because the judge said the motion based on unrefuted averments was well taken, this Court should not question them now.

Furthermore, Curtis was not in jeopardy of losing any speedy trial right under Florida rules or the constitution. Curtis did not have any right to be tried by June 6; he did not suggest that he had any such right; neither the State nor the judge raised or discussed a speedy trial issue; no demand for speedy trial was filed; and it is possible that even with a continuance he could have been tried within the 175-day period set by the Florida speedy trial rule, which would not have expired until June 15, 1995.[6] Counsel merely

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

[6] Curtis was arrested on December 12, 1994, R1, triggering the speedy trial time period which was to run for 175 days, to June 15, 1995. See Fla. R. Crim. P. 3.191(a),(d).

asked for "reasonable" delay, and the judge said he could try the case "relatively quickly" without long delay. T67, 73. Even if his 175-day right had been at issue, the law allowed counsel to briefly waive speedy trial to ensure a fair trial and effective assistance of counsel. State ex rel. Gutierrez v. Baker, 276 So. 2d 470 (Fla. 1973). Moreover, that time frame is a substantive procedural right conferred by rule and does not rise to the level of a constitutional right. Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990).

Analogous precedents in Florida further support finding an abuse of discretion. In Sweet v. State, 624 So. 2d 1138 (Fla. 1993), cert. denied, 114 S. Ct. 1206, 127 L. Ed. 2d 553 (1994), the defendant in a capital murder case at a hearing 130 days after his arrest demanded to go to trial immediately over the objection of counsel who had moved for a continuance because he said he was not prepared. The trial judge granted counsel's continuance motion, ruling that he could not make counsel go to trial if he is not ready, and rejecting Sweet's plea for immediate trial with or without counsel. This Court affirmed that decision. In State ex rel. Gutierrez, this Court concluded that defense counsel properly waived his client's speedy trial right even without consulting the client when the lawyer made a motion for continuance in the good faith belief that it would benefit the client in preparing to defend against a murder charge where he was trying to negotiate a manslaughter plea instead of going to trial with a possible 20-year sentence. Similarly, in Taylor, the court affirmed a decision to

reject the defendant's personal choice to be tried immediately in favor of counsel's motion for a continuance filed five days before a first-degree murder trial. Counsel sought the continuance just before trial, representing that he needed time to investigate a crucial change in one of the State's key witnesses' testimony. The court granted the continuance over the defendant's personal objection, and Taylor was eventually convicted of murder. After reviewing the law in Florida and elsewhere, the district court affirmed, saying counsel's reason for seeking and obtaining the continuance was proper and provided a valid basis for extending the speedy trial period; the speedy trial right asserted by Taylor was merely a procedural right conferred by rule, not a constitutional right; and his constitutional speedy trial right was not violated because the extension was reasonable and necessary to protect the right to competent, adequately prepared counsel.

At bottom, the trial judge unfairly chose to defer to the emotional plea of an unsophisticated teenager who was rushing to judgment under unimaginable pressure of a possible death sentence, when the judge knew full well that the teenager's lawyer was unprepared to defend him and needed only a reasonable delay -- the first and only one in this case. The trial court reversibly erred by denying counsel's well taken continuance motion, thereby denying Curtis his rights to due process, a fair trial, and effective assistance of counsel.

ISSUE II: THE COURT ERRED BY PREVENTING CURTIS FROM PEREMPTORILY CHALLENGING AN UNWANTED JUROR, SUSTAINING THE STATE'S RACE-BASED OBJECTION TO THE CHALLENGE OF A WHITE JUROR IN THE ABSENCE OF ANY EVIDENCE SHOWING AN INFERENCE OR STRONG LIKELIHOOD OF DISCRIMINATORY INTENT AND EVEN THOUGH THE DEFENSE HAD A LEGITIMATE REASON FOR ITS CHALLENGE

Throughout jury selection the State abused the race-neutral principles of State v. Neil, 457 So. 2d 481 (Fla. 1984), State v. Johans, 613 So. 2d 1319 (Fla. 1993), Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1987), and Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), wholly undermining Curtis's lawful ability to make peremptory challenges by questioning his every attempt to challenge jurors who happened to be members of the majority race. The court then forced Curtis, a black juvenile, to explain presumptively valid peremptory strikes of jurors who are white, and forced him to accept one of those jurors, Robert W. Kelley. The court's decisions to force him to explain his challenges, to reject his challenge of Kelley, and to seat Kelley over objection, violated Curtis's right to peremptory challenges under state law and his state and federal constitutional rights to due process, equal protection, a fair trial, and an impartial jury. U.S. Const. amends. V, VI, XIV; art. I, §§ 9, 16, 22, Fla. Const.

The defense's peremptory strikes occurred as follows.[7] After accepting eight jurors (Ms. Taylor, Ms. Riggs, Mr. Kelley, Ms.

[7] The colloquy, T397-412, is attached as Appendix 3.

Thompson, Ms. Sherman, Mr. Ezell, Mr. Marriott, Ms. Gaynor), the defense struck Ms. Stoyer and Mr. Carr. The State asserted a Neil objection as to Mr. Carr, asserting that the defense was "systematically excluding him because he is a white male." Defense counsel noted that he previously had accepted two other white male jurors. Nonetheless, the court shifted the burden and required counsel to explain Carr's strike, which he did by saying Carr suggested he would automatically recommend the death sentence. The court accepted the explanation as race-neutral. T399-400. Defense counsel then struck Mr. Copeland and volunteered race-neutral reasons that Copeland works at a funeral home and has given CPR a number of times; that his response that the punishment should fit the crime suggests that he would vote for the death penalty; and that he is a multiple victim of "crimes for the house and vehicle." The State this time asserted that the strike was "not being applied gender neutrally" because a white female also had said the punishment should fit the crime; but the court accepted the strike. T401-02. After accepting two more jurors (Ms. Wollitz, Ms. Pope), defense counsel struck Mr. Boudreau, to which the State said "[s]ame objection." Again without any prima facia showing of racial discrimination, the court required defense counsel to explain its strike. Counsel said Boudreau's daughter works for the state attorney, is a crime victim, and was strongly in favor of the death penalty. The court again accepted the strike as race and gender neutral. T403. Counsel then accepted Ms. Humphrey and struck Ms.

Parker, to which the State again objected "based upon the same grounds as earlier indicated." The court entered no ruling. T404.

Defense counsel then accepted three more jurors (Mr. Hillin, Ms. Jennings, Ms. Dixon), and backstruck Mr. Kelley. The State objected, citing Neil and claiming that "Mr. Kelley didn't answer anything. He answered the questions real plain. There is absolutely no race/gender reason to strike this individual." Again, without the State indicating the race of the juror and without any prima facie showing of racial discrimination, the court shifted the burden to the defense and required an explanation. Defense counsel responded that "my client indicated during the course of the jury selection he would adequately represent a fair cross-section of the community in this particular case and requested that I strike Mr. Kelley for a peremptory." The State asserted that the reason was not race-neutral, and the trial judge rejected the peremptory strike, ruling "[t]hat is not a race-neutral reason; feelings don't count." T405-06. Curtis later accepted more jurors and peremptorily struck four without objection (Mrs. Bardole, T408, Ms. Stroud, T411, Mr. Lockhart, T411, Mr. Humphrey, T429). Curtis preserved his claim as to Mr. Kelley immediately before accepting the jury, T410, and Kelley served, T425. The final jury consisted of eight men and four women, a minority of whom were black.[8]

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[8] The final jury was comprised of Mr. Hillin, Ms. Jennings, Ms. Dixon, Ms. Zidlicky, Ms. Bahr, Mr. Ebinghouse, Ms. Taylor, Mr. Kelley, Ms. Sherman, Mr. Ezell, Ms. Gaynor, and Ms. Wollitz. T425-33. Counsel stipulated that of the eight women who served,

A. The State did not carry its prima facie burden of proving a strong likelihood or inference of invidious discriminatory purpose in striking juror Kelley, so it was error for the court to require an explanation

Both the federal and Florida constitutions provide that purposeful or deliberate racial discrimination may not be the basis of jury selection. Compare, e.g., Batson (equal protection under U.S. Const. amend. XIV) with, e.g., Neil (right to impartial jury under art. I, § 16, Fla. Const.). Batson and Neil grew from a long and despicable history of racial discrimination against black defendants and potential black jurors, Batson, 476 U.S. at 103 (Marshall, J., concurring); State v. Slappy, 522 So. 2d 18, 20 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988), constitutionally compelling the courts to set standards.

The federal standard initially places a burden on the objecting party to make a prima facia case of purposeful discrimination:

> To establish such a case, the defendant must first show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

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only one was black, Ms. Sherman. T1403.

Batson, 476 U.S. 96-97 (internal quotation marks and cites omitted; emphasis supplied). Georgia v. McCollum applies this same burden to prosecutors objecting to a defendant's peremptory strike.

Until Johans in 1993, Florida's procedure analogously presumed that peremptory challenges of black jurors were non-discriminatory, allowing a strike to be questioned only after the objecting party "demonstrate[s] on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." Neil, 457 So. 2d at 486 (footnote omitted); see also State v. Aldret, 606 So. 2d 1156 (Fla. 1992) (applying Neil to prosecutors objecting to defense peremptories). Johans extinguished the prima facie burden when a black juror is struck, saying:

> The case law that has developed in this area does not clearly delineate what constitutes a "strong likelihood" that venire members have been challenged solely because of their race. Compare State v. Slappy, 522 So. 2d 18 (Fla.) (number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988) with Reynolds v. State, 576 So. 2d 1300 (Fla. 1991) (striking one African-American venire member who was sole minority available for jury service created strong likelihood).
>
> Rather than wait for the law in this area to be clarified on a case-by-case basis, we find it appropriate to establish a procedure that gives clear and certain guidance to the trial courts in dealing with peremptory challenges. Accordingly, we hold that from this time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner.

Johans, 613 So. 2d at 1321 (emphasis supplied).

Given the magnitude of racial discrimination against black citizens still pervading this country's criminal justice system,[9] the striking of a black juror in a black defendant's trial -- especially in a predominantly white community -- legitimately raises the specter of purposeful racial discrimination. This is true at least to the extent that prosecutors should be and are put on notice that their motives must be explained in a racially neutral manner. Black citizens are recognized in constitutional parlance to be members of a "suspect class," a "discrete and insular minority" having been victims of slavery, segregation, and discrimination for hundreds of years, especially in the South. As applied to minority race jurors, Johans flows naturally from this Court's recognition of the historic evil of discrimination against black defendants and jurors. It effectively presumes that when members of this suspect class are peremptorily challenged, the likelihood of racial discrimination exists, thereby shifting the burden to the party striking the black juror.

However, it makes no sense to relieve the State of its burden to prove this "strong likelihood" or "inference" of racial discrimination when a defendant strikes a majority racial group

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[9] For example, the public's outcry is well known concerning Los Angeles Police Detective Mark Furman's publicly reported racial views in the O.J. Simpson case, and racism of police that provoked the Rodney King arrest and the Los Angeles riot four years ago.

member. White citizens of Duval County, who are part of the vast racial majority in this state and in that county,[10] are by no means a suspect class or a discrete and insular minority for whom special constitutional protection has ever been afforded or warranted. There is no constitutionally recognized history of blacks systematically discriminating against whites in the jury selection process. Accordingly, there is no reason to presume a strong likelihood of racial discrimination when a member of the white majority is being peremptorily struck. Erasing the State's prima facie burden under these circumstances creates an unconstitutional presumption of prima facie racial discrimination absent any proof -- a violation of due process and equal protection. U. S. Const. amend. XIV; art. I §§ 2, 9, Fla. Const.

Moreover, Johans tried to clear up what this Court perceived to be a lack of clarity in applying the "strong likelihood" standard in cases that almost exclusively concerned the State's peremptory strikes of black jurors. Johans did not consider the present situation, nor did it attempt to reconcile confusing case law dealing with the prima facie burden in the striking of white jurors. To the contrary, the case law on this point is uniform. The State

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[10] The latest official United States Census data shows that of the 672,971 people in Duval County in 1990, 489,604, or 72.75 percent, were white, and 163,902, or 24.35 percent, were black. 1994 Florida Statistical Abstract 12-13 (Univ. Press of Fla. 1994); see also Nipper v. Chiles, 795 F. Supp. 1525 (N.D. Fla. 1992), affirmed, 39 F.3d 1494 (1994) (en banc), cert. denied, 115 S. Ct. 1795, 131 L. Ed. 2d 723 (1995).

must be held to "an enormous burden" when it objects to defendant's peremptory strike of a majority racial group member. Elliott v. State, 591 So. 2d 981, 986 (Fla. 1st DCA 1991), review denied, 599 So. 2d 658 (Fla. 1992); see also Rome v. State, 627 So. 2d 45, 46 (Fla. 1st DCA 1993); McClain v. State, 596 So. 2d 800 (Fla. 1st DCA 1992), review dismissed, 614 So. 2d 498 (Fla. 1993).

In Elliott, the State alleged that a black defendant in Escambia County had systematically challenged adult white male veniremen. Without even determining whether the State had carried its prima facie burden, the judge compelled the defendant to explain three challenges, finding the reasons vague, nebulous, and insufficient. The First District reversed and remanded after finding no evidence to support "what we perceive as a strained and nearly contrived effort on the state's part to prove that racial motivation occurred." Id. at 986. Rome reversed a conviction because the State failed to carry its heavy prima facie burden of showing a strong likelihood of invidious discrimination in a black defendant's strike of five white jurors. The judge rejected the explanation as to three of those jurors, all of whom served. McClain likewise reversed a conviction where a judge sua sponte inquired into the reasons why a black defendant struck six white jurors without any showing of discriminatory intent. The judge disallowed four of the presumptively nondiscriminatory strikes.

The present case, like Elliott, Rome, and McClain, shows this prosecutor abused race-neutral principles, turning the shield

against discrimination into a sword tearing into the heart of Curtis's lawful right to make peremptory challenges. The judge found each of the State's objections before Kelley to be invalid. The State's objections, as in Elliott, were a strained and nearly contrived effort to prove that racial motivation occurred, going so far as alleging gender discrimination in this male defendant's striking of a male juror, Mr. Carr.

It is not clear from the record what prima facie law the trial court thought it had applied. The only case references in the record were to Neil and Slappy. Johans did not apply, and Rome, which dealt specifically with this situation, came out after Johans and did not even refer to it. Elliott, McClain, and Rome thus constituted the controlling law at the time of Curtis's trial. See Pardo v. State, 596 So. 2d 665, 666-67 (Fla. 1992). The trial court should have held the State to a heavy prima facie burden consistent with Neil, Batson, Elliott, McClain, and Rome. Yet the court clearly violated those standards because there was absolutely no evidence to establish the prima facie burden.[11] Instead, the court effectively relieved the State of any prima facia burden whatsoever. This is erroneous as a matter of state and federal constitutional

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[11] Neil also held that any reasonable doubt as to the prima facie showing would be resolved in favor of the objecting party. In undoing that prima facie burden, Johans undid this holding too. But even if the prima facie burden does apply, this record contains absolutely no evidence that the State carried its enormous burden of showing a strong likelihood of discrimination. Thus, there would be no doubt to resolve in the State's favor.

law under the present circumstances.[12]

The abuse of discretion standard set forth in Files v. State, 613 So. 2d 1301 (Fla. 1992), is inapplicable because the judge did not make any finding. To the contrary, he misapplied the law by relieving the State of its prima facie burden altogether. Thus, he erred as a matter of law, which constituted reversible error. Valentine v. State, 616 So. 2d 971 (Fla. 1993).

B. Curtis offered a legitimate race-neutral explanation for striking Kelley, so denying the challenge and seating the unwanted juror over objection violated Curtis's rights

The judge again erred by ruling that Curtis's desire to have "a fair cross-section of the community" on the jury was "not a race-neutral reason" in that "feelings don't count." T405-06. Federal and Florida law require that after the State establishes a prima facie case (step 1, which was not satisfied as demonstrated above), defense counsel had the burden "to come forward with a race neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination." Purkett v. Elam, 115 S. Ct. 1769, 131 L. Ed. 2d 834, 839 (1995) (explaining Batson); see also Slappy, 522 So. 2d at 22 (applying federal

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[12] Other parties have raised the issue of harmonizing Johans and Elliott, but appellate panels have refrained from addressing it in written opinions. See Watson v. State, No. 93-3145 (Fla. 1st DCA October 5, 1995)(rehearing pending); Way v. State, No. 94-1483 (Fla. 1st DCA May 11, 1995); Simmons v. State, 93-571 (Fla. 1st DCA June 16, 1994). See appendix 4A-H, attached. This is a recurring issue that needs to be resolved.

analysis for steps two and three under Florida law). In the second step, defense counsel's explanation need not be "reasonable," plausible," "persuasive," or even "make sense." As long as an invidious discriminatory purpose constituting an equal protection violation as a matter of law is not inherent in the explanation, it is legitimate. Purkett. In the third step, the judge may consider how persuasive the reason was under the totality of relevant facts, but the burden remains on the State to prove the defendant had an invidious discriminatory purpose: that defense counsel's challenge was specifically because of race. Id.; Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). Race may be a consideration as long as it is not the sole consideration. See Batson; Neil; Kibler v. State, 546 So. 2d 710 (Fla. 1989).

Counsel's explanation satisfied both steps two and three. "Cross-section" embraces many things other than racial considerations. For example, counsel could have wanted to achieve a more gender-neutral balance, or he could have wanted a different mix of socio-economic backgrounds, physical characteristics, education or academic achievements, or other factors all of which make up the cross-section of the community. While Curtis may not have had a constitutional "cross-section" right to guarantee a petit jury mirroring the various distinctive groups in the population, Kibler, 546 So. 2d at 712-13, he did have a right to attempt to get a representative jury -- even by striking one venire member to reach another -- as long as the strike was not done for racially

discriminatory purposes. Id. The desire to obtain a cross-section without a discriminatory purpose has already been upheld:

> In both criminal and civil cases, it has long been a recognized practice of trial attorneys to strike jurors when the attorneys believe that the jurors are likely to identify with the other party. Trial attorneys believe that a jury with several persons who identify with one side or the other is a jury that is likely to either reach no verdict or to reach a skewed verdict, unrepresentative of a fair cross-section of our population. From the cold record, it appears likely that the prosecutor was exercising her peremptory challenges for such reasons. We do not read Neil, Slappy, and their progeny to preclude this time-honored practice.

Marshall v. State, 593 So. 2d 1161, 1165 (Fla. 2d DCA 1992). Likewise, in Elliott the district court found nothing to suggest "the possibility of racial overtones" where the defendant's challenge had been based on his desire to achieve a cross-section on the jury. 591 So. 2d at 986. Thus, a discriminatory purpose is not inherent in the reason; to the extent the judge may have so found, he erred as a matter of law. Cf. Files, 613 So. 2d at 1304 (State's explanation was not improper as a matter of law).

In step three, the law required the court to consider all relevant facts on the record is determining whether the State carried its burden of persuasion to prove that Curtis's strike of juror Kelley was motivated by an invidious racially discriminatory purpose. The relevant facts show: (1) The judge had already found every other objected-to peremptory strike to be race and gender neutral; (2) Curtis peremptorily struck other jurors without objection; (3) Neither the State nor the court asked defense counsel

to elaborate on what his "cross-section" explanation meant, so they had nothing other than the hyphenated phrase from which to divine an allegedly invidious discriminatory purpose; (4) Seeking to have a "cross-section" is not an inherently racially discriminatory purpose because it embraces many legitimate non-racial factors; (5) Curtis had the right to strike one juror to reach another juror, Kibler; (6) Neither the judge nor the State put anything on the record to evince the presence of bare looks, gestures, or anything else that could indicate a racially discriminatory motive; and (7) Contrary to what the judge said, feelings do count in making a peremptory strike. The peremptory strike goes back centuries in the common law and the statutory law of England and this nation, and is premised on a defendant's right to make unexplained challenges based on his feelings about whether a particular juror will give him a fair trial. When considering all these relevant facts, it becomes clear that the State did nothing to carry its burden of persuasion regarding racial motivation, and there is nothing in the record to support the judge's conclusion.

At bottom, Curtis's legal and constitutional rights were violated because he was unable to freely exercise his peremptory challenges and he was forced to be judged by a juror he did not want to serve, a juror he lawfully struck for presumptively nondiscriminatory reasons. Curtis should be given a new trial.

ISSUE III: THE ATTEMPTED FIRST DEGREE FELONY MURDER CONVICTION MUST BE VACATED BECAUSE THE CRIME DOES NOT EXIST AS A MATTER OF LAW

Curtis was convicted of attempted first degree murder of Taaziah. That conviction was based solely on the theory of felony murder. There was no evidence of a premeditated intent to kill Taaziah or Khair-Bek, and the State expressly disavowed the theory that Curtis may have premeditated to kill, telling the jury, "[t]his is a case of Felony Murder. The Defense counsel comes up here and says no premeditation on behalf of the defendant, no premeditation. We are not alleging that." T1037.

In State v. Gray, 654 So. 2d 552 (Fla. 1995), this Court held that the crime of attempted felony murder does not exist in Florida, and it applied its holding to all cases pending on review or not yet final. Accordingly, the conviction and sentence must be vacated.

ISSUE IV: THE JUDGE ERRONEOUSLY ALLOWED A DETECTIVE TO BOLSTER THE CREDIBILITY OF ALBERT FOUNTAIN BY INTRODUCING HIS PRIOR CONSISTENT STATEMENT

Detective Robinson arrested Albert Fountain on December 7, 1993, for unarmed robbery. Fountain immediately asked for deal, saying he would reveal the names of the Safeco robbers in exchange for better treatment on the unarmed robbery charge. Robinson agreed on the spot, so Fountain described what he knew about the robbery, inculpating Curtis. Fountain testified for the State on direct:

> Q How did it come about that you told the police about it when you were arrested?
>
> A I told him he had me to the right, and I was facing a lot of time and I told him if I tell him about the murder and the armed robbery that happened at the Safeco Store will he work out a deal with me, and he said "Yeah."

T699. Likewise, Robinson testified on direct for the State:

Q While talking with Albert Fountain, did he give you any information regarding a murder at the Safeco at Edgewood and Bunker Hill?
A He did, sir.
Q And how did that come about?
A He was looking for help on the charge that he had.
Q You say "He was looking for help," explain that to the jury.
A What he had was an Unarmed Robbery charge, and he was looking to spend a whole heck of a lot of time in prison.
Q What did you tell him in response to that?
A I told him that if the information he give me was valid, in reference to a murder and a robbery, that we would definitely speak in his behalf.

T742-43. On January 5, 1994, Robinson gave a sworn statement to the State, again inculpating Curtis. T703-05.

At trial the defense questioned Fountain at length about his request for a deal beginning with the moment he was arrested. At one point Fountain claimed he "did not know about" whether the State would make a sentencing recommendation as to his unarmed robbery charge after he testified against Curtis. T703-04. Defense counsel impeached Fountain with his prior inconsistent statement of January 5 in which he admitted he understood the State would make a sentencing recommendation based on his cooperation and truthful testimony in the cases against Howard and Curtis. T704-05. When Robinson testified, the State asked him to reveal what Fountain told him upon arrest. Defense counsel objected as cumulative and inadmissible hearsay that improperly bolstered Fountain's character. The State claimed it was admissible as a prior consistent statement offered to rebut defense's implied charge that Fountain recently

fabricated his story. § 90.801(2)(b), Fla. Stat. (1991). The State argued that Fountain's motive to fabricate did not arise until he gave the January 5 sworn statement subjecting him to perjury. The defense argued that his motive arose when he was arrested and immediately sought to cut a deal for himself on December 7. The judge accepted the State's perjury theory, overruled the objection, and permitted Robinson to tell what Fountain had said. T743-61.

Section 90.801(2)(b) provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> ....
>
> (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication....

This provision prohibits admission of a prior consistent out-of-court statement made after the declarant's motive to fabricate arose. For example, in Jackson v. State, 498 So. 2d 906, 909-10 (Fla. 1986), a prisoner attempted to curry favor with the State by disclosing to a detective that he heard the defendant inculpate himself in an armed robbery/murder. After the prisoner testified, the detective testified as to what the prisoner heard the defendant say. This Court reversed because the prisoner's statement was made after his motive to falsify arose. In Anderson v. State, 574 So. 2d 87, 93-94 (Fla.), cert. denied, 502 U.S. 834, 112 S. Ct. 114, 116 L. Ed. 2d 83 (1991), defense counsel implied that a witness changed her story after making a plea agreement. This Court said the judge

erred by permitting an investigator to testify as to what the witness said after the plea agreement because that was when the defense suggested the motive to fabricate arose. In Parks v. State, 644 So. 2d 106 (Fla. 4th DCA 1994), the co-defendant was arrested, interrogated, gave a recorded a statement and twenty-two months later entered a plea agreement. While testifying against Parks, he was cross-examined about the agreement and the statement. The State then was permitted to have a detective introduce the co-defendant's recorded statement. The Fourth District found error because the statement was been made after his improper motive arose. Accord Tome v. United States, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995) (federal law follows same rule); see United States v. Miller, 874 F. 2d 1255, 1274 (9th Cir. 1989) (powerful motive to fabricate existed when declarants made statements to agents or attorneys while under criminal investigation or indictment).

Both Robinson and Fountain testified that Fountain asked for a deal immediately after he was arrested December 7, during the course of a criminal investigation. As defense counsel had suggested, his motive to falsify existed at that moment, and his subsequent sworn statement, plea agreement, and trial testimony all resulted directly from his initial desire to make a deal.

The judge's ruling admitting this evidence violated Florida law and Curtis's rights to due process, a fair trial, and confrontation. U.S. Const. amends VI, XIV; art. I, §§ 9, 16, Fla. Const. This harmful evidence went to the heart of this trial because Fountain

was the key prosecution witness who led police to Howard and Curtis. The State relied on Fountain's credibility throughout closing argument. His credibility was pivotal, yet the judge held this evidence was not cumulative and allowed the State to bolster his credibility in the jury's eyes. This was reversible error.

ISSUE V: THE COURT IMPROPERLY REFUSED TO ALLOW DEFENSE COUNSEL TO COMMENT IN CLOSING ARGUMENT ABOUT THE STATE'S FAILURE TO PRODUCE ANTHONY HOWARD

Curtis and the judge expected Anthony Howard to testify for the State, T70, 142, but the State did not call him. The State may have anticipated not calling Howard, moving in limine to prevent Curtis from arguing about the State's failure to call any witness (without naming which witnesses) under Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991). R26. The court granted that motion. R35. But when the defense was surprised by the State's decision not to call Howard, the defense wanted to comment on the fact that Howard did not testify. The State renewed its motion in limine. Defense counsel argued that Haliburton did not control and that it would be fundamentally unfair to prevent him from commenting about Howard's absence. The judge ruled that defense counsel could not argue Howard's absence to the jury. T969-74. That ruling violated Florida law and Curtis's rights to due process and a fair trial. U.S. Const. amends VI, XIV; art. I, §§ 9, 16, Fla. Const.

Haliburton discusses the narrow rule that counsel cannot comment on opposing counsel's failure to call a witness only when

the witness was not equally available to both sides:

> an inference adverse to a party based on the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction.

561 So. 2d at 250 (quoting Martinez v. State, 478 So. 2d 871, 871 (Fla. 3d DCA 1985), review denied, 488 So. 2d 830 (Fla. 1986)) (first emphasis in original, second supplied). If the witness has a special relationship with the State to suggest the possibility that he would give testimony favorable to the State, he is considered not to be equally available. See Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); Martinez; cf. Amos v. State, 618 So. 2d 157 (Fla. 1993) (error not letting defense comment on State's failure to call eyewitness called by defense).

Howard had pleaded guilty to first-degree murder, attempted first-degree murder, and armed robbery with a firearm, with the understanding that: he would cooperate in Curtis's prosecution by giving truthful testimony if called upon by either party; he would receive a life sentence without eligibility for parole for 25 years for the murder; and without a sentence agreement as to the other two counts, leaving the door open for the State to make a favorable recommendation for lenient treatment as to those counts. He had to give the State what it wanted or face the possibility that the State could seek to void the plea agreement, try him for murder, and obtain a death sentence. Hoffman v. State, 474 SO. 2d 1178 (Fla. 1985); see also McCoy v. State, 599 So. 2d 645 (Fla. 1992); Lopez v.

State, 536 So. 2d 226 (Fla. 1988). He had to give the State favorable testimony or else lose the possibility of a favorable sentencing recommendation on counts II and III. He had to testify in a manner favorable to the State or subject himself to possible perjury charges. Howard was totally under the coercive control of the State, which certainly suggests the likelihood that he would give testimony favorable to the State, and as such he was not equally available to Curtis.

In Martinez, the defendant was prevented from commenting on the State's failure to call the co-defendant who had pleaded to the charges. That case is distinguishable because the co-defendant's case had already been disposed of, whereas here no sentence had been imposed and Howard's case was not yet final. Counsel here should have been permitted to argue Howard's absence to the jury, and the court erred by denying him that right.

ISSUE VI: THE STATE COMMITTED NUMEROUS ACTS OF PROSECUTORIAL MISCONDUCT IN ARGUMENT IN BOTH PHASES, TAINTING THE JURY'S VERDICT AND RECOMMENDATION

The jury's fact-finding process and sentencing recommendation was tainted by numerous incidents of prosecutorial misconduct in remarks made to the jury. These errors violated Curtis's rights to due process and a fair trial. U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const.

The prosecutor set the stage in his opening remarks in the guilt phase by telling jurors Curtis had destroyed the "American dream." He told jurors that the victims had come to America from

Syria in search of the American dream, began to live that dream in the Safeco convenience store, and that Curtis cut short their American dream. T441-42. The State pounded that theme home in closing argument, telling jurors that Khair-Bek "never got to live that American dream, never got to go back to his home in Syria as a successful businessman; instead, he went back to his home in Syria in a coffin." T1080.

These were improper pleas for victim sympathy that also argued facts not in evidence. The remark about Khair-Bek coming here to live the American dream was not based on a fact in evidence. There was no evidence that Khair-Bek ever had been or was likely to be a successful businessman here or in Syria. There was also no evidence that he had been returned to Syria in a coffin. Moreover, none of these facts not placed in evidence were relevant to any issue in this case, especially in the guilt phase. The fact that both victims were foreign-born is totally irrelevant. Instead, the "search for the American dream" argument pleads with jurors -- all of whom likely share the American dream -- to personally relate with and have sympathy for the victim. Many cases have prohibited arguing facts not in evidence. E.g. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994); Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994). The error is especially egregious because it wrongfully attempts to evoke victim sympathy and leads them to inferentially put themselves in the shoes of the victim because they also share the "American dream." Many cases prohibit this as well.

E.g., Davis v. State, 694 So. 2d 794 (Fla. 1992); Brown v. State, 593 So. 2d 1210 (Fla. 2d DCA 1993).

The prosecutor improperly suggested to jurors that they should send a message to the community by finding him guilty, telling them "You know, we hear things from time to time that make us lose faith in the criminal justice system. You hear it on the news, television, whatever. Today, you are the criminal justice system. Today, it is up to you to do justice and to do the right thing. The right thing in this case, the obvious thing in this case, is to find the defendant guilty." T1078. As the court held in Pacifico, 642 So. 2d at 1182, a prosecutor cannot imply that jurors should convict for the good of society. The argument here was improper.

The prosecutor improperly commented on Curtis's right to remain silent and not to incriminate himself, arguing that "He is sitting in jail for six months before this trial, doesn't call the police -- he doesn't call the police to tell them what had happened. He doesn't try to tell them about this so-called coercive or duress situation. Nope. The first time anybody hears it is last night on the witness stand. That was the first time." T1066. This objected to statement was improper because it urges the jurors to believe that Curtis had an obligation to call the police to incriminate himself, and they should hold against him the fact that he did not do so. E.g. Whitton v. State, 649 So. 2d 861 (Fla. 1994), cert. denied, 1995 WL 335122 (U.S. No. 94-9356 Oct. 2, 1995).

The prosecutor further crossed the line by demeaning Curtis's

character as a liar, repeatedly telling the jury he was "lying" and calling his testimony "ridiculous." T1059-71. In the penalty phase, the prosecutor continued to play this theme, again referring to Curtis's "lies" and characterizing his testimony as "crazy." T1300. Prosecutors are neither allowed to impugn the character of a defendant, nor are they allowed to state their personal opinion about the defendant or the veracity of his testimony. E.g. Pacifico, 642 So. 2d at 1182-84; Brown v. State, 593 So. 2d at 1210.

The prosecutor also demeaned the reasonable doubt standard, saying "it is a principle of law that protects innocent people; it is not a shield behind which guilty people can hide." T1078. The reasonable doubt standard protects every citizen in this nation, whether they committed crimes or not. It is not a principle to protect merely the innocent. It is the State's burden, and neither the court nor the State are permitted to do anything to diminish it. Sullivan v. Louisiana, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Defense counsel objected to some of this argument and twice moved for a mistrial, which the court denied both times. T1080-84, T1300-01. The fact that some of these errors were not contemporaneously objected to does not bar this Court from considering them anyway. In Whitton, this Court examined both preserved and unpreserved prosecutorial misconduct in arguments presented to the jury, holding that the Court must conduct a cumulative impact review of both types of errors:

> Although Whitton did not object to the first two

> alleged comments on Whitton's post-arrest silence, he argues that the cumulative impact of all three comments requires reversal. We agree that we must consider all three comments in our harmless error analysis because the harmless error test requires an examination of the entire record. The reviewing court must examine both the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have influenced the jury's verdict. [State v.] DiGuilio, 491 So. 2d [1129] at 1135 [(Fla. 1986)].

649 So. 2d at 864-65. The cumulative impact here is great, necessarily affecting both phases of this trial.

As the result of these improper arguments, jurors were told to look with particular sympathy at this foreign-born businessmen who came to this country in search of the same dream they shared, the American dream; to disbelieve anything Curtis had to say because he is a liar who refused to call the police and tell them what happened; not to allow him to hide behind some artificial shield of reasonable doubt rather than to put the State to its test of proving guilt beyond a reasonable doubt; and to convict him because otherwise society will lose faith in the criminal justice system. No amount of evidence can overcome the State's burden to show beyond a reasonable doubt that these arguments did not contribute to the verdict or the penalty recommendation.

ISSUE VII: THE COURT ERRED BY NOT ISSUING A JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER, AND BY COMPOUNDING THE ERROR WITH AN INSTRUCTION

The State did not charge Curtis with premeditated murder in the death of Khair-Bek. The indictment specifically alleged that the murder was caused "by an act imminently dangerous to another, and

evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." R5 (emphasis supplied). The State did not even pursue the theory of premeditated murder because there was no evidence to support it. T1037. Defense counsel moved for a judgment of acquittal as to premeditated murder at the close of the State's case-in-chief, and renewed it at the close of evidence. The judge denied the motion. T848-49, 914-15. This was error. E.g. State v. Mungin, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995) (insufficient evidence in armed robbery/murder). Consequently, it was also error to instruct the jury on the premeditation theory. R293. See McKennon v. State, 403 So.2d 389 (Fla. 1981).

ISSUE VIII: THE COURT ERRONEOUSLY PERMITTED THE INTRODUCTION OF IRRELEVANT CHARACTER EVIDENCE OF DRUG DEALING

Ten days before trial, the State filed a purported Williams[13] rule notice alleging that Curtis and Howard had conspired to sell cocaine between January 1 and December 21, 1992, and that this would be used to establish motive for the robbery. R41. Defense counsel filed a motion in limine objecting to the introduction of that evidence, arguing that the breadth and lack of specificity of the notice made it impossible to prepare to defend against; the evidence was irrelevant; and it was too tenuous and remote in time to make it admissible. The court denied the defense's motion. T107-17. As a

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

direct result, Fountain testified that the reason he went to Curtis and Howard on the night of the Safeco robbery was to buy crack cocaine from Curtis. He then said Curtis said he and Howard robbed the store to pay a drug debt. T688-91. Permitting this testimony about drug dealing violated Florida law and Curtis's rights to due process and a fair trial. U.S. Const. amends VI, XIV; art. I, §§ 9, 16, Fla. Const.

Motive was not a contested issue in this case, nor is it an element of the charged crimes. The only contested issue was whether Curtis willingly participated or was he under duress. Even if evidence about a drug debt was relevant and admissible to motive, evidence relating to whether Curtis was a dealer of drugs was highly irrelevant and unduly prejudicial. The statement about Curtis needing to pay a drug debt does not show that Curtis was a dealer; he could have been a user. Fountain's motive for going to the apartments to talk to Curtis and Howard was irrelevant given that his mere presence there established the predicate for his testimony about what Curtis said. Rather, the only real purpose for introducing this horribly irrelevant and damning evidence about drug dealing was to impermissibly demean Curtis's character in the jury's eyes. Craig v. State, 585 So. 2d 278 (Fla. 1991). The State made a big point about it too, beginning with its opening statement in which it labeled Curtis as Fountain's drug supplier. T448-49. Even if relevant to the crime, the unduly prejudicial nature of this evidence made it inadmissible. § 90.403, Fla. Stat. (1991).

ISSUE IX: THE JUDGE ERRED BY REFUSING TO CONDUCT AN IN CAMERA JURY INTERVIEW UPON EVIDENCE THAT A JUROR HAD DISCUSSED THE CASE BEFORE THE TRIAL ENDED

After the jury made its sentencing recommendation, defense counsel received an anonymous tip that a Randall Jones knew that one of the jurors, Mrs. Sherman, along with others, had discussed the case with someone not on the jury prior to the close of deliberations. Counsel moved the court to interview juror Sherman. At a hearing on the motion, R379; T1354-67, Jones testified that Joe McCrae, Mrs. Sherman's father, told him

> My daughter is on Wally's case. He said, He look like he in bad shape. I said, Where you get that from? He said, I got it from my daughter. Look like he in bad shape. I said, Well, I don't know too much about what's going on but I know his father is going through the changes, I know Wally going through a little change. I said, If you want to find out anything, ask him. The next day he come back to me again. he asked me again, he said, You heard anything about the boy's case? I said, No, I haven't, and that's as far as I know for right now.

T1397. Jones did not know Mrs. Sherman, and he did not know she was on the jury, but he did know Mrs. Sherman's father is black, and both attorneys stipulated that Mrs. Sherman is the only black female on the jury. Jones, a friend of Curtis's father, declined to talk to the State investigator at home, saying he would only discuss the matter in court under subpoena, and he did not want to hurt anybody in the case or incriminate himself. Jones previously had been convicted of giving false identification and petit larceny.

The defense argued that due process required the court to conduct an in camera interview of juror Sherman to ascertain whether

any misconduct had taken place warranting a new trial. The judge refused. T1397-1410. This was reversible error that violated Curtis's rights to due process and a fair trial. U.S. Const. amends VI, XIV; art. I, §§ 9, 16, Fla. Const.

A juror interview is the easiest and least onerous manner to assure that no juror misconduct has taken place when a claim like the present one is made. For example, in Street v. State, 636 So. 2d 1297 (Fla. 1994), cert. denied, 115 S. Ct. 743, 130 L. Ed. 2d 644 (1995), the defense advised the court that a communication had taken place between an outsider and four of the jurors. The court conducted a juror interview of all four jurors, and then inquired of all the remaining jurors. Finding no improper influence, the court ended the inquiry and proceeded with the trial, a process this Court found to be free of error. The same procedure should have been applied here. All the judge had to do was call in the juror and ask her a few questions in chambers. Instead, the court left the issue unresolved, leaving open the possibility that misconduct took place affecting the fact-finding process. Due process requires more than that, especially in a capital case. This Court should reverse, or at the very least relinquish jurisdiction to the trial court for the purposes of conducting an in camera jury interview.

ISSUE X: THE STATE IMPROPERLY INTRODUCED HARMFUL INADMISSIBLE EVIDENCE OF AN UNCONVICTED CRIME VIA IMPEACHMENT IN THE PENALTY PHASE

Curtis expressly waived his right to seek the statutory mitigating circumstance of no significant history of prior criminal

activity in part because he did not want the jury to hear evidence of the State's unproved allegation that he committed an armed robbery of a Krystal's restaurant in March 1993, four months after the Safeco robbery. Defense counsel made clear many times that this inadmissible evidence would be devastating, and he went to every length to keep it out, seeking rulings in advance to be sure the door remained shut. T1172-80, 1230-33, 1200-1204, 1222-24. Nonetheless, the judge permitted the State to introduce that evidence over objection in its cross-examination of Andrea Jones. On direct, Jones testified as follows:

> Q How many years have you known him, total?
> A Six.
> Q And during that time period, has he ever displayed any kind of violent temper toward you or anyone else <u>in your presence</u>?
> A No.
> Q Have <u>you ever known</u> Mr. Curtis to possess any guns?
> A No.

T1196 (emphasis supplied). The judge ruled that this opened the door, T1200-04, and the State immediately marched right in:

> Q You told defense counsel that the defendant had never displayed violence or violent tempers to you or anybody else that you knew of, right?
> A Yes.
> Q And you also told defense counsel that you didn't know or hear of him ever possessing a gun, right?
> A Yes.
> Q But you do know that he was convicted of Attempted First Degree -- or First Degree Murder, Attempted First Degree Murder and Armed Robbery arising out of this murder on December -- that takes place in December of 1992; you know that, right?
> A Yes.

Q And have you also heard that this defendant is charged -- has been arrested for an Armed Robbery to a Krystal's restaurant that took place in March of 1993; have you heard that?

A Yes.

Q So you had heard of him possessing guns before then, right?

MR. ELER: I am going to object, Your Honor, as to the form. I think that is an allegation.

THE COURT: Overruled.

BY MR. MALTZ:

Q So you have, then, heard of him possessing guns before, right?

A No, not until this happened, until he got arrested.

Q But as you sit here today, with regards to the two situations that I talked about -- the murder at the Safeco and the robbery at the Krystal's in March of 1993, that you said you had heard about, as you sit here today, you have heard of him possessing guns before?

MR. ELER: Objection, Judge, asked and answered.

THE COURT: Overruled.

BY MR. MALTZ:

Q You heard of him possessing guns, as you sit here, having heard about those two incidents, right?

A Yes.

T1207-08.

Permitting this testimony was reversible error for two reasons. First, the alleged robbery took place months after this crime and was merely an unconvicted allegation. Thus it was irrelevant and unduly prejudicial. In Robinson v. State, 487 So. 2d 1040 (Fla. 1986), this Court found reversible error when the State was permitted to impeach the favorable character testimony of several defense witnesses by bringing up in cross-examination two crimes that occurred after the murder but with which he had neither been charged nor convicted. "Hearing about other alleged crimes could

damn a defendant in the jury's eyes and be excessively prejudicial." Id. at 1042. The same reversible error occurred in Garron v. State, 528 So. 2d 353, 358 (Fla. 1988) where only one witness was cross-examined about an alleged but unconvicted crime.

Second, the alleged robbery did not refute the witness's testimony, which was limited to her own direct knowledge. Geralds v. State, 601 So. 2d 1157 (Fla. 1992), involved the cross-examination of a defense penalty witness based on prior convicted crimes. There, like in Curtis's case, the State knew not to put on evidence of prior crimes because the defense had promised not to seek statutory mitigation of no significant history of prior criminal activity. Yet the judge permitted the State to do it anyway, erroneously saying the defense opened the door by eliciting the neighbor's testimony that Geralds had played with his kids and "that he personally never had a confrontation with Geralds." Id. at 1161 (emphasis supplied). This Court reversed for a new sentencing.

Defense counsel's questions on direct were clear and narrowly tailored, and Jones's answers were precise. Nothing she said opened the door to this cross-examination. The present case is even worse than Geralds because here the allegation was more damning, and there had never even been a conviction. The State then compounded the error by arguing the unconvicted allegation to the judge, pointing out that prosecutors would have presented it to rebut the claim of lack of significant prior criminal record but did not do so because Curtis waived that mitigation. T1374. The State thereby turned

this evidence into substantive evidence of a nonstatutory aggravating circumstance, an error of the greatest magnitude. Geralds. This error skewed the weighing process and violated Curtis's rights under Florida law and to due process, confrontation, a fair sentencing, and cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

ISSUE XI: THE STATE INVITED TESTIMONY THAT IT THEN USED TO OPEN THE DOOR TO THE INTRODUCTION OF IRRELEVANT MULTIPLE HEARSAY IN THE CO-DEFENDANT'S PRESENTENCE INVESTIGATION REPORT

On cross-examination of Curtis's mother, Debra Baker, the State elicited testimony that she had never been aware that Howard had emotional problems and never noticed anything wrong with him. T1258-59. In its rebuttal case, the State called David Hall. Over objection, Hall was permitted to testify that he learned from Howard's school that Howard "is educably mentally handicapped," and has "some severe problems, emotional problems, and he has an I.Q. of 70 to 72, in that area." T1265.

Baker said nothing in direct to invite this cross-examination. While the State is allowed to rebut mitigating evidence presented by the defense, it cannot "rebut" evidence the defense did not bring in. Randolph v. State, 562 So. 2d 331, 338 (Fla.) (error for State to present evidence of blood transfusion to rebut mitigation when no blood transfusion evidence had been presented by defense), cert. denied, 498 U.S. 992, 111 S. Ct. 538, 112 L. Ed. 2d 548 (1990). Here, the State used the pretense of cross-examination to open a

door that the defense explicitly left closed; then it walked in with inadmissible evidence.

The evidence was inadmissible for other reasons, too. Hall's testimony was double (at least) hearsay about scientific and/or psychological evidence for which only experts are competent and permitted to present. Moreover, it was not probative of any relevant fact because there was no proof whatsoever to show that Howard's "handicap" affected the role he played in this crime. If otherwise admissible, it may have been relevant if the State had put on expert testimony to show that an individual with Howard's mental and intellectual capacity did not have the ability to lead, control, dominate, or commit violent acts on his own. But no such evidence was introduced, and there is nothing in this record to make Hall's testimony relevant to Curtis. Instead, the State wanted the jury and judge to reject mitigation by piling one inference upon another without any connection between them. The multiple layers of hearsay also render this highly suspect evidence utterly worthless and inadmissible in the penalty phase. The State argued this improper testimony and the judge relied heavily on it to reject valid mitigation, R414, see Issue XIV(B), infra, rendering the error even more highly prejudicial.

Section 921.141(1), Florida Statutes (1991), permits evidence to be introduced in the penalty phase provided it has probative value and the accused has the opportunity to rebut it. Evidence that has no probative value and is unduly prejudicial cannot be

admitted. Mendyk v. State, 545 So. 2d 846, 849 (Fla.) (error to introduce pornography found in house), cert. denied, 493 U.S. 984, 110 S. Ct. 520, 107 L. Ed. 521 (1989). Moreover, Curtis had no opportunity to rebut the report. Since the probation officer had no personal knowledge of the source or accuracy of the data and opinion in that report, cross-examining him to rebut the evidence would have been -- and was -- a fruitless endeavor.

Introducing this evidence contributed to the judge's erroneous decision to reject mitigation, tipping the scale in favor of death. The error violated Florida law and Curtis's right to due process, confrontation, a fair sentencing, and cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

ISSUE XII: THE COURT ERRED BY NOT ALLOWING THE JURY IN THE PENALTY PHASE TO SEE THE CONDITIONS OF HOWARD'S PLEA AGREEMENT AND FAVORABLE SENTENCING RECOMMENDATION TO SUPPORT VALID MITIGATION

At the opening of the penalty phase, Curtis tried to introduce Howard's plea agreement showing the charges to which he pleaded, the sentence agreement as to murder, the open sentence as to the other counts, and the conditions upon which Howard entered his plea. The court granted the State's objection as to the conditions, permitting jurors to see the plea but physically cutting it in half, T1162-74, refusing to let jurors see the following:

> The State sentence and recommendation will be conditioned upon the defendant's cooperation in the State of Florida versus Memwaldy Curtis. "Cooperation" is defined as providing truthful

> testimony when called upon to do so by any party in the Memwaldy Curtis case. The truthfulness of the defendant's testimony will be judged in accordance with the sworn statement he has given prior to the entry of the plea.

T1164; R720. The error was compounded when the court prohibited Curtis from asking Howard's probation officer about the favorable sentencing recommendation Howard had received. The probation officer had recommended that the State nolle prosequi the attempted murder and armed robbery charges "only if the defendant cooperates with the trial of the co-defendant, of Memwaldy Curtis." T1267-68.

Any evidence that bears on mitigation must be admitted in the penalty phase. Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Proof of disparate treatment of a co-defendant is valid mitigation. Downs v. State, 572 So. 2d 895, 899 (Fla. 1990), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989); Campbell v. State, 571 So. 2d 415, 419 n. 4 (Fla. 1990); Slater v. State, 316 So. 2d 539, 542 (Fla. 1975); Barrett v. State, 649 So. 2d 219 (Fla. 1994). The reason why the co-defendant got disparate treatment was certainly a relevant penalty issue in this case.

The State's theory was the Howard was the less culpable of the two; that is why he got a life sentence, and that is why his life sentence should not mitigate Curtis's death sentence. Curtis was trying to refute the State's theory by establishing that the reason

Howard got a lesser sentence was because he cut a deal in a pledge of cooperation, not because he was less culpable. That bears directly and significantly on one of the most important mitigating circumstance being contested. See Issue XIV(B), infra.

Moreover, the rule of completeness required submitting the entire document to the jury. That rule is predicated on fundamental fairness: It is unfair to let the jury see one half of a statement or document when showing the entire document would supply context and meaning and be fair to the defendant. See Christopher v. State, 583 So. 2d 642, 645 (Fla. 1991); Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989), review denied, 560 So. 2d 234 (Fla. 1990); Somerville v. State, 584 So. 2d 200 (Fla. 1st DCA 1991); Henry v. State, 566 So. 2d 29 (Fla. 4th DCA), review dismissed, 576 So. 2d 287 (Fla. 1990); see generally Charles W. Ehrhardt, Florida Evidence § 108.1 (1994 ed.).

It in the present case, neither the jury nor the judge considered this valid mitigating evidence. The court's decision to exclude this mitigating evidence was harmful and reversible error going to the heart of the penalty phase itself, where one of the chief issues was the comparing the culpability and treatment of Howard and Curtis. That violates Florida law and Curtis's right to due process, confrontation, a fair sentencing, and cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

ISSUE XIII: THE TRIAL JUDGE ERRED BY FINDING THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE BASED ON THE ATTEMPTED FELONY MURDER OF TAAZIAH, A CRIME THAT DOES NOT EXIST AS A MATTER OF LAW; BY FINDING PECUNIARY GAIN IN THE ABSENCE OF EVIDENCE THAT CURTIS INTENDED THE KILLING; AND BY NOT MERGING THE AGGRAVATING CIRCUMSTANCES AS ONE BECAUSE THEY ALL AROSE FROM THE SAME ASPECT OF THE CRIME

The judge found the crime was committed while engaged in an armed robbery and committed for pecuniary gain, merging those as one; and that Curtis had been convicted of another felony involving violence, specifically the attempted murder of Fouad Taaziah.[14]

The attempted felony murder of Taaziah was the sole ground the State asserted in support of the prior violent felony aggravating circumstance in its argument to the judge and the jury. R386; T1296-97. This is also the only ground upon which the court relied in making its finding. R410-11; T1414. The conviction upon which the State, the judge, and the jury relied in the penalty phase must be vacated because the crime of attempted felony murder does not exist in Florida. State v. Gray, 654 So. 2d 552 (Fla. 1995). See Issue III, supra. Vacating this conviction necessarily requires vacating the aggravating circumstance based on it. Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (invalid conviction cannot be used in aggravation).

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[14] Curtis recognizes that Florida law authorized the court to find the circumstance of murder committed during the course of an enumerated felony. That statute is unconstitutional on its face and as applied on the ground that it creates an automatic aggravating circumstance. However, because this Court has rejected that argument in other cases, Curtis raises the issue without fully briefing it here.

Eliminating the prior violent felony leaves only two circumstances, pecuniary gain and committed during the course of an armed robbery. Even though the judge properly merged them as one because they both involve the same aspect of the crime, e.g. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977), the judge should not have found pecuniary gain because it was not proved beyond a reasonable doubt. This circumstance arose solely from the commission of the enumerated felony of armed robbery, a guilt-phase element of the crime. Proof of this guilt phase element does not necessarily constitute the pecuniary gain aggravating circumstance, and it certainly does not apply on these facts.

An aggravating circumstance is the bridge our society has drawn to cross from life to death, a measure of a particular individual's moral as well as legal culpability -- beyond mere guilt -- to narrow the class of those guilty of murder who may be sentenced to death. It must show the defendant's culpability is much greater than culpability for first-degree murder alone. Accordingly, finding an aggravating circumstance must be a finding personal to the defendant's relevant acts and character. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). The pecuniary gain circumstance, like "heightened premeditation," is related to but not wholly subsumed within a guilt-phase essential element of first-degree murder, and therefor it is not proved merely by the fact that a death occurred during a robbery. See, e.g., Porter v. State, 564

So. 2d 1060, 1064 (Fla. 1990) (distinguishing heightened premeditation from premeditation), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). It takes more: proof that the individual against whom the circumstance is applied actually personally had formed the "primary motive" of killing for personal enrichment as a necessary component of facilitating the crime. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). It cannot be imputed vicariously to one defendant based on another defendant's motive to kill, just as the heinous, atrocious, or cruel factor cannot be imputed vicariously from the actual killer to a defendant unless the State proves beyond a reasonable doubt that the defendant personally shared that motive. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Omelus v. State, 594 So. 2d 563 (Fla. 1991). Premeditating or planning to commit a robbery does not constitute premeditating or planning to kill for the purposes of proving an aggravating circumstance. Barwick v. State, 20 Fla. L. Weekly S405, 409 (Fla. July 20, 1995); Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2369, 86 L. Ed. 2d 267 (1985).[15] The pecuniary gain factor must be a measure of this defendant's subjective intent.

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[15] Nor does premeditation to rob equate with premeditation to kill for guilt purposes. Felony murder is a legal fiction created to substitute for premeditation in the guilt phase when premeditation has not been proved. E.g. Mungin v. State, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995).

There is no evidence to prove beyond a reasonable doubt that Curtis had ever intended to kill or intended that a killing take place, or that Curtis ever believed killing was necessary to facilitate the robbery. Anthony Howard killed Khair-Bek because he was angry at Khair-Bek for dropping the money. Howard shot him while Curtis was bent over on the ground. The money already had been tendered, and all Curtis had to do was pick it up and leave. Thus, there is no evidence that Curtis sought Khair-Bek's death for pecuniary gain. Even if Howard's motive had been to kill for pecuniary gain, his motive cannot be vicariously imputed to Curtis.

The court erred by finding the prior violent felony and pecuniary gain circumstances and weighing them against Curtis, rendering the sentencing unreliable in violation of both Florida law and Curtis's constitutional rights to due process, a fair sentencing, and protection against cruel and/or unusual punishment. U.S. Const. amends. VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

ISSUE XIV: THE COURT ERRED BOTH IN REJECTING, AND FINDING BUT GIVING INSUFFICIENT WEIGHT TO, SIGNIFICANT MITIGATION ESTABLISHED IN THIS RECORD

The trial court is obligated to consider, find and weigh all statutory and nonstatutory mitigating circumstances reasonably supported by the record. Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) ("when a reasonable quantum

of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."); Campbell v. State, 571 So. 2d 415 (Fla. 1990). Yet the trial court rejected mitigating factors for reasons that have no basis in fact, law, or common sense. The errors in refusing to find or sufficiently weigh aggravating circumstances violates Florida law and Curtis's federal and state constitutional rights to due process, a fair sentencing, and protection against cruel and/or unusual punishment. U.S. Const. amends. VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

A. The court made erroneous findings unsupported by the record to give practically no weight to the substantial mitigating circumstance that Curtis was a minor of 17

"Chronological age of a minor is itself a mitigating factor of great weight." Eddings, 455 U.S. at 116 (emphasis supplied). In Ellis v. State, 622 So. 2d 991 (Fla. 1993), this Court noted its grave concern over many judges' misapplication of the mitigating circumstance of a minor child's age, find in that case that the judge erred by not finding and weighing Ellis's age of 17. Ellis made absolutely clear that a judge may reduce the mitigating weight of a minor child's age only when evidence shows that the child "possessed unusual maturity," mental and emotional, at the time of his alleged crimes. 622 So. 2d at 1001 (emphasis supplied). There is no evidence to diminish youth mitigation in this record, yet the judge gave it "very little weight" because of findings and reasoning that offends common sense, denigrates valid mitigation, and violates

both Florida law and Curtis's constitutional rights.

The judge made the following finding as to age:

> The defendant was seventeen years old on the day of the crime. This is a statutory mitigating factor. However, the defendant committed this crime in a very mature manner. This was not a crime of childhood impulse, but a crime that was carefully planned and executed by this defendant. The evidence showed that this defendant provided the weapons used in the robbery and planned this robbery. The defendant made sure that this robbery occurred when no customers were in the store. This crime was conducted in a mature and adult manner. The evidence, if anything, shows that the defendant was more mature than his biological age at the time of the offense.
>
> According to the testimony of the defendant's fiance, the defendant was the father of one child approximately eight months old on the date of this murder, and she was nine months pregnant with a second one of his children. The defendant chose to bring children into this world and become a father, and was in every way conducting himself as an adult. The statutory mitigating factor of age, while proven, must be given very little weight in determining whether the mitigating circumstances outweigh the aggravating circumstances.

R411-12. These findings do not establish "unusual maturity."

The record shows that two teenagers with handguns burst into their neighborhood store at night, shot up the place, and ran away -- all for $25 apiece. They had been regular customers, yet they had no gloves or masks to conceal their identities from the clerks or passersby; they had nobody posted outside to make sure their crime went uninterrupted; they had no getaway car or escape plan; there is no evidence of careful forethought or planning; they remained in the neighborhood just a couple of blocks away immediately afterward; and then they told a friend all about it and showed him their weapons to

prove they did it. This was a run-of-the-mill convenience store robbery committed by juveniles, albeit a terrible crime with horrible results; but there was certainly nothing "very mature", "adult" or "sophisticated" to warrant a finding of "unusual" mental and emotional maturity.

If this crime was so "very mature" to justify denigrating age as mitigation, then any crime will be considered "very mature" and judges will be free to belittle youth mitigation in virtually any case rather than those few where the evidence actually shows unusual maturity. This practice was also prohibited in Morgan v. State, 639 So. 2d 6 (Fla. 1994). The judge rejected the age of 16 as mitigation saying that a person who had reached the age of responsibility cannot reasonably raise age as a shield against the death penalty. This Court reversed, holding that "[t]o apply the standard used by the trial judge would effectively eliminate age as a mitigating factor in almost every case." Id. at 14. Cf. State v. Mischler, 488 So. 2d 523 (1986) (guidelines departure only for extraordinary reasons). Condoning the judge's reasoning also would defy the rule that death is reserved only for the most aggravated and least mitigated of crimes. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

The judge's other findings with respect to age are deplorable. The judge condemned this youth for his "mature" action of fathering two children out of wedlock. Curtis was a 17-year-old high school dropout working at a fast-food restaurant and living with his

mother. He impregnated his fiancée with their first child, Memwanisha, at the age of 16, and with their second child, Brittany, at the age of 17. His fiancée was even two years younger (she was 17 and he was 19 at the time of trial). And according to the State's evidence, he was involved with crack cocaine and had to resort to robbing a store to pay a drug debt rather than help provide for his infant child and pregnant fiancée. The evidence shows exactly the opposite of what the judge concluded: Curtis was not mentally and emotionally a mature adult who knew how to handle adult responsibilities. A boy's ability to impregnate his girlfriend is a purely physical phenomenon. This Court already has recognized that a minor's choice to engage in sexual activity is youthful and dangerous folly, B.B. v. State, 659 So. 2d 256 (Fla. 1995); Jones v. State, 640 So. 2d 1084 (Fla. 1994), not a act of unusual maturity. See also LeCroy v. State, 533 So. 2d 750, 657 (Fla. 1988) (noting that death sentence is rarely imposed on minors, due in part to minors' immaturity), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989). Moreover, there was no evidence that Curtis "chose" to have children.

The judge's decision to give "very little weight" to this child's age is wholly insupportable. Even in LeCroy, where this Court affirmed a 17-year-old's death sentence, the trial judge had given "great weight" to youth as a mitigating circumstance with even more evidence of maturity that exists in this case.

B. The more culpable co-defendant received a lesser sentence

The trial judge rejected as statutory mitigating evidence the fact that Curtis was an accomplice to the murder. He found:

> The evidence in the trial proved beyond a reasonable doubt that the defendant was the instigator of the robbery. The guns in the murder and robbery belonged to this defendant. He entered the store together with the co-defendant, Anthony Howard. Both gunmen demanded money. This defendant pointed a gun at Najwan Khair Bek while Anthony Howard pointed a gun at Fouad Taaziah. This defendant took money from Najwan Khair Bek. After Anthony Howard shot Najwan Khair Bek and Mr. Khair Bek was fallen to the ground, this defendant then shot Mr. Khair Bek. While the defendant's bullet was not the one that actually killed Mr. Khair Bek, the defendant did actually shoot him. The mere fact that it was not the defendant's bullet that killed Mr. Khair Bek does not prove this mitigating factor. The law should not, and does not, reward bad aim or the fact that the victim's foot absorbed the brunt of the force of the bullet before it struck him in the chest. The defendant's involvement cannot be considered "relatively minor". The jury found beyond a reasonable doubt that the defendant intended for reasonable force to be used, and intended that a killing take place, by bringing a loaded firearm to the robbery, and by shooting Mr. Khair Bek. The law is clear that where the defendant was the instigator of the robbery and was a primary participant in the crime, this mitigating factor should not be found. This mitigating factor is not found to exist in this case.

R412. In a related claim, the judge rejected as nonstatutory mitigation the fact that Howard, the actual killer and leader inside the store, got a lesser sentence for his crimes, saying:

> The facts and circumstances surrounding this defendant and the co-defendant, Anthony Howard, are not the same. The facts and circumstances support a more severe sentence for this defendant.
>
> According to the testimony of Albert Fountain, it was this defendant's idea to commit the robbery

> which resulted in the murder. This defendant planned the robbery and provided the firearms used. This defendant recruited Anthony Howard to assist him. Albert Fountain's testimony was corroborated by the oral and written statements of Anthony Howard that were admitted into evidence during the guilt phase. During the penalty phase it was established that Anthony Howard has severe emotional problems and is mentally handicapped. Anthony Howard clearly was not the dominate [sic] force in this robbery and murder. The defendant was clearly the dominant force behind this crime. That, combined with the fact that the co-defendant, Anthony Howard, suffered severe emotional problems, and was mentally handicapped, justifies this defendant receiving a harsh sentence.
>
> The defendant argues that it should be mitigation that he did not fire the fatal shot. However, the defendant did shoot the victim. The fact that the co-defendant's bullet hit him first and was fatal does not give rise to a mitigating circumstance. Both this defendant and his cohort were "triggermen". No weight is given to this factor.

R413-14.

The record could not be more clear in contradicting these findings. Although Curtis may have suggested the robbery and supplied the weapons (both facts in dispute), Taaziah -- the State's only eyewitness -- said Howard was the leader (a fact consistent with Curtis's mother's testimony that Curtis is not a leader). Howard was the first to walk in. Howard pointed the gun at Taaziah and demanded money. Howard shot Taaziah in the chest right away after seeing him flinch.[16] Howard fired a total of three shots,

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[16] It is unclear as to whether Howard wounded Taaziah, missed Khair-Bek, then killed Khair-Bek (Howard's story at T777-80), or whether Howard missed Taaziah and then shot Taaziah and Khair-Bek (Curtis's testimony at T872-72). This Court should also take into consideration the fact that Howard never

striking Taaziah and killing Khair-Bek. Then and only then did Curtis fire a shot. The evidence showed that Curtis fired a shot that somehow struck Khair-Bek in the foot, the powerless projectile falling against his chest never even piercing the lining of his warmup suit. But the evidence is not clear as to whether Curtis shot intentionally or accidentally, and the State presented absolutely no evidence as to who or what Curtis aimed at if he aimed at all. Not one scintilla of evidence shows he planned to kill anybody or that he intended a death to result. The State even expressly disavowed the idea that he had premeditated murder. T1037.

Despite all this, Anthony Howard got favorable treatment, probably because by chance he was the first one arrested and interrogated. Thus, the actual killer got a life sentence for committing the murder for which Curtis was sentence to die. The actual killer's deal also opened the possibility that he will get a lenient sentence on the charges of attempting to murder Taaziah and robbing the store, for which Curtis was ordered to spend the rest of his life in prison.

The most flagrant flaw in the trial court's reasoning is its failure to distinguish culpability for the robbery from culpability for the murder. Planning a robbery is not the same as planning a murder that occurs during the crime. Barwick v. State, 20 Fla. L. Weekly S405, 409 (Fla. July 20, 1995); Hardwick v. State, 461 So. 2d

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testified, so his veracity and credibility have not been tested.

79, 81 (Fla. 1984). Likewise, being a major participant in a robbery does not mean that he was the one most responsible for committing murder. The record establishes that Curtis was not the most responsible for the murder, and the judge abused his discretion in rejecting this uncontroverted mitigation. Proof that a triggerman codefendant got a lesser sentence is valid nonstatutory mitigation. Downs v. State, 572 So. 2d 895, 899 (Fla. 1990), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989); Campbell v. State, 571 So.2d 415, 419 n. 4 (Fla.1990); see Slater v. State, 316 So. 2d 539, 542 (Fla. 1975) (reversing death sentence as disproportional where actual killer pleaded for life sentence); Barrett v. State, 649 So. 2d 219 (Fla. 1994) (disparate treatment of co-defendant in quadruple murder required reversing jury override).

The Court's reasoning also is defective because it erroneously relied on incompetent, irrelevant evidence of Howard's mental abilities that in no respect whatsoever was shown to have diminished Howard's role or level of culpability. See Issue XI, supra. Some emotionally troubled people commit murder, and their emotional level doesn't make them less culpable than a person who did not kill.

C. Uncontroverted evidence established remorse

The judge's findings are ambiguous as to remorse: he neither found it nor rejected it. That alone is a violation of the clarity required by Campbell. To the extent that the judge may have found remorse, he minimized it:

> The defendant has asserted the non-statutory

> mitigating circumstance that he has shown remorse for his conduct. During the penalty phase, the defendant's family testified that he behaved in a manner which to them indicated that he had remorse for his conduct, including an alleged suicide attempt. On cross-examination these witnesses conceded that the defendant never came out and verbally expressed remorse. Furthermore, during the guilt phase of the trial the defendant testified in his own defense. He never acknowledged guilt of remorse in his testimony, but testified that he acted under duress. The defendant's testimony was inconsistent with the testimony of the other witnesses and was rejected by the jury. While a defendant has an absolute right to a trial and to have the State prove the charges against him, he does not have the right to commit perjury. It would be difficult to find that this defendant had much remorse in light of his guilt phase testimony. If any weight is to be given to this non-statutory mitigating circumstance, it must be very minimal at best.

R414-15.

Again the judge applied inappropriate reasoning. Curtis testified that he was present in the store but acted under duress the whole time, and that his gun went off accidentally, not hitting anybody. It would have been grossly inconsistent to tell the jury "I am not responsible for this murder" and at the same time "I'm sorry I killed him." Yet that is what the judge wanted to hear. Despite what the judge said, he did in effect penalize Curtis for testifying and asserting a duress defense. The judge had the authority to reject Curtis's testimony about the crime, but he could not use that reason to reject remorse otherwise proved by the uncontroverted testimony of three witnesses.

D. Uncontroverted evidence established poor education

The trial court rejected uncontroverted evidence of Curtis's poor educational background by reasoning that

> There was no evidence presented that the defendant's intelligence level was so low as to influence his ability to function in society or to have influenced this murder. There was nothing presented that indicated that the defendant's intelligence level was too low to be able to appreciate the consequences of conduct. The Court finds that this non-statutory mitigating factor does not exist.

R415. The court read into this nonstatutory circumstance artificial burdens requiring Curtis to prove inability to appreciate the consequences of conduct and to function in society. The judge had the authority not to find inability to appreciate the consequences of conduct and to function in society. But that is not what Curtis proved, and the judge did not have the authority to reject Curtis' poor educational background as nonstatutory mitigation.

E. Uncontroverted evidence established that Curtis is a good father

The court rejected uncontroverted mitigating evidence from those who know Curtis best proving that he is very supportive of his children, doing things like taking care of the kids himself when their mother wasn't around, taking them to the doctor, playing with them at the park, and treating their mother wth love and respect. The court said:

> The defendant contended that the defendant is a good father, and that that should be considered as a non-statutory mitigation. The defendant's fiance did in fact testify that he is a good father to her two children. However, on cross-examination, she

> admitted that when the defendant committed this murder, he already had one eight month old child, and was imminently expecting the birth of his second child. When the defendant was already a father he was out on the street selling cocaine, and as a result of a profit shortfall in his drug sales, he went out and robbed a convenience store, resulting in the death of the store clerk. By no stretch of the imagination has it been shown that the defendant is a good father. Being able to father children easily, and being a good father, are two clearly different things. This is one of the great tragedies of American society today. For the defendant to stand behind his fatherhood in light of the facts in this case is a travesty indeed. No mitigating factor has been shown here.

R415. Under the judge's reasoning, no parent who commits a crime can be considered a good parent despite all he or she might do to support the family. The judge may disapprove of Curtis's behavior, but he cannot say he is a bad father as a matter of law based on uncontroverted evidence to the contrary. Those who know him best, and who care most about his relationship to his kids, know him to be a good father. The judge was wrong to reject this mitigation by imposing his own personal subjective standards of what constitutes good parenting.

ISSUE XV: THE DEATH PENALTY IS DISPROPORTIONAL PUNISHMENT IN AN ORDINARY ROBBERY/SHOOTING WHERE THE 17-YEAR-OLD DEFENDANT DID NOT KILL, THE KILLER GOT LIFE, ONLY ONE VALID AGGRAVATING CIRCUMSTANCE EXISTS, AND OTHER MITIGATING EVIDENCE WAS PRESENTED

Curtis was 17-years-old at the time, a mitigating circumstance that should have great weight. Anthony Howard was the one who started the shooting, shot both clerks, and killed Khair-Bek, yet Howard got a life and a chance for leniency on the other counts.

Curtis feels remorse. He is a good father to two young children. He helps others when in need, including family, friends, and strangers alike. He is poorly educated, raised in the unstable background of a broken home where each parent left for years a time. He has adjusted well to prison life. Against this background, the State proved only one valid aggravating circumstance having to do with the armed robbery.

This is an ordinary robbery/shooting with only one aggravating circumstance and a great deal in mitigation. This Court generally reverses death sentences based on only one valid aggravating factor, affirming only when there is little or no mitigation. In Thompson v. State, 647 So. 2d 824 (Fla. 1994), the Court reversed the death sentence imposed pursuant to a 9-3 death recommendation where Thompson walked into a restaurant and shot an employee in the head during a robbery. After striking three of four aggravating circumstances, it found that murder committed during a robbery was outweighed by "significant" mitigation that he had been honorably discharged from the Navy, had been regularly employed, was raised in the church, possessed rudimentary skills, and was a good prisoner. See also, e.g., Besaraba v. State, 656 So. 2d 441 (Fla. 1995) (reversing two death penalties where only aggravator was for contemporaneous murder of second victim); Knowles v. State, 632 So. 2d 62 (Fla. 1993) (reversing two death penalties where only aggravator was for contemporaneous murder of second victim); Songer v. State, 544 So, 2d 1010 (Fla. 1989 (reversed where defendant was

23 when he shot a state trooper after walking away from a prison work-release program, finding single aggravator outweighed by strong mitigation including, among other things, youth, remorse, desire to help others, ability to adapt to prison life, emotionally impoverished upbringing, positive influence on his family). The facts in these cases are even worse than the evidence against Curtis.

This case also is similar to Jackson v. State, 575 So. 2d 181 (Fla. 1991). Clinton Jackson was convicted of felony murder and sentenced to death following a 10-2 recommendation for being one of two robbers who held up a store and killed the clerk. With only one doubled aggravator, this Court reversed the sentence on proportionality grounds finding insufficient evidence to prove "beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose conviction rests solely upon the theory of felony murder." Id. at 192. The facts there were even worse than the present case because Clinton's brother, Nathaniel, had been sentenced to death for the same robbery/murder upon evidence showing that Clinton Jackson himself had fatally shot the victim, whereas in this case we know that Curtis did not kill the victim, and his co-defendant who did kill got a life sentence.

Disparate treatment of Curtis's co-defendant also warrants reversal on proportionality grounds. E.g., Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) (reversing death sentence on collateral review where equally culpable codefendant got life sentence after Scott had

been sentenced); Slater v. State, 316 So. 2d 540, 542 (Fla. 1975) (reversing death sentence as unconstitutionally disproportional where actual triggerman was allowed to plead for life sentence).

The Court has also put great emphasis on youth in vacating death sentences on proportionality grounds, rarely affirming a death sentence for one so young, even when the facts were far worse than those here. See Morgan v. State, 639 So. 2d 6 (Fla. 1994) (reversing for 16-year-old who committed brutal murder); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (reversing for 17-year-old who alone committed robbery/murder and attempted first-degree murder of second victim); Thompson v. State, 328 So. 2d 1 (Fla. 1976) (reversing for 17-year-old who alone committed robbery/murder).

This Court is required to compare the aggravating and mitigating circumstances, and to compare the present case with other cases to determine if the death penalty is a proportional and appropriate sentence. See Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Tillman v. State, 591 So.2d 167 (Fla. 1991); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). When compared to these and other cases, the death sentence imposed here constitutes disproportional punishment in violation of Florida law and Curtis's federal and state constitutional rights to due process, a fair sentencing, and protection against cruel and/or unusual punishment. U.S. Const. amends. VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const. This Court should order imposition of a life sentence. If the Court reverses for a new trial as to guilt, it should instruct the trial court not

to impose the sentence of death if he is convicted on retrial.

CONCLUSION

For the reasons expressed above, this Court should reverse the convictions, vacate the sentences, and remand for a new trial. In the event this Court affirms the conviction for first-degree murder, it should vacate the death sentence and remand that charge for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy if this Initial Brief of Appellant has been furnished by ~~delivery~~ U.S. Mail to Mr. Richard Martell, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301; and a copy has been mailed to Mr. Memwaldy Curtis, on this 1st day of November, 1995.

Respectfully submitted,

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INDEX TO APPENDIX

OFFICIAL RECORDS

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 93-12623 CF
DIVISION: CR-E

STATE OF FLORIDA

vs.

MEMWALDY CURTIS

C. S.
THIS INSTRUMENT
IS COMPUTER

FILED
JUL 28 1994
CLERK CIRCUIT COURT

ORDER IMPOSING DEATH PENALTY

THIS CAUSE came on to be heard for sentencing. The defendant was present in Court with counsel, and the State was represented.

The defendant was tried on June 6, 1994. Following four days of trial, the jury deliberated forty-four minutes before finding the defendant guilty on all counts in the Indictment, including murder in the first degree. On June 24, 1994, the same jury returned for the penalty phase. Evidence was adduced and argument of counsel was heard by the jury and the Court. After being instructed by the Court and deliberating for sixty-five minutes, a majority of the jury, by a vote of nine to three, recommended that the defendant be sentenced to death for the first degree murder of Najwan Khair Bek. On July 22, 1994, argument of counsel to the Court alone in aggravation and mitigation was heard. The Court took the issue under advisement, and the case is before the Court today, July 28, 1994, for imposition of sentence.

The Court finds that the following aggravating circumstances have been proved beyond

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a reasonable doubt:

1. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

The first degree murder of Najwan Khair Bek was committed while the defendant was engaged in the commission of an armed robbery at a Safeco store, a Jacksonville convenience store. The same jury concomitantly found the defendant guilty of this robbery. This circumstance has been proven beyond a reasonable doubt. This aggravating circumstance, standing alone, is sufficient to justify the imposition of a death sentence.

2. The crime for which the defendant is to be sentenced was committed for financial gain.

This murder occurred as a result of the defendant's attempt to obtain money from a robbery. The witness, Albert Fountain, testified that the defendant admitted to him that the robbery at the Safeco store was committed in order to pay a drug debt. The defendant admitted to Detective Hinson that he did receive money from the robbery. The defendant also admitted during the trial, when he testified, that he did receive money from the robbery. This aggravating circumstance has been proven beyond a reasonable doubt. This aggravating circumstance, standing alone, is sufficient to justify the imposition of a death sentence.

This aggravating circumstance, and the prior one of murder during the commission of a robbery, merge, and are considered as one aggravating circumstance. These two aggravating circumstances, when merged, are proven beyond a reasonable doubt, and justify the imposition of a death sentence.

3. The defendant has been previously convicted of another felony involving violence.

The defendant was found guilty in the same trial of attempted first degree murder of the second person in the Safeco store, Fouad Taaziah. The jury found the defendant guilty of this attempted first degree murder. While this defendant did not fire the shot that struck Mr. Taaziah, he was clearly a principal in that offense. This violent felony against a separate victim has been proved beyond a reasonable doubt during the trial, and as an aggravating circumstance, it is sufficient standing alone to justify the imposition of a death sentence.

With regard to mitigating circumstances, the Court finds that the following mitigating circumstance was proven:

1. The age of the defendant at the time of the crime.

The defendant was seventeen years old on the day of the crime. This is a statutory mitigating factor. However, the defendant committed this crime in a very mature manner. This was not a crime of childhood impulse, but a crime that was carefully planned and executed by this defendant. The evidence showed that this defendant provided the weapons used in the robbery and planned this robbery. The defendant made sure that this robbery occurred when no customers were in the store. This crime was conducted in a mature and adult manner. The evidence, if anything, shows that the defendant was more mature than his biological age at the time of the offense.

According to the testimony of the defendant's fiance, the defendant was the father of one child approximately eight months old on the date of this murder, and she was nine months pregnant with a second one of his children. The defendant chose to bring children into this world and become a father, and was in every way conducting himself as an adult. The statutory mitigating factor of age, while proven, must be given very little weight in determining

whether the mitigating circumstances outweigh the aggravating circumstances.

The following mitigating circumstances were either not proven or found to be of insignificant weight:

1. The defendant attempted to prove that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person, and the defendant's participation was relatively minor. This mitigating circumstance was not proven and is given no weight. The evidence in the trial proved beyond a reasonable doubt that the defendant was the instigator of the robbery. The guns in the murder and robbery belonged to this defendant. He entered the store together with the co-defendant, Anthony Howard. Both gunmen demanded money. This defendant pointed a gun at Najwan Khair Bek while Anthony Howard pointed a gun at Fouad Taaziah. This defendant took money from Najwan Khair Bek. After Anthony Howard shot Najwan Khair Bek and Mr. Khair Bek was fallen to the ground, this defendant then shot Mr. Khair Bek. While the defendant's bullet was not the one that actually killed Mr. Khair Bek, the defendant did actually shoot him. The mere fact that it was not the defendant's bullet that killed Mr. Khair Bek does not prove this mitigating factor. The law should not, and does not, reward bad aim or the fact that the victim's foot absorbed the brunt of the force of the bullet before it struck him in the chest. The defendant's involvement cannot be considered "relatively minor". The jury found beyond a reasonable doubt that the defendant intended for reasonable force to be used, and intended that a killing take place, by bringing a loaded firearm to the robbery, and by shooting Mr. Khair Bek. The law is clear that where the defendant was the instigator of the robbery and was a primary participant in the crime, this mitigating factor should not be found. This mitigating factor is not found to exist in this case.

2. The defendant argued that he was under extreme duress or the substantial domination of another person.

The defendant took the stand and testified that he was forced by Anthony Howard to commit this robbery. The jury was instructed during the guilty phase that if they found that the defendant acted under duress, they should find him not guilty. After receiving that instruction, the jury rejected the duress defense and found the defendant guilty as charged, beyond a reasonable doubt. The defendant's testimony was riddled with flaws, and was contradicted by all the other evidence in the case. The jury correctly rejected this contention, as does the Court. The mitigating circumstance of extreme duress was not proven, and carries no weight in this sentence.

3. The defendant made the strategic decision not to adduce any evidence pertaining to the lack of significant history of prior criminal activity by this defendant. The announcement of this decision was given to the Court, following the State's advising the defense that if they intended to put on evidence of the defendant's lack of significant history, the State was prepared to rebut that evidence with evidence that the defendant has been charged with robbing a Krystal's restaurant in March of 1993, and had been arrested for burglary and possession of cocaine in 1991. This mitigating circumstance was not proven and carries no weight.

The defendant raised some non-statutory mitigating circumstances in the penalty phase. The first is that the co-defendant, Anthony Howard, pled guilty and received a sentence of life imprisonment. The facts and circumstances surrounding this defendant and the co-defendant, Anthony Howard, are not the same. The facts and circumstances support a more severe sentence for this defendant.

According to the testimony of Albert Fountain, it was this defendant's idea to commit the robbery which resulted in the murder. This defendant planned the robbery and provided the firearms used. This defendant recruited Anthony Howard to assist him. Albert Fountain's testimony was corroborated by the oral and written statements of Anthony Howard that were admitted into evidence during the guilt phase. During the penalty phase it was established that Anthony Howard has severe emotional problems and is mentally handicapped. Anthony Howard clearly was not the dominate force in this robbery and murder. The defendant was clearly the dominant force behind this crime. That, combined with the fact that the co-defendant, Anthony Howard, suffered severe emotional problems, and was mentally handicapped, justifies this defendant receiving a harsh sentence.

The defendant argues that it should be mitigation that he did not fire the fatal shot. However, the defendant did shoot the victim. The fact that the co-defendant's bullet hit him first and was fatal does not give rise to a mitigating circumstance. Both this defendant and his cohort were "triggermen". No weight is given to this factor.

Remorse. The defendant has asserted the non-statutory mitigating circumstance that he has shown remorse for his conduct. During the penalty phase, the defendant's family testified that he behaved in a manner which to them indicated that he had remorse for his conduct, including an alleged suicide attempt. On cross-examination these witnesses conceded that the defendant never came out and verbally expressed remorse. Furthermore, during the guilt phase of the trial the defendant testified in his own defense. He never acknowledged guilt or remorse in his testimony, but testified that he acted under duress. The defendant's testimony was inconsistent with the testimony of the other witnesses and was rejected by the jury. While a

defendant has an absolute right to a trial and to have the State prove the charges against him, he does not have the right to commit perjury. It would be difficult to find that this defendant had much remorse in light of his guilt phase testimony. If any weight is to be given to this non-statutory mitigating circumstance, it must be very minimal, at best.

The Court gives no weight to the defendant's contention that the defendant had poor grades and test scores while in school. There was no evidence presented that the defendant's intelligence level was so low as to influence his ability to function in society or to have influenced this murder. There was nothing presented that indicated that the defendant's intelligence level was too low to be able to appreciate the consequences of his conduct. The Court finds that this non-statutory mitigating factor does not exist.

The defendant contended that the defendant is a good father, and that that should be considered as a non-statutory mitigation. The defendant's fiance did in fact testify that he is a good father to her two children. However, on cross-examination, she admitted that when the defendant committed this murder, he already had one eight month old child, and was imminently expecting the birth of his second child. When the defendant was already a father he was out on the street selling cocaine, and as a result of a profit shortfall in his drug sales, he went out and robbed a convenience store, resulting in the death of a store clerk. By no stretch of the imagination has it been shown that the defendant is a good father. Being able to father children easily, and being a good father, are two clearly different things. This is one of the great tragedies of American society today. For the defendant to stand behind his fatherhood in light of the facts in this case is a travesty indeed. No mitigating factor has been shown here.

The defense introduced testimony during the penalty phase that the defendant helped a

schoolmate involved in a fight several years ago, and that while he was incarcerated he helped another inmate make a telephone call. While these two facts may in the farthest stretch of the imagination indicate non-statutory mitigation, they should be and are given very little weight.

The defendant presented testimony and argument that he had adjusted well while incarcerated. This is a non-statutory mitigation, and while the testimony did prove the mitigation, the Court affords it very little, if any, weight.

The aggravating circumstances in this case clearly outweigh the mitigating circumstances. Wherefore, it is upon consideration, hereby

ORDERED AND ADJUDGED that the Court must follow the jury's recommendation and impose a death sentence in Count I.

DONE AND ORDERED in Open Court, Jacksonville, Duval County, Florida, this 28th day of July, 1994.

L. V. Haddock
CIRCUIT JUDGE

Copies to:

Howard M. Maltz
Assistant State Attorney

Refik W. Eler
Attorney for Defendant

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ELSTON WATSON,

Appellant,

v. CASE NO. 93-3145

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

App. 4(a)

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT
FLA. BAR NO. 0513253

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED REVERSIBLY IN SUSTAINING THE PROSECUTOR'S NEIL OBJECTIONS TO THE DEFENSE'S PEREMPTORY CHALLENGES OF WHITE PROSPECTIVE JURORS, AND IN SEATING TWO OF THESE JURORS ON THE JURY THAT CONVICTED APPELLANT.

The issue here is whether the trial court improperly applied the principle of Neil - which governs the peremptory challenge of black prospective jurors - to appellant Watson's peremptory challenges of white prospective jurors. State v. Neil, 457 So.2d 481 (Fla. 1984), clarified in State v. Castillo, 486 So.2d 565 (1986). Appellant contends that, not only did the trial court improperly deny his right to peremptorily challenge white prospective jurors, but also, that the jury selection process here made a travesty of Neil.

Neil and its progeny require that the state's reason for excusing a minority prospective juror be race-neutral, reasonable, and non-pretextual. See State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). As the supreme court has noted, "[u]nfortunately, the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives." Slappy, 522 So.2d at 22, citing Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1722-23, 90 L.Ed.2d 69 (1986).

In Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991), review denied, 599 So.2d 658 (Fla. 1992), this court for the first time considered whether the state can make a Neil

challenge to the defense's peremptory challenge of white prospective jurors. This court held that, even when such jurors constitute a majority of the venire, the peremptory challenge of white jurors was nevertheless subject to Neil. 591 So.2d at 984-85. The court also held, however, that the state "carries an enormous burden to establish invidious racial motivation" in such a case. Id. at 986; see also Rome v. State, 627 So.2d 45 (Fla. 1st DCA 1993); McClain v. State, 596 So.2d 80 (Fla. 1st DCA 1992), review dism. 614 So.2d 498 (Fla. 1993). It is noteworthy that Elliott, Rome, and McClain all involved the same trial judge - Nicholas Geeker - and the same prosecutor - Lawrence Kaden - as the instant case.

Neil begins with a presumption that peremptory challenges are exercised in a nondiscriminatory manner. If they are not, then the complaining party must show that challenged jurors are members of a "distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race" (emphasis added). 457 So.3d at 486. Here, the state utterly failed to meet its initial burden of showing the white jurors were challenged solely on the ground of their race.

Moreover, in Elliott, this court held that the state had an enormous burden to prove that defense challenges of white prospective jurors were racially motivated. This enormous burden must necessarily be more than the "strong likelihood" required by Neil. In Rome, this court described the burden as "heavier than normal." 627 So.2d at 46. The prosecutor here

offered no evidence and merely conclusory argument that Watson's challenges were racially motivated, and the judge made no ruling that the state had met its threshold burden. This argument and ruling violated Neil.

Appellant, Elston Watson, is black. At the outset of jury selection, defense counsel, John Albritton, noted that Watson's petit jury was being selected from a panel of 14 prospective jurors, of whom only one - Ms. Price - was black (T-5). Ms. Price would later say that her brother had been charged with the crime of sexual battery (T-32). At the beginning of the actual selection process, defense counsel renewed his objection to the lack of black prospective jurors, and mentioned that one [Asian] juror had been replaced by a white female (T-39).

After defense counsel excused two jurors, the prosecutor objected that he had struck "the number of white jurors in order to get to the one black juror [Price], and I think he needs to state his reasons and they need to be race neutral" (emphasis added) (T-40). Defense counsel responded that all his strikes were race neutral "for cause," and that practically everybody he struck was replaced by another white person. He said there was only one black person on the panel and it was inevitable, if he exercised any strikes, that he would get to her. The court agreed with this assessment (T-40).

Appellant contends this argument came nowhere near meeting the state's initial "enormous" burden of proving that the peremptory challenges were being used in a racially-discriminatory manner.

This colloquy followed:

> [PROSECUTOR]: Your honor, he's already said that he's objecting because they [sic] were not enough blacks on the panel, and he's now struck four white jurors for no apparent reason.
>
> [DEFENSE COUNSEL]: If you put me some blacks on there, I will strike them for you. There are none to strike. . .

(T-40). The prosecutor objected that the defense had to state "reasonable reasons if he's doing a racial discriminatory manner" (T-41).

The court said there was a case out of the Florida Supreme Court "where, [if] there is an objection made, then the court ought to go ahead and require the statement of any race neutral reasons" (T-41). Defense counsel then offered race neutral reasons for excusing four white jurors - Stabler, Rader, O'Daniel, and Carter, which the court accepted (T-41-42). The prosecutor then excused the only black prospective juror - Price. The defense objected that it would leave Watson with an all-white jury, but the objection was overruled (T-42-43).

When defense counsel challenged prospective juror Donald Speck, he gave as a reason that Speck knew one of the law enforcement witnesses. The prosecutor said Speck knew someone with the same last name, not the law enforcement officer. The court denied this challenge (T-44-45). Defense counsel challenged prospective juror Ms. Bain. Defense counsel believed she was a single woman, but she was married with two children. He also said he wanted the jury balanced between men and women. The court denied the challenge, later explaining that it was a

pretext because the defense would have left on Price (T-45-46, 49).

The prosecutor argued that defense counsel was trying to "eliminate all of these jurors so we can get some more hoping they will be black" (T-47). Defense counsel then gave a reason for challenging prospective jurors Zayas and Young, which the court accepted (T-49-50).

After questioning more prospective jurors, the prosecutor again complained that defense counsel had done "an admiral [sic - admirable] job striking the whites to get to black jurors, and I object" (T-65). Defense counsel gave a reason for excusing Mr. Webb. The trial judge said the reason was not sufficient, but he would "let it go" (T-65-66).

In all, defense counsel was forced to give reasons for excusing 9 or 10 prospective white jurors. The judge denied two of the challenges, and these two jurors - Bain and Speck - actually served on the jury which convicted Watson (T-67). The jury which convicted Watson consisted of five whites and one black. The lone black juror was Isadore Malden, an elderly man, a retired cook, who had worked for "many, many years" at a restaurant owned by Judge Geeker's father (T-57).

Neil was most definitely not intended to overburden black defendants in the manner done here. Neil does not require black defendants to explain their peremptory challenges of white prospective jurors, all but one of whom were replaced by white jurors. Moreover, two jurors that defense counsel specifically objected to served on the jury which convicted Watson.

Moreover, the prosecutor's assertions to the contrary, "[e]liminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge." Kibler v. State, 546 So.2d 710, 714 (Fla. 1989). The only limitation is that the other jurors challenged must be excused for a non-racial reason. In Watson's case, however, if he cannot excuse white jurors to reach a more desirable black juror, then he can't excuse any jurors, for he had only white jurors from which to choose whom to eliminate.

It was not the intent of Neil and its progeny to prevent a black defendant from excusing sufficient white prospective jurors to reach one of very few black prospects. No case has ever approved such a result. Mere as a matter of equity, the procedure followed here required the defense to explain his challenges of 10 white prospective jurors, only one of which was replaced by a black prospective juror, while the state had to explain its challenge of the one and only black prospective juror.

In Dinkins v. State, 566 So.2d 859 (Fla. 1st DCA 1990), review denied, 576 So.2d 286 (Fla. 1990), this court held the defendant failed to satisfy his initial burden by relying "solely on the fact that the excused juror was black." Likewise here, the mere fact the prospective jurors Watson struck were white did not satisfy the state's initial burden, especially since all but one of the jurors subject to challenge were white.

Irrespective of any discriminatory motive, a challenged party may well end up excusing more white jurors, simply because they comprise the majority of the venire. To hold the state established its initial burden solely on the basis that the jurors were white, would set a very bad precedent. One party could easily establish its burden by pointing to the number of white jurors excused. This is actually the point of Neil and Batson - without special requirements protecting the rights of minority prospective jurors to serve, many juries would be all or almost-all white. And this is true even if the defense exercises all its peremptory challenges against white prospective jurors.

If this procedure here were followed, then Neil inquiries would be made of virtually every peremptory challenge. If the peremptory challenge of a white juror alone, without a showing of discrimation, were sufficient to trigger a Neil inquiry, not only would it defeat a defendant's right to exercise peremptories and achieve a representative jury, but it would also "inexorably. . .lead to the elimination of peremptory strikes" altogether. Georgia v. McCollum, 505 U.S. ___, 112 S.Ct. ____, 120 L.Ed.2d 33, 52 (1992) (Thomas, J., concurring).

Clearly, there is a difference between excusing jurors who are members of the majority race and those who are members of a racial minority, and it is not unreasonable to require a showing of invidious racial discrimination when the state objects to peremptory challenges of majority-race jurors. Elliott. As this court was careful not to bury the proverbial coffin in

Elliott, it should be careful not to do so here by holding the state could so easily meet its initial burden. Elliott, 591 So.2d at 986, citing Kibler, 546 So.2d at 714 (Ehrlich, C.J., dissenting).

This case amply demonstrates why it is not reasonable to allow Neil challenges of majority-race prospective jurors except under rare circumstances. Such challenges turn Neil on its head. Neil was instead to result in more black prospective jurors actually serving on petit juries, and to ensure that black defendants would be tried by more black jurors. If applied to white jurors, however, Neil can have a completely opposite effect, as it did here - the state used it to prevent Watson from acquiring black jurors. This case is a travesty of Neil.

In State v. Johans, 613 So.2d 1319 (Fla. 1993), the Florida Supreme Court decided there was too much conflicting case law on what was required to meet the threshold requirement, and held that, thereafter, if a Neil objection was made, the judge was obliged to inquire as to the reason for excusing the prospective juror. This requirement makes sense only if it is applied solely to the challenge of minority prospective jurors. It conflicts with Elliott's reasoning that, when the complaint concerns the peremptory challenge of white jurors, the prosecutor must meet a greater than usual burden. More importantly, if there is no threshold requirement to complaining about peremptory challenges of majority-race jurors, then there is no longer such a thing as a peremptory challenge. It is more than

reasonable that, had the supreme court intended Johans to destroy the exercise of all peremptory challenges, it would have done so explicitly. Finally, Johans was decided several months before this court's recent decision in Rome, yet Johans was not mentioned in that decision. Johans does not apply to the instant case.

The three reported case concerning the defense challenge of white prospective jurors all involved the same trial judge and the same prosecutor, as does this one. This jury selection strayed so far afield from what Neil and Batson and Elliott permit, that this court cannot let these errors pass unheeded. This cause must be reversed for new trial.

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ELSTON WATSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 93-3145

Opinion filed October 5, 1995.

An appeal from the circuit court for Escambia County. Nickolas Geeker, Judge.

Nancy A. Daniels, Public Defender, and Kathleen Stover, Assistant Public Defender, Tallahassee, Attorneys for Appellant.

Robert A. Butterworth, Attorney General, and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, Attorneys for Appellee.

App. 4 (b)

PER CURIAM.

Finding no reversible error, we affirm appellant's convictions and sentences for sexual battery with a deadly weapon, armed kidnapping, and aggravated battery. We must reverse and remand, however, certain portions of the trial court's judgment and sentence imposing costs.

The trial court ordered appellant to pay $800 for "costs of prosecution" pursuant to section 939.01, Florida Statutes. The amount was calculated by multiplying $25 per hour by 32 hours of what the prosecutor described as "investigative and trial time." This court has held, however, that the State may not recover

attorney fees as part of these costs. Smith v. State, 606 So. 2d 427 (Fla. 1st DCA 1992), rev. denied, 618 So. 2d 211 (Fla. 1993); Scott v. State, 629 So. 2d 1070 (Fla. 1st DCA 1994). Since it is not clear how much of the $800 is attributable to the State's attorney fees and how much is attributable to assessable investigative costs, we reverse and remand. See Hollingsworth v. State, 622 So. 2d 129 (Fla. 5th DCA 1993).

We also reverse the $5 fee imposed pursuant to an "administrative order." This fee is not specifically authorized by statute or otherwise proper. Lindsey v. Dykes, 129 Fla. 65, 175 So. 792 (1937); Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995); Williams v. State, 596 So. 2d 758 (Fla. 2d DCA 1992); Blanchette v. State, 620 So. 2d 258 (Fla. 1st DCA 1993).

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

BOOTH, MICKLE and VAN NORTWICK, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

HAMP LAMAR WAY,

Appellant,

v. CASE NO. 94-1483

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION

Appellant, HAMP LAMAR WAY, by and through undersigned counsel, requests this Court to rehear its decision in the instant cause under Fla. R. App. P. 9.330 Or 9.331, or to certify a question presented herein to the Florida Supreme Court, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v), and as grounds would show:

1. The Court's opinion of May 11, 1995, affirms without discussion appellant's argument that the trial court improperly applied the principle of State v. Neil when the state objected to appellant's challenges of two white prospective jurors. By omitting any discussion of this issue, it is unclear whether the Court's affirmance is based upon a finding that the state met the

App.4(c)

higher threshold burden of establishing invidious racial motivation required under Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 658 (Fla. 1992), and Rome v. State, 627 So. 2d 45 (Fla. 1st DCA 1993), or whether the Court dismissed the state's failure to meet this burden in light of the Supreme Court's decision in State v. Johans, 613 So. 2d 1319 (Fla. 1993).

2. This case is unique and presents a question of first impression. It is unique in that the state objected to the defense's peremptory challenges of five white jurors when the jury consisted of only white jurors, and there was nothing in the record to suggest the possiblity of racial overtones. A question of first impression is presented in that the decision of State v. Johans has never been extended to the excusal of white prospective jurors. Consequently, an opinion on the merits would significantly assist the bench and bar. See Whipple v. State, 431 So. 2d 1011 (Fla. 2d DCA 1983).

3. In Elliot v. State, supra, this Court for the first time considered whether the state can make a Neil objection to the defense's peremptory challenge of white prospective jurors. The Court held that even when such jurors constitute a majority of the venire, the peremptory challenge of white jurors is subject to Neil. The Court further held, however, that the state "carries an enormous burden to establish invidious racial motivation" in such a case, Id., at 986; accord, Rome v. State, supra; McClain v. State, 596 So. 2d 80 (Fla. 1st DCA 1992), and

concluded that the state had not met this burden as there was nothing in the record to suggest the possibility of racial overtones.

4. Neil begins with a presumption that peremptory challenges are exercised in a nondiscriminatory manner. In State v. Johans, supra, the Court decided there was too much conflicting law on what was required to overcome that presumption and held that, thereafter, if a Neil objection was made, the judge was obliged to inquire as to the reason for excusing the prospective juror. This ruling has never been applied where the challenges are made to majority-race jurors, and this Court has not receded from its holding in Elliott and Rome that the state, in objecting to the excusal of white jurors, has an extra heavy burden of showing a strong likelihood that the challenges were racially motivated.

5. Appellant submits that the state could not meet this burden where the jury is composed of only whites. See Rome v. State, supra (state did not meet its burden where defense challenged five of the first seven jurors, all of whom were white). Moreover, the state did not meet its heavy burden below given that the trial court allowed three of the five defense challenges and let appellant choose between the two remaining challenges and there was no indication the challenges were based on group bias. The racial composition of the jury and the court's ruling negated any inference that the challenges here were racially motivated.

6. Appellant, therefore, requests that this Court reconsider its decision in light of Elliott and Rome, or rehear its

decision en banc because undersigned counsel believes there is a lack of uniformity in the Court's decisions. Undersigned represents:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to this Court's decisions in Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991), and Rome v. State, 627 So. 2d 45 (Fla. 1st DCA 1993), and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

Paula S. Saunders
PAULA S. SAUNDERS

7. Alternatively, if this Court's affirmance was based on the conclusion that State v. Johans implicitly overruled Elliott and Rome, and the state no longer has a threshold burden to trigger a Neil inquiry when challenges are made to white jurors, appellant submits that this Court has misapprehended the Johans decision. If there is no threshold burden when objecting to peremptory challenges of majority-race jurors, especially in a case such as this one where there are only white jurors to challenge, Johans has effectively eliminated the right to exercise peremptory challenges. Presumably, had the Supreme Court intended to eliminate the exercise of all peremptory challenges, it would have done so explicitly.

8. Since the decision in Johans has never been applied in the context presented, and this case appears to present a question of first impression, appellant requests that the Court

reconsider its decision or certify the following question to the Florida Supreme Court as one of great public importance:

> DOES THE DECISION IN STATE V. JOHANS, 613 So. 2d 1319 (Fla. 1993), ELIMINATING THE THRESHOLD BURDEN ON THE COMPLAINING PARTY OF SHOWING A STRONG LIKELIHOOD THAT THE PEREMPTORY CHALLENGES ARE RACIALLY MOTIVATED, APPLY TO THE PEREMPTORY CHALLENGE OF MAJORITY-RACE PROSPECTIVE JURORS.

WHEREFORE, appellant requests that this Court, for the reasons stated above, grant this motion and rehear this appeal, rehear the appeal en banc, or certify the issue set forth above as one of great public importance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished by delivery to Patrick Martin, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Hamp Lamar Way, on this 24th day of May, 1995.

Respectfully submitted,

Paula S. Saunders

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 308846

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
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(904) 488-2458

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

HAMP LAMAR WAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-1483

Opinion filed May 11, 1995.

An appeal from the Circuit Court for Duval County.
David C. Wiggins, Judge.

Nancy A. Daniels, Public Defender; Paula S. Saunders, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Patrick Martin, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

WEBSTER, MICKLE and LAWRENCE, JJ., CONCUR.

App. 4(d)

Saunders APD

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

June 19, 1995

CASE NO: 94-01483

L.T. CASE NO. 93-12372 CF

Hamp Lamar Way v. State of Florida

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, rehearing en banc, or certification, filed May 24, 1995, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler

JON S. WHEELER, CLERK

By: Sondra Joyner
Deputy Clerk

DISTRICT COURT OF APPEAL FIRST DISTRICT STATE OF FLORIDA SAT CITO SI RECTE

Copies:

Paula S. Saunders

Patrick Martin

App. 4(e)

JUN 19 1995

PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

TONY LEE SIMMONS,

Appellant,

v. CASE NO. 93-571

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING, REHEARING EN BANC OR CERTIFICATION

Appellant, TONY LEE SIMMONS, by and through undersigned counsel, requests this Court to rehear its decision under Fla. R. App. P. 9.330 or 9.331, or to certify a question presented herein to the Florida Supreme Court, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v), and as grounds would show:

1. The Court's opinion of June 16, 1994, affirms without discussion appellant's first issue on appeal, wherein he argued that the trial court improperly applied the principle of Neil -- which governs the peremptory challenge of black prospective jurors -- to appellant's peremptory challenges of two white prospective jurors. By omitting any discussion of this issue, it is unclear whether the affirmance is based upon a finding that the state met its threshold burden under Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 658 (Fla. 1992), and under Rome v. State, 627 So. 2d 45 (Fla. 1st DCA 1993), or whether the Court dismissed the state's failure to meet its burden in light of the Supreme Court's decision in State v. Johans, 613 So. 2d 1319 (Fla. 1993).

App. 4(f)

2. In Elliott v. State, supra, this Court for the first time considered whether the state can make a Neil challenge to the defense's peremptory challenge of white prospective jurors. The Court held that even when such jurors constitute a majority of the venire, the peremptory challenge of white jurors is subject to Neil. The Court further held, however, that the state "carries an enormous burden to establish invidious racial motivation" in such a case. Id., at 986; see also, Rome v. State, supra; McClain v. State, 596 So. 2d 80 (Fla. 1st DCA 1992).

3. Neil begins with a presumption that peremptory challenges are exercised in a nondiscriminatory manner. If they are not, then the complaining party must show that challenged jurors are members of a "distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." 457 So. 2d at 486. This burden of showing invidiuous racial discrimination is "heavier-than-normal" when the state objects to defense challenges of white jurors. Rome v. State, supra, at 46; Elliott v. State, supra. Here, the state utterly failed to meet its initial burden of showing that white jurors were challenged solely on the ground of their race, and the judge made no ruling that the state had met its threshold burden.

4. Appellant, therefore, requests that this Court reconsider its decision on this issue in light of Elliott and Rome, or rehear its decision en banc because undersigned counsel believes there is a lack of uniformity in the Court's decisions.

In so requesting, undersigned represents:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to this Court's decisions in Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991), and Rome v. State, 627 So. 2d 45 (Fla. 1st DCA 1993), and that a consideration by the full court is necessary to maintain uniformity of decisions in this Court.

Paula S. Saunders
PAULA S. SAUNDERS
Assistant Public Defender

5. Alternatively, if this Court's affirmance was based on the conclusion that the state no longer has a threshold burden to trigger a Neil inquiry, appellant submits the Court appears to have misapprehended the Supreme Court's decision in State v. Johans, supra.

6. In Johans, the Supreme Court decided that there was too much conflicting case law on what was required to meet the threshold burden, and held that, thereafter, if a Neil objection was made, the judge was obliged to inquire as to the reason for excusing the prospective juror. This ruling does not apply in the instant case for several reasons.

7. First, the Court in Johans expressly stated that its decision had prospective application only, and Johans was not decided until a month after appellant's trial. Moreover, the ruling in Johans makes sense only if it applies solely to the challenge of minority prospective jurors. It conflicts with the reasoning of Elliott and Rome that, when the complaint concerns the peremptory challenge of white jurors, the prose-

cutor must meet a greater than usual burden. More importantly, if there is no threshold requirement when objecting to the peremptory challenges of majority-race jurors, then there is no longer such a thing as a peremptory challenge. Presumably, had the Supreme Court intended to eliminate the exercise of peremptory challenges, it would have done so explicitly.

8. The decision in Johans has never before been extended to the peremptory challenges of white prospective jurors, thus the issue presented here is one of first impression. For that reason, appellant requests that the Court reconsider its decision or certify the following question to the Florida Supreme Court as one of great public importance:

> DOES THE DECISION IN STATE V. JOHANS, 613 So. 2d 1319 (Fla. 1993), ELIMINATING THE THRESHOLD BURDEN ON THE COMPLAINING PARTY OF SHOWING A STRONG LIKELIHOOD THAT THE PEREMPTORY CHALLENGES ARE RACIALLY MOTIVATED, APPLY TO THE PEREMPTORY CHALLENGE OF MAJORITY-RACE PROSPECTIVE JURORS.

WHEREFORE, appellant requests that this Court, for the reasons stated above, grant this motion and rehear this appeal, rehear the appeal en banc, or certify the issue set forth above as one of great public importance.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS #308846
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Mr. Bradley R. Bischoff, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Tony Lee Simmons, on this 28th day of June, 1994.

Paula S. Saunders

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ATTORNEY FOR APPELLANT

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

TONY LEE SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-571

_____/

Opinion filed June 16, 1994.

An appeal from the circuit court for Duval County.
R. Hudson Olliff, Judge.

Nancy A. Daniels, Public Defender and Paula S. Saunders, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

ALLEN, WEBSTER, and LAWRENCE, JJ., CONCUR.

OPINIONS

MOTION FOR

NOTICE TO

SEE MOTION

WRITE USUAL

PCA
Written
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Letter

RETURN TO

JUN 16 1994

PUBLIC DEFENDER
JUDICIAL CIRCUIT

App. 4(g)

Saunders APD

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

July 29, 1994

CASE NO: 93-00571

L.T. CASE NO. 92-11105 CF

Tony Lee Simmons v. State of Florida

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, rehearing en banc or certification, filed June 28, 1994, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Deputy Clerk

DISTRICT COURT OF APPEAL FIRST DISTRICT STATE OF FLORIDA

Paula S. Saunders

Copies:

Kathleen Stover
Bradley R. Bischoff

AUG 18 1994

App. 4(h)