IN THE SUPREME COURT OF FLORIDA

MEMWALDY CURTIS,

Appellant,

vs. CASE NO 84,293

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

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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#". References to appellant's Initial Brief shall be "IB#". References to the Answer Brief shall be "AB#".

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

The State's unresponsive answer, AB10, merely relies on Corpus Juris Secundum for some "line of reasoning" the State fails to spell out. The state also fails to address the legal, ethical, and practial arguments and authorities on which appellant relied.

The Answer Brief suggests by implication that a conflict in the law exists, using a "but see" signal. AB10. There is no conflict. Florida decisions, including all cases cited by the State, apply the rule that appointed counsel's strategic trial decision to seek a continuance, made in good faith to protect the client's constitutional rights, binds the client to a speedy trial waiver irrespective of the client's knowledge or wishes.

The State asks this Court to employ post hoc rationalization by looking at what took place after the trial court denied the continuance to determine whether the trial court acted correctly at the time. AB15. That would be improper. Either the judge acted correctly when he decided the motion, or he did not.

The State fails to address the impact of perhaps the most critical relevant fact: that the judge himself found the continuance motion to be well taken. If discretion applies at all, how can the judge be deemed not to have abused his discretion in denying a motion the judge believed to be well taken?

The State relies on Landry v. State, 20 Fla. L. Weekly S486 (Fla. Sept. 21, 1995) for the inapposite proposition that the defense may waive discovery in a capital case. AB14-15. Appellant said as much in his Initial Brief. IB38. The relevant point addressed in Landry, however, is that a trial court has no authority to question, second-guess, or micro manage defense counsel's good faith strategic or tactical decisions. If counsel's decision is to be questioned at all, the client must do so in collateral proceedings. Landry, 20 Fla. L. Weekly at S488.[1]

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[1] Appellant brings to the Court's attention a typographical error in footnote 6 on page 12 of the Initial Brief. The footnote says Curtis was arrested on December 12, 1994. It should say December 22, 1994. R1.

The problem with giving trial judges broad discretion to choose between client and counsel is further demonstrated by an episode that took place later in the trial. In the penalty phase counsel made a strategic decision not to pursue the mitigating circumstance of no significant criminal history out of concern that it would open the door for the State to present evidence of otherwise inadmissible prior criminal activity. Curtis personally insisted on using the mitigator and allowing the introduction of all the evidence, good and bad. The judge again was faced with the same problem as in the continuance motion: whose strategic decision should be accepted. The judge this time decided that counsel's strategy was better for the defense than the defendant's strategy, so he agreed to let counsel waive that mitigator. T1230-33. Although the judge did the right thing this time, the episode further evinces the problem inherent in granting judges discretion to choose between conflicting strategies of counsel and the defendant.

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 GAVE A LEGITIMATE RACE-NEUTRAL REASON FOR ITS CHALLENGE

Appellant accepts the State's concession, AB18, that it should not benefit from the relaxed burden of State v. Johans, 613 So. 2d 1319 (Fla. 1993). Appellant nonetheless disputes the State's "prospective" rationale because Curtis was tried well after Johans was decided. Valentine v. State, 616 So. 2d 971, 974 (Fla. 1993) ("our holding in Johans is prospective only -- applying to jury selections taking place after our decision in Johans was filed"). The better reason Johans does not apply was set forth in the Initial Brief. IB49-55.

The State's alternative Johans argument misses the point. AB21-24. Curtis distinguished between the majority/minority status of the jurors being struck, not whether the striking party is the State or the defendant. Relying on Kibler v. State, 546 So. 2d 710 (Fla. 1989), the State further claims that minority status is merely a factor to be used in determining whether the burden shifts under State v. Neil, 457 So. 2d 481 (Fla. 1984). AB23. The State's reliance is misplaced.

Neither Kibler nor any other Florida Supreme Court decision directly addresses the issue because those reported decisions deal with peremptory strikes of racial or ethnic minority member jurors, not with majority racial group jurors. In this Court's cases, the jurors' racial or ethnic status as a minority group member always has been the key threshold over which any preserved Neil challenge has had to pass. E.g. Windom v. State, 656 So. 2d 432 (Fla. 1995) (Neil does not apply absent showing that juror was member of distinct racial minority).

Kibler holds that the Neil initial burden requires the objecting party to produce more than just the fact that members of a minority race were challenged; the fact that the minority member juror is not of the same race as the defendant is not enough, but it is something judges may weigh, with other factors, to determine whether the objecting party has demonstrated a substantial likelihood of discrimination in the majority member's striking a minority member juror. 546 So. 2d at 712. See also Reed v. State, 560 So. 2d 203, 206 (Fla.) (prima facie burden of proving substantial likelihood of racial discrimination not established where defendant and victim were white, challenged jurors were black, and two black jurors already had been seated), cert. denied, 498 U.S. 882, 111 S. Ct. 230, 112 L. Ed. 2d 184 (1990). Kibler and Reed demonstrate that some

evidence of a racially discriminatory motive may arise when a member of the white majority tries to challenge a juror who belongs to a constitutionally protected suspect class. That limited proposition is consistent with the policy underlying Johans, Neil and Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1987), of protecting disadvantaged minorities from being victimized by the majority in the historically discriminatory jury selection process. But those cases do not support the State's contrary proposition that the act of striking a majority race juror is evidence of racial discrimination.

The State says the Court should take into consideration the fact that Juror Kelley was the fifth juror peremptorily struck by Curtis in determining whether the State satisfied its initial burden as the objecting party under Neil and Batson. AB19. However the State omits the fact that the judge rejected the State's objections as to each of the four previous challenges because each had been a valid non-discriminatory peremptory challenge. T399-400 (Juror Carr); T401-02 (Juror Copeland); T403 (Juror Boudreau); T404 (Juror Parker). Surely the proper, race- and gender-neutral exercise of four peremptory challenges does not make credible the claim of discrimination in the striking of a fifth majority member juror. Not even a specter of doubt of discrimination was established by the State's baseless objection.

In contrast, see Reynolds v. State, 576 So. 2d 1300 (Fla. 1991), where this Court held that the striking of every minority member on the venire, even if that amounts to just one juror, constitutes a substantial likelihood of discrimination as a matter of law to satisfy the objecting party's initial burden. In this case, Curtis certainly had not peremptorily challenged anywhere close to every member of the majority

race on the venire panel. In Hall v. Daee, 602 So. 2d 512, 514 (Fla. 1992), this Court said that a pattern of striking four out of five minority members shifts the burden to the party exercising the peremptory challenges "[u]nless the inference of discrimination is easily dissipated by other relevant facts noted on the record by the trial court." Cf. Woods v. State, 490 So. 2d 24, 26 (Fla.) (three peremptories exercised by State against black jurors did not rise to level needed to require trial court to inquire into State's motives for challenges), cert. denied, 479 U.S. 954, 107 S. Ct. 446, 93 L. Ed. 2d 394 (1986). This record contains relevant facts to easily dissipate any possible inference of discrimination: Curtis initially accepted Juror Kelley, T398; all the prior objected-to strikes were found racially neutral; the State's improper motives, evinced by its baseless objection on the ground of gender discrimination to the striking of a male juror; other strikes were made without objection; and the defense accepted majority race members who served.

The State concludes by arguing that Neil burden-shifting no longer exists under Johans, AB23-24, but it fails to offer any reason why Johans should apply to cases where majority race jurors are struck. The State also asks this Court to defer the issue until reviewing Ratliff v. State, 21, Fla. L. Weekly D268 (Fla. 1st DCA Jan. 23, 1996). AB24. Ratliff, which this Court may decline to review, is inapposite because the issue there is the allocation of burdens of proof under the relaxed burden of Johans where an African American juror is struck.

The judge in this case relieved the State of its heavy burden altogether, thereby constituting error as a matter of law. Alternatively, it may be possible (though unlikely on these facts) to

infer that the judge found the State had satisfied its burden from the fact that he requested Curtis to explain his challenges. See Kibler, 546 So. 2d at 714 ("The judge made no finding that the appellant had made a prima facie showing of discrimination though this could be implied from the fact that he requested the prosecutor to give reasons."). If so, the decision was an abuse of discrimination on this record.

The State argues that Curtis's explanation, which he should not have been compelled to give, failed to be race neutral. AB20-21. However, the State omits any reference to the latest controlling precedent of the United States Supreme Court, Purkett v. Elem, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), relied on by appellant in his Initial Brief, IB55.[2] Purkett clarified Batson and held that an explanation at this stage is legitimate, even if not reasonable, plausible, persuasive, or sensible, so long as invidious discriminatory intent constituting an equal protection violation is not inherent in the explanation. The State admits that the "cross section" explanation is not inherently an invidious, unconstitutionally discriminatory explanation, acknowledging that "'cross section' could refer to gender, race, religion, economic status, etc." AB20. After making a facially legitimate explanation, the judge failed to do any analysis and just stated a bare conclusion. The weight of the judge's failure to apply the law correctly must be borne by the State, for the State had the ultimate burden to ensure the judge's ruling was correct. Purkett, 131 L. Ed. 2d at 839 ("the ultimate burden

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[2] Purkett must be applied to this case. Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (Batson and all constitutional decisions apply to all cases not yet final); Smith v. State, 598 So. 2d 1063 (Fla. 1992) (due process and equal protection under Florida Constitution requires application of new decisions to all cases not yet final).

of persuasion regarding racial discrimination rests with, and never shifts from, the opponent of the strike"). Curtis had no additional burden, which the State now seeks to impose, to further explain his facially race-neutral explanation; nor was he asked to do so by the judge at trial.

The State disputes appellant's argument that feelings provide support for a peremptory challenge, but the State misses appellant's point. In this case, the State did not present any valid basis to establish its initial burden of a substantial likelihood of discriminatory intent, and the defendant offered a facially race-neutral explanation. Absent a substantial likelihood that the peremptory challenge of Juror Kelley was exercised solely for the purpose of racial discrimination, unexplained feelings and instant impressions traditionally have been and are a proper basis upon which a party may exercise peremptory challenges. E.g. State v. Slappy, 522 So. 2d 18, 20 (Fla.) (quoting Blackstone), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988). The State inappropriately relies on Barfield v. Orange County, 911 F. 2d 644 (11th Cir. 1990), cert. denied, 500 U.S. 954, 111 S. Ct. 2263, 114 L. Ed. 2d 715 (1991). The analysis there applied after the objecting party already had established a substantial likelihood of racial discrimination by making a timely Batson objection after the only two black members of the venire had been struck, thus properly requiring a race neutral explanation. The initial burden was not met by the State in this case, however, so Curtis's feelings should not have been racially scrutinized.

If this Court needs to reach the issue of whether Curtis's explanation was racially neutral, it should find an abuse of discretion

under the totality of circumstances because the record does not contain a hint of any facts to support finding a racially discriminatory purpose underlying Curtis's facially non-discriminatory explanation, Purkett, especially in light of the fact that the State demonstrated no substantial likelihood of discrimination to compel an explanation in the first place, and that peremptory challenges are presumed to be nondiscriminatory, e.g. Slappy.

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

The State argues that because the charging instrument itself embraced both premeditated and felony murder theories, State v. Gray, 654 So. 2d 552 (Fla. 1995) does not apply. AB26. That is wrong.

First, this Court has long held that a first-degree murder indictment stating only one theory legally charges both theories and authorizes the State to prosecute under both theories. E.g. Knight v. State, 338 So. 2d 201 (Fla. 1976). Thus, what the State refers to as an attempted felony first-degree murder indictment in Gray was necessarily, as a matter of law, an indictment charging both attempted premeditated and attempted felony first-degree murder. The same is true in this case. The indictments in Gray and here are indistinguishable as a matter of law.

Second, accepting the State's argument to affirm the attempted murder conviction would violate due process under Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), and Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117

(1931). Griffin read these cases to hold that when a jury is given the option of convicting a defendant on two grounds, one of which is illegal or unconstitutional, due process is violated by a general verdict that may have rested on that unconstitutional or illegal ground. Certainly a conviction of a nonexistent offense is both unconstitutional and illegal, and the verdict was a general verdict, R331. Therefore, the attempted felony murder instruction and the resulting verdict violated due process irrespective of the State's theory. Tape v. State, 661 So. 2d 1287, 1288-89 (Fla. 4th DCA 1995) (sua sponte vacating attempted first-degree murder conviction even though State argued both felony and premeditated theories).

Third, the State's argument excludes any reference to what actually occurred in this case: The prosecutor told the jury in closing argument only to look at the felony murder theory and explicitly abandoned the premeditation theory. T1037. Earlier, the prosecutor discussed the felony murder theory with the jury at great length in voir dire, T281-90, T305-10, and never even mentioned premeditation in his opening statement, referring only to felony murder, T442, T452.

Finally, the evidence was insufficient to support the theory of attempted premeditated first-degree murder, a fact borne out by the prosecutor's express decision to abandon the premeditation theory altogether. Defense counsel argued that intent had not been proved in his motions for judgment of acquittal, T848-49; T914-15, and again argued in his motion for new trial that the verdict was contrary to law and the weight of the evidence, R331. See Issue VII, infra.

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

Appellant takes issue with the State's usual, oversimplified depiction of the standard of review as abuse of discretion. AB27. An abuse of discretion is the standard when the trial judge has to make a factual determination in making a legal ruling, or where there is no strict rule of law applicable. But if the trial judge misapplies a legal rule or applies the wrong law, the standard is de novo review of an error as a matter of law. Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992). This distinction applies to evidentiary decisions. See Hayes v. State, 660 So. 2d 257, 264 (Fla. 1995) (unreliability of DNA evidence rendered its admission erroneous as a matter of law).

The error in this case was the trial judge's decision that a motive to falsify does not arise under section 90.801(2)(b), Florida Statutes (1991) until a declarant makes a statement under oath and subject to perjury. That is an error as a matter of law. Even if abuse of discretion applies, the judge abused his discretion because the facts show that both the declarant Fountain and the detective Robinson, through whom Fountain's hearsay statement was introduced, admitted that they agreed to a deal for Fountain's statement at the time Fountain was arrested and made the statement in question.[3] The law may even presume that a criminal investigation implicitly gives rise to a motive to falsify, rendering Fountain's hearsay statement inadmissible. Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988), but see Edwards v. State, 662 So. 2d 405 (Fla. 1st DCA 1995), review granted, No. 86,887 (Fla. March 7, 1996). But there is no need to resort to that presumption here because

[3] The undersigned counsel wishes to correct an error on page 60 of the Initial Brief. The brief says Robinson gave a sworn statement on January 5, 1994, when it should have said Fountain gave the sworn statement.

the motive actually did arise and was clearly established in the record. See also Cortes v. State, 21 Fla. L. Weekly D576 (Fla. 3d DCA March 6, 1996) (record showed declarant's motive to fabricate arose at time of arrest due to prior relationship, not later when plea was negotiated).

The State erroneously says 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) approved the introduction of two out-of-court statements. AB32. It did not. The admission of one statement was reversed in that opinion. Moreover, the decisions on which the State relies are distinguishable. Unlike the present case, there is no indication in Anderson, DuFour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987), or Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990), that the declarant's motives to fabricate had manifested themselves at the time the statements were made. In each case the only evidence of when the motives of the declarants arose were the times they negotiated their pleas or otherwise started asking for favored treatment on other crimes. If anything, these cases support Curtis's claim because Fountain began seeking favored treatment immediately upon arrest when he gave the statement and persuaded the detective to agree to go easy on him in his other crime.

This Court also should keep in mind its own admonishment that trial courts must take special care to avoid the improper introduction of prior consistent statements through law enforcement officers because the danger of improperly influencing the jury "becomes particularly grave." Rodriguez v. State, 609 So. 2d 493, 499-500 (Fla. 1992), cert. denied, 114 S. Ct. 99, 126 L. Ed. 2d 66 (1993).

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

Once again the State throws out the usual abuse of discretion standard, AB35, without recognizing that if the trial judge misapplies a legal rule or applies the wrong law, the standard is de novo review of an error as a matter of law. Files, 613 So. 2d at 1304. See Issue IV, supra. A judge has no discretion to misapply a rule of law.

This Court should note an irony in the State's argument. In support of its error and harmlessness analysis, the State relies in part on the condition of Howard's plea agreement requiring him to give truthful testimony against Curtis. AB41. The State even says Curtis "fully availed himself" of the opportunity to comment on Howard's plea agreement. AB41. That is false. The jury did not know the critical fact about how the plea was conditioned because the State pushed very hard to deprive the jury of hearing that condition, and the judge prevented the jury from learning about it. See Issue XII, supra. It is unfair for the State to work to deprive jurors of hearing evidence and then to rely on that suppressed evidence on appeal.

This Court's latest pronouncement on the present issue appeared in Terry v. State, 21 Fla. L. Weekly S9 (Fla. Jan. 4, 1996), where the Court merely applied 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), to facts distinguishable from those here. In Terry the Court said the trial judge properly prevented defense counsel from arguing about an uncalled witness because the defense had called the witness to testify; the defense affirmatively opposed the issuance of a bench warrant to compel that witness's presence; and there was no indication in the record that

the uncalled witness was not equally available. 21 Fla. L. Weekly at S12 & S13 n.11. Here, however, the defense did not call Howard to testify; the defense took no affirmative action to prevent his appearance; and the record shows clearly that Howard was being held in jail by the State pending sentencing pursuant to a plea agreement which the State had the lawful right to cancel if Howard did not give the State what it wanted. The trial court misapplied Haliburton in this case.

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

By arguing procedural bar as to a few of the particular acts of prosecutorial misconduct, the State tries to divert this Court's attention from the major focus of appellant's argument: The preserved and unpreserved errors, in combination, were cumulatively so prejudicial that a new trial should be ordered. IB68-69.

The State attacked one of the preserved errors on procedural grounds saying it was not preserved because no motion for a curative instruction was requested. AB43. That is wrong. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994) (defense need not seek curative instruction to preserve improper prosecutorial comment issue for appeal).

The State argues that because defense counsel objected to the prosecutor's comment on Curtis's right to remain silent at trial, the argument attacking the prosecutor's improper comment as violating Curtis's right not to incriminate himself is barred. AB44-45. If a comment on silence is not a comment on one's right not to incriminate oneself, what is it? Moreover, contrary to the State's argument, the prosecutor cannot lawfully attack Curtis's credibility by commenting on six months of post-arrest silence during which time he was in custody,

represented by counsel, and constitutionally exercising his right to remain silent. Accepting the State's argument would defeat the constitutional protection made clear in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

The State claims appellant argues that Whitton v. State, 649 So. 2d 861 (Fla. 1994), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995), is a new rule of law. AB47. He does not. Whitton merely demonstrates that preserved and unpreserved claims of prosecutorial misconduct must be considered together.

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 is correct in pointing out that the indictment charged Curtis with first-degree murder under both premeditated and felony murder theories. AB48. However, whether the indictment charged both theories is irrelevant when the prosecution did not in fact pursue the premeditation theory. The prosecutor labored over the felony murder theory in voir dire, T281-90, T305-10; the prosecutor in opening statement told the jury Curtis was guilty of "First Degree Felony Murder," T442, T452, without mentioning premeditation; and the prosecutor in closing argument explicitly abandoned the premeditation theory, telling the jury to look only at felony murder. T1037. See also Issue III, supra. Surely the jury did convict on a theory the prosecutor told jurors not to consider.

The State puts import on defense counsel's purported statement that premeditation had been proved. AB48. That is both wrong and has no legal significance. The statement cited by the State obviously is either a misstatement by counsel or a scrivener's error by the reporter. One

need only look at the context to see what counsel was arguing. Counsel moved for a judgment of acquittal on all counts in the indictment and said he did not think there was sufficient evidence of intent as to any of the charges. T848-49. Counsel also renewed the motion for mistrial, T914-15, and moved for a new trial on grounds that the verdict was contrary to law and the weight of the evidence, R331. Clearly counsel was arguing that he did not think the evidence of premeditation was sufficient. In any event, this Court has an independent obligation to review the sufficiency of the evidence on direct appeal of a capital murder conviction, and it routinely does so even when sufficiency is not specifically argued on appeal. E.g. Kight v. State, 512 So. 2d 922, 931 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1100, 99 L. Ed. 2d 262 (1988).

Precedent also demonstrates that the evidence was insufficient to establish premeditation beyond every reasonable doubt, a standard that requires the evidence to be inconsistent with every other reasonable hypothesis. There were no statements of either Howard or Curtis before, during, or after the robbery indicating that either juvenile had intended a death to result; Howard said after the robbery that "[i]t was fucked up," T697, indicating things did not go as planned; Taaziah did not see the shooting and gave no indication there had been premeditation to kill; the entire incident was designed solely to get money with no evidence of a fully formed premeditated intent to kill; no especially deadly or penetrating bullets were used; and the evidence is consistent with a robbery gone bad, a spur of the moment shooting, and a reflexive shooting when Khair-Bek suddenly dropped the money on the floor either due to nervousness or in an attempt to resist the robbery.

This case is similar to the Court's decision finding insufficient evidence of premeditation in other cases. For example, in Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), cert. denied, 499 U.S. 932, 111 S. Ct. 1339, 113 L. Ed. 2d 270 (1991), the evidence of premeditation was insufficient where two men hijacked a prison van to free an inmate, one of the men shot and killed an officer with three shots from a 9-mm pistol; any of the shots would have been fatal; one shot was a contact wound where the barrel had been placed against the officer's head; the other two shots were to the chest; the defendant then aimed a gun at a second officer and pulled the trigger but it failed to fire; and the defendant kicked one of the guards before the murder. In Terry v. State, 21 Fla. L. Weekly S9 (Fla. Jan. 4, 1996), two men robbed a gas station, the robbers used Terry's guns, and Terry shot a customer to death. But this Court found the evidence of premeditation insufficient because nobody saw the shooting and the facts did not sufficiently demonstrate what happened to give rise to proof of premeditation beyond a reasonable doubt. In Jackson v. State, 575 So. 2d 181 (Fla. 1991), two men robbed a store and one shot the owner. Also, the defendant had been in the same store the day before, leaving open the likelihood that they would be identified by the owner if left alive. But this Court found insufficient evidence of premeditation because there had been one shot from an unknown weapon; there was no evidence of particularly deadly special bullets; the defendant made a statement indicating his intent was to rob the store but the clerk "bucked the jack"; there was no evidence of a fully formed conscious purpose to kill; and the evidence was not inconsistent with defense's theory that the shot was fired reflexively. In Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996) (on rehearing), a store

clerk was shot once in the head at close range in an armed robbery with a gun that required 6 pounds of pressure to fire; and the same gunman had committed two other armed robberies and shot the clerks each time. But this Court said the State did not prove premeditation because it could have happened at the spur of the moment; no statements showed Mungin had formed the intent to kill before the shot was fired; no witnesses saw the murder; and there was only a single shot as opposed to multiple shots or a continuing attack.

Also the State relies on Mungin for the proposition that the judge did not err by instructing on premeditation. AB49. But subsequent to the State's filing the Answer Brief, this Court changed its Mungin decision on rehearing specifically to hold that a judge does commit error in instructing on a theory of law (premeditation) for which he should have granted the defense's motion for judgment of acquittal.

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

The State argues the relevance of motive evidence and in support quotes only a part of the evidence contested by Curtis. AB52. The State omits from its brief the more harmful and egregious contested testimony in which Albert Fountain identified Curtis as a drug dealer, said he went to the apartments sometime after the murder to buy drugs from Curtis, and said he actually acquired drugs from Curtis that night. T688. This harmful, bad character, collateral crime evidence is the primary focus of Curtis's claim and has no bearing whatsoever on a motive to commit a convenience store robbery earlier that night, especially when there was no evidence to tie that robbery to Curtis's alleged dealing. This

improper evidence further taints the statement about Curtis's purported drug debt.

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

Appellant relies on his argument in the Initial Brief.

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

The State mischaracterized the testimony of Andrea Jones in its effort to establish, without record support, the existence of a contradiction. The State claims Jones answered affirmatively when asked in cross-examination whether she had ever heard of Curtis's possessing guns. AB61. Her response was "No, not until this happened, until he got arrested." She responded "Yes" later only when asked a limited compound question of whether she had heard of him possessing guns based on the charges in the two incidents. T1207-08. The State claims these responses laid a predicate of contradiction by establishing that Jones "had knowledge that Curtis in fact possessed a gun in a robbery subsequent to the instant offenses," AB64 (emphasis supplied), thereby providing a basis to distinguish Geralds v. State, 601 So. 2d 1157 (Fla. 1992). The record refutes the State's claim.

Her only knowledge demonstrated in the record was her knowledge that Curtis had been convicted of the present crime and that he had been arrested in the Krystals robbery. The State did not lay any predicate to establish what she knew about the facts of either incident. The State did not show that she had heard the evidence in the guilt phase. The State did not show that she had any personal knowledge that he possessed a weapon in the present case. The State did not establish that she had

any personal knowledge of the facts of the Krystals case. The State did not ask what she knew about that incident, whether she knew that he actually had possessed a gun in that incident, or, for that matter, whether she had any knowledge of whether such a crime took place or that he participated in that alleged crime. The State failed to present any factual foundation of her personal knowledge upon which to base a purported contradiction; all the State showed was that she had knowledge of an arrest and a conviction. The only evidence of her personal knowledge in this record is her uncontradicted testimony on direct that she had no personal knowledge of Curtis's possessing a gun. No basis for contradiction was established. Geralds is indistinguishable.

The State further tries to distinguish Geralds by claiming there was no "agreement" that the State would not produce "additional" evidence in the penalty phase where the defense waived the mitigator of no significant prior criminal history. AB62-63. Since when do counsel have to agree not to violate the law? As the cases in the Initial Brief demonstrate, the law is abundantly clear that the State must not introduce evidence of prior criminal acts when the mitigator is waived.

A new decision of this Court strongly supports appellant's position. In Hitchcock v. State, No. 82,350 (Fla. March 21, 1996), this Court relied on Geralds to reverse a death sentence where the State used the guise of redirect examination to introduce testimony about unverified collateral crimes. On the State's direct examination, the victim's sister testified that Hitchcock had abused the victim before the murder and had threatened to kill both if they revealed the abuse. On cross-examination, the defense pointed out that she had not told anybody for seventeen years about the abuse she had witnessed. On redirect, the

State adduced testimony about Hitchcock's alleged abuse of the witness, not just the homicide victim. This Court held that the redirect had not been responsive or relevant to the narrow scope of the defense's cross-examination, and the door had not been opened by the defense. Therefore, the Court held, the State erroneously had been permitted to go beyond the scope to present improper, inadmissible, and prejudicial evidence of a nonstatutory aggravating circumstance. The Court also found that the cross-examination of Hitchcock's expert impermissibly went beyond the scope of direct examination.

The State relies on Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978), AB62, but that quoted passage merely states the well settled principle that when a defendant "opens a general subject" in direct examination the door to cross-examination is left ajar to specifics. In contrast, the narrowly focused direct examination here by no means inquired into a general subject area opening the door to inadmissible evidence. See Hitchcock.

The State claims this is harmless, AB64, but both law and logic compel a different conclusion. How could this jury not have been affected by learning that the defendant was charged with committing another armed robbery after this offense took place? Impossible.

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

The State argues that defense counsel's cordial acceptance of the trial court's adverse decision constitutes acquiescence and waiver. AB67. Perhaps the State would have preferred counsel had refused to accept the judge's ruling, bringing about a direct contempt citation.

Neither common sense nor any authority cited by the State or known to appellant support the State's position.

The State argues that the evidence was relevant, but it failed to demonstrate relevance without resort to pyramiding inferences and facts not in evidence, as detailed in the Initial Brief. The State also was unable to distinguish the authorities on which Curtis relies.

The State argues that the evidence was admissible because the statute allows for hearsay evidence. However the evidence here was double or triple hearsay far, far removed from any test of reliability. This hearsay statute cannot be so broadly construed and remain within constitutional limitations of due process, the right to confrontation, and the protection against cruel and/or unusual punishment.

Hitchcock v. State, No. 82,350 (Fla. March 21, 1996) lends further support to appellant's position. The Court found error in the State's use of an expert in rebuttal to introduce more improper and inadmissible evidence after the State itself opened the door to the improper evidence through other witnesses.

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

This Court should note the State's contradictory positions. In the immediately preceding issue, the State argues that it was entitled to present evidence arising from Howard's plea and sentencing to support the State's theory that Howard deserved less punishment than Curtis. Now the State argues that Curtis was not entitled to rebut the State's theory with evidence also arising from Howard's plea and sentencing, evidence that gives a completely different and mitigating explanation as to why

Howard actually got more lenient treatment. AB73. The irony is unmistakable and demonstrates just how unfair and unreasonable the prosecution has been.

The State tries to divert this Court from addressing the true issue by mischaracterizing the argument and the record, claiming that the issue is about commenting on a witness's failure to testify. AB70. Although the judge's ruling is erroneous on that ground as well, the primary focus of this claim is that the evidence was relevant mitigation improperly excluded by the judge. Defense counsel moved to place it in evidence on grounds of relevance, T1163, T1165, T1168, and expressly said this was not a rehash of the guilt-phase argument about the State's failure to call Howard testify, T1165. The State attempted to defend its position on relevancy grounds, T1166, T1168, and the judge ruled on relevancy grounds, T1170.

The State argues that there was no prejudice because evidence of Howard's lesser sentence was presented and the jury was entitled to draw inferences as to what happened. AB71. But the jury heard no evidence from the defense's standpoint as to why Howard might have gotten a lesser sentence because the judge prevented it at the State's request. The jury should not have been required to speculate and draw inferences as to why Howard got a lesser sentence based only on the State's version of the truth when an explanation favorable to the defendant was printed in black and white and offered into evidence. The jury heard nothing from Howard about his agreement to cooperate because he did not testify and his hearsay statements were made at the time of his arrest, not after he had agreed to make a deal for mercy in exchange for "cooperation." The State points to Curtis's testimony, yet the State's case was built on its

depiction of Curtis as a liar who could not be believed, going so far as to argue to the jury in closing that Curtis was "lying" and calling his testimony "ridiculous." T1059-71.

The State's answer also thoroughly ignores the related evidentiary error in this claim, that the judge erred by prohibiting the defense from asking the probation officer about his favorable sentencing recommendation, which was predicated solely on Howard's cooperation in convicting Curtis. That recommendation is of particular import in this case because Howard had not yet been sentenced. T1163.

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 State's sole argument as to the prior violent felony aggravating circumstance based on the attempted felony murder of Taaziah is that State v. Gray, 654 So. 2d 552 (Fla. 1995) does not control, calling the defense's position "specious." AB74. As demonstrated in Issue III, supra, the State's argument is unsupportable. The crime does not exist; the conviction must be vacated; and the illegally and unconstitutionally obtained conviction cannot support an aggravating circumstance as a matter of law.

The State calls the pecuniary gain argument "disingenuous" because the jury was instructed as to doubling. AB75. The fact that the jury may have merged aggravators and that the judge did merge the two aggravators in no way undercuts the fact that the judge found the aggravator, just as the jury may have done. The finding is in the record

and is subject to review by this Court. Instead, the State relies on old case law that does not address the precise issue of one defendant's personal legal and moral culpability for this aggravator when two people participate in a crime under these circumstances. See IB83-85.

The State's Answer Brief raises, for the first time in this case, an aggravating circumstance that was neither argued at trial, instructed, nor found by the judge. AB76. This argument is procedurally barred, Wuornos v. State, 20 Fla. L. Weekly S481, S481 & n.1 (Fla. Sept. 21, 1995), and devoid of support.

The fact that the judge said the one aggravator was sufficient to justify the death sentence, AB76-77, is immaterial, especially given the number of errors the judge made in reaching the ultimate sentence. Moreover, the fact that the judge was willing to base his decision on one aggravator shows how the judge undermined his duty to decide a sentence based on the whole record, not just one portion of it. It also does not take into consideration the settled rule that one aggravator is insufficient when substantial mitigation exists. See Issue XV.

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

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

The State claims that the trial court's decision as to age is amply supported by his "awareness" of certain facts in the record, AB79, but the State omits to inform that Court that the judge did not make any findings as to those facts and did use them in his sentencing order to support his finding. If the judge thought those facts were relevant, he

was obligated to put them in the order. Campbell v. State, 571 So. 2d 415 (Fla. 1990).

B. The more culpable codefendant received a lesser sentence

The State relies in part on the judge's statement that "[t]he law should not, and does not, reward bad aim." AB81. However, the law should and does distinguish between crimes in which people kill and people injure but do not kill; and people who intend to kill and people who do not intend to kill. That is why the law has different degrees of homicide. That is why the law includes the theory of attempt. That is why many crimes have lesser included offenses. That is why sentencing guidelines points decrease as the level of culpability decreases. That is why the Florida and United States Constitutions require individualized sentencing in capital cases to measure the particular individual's moral as well as legal culpability.

The judge's ruling also was based on the absence of relevant mitigating facts the judge had refused to admit into evidence, see Issue XII, supra, necessarily undermining his conclusion.

The State's recitation of facts, AB80, leaves out the most critical facts of all: Howard entered the store first, Howard fired into Taaziah's chest, Howard fired a second shot that missed, and Howard fired a third shot striking Khair-Bek dead. Those facts contrast with the fact that Curtis presumably fired the shot that struck Khair-Bek's foot in the absence of any evidence showing that the shot to the foot had been been fired intentionally or even that it had been aimed.

Cases the State cited, AB81-82, are inapposite on their facts and because they all approve the rejection of statutory mitigation, which is quite different from the nonstatutory mitigation at issue here. See

Groover v. State, 458 So. 2d 226, 229 (Fla. 1984) (judge rejected statutory mitigating circumstance of murder "under extreme duress or under the substantial domination of another person"), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985); Stevens v. State, 419 So. 2d 1058, 1064 (Fla. 1982) (judge rejected statutory mitigators "that his participation in the crime was relatively minor and that he acted under the substantial domination of another person"), cert. denied, 459 U.S. 1228, 103 S. Ct. 1236, 75 L. Ed. 2d 469 (1983); White v. State, 403 So. 2d 331, 339 (Fla. 1981) (judge rejected statutory mitigators that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor, and that the defendant acted under extreme duress or under the substantial domination of another person), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983); Ruffin v. State, 397 So. 2d 277, 283 (Fla.) (judge rejected statutory mitigator "that his participation in the murder was minor and that he was under the domination of" his codefendant), cert. denied, 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194 (1981); Antone v. State, 382 So. 2d 1205, 1216 (Fla. 1980) (judge rejected statutory mitigation "that he was only an accomplice in a capital felony committed by another person and that his participation was relatively minor"); Jackson v. State, 366 So. 2d 752, 757 (Fla. 1978) (judge rejected statutory mitigation that "he acted under the dominating influence of" his codefendant), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979). Jackson is the only one of the State's cases discussing relative culpability, and it is easily distinguished on the facts. Jackson shot one woman, then turned and shot a second woman who was eight months pregnant, the pregnant woman was stuffed in the trunk of a car

with an electrical cord tied around her neck suffocating her, none of which occurred while Jackson was under the domination of his codefendant, and all of which occurred while he was the dominant factor.

C. Uncontroverted evidence established remorse

Appellant relies on his argument in the Initial Brief.

D. Uncontroverted evidence established poor education

The State argues that poor education was properly rejected because it was not relevant because to Curtis's character. AB83. To the contrary, a defendant's poor education necessarily affects one's character, personality, and background, which constitutes relevant mitigation. The record in this case bears out that conclusion. His poor education was one of the many factors that contributed to Curtis's ultimate fall into the world of drugs and crime.

E. Uncontroverted evidence established that Curtis is a good father

Appellant relies on his argument in the Initial Brief.

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

The State's brief omits any reference to Terry v. State, 21 Fla. L. Weekly S9 (Fla. Jan. 4, 1996), which strongly supports Curtis's proportionality argument. Terry and Floyd drove around Daytona Beach looking for a place to rob and decided to rob a gas station while armed and wearing masks. Floyd held an inoperable .25-caliber gun on Mr. Franco, a customer, in the garage while Terry was in the convenience store with an operable .38-caliber handgun. A scream came from the convenience store followed thirty seconds later by a shot. Terry had

killed Mrs. Franco and stole $160. Terry was convicted of first-degree murder, principal to aggravated assault on Mr. Franco, and armed robbery. The judge found 2 aggravating circumstances, both of which directly arose from the instant offense and one of which was directly attributable to the actions of his co-defendant: prior violent felony based on principal to aggravated assault of Mr. Franco, and murder committed during a robbery/pecuniary gain. The judge found no mitigation at all, expressly rejecting his age of 21. Nonetheless, this Court reversed the death sentence as disproportional punishment. The Court's proportionality decision and analysis bears quoting in full:

> Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). We conclude that this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate.
>
> In this case, it is clear that the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting are unclear. There is evidence in the record to support the theory that this was a "robbery gone bad." In the end, though, we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot. Likewise, although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances. Our proportionality review requires a discrete analysis of the facts. Porter, 564 So. 2d at 1064. As stated by a federal appellate court: "The Florida sentencing scheme is not

> founded on 'mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts." Francis v. Dugger, 908 F. 2d 696, 705 (11th Cir. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1696, 114 L. Ed. 2d 90 (1991).
>
> The first aggravator (a capital felony committed during the course of an armed robbery/pecuniary gain) is based on the armed robbery being committed by appellant when the killing occurred. The second aggravator, prior violent felony, does not represent an actual violent felony previously committed by Terry, but, rather, a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the codefendant Floyd who pointed an inoperable gun at Mr. Franco. While this contemporaneous conviction qualifies as a prior violent felony and a separate aggravator, we cannot ignore the fact that it occurred at the same time, was committed by a codefendant, and involved the threat of violence with an inoperable gun. This contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide.
>
> When we compare this case to other capital cases, we find it most similar to robbery/murder cases like Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), and Thompson v. State, 647 So. 2d 824 (Fla. 1994). In Sinclair, which is factually very similar to the case sub judice, the appellant robbed and fatally shot a cab driver twice in the head. Considering these circumstances and finding there was only one valid aggravator, no statutory mitigators, and minimal nonstatutory mitigation, we vacated the death sentence. In Thompson, the appellant walked into a sandwich shop, conversed with the attendant, fatally shot the attendant through the head, and robbed the establishment. On appeal, we vacated the death sentence, finding there was only one valid aggravator (the murder was committed in the course of a robbery) and some "significant," nonstatutory mitigation. Id. at 827. As in Sinclair and Thompson, we find the circumstances here insufficient to support the imposition of the death penalty. We conclude that the circumstances here do not meet the test we laid down in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

Terry, 21 Fla. L. Weekly at S12-13 (footnotes omitted).

The present case is similar in many respects. The "prior violent felony" here also was a contemporaneous conviction based on principal to

a codefendant's act in the same crime, and even so that aggravator must be vacated under Gray. Moreover, this record is filled with valid mitigation both found and erroneously rejected by the trial judge.

The cases on which the State relies, AB85-87, are readily distinguished. In Stein v. State, 632 So. 2d 1361 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), two murderers committed two brutal killings in a Pizza Hut robbery; one victim was shot five times from close range; the other was shot four times while sitting; and the judge found four valid aggravators including cold, calculated, and premeditated, and witness elimination. In Teffeteller v. State, 495 So. 2d 744 (Fla. 1986), the defendant had numerous prior violent felony convictions including the murder of his accomplice in that case. He also had an additional weighty aggravator of being an escaped felon under sentence of imprisonment in Tennessee when the Florida murder occurred. In Hoffman v. State, 474 So. 2d 1178 (Fla. 1985), the defendant was convicted of two counts of first-degree murder and one count of conspiracy to murder where the two decedents had been brutally stabbed and slashed numerous times in a $5,000 contract killing for which the judge found CCP and the other murder as aggravators. In Parker v. State, 458 So. 2d 750 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 S. Ct. 1855, 85 L. Ed. 2d 152 (1985), Parker was a violent drug dealer convicted of the beating and shooting death of three people. The judge found four valid aggravators including CCP, witness elimination, and prior violent felony for the other murders. In White v. State, 446 So. 2d 1031 (Fla. 1984), White singlehandedly killed one person and tried to kill three others; he shot a store proprietor and a customer in the back of their heads, killing one and paralyzing the other; then he pulled the trigger

on two other customers, but the gun misfired. In Maxwell v. State, 443 So. 2d 967 (Fla. 1983), Maxwell and his codefendant held a knife to a man's throat while robbing three men at gunpoint. When the victim refused to give up his gold ring, Maxwell shot him in the chest with an especially deadly bullet. The Judge found five aggravators with no mitigation, and the Court affirmed even after throwing out CCP, HAC and finding illegal doubling. Maxwell is both distinguishable on the facts and is of dubious validity given that current law almost certainly would cause this Court today to reverse the penalty for resentencing under the circumstances.

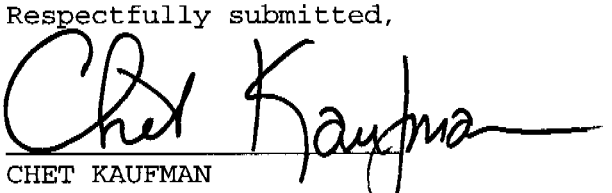
CONCLUSION

For the reasons expressed above and in appellant's Initial Brief, 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 with instructions to impose a life sentence on the capital felony. It should also vacate the attempted first-degree murder conviction and remand for resentencing on all counts.

CERTIFICATE OF SERVICE

I certify that a copy if this Reply Brief of Appellant has been furnished by delivery to Ms. Gypsy Bailey, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301; and a copy has been mailed to the appellant, Mr. Memwaldy Curtis, on this 25th day of March, 1996.

Respectfully submitted,



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