IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,133

ALBERT COOPER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In the trial court, the Appellant, Albert Cooper, was the defendant and the Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R", "SR" and "T" will be used to refer to portions of the record on appeal, the supplemental record and the trial transcript, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On July 3, 1991, an indictment was filed charging the defendant with first degree murder, armed burglary, armed robbery and possession of a firearm during the commission of a felony. (R. 1-6).

On November 23-24, 1992 and December 3, 1992, a hearing was held on the defendant's Motion to Suppress Statements before the Honorable Richard V. Margolius, Circuit Judge. (T. 110-355). At the hearing, Detective Salvatore Garafalo testified that on June 14, 1991, he was advised by a colleague, Detective William Saladrigas, that he should arrest the defendant in connection with a police investigation of a homicide at a Rudy's Restaurant, that had occurred the previous day. (T. 117, 129, 144). Detective Garafalo drove to the area of a Quality Inn located on South Dixie Highway in Miami and watched a U-Haul truck that was believed to belong to the defendant. (T. 145, 146). At about 3:00 PM, the defendant and a female companion, Admonia Blount, entered the U-Haul truck and drove off. (T. 146, 152). When Garafalo received his orders to stop the defendant, he did so and transported the defendant to the Metro-Dade Police Station. (T. 147, 161).

At 5:00 PM, Detective Garafalo read the defendant his Miranda warnings from the standard rights form used by the Metro-Dade Police. (T. 147). Those warnings were as follows:

Number One: You have the right to remain silent. You do not have to talk to me if you do not wish to do so. You do not have to answer any of my questions. Do you understand?

Number Two: Should you talk to me anything that you might say may be introduced into evidence in court against you. Do you understand?

Number Three: If you want a lawyer to be present during questioning, at this time or any time hereafter, you are entitled to have a lawyer present. Do you understand?

Number Four: If you cannot afford to pay for a lawyer one will be provided for you at no cost if you want one. Do you understand that right?

Knowing these rights are you willing to answer my questions without having a lawyer present? (T. 148-149).

The defendant indicated that he understood, initialed the rights form and signed the form. (T. 148-149). The defendant then gave a statement to Detective Garafalo regarding the homicide at Rudy's Restaurant. (T. 150-154).

While the defendant spoke with Detective Garafalo, Detective Saladrigas learned of the defendant's possible involvement in the homicide of Charles Parker at the Outpost Pawn Shop from Admonia Blount. (T. 190). Detective Saladrigas told Detective Pascual Diaz, the lead investigator on the Parker homicide, about the information he had received. Detective Diaz assigned Detective Michael Jones to talk to the defendant about the Parker homicide. (T. 166, 190, 243-45). Detective Jones met with the defendant at 1:00 AM on June 15, 1991, shortly after Detective Garafalo had finished talking with the defendant. (T. 168, 179-80). Detective Jones used the same

Miranda rights warning form used previously by Detective Garafalo to inform the defendant of his rights. Detective Jones did not deviate from the form in any way. (T. 169-170, 172-173, 182). After the defendant had agreed to talk, Detective Jones spoke with the defendant for 40 - 60 minutes before taking a formal, sworn statement. (T. 171-73, 184, 185).

At the conclusion of testimony, with the court's permission, the defendant adopted the argument of the co-defendant, Tivan Johnson, and argued that the rights warning form used in this case by Detective Jones was constitutionally inadequate .(T. 318, 333, 334). Specifically, the defendant contended that the warning provided by police, that he had the right to the presence of a lawyer during questioning, did not include the essential right to have the advice and counsel of a lawyer prior to questioning. Since the police failed to unequivocally inform the defendant that he had the right to **consult** with a lawyer **prior** to questioning, the defendant argued that he could not have properly waived his right to counsel before speaking to the police. (T. 318-324, 333, 334). The court, however, found the rights warning form used to be constitutionally acceptable and denied the defendant's motion to suppress. (T. 354, 355).

Prior to jury selection, a brief argument was held on the State's motion to admit Williams Rule evidence. Specifically, the State wanted to elicit evidence that the defendant was being questioned on an unrelated matter as an explanation for why the defendant was in custody for nearly twelve hours before a statement was taken on the pawn shop homicide.[1] (T. 631-633). The defendant objected and informed the court that the defense would not raise any issue regarding the

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[1] The defendants were first questioned by police concerning the homicide at Rudy's Restaurant, a homicide that served as the basis for charges in Dade Circuit Court Case No. 91-21599. (T. 151-155, 167, 168).

length of time the defendant was in custody prior to the making of his statement. (T. 633). The court took the matter under advisement. (T. 636).

During voir dire, defense counsel questioned several jurors regarding their feelings about the death penalty and their ability to consider and apply the aggravating and mitigating circumstances provided by law. (T. 673-687). During the questioning of prospective juror Vazquez, the judge provided the jury with the following instruction on the law:

> THE COURT: That they are to follow the instruction in that if they find the aggravating circumstances outweigh the mitigating circumstances, they are to vote for the death penalty. Those are the instructions of the Court. If they found -- I'm not telling you what to find as far as mitigating circumstances. But the law is that if a juror in a death penalty case hears my instructions, that they are to consider the aggravating and then the mitigating circumstances and if they feel -- **if you feel that the aggravating circumstances outweigh the mitigating, then you must under the law bring back a recommendation for death.** If you feel the mitigating circumstances outweigh, then you must bring back a recommendation of life imprisonment, and that's the law. (T. 687).

The defendant objected to the court's instruction, stating that the instruction was erroneous because it directed the jury to reach a particular recommendation. (T. 688). The court insisted that its instruction was a correct recitation of the law. (T. 688). Defense counsel then reiterated his position. (T. 689). The court responded by re-instructing the jury:

> THE COURT: It's been brought to my attention that I didn't explain the law to you as thoroughly as I should have. What the law says and what it appears that I omitted -- and I don't

> believe I did; I'm not going to argue -- when a guilty verdict is found by the jury of all 12 people, we go to the second phase, which is about a month later. There will be aggravating circumstances that are told to you and the mitigating circumstances. If the defense wishes to put anything in -- they don't have to, but if they wish, they can. And then the twelve of you can go back into the jury room and you discuss it thoroughly. You discuss the aggravating, you discuss the mitigating, you discuss your views, they discuss their views. And after all the discussion is over, then you vote. As you know, there may be a difference of opinion as to whether the aggravating circumstances outweigh or the mitigating outweigh, and you may not get a unanimous verdict one way or the other. That's in your mind as to whether they do or they don't. **The law says that after all that discussion, after all that deliberation, after all that, if in your mind the aggravating circumstances outweigh the mitigating, then you must vote for the death penalty.** That's only your mind. You understand that?..... (T. 689, 690).

Prior to the reception of testimony, the parties again discussed the matter concerning the time the defendants were in custody prior to the taking of the defendant's statement. The defense informed the court that no issue would be made of the quantity of time the defendant was in custody, nor would there be an issue regarding the voluntariness of the defendant's statement. (T. 1184, 1185). To eliminate the possibility of jury speculation regarding the amount of time the defendants were in custody, the court elected to inform the jury that the defendants were being interviewed on an unrelated matter and that the jury should not consider it in their deliberations. (T. 1188, 1189). The defendant objected to the court's ruling. (T. 1189). The court then decided to instruct the jury

on the issue at the time the defendant's statement was to be introduced in evidence. (T. 1189, 1190).

At trial,[2] Benjamin Brown testified that he was a frequent customer at the Outpost Pawn Shop. (T. 1380). Brown stated that he knew the shop's owner, Chuck Barker, and occasionally did maintenance work for him. (T. 1380). On May 25, 1991, at about 4:40 PM, Brown entered the pawn shop with a piece of equipment that he had brought to pawn. (T. 1384-1386, 1394). Brown observed that there were three young black male customers already in the shop. (T. 1387-1390). Brown noticed that Barker did not "look" the same; he did not joke with Brown the way he normally would. (T. 1392). Brown signed the pawn slip at 4:42 PM, received $30 in cash from Barker and left. (T. 1384, 1394). The three black males remained in the store. (T. 1409).

A week later Brown found out that Barker had been killed. (T. 1395). Brown subsequently contacted the police, gave the police a statement and was shown some photographs by officers. On June 26, 1991, Brown identified the defendant, from photographs, as being one of the black males he had seen at the Outpost Pawn Shop on May 25. (T. 1398-1400).

Debra Barker, Charles Barker's wife, last spoke with Barker at 4:30 PM on May 25, 1991. (T. 1216, 1217). Since the pawn shop normally closed at 5:00 PM, Barker expected her husband to arrive at home at 6:00 PM. (T. 1217, 1218). When he did not come home at the expected time, Debra Barker called her friend Marjorie Bower and asked her to go to the pawn shop to find Chuck Barker. (T. 1618-1620).

Marjorie Bower arrived at the pawn shop at 7:10 PM. (T. 1235, 1250). Bower found the front door to the pawn shop open and loud music playing. (T. 1236). Inside, Bower saw some

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[2] With court permission, the defendants and the court agreed that either defendant's objection would stand for both defendants. (T. 1219).

blood on the floor. She then decided to find a police officer and successfully contacted Officer Frankie Buckner, an officer working off-duty down the street. (T. 1239, 1240, 1257, 1258).

Officer Buckner entered the pawn shop with other officers and found Chuck Barker lying on the floor with several gunshot wounds. (T. 1259, 1260).

Officer Tommy Stoker, a Metro-Dade crime scene technician, went to the pawn shop and examined the body of Charles Barker. Stoker found that Barker was still wearing his jewelry. (T. 1448). Stoker noted that although the pawn shop was extremely cluttered and messy, he was able to find several automatic weapon casings and projectiles in the pawn shop. (T. 1441, 1471, 1490). Two projectiles were found under Barker's body, as was a .25 caliber pistol. (T. 1448, 12481). Stoker impounded documents found on the counter top at the pawn shop and turned them into the police identification section. (T. 1458, 1460, 1464). Stoker also impounded some automatic firearms. He left behind a pistol hanging on a Dutch door in the counter, a pistol in the pawn shop safe and several other firearms. (T. 1480-1484). Finally, Stoker stated that he did not swab Barker's hands for evidence of gunshot residue. (T. 1492).

Robert Latta testified that he worked at the pawn shop both prior to and subsequent to the death of Chuck Barker. (T. 1280-1282, 1313). Latta stated that Barker was heavily armed when he ran the store: Barker wore a .45 caliber pistol in a holster, kept a smaller caliber pistol in his waistband, and had three loaded firearms located around the shop for access when needed. (T. 1291, 1292). Latta conceded that although Barker kept poor inventory records, he was able to determine that several weapons, including a Mossberg shotgun, were missing. (T. 1295, 1296, 1335, 1336).

Detective Pascual Diaz, a homicide detective for Metro-Dade Police, testified that

the homicide unit works in "teams", with each team consisting of a lead detective supported by three or four homicide detectives. (T. 1495, 1496). Diaz headed the investigation in the Barker homicide and was the detective who showed the photos to Benjamin Brown. (T. 1499-1503).

Prior to the testimony of Detective William Saladrigas, additional discussion was had between the court and the parties regarding the length of time the defendant was in custody prior to giving a statement to the police on the Barker case. The defense again objected to a court instruction regarding the defendant being interviewed on an unrelated matter. (T. 1522, 1523). The defense argued that the defense would make no issue of the length of time the defendant was in custody, nor would the defense argue that any coercion was used to obtain the statement. (T. 1522, 1523). Over the defendants' objection, the court instructed the jury:

> THE COURT: Ladies and gentlemen of the jury, please listen to me very carefully, because we are going into another legal matter, so you have to be careful. This detective is going to testify as to how he came in contact with the defendants in this case. Now, for purposes of establishing time, I have ruled that I am going to allow them to talk about this, but it's a totally unrelated matter that first came to the attention of the police. Now, I want you to make sure that you realize that that unrelated matter has nothing at all to do with this case, nothing, not a fact, not a law, nothing. It just was an unrelated matter unimportant as to why, when, where or how, but that it was being done so that there is a logical sequence of how the detective came in contact with the defendants. (T. 1524).

Detective Saladrigas testified that the "team" approach was used in the investigation of the "other matter". During the investigation, six friends of the defendants and residents of the

Hidden Garden Apartments were interviewed. (T. 1525-1527). Based upon the team's interviews with these witnesses, it was deemed necessary to interview the defendants. (T. 1525). It took ten to twelve hours to conduct the interviews on the unrelated matter. (T. 1528).

The defendant objected and moved for a mistrial based upon the testimony of Detective Saladrigas. (T. 1526-1528, 1737, 1738). The defendant argued that Detective Saladrigas' testimony regarding the "team concept", coupled with the testimony of Detective Diaz' testimony regarding the use of teams in the investigation of homicides, led the jury to the inescapable, irrelevant and highly prejudicial conclusion that the defendant was being investigated for a homicide in the "unrelated matter." (T. 1528, 1737, 1738). The court denied the defendant's motion. (T. 1529, 1739).

Timothy Thanos was interviewed by the police on June 14, 1991, the day of the defendant's arrest. (T. 1535). Thanos stated that two weeks prior to their arrest, the co-defendant told him that they had robbed a pawn shop and had shot the owner. (T. 1539, 1540). The co-defendant related that they had taken guns in the robbery. (T. 154). Thanos originally thought that the co-defendant was making up the story about the robbery. Subsequently, Thanos saw both the defendant and the co-defendant in possession of firearms. (T. 1540-1545).

Thanos, a five-time convicted felon with a drug problem, stated that the defendants lived with he and his wife for a short period of time, until two days prior to their arrest. (T. 1532, 1534, 1539). When the defendant left Thanos' apartment, Thanos stated that the defendant stored his property in a U-Haul. (T. 1537).

On June 14, 1991, Detective Salvatore Garafalo was asked by Detective Saladrigas to arrest the defendant. Shortly thereafter, the defendant was arrested while driving a U-Haul in

South Dade. (T. 1560-1564). The U-Haul was subsequently searched and a .38 caliber, Charter Arms pistol and a knapsack were recovered from the rear of the U-Haul. (T. 1642-1644). A rental agreement showing that the U-Haul was rented to the defendant on June 3 was also recovered. (T. 1637, 1669).

Admonia Patricia Blount-Coleman (Blount) was in the U-Haul with the defendant when he was arrested. (T. 1576). At the time of the defendant's arrest, Blount was fourteen years old and had been going out with the defendant for two months. (T. 1576, 1577). Blount stated that two to three weeks prior to their arrest, the defendants talked about their desire to rob a pawn shop and to steal guns and money. (T. 1580-1583). Blount recalled that the defendant said he would hold the guy while Tivan Johnson, the co-defendant would shoot or "splat" the guy. (T. 1584). Blount thought it was just "talk." (T. 1584). Later, the defendant told her that they had killed someone at the pawn shop and that it took a lot of shots because the man they shot was big. (T. 1585, 1586).

Blount stated that although she gave a sworn statement to the police on June 14, she refused to talk to members of the State Attorney's Office on July 12, 1991. (T. 1606). Blount stated that she refused to speak to the prosecutor on the advice of her mother. (T. 1607). Blount was then taken into custody until she agreed to talk to the prosecutor. (T. 1625).

Dr. Jay Barnhart, a Dade County Associate Medical Examiner, supervised the autopsy of Charles Barker. (T. 1678-1685). Dr. Barnhart opined that Barker died from multiple gunshot wounds. (T. 1687). Dr. Barnhart traced the paths of twelve separate wounds. The majority of the projectiles struck Barker in the trunk or abdomen region. (T. 1695, 1704). Dr. Barnhart stated that Wound "B", a bullet that passed through Barker's chest and pierced his heart, was a fatal wound. (T. 1687, 1693). Dr. Barnhart testified that Barker may have been able to move for fifteen seconds to

ten minutes after being hit by the bullet that caused Wound "B", with death likely ensuing ten minutes after being struck by that bullet. (T. 1714-1716, 1726). Differing wound paths for the other bullets suggest that Barker was moving as he was being hit. (T. 1727).

Dr. Barnhart found that several of the bullets left "supported wounds". That is, Barker's back was against a hard surface that prevented the bullets from exiting his body. (T. 1697, 1728). Dr. Barnhart speculated that a floor, a filing cabinet or even a chair could provide the support necessary to cause a "supported wound". (T. 1712, 1729). Dr. Barnhart recovered five projectiles from these wounds. (T. 1702).

Detective Michael Jones interviewed Admonia Blount and the defendant on the evening of June 14-15, 1991. (T. 1744, 1745). In his formal statement, the defendant told Jones that he had been to the pawn shop two to three times prior to May 25, 1991. (T. 1770, 1771). On those occasions, the defendant checked out the security at the pawn shop as part of a plan to rob the store of money and guns. (T. 1770). On May 25, the defendant and Tivan Johnson arrived at the pawn shop at 4:50 PM. They backed their car into a parking space to hide their license tag and to provide easier access to the trunk. (T. 1772). The defendant carried a .380 caliber automatic pistol, while Tivan Johnson carried a .38 caliber pistol. (T. 1772, 1773). Inside the store, the defendants waited until two customers of the pawn shop left. (T. 1774). After Tivan Johnson was shown a few guns by the owner, the defendant took out his gun and shot the owner. (T. 1774-1776). While the owner tried to draw the .45 caliber pistol that he was carrying, the defendant fired at the owner six more times. (T. 1776). Tivan Johnson fired five times, then reloaded his gun with one bullet, fired and hit the owner in the face. (T. 1776, 1777). The defendants then loaded nine handguns, $1400 in cash and some rifles in a duffel bag and left the store. (T. 1778, 1779, 1782). The defendant later sold some

of the guns taken in the robbery. (T. 1782). The defendant concluded by stating that he told Patricia Blount about the robbery. (T. 1784).

Detective Pascual Diaz took a formal statement from Tivan Johnson.[3] The co-defendant told the detective that the defendant planned the robbery at the Outpost Pawn Shop on the Monday before the Saturday that the robbery occurred. (T. 1819, 1820). The Outpost was selected because it had only one employee and no video cameras. (T. 1820). The defendant, Johnson and a man named Eric were to commit the robbery. (T. 1820). On May 25, Johnson armed himself with a .38 caliber pistol, while the defendant got a .380 automatic from Eric. (T. 1821, 1822). The defendants arrived at 4:45 PM and backed their car in at the pawn shop. (T. 1823). After Johnson asked the owner about a few of the guns on display, Johnson took out his gun and told the owner to "Freeze". (T. 1825, 1826). Johnson noticed that the owner was carrying a .45 caliber pistol in a holster. (T. 1826). The defendant then "freaked out" and started firing at the owner. (T. 1826, 1831). The defendant fired seven shots while Johnson fired five. (T. 1826, 1827). After Johnson jumped across the counter to retrieve money and guns, he reloaded his weapon and shot the owner one more time in the head. (T. 1827). The defendants took $1600 in cash, several guns and then left the store. (T. 1827, 1828). Johnson stated that he put the gun he used in the robbery in the back of the defendant's U-Haul truck. (T. 1830). The defendant sold several guns, including a Mossburg shotgun at a pawn shop. (T. 1830, 1831).

At the conclusion of his recitation of the co-defendant's statement, Detective Diaz related that he did not check into Barker's license to sell guns. (T. 1852). Diaz acknowledged that

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[3] Tivan Johnson challenged the admissibility of his statement on the same grounds as the defendant in a pre-trial motion to suppress. (T. 111-355).

although pawn shop owners are required to keep records regarding their acquisition and sale of firearms, he found no such records at the Outpost Pawn Shop. (T. 1860-1862).

The Mossburg shotgun was traced to the South Dade Gun and Pawn Shop. Records at the pawn shop reflected that the defendant pawned the Mossburg shotgun there on May 30, 1991. (T. 1875, 1879-1883). The shotgun as well as a pawn slip signed by the defendant were recovered from the pawn shop. (T. 1879, 1894-1896).

Fingerprint Technician Gil Tamez compared standard fingerprints of the defendants with latent fingerprints lifted from a Ford Probe allegedly used in the pawn shop robbery and latent fingerprints lifted from the U-Haul rented by the defendant. (T. 1905-1909). A print matched to the defendant was lifted from the outside passenger window of the Probe. (T. 1912, 1913). One print belonging to the defendant was lifted from a passenger side mirror on the U-Haul. (T. 1914). No prints were identified on the Charter Arms firearm found in the U-Haul. (T. 1915, 1916).

Fingerprint Technician James Hinds matched the defendant's thumb print with that found on the pawn slip recovered from the South Dade Gun and Pawn Shop. (T. 1921, 1922). An additional fingerprint of the defendant's was found on a pawn record recovered by Technician Stoker at the Outpost Pawn Shop. (T. 1934). Hinds did not know where Stoker had found the pawn slip in the pawn shop. (T. 1940, 1941).

Prior to the taking of testimony on March 6, 1995, defense counsel reported to the court that members of the jury had seen the defendants in chains. (T. 1985). The defendants moved for a mistrial. (T. 1985). The court, finding that the jurors had every reason to believe that the defendants were in jail, denied the motion. (T. 1986).

Criminalist Tom Quirk examined ten projectiles and found that five had been fired

by a .380 automatic and five were fired by a .38 caliber pistol. The projectiles of the same caliber were fired by the same gun. (T. 1994-1997, 2000-2003). Quirk also examined the shirt worn by Charles Barker at the time of his death and found no evidence of burnt gunpowder on the shirt, indicating that Barker was likely shot from a distance of at least four feet. (T. 2010-2017). Since Quirk found evidence of lead particulate on the shirt, a substance discharged from a gun that may be found at a distance of up to six feet, Quirk theorized that the shots that struck Barker in the chest and abdomen were fired at a distance of four to six feet. (T. 2017, 2018).

Criminalist Robert Kennington compared the five .38 caliber projectiles examined by Criminalist Quirk with the .38 caliber Charter Arms pistol found in the rear of the U-Haul. Kennington found that the pistol fired the projectiles in question. (T. 2034, 2036, 2051).

At the conclusion of Kennington's testimony, the State rested. The defendant moved for a judgment of acquittal and renewed all previous motions. (T. 2055). The court denied all pending motions. (T. 2056).

Tivan Johnson testified that he and the defendant went with Eric to the Outpost Pawn Shop on May 25, 1991, so that Eric could pick up some guns from the pawn shop owner. (T. 2063, 2064). Johnson was supposed to be paid by Eric for assisting him in selling the guns later. (T. 2089-2092). Eric supplied Johnson and the defendant with guns before they entered the pawn shop. (T. 2064, 2065). Inside the pawn shop, while Eric and Barker talked about the guns, Johnson and the defendant loaded some guns in Johnson's car and Eric's car. (T. 2066). After a period of time, Eric and Barker began to argue about money Eric claimed he was owed by Barker. (T. 2068-2070). Barker then pulled out his gun and fired at them. (T. 2071). Johnson, the defendant and Eric fired back at Barker at the same time. (T. 2071, 2072). Johnson and the defendant then left and met Eric

at Eric's house, where they gave Eric the guns taken from the pawn shop. (T. 2073). Johnson claimed that Eric gave the defendant a shotgun because Eric owed the defendant some money. (T. 2074).

Johnson testified that he lied to the police in his statement because Eric had threatened his mother if Johnson would reveal Eric's role in the incident. (T. 2074, 2128, 2129). Johnson stated that he was now telling the truth because Eric had been killed on the street. (T. 2075). Johnson denied going to the pawn shop to rob it and he denied reloading his pistol to shoot Barker again. (T. 2075, 2076, 2100, 2135). Johnson further denied telling Blount that the defendants planned to rob a pawn shop and kill the owner. (T. 2079, 2080). Johnson claimed that the police already possessed their facts when he spoke with them and he merely went along with what the police said. (T. 2100-2105, 2108, 2109, 2116).

At the conclusion of Johnson's testimony, both defendants rested. (T. 2160). In rebuttal, the State called Detective Pascual Diaz. Detective Diaz testified that all of the information in Johnson's statement came from Johnson and was not provided to Johnson by the police. (T. 2174-2184).

The State then called Johnson's ex-wife, Renee Carey. The State intended to rebut Johnson's testimony by eliciting statements made by the defendant to Carey in the presence of Tivan Johnson, regarding the pawn shop robbery. (T. 2195, 2198). In doing so, the State hoped to establish an admission by Johnson's silence following the defendant's statements. (T. 2199). The defendant objected and moved to sever the defendants. The defendant claimed that he was prejudiced because the statements would not have been admissible on rebuttal against him only, and because he could not contest Carey's credibility regarding the statements with his own testimony, since the State

waited to call Carey on rebuttal. (T. 2197, 2213). The court denied the defendant's motion to sever and ruled that the State could elicit the defendant's out-of-court statements to rebut Johnson's testimony. (T. 2213, 2214).

Renee Carey testified that she was married to Tivan Johnson on May 25, 1991. Johnson picked Carey up from work at 6:00 PM on that date. (T. 2216-2219). When they arrived at home, Carey observed the defendant counting money. (T. 2223). Carey also saw 12 to 15 guns wrapped in a blanket. (T. 2224, 2225). Later, the defendant told her that the money and guns came from a pawn shop. (T. 2230). Johnson was in the apartment at the time, but was not present in the room when the defendant told Carey what had happened. (T. 2230, 2231, 2233). The defendant moved for a mistrial based upon the foregoing and an additional reference in Carey's deposition used by the prosecutor, where Carey claimed that the defendant told her that "he shot him in the chest". The court denied the defendant's motions. (T. 2233-2235).

At the conclusion of Carey's testimony, the State rested its rebuttal case. The defendant renewed his motion for judgment of acquittal as well as his motions for suppression, mistrial and severance. (T. 2246). The court denied the defendant's motions. (T. 2247).

Subsequently, the jury returned guilty verdicts on all counts, as charged. (R. 255-258, T. 2429).

On April 20, 1995, the court began the penalty phase of the trial.

Salvatore Garafalo testified that he was the lead investigator on the homicide at Rudy's Restaurant. (T. 2524). Garafalo stated that witnesses had seen two men run from Rudy's at 1-1:30 AM on the morning of June 13, 1991 and enter a Ford Probe registered to Renee Carey, Tivan Johnson's ex-wife. (T. 2526). Following the defendant's arrest on June 14, 1991, Garafalo took a

formal statement from the defendant about the homicide. (T. 2527-2531). The defendant told him that Tivan Johnson, a former employee at Rudy's, called the restaurant on the night of June 12, and told the manager, Thomas Walker, that he had lost an earring in the restaurant. (T. 2540-2541). Johnson arranged with Walker to come to the restaurant twenty minutes later to pick up the earring. (T. 2541, 2542). The defendant stated that the plan was to simply take money from the restaurant and leave. (T. 2545). The defendant went to the restaurant door and Walker let him inside. (T. 2545, 2546). Once inside, the defendant pretended to look for the earring. (T. 2546, 2547). A few moments later, the defendant pulled out a pistol, escorted Walker to the rear of the restaurant at gunpoint and had Walker open up an office safe. (T. 2547-2549). The defendant then gave Johnson the signal to come in the restaurant. (T. 2550). After Johnson removed $7-8,000 from the safe, the defendant, at Johnson's suggestion, put Walker in the restaurant freezer. (T. 2552-2554). After Johnson said "Off him", the defendant shot Walker once in the back of the head. (T. 2555, 2556). Johnson and the defendant then left and split the money later at Thanos' apartment. (T. 2557, 2558). The defendant said he used his share of the money to pay bills and purchase a stereo system. (T. 2558, 2562).

Thomas Romagni took a formal statement from Tivan Johnson regarding the Rudy's homicide. (T. 2584-2589). Johnson's statement was similar to the defendant's. Johnson added that he decided to rob Rudy's because he knew the scheduling of the employees and felt that the manager, Walker, was a racist. (T. 2607-2609). Johnson differed from the defendant on the details regarding the shooting of Walker. Johnson said that he told the defendant that he was going to turn the freezer off when the defendant shot Walker. (T. 2625-2627).

Associate Medical Examiner Roger Mittleman went to the scene of the Rudy's homicide and observed the single wound to the back of Walker's head. (T. 2643-2646, 2653).

Mittleman found stippling at the side of the wound, which indicated that the shot had been fired from close range. (T. 2654). Based upon the location of blood spatter found by Mittleman, Mittleman theorized that Walker was in a crouching position when he was shot. (T. 2652).

Dr. Hyman Eisenstein, a board certified neuropsychologist, testified that he examined the defendant five times during the month of April, 1995. (T. 2668-2670). In addition to his interviews with the defendant, Dr. Eisenstein reviewed the defendant's school records and medical records. The doctor also administered several objective tests to the defendant. (T. 2671, 2674).

Dr. Eisenstein learned that the defendant was subjected to physical abuse by an abusive, alcoholic father prior to age seven and has on several occasions suffered head trauma. (T. 2671-2673). Based upon the defendant's medical history[4], his medical records and the test results, Dr. Eisenstein opined that the defendant suffers from brain impairment. (T. 2676, 2698). Specifically, Doctor Eisenstein stated that the defendant has a frontal lobe disfunction that manifests itself in impaired judgment and reasoning ability. (T. 2676, 2682, 2717).

Dr. Eisenstein expanded on the defendant's condition by noting that while the defendant knows that it is wrong to rob or kill, he lacks the proper judgment ability to make good choices. The defendant also lacks the ability to inhibit his behavior so as to conform his behavior to the requirements of the law. (T. 2676, 2682, 2684, 2716, 2718, 2719). Dr. Eisenstein stated that the defendant was also easily subject to the influence and domination of others. (T. 2678, 2682). Dr. Eisenstein noted that the defendant was involved in no criminal activity until he left his mother's home and moved in with Tivan Johnson. Almost immediately after moving in with Johnson, the

[4] Dr. Eisenstein testified that the defendant experienced a period of post-traumatic amnesia, which the doctor stated was evidence of a permanent head injury. (T. 2673).

defendant became involved in criminal activity. Dr. Eisenstein concluded that Johnson replaced the defendant's mother as the person who influenced and directed the defendant's actions. (T. 2678, 2680, 2682). Dr. Eisenstein opined that without Johnson, the defendant would not have committed crimes. (T. 2726, 2727).

Dr. Eisenstein found that the defendant had a full scale IQ of 82, a low average intelligence score. (T. 2691-2695).

Based upon the foregoing, Dr. Eisenstein concluded that at the time of the homicide, the defendant was under the influence of extreme mental or emotional disturbance and was under the substantial domination of another person, namely, Tivan Johnson. Dr. Eisenstein testified that the corresponding statutory mitigating circumstances applied to the defendant. (T. 2681, 2682). In giving his opinion, Dr. Eisenstein recognized that an EEG and CAT scan[5] of the defendant had been taken and produced a normal result. (T. 2696-2698). Dr. Eisenstein countered that his opinion was based on the defendant's responses given to objective tests and a comparison of those test results with the standardized responses given by other brain damaged people. (T. 2698, 2706).

Darleen Cooper, the defendant's sister, testified that their father was an alcoholic who was frequently abusive to the children. (T. 2731-2733). Ms. Cooper recalled a particularly severe incident when the defendant was three or four years old, which resulted in the father ramming the defendant's head into a refrigerator. (T. 2733, 2734). After their father administered several beatings to their mother, their parents divorced and their father moved out. (T. 2735-2737). Ms. Cooper opined that the defendant was adversely affected by the departure of his father. (T. 2737).

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[5] An EEG and CAT scan were administered to the defendant at Jackson Memorial Hospital following a fall and head trauma the defendant suffered at age 14. (T. 2696, 2697).

Darleen Cooper added that when she saw her brother in May, 1991 he seemed to act differently; he acted strange, then nervous and depressed. Cooper thought that the defendant might be under the influence of drugs or alcohol. (T. 2749-2752). At that time, the defendant denied that he had an alcohol problem. (T. 2752).

Dorothy Harris also testified that she noticed a change in the defendant around May of 1991. (T. 2759, 2760). Harris had always known the defendant as a sweet child as he was growing up. In May, 1991, she noticed that the defendant was prone to cursing and was rageful. (T. 2760-2762). Harris believed at that time that the defendant was under the influence of drugs. (T. 2762, 2766).

Cristina Roan, the defendant's aunt, attested to the violent and abusive nature of the defendant's father. Roan stated that the defendant's father frequently whipped and beat the defendant. (T. 2794, 2805). Roan recalled that on one occasion, the defendant and his siblings were threatened by their father with a gun. (T. 2795, 2796). The police had to be called to resolve the situation. (T. 2795-2796).

Roan testified that she believed that the defendant was on drugs at age 17, because the defendant began acting out of character. (T. 2798-2799). Subsequently, the defendant admitted to Roan's son that he had been using drugs. (T. 2806).

Dr. Allan Levy, a psychologist, interviewed the defendant for approximately one and one-half hours in preparation for his testimony. (T. 2820). With the exception of the defendant's refusal to talk about the facts of the murders, the defendant was cooperative with Dr. Levy. (T. 2816, 2820). Dr. Levy also reviewed several tests given to the defendant by Dr. Gary Schwartz, the defendant's medical records and the statement given by the defendant to the police on June 14, 1991.

(T. 2818, 2819).

Based upon the information he reviewed, Dr. Levy opined that the defendant has deep emotional and psychological problems. (T. 2879). Dr. Levy further stated that the defendant suffered through a traumatic childhood that should be considered in assessing the defendant's character. (T. 2846, 2847). However, Dr. Levy felt that the defendant suffered from no major mental illness and had no long term brain damage. (T. 2843, 2844).

Dr. Levy did not contest the accuracy of the poor scores earned by the defendant on the IQ tests administered by Dr. Schwartz and Dr. Eisenstein. (T. 2862-2866). Instead, Dr. Levy maintained that the IQ scores do not reflect the defendant's true ability. (T. 2862). Dr. Levy stated that the defendant's behavior demonstrated a better measure for discerning the defendant's intelligence. (T. 2866, 2867). For evidence of the defendant's behavior, Dr. Levy heavily relied on the defendant's statement given to the police on the day of his arrest. (T. 2850, 2851).

Dr. Levy also stated that the defendant told him that he had been heavily abusing drugs since the age of sixteen or seventeen. (T. 2829). Dr. Levy reasoned that since the defendant made no mention of drug use in his statement to the police, and the defendant failed to acknowledge in two jail admission cards, one for June 1, 1991[6] and one for June 15, 1991, that he was a drug abuser, the defendant was probably offering drug usage as an excuse. (T. 2830-2835).

Finding no evidence in the defendants' statements to the police that the defendant operated under the domination of Tivan Johnson, Dr. Levy concluded that he found nothing to

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[6] The defendant moved for a mistrial based on the State's attempt to admit records of the June 1, 1991 admission into the Dade County Jail, arrest records that were irrelevant and wholly unrelated to the offenses charged. (T. 2883, 2884). The trial court denied the motion. (T. 2884).

support the existence of any statutory mitigating circumstance. (T. 2837).

Admonia Coleman Blount testified that during the two months that she dated the defendant, she never saw him do drugs. (T. 2900). She added that she never saw Tivan Johnson boss the defendant around. (T. 2901). Blount again described the conversation the defendants had with her three to four weeks prior to their arrest, when the defendant talked about plans to rob a pawn shop, take guns and "splat" the owner. (T. 2901, 2902).

Renee Carey also added that she had never seen the defendant take drugs. (T. 2966). In her view, the defendant and Tivan Johnson were friends on equal footing. (T. 2966, 2967).

Dr. Gary Schwartz, a psychologist, testified that he interviewed and administered tests to the defendant on four or five occasions. (T. 2921-2924). Dr. Schwartz opined that the personality, intelligence and psycho-neurological tests he administered were reliable and essential to uncovering information that cannot be learned in an interview. Dr. Schwartz added that some of the tests he gave the defendant had a credibility factor which enabled him to determine if the defendant was being truthful in his answers. (T. 2924-2926).

Dr. Schwartz reported that the defendant had a full-scale IQ of 77 which placed him in the borderline intelligence range; one step above retarded and one step below low average intelligence. (T. 2927, 2928).

Dr. Schwartz found that the defendant had a mild neurological deficiency in his review of the psycho-neurological screen he administered. (T. 2929, 2930). The defendant's results were typical of someone who had a long-standing neurological deficiency or someone who had a lengthy substance abuse problem. (T. 2958).

The defendant had reported that he frequently smoked marijuana and would lace the

marijuana with crack. (T. 2935). The defendant claimed that he and Johnson drank a lot of beer and smoked the crack-laced joints before the homicide at the pawn shop. (T. 2936). Dr. Schwartz testified that the results he saw on the Carlston Psychological Survey, confirmed that the defendant had a severe substance abuse problem. (T. 2928). Based on the test results and the defendant's descriptions of the effect the drugs had on him[7], Dr. Schwartz believed that the defendant was being truthful about his drug problem. (T. 2936, 2937, 2952, 2960).

Based upon his evaluation of the defendant, Dr. Schwartz found no statutory mitigating circumstances. (T. 2937). As non-statutory mitigation, Dr. Schwartz listed the defendant's borderline intelligence level, among the lowest 15% in the country, the defendant's substance abuse problem, which Dr. Schwartz felt adversely affected the defendant's behavior, and the defendant's abusive childhood. (T. 2932, 2933, 2937, 2938).

Viola Cooper, the defendant's mother, testified that her ex-husband was an alcoholic and was extremely abusive to her and her children. (T. 2981-2985). It was not uncommon for the defendant's father to hit the defendant, his siblings or Mrs. Cooper. In fact, there were several incidents that made it necessary for Mrs. Cooper to call the police about her ex-husband. (T. 2984, 2985, 2989, 2990).

Mrs. Cooper described several instances where the defendant suffered head trauma and had to have medical attention. (T. 2987, 2990, 2991). Mrs. Cooper said that following these head

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[7] Dr. Schwartz testified that his sub-specialty was the treatment of people suffering from substance abuse. (T. 2926, 2927). Dr. Schwartz had two years of intensive experience at a substance abuse rehabilitation center. (T. 2927). Dr. Schwartz stated that the answers provided by the defendant regarding his drug use experience were consistent with what Dr. Schwartz had found in the drug treatment program. (T. 2936, 2937).

injuries, the defendant often complained of headaches and frequently needed the assistance of a doctor. (T. 2992).

After the defendant moved out of her house and in with Tivan Johnson, Mrs. Cooper noticed that the defendant had developed a hot temper. (T. 2995). Although the defendant had never mentioned to her that he was using drugs, she suspected that the defendant might be abusing them. (T. 2995).

Wandsetta Cooper, the defendant's sister, testified that life at home with her father was miserable for her and her siblings. (T. 3004). She stated that her father would frequently hit the children; on several occasions, including one involving the defendant, their father would pull out a gun and place it against the head of one of the children. (T. 3005). Even after their parents divorced, their father would keep coming around and the violence caused by him continued. (T. 3007).

Cooper noticed that after the defendant moved out of the house, he exhibited severe mood swings, which caused her to suspect that he was abusing drugs. (T. 3010). Cooper found his behavior to be much like that of her sister, who was also a drug abuser. (T. 3010).

Dr. Gisela Aguila-Puentes, a psychologist, reviewed the test results of Dr. Eisenstein and repeated some of the tests with the defendant. (T. 3017-3021). On both the lateral motor function test and the visual memory test, the defendant demonstrated impairment with Dr. Eisenstein but achieved an average result with Dr. Aguila-Puentes. (T. 3021-3024). Dr. Aguila-Puentes opined that the defendant had manipulated the test results with Dr. Eisenstein because the defendant was not motivated to do well. (T. 3024, 3050).

Following her review of the defendant's statement to the police, Dr. Aguila-Puentes found the defendant to be coherent and organized in thought. (T. 3027, 3035, 3036). On the tests that

the defendant could not manipulate, Dr. Aguila-Puentes found that the defendant scored in the average range. (T. 3032, 3035). In her view, the defendant had no brain injury or disorder. (T. 3032, 3033, 3040).

Finally, Dr. Aguila-Puentes stated that if the defendant's family had noticed the defendant exhibiting behavior that they believed was consistent with drug usage, the doctor would not exclude the possibility that the defendant was taking drugs. (T. 3058). While prolonged use of drugs would show up on her tests, drug use of three to five months would not. (T. 3058, 3059).

At the conclusion of Dr. Aguila-Puentes testimony, the lawyers presented closing argument and the court instructed the jury. Subsequently, the jury returned a recommendation that the death penalty be imposed by a vote of 8 to 4. (T. 3410).

Prior to the imposition of sentence, the defendant apologized to the Barker family and expressed concern for the pain the family suffered. (T. 3424, 3425).

In its sentencing order, the court found three statutory aggravating circumstances: the defendant had previously committed another capital felony; the defendant committed the murder while engaged in the commission of a robbery;and the murder was committed in a cold, calculated and premeditated (CCP) fashion. (T. 3436-3442). In support of the CCP finding, the court relied on the testimony of Admonia Blount. (T. 3441, 3442).

The court found one statutory mitigating circumstance; the defendant had no significant, prior criminal history. (T. 3443). The court found that the evidence did not support the remaining statutory mitigating circumstances. The court found that Dr. Eisenstein was in conflict with the other doctors regarding whether the defendant committed the crime while under a severe mental or emotional disturbance, whether the defendant acted under the domination of Tivan

Johnson and whether the defendant was able to appreciate the criminality of his conduct and could conform his conduct to the law. The court found little evidence to support Dr. Eisenstein's opinion and found the other doctors more credible. As such, the court found that those three mitigating circumstances had not been proven. (T. 3443-3449).

The court found that the defendant's age was not a mitigating circumstance. The court decided that for the defendant's age to be a mitigating factor bearing weight, the defendant's youth must be linked to another characteristic, such as immaturity or senility. Although the defendant was just 18 years old at the time of the murder and had been tested with a below average IQ by two doctors, the court gave no weight to the defendant's age because the court found that the defendant's maturity outweighed his youthful age. (T. 3449, 3550).

Finally, the court found that the defendant's low intelligence and his abusive childhood were non-statutory mitigating circumstances. (T. 3451, 3452). The court also considered the remorse demonstrated by the defendant. (T. 3436).

The court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances and imposed the death penalty on the first degree murder count. (R. 482-485, T. 3451, 3452). The defendant scored 5 ½ to 7 years on the remaining counts. (R. 462). The court departed from the guidelines on the armed burglary and armed robbery counts and imposed consecutive life sentences on those counts, with consecutive three-year minimum sentences imposed on each count. (R. 482-485, T. 3452, 3453). The court departed on the guidelines because of the existence of another capital felony, the Rudy's homicide, that could not be scored. (T. 3452). The state announced a nolle pros on count four of the indictment and the court vacated judgment on that count. (R. 504).

A timely notice of appeal was filed on June 29, 1995. (SR. 1). This appeal follows.

SUMMARY OF ARGUMENT

Guilt/Innocence Phase

The trial court erred in permitting the defendant's confession to be admitted into evidence against him. The confession was given after the defendant was inadequately apprised of his Miranda rights by Metro-Dade Police. The rights warning form used by Metro-Dade Police failed to fully apprise the defendant of his right to counsel in that it completely failed to inform the defendant that he had the right to consult with a lawyer prior to questioning. The failure to apprise the defendant of this essential right, rendered the defendant's subsequent waiver constitutionally infirm.

The trial court further erred when it informed the jury that the defendant had come to the attention of the police on an "unrelated matter". The court then compounded the error by permitting the State to elicit testimony that the defendant had been questioned on that "unrelated matter", under circumstances that plainly brought to the jury's attention that the unrelated matter was a homicide. The court's instruction and the evidence elicited by the State were not admissible because they were not relevant to prove any material fact in issue. Instead, they only served to impermissibly demonstrate that the defendant had a propensity to commit crime.

At the close of the State's case-in-chief, the defendant did not put on a case. The co-defendant, however, testified on his own behalf. In rebuttal of the co-defendant's testimony, the State offered the testimony of the co-defendant's former wife, Renee Carey. Essentially, Carey's rebuttal testimony consisted of admissions made by the defendant to her. The defendant objected to Carey's

testimony, since her testimony did not truly rebut the co-defendant's testimony and served to improperly give the State a second chance to implicate the defendant, when the defendant had put on no case. Over defense objections, motions for severance and mistrial, the State was erroneously permitted to elicit Carey's improper and highly prejudicial testimony.

The defendant's entitlement to due process through the application of the presumption of innocence was compromised, when the defendant was unnecessarily taken before the jury on several occasions in chains and handcuffs.

Penalty Phase

The trial court improperly instructed the jury that they "must" recommend the death penalty if they find that the aggravating circumstances outweigh the mitigating circumstances. The court's instruction not only deviated from the balance struck by the Florida Legislature and this Court in its standard instructions, which dictate no particular result at the conclusion of the weighing process, but the trial court's instruction also served to deprive the defendant of the individualized sentencing determination to which he was constitutionally entitled. The court's instruction also improperly invaded the province of the jury and curtailed the discretion reserved to the jury under Florida law, as part of the jury's inherent pardon power.

The trial court erred in finding that the cold, calculated and premeditated aggravating circumstance had been established beyond a reasonable doubt. The evidence introduced at trial established that the defendant had planned the underlying felony, a robbery, in a felony murder scenario. On a single occasion, the defendants mentioned that they would "splat" the owner of the pawn shop to be robbed. The law in Florida is clear that for application of the "CCP" aggravator, there must be substantial evidence of a calculated, carefully planned pre-arranged design to kill. In

this case, the evidence not only failed to establish the calculation and heightened premeditation necessary for the CCP aggravator, it failed to exclude the possibility that the victim in this case was shot as the result of a spontaneous act during the commission of the underlying felony. Under those circumstances, Florida precedent clearly establishes that the CCP aggravator does not apply in this case.

The trial court applied the wrong standard and abused its discretion in failing to find the existence of the age mitigating circumstance. The defendant was eighteen years and five months old at the time of the homicide. There was substantial evidence in the record demonstrating that the defendant was victimized by violent abuse from his father during his youth, that he possessed borderline, below average intelligence and that he had abused drugs during the period immediately preceding the homicide. Given those factors and the defendant's chronological age, the record does not support the trial court's finding that the age mitigating circumstance did not apply in this case.

The trial court erred in permitting the State to introduce jail records of an irrelevant arrest of the defendant during the penalty phase. The arrest record was arguably relevant to introduce a statement made by the defendant in which he denied the usage of drugs. Notwithstanding the questionable relevancy of the defendant's statement, it was completely unnecessary and prejudicial to inform the jury that the statement was made while the defendant was incarcerated as the result of an arrest. The arrest record constituted evidence of an impermissible non-statutory aggravating circumstance. Given that the defendant was never convicted or charged with an offense resulting from that arrest, the irrelevant arrest record also prejudicially served to diminish the weight of the statutory mitigating circumstance involving a lack of a significant criminal history, which applied to the defendant in this case.

In his sentencing order, the trial judge erred when he failed to evaluate the non-statutory mitigating circumstance of the defendant's drug abuse problem. Since there was substantial evidence in the record to support this non-statutory mitigator, it was incumbent upon the trial judge to evaluate the evidence, make a finding concerning the mitigator, assign it weight and include it in the judge's weighing process. All of these steps are necessary to assure compliance with the constitutional mandate to consider all relevant character evidence and to provide this Court with an opportunity to conduct a meaningful review of the trial court's order. The trial court's complete failure to consider or evaluate the defendant's non-statutory mitigating evidence of drug usage requires a remand for a resentencing.

Finally, the trial court erred in imposing consecutive, mandatory minimum sentences for the use of a firearm during the commission of a burglary and a robbery, where those offenses involved the same victim and occurred in a single transaction.

I

THE TRIAL COURT ERRED IN ADMITTING THE DEFENDANT'S CONFESSION IN EVIDENCE, WHERE THE DEFENDANT HAD FAILED TO VALIDLY WAIVE HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, BECAUSE OF THE FAILURE OF THE POLICE TO ADEQUATELY WARN AND APPRISE THE DEFENDANT OF THOSE RIGHTS.

On June 14, 1991, the day of his arrest, the defendant was given Miranda warnings from a rights warning form regularly used by Metro-Dade Police.[8] (T. 147, 172-173). The form contains the following admonitions:

Number One: You have the right to remain silent. You do not have to talk to me if you do not wish to do so. You do not have to answer any of my questions. Do you understand?

Number Two: Should you talk to me anything that you might say may be introduced into evidence in court against you. Do you understand?

Number Three: **If you want a lawyer to be present during questioning, at this time or any time hereafter, you are entitled to have a lawyer present.** Do you understand?

Number Four: If you cannot afford to pay for a lawyer one will be provided for you at no cost if you want one. Do you understand that right?

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[8] Prior to questioning by Detective Jones, the defendant was read the same rights warning form and questioned by Detective Garafalo. (T.147). The defendant gave Detective Garafalo a statement that was used in the prosecution of the defendant for the homicide in Rudy's Restaurant in Dade County Circuit Court Case No. 91-21599-B. The defendant was convicted of first degree murder and an appeal of his conviction resulted in an affirmance. **Cooper v. State**, 638 So. 2d 200 (Fla. 3rd DCA 1994).

Knowing these rights are you willing to answer my questions without having a lawyer present? (T. 148-49, 172-73).

Detective Michael Jones, the detective who took the defendant's statement in this case, did not expand on or deviate from the form in any way. (T. 182). The defendant signed the rights warning form and gave a statement to Detective Jones that became the feature of the State's case against the defendant.

In this case, both the provisions of the Fifth Amendment and Article I, Section 9 of the Florida Constitution were violated, when Metro-Dade police officers obtained a statement from the defendant without fully and adequately advising the defendant of his right to counsel under those provisions.

In Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602 (1966), the United States Supreme Court recognized the importance of the right to counsel as a necessary safeguard to protect the sanctity of the privilege against self-incrimination, contained in the Fifth Amendment to the United States Constitution. 86 S. Ct. at 1625. Due to the inherently coercive nature of the entire interrogation process, including the period prior to the onset of questioning, the Court recognized:

> "... the need for counsel to protect the Fifth Amendment privilege comprehends **not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning** if the defendant so desires."

86 S. Ct. at 1625-26. To assure that a defendant clearly comprehends his rights under the Fifth Amendment, the Court mandated that:

> "...an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and

> to have the lawyer with him during interrogation ... this warning is an absolute prerequisite to interrogation."

86 S. Ct. at 1626.

Similarly, this Court in Traylor v. State, 596 So. 2d 957 (Fla. 1992), construed Article I, Section 9 of the Florida Constitution, and set forth the requirements necessary to ensure the voluntariness of confessions. Specifically, this Court mandated that prior to custodial interrogation, suspects must be told that they have the right to a lawyer's help, meaning, "that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." 596 So. 2d at 966. This Court concluded that any statements obtained in contravention of the guidelines set forth by the court, violated the Florida Constitution and could not be used by the State. 596 So. 2d at 966.

In reviewing the propriety of the admission of an accused's confession, several courts have carefully scrutinized warnings to assure that the accused was effectively informed that he had the right to consult with a lawyer prior to an interrogation *and* had the right to have the attorney present during questioning. See, e. g., Duckworth v. Eagan, 492 U. S. 195, 204 (1989), Miranda requires "that the suspect be informed, as here, that he has the right to an attorney **before and during** questioning"; United States v. Contreras, 667 F. 2d 976, 979 (11th Cir. 1982), "a Miranda warning is adequate if it fully informs the accused of his right to consult with a lawyer prior to questioning"; holding that warnings that informed the defendant "of his right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed" were sufficient; Montoya v. United States, 392 F. 2d 731, 735 (5th Cir. 1968), "We hold that an express statement that a person 'has the right to consult with a lawyer **and** to have the lawyer

with him during interrogation' is an 'absolute prerequisite to interrogation'."; Windsor v. United States, 389 F. 2d 530, 533 (5th Cir. 1968) (same).

Following the precepts set forth in **Traylor**, this Court ordered that statements obtained in violation of the **Traylor** guidelines, be suppressed. In Thompson v. State, 595 So. 2d 16 (Fla. 1992), the defendant was advised, regarding his right to counsel, that..."if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate." This Court noted that while the defendant was advised regarding his essential rights to consult with an attorney and to have an attorney present during questioning, he was not advised of his right to have a lawyer appointed for him for that purpose, if he could not afford a lawyer. This Court recognized that while the Constitution may not require the use of a "talismanic incantation" of the rights contained within the Fifth Amendment and Article I, Section 9, the Constitution does require that the accused be clearly and adequately informed of his Miranda rights or their equivalent. **Thompson**, 595 So. 2d at 17. This Court concluded that the failure to apprise the defendant of his right to an appointed lawyer contravened the **Traylor** guidelines and mandated suppression of the defendant's statement. See also, James v. State, 223 So. 2d 52 (Fla. 4th DCA 1969); the failure to advise the defendant of his right to consult with an attorney prior to interrogation, to have an attorney with him during interrogation, and to have an attorney appointed for him required suppression of the defendant's post-arrest statements.

It is apparent from the language in **Miranda** and **Traylor** quoted above, and the foregoing authorities, that the defendant was not clearly and fully apprised of his right to counsel guaranteed to him by both the United States Constitution and the Florida Constitution. While the defendant was informed of his right to request that counsel be present during questioning, he plainly

was not informed of the equally significant and independent **right to consult with an attorney prior to questioning**. Both the United States Supreme Court and this Honorable Court have recognized that the right to consult with an attorney prior to interrogation is an essential and fundamental component of the interrogation process; one that is necessary to assure protection of the privilege against self incrimination. **Miranda**, 86 S. Ct. at 1623-27; **Traylor**, 596 So. 2d at 964-66. Yet, the warning provided to the defendant in this case, failed to, explicitly or implicitly, inform the defendant of that basic constitutional guarantee. The warnings provided to the defendant were therefore constitutionally inadequate. As a result of that constitutional deprivation, it was error for the trial court to permit the State to benefit by permitting the State to use the defendant's statements against him.

In the trial court, the State contended that Warning #3 given to the defendant was constitutionally sufficient. While agreeing that a suspect has the right to consult with an attorney prior to waiving his rights and that the suspect must be advised of that right, the State contended that Warning #3 clearly and unequivocally informed the defendant of that right. Specifically, the State contended that when the defendant was advised, "If you want a lawyer present during questioning, *at this time* or any time hereafter, you are entitled to have a lawyer present", he was fully advised of his right to an attorney. (T.328-332).

The State's argument is untenable for three reasons. First, a reasonable person would read the phrase "at this time" to modify "present during questioning," not as providing a separate right to have a lawyer available to consult with *prior* to questioning. That is, "at this time" clearly referred to the questioning that was about to begin. In fact, the phrase in no way effectively conveys to the reader that the reader also enjoys the separate right to consult with an attorney outside of the

presence of the police prior to the interrogation. Second, the State's construction of Warning #3 ignores the fact that the same sentence containing the "at any time" language ended with the phrase "[then] you are entitled to have a lawyer present." Warning #3 thus informed the defendant that if he wanted a lawyer "at this time," then counsel would be provided -- but only for the purpose of being "present," i.e., present *during questioning*. Finally, the last sentence of the Metro-Dade form stated that, "[k]nowing these rights, are you willing to answer my questions *without having a lawyer present*?" Even assuming *arguendo* that a reasonable person would interpret Warning #3 as the State has contended, this final sentence -- which again focuses on the right to "have a lawyer *present* during the interrogation -- would have led a reasonable person to believe that the right to counsel was limited to the right to have a lawyer present during questioning.[9]

Merely having the option of refusing to be questioned by police until a lawyer was present during the interrogation is not constitutionally sufficient under Miranda, Traylor and their progeny. "The right to consult with an attorney before questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them. Thus, it is extremely important that a defendant be adequately warned of this right." People v. Snaer, 758 F. 2d 1341, 1343 (9th Cir. 1985). Since

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[9] The State further contended that a person of common sense would understand that the right to have an attorney present, implicitly includes the opportunity to consult with the attorney. (T. 328-32). The State's contention is faulty for a number of reasons. It ignores the clear requirements of Miranda and Traylor, which require clear and unequivocal admonitions regarding the right to consult with an attorney. It fails to address the absence of the required warning regarding the right to consult with an attorney **prior** to the onset of questioning. Finally, it is clearly unrealistic to expect that a reasonable person, let alone someone like the defendant, who had no prior experience with the process and possessed limited mental abilities, would understand that the right to consult with an attorney prior to questioning is inherent in Warning #3.

the defendant was not adequately apprised of this essential constitutional safeguard, his waiver of his Fifth Amendment and Article I, Section 9 rights to counsel and to remain silent were constitutionally tainted. The admission of his statement, taken from the defendant in contravention of his rights guaranteed to him by the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution, constituted harmful error that requires a reversal of the defendant's convictions.[10]

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[10] To establish that the admission of the defendant's confession was harmless error, the State must establish beyond a reasonable doubt that the improper evidence did not affect the jury verdict. *State v. Lee,* 531 So. 2d 133 (Fla. 1988) and *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). In this case, the defendants' statements constituted the heart of the State's case, in that they were central to the State's effort to prove what had occurred in the Outpost Pawn Shop on May 25, 1991. On this record, it is impossible for the State to establish beyond a reasonable doubt that in assessing the defendant's culpability in the death of Charles Barker, the jury was not affected by the defendant's confession.

II

THE TRIAL COURT ERRED IN INFORMING THE JURY THAT THE DEFENDANT HAD COME TO THE ATTENTION OF THE POLICE ON AN "UNRELATED MATTER" AND IN PERMITTING THE STATE TO ELICIT TESTIMONY THAT THE DEFENDANT WAS QUESTIONED BY THE POLICE ON THAT "UNRELATED MATTER", WHERE THAT INSTRUCTION AND EVIDENCE WERE IRRELEVANT TO ANY MATERIAL FACT IN ISSUE AND SERVED TO DEPRIVE THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL, BY DEMONSTRATING ONLY THAT THE DEFENDANT POSSESSED A PROPENSITY TO COMMIT CRIME.

It is the established law of this state that evidence of any crime committed by a defendant, other than the crime or crimes for which the defendant is on trial, is inadmissible in a criminal case where its sole relevance is to attack the character of the defendant or to show the defendant's propensity to commit crime. Holland v. State, 636 So. 2d 1289 (Fla. 1994); Craig v. State, 510 So. 2d 857 (Fla. 1987); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U. S. 847 (1959). This is so because a verdict of guilt on a criminal charge should only be based on evidence pertaining specifically to the crime. "The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about unrelated matters." Craig v. State, supra at 863.

These well-established principles have been codified in the Florida Evidence Code at Sections 90.401-90.404, Florida Statutes (1993). Section 90.401 provides that relevant evidence is evidence that tends to prove or disprove a material fact. Section 90.402 provides for the admissibility of relevant evidence, except as provided by law. Section 90.403 states, in pertinent part, that relevant evidence is inadmissible if its probative value is substantially outweighed by the

danger of unfair prejudice. "Accordingly, Section 90.404 (2)(a) recognizes the interplay of Section 90.401 and 90.403 by specifying that 'similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue.' Since similar fact evidence of other crimes is inherently prejudicial to a criminal defendant's right to a fair trial, **such evidence is admissible under Section 90.404(2)(a) only to prove a material fact in issue, that is, a material fact that is genuinely in dispute."** Thomas v. State, 599 So. 2d 162 (Fla. 1st DCA 1992). "If there is no bona fide dispute over a material fact that the similar fact evidence is offered to prove, then the probative value of such evidence necessarily has significantly less importance than its prejudicial effect, and the evidence should be excluded under section 90.403." Thomas, at 158.

The trial court violated these fundamental precepts, when the court informed the jury, by court instruction, of collateral criminal conduct attributable to the defendant, that was not relevant to any material fact in issue, and then compounded the error by permitting the State to elicit evidence concerning this irrelevant collateral conduct. It was error for the court to deny the defendant's motion for mistrial based on these events.

On several occasions during the trial, the parties discussed the State's concern regarding the length of time the defendant was in custody prior to giving a statement to the police about the Barker homicide. (T. 631-636, 1184-1190, 1522, 1523). The State wanted to explain away the time period by eliciting evidence that the defendant was being questioned by the police on an unrelated matter. (T. 631-633). Three times the defendant objected to the State's proposed testimony. (T. 633, 1184, 1185, 1189, 1522, 1523). On each occasion, the defendant assured the Court and the State that the defense would make no issue of the time the defendant was in custody prior to his statement and would not contend, in any way, that his statement was involuntary or coerced. (T. 633,

1184, 1185, 1522, 1523). Nevertheless, over defense objection, the Court instructed the jury:

> THE COURT: Ladies and gentlemen of the jury, please listen to me very carefully, because we are going into another legal matter, so you have to be careful. **This detective is going to testify as to how he came in contact with the defendants in this case. Now, for purposes of establishing time, I have ruled that I am going to allow them to talk about this, but it's a totally unrelated matter that first came to the attention of the police.** Now, I want you to make sure that you realize that that unrelated matter has nothing at all to do with this case, nothing, not a fact, not a law, nothing. It just was an unrelated matter unimportant as to why, when, where or how, but that it was being done so that there is a logical sequence of how the detective came in contact with the defendants. (T. 1524).

In instructing the jury about the "unrelated matter" involving the defendant that came to the attention of the police, the trial court clearly violated the provisions of Section 90.404 (2)(a). The clear implication of the trial court's admonition, given the context of the remark, was that the defendant had come to the attention of the police on another criminal matter. However, the trial court's admonition did not go to any "material fact in issue," since the defendants had clearly taken the position that they would make no issue regarding the period that the defendant was in custody or the voluntariness of the defendant's statement. Since there was no "dispute" regarding the time period in question, the sole relevance of the trial court's instruction, then, was one proscribed by law; the criminal propensity of the defendant.

In Roberts v. State, 662 So. 2d 1308 (Fla. 4th DCA 1995), the Fourth District addressed the admissibility of collateral criminal evidence, where the evidence was not relevant to any material fact in issue. Roberts, the defendant, was charged with capital sexual battery. At trial, the defendant admitted that he had fondled a young child while he was in a swimming pool with the child. The defendant, however, denied penetrating the child. During its case in chief, the State was permitted to elicit evidence of a collateral incident of molestation involving another child. The victim in that second incident did not state that the defendant had penetrated her. On appeal, the Fourth District held that the evidence of the collateral, uncharged incident was irrelevant. Since the defendant admitted fondling the child in the case on trial and the evidence of the second incident did not tend to prove that there was penetration in the pending case, the Court found that the evidence of the collateral offense was not relevant to any material fact in issue. As such, the evidence of the collateral offense should not have been admitted. Its admission compelled reversal of the defendant's conviction. See also Thomas v. State, supra.

In several other decisions, Florida courts have condemned the admission of evidence regarding arrests for unrelated offenses, where the only relevance of the evidence was to establish the defendant's propensity to commit crime: Marrero v. State, 343 So. 2d 883 (Fla. 2d DCA 1977), (error for the defendant's jury to have participated in jury selection in another trial involving the defendant); Knight v. State, 374 So. 2d 1065 (Fla. 3d DCA 1065), (error to permit evidence that the defendant was arrested on another occasion on an unrelated charge); Broderick v. State, 564 So. 2d 622 (Fla. 4th DCA 1990), (error to permit officer to testify that he had "become aware that there was [sic] other incidents similar to this incident with the description being the same"); Adan v. State, 453 So. 2d 1196 (Fla. 3d DCA 1984), (error to permit testimony that the defendant was in custody on

an unrelated charge).

The prejudice to the defendant resulting from the trial court's erroneous advisement to the jury, was compounded by the testimony the trial court permitted pursuant to its ruling, namely, the testimony of Detective William Saladrigas. To properly gauge that prejudice, this Court must review Detective Saladrigas' testimony in conjunction with the testimony of the witness that immediately preceded him, Detective Pascual Diaz.

Detective Pascual Diaz, the lead detective on the Barker homicide, testified that the homicide unit works in "teams", with team detectives assigned different tasks by the lead detective. (T. 1495, 1496, 1499-1503). Immediately thereafter, Detective Saladrigas testified that the "team" approach was used in the investigation of the "other matter". (T. 1525-1527). During the investigation, several friends of the defendant and residents of the apartment complex where the defendant had resided were interviewed. Based upon these interviews, it was deemed necessary to interview the defendant. (T. 1525). The investigation of the unrelated matter took ten to twelve hours. (T. 1528).

Viewed in the light of Detective Diaz' testimony, the jury could have readily and reasonably reached the highly damaging conclusion that the defendant was the subject of an investigation into another homicide. In support of that conclusion, the jury could point to the use of the "team approach", an investigation technique utilized by the homicide unit of Metro-Dade police, and the lengthy interview of various witnesses, including the defendant. The jury could easily assume that the lengthy time spent by the police investigating this "unrelated matter" indicated that the police believed the matter to be serious. Given that this testimony was introduced to explain why the defendant was in custody for a lengthy period before a statement on the Barker homicide was

obtained, an immaterial factual issue not disputed by the defendant, it is clear that the probative value of Detective Saladrigas' testimony was far outweighed by the prejudice suffered by the defendant. The trial court should not have permitted the State to elicit Detective Saladrigas' testimony. Roberts v. State, supra; Thomas v. State, supra; Section 90.403, Florida Statutes (1993). Based upon the prejudice suffered by the defendant as the result of the trial court's rulings, it was incumbent upon the trial court to grant the defendant's motions for mistrial. (T. 1529, 1739). The trial court's failure to do so constitutes reversible error.

The admission of improper collateral crime evidence is presumed to be harmful error, because of the danger that a jury will take the bad character or propensity to commit crime thus demonstrated, as evidence of guilt of the crime charged. Holland v. State, supra; Craig v. State, supra; Straight v. State, 397 So. 2d 903 (Fla. 1981). Collateral criminal evidence is particularly harmful when it demonstrates that the defendant has committed a similar crime, or one equally heinous, since the collateral evidence will frequently prompt a more ready belief by the jury that the defendant might have committed the crime charged. Craig v. State, supra; Nickels v. State, 90 Fla. 659, 106 So. 479 (1925).

In this case, the defendant was on trial for his life on a charge of first degree murder. The defendant was denied the opportunity to have the jury fairly determine his guilt of the crimes charged, when the State and the trial court clearly informed the jury that the defendant was under investigation by the police on a completely "unrelated", uncharged and irrelevant homicide. The prejudice suffered by the defendant as the result of the trial court's rulings on this matter, served to deprive the defendant of his constitutional right to a fair trial. A reversal of the defendant's convictions and a remand for a new trial is required.

III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR SEVERANCE AND MISTRIAL, BASED UPON THE STATE'S INTRODUCTION OF REBUTTAL TESTIMONY AGAINST THE CO-DEFENDANT THAT IMPERMISSIBLY IMPLICATED THE DEFENDANT.

This Court has held that a severance should be granted liberally when prejudice is likely to flow from refusing a severance. State v. Vazquez, 419 So. 2d 1088 (Fla. 1982); Crum v. State, 398 So. 2d 810 (Fla. 1979). This Court has consistently recognized that Florida Rule of Criminal Procedure 3.152 (b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants." Espinosa v. State, 589 So. 2d 887 (Fla. 1991). See also Menendez v. State, 368 So. 2d 1278 (Fla. 1979). A motion for severance should be granted if there is evidence directed at a co-defendant or introduced by a co-defendant, which is prejudicial to a defendant and would have been inadmissible at the defendant's separate trial. Espinosa v. State, supra, and Hernandez v. State, 570 So. 2d 404 (Fla. 2d DCA 1990). If potential prejudice may arise during a joint trial, severance is required and the objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency, and convenience. Crum v. State, 398 So. 2d at 811.

In the instant case, the defendant requested and was denied a severance, when the State sought to elicit prejudicial "rebuttal" testimony of Renee Carey, that was designed to counter the testimony of the co-defendant. (T. 2197, 2212). Since the defendant had not put on a case, Carey's testimony, which included highly incriminatory admissions by the defendant, was not proper rebuttal against the defendant. The failure to provide the defendant with his requested severance,

destroyed the defendant's chance to have the jury fairly determine the defendant's guilt.

As stated above, the defendant presented no evidence and did not testify on his own behalf at trial. The co-defendant, Tivan Johnson, did testify. Johnson testified that the defendant, Johnson and a man named "Eric" had gone to the Outpost Pawn Shop so that Eric could complete a deal involving guns with the pawn shop owner. (T. 2063-2065). Johnson stated that he was supposed to be paid for helping Eric sell the guns later. (T. 2089-2092). According to Johnson, Barker was shot following a heated argument between Barker and Eric, which culminated in Barker firing his weapon at the defendants. (T. 2068-2071). Johnson denied that it was the defendants' intention to rob the shop when they went to the shop on May 25. (T. 2075, 2076).

On cross examination, Johnson was asked what he told his ex-wife, Renee Carey, about the pawn shop incident. (T. 2122). Johnson said that he told his ex-wife that something had happened but that it was not a robbery. (T. 2122). The State then sought to impeach Johnson through the use of a statement Carey made to the police. (T. 2140-2143). Over hearsay objections of the defense, the State asked Johnson to review Carey's statement and then asked Johnson if he had showed Carey some handguns and rifles. (T. 2143). Johnson denied that he had done so. (T. 2143).

After Johnson completed his testimony, the State revealed that in fact, Carey had not claimed in her statement to the police that Johnson had told her anything about the pawn shop robbery. Instead, Carey said that the defendant was the one who had told her about it. (T. 2193-2195). The State then indicated that they wanted to call Carey as a rebuttal witness to relate what the defendant had told her, in hopes of establishing Johnson's admission by silence in the face of the defendant's remarks about the robbery. (T. 2195, 2199). The defendant objected to the State eliciting

any statements by the defendant through Carey and moved for a severance from Johnson,[11] since the statements were prejudicial to the defendant and would not be admissible against the defendant, except for their alleged usefulness as rebuttal of Johnson's testimony. (T. 2197). The court denied the defendant's severance request, finding that anything that the State could introduce that was inconsistent with Johnson's testimony, constituted proper rebuttal. (T. 2212-2214).

Renee Carey testified that Johnson picked her up after she finished working at 6:00 PM on May 25, 1991. (T. 2216-2219). Later, inside their apartment, Carey observed the defendant counting some money. (T. 2223). Carey also saw 12 to 15 guns wrapped in a blanket. (T. 2224, 2225). The defendant then told Carey that the money and guns had come from a pawn shop. (T. 2230). Carey said that at the time the defendant made that statement, Johnson was in the apartment, but was not present in the room. (T. 2230, 2231, 2233). The defendant then renewed his motion for severance and moved for a mistrial. (T. 2233). The court denied the motions. (T. 2233). In an effort to impeach Carey on her insistence that Johnson was not present during the defendant's revelations about the pawn shop incident, the prosecutor then read a portion of Carey's statement to the police which included, "Al [the defendant] said he shot him in the chest." (T. 2234, 2235). The defendant again objected, moved for a severance and a mistrial. (T. 2235). The court denied the defendant's motions. (T. 2235). It was reversible error for the trial court to have done so.

After the State rested its case-in-chief and the defendant put on no defense case, the

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[11] Pursuant to Fla. R. Crim. P. 3.152 (b)(2), a motion for severance of defendants may be made during trial, with the defendant's consent, if a severance is necessary to achieve a fair determination of guilt of one of the defendants. Pursuant to Fla. R. Crim. P. 3.153 (a), the defendant's motion was timely made, since the defendant was not aware of the grounds for the motion until the co-defendant testified and the State declared its intention to call Renee Carey as a rebuttal witness. (T. 2193-2199, 2212-2214).

defendant was entitled to believe that the State would not be permitted to elicit any additional information implicating him. This is so because the purpose of rebuttal evidence is to explain or contradict material evidence offered by a defendant. Kirkland v. State, 86 Fla. 64, 97 So. 502 (1923); Britton v. State, 414 So. 2d 638 (Fla. 5th DCA 1982). Since the defendant had offered no material evidence, there was nothing for the State to rebut. However, simply by virtue of his joint trial with the co-defendant, Tivan Johnson, the State was permitted to circumvent this rule and elicit highly prejudicial admissions made by the defendant, in furtherance of "rebutting" the testimony of Johnson. A severance from Johnson should have been ordered to preclude this prejudicial occurrence from affecting the defendant's right to a fair determination of his guilt.

In Hernandez v. State, supra, two brothers were jointly tried for trafficking and conspiracy to traffic in cocaine. One brother testified in his own defense. On cross examination of the brother, the State was permitted to cross examine him about his involvement in unrelated drug deals. The non-testifying brother objected and moved for a severance on the ground that he was being prejudiced by implication that he was involved in the uncharged, collateral drug deals. The court denied the motion. The State was then permitted to put on additional evidence of a drug transaction between the testifying brother and a confidential informant, a transaction that clearly did not involve the non-testifying brother. The non-testifying brother's renewed motion for severance was again denied. In ruling that the court should have severed the non-testifying defendant's trial, the court held:

> Although here the collateral evidence was directed only at the co-defendant, he and Hernandez were brothers. The brothers lived together, and the statements that the co-defendant had previous dealings in drugs and used drugs certainly could have been attributed to Hernandez as a

> possible participant in these acts and may have contributed to the verdicts of guilty against Hernandez. *It is significant that this evidence would not have been admissible at a separate trial of Hernandez even if the co-defendant had testified on the behalf of Hernandez, because the questions with respect to co-defendant's prior drug dealing would not be relevant in a trial against Hernandez for the present crimes.*

Hernandez v. State, 570 So. 2d at 406.

The facts in the present case are more compelling than those in **Hernandez**. In **Hernandez**, the improper and prejudicial evidence elicited by the State on cross examination and rebuttal related only to the co-defendant and affected the defendant only by implication. Here, the trial judge allowed the State to elicit rebuttal evidence against the co-defendant that directly implicated the defendant. That evidence destroyed the defendant's right to a fair trial.

According to the State, the purpose of Renee Carey's testimony was first to contradict Tivan Johnson's testimony regarding what he had told Carey about the pawn shop incident. When the State realized that Carey was maintaining that Johnson had never told her that he had robbed the Outpost Pawn Shop, the State then sought to use Carey to establish Johnson's admission by silence, since Johnson had allegedly failed to speak when the defendant told Carey about the robbery at the pawn shop, in his presence. (T. 2193-2195, 2199).

The problem with Carey's testimony as "rebuttal" in that regard, is that Carey testified that Johnson was not present when the defendant told her about the robbery. (T. 2230, 2231, 2233). Carey thus failed to establish any admission by silence by Johnson and therefore failed to truly rebut the version advanced by Johnson. After failing to rebut the testimony of Johnson, the State was nevertheless successful in gratuitously reading a remark made by Carey in her statement to the police, to the effect that the defendant had told her that he had "shot him in the chest." The net

result of the trial court's ruling was that simply by virtue of the defendant being jointly tried with Johnson, the State was given an improper second "bite at the apple" to elicit testimony implicating the defendant. A severance from the co-defendant would have cured that error.

As noted earlier, the **Hernandez** court found it especially significant that the evidence used against the co-defendant which so prejudiced the defendant, would not have been usable against the defendant in a separate trial. Similarly, in the present case, the State made an affirmative election not to use Renee Carey in their case-in-chief. Since the defendant put on no case, had the defendant not been tried with Tivan Johnson, the State would not have been able to elicit and use the alleged admissions made by the defendant as related by Renee Carey. Kirkland v. State, supra; Dornau v. State, 306 So. 2d 167 (Fla. 2d DCA 1974). See also Donaldson v. State, 369 So. 2d 691 (Fla. 1st DCA 1979) and Garcia v. State, 359 So. 2d 17 (Fla. 2d DCA 1978).

Under the circumstances of the present case, it was reversible error for the trial court to have denied the defendant a severance when the State announced its intentions to call Renee Carey as a rebuttal witness. The error was compounded and the prejudice to the defendant was exacerbated, when the State was permitted to elicit evidence from Renee Carey that was clearly not rebuttal in nature; namely, the defendant's alleged admission to Carey that he had shot Barker in the chest. It was reversible error to deny the defendant's motion for mistrial made as a consequence of the court's rulings.

IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL GROUNDED UPON THE JURY'S OBSERVATION OF THE DEFENDANT IN HANDCUFFS AND CHAINS, IN DEROGATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Drope v. Missouri, 420 U. S. 162, 172, 95 S. Ct. 896, 904 (1975). At the core of the right to a fair trial lies the presumption of innocence, a basic component of a fair trial under our system of criminal justice. Estelle v. Williams, 425 U. S. 501, 96 S. Ct. 1691 (1976). The United States Supreme Court recognized in Estelle v. Williams, supra, that to implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. One factor the Court found which could cause impairment of the presumption was the appearance before a jury of a defendant in shackles, gags or prison clothing. Noting that such an appearance might have a significant effect on the jury's feelings about the defendant, the Court held that the defendant should not unnecessarily be compelled to appear before a jury in such a condition. Illinois v. Allen, 397 U. S. 337, 90 S. Ct. 1057 (1970); Estelle v. Williams, supra.

In the instant case, the defendant was brought before the jury by corrections officers on multiple occasions bound in handcuffs and chains. (T. 1985). The defendant objected to the actions of the officers and moved for a mistrial. (T. 1985). The court responded by noting that the jury should have every reason to believe that the defendant was in jail. (T. 1985). The court then offered to instruct the jury that the defendant was incarcerated. (T. 1985). The defendant refused the

court's offer, noting that the court's proposed admonition was likewise improper. (T. 1985). The court then denied the defendant's motion. (T. 1986).

While the defendant was unquestionably charged with a serious offense, the defendant was still entitled to the jury's presumption that he stood innocent before them, until the State could successfully establish his guilt beyond a reasonable doubt. To that end, the defendant was entitled to have the jury reach its decision on his fate based solely on the evidence presented to them in court, and not to have its decision affected by the emotion generated by observing the defendant bound in chains. In re Winship, 397 U. S. 358, 90 S. Ct. 1068 (1970). Clearly, a defendant who is bound and restrained in chains, presents a picture of a person felt by the court to be dangerous to the officers, court personnel and the public. To preserve the defendant's presumption of innocence, then, it was incumbent upon the trial court to provide direction to the correctional officers within its supervision[12] and, consistent with security concerns, avoid unnecessarily parading the defendant before the jury in handcuffs and chains. To the detriment of the defendant, the court failed to properly fulfill its responsibilities.

When defense counsel brought to the court's attention that corrections officers had again brought the defendant before the jury in chains, the court's response was to offer the jury an instruction to confirm what the court felt that the jury already knew - that the defendant was

[12] The latest incident in which the jury saw the defendant in chains occurred when the defendant was taken by the jury in a hallway outside the courtroom, as the jury waited for court to begin. (T. 1985). The judge briefly inquired of the court corrections officer concerning what could be done to prevent a re-occurrence of the incident. (T. 1986). The corrections officer's response: "There's only one hallway". (T. 1986). In fact, the incident could have easily been avoided by simply having a degree of coordination and communication between the bailiff and corrections; the bailiff could have escorted the jury to the jury deliberation room when corrections officers were ready to bring the defendant to court.

incarcerated. The court's response to the defendant's concerns failed to appreciate the tangible difference between a defendant escorted by corrections officers to court, and a defendant led to the courtroom in handcuffs and chains. For not only does the observation of a shackled prisoner diminish the defendant's presumption of innocence, but it leaves the jury with first hand evidence of a concern for the defendant's future dangerousness and ability to respond to authority, factors that may lead a jury to recommend death as the sentence should the defendant be convicted. Elledge v. Dugger, 823 F. 2d 1439 (11th Cir. 1987); Bello v. State, 547 So. 2d 914 (Fla. 1989). Under the circumstances, the trial court had an obligation to do more[13] to secure the right to a fair trial guaranteed to the defendant. The trial court's failure to do so served to deprive the defendant of the rights guaranteed to him by the Fourteenth Amendment. A new trial and/or sentencing hearing is required.

[13] At a minimum, the court could have read a curative instruction that would have done more to repair the constitutional injury suffered by the defendant and re-affirmed the presumption of innocence than the instruction offered by the court.

V

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT THEY MUST RECOMMEND THE DEATH PENALTY SHOULD THEY FIND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES, IMPROPERLY INVADED THE PROVINCE OF THE JURY AND VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM CRUEL OR UNUSUAL PUNISHMENT, AS GUARANTEED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

In Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726 (1972), the United States Supreme Court held that the Eighth Amendment to the Constitution was violated by vesting the sentencer with unbridled discretion to determine whether or not to impose the death penalty. Such a process resulted in a system in which there was no objective way to distinguish between defendants who received the death penalty and those who did not. The Court reasoned that due to the uniqueness of the death penalty, it may not be imposed under sentencing procedures that create a substantial risk that it will be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U. S. 153, 96 S. Ct. 2909 (1976).

The Court therefore directed the States to adopt systems that guide or channel the discretion of the sentencer to avoid arbitrary and capricious results. Florida adopted such a system that passed muster in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960 (1976); Section 921.141, Florida Statutes. Yet, the Eighth Amendment also imposes a limit on a State's ability to "guide" the sentencer's discretion. The United States Supreme Court has held that the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally

indispensable part of the process of inflicting the penalty of death. Woodson v. North Carolina, 428 U. S. 280, 96 S. Ct. 2978 (1976). This individualized sentencing determination includes the right of the jury to exercise discretion in favor of imposing a life sentence, even where aggravating circumstances have been found to exist. Zant v. Stephens, 462 U. S. 862, 103 S. Ct. 2733 (1983); Peek v. Kemp, 784 F. 2d 1479 (11th Cir. 1986). In accordance with the teachings of the above-cited authorities, the Legislature and this Court have enacted a scheme that channels the discretion of the jury by requiring that the jury consider specific, statutory aggravating circumstances and statutory and non-statutory mitigating circumstances in reaching their sentence recommendation. Section 921.141(2), Florida Statutes (1991); Fla. Std. Jury Instr. (Crim.) Pp. 74-81 . Although the Legislature and this Court's instructions direct the jury to engage in a weighing process of the various aggravating and mitigating circumstances, neither the Legislature nor this Court have mandated that the jury reach a particular recommendation based upon the result of that weighing process. That decision has been left to the jury's discretion. In this case, however, the trial court unconstitutionally deviated from the scheme devised by the Legislature and this Court and invaded the province of the jury, when the trial court informed the jury that they "must" recommend the death penalty if they found that the aggravating circumstances outweighed the mitigating circumstances.

During voir dire, counsel for the co-defendant was discussing the penalty phase process with a potential juror when the trial court intervened and informed the jury:

> THE COURT: **[T]hey are to follow the instruction in that if they find the aggravating circumstances outweigh the mitigating circumstances, they are to vote for the death penalty. Those are the**

instructions of the Court.....But the law is that if a juror in a death penalty case hears my instructions, that they are to consider the aggravating and then the mitigating circumstances and if they feel **-- if you feel that the aggravating circumstances outweigh the mitigating, then you must under the law bring back a recommendation for death.** (T. 687).

The defendant objected to the court's instruction, stating that it was improper for the court to tell the jury that they had to reach a particular conclusion as a result of the weighing process. (T. 688). The judge responded that his instruction on the law was accurate and overruled the defendant's objection. (T. 688). The court then re-instructed the jury in accordance with the court's interpretation of the law:

THE COURT: ...when a guilty verdict is found by the jury of all 12 people, we go to the second phase, which is about a month later. There will be aggravating circumstances that are told to you and the mitigating circumstances.... You discuss the aggravating, you discuss the mitigating, you discuss your views, they discuss their views.....As you know, there may be a difference of opinion as to whether the aggravating circumstances outweigh or the mitigating outweigh, and you may not get a unanimous verdict one way or the other. That's in your mind as to whether they do or they don't. The law says that after all that discussion, after all that deliberation, after all that, **if in your mind the aggravating circumstances outweigh the mitigating, then you must vote for the death penalty.** (T. 689, 690).

In fact, the judge's instruction to the jury did not accurately reflect the law in the State of

Florida[14]. Instead, the court's instruction erroneously deviated from the process mandated by this Court, impermissibly curtailed the exercise of discretion reserved for the jury under Florida's sentencing scheme and denied the defendant the individualized sentencing consideration to which he was entitled under the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

The Standard Jury Instructions for Penalty Proceedings that explain the provisions of Section 921.141, Florida Statutes initially set forth the aggravating circumstances that the jury must first consider. Those aggravating circumstances are intended to "narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of the defendant compared to others found guilty of murder." Zant v. Stephens, 103 S. Ct. at 2742. The jury is then told, "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole...." Clearly, pursuant to the foregoing, the jury is told that they may recommend life imprisonment, even if they find the existence of aggravating circumstances, if they determine that the aggravating circumstances do not justify the death penalty. However, if the aggravating circumstances are deemed to be sufficient, the jury must then consider and weigh any mitigating circumstances.

Ultimately, with regard to the weighing process of aggravating versus mitigating circumstances, this Court has directed that the jury be told:

"If one or more aggravating circumstances are established, you should consider all

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[14] Subsequently, after the jury had heard all of the evidence presented in the penalty phase, the Court correctly instructed the jury in accordance with the standard instructions provided by this Court. (T. 3139-3145). The defendant maintains, however, that the erroneous and conflicting instructions provided by the trial judge during jury selection distorted the jury's obligations and fundamentally impaired the jury's ability to return a reliable sentence recommendation.

the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations." Fla. Std. Jury Instr. (Crim.) P. 80 .

It is apparent from a plain reading of the foregoing, that this Court has not mandated a specific recommendation that the jury must make in the event that the jury reaches a specific result at the conclusion of the weighing process. Instead, this Court, through the standard jury instructions, has reserved for the jury the exercise of its guided discretion in favor of a recommendation of life imprisonment, without regard to the ultimate resolution the jury reaches in its weighing process. This sentencing scheme is not only consistent with the requirements of the individualized sentencing determination mandated by the Eighth Amendment and Article I, Section 17 of the Florida Constitution, but it is also consistent with the inherent "pardon power" retained by the jury, as frequently recognized by this Court. North Carolina v. Woodson, supra; Zant v. Stephens, supra; Gregg v. Georgia, supra; Amado v. State, 585 So. 2d 281 (Fla. 1991); State v. Wimberly, 498 So. 2d 929 (Fla. 1986).

In this case, by mandating that the jury recommend the death penalty if they found that the aggravating circumstances outweighed the mitigating circumstances, the trial court invaded the province of the jury by removing the jury's discretion to recommend a sentence of life imprisonment under those circumstances, in contravention of the state and federal constitutions and

this Court's instructions.

In Jackson v. Dugger, 837 F. 2d 1469 (11th Cir. 1988), the defendant contended that his jury's deliberations in the penalty phase were impaired by a constitutionally faulty instruction given to the jury by the trial judge. The jury was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

The Eleventh Circuit held that the presumption described in the judge's instruction, when employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Constitution. The judge's instruction created an unacceptable risk that the death penalty would be imposed in spite of factors which may have called for a less severe penalty. Jackson v. Dugger, supra at 1473; Sumner v. Shuman, 483 U. S. 66, 107 S. Ct. 2716 (1987). The court therefore concluded that the judge's instruction impermissibly skewed the jury towards a recommendation of death; a result that the court found to be inconsistent with the requirements of the Constitution.[15]

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[15] In Boyde v. California, 494 U. S. 370, 110 S. Ct. 1190 (1990), the United States Supreme Court, relying on its decision in Blystone v. Pennsylvania, 494 U. S. 299, 110 S. Ct. 1078 (1990), found that a California jury instruction, which required the imposition of death if the jury found that the aggravating circumstances outweighed the mitigating circumstances, did not run afoul of the Eighth Amendment. The Court reasoned that since the Eighth Amendment did not require the States to adopt specific standards or place a limit on their ability to set standards to guide the jury in its consideration of aggravating and mitigating circumstances, "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty'." Boyde, supra, 110 S. Ct. at 1196, quoting from Franklin v. Lynaugh, 487 U. S. 164, 181, 108 S. Ct. 2320, 2331 (1988).

As discussed above, Florida has not enacted standards that mandate a specific jury recommendation should the jury arrive at a particular result at the conclusion of its weighing process. The defendant maintains that the requirements of the Florida Constitution and the powers inherently reserved within the jury's province, demand that discretion be retained by the

In this case, the trial judge's instructions went further then the trial judge's instruction condemned by the Court in **Jackson**. Here, the jury was not told that death was "presumed" to be the appropriate penalty if the aggravating circumstances outweighed the mitigating circumstances; instead, they were told that they **"must"** return a recommendation of death if they found that the aggravating circumstances outweighed the mitigating circumstances. The trial judge's instruction unconstitutionally infringed upon the jury's discretion, denied the defendant the individualized sentencing determination to which he was entitled, and was completely inconsistent with the weighing process established by the Legislature and this Court. In that the jury's recommendation was tainted by the trial judge's erroneous instructions, this Court must vacate the defendant's death sentence and remand for a new sentencing hearing before a properly instructed jury. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

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jury to reach an individualized determination at the conclusion of its weighing process. The lesson to be learned from Jackson v. Dugger, supra, is that by mandating that a specific recommendation be made by the jury if a particular result is reached at the end of the weighing process, a trial judge upsets the fragile balance for death sentence determination implemented by the Florida Legislature and this Court. The defendant contends that the trial judge's instructions in this case did precisely that, in violation of the defendant's rights under the Florida Constitution.

VI

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD ESTABLISHED THAT THE HOMICIDE HAD BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE.

In his sentencing order, the trial court found that the evidence had established the statutory aggravating circumstance under Section 921.141(5)(i), Florida Statutes; that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R. 491-92). A review of the record reveals that in fact, there was insufficient evidence to establish that aggravating circumstance beyond a reasonable doubt.

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), this Court sought to provide guidance in the application of the terms employed by the Legislature in Section 921.141(5)(i). To apply the "CCP" aggravating circumstance, the homicide must be "cold", that is, the killing must involve "calm and cool reflection." Jackson, supra at 88; Richardson v. State, 604 So. 2d 1107, 1109. *And*, the killing must be "calculated"; it must be the product of a careful plan or prearranged design to kill, formulated prior to the fatal incident. Jackson, supra at 89; Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). *And* the killing must be the result of "heightened premeditation", to distinguish homicides that require application of the CCP aggravating circumstance from the premeditation required for conviction of first degree murder. Jackson supra at 88-89; Rogers, supra at 533. Finally the killing must be without pretense of moral or legal justification. Jackson, supra at 89; Banda v. State, 536

So. 2d 221 (Fla. 1988).

To differentiate a first degree murder from the first degree murder that merits application of the CCP aggravator, the evidence must sustain the presence of each of the elements of CCP; "cold", "calculated" and "premeditated". Jackson v. State, supra. As such, the CCP statutory aggravator was intended to apply to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first degree murder," Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), such as executions, contract murders or witness elimination killings. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1992); Green v. State, 583 So. 2d 647, 652 (Fla. 1991); Perry v. State, 522 So. 2d 817, 820 (Fla. 1988).

The record in this case demonstrates that the homicide of Charles Barker did not meet the standards reserved for application of the CCP aggravator.

Since there were no witnesses to the homicide itself, the State principally relied on the statements of the defendants to demonstrate how the homicide had occurred. In his statement to the police, the defendant related that he had been to the pawn shop prior to the date of the homicide to check out the shop's security, in furtherance of planning the robbery. (T. 1770, 1771). The purpose for going to the pawn shop on the day of the homicide was to steal guns and money. (T. 1770). Inside the pawn shop, the defendant noticed that Barker was armed with a .45 caliber pistol. (T. 1775). As Barker showed Tivan Johnson a rifle, the defendants pulled out their guns and told Barker to "freeze". (T. 1776, 1825). The defendant "freaked out" and fired his weapon. (T. 1776, 1831). As Barker reached for his gun, the defendants fired several more shots which fatally wounded Barker. (T. 1776, 1826, 1827).

In addition to the above, the State relied on the testimony of Admonia Blount, the

defendant's girlfriend at the time of the homicide. Blount was with the defendant when he was arrested on June 14, 1991. (T. 1576). Blount stated that two to three weeks prior to the defendant's arrest, she overheard a conversation between the defendant and Tivan Johnson. (T. 1580-1583). In the conversation, the defendant talked about a desire to rob a pawn shop of guns and money. (T. 1580). Tivan Johnson signified that he would be part of the robbery by stating, "I'm down". (T. 1580). The defendants then said that they were going to "splat" the owner, which signified to Blount that they were going to kill him. (T. 1584). Blount stated that she didn't believe that the defendants were going to kill anyone; she felt "it was just talk". (T. 1584).

The foregoing clearly establishes that the defendants planned to rob the Outpost Pawn Shop. Their intention to commit a robbery, however, is plainly insufficient to satisfy the standards for the CCP aggravator. This Court has held on numerous occasions that a plan to commit the underlying felony, in a felony murder scenario, is irrelevant to the heightened premeditation and carefully calculated design to kill necessary for application of the CCP aggravator: Geralds v. State, 601 So. 2d 1157 (Fla. 1992)(defendant planned burglary for a week by ascertaining the whereabouts of the occupants of a home; brought gloves, a change of clothes and plastic ties with him to the house; defendant fatally stabbed victim during burglary - held that CCP factor not proven by evidence of extensive pre-felony planning, that did not necessarily encompass full contemplation of murder); Hamblen v. State, 527 So. 2d 800 (Fla. 1988)(defendant shoots robbery victim/store clerk after becoming angry because the victim had pressed an alarm button - held that CCP factor not proven - defendant's conduct not the product of calculated design to kill, but rather a spontaneous act done during course of robbery); Hardwick v. State, 461 So. 2d 81 (Fla. 1984)(defendant raped and strangled victim after victim had refused the defendant's demand for

money - held that CCP factor not proven -for purposes of CCP, defendant's fully formed premeditated intent to rob victim cannot be transferred to a murder which occurs in the course of the robbery); Vining v. State, 637 So. 2d 921 (Fla. 1994)(defendant met with victim on several occasions concerning the defendant's interest in buying the victim's diamonds; on the last occasion, the defendant shot the victim and stole the jewelry - held that CCP factor not proven - for purposes of CCP, calculated plan to rob victim does not establish calculation and heightened premeditation to kill victim); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993)(defendant entered convenience store after having procured a firearm with the intentions of robbing the store; store clerk shot and killed and store proceeds taken - held that CCP factor not proven - intention to commit robbery and procurement of firearm to that end are insufficient to establish the elements of CCP). See also Castro v. State, 644 So. 2d 987 (Fla. 1994) and Power v. State, 605 So. 2d 856 (Fla. 1992).

Even with the addition of the testimony of Admonia Blount, the evidence elicited below does not satisfy the CCP standards. Blount stated that on one occasion, she heard the defendant mention that they would "splat" the pawn shop owner. (T. 1584). Blount testified that given the circumstances of the defendants' conversation, she did not believe that the defendants were going to kill anyone and that what they said was "just talk". Without more, the defendant contends that Blount's testimony is insufficient to demonstrate the calculated, carefully planned, pre-arranged design to kill anticipated and required for application of the CCP aggravator. Jackson v. State, supra; Rogers v. State, supra.

In Valdes v. State, 626 So. 2d 1316 (Fla. 1993), the defendant and a co-defendant planned to forcibly assist a prison inmate in escaping from custody while the inmate was being transported to a doctor's appointment. During the escape, one of the inmate's guards was shot and

killed. The defendant admitted to a police officer that he had accompanied the co-defendant on the escape effort, knowing that the murder of the guard had been planned by others before the incident. This Court found that the CCP aggravator had not been established. This Court emphasized that while there was evidence of a well-planned escape effort, there was insufficient evidence to prove a heightened level of premeditation which encompassed a careful plan or prearranged design to kill.

In Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), the defendant and a co-defendant entered a restaurant and robbed the employees. During the twenty minutes in which they were engaged in the robbery, the defendant pistol whipped one of the victims and then raped a second. The defendant then shot and killed each victim, one at a time. This Court found that on the record presented, there was insufficient evidence to sustain the level of premeditation required for CCP. Implicit in this Court's opinion was that even though the defendant had the time to formulate a design to kill during the defendant's slow, methodical and calculated killing of each victim, the evidence was still lacking to demonstrate the careful planning that is inherent in the CCP aggravator.

Finally, in Clark v. State, 609 So. 2d 513 (Fla. 1992), the defendant and two friends drove with the victim after a day of drinking. The defendant admitted to one of his friends that he drove around in the woods in an effort to get his passengers lost. At the conclusion of the drive, the defendant shot and killed the victim. The defendant then took the victim's wallet. The following day, the defendant went to the boat where the victim had worked to claim the victim's job. This Court found that even though the defendant may have formulated the decision to murder the victim during the drive, as evidenced by the defendant's efforts to confuse his passengers in hopes of making the attempt to locate the victim's body more difficult, the evidence was still insufficient to demonstrate the careful plan or design to kill required for application of the CCP aggravator.

In this case, the record establishes only that the defendant had planned the commission of a robbery at the Outpost Pawn Shop. The singular mention by the defendant that the owner of the pawn shop would be killed during that robbery, is in itself, based upon the foregoing authorities, insufficient to establish the carefully planned and calculated intent to kill that is the hallmark of CCP killings. **Valdes, Wyatt, Clark.** That conclusion is buttressed by the fact that the listener and subsequent reporter of the defendant's statement, Admonia Blount, did not even believe that the statement was a genuine expression of intent at the time it was made. She characterized it as "just talk".

Instead, the record supports the notion that the eighteen year old defendant simply "freaked out" during the robbery and fired his gun in a spontaneous act. (T. 1831). The absence of compelling evidence to refute this scenario, together with the absence of evidence demonstrating the level of heightened premeditation necessary to establish that the homicide of Charles Barker was the product of a calculated and carefully designed plan to kill, renders the evidence legally insufficient to sustain the trial court's finding that the CCP aggravating circumstance applied to the homicide of Charles Barker. Geralds v. State, supra; Hamblen v. State, supra. In that the trial judge relied on this aggravating factor in arriving at his decision to impose a death sentence and there is nothing of record to support the notion that the death sentence would have been imposed in the absence of the CCP aggravator, this Court must remand this cause with directions that the trial judge resentence the defendant.

VII

THE TRIAL COURT ERRED IN FAILING TO GIVE THE REQUESTED JURY INSTRUCTION ON THE STATUTORY MITIGATING CIRCUMSTANCE OF THE DEFENDANT'S AGE AT THE TIME OF THE CRIME AND IN FINDING THIS CIRCUMSTANCE INAPPLICABLE AND/OR OF NO WEIGHT IN THIS CASE, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his sentencing order, the trial court apparently determined that the statutory mitigating circumstance regarding the defendant's age did not apply and/or had little weight.[16] In reaching his conclusion, the trial court applied the following standard:

> "For age to be mitigating, or accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility. Echols v. State, 484 So. 2d 568 (Fla. 1985)."

(R. 498, 499). The trial court acknowledged that while the defendant was just eighteen at the time of the crime and had achieved IQ scores that placed his intelligence in the borderline to low average area, he possessed the ability to plan the crime and was therefore sufficiently mature to render his age of little weight as a mitigating factor. (R. 499). The defendant contends that the trial judge employed an erroneous standard when judging the applicability of Section 921.141 (6)(g) to an eighteen year old, and that the evidence in this record abundantly supports a finding of age as a mitigating factor. The trial judge abused his discretion in failing to give the defendant's age

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[16] In his discussion of the defendant's age under Section 921.141 (6)(g), the trial judge did not specifically find that the defendant's age was not a mitigating circumstance. Instead, he concluded that although the defendant was just eighteen years old at the time of the crime, the court gave little *weight* to that mitigating factor. (R. 499). Later in his sentencing order, the trial judge noted that he found only one statutory mitigating circumstance. (R. 500).

substantial weight as a mitigating factor.

In Echols v. State, supra, the case relied upon by the trial court, the defendant, a fifty-eight year old male, urged that it was error for the trial court to have failed to consider his age in mitigation. This Court found that in the context of dealing with a fifty-eight year old male of sound mind and body, the age of the defendant, standing alone, would not constitute a mitigating factor. Instead, this Court found that in order to consider as mitigation the age of an adult who had long since passed the age of maturity, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility.

Two more recent cases of this Court clearly demonstrate that application of the **Echols** standard is inappropriate in cases involving younger defendants.

In Morgan v. State, 639 So. 2d 6 (Fla. 1994), the trial court found that the age mitigating factor did not apply to the sixteen year old defendant, because the court, relying on Eutzy v. State, 458 So. 2d 755 (Fla. 1984)[17], held that the age mitigating circumstance could only be considered if it was relevant to his mental and emotional maturity and ability to take responsibility for his actions. This Court found that the application of the **Eutzy** standard to the sixteen year old defendant was erroneous. This Court opined that to "apply the standard used by the trial judge would effectively eliminate age as a mitigating factor in almost every case." Morgan v. State, supra at 14.

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[17] In Eutzy v. State, supra, the forty-three year old defendant argued that his age was a mitigating factor because the imposition of a twenty-five year minimum mandatory sentence would render him a non-threat to society upon his release. This Court opined that the mitigating factor must, in some way, ameliorate the enormity of the defendant's guilt. This Court concluded that one who has long since attained an age of responsibility cannot raise as a shield against the death penalty the fact that twenty-five years hence, he will no longer be young. Eutzy, supra at 755.

This Court concluded that the defendant's youthful age was a mitigating factor in **Morgan**.

In Ellis v. State, 622 So. 2d 991 (Fla. 1993), this Court noted an inconsistency in the application of the age mitigating factor in Florida cases. To adopt a more uniform approach this Court concluded that whenever a murder is committed by a minor, the mitigating factor of age must be found and weighed. Unless there is some evidence tending to support a finding of unusual maturity, the mitigating factor of age must be accorded its full weight. This Court remanded **Ellis** back to the trial court with directions to find the factor of the defendant's age, seventeen at the time of the crime, in mitigation. The trial court was then free to diminish the weight accorded that factor if evidence that Ellis possessed unusual maturity was present.

In this case, the defendant was eighteen years and five months old at the time of the homicide. While the defendant concedes that five months separate him from the status of minority enjoyed by the class of defendants described in Ellis v. State, supra, the defendant maintains that it is inappropriate to treat a defendant his age, for mitigation purposes, as the trial court had done; with the class of seasoned adults who had reached their forties of fifties. Given that the defendant was no longer a minor, it was not mandatory for the trial court to have found age as a mitigating factor. **Ellis**. But, given that the defendant was only five months past the status of minority, the defendant contends that the trial court should have been required to find age as a mitigating factor, absent evidence showing the unusual mental or emotional maturity of the defendant. Since the record contains abundant evidence of the defendant's mental and emotional deficits, it was an abuse of discretion for the trial court to have failed to accord the age mitigating factor full weight.[18]

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[18] The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor. Maxwell v. State, 603 So. 2d 490, 491

The defendant was examined by four doctors, each of whom found that the defendant had been subjected to an extremely abusive childhood. (T. 2671-2673, 2846, 2847, 2932-2938). The defendant's family members verified that the defendant's father was an alcoholic who frequently administered beatings to the defendant. (T. 2731-2734, 2794, 2805). On one occasion, the defendant's father put a gun to the defendant's head. On another, the father rammed the defendant's head into a refrigerator. (T. 2733, 2734, 3005). Given that many of these acts of severe abuse occurred during the years when the defendant's personality was being formed, Dr. Allan Levy, a psychologist hired by the State, found that the defendant was beset with deep psychological and emotional problems at the time of the offense. (T. 2872, 2878, 2879).

Additionally, the defendant was tested by two doctors and scored a 77 and an 82 on IQ tests. (T. 2691-2695, 2927, 2928). Those scores placed him in the borderline area, one step above retardation, or in the low average IQ area. Dr. Gary Schwartz testified that his borderline intelligence level placed him among the lowest 15 percentile in the country. (T. 2932-2938).

Finally, there was substantial evidence presented by several witnesses concerning drug usage by the defendant during the two years preceding the offense. (T. 2749-2752, 2762, 2766, 2806, 2928-2937). None of the State's witnesses had established that the defendant was not abusing drugs.[19] Perhaps most persuasive on this issue was Dr. Gary Schwartz, a psychologist who had

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(Fla. 1992); Kight v. State, 512 So. 2d 922 (Fla. 1987).

[19]The State presented the testimony of Admonia Blount and Renee Carey, who testified that during the brief period that they knew the defendant, they had never seen him take drugs. (T. 2900, 2966). Dr. Levy noted that the defendant had not mentioned to the police or jailers that he had a drug problem. (T. 2830-2835). The State's other expert, Dr. Aguila-Puentes, would not exclude the possibility that the defendant was taking drugs. (T. 3058).

examined the defendant. Dr. Schwartz' specialty is the treatment of substance abusers. (T. 2926, 2927). Based upon the test results the defendant achieved on the Carlston Psychological Survey, the defendant's description of the effect that drugs had on him and the consistency of those descriptions with others that Dr. Schwartz had encountered in drug treatment and rehabilitation centers, Dr. Schwartz believed that the defendant had a substance abuse problem. (T. 2928, 2936, 2937, 2952, 2960).

Based upon the foregoing, it is apparent that the record is replete with evidence that suggests that the defendant does not possess unusual maturity that would belie his youthful age. Rather, the record overwhelmingly suggests that the defendant operates with sharp emotional and mental deficits for someone his age. That is precisely the type of circumstance that mitigating factors in general, and the age mitigating factor specifically, were designed to include.[20] Ellis v. State, supra; Eutzy v. State, supra. On this record, it was an abuse of discretion for the trial judge to fail to find the age mitigating factor and to accord it substantial weight. Maxwell v. State, supra. Vacatur of the defendant's death sentence with a remand to the trial court, with directions to include a fully weighted age mitigating factor in a new weighing process, is required.

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[20] The State conceded during a charge conference for the penalty phase, that there was evidence in the record to support an instruction on the age mitigating factor. (T. 3063, 3064). The trial judge, however, omitted the instruction on the age mitigating factor when the court instructed the jury on the law. (T. 3142). The omission precluded the jury from considering a mitigating factor that was demonstrated by substantial evidence. Under the circumstances, the trial court's failure to properly instruct the jury on a mitigating factor to which the defendant was entitled, must result in a vacatur of the defendant's death sentence and a remand for a new sentencing hearing. Bryant v. State, 601 So. 2d 529 (Fla. 1992) and Stewart v. State, 558 So. 2d 416 (Fla. 1990).

VIII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY DURING THE PENALTY PHASE REGARDING AN IRRELEVANT ARREST OF THE DEFENDANT, THROUGH THE STATE'S USE OF A JAIL ADMISSION CARD, WHERE SAID EVIDENCE PERMITTED THE JURY TO CONSIDER WHAT CONSTITUTED A NON-STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the penalty phase, the defense elicited testimony from Dr. Gary Schwartz concerning the defendant's drug usage. (T. 2935, 2936). Dr. Schwartz stated that tests he administered, as well as his interview of the defendant, confirmed that the defendant had been abusing drugs prior to his arrest on June 14, 1991 for the pawn shop homicide. (T. 2928, 2936, 2937, 2952, 2960).

In an apparent effort to rebut the testimony of Dr. Schwartz and other defense witnesses regarding the defendant's drug problem, the State, through the testimony of Dr. Allan Levy, sought to use an inmate intake sheet that was prepared in conjunction with the arrest and incarceration of the defendant on June 1, 1991. (T. 2832, 2833). The defendant immediately objected and informed the trial court that the June 1 arrest was for a collateral incident that was not related to or relevant to the pawn shop homicide. (T. 2833). Defense counsel added that the defendant was never formally charged with any crime resulting from that arrest. (T. 2834). The trial court overruled the defendant's objection and permitted Dr. Levy to relate that the defendant had denied alcohol or drug usage on the inmate intake sheet. (T. 2834, 2835).

Subsequently, the defendant moved for a mistrial based upon the prejudice the defendant suffered as the result of the trial court's ruling, which permitted the State to inform the jury about irrelevant, collateral crimes for which the defendant had been arrested, but not charged. (T. 2883, 2884). The trial court denied the defendant's motion. (T. 2884).

It is well settled in Florida, that the jury's consideration must be limited to the aggravating circumstances set forth in Section 921.141, Florida Statutes in order to assure that the jury's discretion is properly guided and channeled. Proffitt v. Florida, supra. It is therefore inappropriate to permit the jury to consider evidence of a non-statutory aggravating circumstance which might tip the balance in favor of imposition of the death penalty. Drake v. State, 441 So. 2d 1079 (Fla. 1983); Miller v. State, 373 So. 2d 882, 885 (Fla. 1979).

The Florida Legislature, through its enactment of statutory aggravating circumstance Section 921.141(5)(b), has limited the jury's consideration of the defendant's prior criminal experience to previous convictions for other capital felonies or for felonies involving the use of violence. In the present case, the State was permitted to introduce evidence of the defendant's prior arrest and incarceration for an *unknown* crime. Clearly, that evidence did not fall within the purview of Section 921.141(5)(b), and thus, as prejudicial evidence of a non-statutory aggravating circumstance, should not have been admitted for the jury's consideration. Miller v. State, supra; Maggard v. State, 399 So. 2d 973 (Fla. 1981).

Two cases are instructive.

In Geralds v. State, supra, the defendant presented the testimony of his neighbor during the penalty phase, who related that the defendant had never had any confrontations with him during the three years that they were neighbors. On cross examination, the State was permitted to

impeach the neighbor by asking whether he was aware that the defendant had multiple convictions for felonies. This Court held that in light of the defendant's declaration that he would not rely on the statutory mitigating circumstance of absence of a significant criminal record, it was error for the trial court to have permitted the jury to consider the defendant's prior convictions for non-violent felonies. This Court found that it was impermissible for the trial court to permit the jury to consider inadmissible evidence of a non-statutory aggravating circumstance, under the guise of witness impeachment. This Court concluded that the trial court's ruling had the effect of prejudicing the defendant in the eyes of the jury, which created the risk that the jury gave undue weight to the defendant's criminal past and resulted in a recommendation of the penalty of death. This Court remanded the case for a new sentencing hearing.

In Hildwin v. State, 531 So. 2d 124 (Fla. 1988), the defendant had presented evidence in the penalty phase from relatives and friends that he was not a violent person. In rebuttal, the State was permitted to introduce evidence that the defendant had committed a sexual battery on a woman. Since the woman had not reported the crime, the defendant was never charged with or convicted for the offense. This Court held that even though the evidence of the prior sexual battery was not admissible to establish the aggravating circumstance for conviction for prior violent felonies because the defendant had not been convicted, it was admissible to rebut evidence submitted by the defendant of his nonviolent nature, *as long as the jury was not told that the defendant had been arrested or that there had been criminal charges arising from the prior bad conduct.* Since the jury was not told that the defendant had been arrested for the prior sexual battery, this Court found that the evidence of the prior sexual battery was admissible.

In this case, contrary to the precedents established in **Geralds** and **Hildwin**, the trial

court permitted the State to elicit evidence of a prior, irrelevant arrest and incarceration of the defendant, under the guise of rebutting mitigating evidence presented by the defendant. Even if the defendant's statements regarding his lack of drug usage were relevant for the purpose proffered by the State, the trial court could have permitted the jury to consider them without unnecessarily bringing to the jury's attention the fact that the defendant had been arrested and jailed on another criminal offense[21]. By permitting the jury to hear and consider evidence of this non-statutory aggravating circumstance, the trial court prejudiced the defendant in the precise way that concerned this Court in **Geralds** and **Hildwin**.

The prejudice to the defendant was magnified in this case, because not only was the jury permitted to consider the defendant's arrest on an irrelevant offense, but they may have used that inadmissible and prejudicial evidence to negate a statutory mitigating circumstance that existed in this case; namely, the lack of a significant history of prior criminal activity. Section 921.141(6)(a), Florida Statutes. (R. 494, T. 3443). Given that the jury's mission was to engage in an individualized sentencing determination, which included an assessment of the defendant's character, the trial court's admission of this prejudicial and irrelevant evidence helped paint a false picture of the defendant for the jury. The admission of the prejudicial evidence of the defendant's arrest and incarceration created the risk that the jury would place undue weight on the improper evidence, thereby skewing the jury's recommendation toward death. Geralds v. State, supra. In light of the great deference that must be given to the jury's recommendation and the fact that their recommendation was tainted by the

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[21] The State again brought the irrelevant June 1 arrest of the defendant to the jury's attention, when the State relied on the June 1 inmate intake sheet in its closing argument to the jury. (T. 3095).

consideration of inadmissible evidence, a new sentencing hearing before a new jury is required.

IX

THE TRIAL COURT FAILED TO CONSIDER AND WEIGH NON-STATUTORY MITIGATING EVIDENCE IN ITS SENTENCING ORDER, THEREBY PROVIDING AN INADEQUATE BASIS FOR APPELLATE REVIEW AND DEMONSTRATING THE UNRELIABILITY OF THE COURT'S DECISION TO IMPOSE THE DEATH PENALTY, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To assure meaningful review of a sentencer's decision and to guarantee that all relevant factors regarding a defendant's character be considered before imposition of a sentence of death, the United States Supreme Court stated:

> "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U. S. 104, 102 S. Ct. 869, 876-77 (1982).

To assure compliance with the Eighth Amendment and Florida's own interest in adequate appellate review, the Florida Legislature has required through its enactment of Section 921.141(3), Florida Statutes, that when a trial court seeks to impose a sentence of death, the judge must "set fort in writing [the] findings upon which the sentence of death is based."

In Campbell v. State, 571 So. 2d 415 (Fla. 1990) and most recently, in Ferrell v. State, 653 So. 2d 371 (Fla. 1995), this Court has expanded upon and explained the directive of Section

921.141(3). In **Ferrell**, this Court stated that to comply with Section 921.141(3):

> "The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record.

Ferrell v. State, 653 So. 2d at 371. Accord, Larkins v. State, 655 So. 2d 95 (Fla. 1995); Campbell v. State, supra. The absence of any of the enumerated requirements described above deprives this Court of the opportunity for meaningful review. Ferrell v. State, 653 So. 2d at 371.

A mitigating circumstance has been defined as any aspect of the defendant's character or record and any circumstance relating to the offense that may reasonably serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954 (1978); Campbell v. State, supra. In that regard, this Court has frequently recognized that a defendant's drug or substance abuse can constitute a non-statutory mitigating circumstance. Larkins v. State, supra; Knowles v. State, 632 So. 2d 62 (Fla. 1993). See also Barbera v. State, 505 So. 2d 413 (Fla. 1987).

In this case, the defendant presented substantial evidence regarding the defendant's drug abuse, sufficient to establish it as a mitigator by the greater weight of the evidence.[22] Defense

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[22] Dr. Gary Schwartz examined the defendant and administered the Carlston Psychological Survey to determine the existence of and severity of a drug problem in the

counsel relied on the defendant's drug usage as mitigating evidence in his closing argument to the jury and in his sentencing memorandum submitted to the trial court. (R. 455, T. 3134, 3135). Despite substantial evidence in support of this non-statutory mitigating circumstance and clear precedent in this State establishing drug usage as a mitigating factor, the trial court's sentencing order is completely silent as to this mitigator, denoting a complete failure by the trial court to consider it.

The trial court's failure to evaluate, make findings on and to weigh in its sentencing order relevant mitigating evidence advanced on behalf of the defendant, is in clear contravention of the requirements of Section 921.141(3) and this Court's decisions in **Campbell** and **Ferrell**. Without the trial judge's findings on this additional mitigating evidence, this Court is precluded from providing meaningful appellate review of the defendant's sentence. **Ferrell**. Further, given the absence of this non-statuory mitigating circumstance from the weighing process employed by the trial court, it is apparent that the result reached by the trial court must be deemed to be constitutionally unreliable. Eddings v. Oklahoma, supra; Lockett v. Ohio, supra. This Court must therefore remand this cause for a new sentencing hearing. Campbell v. State, supra; Santos v. State, 591 So. 2d 160 (Fla. 1991).

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defendant. Dr. Schwartz, who has had substantial experience in the treatment of substance abusers, found from the results of the Survey as well as from his own findings, that the defendant had a drug problem. (T. 2926-2928, 2936, 2937, 2952, 2960). Specifically, the defendant reported that he smoked marijuana and marijuana laced with crack. (T. 2935, 2936). The defendant also told Dr. Schwartz that he had consumed a lot of beer and smoked the crack-laced joints before the homicide at the pawn shop. (T. 2936).

The defendant's drug usage was confirmed by the testimony of Cristina Roan and Wandsetta Cooper. Roan testified that she believed that the defendant began using drugs at age 17, when she noticed the defendant acting out of character. (T. 2798-99). Roan stated that the defendant confirmed his drug use in a conversation with her son. (T. 2806). Wandsetta Cooper noted that her brother suffered from severe mood swings, which caused her to suspect that her brother was abusing drugs. (T. 3010). Wandsetta found that her brother's conduct was very similar to that of her sister, who was also a drug abuser. (T. 3010).

X

THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE THREE-YEAR MANDATORY MINIMUM SENTENCES FOR ARMED BURGLARY AND ARMED ROBBERY, WHERE THOSE OFFENSES OCCURRED AS PART OF A SINGLE CRIMINAL EPISODE.

The trial court imposed life sentences on the defendant's convictions for armed burglary and armed robbery. (R. 483). Additionally, the trial court imposed a three-year minimum mandatory sentence on each charge for the defendant's possession of a firearm during the commission of each offense, the minimum sentences to run consecutively. (R. 484, 485). This Court in Palmer v. State, 438 So. 2d 1 (Fla. 1983), construed Sections 775.021 (4) and Section 775.087 (2) and held that where several offenses are committed in a single transaction involving a single victim, consecutive mandatory minimum sentences for the possession of a firearm may not be imposed. See also Frederick v. State, 639 So. 2d 1047 (Fla. 1994). Since the armed burglary and armed robbery counts in this cause arose in a single episode involving a single victim, it was error for the trial court to impose the applicable mandatory minimum sentences consecutively. This Court must remand with directions that the minimum mandatory sentences imposed for the armed burglary and armed robbery counts run concurrently.

CONCLUSION

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

Respectfully submitted,

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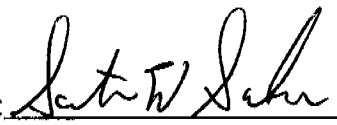
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 on this 16 day of July, 1996.

By: _____
SCOTT W. SAKIN, ESQ.