IN THE SUPREME COURT OF FLORIDA

BOBBY L. STEVERSON,

Appellant,

vs.

Case No. 86,590

STATE OF FLORIDA,

Appellee.

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Appellant, Bobby L. Steverson, is referred to by name in this brief. References to the record **(Vols.** I-III, **pgs. 1-403)** are designated by "R," and references to the transcript **(Vols.** III-XXI, pgs. **1-3172)** by "T." The supplemental record is identified by "SR." Evidentiary items are designated by number.

STATEMENT OF THE CASE

On April **7,** 1994, a Polk County grand jury indicted Bobby Steverson for the first degree murder of Bobby Lucas (Count I), armed burglary with assault of Mr. Lucas (Count 11), and armed robbery by taking a television and/or video cassette recorder from Mr. Lucas's trailer (Count III). The crimes occurred on March 2 - 3, **1994.** (R2-4)

The Honorable Dennis P. Maloney, Circuit Judge, presided over trial in May 1995. The jury returned verdicts of guilty as charged on all counts, **(R164-166, T2787-2790)** and recommended a sentence of death by nine to three. **(R217, T3168-3171)**

In imposing the death penalty, the judge found three statutory aggravating factors: (1) previous convictions of felonies involving the use of threat or violence to a person; **(2)** the murder was committed during the commission of a robbery and burglary; and **(3)** the murder was especially heinous, atrocious and cruel.[1] In mitigation the court found: (1) the murder was committed while Mr.

[1] § 921.141(5) (b), (d), and (h), **Fla.** Stat. **(1993).**

Steverson was under the influence of extreme mental or emotional disturbance; and (2) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.[2] The court recognized many non-statutory mitigating circumstances. These included Mr. Steverson's childhood emotional and physical abuse and lack of a dominant male figure which led him into decline; a rehabilitative period, which included a good marriage and good employment; a debilitating back injury suffered on the job, which led to termination of his employment and his deterioration again into drug and alcohol abuse; and a brief rehabilitative hospitalization which terminated when insurance coverage lapsed. The court concluded that the aggravating factors outweighed all mitigating circumstances. **(R357-358, 361-365)**

The judgment and sentence is attached as Appendix A.

STATEMENT OF THE FACTS

Trial Testimony

The pertinent trial testimony is:

On the morning of Thursday, March 3, **1994,** two friends of Bobby Lucas discovered his body in his trailer in west Lakeland. **(T1417,** 1421, **1450-1451)** Tape bound his ankles and wrists to a kitchen chair. Numerous stab wounds marked his shirt. A taped plastic bag covered his head, and tape also covered his nose and

[2] § 921.141(6) (b) and (f), Fla. Stat. (1993).

mouth. A cord extended from the chair around his neck. (T1430-1432; 1258-1264) A TV and VCR appeared to be missing from the trailer. (T1210, 1405-1406)[3]

From Mr. Lucas's trailer sheriff's office personnel collected scores of items for evidence, including 29 fingerprint cards and materials to be submitted for blood testing. The police conducted interviews to determine places and bars frequented by Mr. Lucas. They also obtained names of rock cocaine users and drug hookers with whom Mr. Lucas associated. (T1190-1192, 1276-1279, 1437-1440, 1489-90, 1512-1517, 1921-1925, 2192-2195)

Eventually additional items of evidence were collected from Mr. Steverson's blue Honda CRX. (T1199, 1267, 1331-1334) Despite the numerous fingerprints and other items of physical evidence collected from the crime scene and from the Honda, scientific tests, including DNA/PCR evaluations, did not connect Mr. Steverson to the crime in any way. (T1566-1605, 2261-2262)

Certain fingerprints were linked to a Hall, a Vanskiver, and a Kimberly Allen. No fingerprints were linked to Mr. Steverson. (T1609-1634)

It is undisputed that Bobby Steverson had known Bobby Lucas for many years and occasionally saw him over the years. The two men began getting together with some frequency in late 1993 and February and March 1994, because both men were using drugs. (T2314-2317, 2355)

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[3] Mr. Lucas's death occurred between midnight and 2:00 a.m., March 3. (T1644-1645) He was last seen alive between 9:00 and 11:00 p.m., March 2. (T1366, 1370, 1760-1761, 1345-1359, 1364)

Mr. Steverson said he visited Mr. Lucas on March 2, arriving between 10:00 and 11:00 p.m. The two drank and smoked crack cocaine. About 11:30, someone knocked on the door and Mr. Steverson said, "go away, bitch," because Mr. Lucas did not want to see anyone. Steverson said Mr. Lucas was alive when he left the trailer, which was sometime between 11:30 and midnight. (T2355-**2361, 2431-2435)**

Several witnesses testified about their observations of a car parked at Lucas's trailer on or about March 2 - 3. Jay Peterson said he left the trailer next door to Mr. Lucas's at about 1:00 a.m. He saw a man who wore a baseball cap leave the area of Lucas's trailer door and walk to a small, blue or off-blue compact car, like a Ford Escort or a Chevrolet Chevette. Jay guessed the man was Caucasian. He did not remember anything more about what the person wore. (T1537-1545, **1547-1550)** Mr. Steverson never was known to wear or own any type of cap or hat. **(T2359,** 2490, **2541-2543)**

Three of the users, dealers, and hookers who were eventually contacted by the police testified that they saw a blue Honda parked behind Mr. Lucas's truck when they had been to Lucas's together late one night. Robert Todd Hall, testified that on March 2, Brenda Houle (a/k/a VanSkiver; a/k/a Salt & Pepper), Kenneth Eldridge ("Sharkey"), and he drove to Lucas's trailer in Hall's Tercel, a small hatchback Toyota. (T1681-1683, 1687-1688) Hall said he saw a blue Honda parked behind the victim's truck at about 11:00 or 11:30. (T1687-1689, 1690-1695, 1698)

Hall and the others made regular visits to Mr. Lucas's. Hall usually drove and was paid in drugs for driving. (T2063-2066)

Brenda Houle said they visited Mr. Lucas's possibly on a Friday night. (T2063-2068, 2059, 2082, 2087) About 11:00, midnight, or later she saw a blue CRX parked at the trailer behind Lucas's pickup. (T2068-2071, 2094-2096) In the hatchback of the car she thought she saw a TV, a VCR and/or a microwave or stereo receiver. There were three items in the car. (T2076-2077, 2091-2092) When she knocked on the door to see if Mr. Lucas wanted to buy some drugs she heard a voice, not Lucas's, say, "Bitch, get away before you get hurt." (T2073-2075)[4]

Kenneth Eldridge ("Sharkey") testified they went to Mr. Lucas's trailer many times, including a night in March, to sell him drugs or women. (T1699-1701, 1705-1706, 1711, 1731, 1734-1735) Sharkey thought it was very late -- 12:30 or 1:30 a.m. **or** later. (T1707-1708, 1713) Parked behind Lucas's truck was a small, navy or light blue car, with silver or gray around the bottom. It was a Honda CRX or CX. (T1708-1711)[5]

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[4] Brenda, who was both a user and seller of large-quantity drugs, had been convicted of over 100 felonies and testified she was in the drug business with Sharkey. (T2057-2059, 2084-2085, 2087) Brenda first found out that Bobby Lucas had been killed when she read a story in the newspaper. She heard she was being sought for questioning. (T2066) She saw the Honda again a few days later at the home of Bill Tudor. (T2078) The detectives had a hard time finding her and probably did not question her for a month after the incident. (T2066, 2081)

[5] Sharkey admitted he and Brenda (Salt & Pepper) were boyfriend and girlfriend, but denied they were business partners in big drug business or that he dealt in large quantities of drugs. (T1703, 1729, 1730-1731) Sharkey denied he had drugs that night or that he ever drank, but said he and the others were partying. He

The trial of Mr. Steverson then featured testimony, over objection, of several witnesses about Steverson's attempted murder of detective Brian Rall. This offense occurred on March 7, 1994 at a drug house, the home of George and Debbie Lumbis, which the police had under surveillance. The police had also checked blue cars that were seen near the Lumbis's house. (T2192, 2199-2204, 2208)

For the criminal actions concerning the shooting of detective Rall, Mr. Steverson was tried before this trial and convicted for first-degree attempted murder of a law enforcement officer. On appeal, the attempted first-degree murder conviction was reversed and remanded, with directions to the trial court to reduce the conviction to attempted second-degree murder. The decision of the appellate court, Steverson v. State, No. 95-00713 (Fla. 2d DCA July 26, 1996), is attached as Appendix B of this brief.

At this trial on the Lucas charges, defense counsel unsuccessfully sought exclusion or limitation of the details of the collateral crime. (R66, 125, 139-146, 215-216; T1088-1089, 1525-1526, 2565, 2815-2817, 3060) Detective Rall testified that twice on March 7, an informant, Red Gore, paged him and said he had spotted a blue Honda. (T2208-2209, 2236) The car was supposed to be at the drug house of George and Debbie Lumbis, where the police had previously checked blue cars. Detective Rall and his partner

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could not remember if they had gone to Mr. Lucas's earlier. (T1710-1711, **1734-1735)**

drove to the Lumbis's in an unmarked maroon Taurus. (T2207, 2209-2210, 2213-2214) Rall said he was really looking to see if there was a credit card receipt that was possibly in the name of Bobby Lucas but would be in the pocket or possession of the person who drove the blue car. Detective Rall never found any such receipt. (T2249)

When Rall went to the Lumbis's, he wore a gun and had a badge and pager displayed. (T2210) He blocked the Honda. (T2213) Mr. Steverson, who he recognized as a victim from an earlier crime, was in the car and detective Rall approached. (T2213-2214) Rall asked Steverson why he had not followed up on the earlier case in which Steverson had been a victim. According to Rall, Steverson seemed to focus on Rall's badge and gun. Rall felt uncomfortable and said, "Bobby, you don't have any guns on you, do you." He thought Mr. Steverson said something and then he saw a butt of a handgun in Steverson's waistband. Rall immediately stepped back and yelled, "Oh, shit." He tried to pull his gun, a 9 millimeter, from his holster but the holster malfunctioned and his gun would not release immediately. Steverson got out of his car and began shooting as detective Rall ran backward trying to find cover. Steverson shot twice. Rall yelled to stop. Steverson turned and shot once more. Detective Rall returned fire, running after Bobby Steverson and shooting at him. Rall shot nine times. Mr. Steverson fell, rolled on the ground, and shot at Rall two more times. Rall hid behind a car, but when he looked out he was struck with a shotgun blast with birdshot. (T2217-2220) Mr. Steverson had been hit twice. (T2220)

The shotgun blast struck detective Rall in the leg, torso, face, under his armpits, on the top of his head and on one of his arms. A pellet struck the glass of his eyeglasses and deflected, and the pellet is still lodged in his nose. (T2221) After he was hit, detective Rall waited for help, staggered down the street, and yelled into his radio. (T2222) He could not see because blood dripped over his eyeglasses and face. (T2222) He was treated at the hospital and released late that night. (T2223) Rall testified that if he had information that Mr. Steverson was armed on March 7, he would have had an army with him when he approached. (T2240-2241) He resumed investigation of the Lucas case around March 15. (T2223-2229)

Detective Rall's partner was detective Primeau. (T1922-1925) Primeau testified he and Rall went to the Lumbis's on March 7 to try to locate a blue Honda, based on information that the car might be there. They drove a maroon unmarked car. They wore street clothes -- shirt, tie, and slacks -- and carried firearms, badges, and pagers. They waited until people came out of the Lumbis's, and blocked the blue Honda as Mr. Steverson got in the Honda. (T1928-1938)

According to Primeau, detective Rall walked up to Bobby Steverson and asked him if he remembered him from the case Rall investigated earlier where Steverson was a victim. (T1938-1939) Rall then asked a standard police question, basically, "you don't have *any* guns, you know, knives, . . .," and asked Steverson to step out of the car. (T1939) Suddenly, Rall backed away from the

car, reached for his gun and yelled, "Oh, shit . . . ." Detective Primeau ran for shelter. (T1939)

Primeau heard an exchange of gunshots. (T1940) He saw Mr. Steverson running, moaning, with a hand up, and then he saw Steverson fall. Steverson was wounded in the right leg and right shoulder. (T1942-1943) Primeau chased Steverson. After Steverson fell, Primeau put his foot on Steverson's buttocks, pointed his gun at him, and told him not to move. (T1943)

Detective Primeau heard sirens and, shortly, deputy Larry Annen arrived and handcuffed Mr. Steverson. (T1943) Primeau then went to check on Brian Rall. (T1944) Primeau heard Rall yelling. He could see his partner down on the sidewalk. Rall seemed as he continued to yell. (T1944) Primeau saw a sawed off gun and a .22 on the ground. The guns in evidence looked like the two at the scene, but Primeau never saw them in Mr. Steverson's hand. (T1944-1947)

Detective Larry Annen, a plainclothes tactical drug unit officer, testified he quickly arrived at the scene of the shooting of Brian Rall after hearing over his radio an "officer down" call. (T2098-2105) Numerous officers and undercover agents also heard the call and went to the area. (T2105)

Detective Annen first saw detective Rall, who was seated on the ground leaning against a post. Deputies were helping him. Detective Rall had blood on him and Annen knew he was injured. (T2105, 2107) Annen went to Mr. Steverson, who lay injured on the

ground, and asked what happened. **(T2106-2111)** Over objection, Annen testified the man's responses were: "I shot him, so he shot me." (T2108-2109) Annen asked him if there were any guns lying around and the man said, "yeah, two." Annen could not see any guns at the time. (T2109) Detective Annen asked him what he was shot with and he replied, "a 9 millimeter." (T2110) Annen said, "what did you shoot him with, when I was referring to Brian Rall, and he said, a .22." (T2110)

Sergeant Richard Bernard arrived at the scene after the shooting and saw that both detective Rall and Mr. Steverson were injured. Numerous police personnel were at the scene. (T1523-1524) Rall was bleeding and required medical care. Steverson appeared to be injured, but sergeant Bernard concerned himself with detective Rall, waited for the ambulances, and then went to the hospital to check on Rall. (T1524-1525) Over objection, **12** photographs of detective Rall's injuries were introduced as State Exhibit 130A through L. (T1525-1526)

Sergeant Bernard stayed at the hospital for at least forty-five minutes and insured that Rall's wife arrived and someone would be with him. (T1527) Detective Rall was incapacitated for several days. (T1529) Detective Primeau was put on administrative leave for a day or two because he was involved in a deadly force situation. (T1529)

While Rall was off duty numerous police personnel, including sergeant Bernard, sergeant Bob Kerr, detective Ann Cash, and crime scene technician Laurie Ward continued the investigation of the

shooting of detective Rall and the murder of Mr. Lucas. Mr. Steverson's Honda was searched and numerous items of potential evidence were photographed and processed. (T1199, 1267, 1269, 1319-1324, 1329-1331, 1472-1481, 1489-1501, 1531-1534)

When detective Rall returned to duty, the Lucas case was turned back over to him. (T1500-1501) According to Rall, he located a potential witness, Anne Dzublinski, on March 23 and interviewed her. He reinterviewed a potential witness, Bill Tudor. As a result, he wrote up an arrest affidavit for Mr. Steverson for the murder of Bobby Lucas. (T2229-2232)

Beyond the testimony about the attempted murder of detective Rall, the state theorized that the case was a circumstantial case of "admissions" that Mr. Steverson purportedly made to four people -- Anne Dzublinski, Tony Fisher, Sandra Pinkham, and Sylvester Johnson (Thumper). (R239; T2621-2644)

Anne Dzublinski lived at the drug house of Bill Tudor in exchange for $25 a week and for providing Tudor with drugs and alcohol. (T2117-2125)[6] According to Anne, Mr. Steverson arrived there at 1:00 or 2:00 a.m. on March 3. (T2134-2135, 2138) He seemed upset and had blood on his clothes between the thigh and the knee. A little blood was on his face. (T2135-2136) He said he had been in a fight at a bar with somebody who owed him money and the guy had punched him in the nose. (T2136)

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[6] Anne was a convicted felon and a lifetime user of alcohol, marijuana, cocaine, tranquilizers, heroin, and LSD. In the early part of 1994, Anne abused drugs and alcohol almost daily and suffered blackouts and memory problems. (T2166-2167, 2177-2182)

After they drank and had cocaine, Anne said Steverson told her that he thought he'd hurt somebody, that it was an older man with arthritis and gray hair. (T2137-2139) He thought maybe he had killed him. (T2140) Mr. Steverson told her "he had duct taped this person to a chair and that he had stabbed them and that he put a plastic bag over his head and he thought he'd killed him, and he made me swear I would never tell, And I tried my best to keep that promise until they told me they were arresting me for accessory to murder after the fact." (T2141) He told her that someone knocked on the door and the two figured it must have been Brenda because she had a very distinctive voice. (T2144-2145) Mr. Steverson was not sure if the man was dead. (T2146)[7]

Tony Fisher testified that he checked into a room at the Budget Motel on Highway 92, where Mr. Steverson happened to be staying. (T1975-1976) Steverson tried to sell Fisher a watch. Fisher said he saw a receipt for the watch, which he thought bore

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Anne said she read an article about Mr. Lucas's murder in the newspaper, but she did not call the police because she did not believe Bobby Steverson could do something like that. (T2156) When the police found her she first told them she knew nothing. When they told her they were charging her with accessory to murder she went to the station with them and told them the truth, to the best of her ability. (T2157) She was afraid of the police and shocked at what they said. (T2171)

To Anne, Mr. Steverson seemed scared, afraid, and paranoid, and so was she. (T2142-2144) She saw Mr. Steverson again that day or the next and he said he was leaving town. He wanted her to go with him but she said no. (T2149, 2175-2177)

Anne was sure she had these conversations with Mr. Steverson and she related them to the best of her ability, but she might have the sequence of events wrong. (T2183-2184)

According to the testimony of Bill Tudor, who was also a heavy alcohol and cocaine abuser, Anne told him that Mr. Steverson had killed a man. (T1861-1863, 1864-1865)

Mr. Lucas's signature. When shown a receipt from Mayor's Jewelers for the watch in court, it bore the name of Bobby Steverson, and Fisher said he could have been wrong about his previous position. (T1999, **2014-2017**; Defense Exhibit **2**, 7)

The next morning Mr. Steverson purportedly told Fisher he had killed Mr. Lucas but it was an accident. **(T1978-1981)** Fisher later hooked up with Red Gore, a police informant, and told him, knowing Gore would pass on the information. **(T1983-1987,** 2019-2020)[8]

According to Sylvester Johnson (Thumper), Mr. Steverson's statements to him were that he got in a "tussle" with a guy and he killed the guy after the guy threatened to call the police about something and swung a knife at Mr. Steverson. Allegedly Mr. Steverson said he took the knife, hit the guy, tried to leave, and they got in another tussle and the guy got killed. According to

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[8] Fisher said the police informant, Red Gore, told him that Bobby Lucas was killed. Fisher also read about the murder in the newspaper, and he heard about it from talk on the streets. **(T1974-1975)** Red Gore knew the details of how Mr. Lucas was killed. **(T2022)** There was a reward out, but Fisher denied he asked for anything or that Gore, he, and others had framed Steverson. **(T2020-2027)**

The Budget Motel had no registration card for Fisher. **(T2274-2286, 1996-1997, 2009-2011)**

Fisher had an extensive criminal record. At the time he testified, Fisher was serving time in county jail. He first refused to testify in this case but, facing contempt, he chose to testify. **(T2028-2045, 2050-2056, 1950-1965)** The first time anyone in law enforcement ever contacted Tony Fisher, and the first time he ever told anyone his story was a few months before the trial. (T1993, **2001, 2027)**

Thumper, Steverson said he thought he needed to leave town soon. **(T1886-1893, 1907-1908)**[9]

Sandra Pinkham said she saw Bobby Steverson on March 5th or 6th when she asked him for a ride. **(T1771-1773, 1796-1798)** According to her, he drove "like a nut" so she offered to drive. He did not want anyone to drive who would stop for the police. (T1773-1774) She asked him if he had done wrong things, and if he had ever murdered anybody. According to Pinkham, he said, "Yes, I have." **(T1774, 1777, 1778)** She asked no details and he offered no other explanation. (T1778-1779)[10]

[9] Thumper did not believe Mr. Steverson. **(T1895, 1908)** Mr. Steverson did not mention anybody's name, or whether the person was a man or a woman, white or black, young or old, or where the person lived. Thumper did not know who Steverson was talking about. **(T1892-1893)**

At some point, Steverson told him to look in the newspaper, so Thumper did. Mr. Steverson said the police were not going to take him alive, or something like that. (T1898) Thumper still did not believe Mr. Steverson. (T1901)

Thumper denied knowledge of many of the witnesses, events, and his involvement in drugs, contrary to the testimony of others. **(T1872-1876, 1880, 1904-1913, 1702, 1757, 1788, 1867-1868, 1881, 1988-1989, 2023, 2059, 2065-2066, 2096-2097, 2167-2168, 2170, 2492-2496).**

Detective Rall talked to Thumper two or three weeks after the shooting. (T1899-1900) Thumper told Rall about the conversation Bobby Steverson had with him. (T1900)

[10] Pinkham stayed at Bill Tudor's drug house in March **1994. (T1748-1753, 1782-1785) She** said she went out and used cocaine on the night of March **2.** (T1760-1761, **1786-1787)** She returned **to** Tudor's about 7:00 the next morning, planning to do more cocaine. (T1762, **1786)** She said **Bobby** Steverson was in the bedroom with Anne and he acted strangely. **(T1762-1763, 1769-1770, 1781-1783)**

Pinkham knew about the shooting of detective Rall because she read about it in the newspapers. She knew about the killing of Bobby Lucas because word spread through the drug community quickly and in detail. The police were combing the area and putting pressure on people to try to find out what happened. Pinkham, however, did not come forward with her assertions for nine months.

Dr. Alexander Melamud performed the autopsy on Mr. Lucas. (T1644-1645) Dr. Melamud's opinion was that all injuries inflicted on Mr. Lucas were done in a very short time. It was impossible to determine the order in which they were inflicted. (T1661, 1668-1669)

Due to Lucas's multiple injuries, death could have occurred very fast. (T1657-1659, 1659-1660, 1669, 1677) The 12 stab wounds alone would have caused Mr. Lucas's death. (T1666-1668) Strangulation from the cord would have caused death. However, given the multiple injuries, there was no way to determine how quickly death from strangulation could have occurred. In cases of only strangulation, death can result immediately or can take up to five minutes. (T1653-1659)[11]

In December 1994 she wrote a letter to Grady Judd and told him what she knew. She denied she did this for preferred treatment concerning a Maine conviction. Pinkham said in March 1994, she was involved with Red Gore and acted at his instruction, so she did not come forward earlier because Gore threatened her. She did not know if Gore had some interest in the case. She said Tony Fisher also told her Bobby Steverson told him he killed Bobby Lucas. (T1799-1806, 1813-1837; Defense Exhibit 1) Tony Fisher, however, denied he told Pinkham about the conversation between him and Steverson. (T1991-1993)

[11] Mr. Lucas had eight stab wounds on his chest from the lower and mid-neck to the upper chest. All entered the pleural cavity and injured both lungs, causing massive internal and external hemorrhage. (T1651-1652, 1661) Of four injuries to the lower part and back of the neck, one penetrated the right lung. (T1652, 1661-1662) The eight wounds to the chest and the two lowest stab wounds to the back were done with an elongated object with a dull end, such as a screwdriver. (T1663) Dr. Melamud thought the other two wounds to the back were caused by a knife. (T1664-1665)

Mr. Lucas also exhibited evidence of manual or ligature strangulation disclosed by ruptures of small blood vessels on his face. (T1653-1655) The cartilages of the larynx -- the thyroid and

Mr. Lucas tested positive for using cocaine. His alcohol test was .110 grams per decaliter indicating he had ingested five to six drinks. (T1670-1671, 1676) He probably ingested the cocaine not long before his death. Tests showed Lucas chronically abused drugs. (T1672, 1675-1676) He probably abused alcohol for a long period. (T1673) The alcohol and cocaine in Mr. Lucas's system would have diminished pain he suffered immediately prior to his death. (T1677) The combination of alcohol and cocaine was strong. (T1679)

The Appellant, Bobby Steverson, testified on his own behalf. He denied he made statements to Anne, Tony, Thumper, or Sandy. He admitted the shooting of detective Brian Rall was entirely his fault because he was high on drugs and afraid he would be robbed again, having been the victim of two previous crimes. He said he did not know Rall was a police officer. (T2355-2431)

Deputy Sheriff Charles Delph and crime scene technician Cynthia Holland testified about the investigation of the January 22, 1994 incident in which Mr. Steverson was robbed and cut up. (T2457-2477, 2484-2488)

Mr. Steverson's wife, Marianne, related her husband's decline, after an injury, into alcohol and drug abuse, his brief experience at a rehabilitation center, and his experiences as a victim of a robbery and a kidnapping. (T2504-2561)

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cricoid -- were fractured on the left. (T1656-1657)

The taped bag over Mr. Lucas's head could have caused death of itself, but the estimate of that was "going to the deep forest." (T1659-1660)

Penalty Phase Testimony

Dr. Melamud's penalty phase testimony substantially mirrored his testimony during guilt phase. (T2829-2843)

The state also presented testimony about Mr. Steverson's prior convictions in 1982 for battery on a law enforcement officer (T2850-2854, State Exhibit 136) and in 1985 for armed robbery. (~2862-2877, State Exhibit 137) Detective Rall recounted his emotions and injuries concerning the incident resulting in Steverson's 1995 conviction for attempted murder of a law enforcement officer. (T2856-2861, State Exhibit 138)

The defense called Gayle Steverson (mother) and Patricia McCarty (aunt). They related evidence of Mr. Steverson's abuse by caretakers when he was an infant. (T2879-2884, 2897, 2912-2913, 2916-2917, 2919) Gayle Steverson described Bobby Steverson's abuse over an extended period of time by his stepfather, which resulted in him running away from home as a teenager. (T2884-2889, 2892, 2904) Both Ms. Steverson and Ms. McCarthy testified that at that time he was also deeply affected by the loss of his grandparents, and their deaths caused a severe grief reaction where he could not breathe and **was** taken to the hospital. (T2893-2894, 2914-2915)

Cecil Stephens, Mr. Steverson's natural father, testified that he essentially abandoned his son during his formative years. Only recently had he established a close relationship with Bobby. (T2922-2927)

Mr. Steverson's wife, Marianne, knew of her husband's difficult past and his efforts to overcome that past. For a couple

of years he did well and worked very hard. He was helpful to other people, well liked, and kind. After his injury at his job, he declined into drinking and drugs again. (T3043-3056)

Clinical psychologist Dr. Joel Freid testified he evaluated Mr. Steverson and reviewed the records and psychiatric evaluations relating to his job injury and his brief drug rehabilitation effort at a hospital in California. (T2930-2940, 2942-2943, 2946-2950, 3005-3006) As to mitigating factors, Dr. Freid found Mr. Steverson's history to be very important. (T2951-2952)

Mr. Steverson was the product of a very unstable and disruptive family situation beginning probably at conception. (T2952-2953) He was the victim of early physical abuse. (T2953) From about ages three to 16, he had no contact with his natural father. (T2953-2954) When his mother remarried, Steverson's stepfather was abusive to him both physically and mentally. His mother also may have abused him and she was an alcoholic. (T2954, 2956, 3006-3009) He may have suffered sexual abuse at her hands. (T2978-2985)

Significant is that Mr. Steverson had no male role model or only unhealthy role models. (T2955-2956, 2958) His maternal grandparents, who he was close to, were alcoholics. (T2956, 3009)

Mr. Steverson was genetically and environmentally predisposed to becoming an addict and, in fact, began drinking alcohol somewhere around the age of 12. (T2956-2961) Very shortly after, he began experimenting with drugs. When he met his second wife he became drug free for a period of time until after his industrial accident. Then he began using drugs to self-medicate -- to rid

himself of the psychological discomfort, anxiety, and depression he was experiencing. (T2956-2957, 2961, 3035-3037)

Steverson's employment record was generally good until the accident at his job. After the loss of his employment and his inability to get other employment, his downfall began. (T2964-2965, 3013-3015)

Steverson's attempt at rehabilitation in the hospital in California showed a diagnosis of major depression, post-traumatic stress disorder, cocaine abuse, and suicidal ideation. (T2966) He should have had mental health treatment many years earlier. (T2967)

At the time of the offense Mr. Steverson was using cocaine excessively. The addiction to cocaine is very strong and occurs very quickly. In this case it was coupled with addiction to alcohol. (T2971-2973) Use of cocaine and alcohol, coupled with depression, impaired his ability to think or behave rationally or conform his behavior to the letter of the law. (T2975, 3023-3024) The crime was committed while Mr. Steverson was under the influence of extreme mental or emotional disturbance, (T2975-2978, 3020-3021)

Juror Misconduct Rulings

The day after the jury returned its recommendation in favor the death penalty, juror Roger Davis contacted the trial judge's office to express concern that the jury had been exposed to newspaper articles about the case, and that juror Robert Mathis may have been guilty of misconduct. The trial judge promptly advised

counsel for the state and defense of this communication by juror Davis. (R221-222)

The allegation by juror Davis concerning juror Mathis was that during the death penalty phase, Mr. Mathis told the jury that his uncle was clubbed to death and the assailant was convicted for his murder. The assailant did not get death but was given a sentence of many years in prison. Despite this lengthy prison term, the assailant got out of prison in no time and went on to kill three more people. Juror Mathis allegedly said that if Mr. Steverson were not given the death penalty, he would get out soon and kill again. (R222, 219)

Defense counsel filed a sworn motion seeking to interview at least juror Roger Davis concerning the matters he communicated. (R218-220) Counsel apprised the court that, had Mr. Mathis disclosed the information about his uncle during voir dire, counsel would have excused him from jury service peremptorily and Mr. Mathis possibly would have been excused for cause. He asserted that Mr. Mathis's concealment of the information constituted misconduct. (R219)

At a hearing on June 15, 1995, defense counsel further urged a new trial should be granted based on juror Mathis's concealment of information during voir dire. (R225-247) After the hearing, the court ordered the state and defense to submit a list of questions to the court for consideration in interviewing the jurors. Counsel for the defense did so, and the state eventually filed objections to certain questions. (R254-258, 301-302) On the issue of juror

Mathis, the state took the position that a review of the voir dire transcript showed that defense counsel never asked juror Mathis the specific question of whether any of his relatives had been the victim of violence, thus defense counsel was not diligent. (R301-302)

On June 23, 1995, the court conducted a one or two-question inquiry of ten of the jurors concerning only whether they had been exposed to the newspaper accounts. The two jurors who did not show up for the hearing were jurors Mathis and Strickland. The jurors were not subpoenaed. (R260-261, 268, 286)

Defense counsel strenuously objected to the limitations of the inquiry about the newspaper account, and the exclusion of inquiry concerning juror Mathis's conduct. The court's position was that nothing Mr. Mathis said was important. The trial judge said he read the transcript of voir dire of Mr. Mathis, the prospective juror was extremely candid, and nothing Mathis said, even if the allegations were true, would require a new trial. (R260-290)

At this June 23 hearing, another juror potentially corroborated juror Roger Davis's comments about juror Mathis. Juror Barbara Brown offered the following statement to the court:

> . . . The only thing that was said in there at all that I remember was the black guy -- I can't remember his name -- but he told something about his uncle being murdered or something. That was the only thing that was said.

(R278-279) Defense counsel alerted the court that Mr. Mathis was the only black member of the panel. (R287)

Counsel also strenuously argued on both issues of juror misconduct that the hearing was too limited, blocked the truth-finding process, and denied due process to Mr. Steverson. The court was asked to revisit the matter, and allow a meaningful interview of all jurors or grant a new trial. (R287-290) Counsel also filed a motion for new trial based on juror misconduct. (R303-304)

The court's order denying the motion for new trial outlines the procedure used to interview the jurors on the issue of exposure to the newspaper accounts. (R307-311) On the matter concerning juror Mathis, the court stated that the record of the voir dire revealed that Mr. Mathis gave candid answers to questions and defense counsel was not diligent in pursuing specific questions to him concerning who he knew who had been the victim of violent crime. (R307-311) The court said: "Whatever Mathis' motives were, or whether he may have influenced other jurors with his life experiences, these were clearly matters which inhered in the verdict of the jury and are not subject to judicial inquiry." (R309)

On exposure to the news account, the court concluded that juror Davis overheard one juror, prior to commencement of the penalty phase, tell another that a newspaper headline said "Steverson Confesses." (R309)

Juror Davis testified that he was sitting next to two jurors, before penalty phase proceedings began, and one juror was telling another juror that Mr. Steverson had confessed, although this was not brought up in the jury room. (R270-272) Jurors Gwen Reynolds

and David Ward said they saw the headline that Mr. Steverson confessed, but did not read or discuss the accompanying article. The article **was** not discussed during penalty deliberations. (R282-284)

The court found that two jurors likely were aware of the post-conviction confession and it was improper for them to receive the information, but the information was meaningless. (R310-311)

The court's order denying the motion for new trial is attached as Appendix C of this brief. The juror questionnaire of Mr. Mathis is attached as Appendix D.

SUMMARY OF THE ARGUMENT

New Trial Issues

Mr. Steverson raises two issues for a new trial. In Issue I, he asserts that structural error occurred in his case because of juror misconduct. This argument is based on juror Mathis's concealment or failure to disclose material information about his history and his beliefs about a life versus death sentence. Mathis not only omitted crucial information in his juror questionnaire and in voir dire, but then in penalty phase revealed the information and argued a legally improper reason for imposing the death penalty.

The trial court erred in denying the motions to interview and for new trial based on Mathis's conduct. Overt acts of misconduct are established, and prejudice must be presumed. A new trial must follow as a matter of law because the Appellant **was** denied his constitutional rights to a fair trial by an impartial jury.

Issue II shows an independent basis for granting a new trial, also based on denial of a fair trial under the United States and Florida constitutions. Mr. Steverson's trial on the charges at issue was tainted by improper introduction of details of the collateral crime of the attempted murder of law enforcement officer Brian Rall, with that crime becoming a feature of the entire trial, in violation of Williams v. State, 117 So. 2d 473 (Fla. 1960), and its progeny. The error in failing to exclude or limit the consideration of the irrelevant and prejudicial featured evidence is not harmless.

Reversal for Imposition of a Life Sentence

As Issue III, Mr. Steverson asserts that the death penalty is disproportionate in his case in light of the totality of the circumstances. There were three aggravating circumstances found here, but two statutory mitigating circumstances and other non-statutory mitigating circumstances also were found. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is disproportionate, the nature and quality of the factors must be weighed as compared with other death appeals. Here also, the trial judge's weighing procedure was flawed because of improper reliance on the details of the collateral offense of the shooting of detective Rall, and an attempt to ignore the mitigation, contrary to ~~Miller~~ v. State, 373 So. 2d 882 (Fla. 1979).

The mitigating aspects of this case were substantial. They showed that Mr. Steverson was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired, plus there were many non statutory mitigators. The heinous nature of the crime should be substantially diminished due to mental illness and drug and alcohol abuse.

The death penalty is not warranted and remand for imposition of a life sentence is required.

New Penalty Phase Issues

Issues IV requires reversal for a new penalty phase because jurors immediately prior to penalty phase were exposed to news accounts that Mr. Steverson confessed to a corrections officer after the guilt phase verdict. The trial court improperly restricted inquiry into this matter by failing to question the whole jury. Contrary to the court's conclusion, potentially five to seven jurors may have had knowledge of the news account and may not have disregarded it. The trial court's ruling that any error was harmless put the cart before the horse, because the trial court did not ask the jurors the required questions and the court's rulings relied on cases inapposite to the facts here.

Issue V requests reversal for a new penalty phase because, under the facts present here, the use of the felony murder aggravators created an arbitrary and unlawful presumption that the death penalty should be automatic.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHERE HIS CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY WERE VIOLATED.

The Appellant asserts, as he did below, that juror Robert Mathis concealed or failed to disclose material information in voir dire. The concealment or failure to disclose the information was not due to lack of diligence of counsel. (R218-311) The improper extrinsic factual matter undisclosed in voir dire and then revealed in the jury room by juror Mathis was objectively demonstrated as an overt act of misconduct. A new trial is required because Mr. Steverson was denied his right to a fair trial in both guilt and penalty phase in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, Florida courts use a three-part test: (1) the complaining party must establish that the information is relevant and material to jury service in the case; (2) that the juror concealed the information during questioning; and (3) that the failure to disclose the information was not attributable to the complaining party's lack of diligence. De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995), citing, Skiles v.

Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So. 2d 253 (1973).

The De La Rosa court explained that Florida appellate courts have reversed for a new trial where jurors allegedly fail to disclose a prior litigation history or where other information relevant to jury service is not disclosed. The court affirmed the trial court's granting of a new trial because a juror failed to disclose a prior history of litigation, which deprived De La Rosa of a fair and impartial trial. 659 So. 2d at 241.

There, the court found the juror's failure to disclose to be material because a person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general. Counsel must be permitted to make an informed judgment as to the prospective juror's impartiality and suitability for jury service. 659 So. 2d at 241, citing, Bernal v. Lipp, 580 So. 2d 315 (Fla. 3d DCA 1991).

The De La Rosa court found the juror also concealed the information, explaining that the jury panel was asked several questions regarding involvement in prior lawsuits or commercial disputes. It was difficult to believe the particular juror did not think the questions posed by counsel applied to him. There was no record basis supporting a conclusion that the juror did not listen to or hear any of counsel's questions. Assuming, arguendo, that the juror had no intention of misleading counsel, "the omission nonetheless prevented counsel from making an informed judgment -- which would in all likelihood have resulted in a peremptory

challenge . . . " 659 So. 2d at 241-242, citing, Industrial Fire & Casualty Ins. co. v. Wilson, 537 So, 2d 1100 (Fla. 3d DCA 1989) and Bernal.

As to the third prong, diligence of counsel relating to the concealment, the court concluded that the lower appellate court majority erred in adopting the state's rationale that a juror's failure to answer counsel's questions directed to a panel, and not to the juror specifically, does not constitute concealment. such a conclusion would preclude "collective questioning of jurors and will compel attorneys to obtain individual oral or written responses in order to fulfill the concealment prong of the Bernal test." 659 So. 2d 242, adopting, Zequeira v. De La Rosa, 627 So. 2d 533-34 (Fla. 3d DCA 1993) (Baskin, J., dissenting).

In the instant case, at least one juror (Davis) established that juror Robert Mathis urged during penalty phase deliberations that his uncle was beaten to death with a club. Although his uncle's assailant was sentenced to many years in prison, he got out in no time, and went on to kill three more people. Juror Mathis urged that Mr. Steverson should be given the death penalty because if he got life he would get out soon and kill again. (R218-222)

Mathis did not disclose this information about his uncle's murder and his feeling about a life versus death sentence in his jury questionnaire or invoir dire, (SR1-2; T393-417, 502-507, 527-528, 582-589, 614-612, 634-635; Appendix D) Defense counsel filed a sworn motion seeking to interview at least juror Davis, and moved for a new trial. The court denied both motions, concluding counsel

was not diligent in his voir dire questions to juror Mathis, so Mathis did not need to disclose anything. (R218-222, 225-247, 254-258, 260-290, 301-304, 307-309; Appendix C). The court's order states:

> . . . Additionally, . . . Florida's Evidence Code, . . . absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of the jurors. State v. Hamilton, 574 So. 2d 124 (1991) . . , This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. Branch v. State, 212 So. 2d 29, 32 (Fla. 2d DCA) [1968]. Whatever Mathis's motives were, or whether he may have influenced jurors with his life experiences, these were clearly matters which inhered in the verdict of the jury and are not subject to judicial inquiry." (R308-309; Appendix C).

The trial court's rulings constitute legal error. Here, overt acts of misconduct were alleged and should have been the subject of proper inquiry. Wilding v. State, 21 Fla. L. Weekly S213, 214 (Fla. May 16, 1996). Further, a trial judge may not exalt society's interest in the secrecy of the deliberative process over society's interest in the fairness of the deliberative process. When a trial court fails to focus on overt acts of misconduct and places secrecy over the fairness of the deliberative process, the judge approaches the matter from the "exactly wrong" position. Wright v. CTL Distribution, Inc., 21 Fla. L. Weekly D1968, 1969 (Fla. 2d DCA August 30, 1996) .

Misconduct by Mathis, prejudice by his actions, and diligence by both counsel and the court are shown by the facts in this case. Here, in his juror questionnaire, Mr. Mathis was asked the specific

question: "Have you or any family member been the victim of or a witness to a criminal act?" Mathis apparently first checked "no" on the questionnaire, then scratched out that check and added a check-box, stating "almost." He then checked that he was not the actual victim/witness of the crime he disclosed. He checked that he did not testify in the case. It was a Polk County case. He was called, but the case settled. (SR1-2; Appendix D)

During voir dire, Mathis did disclose a number of items **about** his history to the state attorney, including that he was a witness to a break-in and a "tussle" where a man got stabbed. (T394-397) [The stabbing apparently was the crime Mathis revealed in the questionnaire.] The state attorney further asked Mathis if he knew anyone charged with a violent crime. Mr. Mathis responded, "indirectly" in his community. (T402-404) He said he never thought about whether he would make a good juror on a murder case. (T406) He would hope that he could get other jurors to listen to his convictions. (T413)

When asked by the state attorney if there was anything else he did not ask or that he missed, juror Mathis said: "You're asking questions, I don't know." (T417) He said he had at times given thought to the death penalty, had fluctuated, and really couldn't tell how he felt about it, and did not want to get trapped by the question. (T502-507) Because the state attorney later asked some prospective jurors about their drug use, Mathis later revealed that he had been in a drug treatment facility in the past. (T527-528)

Defense counsel asked Mathis if he had anything in his

background that might make it impossible for him to make a fair decision on the facts he heard and Mathis said no, that he tried to be law abiding. Everyone had skeletons, but he had nothing big. (T587-588) He was told that a life sentence would mean a mandatory 25-year sentence and said he understood that. (T614) Mathis said he never thought about his feelings about the mandatory 25 years. (T615-616)

Under the De La Rosa test, the information juror Mathis concealed or failed to disclose is the most relevant and material information needed in this case because this was a capital murder case. Mathis's concealment or failure to disclose his uncle's murder and the assailant's early release despite a lengthy sentence precluded counsel from making an informed judgment about his suitability and impartiality to sit as a juror to determine guilt, as well as penalty, and deprived Mr. Steverson of a fair trial. Mathis not only omitted crucial information, but then argued a legally improper reason for imposing the death penalty.

That juror Mathis concealed the information is revealed by the communication of juror Davis (R218-222) and is supported by the statement of juror Brown (R278-279, 287-288) Juror Brown's statements in a different inquiry were: ". . . The only thing that was said in there at all that I remember was the black guy -- I can't remember his name -- but he told something about his uncle being murdered or something. That was the only thing that was said. (R278-279) Defense counsel advised the court that this was a reference to juror Mathis. (R287)

That juror Mathis concealed the information also is supported by the juror questionnaire of Mathis and a review of the entire voir dire. Virtually every question asked during voir dire by both the state attorney and defense counsel was designed to elicit anything in the prospective jurors' backgrounds that would preclude them from fairly considering the evidence and the appropriate penalty. Jurors were asked if they knew anyone, including relatives, who were victims of violent crime. Jurors were repeatedly asked, individually and as a panel, to provide any information about their experiences and history that would be important and might not have been specifically asked. (T54, 85, 97, 101, 108-109, 118, 150, 163-164, 168-169, 174-176, 186, 188, 199-202, 208-242, 269-271, 298-302, 343-344, 347, 354, 366, 393-417, 425, 430, 438-439, 441, 460-461, 464, 468-476, 482-485, 500-501, 502-507, 527, 573, 582, 616, 655, 665, 682-683, 710-714, 716-718, 724, 740-747; Appendix D)

Many jurors came forward with information about relatives or people they knew who were victims of car thefts, armed robberies, a purse snatching, a burglary, spouse abuse, death due to cocaine use, murder and attempted murder. (T46-47, 82-83, 86, 118, 135-136, 168-169, 176, 268-271, 430, 468, 482-485, 710-714, 714-727) One juror said he forgot to disclose such a matter on his question-naire. (T176)

The prospective jurors referenced are Bailey, Wells, Ware, Callahan, Ranze, Wilkes, Yasgur, Carter, Atkins, Cruz, and Roach. Of these eleven prospective jurors, nine were challenged by the

defense and the state. The defense successfully challenged prospective juror Roach for cause. (T640) The defense exercised peremptory challenges against prospective jurors Bailey, Wilkes (the juror who did not disclose some information on his questionnaire), and Atkins. (T319, 321, 791) The state successfully challenged prospective jurors Ranze and Cruz for cause. (T320-321, 791) The state exercised peremptory challenges against Wells, Yasgur, and Ware. (T319, 639, 1066)

It is incomprehensible, given the context of this voir dire and the juror questionnaire, that juror Mathis did not understand or comprehend the type of information sought by counsel, or think that the questions of both counsel did not apply to him. Had the information been disclosed, counsel would have asked to excuse Mathis for cause, or peremptorily, or at the very least made further specific inquiry. (R218-220)

At a hearing, the trial court precluded any inquiry into juror Mathis's concealment or nondisclosure of information. The trial court did not subpoena the jurors for this hearing, which also addressed another matter. Ten jurors were present for the hearing. One juror was out of town. Juror Mathis did not show up. (R268, 286)

The court concluded that even if the Mathis allegation was true it would not rise to the level of requiring a new trial because defense counsel never asked the specific question of whether Mathis had a relative who had been the victim of a crime. (R261-262, 307-308; Appendix C)

As previously outlined, counsel for both the state and defense diligently attempted to discover the type of information that Mathis concealed or failed to disclose concerning his personal history and his thoughts about a life sentence with parole versus a sentence of death. Efforts to secure a fair and impartial jury were thwarted by his concealments.

The trial court's conclusions in this case are by law reversible error. A court and trial counsel are entitled to truthful responses to questions propounded during voir dire in order to determine whether legal cause for challenge or reason for peremptory challenge exists. Mitchell v. State, 458 So. 2d 819, 820-821 (Fla. 1st DCA 1984). This right to a fair and impartial jury is zealously protected in civil cases as well as criminal cases in Florida, and this should be especially true in a death penalty case.

Mitchell involved numerous convictions involving offenses which arose out of a major disturbance at Cross City Correctional Institution where he was an inmate. There, in jury selection, the court first asked the jurors a number of questions. One question was whether any of the jurors had a family member, relative, or friend who was employed at the Cross City Correctional Institution. All jurors, including a juror Newman, responded in the negative. The court disallowed repetitive questioning, so counsel made no further inquiry concerning prospective jurors and any relationship they had with employees at the correctional facility.

After the verdict in Mitchell, it was discovered that Mrs. Newman had a nephew who worked as a Correctional Officer at Cross City. The nephew was in the courtroom during trial, assisting in security. Upon motion for new trial, the court heard Newman's testimony. She asserted that she did not respond to the court's question because she thought the question related to her immediate family, and that her relationship to her nephew and his presence in the courtroom had no effect on her deliberations. 458 So. 2d at 820.

The appellate court said the trial judge's question should have easily elicited a positive response from Newman. The question and negative answer were both clear and straightforward. Therefore, it was not incumbent upon defense counsel to explore the topic further. "Even assuming . . . that the juror had no intent to deceive, nevertheless, relief will be afforded where (1) the question propounded is straightforward and not reasonable [sic] susceptible to misinterpretation; (2) the juror gives an untruthful answer, (3) the inquiry concerns material and relevant matter to which counsel may reasonably be expected to give substantial weight in the exercise of his peremptory challenges; (4) there were peremptory challenges remaining which counsel would have exercised at the time the question was asked; and (5) counsel represents that he would have excused the juror had the juror truthfully responded. 458 So. 2d at 821. See also, Fla. R. Crim. Pro. 3.600(b)(4) (juror misconduct is a basis for a new trial where the substantial rights of the defendant are prejudiced).

In Marshall v. State, 664 So. 2d 302 (Fla. 3d DCA 1995), the court also reversed for a new trial because a juror (Giorgio) failed to disclose she was a volunteer at the jail where the defendant was housed, and she escorted a defense witness to talk to the defendant in the jail on the eve of trial. The nondiscloure was not revealed on voir dire, partly because neither defense counsel nor the court asked the panel members about any connection to law enforcement. The court did ask the venire for a personal history, including employment. At least one panel member disclosed that her "whole immediate family [was] in law enforcement so [she did not] know if that would prejudice [her]." Juror Giorgio remained mute. After the jury was chosen, the court admonished jurors to have no discussions with the defendant, counsel, or witnesses. 664 So. 2d at 303.

Giorgio never disclosed her jail contact with the witness or the defendant during trial. However, during jury deliberations, the defense began to learn of Giorgio's status. The jury returned a guilty verdict and was discharged. Subsequently, defense counsel filed motions for a new trial and juror interview. The court denied the motions. 664 So. 2d at 304.

The Marshall court reversed for a new trial because the nondisclosure constituted prejudicial error misconduct which deprived the defendant of his Sixth Amendment right to a fair trial. The post voir dire visitations alone constituted misconduct. Thus, the juror's own misconduct obviated the need to address whether the defendant had earlier waived his right to

contest Giorgio's connection with the prison at voir dire. Prejudice was presumed. 664 So. 2d at 304-305.[12]

In a civil case where juror misconduct was alleged, Mobil Chemical Co. v. Hawkins, 440 So. 2d 378, 379 (Fla. 1st DCA 1983), the court and counsel asked prospective jurors if they knew witnesses or attorneys related to the case. They got negative responses. Because of negative responses of a juror, who it was later learned knew of relationships with the plaintiff's wife and the plaintiff's former attorney, a new trial was granted.

In Mobil, as prospective jurors were excused and replaced, the court and the attorneys for both parties increasingly relied on the "commendable (and, we believe, universally practiced) time saving technique of asking the new prospective jurors whether they had heard the questions asked previously, and whether their answers would differ from those given by other prospective jurors." 440 so. 2d at 380.

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[12] Contrast Blaylock v. State, 537 So. 2d 1103 (Fla. 3d DCA 1988), review denied, 547 so. 2d 1209 (1989), wherein a juror disclosed the fact that he had been held hostage, but defendant's trial counsel made a tactical decision to intentionally refrain from pursuing the line of questioning concerning that subject.

In the instant case, the trial court erroneously relied upon Blaylock to deny the juror interview. (R308) Here, there was a sufficient showing that juror Mathis concealed or failed to disclose material information about his history and his feelings about the death penalty versus a life sentence with no parole for 25 years. There was not, and could not be, a tactical decision by defense counsel to not question juror Mathis more specifically. Because of Mathis's concealment or non-disclosure, there was no reason for either counsel, or for the trial judge, to think further specific questioning during voir dire was in order.

A final juror called to the box responded "No" to the court's questions whether she knew "anything about this case or anyone involved" and whether her answers to the previously asked questions would be "unusual." When counsel asked the prospective juror if she had heard the questions asked of the other jurors and whether her answers would be the same as theirs, she responded affirmatively. Based on her responses counsel for both parties accepted the juror as qualified. 440 So. 2d at 380.

After trial defense counsel learned the juror knew and had been a client of an attorney in the case and was related, as a second cousin, to a witness in the case. Applying Rules of Civil Procedure and a predecessor statute, the court presumed prejudice. 440 so. 2d at 380.

In Mobil, it was argued that Mobil waived the issue of juror misconduct by failing to specifically ask the juror on her voir dire about any relationship she might have had with the attorney or with the witness and his family. The appellate court responded:

> We . . . reject, as being entirely without merit, appellee's argument that Mobil waived its right to challenge the juror post-trial by failing to specifically ask her on voir dire about any relationship she might have with the Crawford family or appellee's wife. It is abundantly clear from the transcript of voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as a juror could have sat through the voir dire without realizing that it was his or her duty to make known to the parties and the court any relationship with any of the named parties, witnesses, or attorneys. Nevertheless, the juror failed to reveal her relationship to appellee's wife and to his former attorney. Her failure to disclose material information bearing on her possible bias and her qualifi-

> cations to serve as a juror deprived Mobil of its right to intelligently participate in selection of the jury, and gives rise to an unacceptably strong inference that Mobil did not receive the fair trial to which it was entitled. Accordingly, we reverse and remand for a new trial.

440 so. 2d at 381.

In Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So. 2d 253 (1973), the appellate court upheld the trial court's granting of a new trial based upon Juror Mesa's failure to respond truthfully, and his concealment of information that he had previously been a party to a lawsuit and had been a client of an attorney who was the partner of the plaintiff's attorneys. 267 So. 2d at 382.

The trial counsel in Skiles asked the prospective jury panel whether any of them knew the attorneys or associated counsel. There was no apparent affirmative response from any of the jury panel. Each member of the panel was then specifically asked whether or not they had ever been involved in accident cases to which Mr. Mesa replied, "Just a car." Mr. Mesa was then asked, "You have never been a party to a lawsuit, one way or the other?", to which he replied, "No." 267 So. 2d at 381. After the motion for new trial was made, the trial court inquired of juror Mesa concerning his prior involvement in the lawsuit and association with counsel. Mr. Mesa responded affirmatively to both questions. The trial court's basis for granting a new trial was because Mesa's failure to respond truthfully on voir dire deprived the defendant of the opportunity to examine him on the matters and, therefore,

deprived him of a possible basis for challenge for cause and certainly deprived him of information that could have given him the opportunity to challenge peremptorily. 267 So. 2d at 381. As the appellate court explained, in upholding the order granting a new trial:

> "'It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, ... A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, . . . impairs . . . [a party's] right to challenge.'" (Loftin v. Wilson, Fla., 67 So.2d, 185, quoting Pearcy v. Michigan, Mut. Life Ins. Co., 111 Ind. 59, 12 N.E. 98.)
>
> ". . . When the right of challenge is lost or impaired, the . . . conditions and terms for setting up an authorized jury are not met; the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant; . . . the terms of the statutes with reference to peremptory challenges are substantial rather then technical, such rules, as aiding to secure an impartial, or avoid a partial, jury, are to be fully enforced; the voir dire is of service not only to enable the court to pass upon a juror's qualifications, but also in assisting counsel in their decision as to peremptory challenge; the right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information; the question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established; . . . next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial, and anything that tends to impair their belief in this respect must seriously diminish their confidence and that

> of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects; the fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; . . . when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law." (Emphasis supplied) Drury v. Franke, 247 Ky. 758, 797, 57 S.W.2d 969, 984, 985; 88 A.L.R. 917.

267 So. 2d at 381-382. As the Skiles court said, there is a "miscarriage of justice" when a party is precluded from the opportunity of having a juror excused for cause or of excusing such juror peremptorily by reason of a material concealment by the juror of a fact sought to be elicited on voir dire where the failure to discover the concealment is not through want of diligence by the complainant. 267 So. 2d at 382.

In addition to the principles set forth above, the other legal principles applicable in this case are:

> One of the most sacred and carefully protected elements of our system of criminal -- or civil, for that matter -- justice is the sanctity of an impartial jury that has not been infected by unlawful or improper influences. This is absolutely vital to the guarantee of a fair trial to an accused. The safeguarding of that ideal must be zealously guarded.

Meixelsperger v. State, 423 So. 2d 416, 417 (Fla. 2d DCA 1982). It is not the province of a jury to allow the question of whether a prisoner may or may not be paroled to enter into its delibera-

tions. Burnette v. State, 157 So. 2d 65, 68 (Fla. 1963). See also, Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L. Ed. 2d 754 (1984), and Elledge v. State, 346 So. 2d 998 (Fla. 1977) (it is improper to influence a jury that if a defendant gets out of jail because he is paroled he will kill again).

Prejudice based on juror misconduct is rebuttably presumed if established by objective demonstration of extrinsic factual matter disclosed in the jury room. Powell v. Allstate Ins. Co., 652 So. 2d 354 (Fla. 1995). Overt acts of misconduct may be demonstrated only by objective facts, such as whether the matter was discussed by or brought to the attention of other jurors, and the number of jurors involved. Wilding v. State, 21 Fla. L. Weekly S213, 214 (Fla. May 16, 1996).

Here, the trial judge did not allow any inquiry into the objective facts, which was error. Despite this error, misconduct and prejudice are evident. It is established that juror Mathis concealed information in voir dire, It is established through at least juror Davis and potentially juror Brown that juror Mathis exposed all 12 jurors during penalty phase deliberations to the legally improper consideration that death should be imposed because life without possibility of parole for 25 years did not really mean that, and Mr. Steverson would get out and kill again in no time, as did his uncle's assailant.[13]

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[13] The crimes in this case preceded the amendment to section 775.082(1), Florida Statutes (Supp. 1994), which makes persons convicted of a capital felony punishable by death ineligible for

Juror Mathis was the stealth juror. He was the juror with a hidden agenda. He concealed in voir dire what he should have revealed. He revealed in penalty phase what he should have concealed.

Prejudice must be presumed. The errors in this case are structural and mandate a new trial. De La Rosa; Skiles; Mobil; Powell; Marshall; Mitchell.

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parole if sentenced to life imprisonment. Ch. 94-288, §1, Laws of Florida, effective May 25, 1994.

ISSUE II

APPELLANT WAS DENIED A FAIR TRIAL AND DUE PROCESS BECAUSE THE PROSECUTION WAS ALLOWED TO MAKE EVIDENCE OF OTHER CRIMES A MAIN FEATURE OF THE TRIAL.

In this capital murder case, the trial court ruled that evidence of a collateral crime, the attempted murder of law enforcement officer Brian Rall, would be introduced without limitation. The abundant and detailed evidence of the collateral offense was not relevant to the charged offenses, and became a main feature of the trial. Even if some limited amount of the evidence of the collateral crime was relevant, the overpowering nature of the evidence presented to the jury constituted prejudicial and harmful error. A new trial is required because Mr. Steverson was denied a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 16, of the Florida Constitution,

Here, trial counsel sought exclusion or limitation of the collateral crime evidence after the state filed notice of intent to rely on "Williams Rule" evidence. [Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) ; § 90.404(2)(a), Fla. Stat. (1993)]. (R66, R125)

At a hearing on the matter, the state recognized the evidence was not admissible as Williams Rule evidence. The state also acknowledged that it was not asking for a flight instruction as that would be improper. However, the state asserted the evidence

was admissible because it was intertwined with other testimony and the collateral crime showed consciousness of guilt. (R140-146)

The defense urged the evidence would only inflame and prejudice the jury and details of the collateral crime should therefore be limited or excluded from both the guilt and penalty phases of trial. The court denied the defense motion in limine, and trial counsel's renewed efforts to limit or exclude consideration of the evidence. (R125, 139-140, 215-216; T1088-1089, 1525-1526, 2565, 2815-2817, 3060)

The collateral offense concerning the shooting of detective Rall occurred four days after the murder of Mr. Lucas. Mr. Steverson was tried and convicted for the attempted first-degree murder of a law enforcement officer before the instant case went to trial. The conviction was reversed for imposition of a conviction and sentence for attempted second-degree murder. (Appendix B) In this trial for the Lucas offenses, however, the jury was allowed to hear all of the details of the collateral offense concerning the shooting of detective Rall.

Assuming collateral crime evidence is admissible in a case, "the prosecution should not be allowed to go too far in introducing evidence of other crimes. The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident." Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985), citing Williams v. State, 117 So. 2d 473 (Fla. 1960).

Collateral crimes evidence that is relevant should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L. Ed. 2d 200 (1989); § 90.403, Fla. Stat. (1993).

Limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity. Such evidence would not be relevant. Even if relevant, it should not be admitted if its probative value is substantially outweighed by undue prejudice. Bryan, 533 so, 2d at 746.

In this trial concerning the Lucas offenses, the state's theory was that its case against Mr. Steverson was circumstantial. The case centered on the credibility, or lack thereof, of four state witnesses who presented testimony about statements Mr. Steverson allegedly made to them. The state asserted that the jury must have believed at least one of these witnesses. There was no scientific evidence linking Steverson to Lucas's murder. There was undisputed evidence that Steverson visited Lucas's trailer the night of the crimes. (R239, T1566-1605, 1609-1634, 2355-2361, 2431-2435)

Yet, the state in this trial was allowed to feature the collateral offense of an attempted first-degree murder of detective Rall and its details to show Mr. Steverson's bad character and

propensity because he was the shooter of a law enforcement officer. The details of that crime were immaterial and of no probative value to the charged offenses. The collateral offense became an overwhelmingly prejudicial main feature in this trial that predisposed the jury to find guilt and impose the death penalty.

The facts concerning the shooting of detective Rall are set forth in the Second District's opinion, which reversed Mr. Steverson's conviction for attempted first-degree murder of a law enforcement officer to a conviction for attempted second-degree murder. Steverson v. State, No. 95-00713 (Fla. 2d DCA July 26, 1996), (Appendix B). As the court explained, the shooting of Rall began with Steverson's criminal drug problems:

> He was indebted to a drug dealer who in January of 1994 threatened his wife and him with physical harm. On two occasions, Steverson was subjected to physical abuse. He was hospitalized as a result of the last episode which occurred in February of 1994. The violent events inspired him to acquire firearms for self-protection, i.e., a pistol and a shotgun from which he removed a portion of the barrel. Some time later, in early March of 1994, in the course of a murder investigation unrelated to the instant proceeding, two detectives visited a drug house which coincidentally Steverson frequented. They had the house under surveillance. One of the detectives recognized Steverson and approached the car in which he was sitting. Steverson had his two weapons with him. On the heels of their encounter, Steverson and the detective exchanged gunshots. Steverson wounded the detective with the sawed-off shotgun. . . .

(Appendix B, p.3)

Here, the state essentially tried Mr. Steverson for attempted first-degree murder of detective Rall, as if it were another

offense at trial. The jury heard virtually every detail of the Rall case, including every emotional aspect of the shooting, the detective's injuries, his bloodied face, his staggering, his yelling, the frantic "officer down" response by numerous law enforcement officers and undercover agents, the hospital treatment, and the time off work due to deadly force.

In addition to a lengthy recitation about the shooting, detective Rall personally and graphically described his injuries. (T2210-2221) Twelve photographs of his injuries were presented over objection. (T1525-1526, Exhibit 130 A-L)

Rall narrated how blood dripped over his eyeglasses and face, how he awaited help, staggered down the street and yelled into his radio. He portrayed his treatment at the hospital, the time he had to take off work, and the birdshot that remained in his body. (T2221-2229)

Detective Primeau, Rall's partner and mentor, **also** reiterated the step-by-step details of the shooting. He further testified to Rall's condition -- his partner was down on the sidewalk, startled, bloody, and yelling. (T1928-1947)

Detective Annen testified about the "officer down" call and his actions. When Annen arrived at the scene, Rall was bloody and obviously injured, but was being attended to. Annen went to Mr. Steverson, who was shot. Over objection, he testified to Steverson's remarks made at that time. (T2098-2111)

Sergeant Bernard testified about the frantic scene. He described his distress and concern for Rall's bleeding and need for

medical care, the wait for the ambulance, and his trip to the hospital to check on detective Rall and to insure that Rall's wife arrived at the hospital. He reiterated that Rall had to take leave. Further, he testified detective Primeau had to take administrative leave for a day or two because of the deadly force situation. (T1522-1529)

In Williams v. State, 117 so. 2d at 475-476, the court explained that evidence of a robbery and shooting committed one month after the homicide was admissible because it was relevant to identity of the accused and the weapon used, as well **as** the pattern defined in the two incidents. However, the evidence of the collateral offense became a feature instead of an incident of the trial. Testimony about the subsequent crime was so disproportionate to the issues of sameness of perpetrator and weapon and of design that it may well have influenced the jury to find **a** verdict resulting in the death penalty, while a restriction of that testimony might have resulted in a recommendation of mercy, a verdict of guilty of murder of a lesser degree or even a verdict of not guilty. A new trial was required.

In this case, there was no similarity of offenses or weapon, as was apparent in Williams. There **was** only undisputed evidence that Mr. Steverson, in his blue car, **was** at Mr. Lucas's trailer the night of the Lucas murder. Four days later Steverson was in his blue car at the drug house of George and Debbie Lumbis. There the police thought they might find someone in a blue car who might

possess a receipt or credit card bearing Lucas's name, a fact that never materialized. (T2249, 2622)

The erroneously admitted evidence of the details of the Rall collateral crime went far beyond relevancy, context, or purported consciousness of guilt. Here, the state was allowed to essentially retry Mr. Steverson for the shooting of Rall for its sheer shock value.

As explained in Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L. Ed. 2d 680 (1988) :

> . . ." [C]ollateral crime" evidence is given special treatment because of the danger of prejudicing the jury against the accused either by depicting him as a person of bad character or by influencing the jury to believe that because he committed the other crime or crimes, he probably committed the crime charged. see, e.g., Williams v. State, 110 so. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Winstead v. State, 91 So. 2d 809 (Fla. 1956); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). A verdict of guilt on a criminal charge should 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.
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> * * *
>
> . . . The basis for the prohibition on evidence of collateral crimes should be kept in mind:
>
> > Evidence that the defendant has committed a similar crime or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the

> juror to believe the prisoner guilty.
>
> Nickels v. State, 90 Fla. at 685, 106 So. at 488 (emphasis supplied). . . .

Craig v. State, 510 So. 2d 857, 863-864 (Fla. 1987).

The level of emotional reaction from the extraneous, inflammatory, and prejudicial details of the collateral crime evidence in Appellant's case is obvious. There are only a few crimes that would be considered as heinous as attempted first degree murder of a law enforcement officer. Indeed, punishment for such an offense is enhanced by statute in Florida.[13] Here, the way the detective's shooting was portrayed created a horrific bias. The details of the collateral crime featured in this case likely predisposed the jurors to believe that Mr. Steverson was guilty of the Lucas offenses as charged, and deserved the worst penalty.

In Henry v. State, 574 So. 2d 73 (Fla. 1991), the defendant's conviction for the first-degree murder of his wife was reversed for a new trial because of the erroneous admission of excessive testimony concerning the defendant's murder of his wife's son. The evidence did not qualify as similar fact evidence. In explaining where the evidence was admissible as being part of a prolonged criminal episode, the court said:

> . . . Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally

[13] § 775.0825, Fla. Stat. (1993) (repealed 1995); § 784.07(3), Fla. Stat. (1993)(amended 1995); Appendix B.

> unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla. Stat. (1985). Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.

Henry, 574 So. 2d at 75. See also, Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1992) (although evidence connected with defendant's arrest in collateral crime was admissible to establish identity and connect him to the victim of the charged offense, the details of the collateral crime were not admissible).

Here, as in Henry, the state's presentation of the details of the collateral crime were not admissible. The overpowering and inflammatory portrayal of the shooting of detective Rall misdirected the jury's attention from the crime charged, emphasized only criminal propensity, and became a main feature of the trial. The evidence was not similar fact evidence, and did not support a flight instruction, as the state conceded. (R140-146; Appendix B) To whatever limited extent, if any, evidence of the collateral crime was relevant to the state's theory of consciousness of guilt, it became irrelevant, prejudicial, and inflammatory due to the nature and extent of its presentation.[14]

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[14] Mr. Steverson's position that a new trial should be granted is further supported by decisions of Florida district courts of appeal, which show the prejudicial impact of collateral crimes evidence when it becomes a feature of the trial. See, e.g. Singer v. State, 647 So. 2d 1021 (Fla. 4th DCA 1994), review denied, 654

As in the cited cases, the details of the shooting of detective Rall created a highly emotional story that likely influenced the jury to believe Mr. Steverson committed the charged offenses. Had the evidence been properly excluded or restricted, the jury may have reached a verdict of not guilty, guilty of a lesser degree offense, or guilty as charged but with a recommendation of life imprisonment.

The penalty phase of this case is also infected by the prejudicial collateral crime evidence. Although relevant evidence concerning circumstances of prior violent felony convictions is admissible in a capital sentencing proceeding, its admission is subject to the caveat that its prejudicial effect cannot clearly

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So. 2d 920 (1995) (in trial of resisting without violence, probative value of defendant's postarrest threat against arresting officer outweighed by prejudice); Shorter v. State, 532 So. 2d 1110 (Fla. 3d DCA 1988) (improper suggestion that defendant put three officers in the hospital when arrested created prejudice far outweighing any relevance to consciousness of guilt); Mattera v. State, 409 so. 2d 257 (Fla. 4th DCA 1982) (evidence of collateral robbery irrelevant, prejudicial, and a feature); Zeigler v. State, 404 so. 2d 861 (Fla. 1st DCA 1981), cert. denied, 412 So. 2d 471 (1982) (collateral second-degree murder conviction not relevant except to show propensity and, if relevant, became feature); Matthews v. State, 366 So. 2d 171 (Fla. 3d DCA 1979) (extensive use of collateral offense only showed propensity and became feature); Drayton v. State, 292 So. 2d 395 (Fla. 3d DCA), cert. denied, 300 So. 2d 900 (1974) (collateral crime evidence not relevant, used to show propensity, and resulted in overkill); Davis v. State, 276 So. 2d 846 (Fla. 2d DCA 1973), affirmed sub nom State v. Davis, 290 So. 2d 30 (1974) (collateral crime evidence irrelevant and became feature); Simmons v. Wainwright, 271 So. 2d 464 (Fla. 1st DCA 1973) (defendant entitled to fair trial based upon the charged offense; should not be tried on irrelevant, immaterial, and inflammatory collateral crime evidence); Green v. State, 228 So. 2d 397 (Fla. 2d DCA 1969), cert. denied, 237 So. 2d 540 (1970) (conviction on charge of assault with intent to commit murder tainted by detailed evidence of collateral crime of manslaughter, which became feature).

outweigh its probative value. Duncan v. State, 619 So. 2d 279 (Fla. 1993), cert. denied, S . 114 S.Ct. 453, 126 L.Ed.2d 385 (1993); Rhodes v. State, 547 So. 2d 1201, 1204-1205 (Fla. 1989). Details of the collateral offense must not be emphasized to the point where that offense becomes the feature of the penalty phase. Duncan; Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S. Ct. 869, 88 L. Ed. 2d 907 (1986).

In this case, the defense objected to the jury's consideration of the details of the collateral crime in penalty phase. The court denied counsel's request for a limiting instruction. Detective Rall was then allowed to testify in penalty phase that when he was shot he thought he was struck in the head. He had a large pain in the top of his head. He was knocked to the ground and dropped his radio. He was in shock that he could move. He got up, dazed and scared. Someone handed him his radio and he frantically called for help. (~2856-2857)

According to Rall, pellets remained in his head. They were left there by the doctors because to remove them would cause more chance of scarring. (T2857-2588) Detective Rall believed about 13 of 30 pellets remained. After the shooting he was taken to the hospital and released the next day. He was given pain medication. It was the first time he had been shot at. He stayed off work seven to ten days. (T2858-2859)

This testimony, coupled with all the erroneously admitted testimony and evidence of the featured collateral crime in guilt phase, compounds the error here. The jury could not forget the

prejudicial guilt phase testimony, and was allowed to reconsider it as a prejudicial feature in penalty phase.

The taint of the inflammatory and prejudicial collateral crime evidence allowed in guilt and penalty phase flowed as well to the judge's order imposing the death penalty. There, the judge featured the collateral crime, stating:

> Finally, and most importantly, four days after the murder which is the subject of this sentence, Steverson attempted to murder a law enforcement officer who was attempting to talk to him. The details of this crime can be found in the transcript of this trial. Essentially, Steverson was seated in the driver's seat of an automobile when the officer walked up to the driver's window. Steverson pulled a .22 calibre [sic] revolver from his belt and began firing as the officer backpedaled to a position of cover. When he ran out of ammunition in the revolver, and still had not hit the officer, Steverson pulled a sawed-off shotgun from his pants and shot the officer in the face and chest.
>
> Predicting future criminal behavior is a highly speculative endeavor. But when a man exhibits an escalating pattern of violent anti-social actions culminating in a murder and then follows the murder with an attempt to murder an investigating officer, it is clear that society will never be safe from such a man while he continues to live.

(R361-362, Appendix A)

It is evident that this entire case became a case about detective Rall. It was not a case that focused on the evidence and the credibility of the witnesses against Mr. Steverson concerning the Lucas charges, as it should have been. It is a case that featured Rall's shooting, everywhere throughout this trial, for the specific purpose of finding Steverson guilty and imposing the worst penalty. It is a case where the prosecutor and the trial judge

acquiesced to the inflammatory facts of the collateral crime and allowed the jury to essentially re-try Mr. Steverson for his actions against Rall to prejudice the jury in the Lucas case. This was prosecutorial and judicial error.

A new trial is mandated, as Steverson **was** denied a fair trial on the charged offenses and the penalty. The error cannot be deemed harmless. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986) ; Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967).

The error argued in this issue provides an independent basis for reversing this **case** for a new trial. If the Court does not grant relief specifically on this issue, but reverses on Issue I, then the trial court should be directed that any evidence of the collateral crime that is admissible must be limited and may not become a feature of the new trial.

ISSUE III

THE DEATH PENALTY IS NOT WARRANTED AND IS DISPROPORTIONATE IN THIS CASE.

In this trial, at the conclusion of the state's case and at the close of all the evidence, the defense moved unsuccessfully for a judgment of acquittal based on the failure to prove either felony murder or premeditation. The defense further argued unsuccessfully, at penalty phase and after penalty phase, that the death penalty was not warranted and was disproportionate. (T2263-2272, 2565-2566, 2879; R312-317) The jury recommended death by a vote of nine to three. (R217, T3168-3171)

The trial judge concurred in the death recommendation, finding three aggravating factors: (1) prior violent felony convictions; (2) the murder was committed while the Appellant was engaged in an armed burglary and armed robbery; and (3) the murder was especially heinous, atrocious, or cruel.[15] The judge found two statutory factors in mitigation: (1) that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of **law was** substantially impaired.[16] Many non-statutory mitigators were found, including a childhood characterized by repeated emotional and physical abuse, lack of a dominant

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[15] § 921.141 (5) (b), (d), and (h), Fla. Stat. (1993).

[16] § 921.141 (6) (b) and (f), Fla. Stat. (1993).

male figure, failure at school, and decline into drug and alcohol addiction and crime at a very early age. This was followed by a period of rehabilitation, a good marriage, and a good employment record. However, a debilitating back injury suffered on the job caused Mr. Steverson to have to quit employment and caused a downward spiral again into drug abuse and alcoholism from which he could not escape despite an attempt at rehabilitation. (R361-365, Appendix A)

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So, 2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

The doctrine of proportionality is to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution, among other reasons. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is disproportionate, the nature and quality of the factors must be weighed as compared with other death appeals. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993), citing, Tillman v. State, 591 So. 2d 167, 168-169 (Fla. 1991).

In Kramer, the trial court found two aggravators, the existence of a prior violent felony conviction and heinous, atrocious and cruel (HAC). In mitigation, the court found many

factors including that: Kramer was under the influence of mental or emotional stress at the time of the crime; his capacity to conform his conduct to the requirements of the law was severely impaired at the time of the crime; he had previously been a model prisoner and good worker; and he suffered from alcoholism and from some prior drug abuse. 619 So. 2d at 276.

The facts of Kramer show that the victim there died of fractures to the head caused by a beating with a blunt instrument. The victim had a blood alcohol level of .23. A large rock and numerous beer cans were found near the body. 619 So. 2d at 275.

An informant led police to the defendant. Kramer first told police he was with the victim on the night of the murder, but left him alive and unharmed. He later said he had gotten into an argument with the victim, the victim pulled a knife, Kramer threw a rock at the victim and then hit him again with the rock. The state said that the victim had both defensive wounds and had been attacked while in passive positions. 619 So. 2d at 276.

In reviewing whether death was proportional in the case, this Court found that the prior felony conviction clearly existed, and it assumed HAC existed. However, the mitigating factors of alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning were dispositive. Although there was substantial competent evidence to support a jury finding of premeditation, the majority of the Court said the murder showed a spontaneous fight, occurring for no discernible reason, between

a disturbed alcoholic and a man who was legally drunk. The death penalty was disproportionate, 619 So. 2d at 277-278.

In the instant case, the facts show that Mr. Steverson had prior violent felony convictions, which the court used as an aggravator.[17] The trial court used the felony murder theory as an aggravator, because of its holding that Steverson robbed and burglarized Mr. Lucas." The court found HAC because Mr. Lucas was stabbed, strangled, and asphyxiated.[19]

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[17] As was argued below, one conviction was for a 1982 crime for battery on a law enforcement officer, emanating from a domestic violence situation, which was remote in time. Additionally, the victim of this crime, deputy Annen, testified in penalty phase that he did not seek to charge Mr. Steverson with that offense but the state chose to do so. (T2820, 2850-2854, State Exhibit 136)

A second conviction occurred in 1985 and related to an armed robbery. As was argued below this was not a per se crime of violence. In that case, Mr. Steverson purportedly test-drove a car with the car salesman, and pulled a gun on him but without any real threat. (T2820, 2862-2877, State Exhibit 137)

The third conviction related to the attempted murder of detective Rall and featured inflammatory evidence, the details of which were objected to throughout guilt and penalty phase in this trial. (T2820, 2856-2861, State Exhibit 138; see Issue II)

[18] The trial court denied motions for judgment of acquittal on these matters.

[19] The medical testimony established that Lucas ingested alcohol and cocaine in significant portions not long before his death. (T1670-1679) The injuries he suffered were done in a very short period of time, and it was impossible to determine the sequence of the injuries. (T1661, 1668-1669) Due to the multiple injuries, death could have occurred very quickly. (T1657-1660, 1669, 1677) The alcohol and cocaine in Mr. Lucas's system, which was extremely strong, would have diminished pain he suffered immediately prior to his death. (T1670-1679) See Rhodes v. State, 547 so. 2d 1201, 1208 (1989) and Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983), for the proposition that where there is a possibility that a victim is unconscious or semiconscious and under the influence of drugs or alcohol, HAC may not apply.

The senseless crime in this case is substantially mitigated by Mr. Steverson's strong addiction to alcohol and cocaine, mental stress, severe loss of emotional control, and his entire history. Here, there was evidence that the irrational murder of Mr. Lucas occurred after both men were in a drug and alcohol induced state. Even if the aggravators in this case are assumed, the statutory and non-statutory mitigators compel reversal for imposition of a life sentence under the totality of the circumstances.

The testimony of Dr. Freid established unrebutted evidence of statutory mitigation, that Mr. Steverson acted under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Dr. Freid's testimony also established many other factors in mitigation. Steverson's entire history was very important. He was the victim of a very unstable and disruptive family situation beginning probably at conception. He was the victim of early physical abuse. From about ages 3 to 16, he had no contact with his natural father. His stepfather abused him physically and mentally. His mother also may have abused him and she was an alcoholic. He may have suffered sexual abuse at her hands. (T2951-2956, 2975-2976, 2978-2985, 3006-3009, 3020-3024)

Mr. Steverson had no male role model or only unhealthy role models. His maternal grandparents, who he was close to, were alcoholics. He was genetically and environmentally predisposed to becoming an addict. He began drinking alcohol somewhere around the

age of 12, and shortly after began using drugs. After he met his second wife he became drug free for a period of time until after his industrial accident, when he began using alcohol and drugs again to self-medicate. (T2955-2961, 3035-3037).

In addition to his back injury, he walked with a limp, had a prior history of some hearing loss, and had an early speech impairment which remained mildly apparent. (T2962-2963) **He may** have suffered a learning disability, but obtained a GED in prison. (T2964-2965, 2967-2968, 3013-3015; Defense Exhibit 9)

His employment record was generally good until his accident. After the loss of his job and his inability to obtain other employment, his severe downfall occurred. (T2964-2965, 3013-3015) The attempt at rehabilitation at the hospital in California showed a diagnosis of major depression, cocaine abuse, post-traumatic stress disorder, and suicidal ideation. He should have had mental health treatment many years earlier. (T2966-2967) At the time of the offense he was using cocaine excessively and was strongly addicted to it, coupled with addiction to alcohol. (T2971-2973)

The mitigation in this case is substantial. It reflects an irrational crime by a severely emotionally disturbed, cocaine and alcohol addicted individual. Death is disproportionate under the circumstances present here. See Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) (evidence that the defendant was an abused child and became chronic alcoholic who lacked substantial control over his behavior, and had been drinking heavily on the day of the murder, constituted substantial mitigation to aggravator of

heinous, atrocious and cruel; death sentence disproportional); Livingston v. State, 565 So, 2d 1288, 1292 (Fla. 1990) (childhood abuse and neglect, marginal intellectual functioning, and evidence of extensive use of cocaine and marijuana counterbalanced the two factors found in aggravation, prior violent felony and felony murder; death penalty vacated); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite finding of five aggravators; mitigation showed extreme mental or emotional disturbance, inability to appreciate criminality of conduct or conform conduct to law, and low emotional age).

Additionally, in this case, the trial court's weighing procedure was flawed. The court improperly relied on the collateral crime of the shooting of detective Rall to say that, absent a death penalty, Mr. Steverson would kill again, so that society would never be safe from him. The court said:

> Finally, and most importantly, four days after the murder which is the subject of this sentence, Steverson attempted to murder a law enforcement officer who was attempting to talk to him. The details of this crime can be found in the transcript of this trial. Essentially, Steverson was seated in the driver's seat of an automobile when the officer walked up to the driver's window. Steverson pulled a .22 [sic] calibre revolver from his belt and began firing as the officer backpedaled to a position of cover. When he ran out of ammunition in the revolver, and still had not hit the officer, Steverson pulled a sawed-off shotgun from his pants and shot the officer in the face and chest.
>
> Predicting future criminal behavior is a highly speculative endeavor. But when a man exhibits an escalating pattern of violent anti-social actions culminating in a murder and then follows the murder with an attempt to murder an investigating officer, it is clear

> that society will never be safe from such a man while he continues to live.

(R361-362, Appendix A)

In Miller v. State, 373 So. 2d 882 (Fla. 1979), akin to the instant case, the lower court found three statutory aggravating circumstances of prior violent felony, felony-murder, and HAC. It found statutory mitigating circumstances of extreme mental or emotional disturbance and incapacity to conform conduct to the law, which the court merged as one factor.

Concerning the aggravator of prior felony conviction, the Miller trial court said, "one need only review the defendant's testimony and the evidence of the man's conviction in Massachusetts." 373 So. 2d at 883-884.[20] In concluding the death penalty to be appropriate, the judge's order stated:

> * * *
>
> Thus, in weighing the aggravating and mitigating factors, I have to conclude that the aggravating factors are such that the reality of Florida law wherein life imprisonment is not, in fact, life imprisonment; and, in fact, the defendant would be subject to be released into society -- In other words, it doesn't mean life imprisonment and there is a substantial chance he could be released into society. And the testimony overwhelmingly establishes that the mental sickness or illness that he suffers from is such that he will never recover from it, it will only be repressed by the use of drugs.
>
> Thus, in light of that fact, in light of the aggravating factors here, I have to conclude the only certain punishment and the only assurance society can receive that this man never again commits to another human being

[20] The court did not set forth any information or specifics about this Massachusetts conviction.

> what he did to that lady is that the ultimate sentence of death be imposed.
>
> If the law in Florida were such that life imprisonment meant the ability to live in a prison environment for the entire, remainder of one's life, I would have the conclusion that there would be sufficient mitigating factors to offset the aggravating factors, and allow him to live in prison.
>
> * * *

373 so. 2d at 885 (emphasis supplied in opinion).

In Miller, this Court concluded that the trial judge's use of the defendant's mental illness, and his propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appeared contrary to legislative intent. "The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future. To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse." 373 So. 2d at 886.

In Miller, it appeared likely that the heinous nature of the crime resulted from the defendant's mental illness. In light of the motivating role the defendant's mental illness played in the **crime**, and the apparent causal relationship between the aggravating circumstances and his mental illness, it **was** reversible error for the trial court to consider as an additional **aggravating** circum**stance**, **not** enumerated by statute, the possibility that Miller

might commit similar acts of violence if he were ever to be released on parole. Miller was entitled to have his sentence of death vacated to life. 373 so. 2d at 886.

Here the court, directly contrary to Miller, extensively relied on the likelihood that Mr. Steverson, absent a death sentence, could be released and could likely kill again so that society would never be safe from him. (R361-362, Appendix A) The court also found two statutory mitigators but then, also contrary to Miller, tried to ignore the mitigators. The court said, concerning Dr. Freid's testimony:

> . . . I have some difficulty with this type of testimony because it is so conjectural. Steverson never admitted to Dr. Fried [sic] that he committed the murder, and because it implies that everyone who murders while drunk and stoned is entitled to at least two statutory mitigating circumstances. . . .

(R364, Appendix A)

In Huckaby v. State, 343 So 2d 29, 33 (Fla. 1977), cert. denied, 434 U.S. 920, 98 S. Ct. 393, 53 L. Ed. 2d 982 (1977), the trial judge ignored the mitigating aspects of the death penalty case -- that Huckaby was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. Quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), this Court said:

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations

> require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present."

343 so. 2d at 34.

The Huckabv Court explained that its decision was based on the causal relationship between the mitigating and aggravating circumstances surrounding the crime. The heinous and atrocious manner of the crime and the harm to which others were exposed were the direct consequence of the mental illness of Huckaby, as the record revealed. The Court held that where the crimes were the consequence of the defendant's mental illness, the death penalty was not warranted. The case was remanded for imposition of a life sentence.

The totality of the circumstances in this case show that the death sentence is disproportionate. The sentence violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Reversal for imposition of a life sentence is required.

ISSUE IV

APPELLANT IS ENTITLED TO A NEW PENALTY PHASE BECAUSE THE TRIAL COURT PRECLUDED ANY MEANINGFUL INQUIRY OF JURORS EXPOSED TO EXTRANEOUS, PREJUDICIAL NEWS MATERIAL.

Mr. Steverson urges that the trial court conducted an insufficient interview of jurors to determine if they were exposed to prejudicial newspaper accounts or headlines immediately prior to penalty phase deliberations, The news accounts related that Mr. Steverson confessed to a corrections officer after the guilt phase verdict. (R218-311; T2794-2815; Appendix C)

Here, the court conducted a two-question interview of jurors on the matter at issue, but the court did not subpoena the jurors for the interview. Only 10 of the 12 jurors appeared for the interview. (R260-261, 268, 286, 307, 309) The court erred in the manner and restriction of this inquiry, as was argued below. (R218-222, 254-258, 262-264, 287-290, 301-304, 305) A new penalty phase, with a newly impaneled jury, is required.

When questions of possible prejudice exist, such as when jurors are exposed to a television or news report, the court must determine whether the material has actually reached the jury or whether members of the jury have knowledge of the impermissible matter. Alfonso v. State, 443 So. 2d 176, 177 (Fla. 3d DCA 1983), citing United States v. Herring, 568 F.2d 1099 (5th Cir. 1978). The inquiry must be sufficient, and must determine that jurors are

still capable of being impartial. Jones v. State, 411 So. 2d 165, 167 (Fla. 1982).

In the instant case, pertinent testimony at the brief juror inquiry reflected the following:

Juror Davis testified that after the penalty phase was delayed, the jurors, including himself, were curious: (R271)

> The next morning before the Jury started, I was sitting next to two Jurors and I was wondering why also, and one Juror was telling the other Juror why that Mr. Steverson had confessed. And so that made three of us, I know, that knew, and I don't know others.

(R271-272) The court told Davis not to name the other two jurors who he heard discussing the matter. (R272) Juror Davis said the newspaper article was not discussed in the jury room, as everyone knew that it was not supposed to be brought up. (R272)

Upon interviewing the nine remaining jurors present for the interview, the court advised each juror individually that after Mr. Steverson was convicted of first degree murder, he was placed in a holding cell and made incriminating statements to a correctional officer. The judge said The Tampa Tribune and The Lakeland Ledger printed "accurate articles" about that "confession." Mr. Wallace and Mr. Brawley, "for reasons known only to them," determined that the jury was not to be informed of that post-conviction "confession." The court asked each juror two questions, essentially: (1) Were you aware of that post-conviction confession during the deliberations on the penalty phase? and (2) During the deliberations on the penalty phase, was there any discussion by any of the 12 about the post-conviction confession? All of the 10 jurors

present responded "no" to the second question. (R272, 274, 275-276, 277, 278, 280, 281-285)

In addition to Mr. Davis's statements to the first question, juror Reynolds said, "The following day after we made our decision -- I read the paper daily -- I saw the headlines. I did not read the article." (R273)

Juror Ward testified that he was seated in the hallway before penalty phase deliberations. A lady sat down beside him, and opened up a paper. Juror Ward saw a headline that Steverson confessed, but did not read the article, and did not discuss the headline with anyone. (R282-284)

Defense counsel strenuously objected to the fact that the full panel was not present, and urged that the limited hearing and procedure was a sham that did not allow the truth to be determined. He asked the court to revisit all considerations, including proposed questions or other appropriate inquiry. (R287-290) The proposed questions, at a minimum, would have addressed what the jurors observed, which jurors had access to news reports or knowledge of the allegations in the news, a more thorough description of the news reports they were exposed to, and whether they disregarded the news accounts. (R256, 301) The court refused to make any further inquiry.

The state urged that the inquiry showed at most that three jurors **saw** the article or the headline. (R290) The court ruled that at least two jurors were **aware of the headline or news** account, which was improper. According to the court, no error

occurred, however, because the article was not discussed during deliberations. (R307, 309, 311; Appendix C)

That the article was not discussed during deliberations is not the test. Jurors must be questioned whether they can disregard what they read and render an impartial verdict based solely on the evidence. Refusal to inquire requires a new trial. Robinson v. State, 438 So. 2d 8, 9 (Fla. 5th DCA 1983), pet. for review denied, 438 So. 2d 834 (1983) The fact that jurors testify that an extraneous concern did not affect or influence their decision is not the relevant question. See Sanchez v. International Park Condominium Association, Inc., 563 So. 2d 197 (Fla. 3d DCA 1990) (new trial ordered despite fact that jurors testified extraneous concern did not affect or influence their decision); Cappadona v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986) (three jurors' exposure to improper material, which they said did not affect their impartiality, required mistrial); United States v. Williams, 568 F.2d. 464, 471 (5th Cir. 1978) (fair trial denied due to two jurors' exposure to prejudicial newscast, even though jurors stated they could disregard the newscast).

Here, the ten jurors that were present only said the article was not mentioned during deliberations. That does not mean that the jurors who saw the article did not let it affect them. They were not asked whether they could disregard the extraneous matter and render a verdict based solely on the evidence.

The right to have the jury deliberate free from distraction and outside influence is a paramount right, to be closely guarded.

Livingston v. State, 458 So. 2d 235, 237 (Fla. 1984); Keen v. State, 639 So. 2d 597, 599 (Fla. 1994). Overt acts of misconduct may be demonstrated by objective facts, such as whether the matter was discussed by or brought to the attention of other jurors, and the number of jurors involved. Wilding v. State, 21 Fla. L. Weekly S213, 214 (Fla. May 16, 1996), citing, Powell v. Allstate Insurance co., 652 So. 2d 354, 357 (Fla. 1995); Baptist Hospital of Miami v. Maler, 579 So. 2d 97, 101 (Fla. 1991); State v. Hamilton, 574 So. 2d 124, 128-129 (Fla. 1991). When it cannot be said beyond a reasonable doubt that improper extraneous material did not influence jurors in some way, reversible error occurs. Keen, 639 so. 2d at 599.

In Keen, a death penalty case, this Court remanded for a new trial because jurors were exposed to an unauthorized magazine article, which concerned tactics of defense attorneys who demeaned a victim's character and made personal attacks on the prosecutors. Two jurors admitted reading the article during guilt-phase deliberations. One juror also said he underlined and bracketed the portions he found interesting. In response to the trial court's questioning, both jurors said the article did not influence their decisions. 639 So. 2d at 599.

This Court said the article was relevant because it dealt with criminal cases and the tactics of defense lawyers. It could not be said beyond a reasonable doubt that the article did not influence jurors in some way. Additionally the trial judge compounded the

error when she questioned jurors about how the article affected their decision-making process. 639 So. 2d at 599.

In the instant case, the trial court foreclosed inquiry of all jurors on their exposure to improper extrinsic material by not requiring all the jurors to be present and by improperly restricting questioning of the jurors. The testimony here establishes that anywhere from five to seven jurors were aware of an article or a headline about the matter. The testimony shows:

(1) Juror Davis knew of the confession / news account through two jurors who discussed the confession in front of him, but who he **was** not allowed to name. (R271-272) Thus, three jurors (Davis and the two unnamed jurors who discussed the matter) had knowledge of the news account.

(2) Jurors Reynolds and Ward testified they saw a headline, but did not mention what they **saw** to anyone on the jury. (R273, 282-284) Since these two jurors made no mention of what they saw, they were not the jurors referred to by Mr. Davis. Thus, the total number of jurors exposed to the account now equals five (Davis, plus the two he heard discuss the matter, plus jurors Reynolds and Ward) .

(3) Jurors Strickland and Mathis were not present for the inquiry. (R260-261, 268, 286) One or both of these jurors may or may not have been the ones, referred to by juror Davis, who discussed the news account. Thus, anywhere from five to seven jurors may have had knowledge of the news account.

The vote in this case was nine for the death penalty and three for life. If even four of the jurors were exposed to the news account, and did not disregard it, their vote for death could have been swayed. The penalty vote, absent consideration of the improper material, might have been a tie or a life recommendation.

The trial court also erroneously concluded that any prejudice established by the jurors seeing the news account or headline, and "one or two" of these jurors discussing the confession before penalty phase deliberations, was improper but was rebutted because it was harmless beyond a reasonable doubt.

The court put the cart before the horse. The trial court did not question the full panel, did not fully consider the testimony of the number of jurors involved, and did not ask the legally required questions including whether the jurors disregarded the matter. Keen; Robinson.

In jumping to the conclusion that the error here was harmless, the trial court erroneously relied on Amazon v. State, 487 So. 2d 8 (Fla. 1986). (R310; Appendix C). Amazon is distinguishable from the facts in this case for many reasons. First, the jury in Amazon recommended a life sentence, which is not the case here. Second, the fact that four jurors in Amazon violated sequestration by going to a motel bar after the guilty verdict but before the sentencing phase of trial was of no prejudice to Amazon because of the life recommendation. Third, the court said the fact that a juror saw a t.v. news account of Amazon's trial, including a video of the testimony of an important state witness, was prejudicial, but had

no substantial impact on the outcome. This **was** because the jurors were not exposed to sound or words; the jurors had already seen the witness testify that day; and the subject of the testimony **was** too remote. 487 So. 2d at 12.

Here, the jurors were exposed to much more than silence and the prejudicial matter was not remote. The news accounts involved exposure to inflammatory words. The jurors were also already curious because of the delay in Mr. Steverson's penalty phase.

Also in contrast to Amazon, this was a death recommendation by nine jurors, not a life recommendation. In Amazon, there was a sufficient inquiry, which did not occur here. Additionally in this case, as outlined above, if even three or four jurors were affected in some way by the news accounts, the penalty recommendation might have been six to six, or even seven to five in favor of life, had the exposure not occurred.

In determining harmlessness in this case, the trial court also erroneously relied on United States v. Bolinger, 837 F.2d 436, 439-440 (11th Cir. 1988). (R310; Appendix C) Bolinger involved a guilt phase determination, not a consideration for a life or death penalty recommendation **as** is present here.

In Bolinger, the defendants were charged with engaging in a criminal drug enterprise. One of the defendants in the case (de la Fuente) alleged that a juror (Hunter) was exposed to a newspaper article about a raid on de la Fuente's house. There **was** testimony in the full juror interview that Hunter commented on the matter to several other jurors. 837 F.2d at 440.

The district court found **that** only one other juror overheard Hunter's comments regarding the substance of the newspaper article, and other jurors only heard reference to the article. The district court held that the evidence against de la Fuente was so overwhelming that the introduction of the extrinsic evidence could not have been prejudicial. The appellate court agreed. 837 F.2d at 440.

In contrast to Bolinger, the trial court in this case: (1) failed to make a full inquiry into the juror's exposure to the extraneous news account relative to a death versus life recommendation, or even the number of jurors involved; and (2) confused the jurors' finding of guilt, based in part on evidence of Mr. Steverson's other statements introduced in guilt phase, to conclude exposure to extraneous and inflammatory news accounts was harmless when the jurors were considering the penalty to be imposed.

Interestingly, the trial court relied on Prestonv. State, 607 so. 2d 404 (Fla. 1992), to say that residual doubt in the minds of the jurors is not an appropriate nonstatutory mitigating circumstance. Thus, the fact that jurors saw a newspaper article that may have removed any residual doubt was harmless. (R310-311; Appendix C)

Residual doubt is not the issue involved in this case. The issue here is that the jurors were exposed to improper material prior to penalty phase and an insufficient inquiry was made of them concerning this exposure.

In contrast, the defendant in Preston claimed that there was relevant evidence of two witnesses, which the trial court ruled

inadmissible in penalty phase, to establish the mitigating circumstances that he was only an accomplice in the murder. Allegedly the crime was committed by another and Preston acted under extreme duress or the dominion of another. This Court said the testimony the two witnesses would have given in penalty phase did not tend to establish either of these mitigating factors. 607 so. 2d at 411.

The Court ruled that the only relevance of the testimony was to suggest that someone else committed the murder, thereby creating residual doubt about the defendant's guilt of the crime. Residual doubt is not an appropriate nonstatutory mitigating circumstance; thus, the testimony **was** properly excluded. 607 So. 2d at 411.[21]

In this case, Mr. Steverson did not seek to introduce residual doubt as a mitigator as was the **case** in Preston. Here, the opposite occurred. Mr. Steverson simply asserted that he was found guilty but was entitled to a fair penalty phase determination. He asserted that this determination should have been free from extraneous and prejudicial information, and that a full inquiry of the entire jury panel should have been held. This did not occur.

Mr. Steverson was denied a fair penalty phase and due process in violation of the Fifth, Sixth and Eighth Amendments to the United States Constitution, and Article I, sections 2, 9, 16, 17,

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[21] See also, Buford v. State, 403 So. 2d 943, 953 (Fla. 1981), cited as well by the trial court. (R310-311, Appendix C) Buford involved a life override where it was urged that the judge should have considered in penalty phase that the defendant was a mere accomplice.

21, and 22 of the Florida Constitution. This cause must be remanded for a new penalty phase determination before a new jury.

ISSUE V

A NEW PENALTY PHASE IS REQUIRED BECAUSE FLORIDA'S FELONY MURDER AGGRAVATOR AND CORRESPONDING JURY INSTRUCTION CREATED AN UNCONSTITUTIONAL PRESUMPTION IN FAVOR OF IMPOSING THE DEATH PENALTY HERE.

An aggravating factor is constitutionally invalid unless it genuinely narrows the class of persons eligible for the death penalty, is not arbitrary, and reasonably justifies the imposition of death on a defendant as compared to others found guilty of first degree murder. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1982). As Mr. Steverson argued below, and argues on appeal, Florida's felony murder aggravator and corresponding jury instruction create an unlawful presumption that the death penalty should be imposed any time a felony murder aggravator is involved. The aggravator does not guide the sentencer's discretion. (R37-39, 134-136, T3060)

Here, Mr. Steverson was convicted as charged of murder during the commission of an armed burglary with assault and armed robbery with assault. (R2-4, 164-166, 372-373; T2787-2790) The jury was instructed on both the felony murder aggravators, heinous, atrocious, and cruel (HAC), prior felonies, and pecuniary gain. (T3160-3162) It **was** also instructed to consider in mitigation that the crime for which Steverson was to be sentenced was committed while he was under the influence of mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

impaired. (T3162-3163) The jury was told that in mitigation it could consider **any** other aspect of Mr. Steverson's character or record and any other circumstances of the offense. (R3163)

The jury recommended death by a vote of nine to three. (R217, T3168-3171) The trial judge agreed with the jury's death recommendation, finding **as** aggravating factors felony murder based on both the armed burglary and armed robbery, HAC, and prior felonies. The judge found two statutory mitigators and some non-statutory mitigators but concluded the aggravators far outweighed the mitigators. (~357-358, 361-365, Appendix A)

A finding of only one statutory aggravator in Florida makes a defendant death penalty eligible. § 921.141 (2) and (3), Fla. Stat. (1993). It is Mr. Steverson's position that the felony murder aggravator and jury instruction allowed here are invalid because they instantly invite a verdict in favor of death by their simple application. §921.141(5)(d), Fla. Stat. (1993).

In Zant v. Stephens, the Georgia death penalty statute was at issue. Georgia is a non-weighing state, unlike Florida. In a non-weighing state, the jury must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances. Under the Georgia system, "'[i]n making the decision **as** to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These

circumstances relate both to the offense and the defendant."' 462 U.S. at 872 (quoting the Georgia Supreme Court).

The facts of Zant show that three statutory aggravators were found. Subsequently, one of these aggravators ("substantial history of serious assaultive criminal convictions") was deemed unconstitutionally vague in another Georgia case. In reviewing Zant's case, the Georgia Supreme Court held that the finding of the two remaining statutory aggravators adequately supported the death penalty. The Supreme Court upheld, ruling **that** the jury instruction on the unconstitutional aggravator did not invalidate the death sentence. The sentence was adequately supported by the other two aggravators.

However, in Stringer v. Black, 503 U.S. 222, 235, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), the court explained that if a weighing state, such as Florida, uses aggravating factors to decide who is eligible for the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." In "weighing" states, after a jury has found **a** defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence, and then the trial judge imposes the sentence based upon a recommendation from the jury. A weighing state **may** not make the automatic assumption that an invalid aggravating factor has not infected the weighing process. The difference between a weighing state and a non-weighing state is not one of "semantics," but of critical importance. When the sentenc-

ing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. Stringer v. Black, 503 U.S. 222, 229, 231-232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

Stringer involved a Mississippi case, a weighing state like Florida. There, the improper consideration of a HAC aggravating factor was error because it did not narrow that factor in the weighing process. The Supreme Court reversed for a new penalty phase, stating that "use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty. The Court said, as cautioned in Zant, when the weighing process is infected with a vague factor the death sentence must be invalidated. Stringer v. Black, 503 U.S. at 235-236.

In analyzing the felony murder aggravator in a weighing state, State v. Middlebrooks, 840 S.W. 2d 317, 341-346 (Tenn. 1992), cert. dismissed, 510 U.S. , 114 S.Ct. 651, 126 L.Ed.2d 555 (1993), is instructive. There, in considering the felony murder aggravator the Tennessee Supreme Court said:

> In Zant v. Stephens . . . the United States Supreme Court said that in order to comply with the Eighth Amendment, aggravating circumstances must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' . , . It seems obvious that Tennessee's statute fails to narrow the class of persons eligible for the death penalty because:

> Automatically instructing the sentencing body on the underlying felony in a felony-murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony-murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
>
> * * *
>
> A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically charged against him. This disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

840 So, 2d at 342 (citations omitted).

In Middlebrooks, the court found two statutory aggravating circumstances -- felony murder and HAC. The court remanded the case for resentencing because it could not be concluded that the elimination of the felony murder aggravator was harmless beyond a reasonable doubt. 840 So. 2d at 347.

Both the Stringer and Middlebrooks courts distinguished other cases, including Zant, because it involved a non-weighing state, and Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Lowenfield involved another non-weighing state,

Louisiana. There, the defendant argued that his death sentence was invalid because the aggravating factor (underlying felony of armed robbery as aggravating factor) found by the jury duplicated the elements it already had found in determining there was a first degree homicide. The Supreme Court rejected the argument that the Louisiana sentencing procedures failed to genuinely narrow the class of death-eligible defendants in a predictable manner, because the narrowing function was performed at both guilt and penalty phases, as Louisiana was a non-weighing state. 484 U.S. at 244-245.

The Appellant recognizes that Florida has applied Lowenfield in a number of cases. See, e.g., Johnson v. State, 660 So. 2d 637, 647-648 (Fla. 1995); Wuornos v. State, 20 Fla. L. Weekly S481 (Fla. Sept. 21, 1995). However, he asserts that Lowenfield is inapplicable under the facts here. Stringer v. Black; Middlebrooks.

Under Florida's capital punishment design, allowing the jury and the judge to consider and weigh aggravating factors which merely repeat already enhanced elements of the crime itself and automatically invite imposition of a death penalty recommendation, infects the weighing process. The procedure involved here violates the Eighth Amendment and the Florida Constitution and renders the sentence infirm. A new penalty phase is required.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Mr. Steverson respectfully asks for reversal for a new trial on Issues I and II. Alternatively, he asks that his death penalty be vacated and his cause remanded for imposition of a life sentence on Issue III. He requests reversal for a new penalty phase on Issues IV and V.

APPENDIX