IN THE FLORIDA SUPREME COURT

EUGENE EDWARDS,

Petitioner,

vs. Case No. 86,887

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, Eugene Edwards, was the Appellant before the First District Court of Appeal and the Defendant before the Circuit Court. Respondent, the State of Florida was the Appellee before the First District Court of Appeal and prosecuted Petitioner in the Circuit Court. References to the record on appeal, (designated by the Circuit Court Clerk as Volumes I - II), which contains the pleading and orders filed in this cause will be R, followed by the appropriate page number. (Volume I pg. 1-174; Volume II 175 - 237). References to the trial transcript (designated by the Circuit Court Clerk is Volumes III - X) will be T. followed by the appropriate page number.

Pursuant to Reed v. State, 470 So.2d 1382 (Fla. 1985), Petitioner requests this Court to consider some of the issues raised below which the First District Court of Appeal did not consider in its opinion which certified conflict. Petitioner will include the facts from the record which relate only to the issues raised in this brief.

STATEMENT OF THE CASE AND FACTS

A grand jury indicted Petitioner and four co-defendants (Thomas Thompson, Charles Bell, Eric Johnson and Thomas McMullen) for the armed robbery of Emory Davis; the attempted armed robbery of Tammy Jo Johnson and/or Katrina Jones, the first degree murder of Tammy Jo Johnson and the attempted first degree murder of Katrina Jones. (R.1-1a).

Prior to the trial in this cause, Petitioner's case was joined with co-defendant, Charles Bell -- the other co-defendants were tried separately.

This cause then proceeded to trial and produced the following relevant facts for this cause. The court tried Petitioner's case together with his co-defendant Charles Bell with two separate juries. (T.225-226). During the State's opening statement (before both juries), the prosecutor described the robberies (similar fact evidence) -- first the robbery of Emory Davis and then an attempted robbery of a man with groceries. (T.230-31). After these acts, Petitioner, Charles Bell, Thomas Thompson, Eric Johnson and Mike McMullen continued to ride their bicycles together. (T.231). The prosecutor then stated:

> And, in fact, at one point Bell had some problems with his bike and ended up leaving his bike and ended up getting on Thompson's bike, he pedalling Thompson's bike and Thompson on the handlebars, but all five remained together as a <u>pack,</u> in a group. (T.231) (Emphasis supplied).

Counsel for Charles Bell objected to the use of the word "pack:" (T.231-32). The Court overruled the objection. (T.232). The State then repeated "they all

remained together as a group, in a pack. (T.232)(Emphasis supplied). Later in the opening statement, the State repeated the use of the term "pack."

> When she (Katrina Jones, friend of murder victim) was going to take off her seat belt, she looked back and she saw had (sic) a pack, that pack included Edwards (Petitioner) and Bell, that pack that was involved in this. She saw that pack of bicycles, boys on the bicycles, and she saw them going and then she saw them turn and turned towards them and mumbling something, so she got scared and she tried to get Tammy Jo Johnson (the murder victim) to leave. (T.234)(Emphasis added).

Later, the State repeated, in summary, its opening statement and stated:

> They all took off, that is all five of them took off riding their bicycles, together, as a pack... They then went to where Katrina Jones and Tammy Jo Johnson were in their convertible and then the attempted robbery, all five of them, and in fact, were involved in the shooting and then they all fled together as a pack, they fled the scene. So that day of October 21, 1993, they altogether, all five of them, acting as a pack, working jointly, committed the crimes of attempted armed robbery, first degree murder and attempted first degree murder because luckily Katrina Jones lived. (T.237)(Emphasis supplied).

After the State finished its opening statement, counsel for Bell made a continuing objection and motion for mistrial to the reference to a pack. (T.238). The Circuit Court denied the motion without comment. (T.238).

Petitioner made his opening statement before his jury; counsel for Bell then made his opening statement to the Bell jury. (T.240). After the opening statements, the two juries were present in the courtroom. (T.263). The first state witness was Emory Davis (the suspect of the uncharged, similar fact evidence case which was severed from the trial of this case). On October 21, 1993, around 7:30 p.m., Emory Davis was traveling on his bicycle to his home. (T.269). Davis testified that 6 young men jumped him. (T.269). One put a gun to Davis' neck, another leaned across the

handlebars with a gun. (Id). The "little short one" went through a bag and Davis' pockets. (T.266-67). The little one took a dollar and a half from Davis. (T.267). The group took Davis' bicycle and left a bicycle with a wobbly wheel. (T.268).

After counsel for Petitioner cross-examined Davis, counsel for Bell questioned Davis. Davis stated that the police had shown him photographic spreads. (T.273). He didn't remember making six identifications. (T.273-74). The person who put the gun to his neck had brownish skin. (T.274). Davis remembered a face with gold in his mouth and he identified him in a photospread. (Id). The person who went through his pockets -- Davis identified him in a photospread. (T.275). This person was Thomas Thompson. (T.275). During counsel for Bell's questioning of Davis, Davis was asked about whether the person who went through Davis' bag was the shortest of the group. (T.286-288). During re-cross examination, counsel asked Davis about his deposition testimony. (T.289). The State objected and stated:

> Again, your Honor, I'm going to object and ask to strike all of this. The witness has answered truthfully then and answered truthfully now. (T.289).

The trial court sustained the objection about the attempt to impeach Davis and noted that the deposition testimony was consistent with trial testimony. (T.289). Counsel for Petitioner made an objection, after Davis was excused, to the State's comment about his testimony:

> Technically a motion on the last exchange. I didn't want to interrupt the flow of it too much, but Mr. Bishop just stated to the Court and jury that Mr. Davis, the witness, has answered truthfully, then and truthfully now, was the statement that he made. We object to that comment. (T.291).

Petitioner then moved for a mistrial and counsel for Bell adopted the motion.

(T.292). Counsel for Bell argued that the State was giving a personal opinion on the truthfulness of a witness. (T.292). The Court denied the motions, but noted:

> I'd like to caution counsel, both counsel for the State and both counsel for the defense, on opening statements or closing arguments we're not concerned in the least what you think or what you feel or these type of arguments ... I didn't interject myself, but I'd like to caution counsel that's totally improper about what you think or believe or feel, all of these things. (T.293).

The testimony then resumed. Marjorie Thomas was driving her car on October 21, 1993 around 9:00 p.m. near Willowbranch Street. (T.295). She said she saw a gang of boys standing over by a bar. (T.296). There were 5 or 6 boys. (T.296). They were around a car with ladies in it. (T.296-297). Thomas then continued on her way and then heard a shot ring out. (Id). Thomas identified the car from a photograph. (T.297). Thomas could not describe any of the persons. (T.299). The persons had bicycles. (T.300). At the time of the gunshot, Thomas didn't know what any of the group was doing at that moment. (T.302). There could have been 4 persons around the car. (T.302).

Katrina Jones was a friend of Tammy Jo Johnson. (T.306). On October 21, 1993, Jones and Johnson went to dinner; they finished around 8:30 p.m. (T.306). they then went to Joe's Bar on Roosevelt Boulevard. (T.306). Johnson drove a Mustang convertible. (T.307) The top was down. (T.308). Jones and Johnson arrived at the bar around 9:00 p.m. (T.308). As Jones started to get out of the car, she noticed some kids across the street -- some were walking, some were on bicycles. (T.308). There were 4 to 6 kids. (T.309). Johnson had a gun underneath her seat. (Id). The kids then came across the street very quickly. (T.309).

Jones told Johnson that she wanted to go and Johnson tried to put the keys in the car ignition. (T.310). Jones said that then one of the kids was standing beside Johnson's door with a gun -- he said "give it up." (T.310). Jones identified Petitioner as that person. (T.310). At the point Jones identified Petitioner, counsel renewed his objection to the identification based upon the pre-trial motion. (T.310-11). When Petitioner said give it up, Jones said she was afraid. (T.311). According to Jones, Petitioner pointed the gun at Johnson. (T.311) Jones then heard something behind her and she turned around and saw a younger and smallest (of the group) black male approaching the rear of the car. (T.311). Another one of the kids (taller than the one at the back) was standing there with a gun. (T.312). Jones testified that the smaller kid looked 14; she had previously identified him in court. (T.312).

After Jones turned back to look at Johnson, firing started; Johnson began screaming. (T.312-13). Jones leaned forward to the dashboard. (T.313). Jones saw Johnson slouched down in the seat holding her gun. (T.313). During the shooting, Jones didn't know where the youngest kid at the back of the car was nor did she know where the person next to her side of the car was during the shooting. (T.314). Jones went to the hospital and had a bullet removed from her left arm. (T.320-21).

Jones testified that she didn't know if Johnson fired her gun. (T.322). Jones had known Johnson for three and a half years. (T.323). Jones and Johnson were lovers. (Id). On cross-examination, Jones stated she could not say what the kids were wearing - her description of them was young, black kids. (T.324). She couldn't say if they had more than one bicycle. (T.324). She couldn't describe the color of

any bicycle. (T.324-25). The person at the rear of the car was Thomas Thompson. (T.329). After the shooting, Jones ran inside the bar. (T.335). Trent Cunningham ran outside and found Johnson in the front seat; she had a gun in her hand. (T.336). The police and rescue were called. (T.336). A bicycle was laying beside the driver's door, near the rear tire. (T.336).

Officer M.R. LaForte, an evidence technician, went to the scene of the shooting. (T.395). He found a Smith and Wesson revolver, a spent shell casing on the ground and a bicycle. (T.346). LaForte processed the shell casing for fingerprints. (T.348). The bicycle was also processed for fingerprints. (T.351-52). Dr. Floro is a forensic pathologist and Deputy Chief Medical Examiner. (T.358). He performed the autopsy on Tammy Jo Johnson. (T.360). Floro opined that Johnson died from two gunshot wounds, one in the head and one in the chest. (T.361). The bullet to the head paralyzed Johnson immediately and the shots were fired in rapid succession. (T.365). Dr. Suey treated Katrina Jones; he removed a bullet from her arm. (T.372). John Wilson is a latent print-examiner with the Florida Department of Law Enforcement (FDLE). (T.368). He examined prints from Johnson's car lifted by Allen Miller of FDLE. (T.377-78). The prints did not match Petitioner or the other co-defendants. (T.387).

Thomas McMullen, "Mike," was arrested with Petitioner. (T.414-16). He knows Petitioner (Gene), Eric Johnson, Charles Bell and Thomas Thompson. (T.414). On October 21, 1993, Mike saw Thomas Thompson (Tommy) at Eric Johnson's house. (T.419). Petitioner was there. (T.419). According to McMullen, Petitioner had a .25

gun. (T.419). McMullen, Tommy, Eric and Petitioner then went to the store. (T.421). Along the way, the group saw Charles Bell. (T.421). At a park, the group talked about what they were going to do; Petitioner asked if they wanted to go robbing, according to McMullen. (T.422). Everybody said, "Yeah, we down with it." (T.423). No one said no. (T.423). Petitioner then told Eric to get his gun. (T.423). Eric and Petitioner started arguing about this. (T.423-24). After the meeting in the park, the group split up. (T.425). The group later gathered and went riding on bicycles. (T.425). According to McMullen, the boys then saw an old black man riding a bicycle. (T.427).

Petitioner then said he was going to get the bicycle, McMullen testified. (T.427). All of the group then rode up to the man. (Id). Petitioner put a gun to the man's head and told him to get off the bicycle. (T.427-28). Tommy then jumped off his bicycle and checked out the man's pockets and pouch. (T.428). Tommy got a dollar and some change and cigarettes from the man. (Id). Later, Tommy gave a cigarette to everybody. (Id). The boys then started to ride away and the chain on Charles Bell's bike popped. (T.429). Charles and Tommy then rode together. (T.429-30). As the gang was riding, they saw a black man walking with a grocery bag. (T.430). According to McMullen, Charles Bell road up and gave his gun to McMullen. (T.430). McMullen put the gun in his waist. (T.431). McMullen was going to rob the man, but the police came and he gave the gun back to Charles. (T.431).

The boys then rode to another part of town and they saw a convertible with two people in it. (T.432). According to McMullen, Petitioner said they looked like

they got some money. (T.432). Charles Bell tried to give the gun to McMullen and according to McMullen, he didn't take it. (T.433). Tommy Thompson took the gun. (T.433). Petitioner and Tommy went up to the car. (T.433). McMullen testified that Petitioner went to the driver's side and Tommy went to the passenger's side. (T.434). McMullen said he got within six or seven feet of the car; Eric Johnson was behind him and Charles Bell was behind Eric. (T.435).

McMullen testified he then heard a shot, another shot and then a couple of more. (T.435). The group then fled the scene; Petitioner ran around the corner. (T.436). The boys went down a sidewalk and somebody said, "Did you kill them" -- Tommy said, "Yeah, I shot all mine;" Petitioner said, "I should have killed her, she tried to shoot me." (T.437). Tommy then took the gun. (T.437).

McMullen stated he expected to get anything that was gotten from the car. (T.438). On November 6, 1993, the police arrested McMullen. (Id). Initially, McMullen denied any involvement. Later, he told what happened. (Id). McMullen gave a sworn statement to the State Attorney based upon a plea agreement. (T.440). He pleaded guilty to second degree murder, attempted armed robbery and attempted first degree murder. (T.441). The plea agreement was for a cap of a 30 year sentence and McMillan was to testify truthfully. (T.441). The State would make a recommendation of a sentence and the trial court would determine the sentence. (T.442).

As to the sentence, McMullen understood that he could get less than 30 years. (T.443). As a part of the deal, McMullen did not receive a 3 year minimum,

mandatory sentence. (T.443-44). McMullen didn't know if Tommy shot Johnson in the back. (T.444). He didn't see Johnson with a gun. (T.45). McMullen admitted he has a bad memory. (T.446).

Several months before this incident, McMullen and Eric Johnson committed burglaries together. (T.446). Thy were not prosecuted for these crimes. (T.447). McMullen also burglarized a house across from Tommy's grandmother's house. (T.447). McMullen took 2 .22 rifles from the house; he was not arrested or prosecuted for those crimes. (T.447). Immediately, before the October shooting, McMullen committed several thefts of bicycles. (T.447-48). He had not been arrested or prosecuted for those crimes. (T.449). He also stole some cars with Eric Johnson and was not arrested nor prosecuted for those crimes. (T.450). He also robbed a man at a gas station. (T.451).

McMullen admitted that every other day he smoked marijuana with Eric Johnson. (T.449). This had no effect on his memory, McMullen testified. (T.449). McMullen acknowledged that when he was first charged with these crimes, he faced a minimum sentence of 25 years. (T.452). At the time of his arrest, McMullen had a pending juvenile case in Georgia. (T.463). At the time of his testimony, McMullen had a pending juvenile case in Georgia. (T.463). At the time of his testimony, McMullen had a pending armed robbery charge. (T.469-65).

James Parker, a homicide detective with the JSO, investigated the shooting of Tammy Jo Johnson. (T.537). He interviewed Thomas Thompson and Charles Bell on November 5, 1993. (Id). Detective Parker testified he advised Bell of his rights.

Detective Quinn Baxter interviewed Petitioner on November 4, 1993. (T.543). Baxter advised Petitioner of his constitutional rights (T.546-50)(at this point the court excused the Bell jury from the courtroom). Petitioner signed a form which indicated that he understood his rights. (T.550).

According to Baxter, Petitioner made the following statement:

> ...himself, Eric, Charles, Thomas and Mike were riding bicycles that day. In fact, the bicycle Mr. Edwards owned he stated was taken during a robbery of an old man earlier that day before the homicide, and he stated that he left the bicycle at the homicide scene, that was the bicycle taken from the old man earlier in the early robbery, and then he said that they saw some ladies getting out of their car, Thomas went up to the car and was going to rob the ladies. The driver of the car pulled a gun out and pointed it at Mr. Edwards. Then Mr. Edwards stated that he was, in fact, shot during this incident on the right thumb, and showed us where he was shot on his right thumb. He stated that the next day he went to University Hospital to get treatment for that gunshot. (T.551).

Baxter then continued to relate the statement made by Petitioner. He said he was on the driver's side of the victim's car. (T.550). Thomas had either a .32 or .38 caliber handgun and Petitioner had a .25 caliber. (T.552). Thomas was near the left back tire of the car; Eric was closer to the street; Petitioner didn't know where Mike and Charles were. (T.552). Petitioner heard Thomas say, "Don't do it" when the victim pulled her gun; the victim shot and Thomas shot. (T.552). Petitioner further stated that Charles had a .32 or .38 caliber gun; Petitioner stated he didn't know if he actually fired his gun. (T.552).

The State then specifically asked Baxter if Petitioner talked about the robbery to Emory Davis; Baxter testified that Petitioner said that they all robbed Davis -- Thomas took two dollars from Davis. (T.552-53). Petitioner made a written statement

(T.553-555). Baxter wrote out the statement as Petitioner told it to him. (T.555). The Court received the written statement into evidence. (T.557-559). The State then introduced evidence before the Bell jury -- the Edwards jury was not present. (T.561-592). The Edwards jury then returned and both juries were present. (T.593). Detective T.C. O'Steen went to Dr. Suey's office and obtained the bullet removed from Katrina Jones' arm. (T.594). On November 6, 1993, O'Steen interrogated Thomas McMullen. (T.595). The State then attempted to introduce a written statement taken from McMullen. (T.595). Counsel for Bell objected to the introduction of the statement and moved for a mistrial; counsel for Petitioner joined in the motion. (T.606). The court asked if the motion was a standing motion and denied it. (T.606). The court noted that the statement may have been relevant citing a "relatively new doctrine" in the law -- anticipatory rehabilitation. (T.596). The court, however, initially sustained the defense objection. (T.596). The State then argued that the statement was admissible to rebut the claim of recent fabrication. (T.597-58). Counsel for Bell then argued that the statement was not made before the declarant had a motive to falsify -- he had been arrested and charged with murder. (T.598-99). The declarant had a motive to curry favor from the police. (T.599). Counsel also argued that the statements the declarant said he didn't make (during his testimony) were not in the statement. (T.599-600). The court then changed its ruling and allowed the statements in evidence. (T.600).

The State then introduced the entire statement of McMullen into evidence. (T.606-607). The statement included the robbery of Emory Davis and the shooting in

this case. (T.606-09).

O'Steen conceded that some of the language in the statement was his -- it was not a verbatim translation of what McMillan said. (T.609-11). There were no witnesses to the written statement, other than O'Steen. (T.613) O'Steen did not try to get another witness for the statement. (The statement form has a signature line for a second witness to the statement). (T.613). There were no efforts to videotape or tape record the statement. (T.614).

Officer R.V. Nelson interrogated Petitioner on November 5, 1993 while Petitioner was in jail. (T.627). Nelson interviewed Petitioner about the robbery of Emory Davis. (T.631). Nelson did not speak with or get the permission of Petitioner's parents to talk with Petitioner. (T.638-39). Nelson didn't know that JSO policy required such permission. (T.639). After Nelson read Petitioner his rights, Petitioner stated he and another defendant placed guns on the victim, took his bike, about two dollars and some cigarettes. (T.633). The State introduced evidence about a written statement by Petitioner. (T.634). Prior to the introduction, the trial court, after a request by counsel for Petitioner, instructed the jury about the proper use of the evidence of other crimes. (T.637). The State then introduced the written statement. (T.638).

The court then excused Petitioner's jury and heard testimony for the Bell jury. (T.639-664). Petitioner's jury then returned for more joint testimony. Detective A.J. Roberts went to Petitioner's home to search for a gun. (T.667). Robert stated he found a partially disassembled .25 caliber semi-automatic pistol. (T.668).

Jodi Phillips is a latent print examiner with the JSO (T.672). He compared the fingerprints of Petitioner with the prints on the bicycle found at the scene of the shooting. (T.675-76). Phillips identified Petitioner's prints on the bicycle. (T.684).

David Warniment is a firearm examiner with the FDLE. (T.681). Warniment examined and compared the gun taken from Petitioner's house and the shell cartridge case found at the scene of the shooting. (T.690). Warniment opined that there was strong evidence of a relationship between the gun. (.25 semi-automatic pistol) and the shell -- but Warniment could not conclusively identify the shell as being fired by the gun. (T.690). Warniment also examined the bullet taken from the arm of Katrina Jones' arm. (T.691-92). He concluded that the .25 caliber gun had fired the bullet. (T.692).

After Warniment's testimony, the state rested its case. (T.695). Petitioner moved for a judgment of acquittal; the trial court denied it. (T.695-96). Petitioner decided not to testify nor present any evidence. (T.704-05).

The parties then presented their final arguments. During the State's closing statement, the prosecutor stated:

> And, you know, at that point maybe Ms. Johnson, Ms. Jones could have gotten away from the scene, but, unfortunately, this defendant was not alone because he was part of a pack. He was part of a number one, two three, four and five, a group that earlier that same date were involved in the incident involving poor Mr. Davis. (T.800).

The State then described the robbery of Emory Davis. (T.803). The prosecutor also talked about the intended robbery of the man with the groceries. (T.804). Later in the argument, the prosecutor again mentioned the robbery to Davis and the

intended robbery. (T.815-17,19). After Petitioner's arguments and jury instructions, the jury retired to deliberate. (T.867). The jury then returned guilty verdicts for attempted armed robbery with a firearm, first degree murder with a firearm and attempted murder in the first degree with a firearm. (T.878-79) (R.172-74). The separate jury found co-defendant Bell guilty of attempted robbery with a firearm, first degree murder without a firearm and attempted first degree murder without a firearm. (T.1018). Petitioner's case was passed for sentencing. Petitioner filed a motion for new trial. (T.213-14). The trial court denied it. (T.103). The trial court sentenced Petitioner to life with no parole for 25 years (with a 3 year minimum mandatory term under Section 775.087, Florida Statutes) for the first degree murder, 22 year years for the attempted first degree murder to run concurrently with the life sentence and 15 years for attempted armed robbery to run concurrently. (T.1038-39), R.218-226). Petitioner timely filed his notice of appeal. (R. 229). The appeal then followed.

The First District Court of Appeal affirmed Petitioner's convictions and discussed only one of the six issues raised on appeal. The First District Court of Appeal certified a conflict with its decision and Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988) concerning the admissibility of prior consistent statements made by a co-defendant who confessed to the police. (Did a motive to falsify exist at the time the statement was made during custodial interrogation)?

SUMMARY OF ARGUMENT

This Court should resolve the certified conflict between this case and Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988) by deciding that a prior consistent statement made by a co-defendant/accomplice during custodial interrogation (after an arrest for first degree murder) is not admissible (where the statement admits participation in a robbery and murder, but blames others for a shooting or use of a gun) because the statement was made when a motive to falsify existed. A prior consistent statement is admissible only if it was made before the motive to falsify existed. The First District Court of Appeal held that a statement made during a police investigation was not automatically made when a motive to falsify existed. In Quiles v. State, supra, the Second District Court of Appeal held that a statement made by a victim (involved in an altercation with the Defendant) during a police investigation was inadmissible due to a motive to falsify. (The victim may have been the aggressor or instigator or used a weapon himself). If a victim's statement is inadmissible due to a possible motive to falsify, then a statement made by a co-defendant charged with first degree murder (with a manifestly greater motive to falsify) should also be inadmissible.

Pursuant to Reed v. State, 470 So.2d 1382 (Fla. 1985) this Court should review 2 other issues raised by Petitioner, but not discussed in the opinion by the First District Court of Appeal. The prosecutor deprived Petitioner of a fair trial by referring to Petitioner and his co-defendants as a "pack" on 9 different occasions during opening statement and closing argument.

The work pack has a pejorative meaning: it is not just another term for a group of people. It signifies a group of wild animals or a group of thugs or thieves. Common phrases in our language are "a pack of wild animals", "a pack of wild dogs", or "a pack of thieves." This Court and the District Courts of Appeal have resolutely condemned the use of such abusive and inflammatory remarks. **See** Gluck v. State, 62 So.2d 71 (Fla. 1952); Stewart v. State, 51 So.2d 494 (Fla. 1951)(comment that defendant was a sexual fiend and maniac); Darden v. State, 329 So.2d 287 (Fla. 1976); Arnold v. State, 613 So.2d 148 (Fla. 1st DCA 1993); Brown v. State, 610 So.2d 579 (Fla. 1st DCA 1992); Gleason v. State, 591 So.2d 278 (Fla. 5th DCA 1991); Brown v. State, 580 So.2d 327 (Fla. 5th DCA 1991); State v. Ramos, 579 So.2d 360 (Fla. 4th DCA 1991). If this Court does not reverse this case for a new trial, then such comments are likely to continue because a prosecutor may decide to risk the use of such inflammatory language if an appellate court finds the language to be improper, but then finds harmless error. This Court in Stewart v. State, supra, held that a trial court had a duty, on its own motion, to restrain and rebuke counsel for the use of such remarks.

The prosecutor also deprived Petitioner of a fair trial by expressing a personal belief in the veracity of a key state witness. **See** Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994).

I. The decision of the First District Court of Appeal conflicts with Quiles v. State, 523 So.2d 1261 (Fla.2d DCA 1988) on the issue of whether a motive to falsify existed at the time a co-defendant/accomplice (during custodial interrogation for first-degree murder) made a prior consistent statement used against Petitioner, pursuant to Section 90.801(2)(b), Florida Statutes.

A. The ruling below on the issue of the admissibility of a prior consistent statement by a co-defendant/accomplice to first-degree murder.

In the appeal before the First District Court of Appeal, Petitioner argued that the trial court erred in admitting a prior consistent statement by a co-defendant/ accomplice of Petitioner. The accomplice made prior consistent statements during custodial interrogation. (The police had arrested the accomplice, Mike McMullen, for first-degree murder. Petitioner argued at trial that a motive to falsify (to exonerate oneself or place blame on others) existed at the time of statement: the police had just arrested the witness for first degree murder.

The First District acknowledged that in Quiles v. State, supra, the Court held that a prior consistent statement given to the police by a witness (who was directly involved in the crime) was per se inadmissible because a police investigation of a crime gives rise to a motive to falsify. (**See** Appendix I, Decision of the First District Court of Appeal). The First District Court certified direct conflict with Quiles v. State, but noted that other decisions had permitted prior consistent statements to the police and the mere fact that the police are conducting an investigation into a crime does not automatically establish a motive to falsify.

B. The decision in Quiles v. State, supra and other cases which permitted consistent statements to rebut claims of improper motive or recent fabrications.

In Quiles v. State, supra, the Second District Court of Appeal considered whether a prior consistent statement under Section 90.801(2)(b) was admissible. The victim of an altercation with the defendant; gave the statement to the police in the course of the investigation of the incident. The Quiles court noted that the statement could be admissible as a prior consistent statement if (1) it is consistent with the declarant's other testimony, (2) offered to rebut an express or implied charge against the witness of improper influence, motive or recent fabrication, (3) the statement must have been made before the existence of a reason to falsify arose. 523 So.2d at 1263. **See** Anderson v. State, 574 So.2d 87 (Fla. 1991); Preston v. State, 470 So.2d 836 (Fla. 2d DCA 1985). All three of these criteria must be present for a prior consistent statement to be admissible.

In the opinion below, the First District Court of Appeal noted that other courts had upheld the use of prior consistent statements (made to the police) to rebut the implied charge of improper motive or recent fabrication. The opinion cited Anderson v. State, supra; Stewart v. State, 558 So.2d 416 (Fla. 1990); Dufour v. State, 455 So.2d 154 (Fla. 1986), cert.denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d. 183 (1987); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982). In Anderson, supra, the defense implied the witness changed her story after making her plea agreement. However, the witness made her statement in question to the police before the plea agreement. In Anderson, there was no argument that the motive to falsify existed at

the time the witness made the statement to the police. In Stewart v. State, supra, the defense claimed that the witness was attempting to obtain favored treatment at sentencing on convictions on other charges. The witness was not a co-defendant, but a friend of the Defendant. The Defendant told the witness about the crimes in question. After the police arrested the witness on other crimes, the witness told the police about the defendant's confession. This Court held that because the motive to falsify (to get favorable treatment on convictions) did not exist at the time of the statement (no convictions for the witness at that time), the statements were admissible as prior consistent statements.

In Dufour v. State, 495 So.2d 154 (Fla. 1986) this court permitted a prior consistent statement made at the time of arrest because the statement was made before the implied charge of improper motive or recent fabrication due to plea negotiations. This Court found that the statement was made prior to the motive to fabricate (plea negotiations). There is no argument in Dufour, supra, that a motive to fabricate existed at the time of the witness' arrest. In McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982), the First District Court of Appeal decided the prior consistent statement of a co-defendant was admissible because the defense implied improper motive. (The witness' sentencing was delayed until after his testimony -- the witness would therefore give favorable testimony to the State in exchange for the hope of favorable treatment).

None of these cases address the precise issue presented by this case: A claim of improper motive, a motive to falsify which existed at the time of the statement

(arrest for first degree murder). In this case, the State introduced the witness' entire written statement to the police as a prior consistent statement. (T.597-98). This statement was significant because it directly implicated Petitioner and it indicated Petitioner and Thomas Thompson were the shooters in this case. The confession also stated that Petitioner pointed a gun at the victim in the collateral crimes evidence case.

The witness (Mike McMullen) gave the statement to the police after the police arrested him for first degree murder. McMullen had a powerful motive to falsify at that time. Although he admitted his involvement in the robbery attempt, he placed the act of shooting on others. McMullen had ample reason, at that time, to attempt to exonerate or lessen his culpability to the offenses. McMullen also had reason to lie about his involvement in the collateral crimes cases.

C. The case law applied to the facts of this case.

The First District Court of Appeal held that the mere fact that the police are conducting an investigation into a crime does not automatically establish a motive to falsify. Although this may be true, in this case there was a powerful motive to falsify. There were 5 defendants involved in this case. Once the police arrested McMullen, he had a motive to place more blame (the actual shooting) on the others than on himself. This is, by definition, a motive to falsify. In Quiles v. State, supra, the issue was whether the Defendant had assaulted the victim with a gun. A police officer testified to statements made by the victim concerning the gun and altercation between the Defendant and the victim. The Second District held that the prior

consistent statement was not admissible because it was not made prior to the existence of a motive to falsify -- the declarant called the police and the statements were made during the police investigation. In Quiles, the victim also had a motive to falsify (he had a bat and threatened people with it) concerning the gun and the actions of himself and Quiles. If these factors constitute a motive to falsify, then an individual facing first degree murder charges based upon felony murder (murder committed during an attempted robbery) has a similar, if not manifestly more powerful, motive to falsify. Under the facts of this case, this Court should find the prior consistent statement was inadmissible; the Court should disapprove of the decision below and adopt the reasoning of Quiles. This Court should find that when a co-defendant puts blame on other co-defendants, a motive to falsify exists.

The reason for the limitation or prior consistent statements is to prohibit improper bolstering of a witness' credibility. **See** Turtle v. State, 600 So.2d 1214 (Fla.1st DCA 1982); Perez v. State, 595 So.2d 1096 (Fla. 3d DCA 1992); and Dufour v. State, supra. This problem is especially acute in a situation involving testimony by a co-defendant accomplice. If the prior consistent statements of a victim are not admissible to bolster credibility (not otherwise admissible under Section 90.801(2)(b), then statements of a co-defendant accomplice should also not be admissible.

II. **The trial court erred in permitting the prosecutor to describe repeatedly Petitioner and his co-defendants as a "pack" concerning the commission of the instant offense and two other uncharged collateral crimes offered as similar fact evidence under Section 90.404, Florida Statutes.**

A. The numerous references to Petitioner as a part of a "pack."

In opening statement and closing argument, the prosecutor referred to Petitioner and his co-defendants as a pack on nine (9) different times. **See** (T.231,232,234,237,800). The State Attorney used the references to pack to explain how Petitioner and his co-defendants robbed Emory Davis, "attempted" to rob another man with groceries and then committed the offenses charged in this case. During his closing statements in this case, the prosecutor again referred to Petitioner and his co-defendants as a pack.

The phrase pack is not just another term for a group of people. The term pack is a pejorative word which signifies a group of wild animals or a group of thugs or thieves. Common phrases in our language are phrases like, "a pack of wild animals", "a pack of wild dogs" or a "pack of thieves or thugs."

The Oxford English Dictionary (compact edition) defines pack in relevant manner, as "a company or set of persons; generally implying low character, or association for some purpose." (Oxford University Press, American Compact Edition 1982). We do not normally refer to a group of people or an association of people as a pack, unless we intent to impugn the character of the group.

The use of the word pack in this case had the unquestionable intent of an allusion to a group of wild animals preying on innocent persons. The prosecutor

used the phrase in describing Petitioner's activities in this case and the two similar fact collateral crimes cases. The use of the word pack also included the allusion of a group of ravenous beasts who prey again when they are hungry. The prosecutor most likely carefully chose this word to inflame the prejudice and passions of the jury. Petitioner can think of no other reasonable and legitimate use of the word pack in this case.

B. The case law on improper references to the Defendant's character.

In Arnold v. State, 613 So.2d. 148 (Fla. 1st DCA 1993), Judge Zehmer in a concurring opinion wrote, that the prosecutor's calling the defendant "an animal" was patently objectionable and had no place in a courtroom dedicated to providing a fair trial. In Arnold v. State, supra, the Court affirmed the conviction because there was no objection. In this case, there was an objection and motion for mistrial. **See also** Blunt v. State, 397 So.2d 1047 (Fla. 4th DCA 1981)(comment that animals belong in cages -- references to Defendant -- was improper, but there was no objection); Zamot v. State, 375 So.2d 881 (Fla. 3d DCA 1979)(improper comments of prosecutor that he was glad he wouldn't have to meet up with Defendant in a dark alley).

In Darden v. State, 329 So.2d 287 (Fla. 1976), this Court disapproved of the prosecutor's comments, even when defense counsel said that whomever committed the crime was an animal. Other courts have reversed convictions based upon comments on the defendant's character or the fact that the defendant just got out of jail or will commit other crimes if not put in jail. **See** Brown v. State, 610 So.2d 579 (Fla. 1st DCA 1993)(comment that defendant was 3 time felon and crimes in one area

were committed by people like defendant); Gleason v. State, 591 So.2d 278 (Fla. 5th DCA 1991)(Defendant about to commit murder); Brown v. State, 580 So.2d 327 (Fla. 5th DCA 1991)(defendant was prone to be a hothead); State v. Ramos, 579 So.2d 360 (Fla. 4th DCA 1991)(defendant was a kingpin in drug trafficking).

Petitioner concedes that the above-mentioned cases did not review the exact language used in this case. However, the language used in the above-cases is qualitatively less inflammatory than the use of pack in this case. If the phrases "kingpin" or "people like the defendant - a convicted felon" are improper comments, then use of an inflammatory phrase like pack is surely improper.

Prosecutors are officers of the court and have an ethical duty to seek justice and a fair trial for a citizen accused of a crime. In Gluck v. State, 62 So.2d 71(Fla. 1952) this Court noted that the court has the duty to reprimand the prosecutor if the prosecutor makes improper comments about the defendant. The Gluck court also stated that there should be a noncondation of the conduct in front of the jury. In Stewart v. State, 51 So.2d 494 (Fla. 1951), this Court held that it was the duty of counsel to refrain from inflammatory and abusive remarks (prosecutor said that it was time to stop the sexual fiend and maniac before some poor little child lost her life or was mutilated). The Stewart court also held that the trial court had a duty, on its own motion, to restrain and rebuke counsel. In this case, the trial court simply summarily denied Petitioner's and co-counsel's objections to the use of the word pack.

Petitioner realizes that the recent trend is for courts to affirm convictions in cases where the prosecutor used inflammatory or abrasive language. The above

cases directly hold that the trial court has a duty, independent of any objections, to restrain and rebuke such conduct. In this case, there was an objection and the trial court did nothing. The use of the word pack, with its association with wild animals, deprived Petitioner of a fair trial, regardless of the another evidence against him. How could anyone say Petitioner's trial was fair when the prosecutor referred to him, by allusion, as an animal -- like a pack of wolves? The pack comment is similar to the "fiend" and "maniac" comment disapproved of in Stewart v. State, supra.

Prosecutors will continue to use phrases like pack, fiend, maniac or monster so long as appellate courts affirm convictions based on waiver or harmless error. Some prosecutors will take the chance of using such a phrase to obtain a conviction; some prosecutors will hope or rely upon an affirmation of the conviction based upon waiver or harmless error. The only realistic way to stop these comments is for an appellate court to reverse a conviction whenever the prosecutor uses such terms. This Court should resolutely condemn the use of the phrase "pack." If this Court does not, then some prosecutors will undoubtedly continue to use such phrases.

III. **The prosecutor deprived Petitioner of a fair trial by stating, before the jury, that a witness had testified truthfully; such conduct was an improper statement of a personal belief in the veracity of a witness.**

A. The personal comment on the veracity of a witness.

During the testimony of Emory Davis, counsel for Petitioner's co-defendant attempted to impeach Emory Davis. (T.216-88). Davis was the victim of the collateral crime of armed robbery; this charge was several from the instant case, but the trial court, over objection allowed such testimony under Section 90.404 Florida Statutes. Counsel for Bell attempted to refer to Davis' deposition testimony about whether the individual who went through Davis' bag during the robbery was the shortest of the group. (T.289). The State then immediately commented:

> Again, Your Honor, I'm going to object and ask to strike all of this the witness has answered truthfully then and answered truthfully now." (T.289).

The trial court compounded the problem by making the following comment:

> That's not any different than what he testified earlier, Mr. Williams, (counsel for Petitioner's co-defendant, Charles Bell), as I recall his testimony, so I don't know what purpose that's offered. (sic)(T.289).

B. The case law on statements of personal belief concerning the veracity of a witness.

A prosecutor should never make personal statements of belief concerning the veracity of a witness. In Irving v. State, 627 So.2d. 92 (Fla. 3d DCA 1993), the Third District Court of Appeal affirmed the conviction, but noted that it was improper for the prosecutor to vouch for the credibility of a state witness. The prosecutor expressed his personal belief that the witnesses were telling the truth. **See** Kelly v. State, 451

So.2d 896 (Fla. 4th DCA), rev.denied, 458 So.2d 272 (Fla. 1984) In this case, Defense counsel did request a mistrial. The defense in Irving did not request a mistrial.

The First District Court of Appeal, in Pacifico v. State, 642 So.2d 1178, 1184, (Fla. 1st DCA 1994) held:

> That because a jury can be expected to attach considerable significance to a prosecutor's expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter in this case. Singletary v. State, 483 So.2d 81 (Fla. 2d DCA 1985).

The expression of personal belief was egregious in this case. Counsel was attempting to impeach Emory Davis with a prior inconsistent statement. The prosecutor objected to this attempt and then blatantly vouched for Davis' credibility by stating that Davis had told the truth at trial and at deposition. This error was not harmless because it involved the credibility of a key state witness -- the only eyewitness to the collateral crime evidence of the armed robbery before the attempted armed robbery and murder in this case. Errors which affect questions of credibility of a sole key witness to a case or issue are not, by definition, harmless. **See** Colutino v. State, 620 So.2d 244 (Fla. 3d DCA 1993); Reyes v. State, 580 So.2d. 309 (Fla. 3d DCA 1991); Lazarowicz v. State, 561 So.2d 392 (Fla. 3d DCA 1990); Preston v. State, 470 So.2d 836 (Fla. 2d DCA 1985).

CONCLUSION

This Court should approve of the decision in Quiles v. State, supra, and disapprove of the decision by the First District Court of Appeal. Consequently, this cause should be remanded for a new trial. If this Court decides to exercise its discretion to review the other issues raised in this appeal, the Court should decide the State deprived Petitioner of a fair trial by referring to him and his co-defendants as a pack and giving a personal opinion on the veracity of a state witness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing has been furnished by U.S. Mail this 15th day of December, 1995 to: Office of the Attorney General, The Capitol, Tallahassee, Florida 32201.

JAMES T. MILLER