IN THE SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 88,802
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

RICHARD JORANDBY
Public Defender

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Michael Scott Keen

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Circuit Court. The volume of the current record or transcript will be referred to by roman numeral. The following symbols will be used:

R Record on Appeal

T Transcript on Appeal

ST Supplemental Transcript on Appeal

1R Record of Original Appeal

2R Record of Second Appeal.

STATEMENT OF THE CASE

This case involves a retrial after two prior reversals for new trials by this Honorable Court. Keen v. State, 504 So. 2d 396 (Fla. 1987); Keen v. State, 639 So. 2d 597 (Fla. 1994). This trial was held on June 20-22, 26-27, 1995. Mr. Keen was convicted of first degree murder XVIT1809. The penalty phase was held on August 14, 1995. The jury recommended life XVIIT1903. The trial judge imposed the death penalty XVIIT1916-43.

STATEMENT OF THE FACTS

FACTS CONCERNING THE MOTION TO SUPPRESS

Mr. Keen filed a motion to suppress his police statements prior to his first trial 1R1665-66. An evidentiary hearing was held on this motion 1R121-275. The defense argued two grounds, that the defendant had not been taken to first appearances within 24 hours and that the statement was involuntary 1R275,1668-71. The trial court denied the motion, without making any factfindings 1R1676. This Court upheld the denial

of the motion to suppress. Keen v. State, 504 So. 2d 396, 399-400 (Fla. 1987). This Court has subsequently disapproved of its reasoning in Keen I on this issue. Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). This Court did not reach any issues concerning the motion to suppress in the second appeal as it was reversing for a new trial on other grounds. Keen v. State, 639 So. 2d 597 (Fla. 1994). Mr. Keen filed a new motion to suppress prior to the current trial, which raised new grounds as well as re-raising previous grounds IR93-99. Oral argument was held on the motion and the defense adopted the evidence at the prior motion ST23-26. The trial court denied the motion IR115-123. Defense counsel renewed the motion at the time the statements were introduced and orally added an additional ground XIIT1338-47. The trial judge again denied the motion XIIT1338-47.

Don Scarborough of the Broward County Sheriff's Office took a taped statement from Mr. Keen on December 10, 1981 XIIT1208. This statement was taken at the office of Bruce Randall, his attorney on this case XIIT1207. Mr. Keen agreed to speak with his attorney present XIIT1208. During the interview, Mr. Keen was asked how the police could reach him if they needed to speak to him again XIIT1211-12. His attorney indicated that Mr. Keen would stay in touch with him and that he could be reached through his office XIIT1213.

The next attempt by police to interview Mr. Keen was after his arrest on August 23, 1984. This was done by Officers Phillip Amabile and Richard Scheff XIIT1334. Officer Amabile testified that he had reviewed Mr. Keen's prior police

statements XIIT1329. Officers Amabile and Scheff arrested Michael Keen at his place of business in Seminole County, Florida at about 10:15 a.m. on August 23, 1984 1R161. Mr. Keen told an employee, Sam Sparks, to get him a lawyer 1R162. The officers heard him say this and noted it at 10:26 a.m. 1R179. He was given Miranda warnings at 10:31 a.m. 1R179. Mr. Keen was shocked and amazed when arrested 1R160. They took him to the Seminole County Jail and arrived at about 11:15 a.m. 1R163. They then took Mr. Keen to the Seminole County Sheriff's Office and arrived at about 11:45 a.m. 1R165. He was again given Miranda warnings at about 12:15 p.m. and interrogated for about one and one half hours 1R166. He was booked into the Seminole County Jail at about 1:50 p.m. and again given Miranda warnings. The officers did not take him to first appearances from the time they arrested him at 10:15 a.m. on August 23, 1984 until the time they booked him in the Broward County Jail at 9:07 p.m. on August 24, 1984, well beyond the 24 hour period provided by Florida law 1R172.

The officers picked up Mr. Keen at 8 a.m. at the Seminole County Jail on August 24, 1984 1R173. He was given Miranda warnings again 1R179. The trip back to Ft. Lauderdale took about four hours 1R179. During the drive back the officers shifted the conversation to the case 1R192. During this conversation Mr. Keen stated that "he could see no strategic reason to give a statement" 1R193. They arrived back at the Broward County Sheriff's Office at about 12:30 p.m. 1R131. At about 1:30 p.m. the officers placed Mr. Keen in an interview room and gave him Miranda warnings 1R142-43. They spoke to Mr.

Keen for four hours before they began taking a formal statement from him 1R143. Mr. Keen maintained his original version for about three hours 1R144. Around 4:30 p.m. he began to give a different version of events in which he stated that Ken Shapiro pushed he and his wife overboard and that he was able to get back on board and she was not 1R147-49. At approximately 5:45 p.m. Officer Amabile began writing out a statement which he claimed reflected Mr. Keen's new version 1R150-151. Mr. Keen refused to make a taped statement as he feared a tape could be altered 1R150. This written statement ended at approximately 7:45 p.m. 1R155. Mr. Keen refused to sign this "statement" 1R152.

TRIAL FACTS

This case involved the death of Anita Keen, who disappeared in the Atlantic Ocean, off the coast of Broward County, Florida on November 15, 1981. The State's case depended almost completely on the testimony of Ken Shapiro who admitted that he participated in this homicide and has never been charged. Shapiro testified that he came to Florida in December, 1977 at age 24 and had no concrete plans XT922. He originally lived with his grandparents XT923. He finally found a job in June, 1978 XT924. Michael Keen was partly responsible for his being hired XT924. They worked for an electrical sign company XT924. He and Michael Keen became close friends XT925. They went to the movies, jai-alai, dog track, and sporting events together XT926. In late, 1978, he moved into Michael Keen's apartment in Hialeah, Florida XT926. They lived and worked together. Michael Keen was his manager XT927. They worked on commission

and Michael Keen did much better than he did. He needed Michael Keen's help to live XT929. Michael Keen often loaned him money XT929. Michael Keen was very successful as a salesman and Shapiro was very unsuccessful XT930.

In mid-1980 Shapiro left the sign company and took a job with a meat company in Tampa XT933. He was $2-3,000 in debt to Michael Keen at that time XT934. He lost the job after two or three months and came back to Ft. Lauderdale to live with Michael and Patrick Keen XT935-936. He was driving a Cadillac that Michael Keen had leased for him XT937. He went back to work for the sign company and continued to have financial problems XT937. He continued to socialize with Michael Keen and to receive financial help from him XT938. Michael Keen had an active social life and dated regularly, while Shapiro did not date XT940.

Shapiro claimed that Michael Keen met Anita Lopez in late 1980 XT941. He claimed that Mr. Keen had discussed marrying a woman and killing her for profit XT943. He claimed that Mr. Keen had first talked about pushing the woman off a high building and then later talked about drowning her in the ocean XT945. Shapiro was a witness at Mike and Anita's wedding on August 1, 1981 XT952. Shapiro claimed that the plans for the killing began to accelerate after the marriage XT953. He claimed that Mr. Keen also told him that this would clear his debt XT955. He claimed that they had several discussions before the event XT956.

He claimed that on Sunday, November 15, 1997 Michael and Anita went out on the boat and he met them at Tugboat Annie's

XT958. He's not sure when he met them, but he thinks it was between 11 a.m. and 1 p.m. XT960. He claims that they had drinks there XT960. He claimed that they went out on the boat after an hour or so XT961. He claimed that the boat was a Bayliner cruiser with a fly bridge and was over 20 feet in length XT962. He stated that they went east on the Intracoastal 10-20 miles into the ocean XT965. They listened to the Miami Dolphin football game on the radio and eventually switched to music XT966. At first, they all listened and then Anita went down below XT966.

He claimed that eventually Anita came up and stood at the rail XT968. He claimed that Michael then put the boat in neutral and came down from the fly bridge XT969. He claimed that he watched while Mr. Keen "picked her up and pushed her over." XT970. He claims that he "couldn't actually see her go in" the water XT970. He claimed that Mr. Keen then told him to put the boat in gear and get it out of her range which he did XT971. He claimed that Michael Keen then took over control of the boat XT971. He claimed they both watched her swim XT971. He claims that they were out there for 15 minutes to an hour and left her swimming when it got dark XT972. He claims that they didn't hear her say anything XT972-973. It took several hours to get back XT975. He claimed that they got back at 9 or 10 p.m. or later XT976. He first called the Coast Guard and told the Coast Guard that a woman was missing and they should begin a search XT977. Shapiro believes that Mike did not talk to the Coast Guard XT977. Someone from the

Sheriff's Department came out and they both spoke to him XT977-978.

Shapiro was interviewed about a week later by Detective Carney and he lied under oath XT981. He again told the authorities that Anita Keen had disappeared. In 1982 he gave a deposition to an attorney XT982. In 1982 he and Mr. Keen went to California together in a motor home and stayed together for a week or ten days XT983. Michael came back and Shapiro stayed on for another week to ten days XT983. Shapiro then moved to New York for most of 1982 XT982. He gave a deposition in New York in 1982 XT985. He again stated that Ms. Keen disappeared XT986. He lied under oath. He had occasional contact with Michael Keen between 1982 and 1984 XT986. He worked for a liquor company in New York and was fired XT989. He came back to Broward County in 1984 XT989. Mr. Keen had moved to Orlando XT990. Officers Amabile and Scheff came to his house in August, 1984 XT991. He was then brought to the police station XT992. They pressured him and threatened him with prosecution XT993. He changed his story after an hour or more of this XT994. He was there for five or six hours XT995. It was at this time that he first told anyone his current version of events.

Shapiro agreed to put a recording device on his phone and to record any conversations with Mr. Keen XT997. A recording was played of his conversation with Mr. Keen on August 2, 1984 XT988. During the tape Mr. Keen consistently says that Anita's death was an accident XT1003,1009,1012.

Mr. Shapiro was unemployed and living off his grandparents in June, 1978 when he met Mr. Keen XT1020. Mr. Keen trained

him and he admired Mr. Keen's sales' ability XT1021. His grandparents wanted him out of their house and Michael Keen gave him a place to stay XT1021. Michael Keen paid most of his bills XT1024. Shapiro lost money gambling XT1023. He often skipped work and went to the track or to bars XT1025. He was financially dependent on Michael Keen XT1026. Mr. Keen leased a Cadillac for him and made most of the payments on the car XT1027. He was several thousand dollars in debt to Michael Keen XT1028. Shapiro tried unsuccessfully to make a living off playing the horses XT1028. Shapiro rarely dated XT1029. Mr. Keen was popular with women and dated frequently XT1029. Michael Keen was a big part of Shapiro's social life XT1030.

Shapiro testified that Michael Keen never expressed any hatred of Anita Keen, never hit her, or threatened her XT1035. Shapiro stated in his deposition in New York that Mr. Keen loved Anita very much XT1037. He now claims that he was lying XT1037. He admits that he lied under oath in his statements to Detective Carney and to attorney Stone XT1039. He had previously testified that Michael Keen had called him on the morning of the incident XT1045. He now claims that he's not sure of this XT1045. He told the Coast Guard that Anita Keen was missing when they got back XT1057. He now admits that he lied XT1057. He testified that a representative of the Coast Guard did <u>not</u> come to the house XT1057. He admitted that he had previously testified that a representative of the Coast Guard did come to the house XT1058.

He stated that he is 5'8" and that the railing on the boat came over his waist XT1058-1059. He stated that Anita Keen was

5'2"-5'3" XT1060. He claimed that when Mr. Keen stopped the boat he and Mr. Keen went down from the fly bridge XT1061-62. He testified that Mr. Keen had "picked up" Anita Keen and threw her over the railing XT1062. He had previously testified that she was "pushed over the rail." XT1063. He then claimed that "it was a combination" when he was confronted with the contradiction. In a deposition in 1984 he specifically stated that Michael Keen did not pick Anita up XT1064. He also stated in this deposition that Mr. Keen only touched Anita in the upper back, "behind the shoulder blades." XT1064. He never testified in 1984 that the woman had been picked up XT1065.

Ken Shapiro admitted that he was the person who put the boat in gear and maneuvered it out of Anita Keen's way when she was in the water XT1066. He claims that he didn't see her swim toward the boat XT1068. He claims that he never heard a sound from her XT1069. He claimed that they were close enough to have heard her if she yelled XT1069. He claimed that she was still alive when they headed back XT1071. He told Officer Carney that they stayed out there for 45 minutes XT1072. However, he had testified in a deposition that it had only been 15-20 minutes XT1072-73. He now claims that it may have been over an hour XT1072. He told the police that Anita Keen was wearing a long sleeve blouse XIT1089. He now claims that she was wearing a tank top XIT1089. He admitted that he lied to Mr. Stone when he said that he and Anita were like sister and brother XIT1090. Shapiro testified in 1987 that Anita Keen wanted him out of the house XIT1092. He admitted that in 1980 he was making about $10,000 a year and Mr. Keen was making $40-

50,000 a year. In 1980 Mr. Keen had started a new company called Sign Up, which was doing very well XIT1095. He admitted that he had told the police that the date was picked a day or two before, but had told the grand jury that it was two or three weeks earlier XIT1103-1104. He admitted that he lied to the Coast Guard, to Officer Carney and to Mr. Stone in deposition XIT1113-15.

Shapiro claims that he was never promised not to be prosecuted XIT1117. He was confronted with a written statement to his attorney from the prosecutor stating that the State Attorney had no intent to prosecute XIT1117-18. He claimed that he had never seen this XIT1118. He admitted that he lied under oath twice XIT1122. The police threatened him with a homicide prosecution when they came to him in 1984 XIT1138. He has never been prosecuted for anything in regard to this incident XIT1144.

The State called Hector Mimoso, a former deputy with the Broward County Sheriff's Office XIIT1187. He went to Michael Keen's house on November 15, 1981 at 11:03 p.m. on a missing person's report XIIT1189. He was asking Mr. Keen the questions and Mr. Shapiro was answering them XIIT1193. Shapiro seemed restless and worried XIIT1194. Michael Keen appeared calm XIIT1195. He had to ask Shapiro to let Mr. Keen talk XIIT1195. Mr. Keen stated that he, his wife, and Shapiro had gone out boating and had decided to come back about six o'clock XIIT1195-1196. Anita Keen had become tired and had gone downstairs to sleep XIIT1196. They arrived back home and she was missing XIIT1196. Mr. Keen said that he had not heard any

splash or scream XIIT1201. Shapiro was answering all of the questions and he had to tell him to stop XIIT1203. Shapiro seemed very interested in what was being said XIIT1204.

The prosecution called Officer Don Scarborough of the Broward County Sheriff's Office XIIT1205. He took a taped statement from Michael Keen on December 10, 1981 XIIT1208. Mr. Keen stated that on November 15, 1981 he went out on his boat with his wife XIIT1214. They left at about 11 or 12 in the morning and stopped at Tugboat Annie's XIIT1215. Shapiro met them there XIIT1215. They had drinks and then went back out into the ocean XIIT1215. They turned on the Miami Dolphins game on the radio and headed due east XIIT1216. They were all three on the fly bridge XIIT1217. They turned on music when the game ended XIIT1217. They watched the sunset and then Anita got tired and went below to go to sleep XIIT1218. They headed back and listened to music along the way XIIT1219. Anita Keen was missing when they returned home XIIT1220. Ken Shapiro then called the Coast Guard and the Broward County Sheriff's Office XIIT1221.

The State introduced the testimony of Don Johnson, a Life of Virginia sales representative XIIT1236. He contacted Mr. Keen in June, 1981 when Mr. Keen moved into the area from Orlando XIIT1237. Mr. Keen took out a $50,000 life double indemnity insurance policy on his fiancee XIIT1238. His fiancee was present and answered all the questions XIIT1238.

The State called Maddie Genova, a retired office worker from Prudential Insurance XIIT1254. In June of 1981 she was working as an assistant office manager XIIT1255. She

identified a whole life policy for $50,000 on Anita Keen, with a double indemnity provision in the case of accidental death XIIT1268. Michael Keen was the beneficiary XIIT1269. The records reflect that the policy was sold based on a call initiated by the agent XIIT1271. Mr. Keen had $115,000 in life insurance on himself XIIT1275. A whole life policy is a form of forced savings in which equity is built up XIIT1276-77.

The State called Officer Phillip Amabile of the Broward Sheriff's Office XIIT1321. He and Officer Richard Scheff contacted Ken Shapiro on August 21, 1984 XIIT1328. They spoke to him for four hours or longer XIIT1330. He and Officer Scheff arrested Mr. Keen on August 23, 1984 in Seminole County, Florida XIIT1334. He was taken to the Seminole County Jail and then to the Seminole County Sheriff's Office for interrogation XIIT1335-1336. They confronted him with Ken Shapiro's new version of the offense XIIT1337. He claimed that Mr. Keen maintained that the original 1981 statement was correct XIIT1349. He claimed that after about two hours Michael Keen stated that it was "a big fuck up." XIIT1358. Mr. Keen stated that he and his wife went out on the boat on November 15, 1981 XIIT1359. They stopped at Tugboat Annie's and met Ken Shapiro there XIIT1359. They all went out on the boat into the ocean XIIT1360. They listened to the Dolphins game as they went out to sea XIIT1360. He stated that eventually Ken Shapiro took over the controls of the boat XIIT1360. He claimed that Mr. Keen stated that he and Anita were hugging on the side of the boat XIIT1361. He felt a shove and they both fell overboard XIIT1361. She hit her head on the platform XIIT1361. Michael

Keen eventually got back on the boat and got control of the boat XIIT1361. He stated that Shapiro was like a zombie frozen at the controls XIIT1361. After an hour they gave up searching and returned home XIIT1361. He stated that he felt it was an accident XIIT1363.

They passed a Coast Guard station on the way in but Shapiro didn't want to stop because he felt they wouldn't believe it was an accident XIIT1379. Shapiro called the Sheriff's Office when they returned home and he did all the talking XIIT1380. Shapiro came up with the original version of a disappearance XIIT1382.

They spoke for about two more hours and eventually recorded this in the officer's handwriting XIIT1365. Officer Scheff took over writing at one point and Mr. Keen made two corrections of intentional errors that Officer Amabile had made XIIT1368. He claimed that he normally tapes conversations, but that Mr. Keen wanted it recorded this way XIIT1369. Mr. Keen refused to sign the statement XIIT1384.

Officer Amabile stated that the case boiled down to Ken Shapiro's word against Michael Keen's XIVT1395. Shapiro was home sick when they went to see him in August, 1984 XIVT1397. Shapiro originally said the death was a mystery XIVT1399. Shapiro continued with this for over an hour XIVT1401. They told Shapiro that they had information implicating him in a murder XIVT1401. They told him if he persisted in his version it would increase the chance of him being charged with murder XIVT1403. They let him know that it was best to try and cooperate with them XIVT1403. They interrogated Shapiro for

over six hours XIVT1404. Shapiro eventually says that Mr. Keen "pushed" his wife XIVT1406. He never said he lifted or threw her XIVT1406. Shapiro has never been arrested XIVT1408.

Officer Amabile testified that Mr. Keen was "shocked" when he was arrested XIVT1411. He and Scheff told Michael Keen that he was facing the electric chair during his first interview with him XIVT1413. Mr. Keen was picked up at 8 a.m. the next morning and placed in handcuffs and leg shackles and placed in the back of their car XIVT1416. They drove back to Broward County, approximately four hours XIVT1417. Mr. Keen continued to maintain his innocence during the drive XIVT1419. In Broward County he was taken into an interrogation room and questioned further XIVT1423. Michael Keen never stated that he killed his wife or had a plan to kill his wife XIVT1426. 90% of the statement was in Amabile's handwriting XIVT1426. He's never done this in a case before or since XIVT1427. The written statement was not a verbatim transcription XIVT1428. Some are in question and answer form and some are from his recollection XIVT1429. There are numerous grammatical errors in the statement XIVT1437. At times, there are more questions than answers XIVT1438. Mr. Keen refused to give a taped statement because of his fear that the tape could be tampered with XIVT1439-40. He refused to sign the statement XIVT1440.

The prosecution called Michael Moran, a jailhouse informer XIVT1483. He claimed that he was in the same cellblock as Mr. Keen in 1984 XIVT1484. He was brought to Florida from an Iowa prison on an outstanding warrant on a 1980 charge for robbery and grand theft XIVT1484. He claims that he was in a cellblock

with Mr. Keen for ten days to two weeks XIVT1485. He claimed that Michael Keen solicited him to kill Shapiro XIVT1487. He had told Mr. Keen that he was going to bond out soon and be discharged on his Iowa sentence XIVT1487-88. He claimed that Mr. Keen had told him where to locate Shapiro XIVT1490. He claimed that he was to make it look like a robbery until he had him "in a vulnerable situation" XIVT1490. He was then to force him to write out a confession and a suicide note XIVT1490-91. He was then supposed to hang him XIVT1491. He was supposed to leave one note at the scene and mail one to Mr. Keen's attorney XIVT1491-92. He claims that Mr. Keen wrote down the phone number of Shapiro's parents' liquor store in New York XIVT1493. He produced an envelope that he claimed was partially in his handwriting and partially in Mr. Keen's XIVT1495. He claims that he was also given the address of Shapiro's grandparents and a date that he was supposed to give a deposition XIVT1497. He claims that he was also told that Shapiro might be at "some cheap motel" in Miami Beach XIVT1498. He claimed that he was supposed to bring photos of Ken Shapiro dead to Michael Keen's brother in Orlando XIVT1500. He claimed that he was to receive $20,000 and that he "forgot how it was to be handled." XIVT1500.

His armed robbery charge in Broward County was ultimately dropped after he became a State witness in this case XIVT1502. He is now serving life without parole for a subsequent first degree murder in Michigan XIVT1504. In October, 1994 he had written defense counsel in this case and stated that he would refuse to testify XIVT1514. In November, 1980, he committed

an armed robbery and stole a car, credit cards, and money in Fort Lauderdale XIVT1524. He went to Arkansas and was arrested XIVT1524. He was later arrested for two counts of murder while he was out on bond XIVT1525. He was acquitted on these charges and then was arrested in Iowa XIVT1525. He began doing a five year sentence in 1982 in Iowa XIVT1526. He was brought back to Florida in September, 1984 XIVT1526. He was placed in the Broward County Jail on October 1, 1984 XIVT1528. He filed a motion for bond reduction on October 4, 1984 and failed to mention that he was serving a sentence in Iowa XIVT1529. He knew that he was facing a three year mandatory minimum and a possible sentence as a habitual offender in October, 1984 XIVT1531. He had a history of failures to appear XIVT1533.

He claims that he first met Mr. Keen on October 2, 1984 XIVT1533. He claims that Mr. Keen solicited him after only three or four days together even though they were not friends XIVT1537. He claimed that he was supposed to pick up $300 from a Western Union and buy a cheap gun and camera XIVT1538. He claimed that afterwards he was going to be paid in $500 a month installments and receive a $5,000 piano XIVT1539. He claimed that in October, 1984 he had a realistic chance of getting out of jail even though he was being held without bond, had prior failures to appear and facing a potential habitual offender sentence on a armed robbery charge XIVT1540. One month after beginning his work for the State he went from a no bond status to $1,000 bond XIVT1547. In December, 1984 he bonded out and was rearrested within a month XIVT1550. He pled guilty to two offenses and began doing a ten year sentence XIVT1551. In 1987

he was brought back from prison in Iowa to face his Broward County case XIVT1551. The prosecutor dropped his 1980 robbery case in return for his testimony in this case XIVT1553. He was supposed to be returned to Iowa for fulfillment of sentence but he was released in October, 1987 XIVT1554. He was involved in a first degree murder and armed robbery in Michigan within a month after being released XIVT1554. He was convicted of both these charges and sentenced to life without parole XIVT1556. He admits he uses numerous aliases and is a manipulative person XIVT1556-57.

Moran also claimed that when he was in the Broward County Jail in 1987 he obtained a confession to a first degree murder from Dennis Sochor XIVT1560. He claimed that this also happened within four or five days of meeting Mr. Sochor XIVT1560. He claimed that Sochor also solicited him to kill a witness in his case XIVT1560-61. He also testified against Mr. Sochor XIVT1562. He admits that he is a jailhouse lawyer XIVT1562. He admits that he has 15 convictions including 8 felonies XIVT1564-66. He told the Sochor jury that he would turn his life around if he is released XIVT1566-67.

The State called Dale Nelson, a State Attorney Investigator XVT1579. In October, 1984, he received an envelope from Michael Moran Hickey XVT1581. He took this to the FBI lab XVT1583. He also took fingerprints from Mr. Keen in 1987 XVT1585. The State called Max Jarrel, a fingerprint examiner from the FBI XVT1588. He testified that one latent on the envelope matched Michael Keen and none matched Michael Moran XVT1597,1606. The State rested XVT1609.

The defense entered certain stipulations into evidence. Both sides stipulated that on November 15, 1981 that sunset was at 5:32 p.m. XVT1621. Both sides stipulated that the Miami Dolphin game started at 1:00 p.m. XVT1621. The defense also introduced the Prudential Life Insurance policy on Michael Keen XVT1621. It introduced the letter from the prosecutor to Shapiro's attorney announcing that the State had no intent to prosecute him XVT1622. It also introduced copies of Michael Moran Hickey's motion to set bond and the order reducing his bond XVT1622. Both sides then rested XVT1622. Mr. Keen was convicted of first degree murder XVIT1809.

The State introduced no new evidence at the penalty phase XVIIT1839-1840. The defense introduced the testimony of Bonnie Keen, Michael's mother XVIIT1840. (Her prior testimony was read to the jury by agreement of the parties due to the fact that she is 75 years old and recovering from a stroke.) XVIIT1840. Michael is the oldest of four children XVIIT1842. He was born in Jacksonville and grew up in Haines City XVIIT1841. He was very protective towards the other children and always looked after them XVIIT1841. He was always a quiet and gentle person XVIIT1841. He excelled in all the arts, especially piano XVIIT1841. He competed in the International Piano Guild XVIIT1841. He was an honor society student in high school and played on the football team XVIIT1842.

Michael's father was a Marine who saw combat in the South Pacific XVIIT1842. He became an alcoholic and deserted the family when Michael was seven years old XVIIT1842. Michael had to assume the role of the father figure, the head of the family

XVIIT1842. Michael assumed that role until he went to college XVIIT1842. Michael has always been a good son to her and a good brother to the other children XVIIT1842-43.

Michael and Ken Shapiro came to her house after Anita's death. Michael was very subdued XVIIT1843. He lost all interest in everything and sat around the house and grieved XVIIT1843.

Both sides stipulated that Michael Keen had been incarcerated since 1985 and only one disciplinary report XVIIT1844. This was possession of a misdemeanor amount of marijuana in 1989 XVIIT1844. Both sides then rested XVIIT1845. The jury recommended a sentence of life imprisonment by a vote of seven to five XVIIT1903. The trial court imposed the death penalty XVIIT1918-42.

SUMMARY OF THE ARGUMENT

1. The trial court improperly admitted hearsay evidence in the guise of "explaining the police investigation". This rationale has been rejected by this Court. Wilding v. State, 674 So. 2d 114 (Fla. 1996); Conley v. State, 620 So. 2d 180 (Fla. 1993); State v. Baird, 572 So. 2d 904 (Fla. 1990). This was harmful error.

2. The trial court erred in denying a motion for mistrial after a witness mentioned the prior trial of this case. Jackson v. State, 545 So. 2d 260, 262-63 (Fla. 1989).

3. The trial court improperly refused to allow the introduction of a letter which State witness, Michael Moran, wrote to the judge in his Michigan case. This letter was relevant to show Moran's motive for testifying and as

impeachment by prior inconsistent statement. Cowheard v. State, 365 So. 2d 191 (Fla. 3d DCA 1978).

4. The trial court erred in allowing a lay witness to identify Mr. Keen's printing on a note when the witness had insufficient familiarity with the printing.

5. The trial court erred in allowing a police officer to testify as to whether a scream or splash could be heard from the flybridge of Mr. Keen's boat when this was based on pure speculation. Fino v. Nodine, 646 So. 2d 746 (Fla. 4th DCA 1994).

6. The trial court erred in admitting improper collateral offense evidence and opinion evidence. Hayes v. State, 660 So. 2d 257 (Fla. 1995).

7. The trial court gave a one-sided jury instruction on jurisdiction which improperly highlighted the State's theory.

8. The trial court erred in prohibiting the cross-examination of Michael Moran concerning his intent to invoke the Fifth Amendment.

9. The trial court erred in denying Mr. Keen's motion to suppress his police statements. Mr. Keen had previously indicated his desire to deal with the police through counsel. He was not taken to first appearances within 24 hours as required by Fla.R.Crim.P. 3.130 and Article I, Section 16 of the Florida Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992); Peoples v. State, 612 So. 2d 555 (Fla. 1992); Phillips v. State, 612 So. 2d 557 (Fla. 1992); Owen v. State, 596 So. 2d 985 (Fla. 1992).

10. The trial court erred in failing to dismiss the indictment as it was based on perjured testimony. Patrick Keen testified to the grand jury that Michael Keen had made inculpatory statements about this offense. He subsequently recanted this under oath. He was convicted of perjury arising out of this testimony. An indictment can not stand when it is based on perjured testimony on a material element. Anderson v. State, 574 So. 2d 87 (Fla. 1991); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

11. The trial court improperly restricted Mr. Keen in his cross-examination of the interrogating officers about the fact that they were disciplined for their improper interrogation techniques in other cases. Mendez v. State, 412 So. 2d 965 (Fla. 2d DCA 1982).

12. Florida had no jurisdiction to prosecute this case as the offense occurred outside the territorial jurisdiction of Florida. People v. Holt, 440 N.E.2d 102 (Ill. 1982).

13. The case must be dismissed due to prosecutorial misconduct intentionally designed to provoke a mistrial. Duncan v. State 525 So. 2d 938 (Fla. 3d DCA 1988).

14. The Standard Jury Instruction on Reasonable Doubt is unconstitutional. Cage v. Louisiana, 498 U.S. 39 (1990).

15. The trial court erred in overriding the jury's recommendation of life imprisonment. There were several reasonable bases for the jury's recommendation. Another principal in this case was never prosecuted and testified as a State witness. The disparate treatment of a principal is a reasonable basis for a life recommendation. Pomeranz v. State,

___ So. 2d ___, 23 Fla. L. Weekly S8 (Fla. December 24, 1997); Craig v. State, 685 So. 2d 1224 (Fla. 1996); Brookings v. State, 495 So. 2d 135 (Fla. 1986). The key State witness was an admitted perjurer who was testifying to save his own life. Doubts about the credibility of the State's witnesses concerning the circumstances of the offense are a reasonable basis for a life recommendation. Pomeranz; Douglas v. State, 575 So. 2d 165 (Fla. 1991). Michael Keen had a difficult early life. He had an alcoholic father who abandoned the family when he was seven. Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Scott v. State, 603 So. 2d 1275 (Fla. 1992). He was a good brother and son. Barrett v. State, 649 So. 2d 219 (Fla. 1996); Scott; Perry v. State, 522 So. 2d 817 (Fla. 1988). Despite his early difficulties he had many positive achievements and character traits. Barrett, Scott. He had an excellent work record. Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987). Mr. Keen had an excellent record while incarcerated. Fead; McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). He has a good prospect for rehabilitation. Barrett; Holsworth; Fead.

16. The trial court committed substantial errors in its sentencing order.

17. The trial court erred in failing to consider life without parole as a sentencing option. Salazar v. State, 852 P.2d 1357 (Okl. Cr. 1993).

18. Electrocution is cruel and unusual punishment.

19. Florida's death penalty statute is unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE INTRODUCTION OF IMPROPER HEARSAY.

The trial court allowed the admission of improper hearsay evidence in the guise of explaining the police investigation XIIT1323-1327. Mr. Keen's motion for mistrial was denied and his objection overruled on this issue XIIT1324-27. This Court has consistently rejected the rationale of "explaining the police investigation" as a reason for allowing a police officer to testify to hearsay evidence from other witnesses. Wilding v. State, 674 So. 2d 114, 118-119 (Fla. 1996); Conley v. State, 620 So. 2d 180, 182-83 (Fla. 1993); State v. Baird, 572 So. 2d 904 (Fla. 1990). This is reversible error. Wilding; Conley; Baird; Thomas v. State, 581 So. 2d 993 (Fla. 2d DCA 1991), overruled on other grounds in State v. Jennings, 666 So. 2d 131 (Fla. 1995); Trotman v. State, 652 So. 2d 506 (Fla. 3d DCA 1995); Davis v. State, 493 So. 2d 11 (Fla. 3d DCA 1986); Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981); Young v. State, 664 So. 2d 1144 (Fla. 4th DCA 1995); Horne v. State, 659 So. 2d 1311 (Fla. 4th DCA 1995); Van Pullen v. State, 622 So. 2d 19 (Fla. 4th DCA 1993); Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989). The admission of this evidence constituted impermissible hearsay under the Florida Evidence Code, see Fla. Stat. 90.801-802, denied Mr. Keen his rights under the Confrontation Clause of Article I, Section 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution and denied him due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

In the present case the State introduced hearsay testimony to indicate there was other evidence of Mr. Keen's guilt.

> Q. (Prosecutor) When did you first get involved in investigating her disappearance or her death?
>
> A. (Officer Amabile) I became involved in the case in August of 1984.
>
> Q. At that point, what had been the status of the investigation?
>
> A. The case had remained open and it was classified only as a missing persons case.
>
> Q. Why did you begin to investigate the case at that time?
>
> A. The office had received information from two insurance companies that they had received information that the case was not a missing persons case, but a murder.
>
> Q. As a result of receiving that information, then, what did you do in the reopening of the investigation?
>
> A. The initial call to the office entailed that a Patrick Keen --
>
> DEFENSE COUNSEL: Your Honor, I'm going to object to any hearsay coming from any other source.
>
> THE COURT: Sustained.
>
> Q. Without telling us what was said, first of all, I would like to know, do you know Patrick Keen?
>
> A. Yes, I do.
>
> Q. Have you met Patrick Keen?
>
> A. Yes, I did.

Q. And without telling us what was said during this period of time in August of ‘84, did you talk to Patrick Keen?

A. Yes, I did.

Q. And do you know what Mr. Keen’s relationship was to Michael Keen?

A. Yes, I do know.

Q. And what was that relationship?

A. They are brothers.

Q. Now, as a result of talking to him, did you pursue your investigation in this case?

A. That is correct.

Q. Tell us what you did?

XIIT1323-1324.

Mr. Keen then moved for mistrial and the following colloquy occurred.

DEFENSE COUNSEL: We move for a mistrial. They have clearly -- here is what they said. We believed information from the insurance company, that this was not an accidental death, it was murder. The next thing we said, we talked to Patrick Keen, and based on that information, or we continued with our investigation on a clear inference to be drawn as Patrick Keen said that it was a murder, and Patrick Keen was established as the defendant’s brother, so they got a hearsay statement in. And what else can be concluded from the fact we interviewed the defendant’s brother and we had information that this was not an accident, this was a homicide. What else did the brother tell him about the fact that it was a homicide? What else can be concluded from that?

PROSECUTOR: The jury is entitled to know the background, the reason why these officers three years later are pursuing an investigation. They have not made any specific reference to quoted statements made by Patrick Keen whatsoever, and oftentimes we do ask questions, where did your investigation take you

> next, who did you talk to; as a result of talking to that person, what did you do next.
>
> DEFENSE COUNSEL: If they just said, who did you talk to; we talked to A, B, and C; that would be one thing. But they didn't say that. They went out and canvassed and spoke to a bunch of people. That line of questioning was structured. We opened the investigation because we received information from the insurance company that it is not a murder, clearly hearsay, and clearly offered the truth of the matters attested.
>
> And then the next question, do you know back when we received information from Patrick Keen. What else, what other conclusion are you going to draw, and it's going to be compounded by the fact they are not calling Patrick Keen.
>
> THE COURT: The objection is overruled, motion is denied.

XIIT1325-1327.

This was improper hearsay. The officer stated that the Sheriff's Office had received information from two insurance companies that this was a murder and not a missing persons case XIIT1323. He then went on to say that he had received information from Patrick Keen and identified Patrick as Michael's brother XIIT1324. He then stated that this led him to interview Ken Shapiro XIIT1324-27. This was improper hearsay designed to infer that Patrick and the insurance companies had given the police other evidence of Michael Keen's guilt, to bolster Ken Shapiro, and to corroborate the police theory of the case.

The first aspect of the improper hearsay is very similar to that held to require reversal in Van Pullen. In Van Pullen, a police officer testified that he had been advised to be on the lookout for suspects in a "possible rape and abduction".

622 So. 2d at 19. The court held it to be reversible error even though it contained no direct reference to the defendant, but merely described the nature of the offense. Here, the statement that this was a murder and not a missing person case was even more prejudicial than the reference in Van Pullen. The State had introduced Michael Keen's original police statement that this was a missing person case through two witnesses XIT1193-1199,1209-1231. Ken Shapiro also admitted that he had originally made police statements to the same effect XT977-980. If the jury had believed this testimony it would have had to acquit Mr. Keen. The improper hearsay that the police had information from two insurance companies that this was a murder and not a missing person case was harmful error as it provided improper rebuttal of this hypothesis of innocence. Additionally, the State introduced Michael Keen's police statement that Ken Shapiro had pushed he and his wife off the boat and that he thought this was an accident XIIT1363.

The second portion of the hearsay was also harmful error. The prosecutor brought out that the officer had received information from Patrick Keen and as a result of that information he continued his investigation and interviewed Ken Shapiro XIIT1324-27. He also specifically brought out that Patrick Keen is Michael Keen's brother XIIT1324. This left the inescapable inference that Patrick Keen had supplied information which pointed to the guilt of Mr. Keen, which corroborated Ken Shapiro's version of events and which supported the police theory of the case. This is akin to the testimony that this Court found improper in Conley. In Conley,

this Court held that an officer's testimony that he "received a call in reference to a man chasing a female down the street" and "the man supposedly had some type of gun or rifle". 620 So. 2d at 182. This Court held that this was reversible error even though it did not contain a direct reference to the guilt of the defendant.

In Thomas, the police officer stated that someone had called in and gave a description of a couple of guys at a bar with drugs. 581 So. 2d at 995. In Trotman, the Court held that it was reversible error for an officer to testify that after speaking to a juvenile he arrested the defendant. 652 So. 2d at 507. The Court quoted with approval its prior holding in Postell.

> When the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay.

Postell v. State, 398 So. 2d 851, 855 (Fla. 3d DCA 1981) (citing State v. Bankston, 63 N.J. 263, 307 A.2d 65 (1973). See also Wilding, supra, at 119 quoting same portion of Postell with approval.

The testimony here was especially harmful given the nature of the evidence. Virtually the State's entire case was the word of Ken Shapiro. In reversing Mr. Keen's conviction previously this Court stated:

> It would be legerdemain to characterize the evidence as overwhelming; the real jury issue in this trial centered on the credibility of Shapiro versus the credibility of Keen.

Keen v. State, 504 So. 2d 396, 401 (Fla. 1987).

The lead investigative officer, Philip Amabile testified that "from an investigative standpoint" the "case really really boils down to who or you going to believe Ken Shapiro or Michael Keen" XIVT1395. The admission of testimony that there was other information from insurance companies and from Patrick Keen, Michael Keen's brother, was harmful error. It was especially harmful when it was followed up with the statement that this led to interviewing Ken Shapiro. This led jurors to believe that this other information would corroborate the testimony of Ken Shapiro whose credibility was essential to the State's case. His testimony was otherwise suspect. He admitted committing perjury in this case and he has never been prosecuted in this case even though he admitted being a principal in a first degree murder XIT1118-19,1121. Anything which would infer other evidence to bolster his version is harmful error.

POINT II

THE TRIAL COURT ERRED IN DENYING MR. KEEN'S MOTION FOR MISTRIAL AFTER A WITNESS DISCUSSED THE PRIOR TRIAL OF THIS CASE.

This issue involves the trial court's denial of Mr. Keen's motion for mistrial after a witness discussed the prior trial of this case. This denied Mr. Keen due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The following colloquy occurred between defense counsel and State witness, Maddie Genova, an insurance agent.

> Q. (Defense counsel) And Mr. Keen never collected any benefits on this policy, did he?
>
> A. (Ms. Genova) That, I don't know.
>
> Q. Well, you said you have the whole Prudential file there. If you do, you would know that.
>
> A. This was from his last trial. This was not the complete file up to date.

XIIT1276.

Subsequently, defense counsel moved for a mistrial, which the trial court denied XII,XIIIT1279-84,1300-1314. This was error. A mistrial is required when jurors are made aware of a prior conviction in the same cause. Jackson v. State, 545 So. 2d 260, 262-263 (Fla. 1989); Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987); Cappadona v. State, 495 So. 2d 1207 (Fla. 4th 1986); United States v. Williams, 568 F.2d 464 (5th Cir. 1978); Hughes v. State, 490 A.2d 1034 (Del. 1985). Although the witness in the present case used the word "trial" rather than "conviction" a mistrial is still required. The discussion of the prior trial would naturally lead jurors to speculate as to whether there had been a conviction and a reversal on appeal. Virtually everyone is aware that there are not retrials of acquittals. A new trial is required as in Jackson, Weber, and Cappadona.

The trial court denied the motion on the merits. However, it also made comments to the effect that the objection may not be contemporaneous XIIT1308-1314. The objection was timely to preserve the issue. The motion for mistrial was made eight questions after the witness discussed the "last trial" when the

witness completed her testimony, before any other witnesses were called XIIT1276-79.

This Court has outlined the parameters of a timely objection.

> An objection need not always be made at the moment an examination enters impermissible areas of inquiry. In *Roban v. State,* 384 So. 2d 683 (Fla. 4th DCA), *review denied,* 392 So. 2d 1378, 1379 (Fla. 1980), objection to an impermissible gratuitous comment by a witness was made several questions later after the objectionable testimony. The district court found the objection timely because the question put to the witness was within the time frame for a contemporaneous objection. In the case now before us, objection was made during the impermissible line of questioning, which is sufficiently timely to have allowed the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial.

Jackson v. State, 451 So. 2d 458 (Fla. 1984).

Other Florida courts have also outlined the purposes of the rule.

> The purpose of requiring contemporaneous objection is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue. *Dodd v. State,* 232 So. 2d 235, 238 (Fla. 4th DCA 1970). When objection is made to unsolicited comments of a witness, the immediacy of the objection is not as critical as when the objection is to a question. Neither the questioner nor the other counsel can anticipate such voluntary statements from the question. Thus, courts have long recognized that objections to unsolicited comments are timely if made within a reasonable time. Here it appears defense counsel voiced his objection and moved for mistrial within a reasonable time.

Carr v. State, 561 So. 2d 617, 619 (Fla. 5th DCA 1990) (footnote omitted).

> An objection need not always be made at the moment an examination enters impermissible areas of inquiry. An objection made during an impermissible line of questioning is sufficiently timely if it allows the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial. *Jackson v. State,* 451 So. 2d 458, 461 (Fla. 1984), *cert. denied on*

> *other grounds,* 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988), *citing Roban v. State*, 384 So. 2d 683 (Fla. 4th DCA), *rev. denied*, 392 So. 2d 1378 (Fla. 1980).
>
> In *Roban*, a motion for mistrial based on a comment on the right to remain silent was not made until three more questions had been asked and answered. The Roban court found that his was within the time frame for a contemporaneous objection. Roban, at 685. See also *Johnston v. State*, 497 So. 2d 863, 869 (Fla. 1986) (an objection and motion for mistrial occurring after four additional questions had been asked and answered complied with the contemporaneous objection rule). Based on the foregoing authority, we find that the objection and motion for mistrial herein were sufficient to preserve for review the issue now raised by the appellant, and reject the state's argument to the contrary.

Sharp v. State, 605 So. 2d 146, 148 (Fla. 1st DCA 1992).

Here, as in Carr, the witness volunteered an unforeseen comment. The defense objected in a timely manner. Nothing of significance happened in the interim. The motion for mistrial was timely. The trial court should have granted the motion.

POINT III

> THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM INTRODUCING A LETTER WHICH WAS RELEVANT TO A WITNESS' MOTIVE AND WHICH WAS INCONSISTENT WITH HIS TRIAL TESTIMONY.

The trial court prohibited defense counsel from introducing a prior inconsistent statement from key prosecution witness, Michael Moran, which would have contradicted his testimony on a material matter and would have exposed his motives for testifying. This restriction denied Mr. Keen his rights to confront and cross-examine witnesses and to due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution, the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution, and Florida Statutes 90.608 and 90.614.

The prosecution called Michael Moran (aka Michael Hickey) to claim that Mr. Keen solicited him to kill Ken Shapiro while they were both in the Broward County Jail XIVT1483-1583. He was the only witness to testify to these allegations. During his direct testimony, the prosecutor had the following colloquy with Mr. Moran:

> Q. (Prosecutor) Ultimately did you wind up in Michigan?
>
> A. (Mr. Moran) Yeah.
>
> Q. And now, sir, you are serving time in Michigan, am I correct?
>
> A. That is right.
>
> Q. And tell us what for and what is your sentence?
>
> A. First degree murder, life with no parole.
>
> Q. As a result of your testifying here in this case, have there been any promises in any way to help you with your case or to try to get you a more lenient treatment?
>
> A. There is nothing that my testimony could do here in Michigan.
>
> Q. There is nothing that we can do?
>
> A. Exactly.
>
> Q. And have you been promised in any way that the State Attorney's Office will reduce your sentence, help you get your sentence reduced?
>
> A. I said the State of Florida can't do nothing about Michigan.

XIVT1504.

On cross-examination, Mr. Moran denied testifying against the co-defendant in his Michigan case, Ted Scafey XIVT1507-1508. He identified a letter that he wrote to the judge in his case "after conviction, prior to sentencing" XIVT1508-09. He specifically denied that he had any interest in having the Michigan authorities be made aware of his testimony in Florida XIVT1567.

Mr. Keen unsuccessfully attempted to introduce the letter which Mr. Moran had written to the judge in Michigan after his conviction but prior to sentencing XVT1616-19. This letter was admissible in three respects. (1) It is direct evidence of Mr. Moran's motive for testifying. (2) It is admissible as a prior inconsistent statement. (3) The prosecution opened the door to this entire area with its direct testimony. A defendant has an absolute right to explore pending charges against a prosecution witness in order to bring out the witness' motive. Davis v. Alaska, 415 U.S. 308 (1974); Thornes v. State, 485 So. 2d 1357 (Fla. 1st DCA 1986); Douglas v. State, 627 So. 2d 1190 (Fla. 1st DCA 1993); Cowheard v. State, 365 So. 2d 191 (Fla. 3d DCA 1978); Auchmuty v. State, 594 So. 2d 859 (Fla. 4th DCA 1992).

There is no requirement that the there be an agreement between the State and the witness.

> There is no requirement, as a predicate to admissibility of this testimony, to show that the state and the witness have first entered into an agreement providing for the manner in which the witness will testify and the effect of such testimony on any future action which the state may take against her. The mere chance that a witness, in her own mind, may be attempting to curry favor is sufficient

> to allow for broad cross-examination in order to show bias.

Thornes, supra, at 1359.

There is no requirement that the witness' pending case be in the same jurisdiction as the case on trial. Cowheard, supra.

In this case, the letter at issue was relevant to show the witness' motive. In the letter the witness makes a point of telling his judge in Michigan that he was a prosecution witness in this case. He stated "I testified against a man who had killed his nineteen year old pregnant wife and then attempted to hire someone to kill the State's chief witness." Appendix, p. 1. He is going out of his way to mention his Florida testimony to the Michigan judge prior to sentencing. The case for admission of this evidence is even stronger than in Cowheard. In Cowheard the defendant was not allowed to bring out the fact that a State witness was awaiting sentencing in Federal Court. The Court held this to be reversible error even though there was no showing that the prosecution would attempt to aid him in any way in Federal Court. Here, the witness made a point of writing to his sentencing judge and informing him that he was testifying in a first degree murder case in Florida. This is relevant to Moran's motive for testifying.

The letter was also admissible as impeachment by a prior inconsistent statement. Fla. Stat. 90.614 states:

> If a witness denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible.

(Emphasis supplied). See also Fleming v. State, 457 So. 2d 499 (Fla. 2d DCA 1984); Pugh v. State, 637 So. 2d 313 (Fla. 3d DCA 1994).

Here, Moran admitted writing the Michigan judge prior to sentencing. However, he denied the crucial parts of the letter. He stated that he could receive no benefits in Michigan from testifying in Florida XIVT1504. He stated that he had no interest in the Michigan authorities knowing about his testimony here XIVT1567. The letter was admissible to impeach this testimony. The fact that he would take the trouble to write his Michigan judge and specifically mention his Florida testimony is proper impeachment.

The letter was also admissible to impeach another aspect of Moran's testimony. He claimed that he did not testify against his Michigan co-defendant, Ted Scafey. The letter directly contradicts this testimony. In the letter he specifically states that he "testified against the real killer". Appendix, p.1. The defense was attempting to show that when Moran was facing prison he would say anything to reduce his exposure and that his favorite way to help himself was to become a prosecution witness.

This letter was also admissible as the State had opened the door to this entire area. The State had introduced Moran's Michigan case. It left the false impression that he had no possible hope of his Florida testimony benefitting him in Michigan.

The exclusion of this testimony was harmful error. Moran was the only witness to testify to the alleged attempt to hire

him to kill Shapiro. This letter would have provided insight into his motive for testifying and would have impeached his trial testimony.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING AN UNQUALIFIED WITNESS TO IDENTIFY A PRINTED NOTE AS BEING FROM MR. KEEN.

The trial court erred in allowing Ken Shapiro to claim to identify a printed note as being from Mr. Keen. Mr. Shapiro was not an expert in handwriting analysis and had an inadequate knowledge of Mr. Keen's printing to identify the note. This evidence denied Mr. Keen due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

Ken Shapiro testified that he had seen Michael Keen's handwriting previously XIIT1185-86. He testified that he thought he would only be able to identify his signature XIIT1166. However, when he was asked if he had seen Mr. Keen print documents he stated: "On certain rare occasions, yes." XIIT1185. He was then shown a printed note which Michael Moran had turned over to the State Attorney's Office XIIT1185. Over objection, he was allowed to testify that he could identify one word on the printed note XIIT1165-86. This was improper as Shapiro was not qualified to identify Mr. Keen's printing.

In order for a witness to identify handwriting he must either be an expert or "sufficiently acquainted with the handwriting of the defendant to testify as a skilled witness". Clark v. State, 114 So. 2d 197, 203 (Fla. 1st DCA 1959). Here,

the witness stated that he had seen Mr. Keen's handwriting. However, he also stated that he had had only seen him print "on rare occasions". He also stated that he thought he would only be able to identify his signature. He was clearly not qualified to identify his printing. This case is akin to Fassi v. State, 591 So. 2d 977 (Fla. 5th DCA 1991). In Fassi a handwriting expert was allowed to identify spray painted graffiti as coming from the defendant by comparing it with his handwriting. Id. at 978. The Court held that this was reversible error as these were two different mediums. Printing is substantially different from handwriting. Mr. Shapiro did not have an adequate knowledge of Mr. Keen's printing to identify it. This error is harmful as this identification helped corroborate Mr. Moran's otherwise incredible testimony. A new trial is required.

POINT V

THE TRIAL COURT ERRED IN ALLOWING A LAY WITNESS TO EXPRESS AN OPINION BASED ON A INSUFFICIENT PREDICATE.

The trial court allowed former police officer Hector Mimoso to testify that a scream or splash could have been heard from the flybridge of Mr. Keen's boat over objection, when a sufficient predicate for this testimony had not been made. This denied Mr. Keen due process of law pursuant to Article I, Sections 2,9, 16, and 17 of the Florida Constitution; the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Fla. Stat. 90.604 and 90.701. A new trial is required.

The prosecution called Hector Mimoso, a former Broward County Sheriff's officer to testify. He stated that on November 15, 1981 he went to Michael Keen's home after 11 p.m. XIIT1190. He claimed that he went up to the fly bridge of Mr. Keen's boat XIIT1199. He testified, over objection, that someone on the flybridge would be able "to hear a scream or a splash" from the back of the boat XIIT1200. The State had not laid a predicate for this lay opinion testimony.

Lay opinion testimony can only be admitted if a proper predicate is laid. Fino v. Nodine, 646 So. 2d 746 (Fla. 4th DCA 1994); Laffman v. Sherrod, 565 So. 2d 760 (Fla. 3d DCA 1990); Beck v. Gross, 499 So. 2d 886 (Fla. 2d DCA 1986); Albers v. Dasho, 355 So. 2d 150 (Fla. 4th DCA 1978). Speculation is inadmissible. Durrance v. Sanders, 329 So. 2d 26 (Fla. 1st DCA 1976). Mr. Mimoso was not an expert. He did not perform any tests. He merely stood on the top of the flybridge and guessed that someone on the flybridge could hear a scream or splash at the back of the boat. He never testified that he turned on the engine of the boat or made any attempt to determine what competing sounds could be interfering. He also made no attempt to simulate the volume of a scream or splash. His testimony was mere speculation.

The admission of this testimony was harmful error. The prosecution introduced the testimony of several witnesses that Anita Keen had disappeared while he and Ken Shapiro were out on the boat and that she was missing when they returned XIIT1191-1199,1209-1221. If the jury was to believe this version of events it would have to acquit Mr. Keen. The State

specifically introduced testimony that Mr. Keen had said he did not hear a splash or scream XIIT1201. The improper opinion testimony of Mr. Mimoso was designed to hurt Mr. Keen's credibility as to all issues and to specifically rebut the possibility that Anita Keen's death had been accidental. The admission of this speculation was harmful error and a new trial is required.

POINT VI

THE TRIAL COURT ERRED IN ALLOWING IMPROPER COLLATERAL OFFENSE EVIDENCE AND OPINION EVIDENCE.

The trial court erred in allowing improper collateral offense evidence and opinion evidence. This denied Mr. Keen due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The prosecution introduced a tape of a conversation between Mr. Keen and Ken Shapiro. In the tape Mr. Keen urges Shapiro to talk to his girlfriend, Carol Martin XT1004. Shapiro then states:

> And in, in light of your past history, even she believes that you're guilty. So, and of course again in many ways she has mixed feelings, as do I, because I'll never forget the days where you and I did things together. And, you know, she, she knows and will remember, you know, the nice guy that you really have been and can be, and then again she, she knows, in light of your past history, what you're capable of and, and felt that perhaps she was in potential danger down the road.

XT1005.

The references to Mr. Keen's "prior history" and that history causing Ms. Martin to believe that he's guilty and to fear for her safety clearly constitute improper collateral offense evidence. Indeed, this case was previously reversed for similar evidence. Keen v. State, 504 So. 2d 396 (Fla. 1987).

It is clear that a witness may not offer his opinion on the guilt of the accused. Hayes v. State, 660 So. 2d 257 (Fla. 1995); Henry v. State, 700 So. 2d 797 (Fla. 4th DCA 1997); Zecchino v. State, 691 So. 2d 1197 (Fla. 4th DCA 1997). Here, Ken Shapiro was testifying to Carol Martin's opinion that Mr. Keen was guilty. This evidence was improper opinion as well as improper hearsay.

There was no objection to this evidence in this case. However, improper collateral offense evidence can constitute fundamental error. Davis v. State, 276 So. 2d 846 (Fla. 2nd DCA 1973) affirmed as State v. Davis, 290 So. 2d 30 (Fla. 1974). Here, the error was especially egregious as this case has been previously reversed due to similar collateral offense evidence.

POINT VII

THE TRIAL COURT ERRED IN GIVING AN IMPROPER SPECIAL JURY INSTRUCTION ON JURISDICTION.

The trial court erred in giving an improper jury special jury instruction over objection on jurisdiction. This denied Mr. Keen due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution.

The trial court gave the following instruction on jurisdiction.

> In addition to proving beyond a reasonable doubt all of the material allegations set forth in the Indictment, the State is also required to prove beyond a reasonable doubt that the State of Florida has territorial jurisdiction over the conduct attributable to the Defendant.
>
> In order for you to find that Florida has jurisdiction, you must find beyond a reasonable doubt that either:
>
> 1. The death of LUCIA ANITA KEEN occurred within the three (3) mile limit of Florida, or
>
> 2. An essential element of the offense occurred in Florida, such as premeditation, which was part of one continuous plan, design, and intent leading to the eventual death of LUCIA ANITA KEEN.

IIR308.

Mr. Keen objected to Paragraph Two of the instruction XVT1629-30.

This instruction was improper in two respects. First, it incorrectly states that the mere formation of premeditation in the State of Florida gives Florida jurisdiction. See Point XII. Secondly, the wording of the instruction is one-sided and improperly highlights the State's theory of the case. In Lane v. State, 388 So. 2d 1022 (Fla. 1980) this Court stated:

> Specific instructions must be given which require the jury to find beyond a reasonable doubt that either: (1) the fatal blow to the victim occurred in Florida; (2) the death of the victim occurred in Florida, or (3) an essential element of the offense which was part of one continuous plan, design and intent leading to the eventual death of the victim occurred in Florida.

388 So. 2d at 1029.

Paragraph Two of the instruction in this case is similar to Paragraph Three in Lane. However it contains a crucial difference. The instruction in the current case specifically tells the jury that Florida has jurisdiction if "premeditation" occurred in Florida as opposed to saying "an element" as the this Court held in Lane. This is crucial in this case. It was the State's theory that premeditation occurred here, not any other element. This instruction was one-sided and improperly highlighted the State's theory of the case. It is reversible error to give an unbalanced instruction. United States v. Dove, 916 F.2d 41, 44-46 (2d Cir 1990). It is error to single out a party's theory through a jury instruction. Baldwin v. State, 35 So. 220, 222, 46 Fla. 115 (Fla. 1903). This instruction was specifically designed to highlight the State's theory on this issue. Reversal for a new trial is required.

POINT VIII

THE TRIAL COURT ERRED IN ITS RESTRICTION OF CROSS-EXAMINATION OF A KEY STATE WITNESS.

The trial court erred in refusing to allow Mr. Keen to cross-examine State witness Michael Moran (a.k.a. Michael Hickey) concerning his previous statements to defense counsel that he would refuse to testify, even if it involved invoking the Fifth Amendment. This denied Mr. Keen due process of law pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The State called Michael Moran to testify to claim that Mr. Keen had tried to hire him to kill Ken Shapiro XIVT1483-1504. He was the only witness to testify to these alleged events. Moran was sentenced to life without parole in Michigan XIVT1504. He had written defense counsel a letter in which he stated that he would refuse to testify and if necessary he would invoke his Fifth Amendment right to remain silent XIVT1511-1516. The trial court prevented defense counsel from bringing out that Moran had stated that he intended to invoke his Fifth Amendment right XIVT1511-1516. This was an improper restriction on cross-examination of a key prosecution witness.

The erroneous restriction of cross-examination of a key prosecution witness is reversible error. Coco v. State, 62 So. 2d 892 (Fla. 1953); Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Zerquera v. State, 549 So. 2d 189 (Fla. 1989). In the present case, Mr. Moran's stated desire to claim the Fifth Amendment was relevant. Moran previously testified against Mr. Keen in return for pending cases in Florida being dropped XIVT1500-1503. He only became reluctant to testify when he learned that the Florida authorities would not help him on his first degree murder case in Michigan in which he was doing life without parole XIVT1504. Mr. Moran's complete change in attitude concerning his testimony was clearly relevant. It is well settled that the defense "should be allowed wide latitude to demonstrate bias or possible motive for a witness testimony". Lavette v. State, 442 So. 2d 265, 268 (Fla. 1st DCA 1983). Mr. Moran had no Fifth Amendment privilege. He had freely testified previously. Nothing that he had testified to

had implicated him in any manner XIVT1483-1504. Additionally, any claim of Fifth Amendment privilege would have to be resolved by a judge and could not stand based on a blanket claim by the witness. State v. Kelly, 71 So. 2d 887, 897 (Fla. 1954). Here, the witness' complete about face concerning his willingness to testify depending on the benefits he would receive is relevant. The fact that he would go so far as to improperly claim the Fifth Amendment is also relevant. This case must be reversed for a new trial.

POINT IX

THE TRIAL COURT ERRED IN DENYING MR. KEEN'S MOTION TO SUPPRESS HIS POLICE STATEMENTS.

The trial court erred in denying Mr. Keen's motion to suppress his police statements. He was interrogated even though he had invoked his rights to counsel and to remain silent. His statements were also taken even though the police failed to take him to first appearances within twenty four hours as required by the United States and Florida Constitutions and the Florida Rules of Criminal Procedure. The denial of this motion denied Mr. Keen his rights pursuant to Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution; the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Florida Rule of Criminal Procedure 3.130.

This Court originally held that the trial court properly denied the motion to suppress. Keen v. State, 504 So. 2d 400 (Fla. 1987). However, this Court should revisit its holding for two reasons. First, new grounds were raised in the present trial that were not raised previously. Second, this Court has explicitly overruled this decision on this issue. Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). A

court can change its prior ruling if it becomes convinced that the prior ruling is erroneous. Beverly Beach Properties v. Nelson, 68 So. 2d 604, 607-608 (Fla. 1953); Massie v. University of Florida, 570 So. 2d 963, 974-976 (Fla. 1st DCA 1990). Intervening caselaw is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196, 1208 (5th Cir. 1985). This Court should revisit its prior decision.

Here, counsel raised an additional ground that had not been raised previously. Don Scarborough of the Broward County Sheriff's Office testified that he took a taped statement from Mr. Keen, concerning this case, on December 10, 1981 XIIT1208. This statement was taken at the office of Bruce Randall, his attorney on this case XIIT1207. Mr. Keen agreed to speak with his attorney present XIIT1208. During the interview, Mr. Keen was asked how the police could reach him if they needed to speak to him again XIIT1211-12. His attorney indicated that Mr. Keen would stay in touch with him and that he could be reached through his office XIIT1213.

The next attempt by police to interview Mr. Keen was after his arrest on August 23, 1984. This was done by Officers Phillip Amabile and Richard Scheff XIIT1334. Officer Amabile testified that he had reviewed Mr. Keen's prior police statements XIIT1329. Defense counsel specifically objected on this additional ground when he renewed his pre-trial motion to suppress at the time the statement was introduced XIIT1338-47. The trial court overruled the objection XIIT1338-47. This additional ground significantly changes the motion to suppress.

The last police interview with Mr. Keen prior to his arrest was in the presence of his retained counsel XIIT1207. During the interview Mr. Keen's counsel specifically told the police that they could reach Mr. Keen through his office XIIT1213. This indicates a continuing

representation of Mr. Keen and a continuing desire to deal with the police through counsel. An attorney can invoke a defendant's rights to counsel and to remain silent under the Florida and United States Constitutions. Del Duca v. State, 422 So. 2d 40 (Fla. 2d DCA 1982); State v. Barmon, 67 Or.App. 369, 679 P.2d 888, 892 (Or. 1984); Stone v. State, 612 S.W.2d 542 (Tex.Crim.App. 1981). The facts in the present case are more compelling than those in Del Duca. In Del Duca counsel informed the police that he represented the defendant and that he did not want the police questioning his client. 422 So. 2d at 40. Here, the defendant gave a police interview with his retained counsel present and the attorney stated that he would deal with the police through counsel. It is clear that the attorney was acting on behalf of Mr. Keen. The police reinitiated interrogation of Mr. Keen after his arrest without honoring his prior request to deal with the police only through counsel. Edwards v. Arizona, 451 U.S. 477 (1981) prohibits the police from reinitiating interrogation of a person who has expressed a desire to deal with the police only through counsel. Del Duca, supra.

At the time of Mr. Keen's arrest, he immediately requested counsel in the presence of the officers. Mr. Keen was arrested at 10:15 a.m. at his business in Seminole County, Florida 1R161. At the time of his arrest, Mr. Keen told an employee, Sam Sparks, to get him a lawyer 1R162. The officers specifically noted that he had said this at 10:26 a.m. 1R179. This Court has previously stated that it did not take this to be an invocation of Mr. Keen's rights. 504 So. 2d at 400. However, this Court should revisit this in light of the additional fact that Mr. Keen had previously had retained counsel, had given a police statement with this counsel, and had expressed a desire to deal with the police only through counsel. This statement becomes much more clearly a desire

to speak to the police only through counsel in light of the prior background.

It is undisputed that Mr. Keen was not brought to first appearances until well beyond the required 24 hour period. 504 So. 2d at 399-400. Officer Amabile testified that he knew that the law required that a person be brought to first appearances within 24 hours. The 24 hours would have expired at 10:15 a.m. on August 24, 1984 and the bulk of the statements were taken between 1 and 8 p.m. on August 24, 1984 1R131-155. This Court previously held that this violated Rule of Criminal Procedure 3.130 but stated that this did not render statements made after this time inadmissible but that a defendant must show that the delay "induced" the statement. Id. at 400. This Court also distinguished its prior case of Anderson v. State, 420 So. 2d 574 (Fla. 1982) because Mr. Anderson had been indicted and Mr. Keen had not. Id. at 400. This Court rejected a claim of a Sixth Amendment violation because Mr. Keen had not been formally charged. Id. This Court made no analysis of the case under the Florida Constitution.

This Court has specifically rejected its reasoning in Keen I. In Owen v. State, 596 So. 2d 985 (Fla. 1992) this Court held that the Sixth Amendment right to counsel attaches at first appearances and disapproves of this aspect of Keen I. Id. at 988-990. This Court has also since held that the right to counsel under the Florida Constitution attaches at first appearances. Phillips v. State, 612 So. 2d 557 (Fla. 1992); Peoples v. State, 612 So. 2d 555 (Fla. 1992); Traylor v. State, 596 So. 2d 957, 970 (Fla. 1992). It is now clear that the failure to take Mr. Keen to first appearances within 24 hours is not only a violation of Rule 3.130, but also a violation of the Sixth Amendment and Article I, Section 16 of the Florida Constitution.

This Court should revisit its holding that statements taken in violation of the 24 hour rule are not per se inadmissible, but that a defendant must show that the delay induced the statement, in light of the fact that this Court has now recognized that the violation of the 24 hour rule is not merely a violation of the Florida Rules of Criminal Procedure, but is a violation of the Florida Constitution and the Sixth Amendment to the United States Constitution. Many states hold that the failure to take a defendant before a magistrate within a prescribed time period requires that statements taken after this time must be suppressed. Delaware holds that an accused must be taken before a magistrate within 24 hours and any statement taken outside of this period must be suppressed. Vorhauer v. State, 59 Del. 35, 212 A.2d 886 (1965). Both Pennsylvania and Massachusetts require that a defendant must be taken before a magistrate within six hours and that any statement taken outside this period must be suppressed. Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977); Commonwealth v. Duncan, 514 Pa. 395, 525 A.2d 1177 (1987); Commonwealth v. Rosario, 422 Mass. 48, 661 N.E.2d 71 (1996). The Delaware Supreme Court has outlined the reasons for such a policy.

> We hold that under the facts and circumstances of this case, there was an "unreasonable delay" as a matter of law under Sect. 1911 and Rule 5(a); and that the detention of the defendant, in excess of the 24 hour period specified by Sec. 1911, was unlawful by reason of the violation of both Sec. 1911 and Rule 5(a).
>
> We further hold that the incriminating statement obtained from the defendant during such unlawful detention, i.e., after the expiration of the 24 hour period, was rendered inadmissible as a matter of law for that reason alone, without regard to voluntariness.
>
> While our conclusions are not based upon comparable constitutional grounds, we adopt the rationale of this court in Richards v. State, 6 Terry 573, 77 A.2d 199 (1950) wherein

this court adopted the federal rule barring evidence obtained as the result of an unlawful arrest. It was there stated:

> "We prefer the rule followed in the Federal courts. We conceive it the duty of the courts to protect constitutional guarantees. The most effective way to protect the guarantees against unreasonable search and seizure and compulsory self-incrimination is to exclude from evidence any matter obtained by a violation of them.
>
> "We believe that as long as the Constitution of this state contains the guarantees to the citizen referred to, we have no choice but to use every means at our disposal to preserve those guarantees. Since it is obvious that the exclusion of such matters from evidence is the most practical protection, we adopt that means. It is no answer to say that the rule hampers the task of the prosecuting officer. If forced to choose between convenience to the prosecutor and a deprivation of constitutional guarantees to the citizen, we in fact have no choice. * * *."

We correlate "the fruit of wrongdoing" in an unlawful detention and in an unlawful arrest -- and we exclude both. Paraphrasing the language in Richards: We conceive it the duty of our court, in the administration of criminal justice, to enforce all applicable Statutes and Rules of Court. We find here a flagrant disregard of both Sec. 1911 and Rule 5. The exclusion in criminal trials of evidence obtained as a result of such violation of the law is the most practical and effective means at the disposal of our courts for the avoidance of similar violations in the future. We adopt such means to enforce the law, seeking to deter unlawful detentions just as we have sought to deter unlawful arrests. The law may not be enforced by disobedience of the law.

212 A.2d at 893-893.

This Court should revisit its holding in Keen I and instead adopt a per rule of inadmissibility for statements taken outside the 24 hour period. The current rule puts the burden on the citizen who is the victim of the constitutional violation to show that the violation induced the statement. This Court does not follow such a rule in terms of any other violation of a constitutional right. The current rule

provides no deterrence against police misconduct. The police have every incentive to not take a defendant to first appearances and continue questioning him beyond the 24 hour period and hope that the defendant can not meet his high burden of showing that the delay induced the statement. The per se rule is especially reasonable given the fact that Florida employs the relatively lengthy 24 hour rule. States such as Massachusetts and Pennsylvania require a first appearance within 6 hours and still employ the per se rule.

Assuming arguendo that this Court continues to adhere to its rule that the defendant must show that the delay induced the statement, it should revisit its holding in this case in light of the additional facts presented in this trial. In this trial, Appellant raised for the first time, the fact that Mr. Keen had previously made a police statement with retained counsel and his counsel had told the police that Mr. Keen could be reached through his office. This fact along with the fact that he immediately asked his employee to get him a lawyer demonstrate that the delay induced the statement. The police knew about the prior dealings through retained counsel. They also knew that Mr. Keen would receive counsel at first appearances and would not make any future statements without counsel being present. The delay induced the statement.

Mr. Keen's statements taken after the 24 hours had expired are also taken in violation of the Fourth Amendment and Article I, Section 12 of the Florida Constitution as he was being illegally detained at that time. The fact that Mr. Keen was not taken to first appearances in a timely manner made his detention illegal. The Fourth Amendment requires prompt presentation before a neutral magistrate. Gerstein v. Pugh, 420 U.S. 103 (1975). A statement taken after a Fourth Amendment violation must be suppressed unless the government can show intervening

circumstances to break the chain from the unlawful detention. Taylor v. Alabama, 457 U.S. 687 (1982); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975); Libby v. State, 561 So. 2d 1253 (Fla. 2d DCA 1990). Here, the statements were taken in police interrogation after the 24 hour period had expired. Mr. Keen had not been released from custody, nor had he consulted with counsel or anyone else. There was no break sufficient to purge the taint of the illegal detention. In Libby, supra the Court described some of the circumstances sufficient to dissipate the taint of the illegal detention.

> There were no intervening circumstances, such as consultation with counsel or release from custody, to sufficiently attenuate the confession. *See Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416, 417 (1975), 4 W. LaFave, *Search and Seizure* § 11.4(b) at 398 (2d ed. 1987).

561 So. 2d at 1254.

None of these factors were present here. The statement must be suppressed as the product of an illegal detention which violates Article I, Section 12 of the Florida Constitution and the Fourth Amendment to the United States Constitution.

The statement at issue was also taken after Mr. Keen had invoked his right to remain silent. Officer Scheff testified that during the ride back from Seminole County Mr. Keen said that "he could see no strategic reason to make a statement" 1R193. Officer Amabile stated that he said "that he did not see any strategical benefit for himself, if he told us anything else" 1R26. The officers continued to question Mr. Keen about this offense. This ground was not raised previously, so this Court did not deal with this issue in Keen I. This issue was raised in this trial IR94-95. The United States Supreme Court has held:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

Miranda v. Arizona, 384 U.S. 436 (1966).

This Court has held that under the Florida Constitution

> If the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin, or, if it has already begun, must immediately stop.

Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992).

It is clear that Mr. Keen's statement that he did not see any "strategic reason to make a statement" is an invocation of his right to remain silent under the United States and Florida Constitutions. Mr. Keen's statements subsequent to this point must be suppressed.

Mr. Keen's statements were also involuntary. DeConingh v. State, 433 So. 2d 501 (Fla. 1983); Blackburn v. Alabama, 361 U.S. 199 (1960). Every indication by Mr. Keen seemed to show that he did not want to cooperate. Not only did he ask for an attorney, but he refused to allow any statements he made to be tape recorded 1R140,150. Later, he refused to sign the handwritten 'transcript' which was written by the officers 1R152,227. Keen's physical and emotional state prevented him from giving a free and voluntary statement. Mental and emotional distress may prevent a person from effectively waiving their rights thereby making a statement inadmissible. DeConingh, supra at 503.

The statements at issue were also induced by promises. A statement can not be introduced if it is "obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Bram v. United States, 168 U.S. 532 (1897). The police used Mr. Keen's antagonism at Ken Shapiro to induce a statement. Mr. Keen asked whether Ken Shapiro was in custody 1R197. He was told that he was not 1R197. Mr. Keen then asked if Shapiro had been granted

immunity 1R198. He was told that this would be a decision of the State Attorney's Office but

> that it might make the State Attorney's Office less likely to offer Ken Shapiro immunity if they had a statement from -- a truthful statement from Michael Keen.

1R198.

The police played on Mr. Keen's anger at Ken Shapiro accusing him of murdering his wife and used this to entice Mr. Keen to give a statement. This improper influence helped induce his statement.

The admission of Mr. Keen's statements was improper pursuant to the United States and Florida Constitutions and the Florida Rules of Criminal Procedure. He invoked his rights to counsel and to remain silent. He was not taken before a magistrate in a timely manner and his statements were involuntary. The admission of these statements was harmful error. The prosecution's case consisted almost entirely of the testimony of Ken Shapiro who was never prosecuted for his admitted role in this offense and was an admitted perjurer. The admission of Mr. Keen's police statements was clearly harmful in a case where the evidence is in such doubt.

POINT X

> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS AS THE INDICTMENT WAS BASED ON PERJURED TESTIMONY.

Appellant filed a motion to dismiss the indictment as it was based on perjured testimony IR109A-I. Argument was held on the motion SR166-173. The motion was denied IR109N-P. Patrick Keen, Michael Keen's brother, testified before the grand jury that Michael Keen had made statements to him that he had killed his wife for insurance money SR210-243. He subsequently went to the State Attorney's Office and stated that

all this testimony was false SR245-290. He was convicted of perjury in an official proceeding IR109I;SR168-169.

He was tried on the original indictment without the subsequent recantation being revealed to the grand jury. This denied Mr. Keen due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 15, and 16 of the Florida Constitution.

This Court held in Anderson v. State, 574 So. 2d 87 (Fla. 1981) that the Due Process Clause is violated when a grand jury indictment is based upon perjury on a material element. 574 So. 2d at 91-92. This Court in Anderson cited with approval four cases from other jurisdictions. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); People v. Pelchat, 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984); Escobar v. Superior Court, 155 Ariz. 298, 746 P.2d 39 (App.1987); State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977). In Anderson, the following scenario took place:

> Anderson contends in his first point that the trial court erred when it failed to dismiss the indictment because the indictment was based solely on Beasley's perjured testimony before the grand jury. During her trial testimony, Beasley admitted that her grand jury testimony differed from her trial testimony. When she appeared before the grand jury on July 15, 1987, she minimized her role in the killing and said that Grantham had been killed outside of her presence. She told the grand jury that Anderson and Grantham went for a ride while she remained in Anderson's apartment. When Anderson returned alone, he had blood all over the front of his shirt and on his hands, and his eyes were wild. She charged that Anderson admitted killing Grantham and threatened to kill her unless she helped him take Grantham's car to Tampa Airport.
>
> After testifying before the grand jury, Beasley told a different story to FDLE agents. She told the agents on July 16 that Anderson walked into the apartment while Grantham was trying to rape her. Anderson pulled Grantham away, told her to get dressed, and forced Grantham into the car at gunpoint.

> Beasley also testified that she told agents that she saw Anderson shoot Grantham four times.
>
> On July 24, Beasley negotiated a plea to third-degree murder with a maximum sentence of three years. Beasley told the prosecutor that she was present when Anderson shot and killed Grantham in accordance with a prearranged plan. She told the same story at trial. Anderson argues that because the state knew prior to trial that Beasley's grand jury testimony was perjured and did nothing to correct the testimony, the indictment should have been dismissed.
>
> 574 So. 2d at 90.

This Court analyzed this issue as follows:

> Beasley's grand jury testimony, although false in part, was not false in any material respect that would have affected the indictment. In every statement Beasley made, she consistently accused Anderson of the murder. Before the grand jury, she accused Anderson, but claimed he was alone when he murdered Grantham. At trial, she again accused Anderson, but switched her role in the murder from nonparticipant to unwilling, after-the-fact accomplice. Although Beasley's role changed, Anderson's did not. Here, we are not faced with subsequent testimony that can be said to remove the underpinnings of the indictment. On the contrary, Beasley's later testimony would have strengthened the probability of an indictment because she was an eyewitness to the murder. Thus, Beasley's perjurious grand jury testimony could have no factual bearing on the grand jury's decision to indictment Anderson for murder.
>
> 574 So. 2d at 92.

In the present case the subsequent statement of Patrick Keen directly contradicted his grand jury testimony as to whether Michael Keen had made any inculpatory admissions to him. This presents a far more compelling case than Anderson.

The reasoning of Anderson and the cases cited with approval in Anderson requires reversal. In Basurto, the Court held it to be a violation of the Due Process Clause when the prosecutor did not inform the trial court and the grand jury of a material change in a witness' testimony. In Basurto an unindicted co-conspirator and a Customs Agent

testified before the grand jury. Subsequently the unindicted co-conspirator recanted his testimony regarding the defendant's activities prior to May 1, 1971. Id. at 784. On that date a mandatory minimum sentence became effective. 497 F.2d at 784. The grand jury testimony was unrecorded and the parties' disputed whether the agent gave independent testimony as to the activities prior to May 1, 1971. Id. The prosecutor informed opposing counsel of the recantation, but failed to notify the court or the grand jury. Id. The Court held that this was a due process violation and that reversal is required. The Court specifically held that it was irrelevant whether the agent provided independent testimony as to the activities prior to May 1, 1971.

> It is not necessary that the dispute be resolved, since it does not affect the holding of this court. The issue here is not one relating to the sufficiency of evidence before a grand jury to sustain an indictment, but rather, the duty of a prosecutor when he becomes aware that perjury as to a material fact has been committed.

497 F.2d at 789, n.1

In Pelchat, a police officer had testified to the grand jury that he had seen the defendant involved in drug activity and later told the prosecutor that he had misunderstood his question and had not seen the defendant involved in drug activity. The Court held that this required reversal even though the defendant had pled guilty. In Escobar, a police officer testified that a child victim had third degree burns when he actually had second degree burns. The prosecutor failed to inform the Court and the grand jury. The Court held that a new trial was required as the false testimony could have influenced the grand jury as to the degree of felony it charged. In Reese, the defendant was charged with constructive possession of heroin found at a search of his house. The defendant was not present at his house at the time of the search.

An officer falsely testified to the grand jury that there no adults present at the time of the search, when in fact there were two. The Court held that this was material to the issue of constructive possession and that the conviction must be reversed and the indictment dismissed.

This case must be reversed for a new trial under Basurto. In Basurto, a witness had retracted his testimony as to some of the defendants' activities. The Court held that this was material as it could affect the defendants' eligibility for a mandatory minimum. The Court held that a new trial and dismissal of the indictment was required regardless whether there was other evidence to these same activities. Here, a witness completely retracted his testimony as to all alleged admissions by Mr. Keen. A new trial and dismissal of the indictment is required.

POINT XI

THE TRIAL COURT ERRED IN PROHIBITING CROSS-EXAMINATION OF OFFICERS AMABILE AND SCHEFF REGARDING THEIR IMPROPER INTERROGATION TECHNIQUES IN OTHER CASES.

The trial court precluded defense counsel from cross-examining Officers Amabile and Scheff regarding their improper interrogation techniques in other cases. Defense counsel asserted his right to cross-examine Officers Amabile and Scheff about being disciplined for improper interrogation techniques in other cases IR43-45. Argument was held on the motion ST46-55. The trial court issued an order prohibiting cross-examination on this subject IR133-134. This denied Mr. Keen due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitutions and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The court in Mendez v. State, 412 So. 2d 965 (Fla. 2d DCA 1982), reversed for failure to allow cross-examination concerning the officer's discipline for excessive force, holding it related to the officer's motive to testify concerning his use of force in that case. See also Henry v. State, 688 So. 2d 963 (Fla. 1st DCA 1997); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

The police conduct in the interrogation was an important issue below. The alleged statement of Mr. Keen was written entirely in the handwriting of Officers Amabile and Scheff XIVT1426-27. Officer Amabile testified that this was highly irregular and that he had never done this in any other case XIVT1427. Officer Amabile claimed that Mr. Keen refused to give a taped statement because of the possibility of altering tapes XIVT1439-40. He claimed that Mr. Keen had refused to sign or initial the statement even though he had initialed other documents XIVT1440. The accuracy of the statement was a major issue. The officers' interrogation practices were relevant here.

POINT XII

THE STATE OF FLORIDA HAD NO JURISDICTION TO PROSECUTE THIS HOMICIDE.

It is undisputed that this homicide occurred more than three miles off the coast of Florida. Florida had no jurisdiction to try Mr. Keen; only the federal government may try this offense. Mr. Keen filed a motion to dismiss and supplemental motion to dismiss prior to the first trial of this case 1R1665-66,1704-06. Oral argument was held on this motion 1R274-285. The State conceded that the homicide took place beyond the three-mile limit 1R1677. The trial court denied the motion and this Court affirmed this ruling. Keen v. State, 504 So. 2d 396 (Fla. 1987). Mr. Keen filed another motion to dismiss prior to this

trial IR66-70. Oral argument was held on this matter SR15-22. The trial judge denied the motion IR110-114. Appellant urges this Court to reconsider its ruling.

This Court held that Florida has jurisdiction when the element of premeditation occurred in Florida, but § 910.005(2) explicitly requires an essential element with conduct occur in Florida.

> An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state. In homicide, the "result" is either the physical contact that causes death, or the death itself; and if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state.

§ 910.005(2), Fla. Stat. (1987). This Court only required premeditation, an operation of thought, not conduct, occur in Florida. This interpretation substantially broadened the jurisdictional statute and ignored its plain wording, contrary to the principle of strict construction. State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977). In People v. Holt, 440 N.E.2d 102 (Ill. 1982), the Illinois Supreme Court interpreted Section 1-5 of the Illinois Criminal Code, an identically worded statute to § 910.005(2). 440 N.E.2d at 103. Holt was charged with felony-murder with the underlying felony beginning in Illinois but the killing occurred in Wisconsin. The Court in Holt described the importance of the conduct requirement in determining jurisdiction.

> Section 1-5 does not declare that any element of the offense will support jurisdiction. The language is "the conduct which is an element of the offense, or the result which is such an element." (Emphasis added.) (Ill.Rev.Stat. 1979, ch. 38, par. 1-5.) The "element" phrases do not expand jurisdiction but limit it. The proper meaning is that "the conduct" is enough only if it is an element of the offense ... What the draftsmen had in mind was something like mailing a letter bomb from one State to another, or firing a weapon across a State line.

440 N.E.2d 105. The same reasoning applies to Florida's statute. See also State v. Harvey, 730 S.W.2d 271, 277-8 (Mo.App. 1987) (jurisdiction proper at common law only in the State where the killing occurred; premeditation alone would not support jurisdiction). This Court's reliance on Lane, is misplaced. In Lane, the victim was beaten and robbed in Florida before being driven to Alabama to be beaten further. 388 So. 2d at 1023. Thus, in Lane, unlike in Keen, there was unlawful conduct in Florida.

The Keen analysis conflicts with the definition of premeditated murder. Premeditation alone is not an element of first degree premeditated murder. The Standard Jury Instructions state:

> Before you can find the defendant guilty of First Degree Premeditated Murder the State must prove the following three elements beyond a reasonable doubt:
>
> 1. Victim is dead.
> 2. The death was caused by the criminal act or agency of the defendant.
> 3. This was a premeditated killing of the victim.

The element involved is "premeditated killing", not mere premeditation. An interpretation requiring premeditated killing would be consistent with the conduct requirement of the statute.

The reasoning of Keen leads to absurd results. A person could form the intent to kill in one state, drive across country, kill someone, and then be eligible to be prosecuted in every state that he drives through. Such a broad view of jurisdiction is untenable. It could lead to situations where several states have jurisdiction.

The Court's opinion in Keen also incorrectly rejected the argument the Federal Government has exclusive jurisdiction over crimes committed on the high seas. Several provisions of the United States Constitution indicate the Federal Government's intent to take jurisdiction over

crimes on the high seas. Article I, Section 8 of the Constitution explicitly gives the Federal Government the power to punish crimes on the high seas and lists a series of powers exclusive to the Federal Government, e.g. declaring war and printing money. Article III, Section 2 specifically gives the Federal Courts jurisdiction in "all cases of admiralty and maritime jurisdiction." The Federal Courts have consistently held that this gives the federal courts exclusive jurisdiction in the civil context. Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984) (Admiralty jurisdiction the exclusive province of the Federal Courts). The same rule should apply in the criminal context.

This case falls within the specific maritime and territorial jurisdiction of the United States defined in 18 United States Code § 7. In United States v. Tanner, 571 F.2d 334 (5th Cir. 1978), the Court interprets Subsection 3 of this section to give the Federal Courts "exclusive jurisdiction." 571 F.2d at 335. The same rule of exclusivity should apply to the first clause (The high seas provision). Florida had no jurisdiction to try this case.

POINT XIII

THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS DUE TO PROSECUTORIAL MISCONDUCT.

The trial below constituted double jeopardy as the reversal of the first trial was caused by intentional prosecutorial misconduct. This denied Mr. Keen's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. Prior to this trial Appellant filed a motion to dismiss due to prosecutorial

misconduct IR58-61. Oral argument was heard on the motion SR3-15. The trial court denied the motion IR109Q-U.

The prosecutor intentionally provoked a mistrial in the first trial of this case. He filed a pretrial motion to admit collateral crimes evidence 1R1683. There was an evidentiary hearing on this issue 1R303-354. He asked the judge to reserve ruling, stating:

> What I have told Mr. Gulkin (defense counsel) from the very outset, I will not make references to this in my opening statement at all. If I am going to offer it ... I will give him ample advance warning to approach the bench and ample advance warning for a ruling from the Court prior to any evidence being offered in front of the jury.
>
> The Court, at that point, may be in a better position, having heard the testimony during the course of the trial, of making a determination of yes, it is admissible or no, it is not admissible.

1R349. The Court reserved ruling, but said:

> I want it understood that there be no mention whatsoever until there is a ruling by the court.

1R350,354. The prosecutor promised:

> I will approach side bar if I am going to offer it into evidence at all. I will approach side bar before we call any witnesses relative to that point ... and the Court then can make a ruling either yes or no.

1R354. At the conclusion of Shapiro's 1984 testimony, the prosecutor proffered testimony concerning the alleged collateral offense 1R877-885. The prosecutor stated:

> The State is in a <u>position where we simply are not in a posture where we can effectively prosecute the case</u> at this point without providing that particular information (the alleged prior violence) to the jury.

1R885. The judge excluded it 1R885.

Despite his promise and the Court's orders, the prosecutor asked Mr. Keen:

> Q. Didn't you describe to Ken Shapiro how you and Patrick Keen had tried to beat Patrick Keen's wife to death with a rock in 1972?

1R1258-1259. This intentionally violated the court's order. The State confessed error on appeal. 504 So. 2d at 401.

Mr. Keen respectfully disagrees with this Court's characterization, in dicta and without briefing, of this action as done "in the heat of trial" and not to intentionally goad the defense into requesting a mistrial. Keen v. State, 504 So. 2d 396, 402 n.5 (Fla. 1987). The prosecutor proffered the evidence and had it excluded. The only possible reason to bring this up again was to force a mistrial. He stated that he could not prosecute the case without the information.

In Oregon v. Kennedy, 456 U.S. 667 (1982), the Court held Double Jeopardy bars retrial if the prosecutor's misconduct is designed to provoke a mistrial. 456 U.S. at 679; see Duncan v. State, 525 So. 2d 938, 941-942 (Fla. 3d DCA 1988). In Duncan, the court found the prosecutor intentionally provoked a mistrial because his action was contrary to the court's order and he gained an advantage from the mistrial. The prosecutor's action in 1984 was deliberate. There was a proffer, an adverse ruling, and then it was brought out anyway. The prosecutor gained a tactical advantage from the second trial. He was able to produce a jailhouse informer, Michael Hickey, who did not testify at the first trial, skipping his bond. The State knew what Hickey would say and used him at retrial. Hickey testified to an alleged scheme to kill Ken Shapiro 2R794-822. The prosecutor again used the testimony of Hickey (also known as Moran) in this trial XIVT1483-1573. Thus, he continued to benefit from his original misconduct. The misconduct here was as egregious as in Duncan.

Although dismissal is required under the Kennedy standard, Appellant would also urge this Court to adopt a broader standard under the Florida Constitution. Many state courts have recognized the undue restrictiveness of the Kennedy standard and have adopted a broader standard as a matter of state constitutional law. Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261, 270 (Ariz. 1984) (en banc); State v. Breit, 122 N.M. 655, 930 P.2d 792(1996); Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (Pa. 1992); Bauder v. State, 921 S.W.2d 696 (Tex.Crim.App. 1996). Appellant would urge this Court to adopt the standard espoused by four members of the United States Supreme Court who joined Justice Stevens' concurring opinion in Kennedy. This standard would prevent retrial when there is prosecutorial "overreaching" or "harassment". Kennedy, 456 U.S. at 683. This was the law prior to Kennedy. This Court should adopt this standard as a matter of state constitutional law.

POINT XIV

THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL.

The trial court gave the Standard Jury Instruction on Reasonable Doubt over defense objection. This instruction is unconstitutional and denied Mr. Keen due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mr. Keen filed written objections to the Standard Jury Instruction on Reasonable Doubt IIR246-251. The trial judge gave the Standard Jury Instruction on Reasonable Doubt over objection IIR309.

An improper instruction on reasonable doubt violates due process and is a structural defect whose use can never be harmless. Sullivan

v. Louisiana, 508 U.S. 275 (1993); Cage v. Louisiana, 498 U.S. 39 (1990). The Florida instruction dilutes the standard of proof.

The Supreme Court has long disliked instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312 (1881). It has approved but one definition. In Holland v. United States, 348 U.S. 121, 140 (1954), disapproving one instruction, it wrote that "the instruction should have been in terms of the kind of doubt that would make a person hesitate to act". Hence, the instruction approved in United States v. Turk, 526 F.2d 654, 669 (5th Cir. 1976):

> A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would not hesitate to act upon it in the most important of your own affairs.

Speculation and imagination come into play when one determines to act in the most important of one's affairs. A doubt founded on speculation or an imaginary or forced doubt will cause one to hesitate to act. The court's instruction was unconstitutional.

POINT XV

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE.

The trial court erred in overruling the jury's recommendation of life imprisonment. This denied Mr. Pomeranz' rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and Fla. Stat. 921.141.

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

> Under Florida law, the role of the jury is one of great importance, and this is no less true in the penalty phase of a capital trial. *Tedder*. Juries are at the very core of our Anglo-American system of justice, which brings the citizens themselves into the decision-making process. We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the *Tedder* standard adopted in 1975 and consistently reaffirmed since then.

Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992).

> If facts are evident on the record upon which a reasonable juror could rely to recommend life imprisonment, then the trial court errs in overriding the life recommendation....
>
> Under *Tedder*, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment.

Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990).

In analyzing the existence of mitigating circumstances, the issue is whether any reasonable person could find such a circumstance even though "some reasonable persons might disbelieve" the testimony or circumstance. Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990).

In this case there are several reasonable bases for the life recommendation. The first is the disparate treatment of Ken Shapiro, who was a principal, guilty of first degree murder. This Court has consistently held that the disparate treatment of a principal is a reasonable basis for a life recommendation. Craig v. State, 685 So. 2d 1224 (Fla. 1996); Barrett v. State, 649 So. 2d 219 (Fla. 1994); Jackson v. State, 599 So. 2d 1088 (Fla. 1992); Fuente v. State, 549 So. 2d 652

(Fla. 1989); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Spivey v. State, 529 So. 2d 108 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Caillier v. State, 523 So. 2d 158 (Fla. 1988); Duboise v. State, 520 So. 2d 260 (Fla. 1988); Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

Ken Shapiro is a principal according to his own testimony. Shapiro admitted that he had several conversations with Michael Keen concerning a plan to kill a woman for money XT944-946. He continued to participate in these conversations and made no effort to withdraw XT944-46. These discussions became more specific after Michael began dating Anita and he continued to participate XT948-49. The discussions became more concrete after Michael and Anita got married and he continued to participate XT953. In October, 1981 Shapiro claimed that the discussions turned into a specific plan and a date was picked and he continued to be involved XT955. Shapiro expected to pay back his several thousand dollar debt to Michael Keen XT955.

Shapiro admitted that on November 15, 1981, Michael and Anita Keen went out alone and he met them at Tugboat Annie’s XT956-58. They socialized and went out on the boat together XT960. He claimed that when Michael stopped the boat and began moving towards Anita that he knew that he was going to push her XT969-70. He made no effort to stop him or to warn Ms. Keen XT970. He claimed that when she went overboard, he took control of the boat and moved it out of her range XT970-971. He claimed they both watched her swim and eventually came back

together XT974-976. He claims they discussed their version of events together XT975. Shapiro admitted that he was the person who called the Coast Guard and gave them a false story XT977.

The State called Hector Mimoso, a former deputy of the Broward Sheriff's Office XIIT1187. On the night in question he went to Michael Keen's home XIIT1189. He was asking Mr. Keen questions and Shapiro was always interrupting and answering them XIIT1193. He had to ask Shapiro to be quiet and let Mr. Keen speak XIIT1195,1203. He admitted that he lied under oath in an interview with Officer Carney of the Broward Sheriff's Office about a week later XT981. He gave a deposition to an attorney in 1982 in which he lied under oath XT982. It was not until 1984, when he was confronted by Officers Amabile and Scheff that he told anyone his current version of events XT994. He admits covering up this offense for three years and lying to the Coast Guard, to the Broward Sheriff's Office, and in a deposition.

Ken Shapiro was a principal to first degree murder under his own testimony. Indeed, the prosecutor specifically admitted that Ken Shapiro was a principal in this crime.

> Well, you can consider the fact that Ken Shapiro was indeed an accomplice in this case. He took the stand and told you that he was an accomplice.
>
> Under the law, an accomplice is by participation. And the jury has the option, if they so choose, if they were on trial to be treated equally, be treated the same as his counter part or his co-defendant, and every act, that is the act of Mr. Keen, conceivably can be transferred to Mr. Shapiro, and he can be considered as committing those acts if he knew what was going to happen, if he participated in the crime, which he did. He knew what was going to happen, he did something by which he intended to help.

XVIT1861-1862.

Shapiro was involved in numerous discussions concerning the planning of this offense. He expected to receive a benefit from this offense, the erasing of a debt of several thousand dollars. He met Mr. and Ms. Keen at the agreed location, knowing that a homicide was going to occur. He made no effort to warn Anita Keen of this plot, to stop it, or to withdraw from it in any way, despite numerous opportunities to do so. It was Shapiro who actually maneuvered the boat out of Anita Keen's range, when she went into the water. He also played a major role in covering up the offense for three years. He was clearly a principal in this offense, as the prosecutor admitted.

Ken Shapiro has never been charged with anything in this incident. The lenient treatment which he has been given is a reasonable basis for a life recommendation. This Court's opinion in Brookings controls this issue.

> This Court has upheld a jury recommendation of life which could have been based, to some degree, on the treatment accorded another equally culpable of the murder. *See e.g., McCampbell v. State*, 421 So. 2d 1072 (Fla. 1982). We have also held that a jury may not compare treatment of those guilty of a different, lesser crime when weighing the propriety of the death penalty. *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984), *cert. denied*, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985).
>
> We find here that the jury could reasonably consider the treatment of Lowery and Murray and therefore, under the *Tedder* standard, the trial court's override was improper. The jury heard both Lowery and Murray testify about their roles in this homicide. Murray testified that she hired appellant to kill Sadler in order to protect her son from murder charges, and provided appellant and Lowery with money, lodging and

> transportation both before and after Sadler was killed. Lowery testified that she helped appellant purchase the murder weapon and ammunition, helped devise a plan to lure Sadler from his home in order for appellant to ambush the victim, drove Murray's car to and from the murder scene and ran over Sadler's body after the killing was accomplished. In short, although appellant pulled the trigger, Murray and Lowery were also principals in this contract murder, helping to plan and carry out this crime. That Murray would escape any chance of the death penalty and that Lowery would walk away totally free while the ultimate penalty was sought against appellant, are facts that could reasonably be considered by the jury. Since reasonable people could differ as to the propriety of the death penalty in this case, the jury's recommendation of life must stand.

495 So. 2d at 142-143.

In McCampbell, this Court found the disposition of the co-defendants' cases to be a reasonable basis for a life recommendation, even though it was undisputed that the Appellant was the sole trigger person, and the co-defendants were only guilty on a felony-murder theory. 421 So. 2d at 1073, 1075-1076.

This Court's decision in Harmon is also significant.

> Of more consequence is Harmon's contention that the jury could have based its life recommendation, in part, on their questioning of the respective roles of Harmon and Bennett in the murder and the disparity in treatment between the two if Harmon were sentenced to death. Although Bennett testified that he thought they might be going to commit a robbery, he denied having any knowledge that they were traveling to the victim's home or that Harmon was going to kill someone. He also denied having any part in the robbery of the victim. Shadle testified that Harmon informed him that both he and Bennett were involved in the robbery. Furthermore, Harmon took the stand and testified in his own defense. Harmon stated that during the time he supposedly was traveling to Florida with Bennett, he remained in South Carolina and helped a friend find a part for an appliance, sat

at the kitchen table for a while by himself, and then got in the car and drove to a restaurant to get something to eat. After this, he stated that he drove around by himself, thinking about a personal problem, and did not return until between 3:00 and 5:00 the next morning. He testified that he had not seen Bennett since the prior evening when he was helping find the part for the friend, that he next saw Bennett the late afternoon of the day the murder occurred and that when he arrived Bennett looked like he had been drunk, "like he'd been out partying all night."

Bennett testified that during the trip to Arizona after the murder, he had numerous opportunities to part company with Harmon but did not due to his alleged fear of Harmon. Harmon testified that Bennett did not separate from him until Harmon made known his intention to return to Florida and try to clear himself from charges. Bennett pled guilty to second-degree murder. The jury was aware that, pursuant to his plea agreement with the state, Bennett would be sentenced to a maximum of seventeen years, with a lesser sentence possible.

This Court has recognized that "the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision." *Craig*, 510 So. 2d at 870. We find, based on a review of the record, that the jury could have reasonably questioned the degree of participation by Bennett in the murder, together with the disparity between the maximum sentence possible for Bennett (seventeen years) and a recommendation of death for Harmon. *See Malloy v. State*, 382 So. 2d 1190 (Fla. 1979). *Compare Eutzy*, 458 So. 2d 755 (argument that jury's recommendation of life could reasonably have been based on the disparate treatment of witness and appellant rejected where record was devoid of any evidence which would show that witness was a principal in the first degree).

Reasonable people could conclude that the mitigating factors presented, the disparate treatment of Harmon in comparison with Bennett viewed in conjunction with the nonstatutory mitigating factors set forth in the

> testimony of the psychiatrist, outweigh the proven aggravating factors. Because the facts are not so clear and convincing that no reasonable person could differ that death was the appropriate penalty, the trial court erred in overriding the jury recommendation of life. *Amazon v. State*, 487 So. 2d 8, 13 (Fla.) *cert. denied*, 478 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986).

527 So. 2d at 189-190.

In Malloy this Court found the co-defendants' lesser sentences to be a reasonable basis for a life recommendation despite their testimony that Malloy was the sole triggerperson and that they attempted to dissuade him from killing the victim. 382 So. 2d at 1191, 1193. In Pentecost, this Court found the disparate treatment of co-participants to be a reasonable basis for a life recommendation, even though one of the participants was not present at the homicide and the State presented direct evidence that Pentecost was the sole person who stabbed the victim. 545 So. 2d at 862-863.

In Fuente, this Court held the life recommendation to be reasonable, based upon the treatment of co-participants even though the evidence was undisputed that one participant, Barbara Alfonso, was not present at the homicide and the evidence was disputed as to whether she was even involved. 549 So. at 653-54, 658-59.

> Fuente challenges the trial court's override of the jury's recommendation of life imprisonment. Because we find that even if all three aggravating factors were properly found the jury override was improper in this case, we need not address Fuente's challenge to two of these factors. It is clear from the record that during the penalty phase closing argument defense counsel relied heavily on the fact that both Salerno and Barbara Alfonso had received total immunity from prosecution in exchange for their testimony. Although it was not clear that Salerno

had been given immunity from state prosecution, Barbara Alfonso testified that she had been promised immunity by state authorities. Fuente argues that the jury could have reasonably based its recommendation on apparent disparate treatment accorded Salerno and the victim's wife.

In *McCampbell v. State*, 421 So. 2d 1072 (Fla. 1982), we recognized that a jury may reasonably base its recommendation of life on disparate treatment accorded a co-perpetrator. *See also Pentecost v. State*, 545 So. 2d 861 (Fla. 1989); *Spivey v. State*, 529 So. 2d 1088 (Fla. 1988); *Harmon v. State*, 527 So. 2d 182 (Fla. 1988). More recently, in *Brookings v. State*, 495 So. 2d 135, 143 (Fla. 1986), on facts quite similar to those presented in this case, we held that the disparate treatment accorded "principals in [a] contract murder, helping to plan and carry out [the] crime" could serve as a reasonable basis for a recommendation of life. In *Brookings*, the woman who hired Brookings to kill the victim was allowed to plead to second-degree murder and the active participant in the killing received total immunity. In *Brookings*, there were four valid aggravating circumstances: 1) convictions of three violent felonies; 2) the murder was committed for pecuniary gain; 3) the murder was committed to prevent the victim from testifying as a state witness; and 4) the murder was committed in a cold, calculated and premeditated manner. *Id.* at 142 n.3. The trial court in *Brookings* found three nonstatutory mitigating factors, two of which specifically dealt with the differing treatment accorded the co-participants. *Id.* at 142. Although Brookings had pulled the trigger, we concluded that the fact that one participant would escape the death penalty and the other would walk away totally free while the ultimate penalty was sought against Brookings were facts that could reasonably be considered by the jury. Therefore, under the *Tedder* standard, the override was improper. *Id.* at 142-143. *Brookings* cannot be distinguished from this case by the fact that the trial court in *Brookings* found the disparate treatment of co-penetrators a mitigating factor and the trial judge in this case did not. *See Caillier v. State*, 523 So. 2d 158 (Fla. 1988) (disparate treatment accorded equally culpable accomplice could have served as basis for jury's recommendation of life despite fact that trial judge specifically rejected such treatment as a mitigating factor). Because the jury in this

> case could have reasonably based its recommendation on the fact that Salerno and the victim's wife would likely not be prosecuted for their participation in the murder, the override was improper.

549 So. 2d at 658-659.

It is clear that Ken Shapiro was a principal in this homicide. He participated in numerous discussions planning this homicide over a period of months. He met Michael and Anita at the designated site and went on the boat with them. He knew what was going to occur and made no attempt to stop the plan or to warn Anita Keen or the authorities. He actively participated in the homicide by driving the boat out of Ms. Keen's range. He had a primary role in the cover-up of this offense. He admitted making several false statements under oath. Shapiro admitted that he intended to benefit from the murder, by having his several thousand dollar debt erased. As the prosecutor conceded, he was clearly a principal. The fact that he has never been prosecuted for this offense is a reasonable basis for a life recommendation as in Brookings, Fuente, Spivey, Pentecost, and McCampbell.

Another reasonable basis for a life recommendation is the credibility problems with the State's main witness, Ken Shapiro. Shapiro is an admitted perjurer who is literally testifying to save his life. He made numerous inconsistent statements concerning this offense. This Court has noted that questions about the credibility of the key State witness regarding the circumstances of the offense are a reasonable basis for a life recommendation. Pomeranz v. State, ___ So.

2d ___, 23 Fla. L. Weekly S8, 10 (Fla. December 24, 1997); Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991).

The jury could have also reasonably recommended life based on doubts about the actual role which Ken Shapiro played. This Court has consistently held that a conflict in the evidence as to the identity of the actual killer is a reasonable basis for a life recommendation. Barrett, Cooper v. State, 581 So. 2d 49 (Fla. 1991); Harmon, Pentecost, Hawkins v. State, 436 So. 2d 44 (Fla. 1983); Malloy. In this case, the State introduced Mr. Keen's police statement in which he stated that it was Ken Shapiro who pushed Anita Keen overboard XIIIT1361. The jury could have believed this testimony, partially or completely, and still believed that Michael Keen was involved in this homicide and thus convicted him of first degree murder. This is a reasonable basis for the life recommendation.

The jury could have also reasonably recommended life imprisonment based on Michael Keen's difficult early life. There was undisputed testimony that Michael's father was an alcoholic who deserted the family when Michael was seven XVIIT1842. This Court has recognized a difficult early life as a reasonable basis for a life recommendation. Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Scott v. State, 603 So. 2d 1275 (Fla. 1992); McCampbell, supra at 1075-76. In Hegwood, this Court specifically noted the defendant's mother's alcohol abuse as a significant factor. Here, it is undisputed that the defendant's father was an alcoholic. Growing up in an alcoholic home and being abandoned at a young age is a reasonable basis for a life recommendation.

It is also undisputed that Michael Keen was a good brother and son XVIIT1842-43. Michael's mother testified that after Michael's father left the house, he had to assume the role of the father figure, until he went to college XVIIT1842. A defendant's caring relationship with his family is a reasonable basis for a life recommendation. Barrett; Scott; Perry v. State, 522 So. 2d 817, 821 (Fla. 1988).

There was undisputed evidence that Michael Keen had numerous positive achievements as a youth despite growing up with an alcoholic father who abandoned him. He excelled in piano and the arts XVIIT1841. He competed in the International Piano Guild XVIIT1841. He was an honor student in high school XVIIT1841-1842. He played high school football XVIIT1842. He won a scholarship to Eckerd College and graduated XVIIT1842. Positive character traits and accomplishments are a reasonable basis for a life recommendation. Barrett, Scott, McCampbell, Stevens v. State, 613 So. 2d 402 (Fla. 1992); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Thompson v. State, 456 So. 2d 444 (Fla. 1984). These traits and actions are especially significant as they show potential for rehabilitation and productivity within the prison system. Holsworth, Fead, McCampbell.

There was undisputed evidence that Michael Keen had an excellent employment history and excelled at his work. Ken Shapiro testified that Mr. Keen had an excellent work record XT927-30,1021. Mr. Keen was a supervisor at a sign company when Shapiro first met him XT927. He then started his own company which was very successful XIT1095. A good work record

is a reasonable basis for a life recommendation. Holsworth, Fead, McCampbell.

Mr. Keen had an excellent record while incarcerated. Both sides entered into a stipulation that Mr. Keen had been incarcerated since 1985 and had only one minor disciplinary infraction XVIIT1844-45. Good conduct in prison is a reasonable basis for a life recommendation. Fead, McCampbell. This mitigating circumstance is particularly compelling in the present case, as both sides stipulated to Michael Keen's good institutional record and it involved a ten year period.

Mr. Keen has a good potential for rehabilitation. The prosecutor stated that this mitigating circumstances applies XVIITI866. This factor is supported by Mr. Keen's good record in prison, his good work record and his positive character traits and accomplishments. Good prospects for rehabilitation constitute a reasonable basis for a life recommendation. Barrett, Holsworth, Fead, McCampbell.

The prosecution also conceded that Mr. Keen had good behavior at trial XVIIT1865. This has been recognized as a mitigating circumstance. Monlyn v. State, ____ So. 2d ____, 22 Fla. L. Weekly S631 (Fla. October 9, 1997). It is clear that the mitigating circumstances, individually and cumulatively, provide a reasonable basis for a life recommendation.

The jury could have rejected and/or given less weight to the aggravating circumstances. The trial judge found three aggravating circumstances XVIIT1920-29. All three of these aggravating circumstances could be reasonably rejected and/or given less weight by the jury. The trial judge found the

"especially heinous, atrocious, or cruel"(HAC) aggravator XVIIT1921-26. Fla. Stat. 921.141(5)(h). The jury could have reasonably rejected this circumstance. The State presented Ken Shapiro as its only witness to the circumstances of this offense. He testified that Michael Keen allegedly came up behind Anita Keen and pushed her over the railing of the boat XT968-70. Shapiro admitted that he drove the boat out of Ms. Keen's range XT970-71. He then claimed that they watched her swim for 15 minutes to an hour and then returned while she was still swimming XT970-73.

HAC does not apply unless it is clear that Appellant intended to cause unnecessary and prolonged suffering. Kearse v. State, 662 So. 2d 677 (Fla. 1995); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Mills v. State, 476 So. 2d 172, 178 (1985); Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).

In Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court recognized that the crime was "vile and senseless" where the victim unsuccessfully begged for his life, but held that HAC did not apply because the record did not demonstrate that Bonifay intended to inflict a high degree of pain or to torture the victim:

> Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape-recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to

> one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So. 2d 160 (Fla. 1991).

Bonifay, 626 So. 2d at 1313 (emphasis added). Likewise, in Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), especially HAC did not apply as there was "no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victim."

There is no evidence that Mr. Keen had any intent to cause any prolonged suffering or intentional torture. The jury could have reasonably rejected HAC or given it less weight.

The trial judge also found the pecuniary gain and “cold, calculated, and premeditated” aggravating circumstances XVIIT1920-29. Fla. Stat. 921.141(5)(f) and (i). The jury could have reasonably rejected both these circumstances and/or given less weight to them. Although Ken Shapiro’s testimony could provide a basis for a jury to find these aggravating circumstances the jury could have also reasonably rejected these aggravating circumstances due to doubts about Shapiro’s credibility. The jury could have believed Shapiro to the extent that it found Mr. Keen guilty of first degree murder but had a reasonable doubt as to whether Mr. Keen engaged in a lengthy plan to kill his wife for money. There are numerous

reasons to suspect Shapiro's credibility. He admitted committing perjury on more than one occasion XT981-986. He only came forward with his version after being confronted by the police and threatened with prosecution three years after the offense XT991-95. It was clear that Shapiro was receiving a tremendous benefit for his testimony. He has never been charged with anything, even though he was clearly guilty of first degree murder. Even after his complete change in versions in 1984, Shapiro continued to make inconsistent statements as to this offense. Shapiro had previously testified that Michael Keen had "pushed" (Anita) over the rail XT1062. At this trial he testified that he had "picked up" Anita Keen and threw her over the railing XT1062. In 1984, he had specifically stated that Mr. Keen did <u>not</u> pick Anita up XT1064. He stated that Mr. Keen only touched Anita Keen in the upper back, "behind the shoulder blades" XT1064. When he was confronted with this major inconsistency, he then said that "it was a combination" XT1062. Shapiro testified in this trial that a representative of the Coast Guard did <u>not</u> come to the house on the night of the incident XT1057. He had previously testified that a Coast Guard representative <u>did</u> come to the house on the night in question XT1058. In this trial he testified that he and Michael Keen may have been in the boat for over an hour after Anita Keen had gone in the water XT1072. He had testified in a deposition that it was only 15-20 minutes XT1072-73. He now claims that Anita Keen was wearing a tank top XIT1089. He had originally claimed that she was wearing a long sleeve blouse XIT1089. Many aspects of Shapiro's

testimony are also hard to believe. Shapiro claims that he acted out of fear of Michael Keen, yet he admitted that he engaged in numerous discussions over a period of months and made no effort to stop him, warn Anita Keen, or alert the authorities. He continued to live with Michael Keen and then Michael and Anita Keen. He continued to socialize with Michael Keen and to receive money and other benefits from him. He met them at the assigned spot on the day in question, went out on the boat together and even drove the boat when Anita first went in the water. He covered up the incident for three years and even traveled to California with Mr. Keen.

There are many reasons to doubt Ken Shapiro's credibility. He was an admitted perjurer who was literally testifying to save his life. He made numerous inconsistent statements concerning this incident, including how Anita Keen was killed. Aspects of his testimony are inherently incredible. The jury could have had a reasonable doubt as to one or both of these aggravating circumstances based on all these problems with his credibility.

Even if the jury had believed all of Ken Shapiro's testimony, it could have reasonably merged these aggravating circumstances into one. In the present case, the identical conduct was used to support these two aggravating circumstances. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). Ken Shapiro testified that Mr. Keen allegedly had a plan to marry a woman and kill her for insurance money. This same plan was used to support both aggravating circumstances.

There are several reasonable bases for the life recommendation here. This Court has held life recommendations to be reasonable in cases far more aggravated than the current one. Barrett, supra, involved four counts of first-degree murder and one count of conspiracy to commit murder. Caruso v. State, 645 So. 2d 389 (Fla. 1994) involved a brutal double murder of an elderly couple. Parker v. State, 643 So. 2d 1032 (Fla. 1994) involved three murders. Jackson v. State, 599 So. 2d 103 (Fla. 1992) involved five murders. Hegwood v. State, 575 So. 2d 170 (Fla. 1991) involved three murders. This case is far less aggravated than any of these cases and also has substantial mitigation.

This case is similar to other cases which this Court has reduced to life imprisonment based on the disparate treatment of other participants. In Fuente, supra, the trial court found three aggravating circumstances; prior violent felony, the homicide was committed to avoid arrest, and the cold, calculated, and premeditated nature of the homicide. 549 So. 2d at 654. This Court assumed the validity of all three aggravating circumstances, yet reduced the sentence to life imprisonment based on co-defendant disparity. Id. at 658-659.

In Brookings, supra, this Court found that there were four valid aggravating circumstances; prior convictions for three violent felonies (two armed robberies and shooting with intent to kill a police officer); committed for pecuniary gain; committed to hinder law enforcement (the victim was killed to prevent him from testifying); and CCP. This Court reduced the

sentence to life imprisonment based upon disparate treatment of co-participants. 495 So. 2d at 142-143.

Caillier, supra, involved a woman who had conspired with her lover to kill her husband for insurance money. This Court held the life recommendation to be reasonable because her co-conspirator had been allowed to plead to life imprisonment. Here, the co-conspirator had never been charged. In Harmon, this Court found that there were three valid aggravating circumstances; prior violent felony (armed robbery); committed for pecuniary gain; and avoid arrest. This Court found the life recommendation to be reasonable based on the disparate treatment of a co-participant even though the defendant was the triggerperson. In Barrett, the defendant was convicted of four counts of first degree murder and one count of conspiracy to commit first degree murder. There were five valid aggravating circumstances; prior violent felony, avoid arrest, pecuniary gain, hinder law enforcement, and CCP. This Court found the life recommendation to be reasonable based, in part, on the life sentence given to Barrett's co-defendant. This case is far less aggravated in that it involves a single homicide and also involves other substantial mitigation. The life recommendation was clearly reasonable. This case must be reduced to life imprisonment.

POINT XVI

THE TRIAL COURT COMMITTED SUBSTANTIAL ERRORS IN ITS SENTENCING ORDER.

The trial court committed substantial errors in its sentencing order. The trial judge used an improper legal

standard in evaluating mitigating and aggravating circumstances, made substantial errors in its findings of aggravating and mitigating circumstances, and used improper considerations to undermine the jury's recommendation. This denied Mr. Keen due process of law and a fair sentencing proceeding pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, and Florida Statute 921.141.

The trial court failed to view the evidence regarding mitigating and aggravating circumstances in the light most favorable to the jury's recommendation. He merely substituted his judgment for the jury's.

> Under *Tedder*, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment.
>
> Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990).

Here, the trial judge failed to view the mitigating evidence in order to determine if the jury could reasonably have found the mitigating factors and failed to weigh it in the light most favorable to the jury's recommendation. He also failed to view the evidence to determine if the jury could reasonably reject the aggravating circumstances and to weigh them in the light most favorable to the jury's recommendation IIR449-461. Instead, he merely substituted his judgment for that of the jury. Indeed, the trial judge emphasized that he was "independently evaluating all of the evidence" IIR459. He

never attempted to follow the requirements of Cheshire and Holsworth.

The trial court made substantial errors in its findings concerning mitigating circumstances IIR450-459. The trial judge applied the wrong legal standard in evaluating the mitigating circumstance of the disparate treatment of Ken Shapiro IIR456-458. The trial judge stated:

> The Court recognizes that disparate treatment of an equally culpable accomplice is a nonstatutory mitigating factor which can serve as a basis for a jury's recommendation of life. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Brookings v. State, 495 So. 2d 135 (Fla. 1986). Based on the testimony presented during trial, however, the Court is unable to conclude that Mr. Shapiro was either a willing or equally culpable accomplice. See Colina v. State, 634 So. 2d 1077 (Fla. 1994).

IIR451.

This analysis is seriously flawed. The trial judge cites three cases in this portion of the order. A review of these cases demonstrates the confusion exhibited by the judge. Campbell is a death recommendation case in which there are no co-perpetrators. It is irrelevant. Colina is a death recommendation case and is irrelevant. Brookings is a life recommendation case and it lays out the correct rule on this issue. In Brookings, this Court stated:

> This Court has upheld a jury recommendation of life which could have been based, to some degree, on the treatment accorded another equally culpable of the murder. *See e.g., McCampbell v. State*, 421 So. 2d 1072 (Fla. 1982). We have also held that a jury may not compare treatment of those guilty of a different, lesser crime when weighing the propriety of the death penalty. *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984), *cert. denied*, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985).

> We find here that the jury could reasonably consider the treatment of Lowery and Murray and therefore, under the *Tedder* standard, the trial court's override was improper. The jury heard both Lowery and Murray testify about their roles in this homicide. Murray testified that she hired appellant to kill Sadler in order to protect her son from murder charges, and provided appellant and Lowery with money, lodging and transportation both before and after Sadler was killed. Lowery testified that she helped appellant purchase the murder weapon and ammunition, helped devise a plan to lure Sadler from his home in order for appellant to ambush the victim, drove Murray's car to and from the murder scene and ran over Sadler's body after the killing was accomplished. In short, although appellant pulled the trigger, Murray and Lowery were also principals in this contract murder, helping to plan and carry out this crime. That Murray would escape any chance of the death penalty and that Lowery would walk away totally free while the ultimate penalty was sought against appellant, are facts that could reasonably be considered by the jury. Since reasonable people could differ as to the propriety of the death penalty in this case, the jury's recommendation of life must stand.

495 So. 2d at 142-143.

Brookings makes clear that a jury may reasonably recommend life imprisonment based on the lesser sentence given to any other participant who is also a principal to first degree murder, but not based on the treatment of a person who could only be guilty of some lesser offense. Indeed this Court has consistently held that "disparate treatment of principals ... can serve as a reasonable basis for a life recommendation". Brookings at 143; Barrett v. State, 649 So.2d 219, 223 (Fla. 1994); Fuente v. State, 549 So.2d 652, 658 (Fla. 1989). This Court's phrase "equally culpable" in Brookings must mean being guilty of the same offense rather than having the exact same degree of participation in the offense. This is the only way

to explain the reasoning of Brookings. One of the co-defendants in Brookings, Lowery, had no participation in the actual killing, but was merely involved in the planning, drove the car to and from the scene, and ran over the body afterward. This person does not have the same degree of participation as a triggerperson, yet this Court held that her lesser sentence is a reasonable basis for a life recommendation. Id. at 143. She clearly was a principal in a first degree murder. This is the only requirement in a life recommendation case. This is demonstrated by a recent case from this Court. Pomeranz v. State, ___ So. 2d ___, 22 Fla. L. Weekly S8 (Fla. December 24, 1997). In Pomeranz the defendant had entered a store alone and had been the sole triggerperson. This Court held the co-defendant's life sentence is a reasonable basis for a life recommendation even though he was not present during the killing and had only driven the car to and from the scene.

The trial judge's requirement of the same level of participation was an incorrect interpretation of Brookings. A correct application of Brookings and this Court's other life recommendation cases demonstrates that the disparate treatment of Ken Shapiro was a reasonable basis for a life recommendation.

Ken Shapiro was a principal to first degree murder. See Point XV. Indeed, the prosecutor specifically admitted that Ken Shapiro was a principal in this crime XVIIT1861-62. The trial court erred in rejecting this mitigating circumstance.

The trial judge erred in rejecting Mr. Keen's good potential for rehabilitation as a mitigating circumstance

IIR459. There was also undisputed evidence that Michael Keen had an excellent employment history and had excelled at his work. The prosecutor explicitly agreed that this mitigating circumstances applies XVIIT1866. This factor is supported by Mr. Keen's good record in prison, his good work record prior to prison and his positive character traits and accomplishments. Good prospects for rehabilitation constitute a reasonable basis for a life recommendation.

The trial judge also failed to consider Mr. Keen's difficult early life and his being a good brother and son as mitigating circumstances. The jury could have also reasonably recommended life imprisonment based on Michael Keen's difficult early life. There was undisputed testimony that Michael's father was an alcoholic who deserted the family when Michael was seven XVIIT1842. A difficult early life is a reasonable basis for a life recommendation. Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Scott v. State, 603 So. 2d 1275 (Fla. 1992); McCampbell, supra at 1075-76. In Hegwood, this Court noted the defendant's mother's alcohol abuse as a significant factor. Growing up in an alcoholic home and being abandoned at a young age is a reasonable basis for a life recommendation.

It is also undisputed that Michael Keen was a good brother and son XVIIT1842-43. Michael's mother testified that after Michael's father left the house, he had to assume the role of the father figure, until he went to college XVIIT1842. A defendant's caring relationship with his family is a reasonable basis for a life recommendation. Barrett; Scott; Perry v. State, 522 So. 2d 817, 821 (Fla. 1988).

Michael Keen had numerous positive achievements as a youth despite growing up with an alcoholic father who abandoned him. He excelled in piano and the arts XVIIT1841. He competed in the International Piano Guild XVIIT1841. He was an honor student in high school XVIIT1841-1842. He played high school football XVIIT1842. He won a scholarship to Eckerd College and graduated XVIIT1842. Positive character traits and accomplishments are a reasonable basis for a life recommendation. Barrett; Scott; McCampbell; Stevens v. State, 613 So. 2d 402 (Fla. 1992); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Thompson v. State, 456 So. 2d 444 (Fla. 1984). These traits and actions are especially significant as they show potential for rehabilitation and productivity within the prison system. Holsworth; Fead; McCampbell.

The trial judge also erred in his findings as to aggravating circumstances. He failed to view the evidence in the light most favorable to the jury's recommendation and to determine whether the jury could have reasonably rejected one or more of the aggravating circumstances, doubled them or given them little weight IIR450-456.

The jury could have rejected and/or given less weight to the aggravating circumstances. The trial judge found three aggravating circumstances XVIIT1920-29. All three of these aggravating circumstances could be reasonably rejected and/or given less weight by the jury. The trial judge found the "especially heinous, atrocious, or cruel"(HAC) aggravator XVIIT1921-26. Fla. Stat. 921.141(5)(h). The jury could have

reasonably rejected this circumstance. Ken Shapiro testified that Michael Keen allegedly came up behind Anita Keen and pushed her over the railing of the boat XT968-70. Shapiro admitted that he drove the boat out of Ms. Keen's range XT970-71. He then claimed that they then watched her swim for 15 minutes to an hour and then returned while she was still swimming XT970-73. HAC does not apply unless it is clear that Appellant meant to cause unnecessary and prolonged suffering. Kearse v. State, 662 So. 2d 677 (Fla. 1995); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). See Point XV. There is no evidence that Mr. Keen had any intent to cause any prolonged suffering or intentional torture. The jury could have reasonably rejected HAC or given it less weight.

The trial judge also found the pecuniary gain and "cold, calculated, and premeditated" aggravating circumstances XVIIT1920-29. Fla. Stat. 921.141(5)(f) and (i). The jury could have reasonably rejected both these circumstances and/or given less weight to them. Although Ken Shapiro's testimony could provide a sufficient basis for a jury to find these aggravating circumstances the jury could have also reasonably rejected these aggravating circumstances due to doubts about Shapiro's credibility. See Point XV.

There are many reasons to doubt Ken Shapiro's credibility. He was an admitted perjurer who was literally testifying to save his life. He made numerous inconsistent statements concerning this incident, including how Anita Keen was killed. Aspects of his testimony are inherently incredible. The jury could have had a reasonable doubt as to one or both of these

aggravating circumstances based on all these problems with his credibility.

Even if the jury had completely believed Ken Shapiro's testimony, it could have reasonably merged these aggravating circumstances into one. See Point XV.

The trial judge relied on improper factors to devalue the jury's recommendation. The trial judge relied on the length of the jury's deliberation and the split in the jury's vote in order to devalue the jury's recommendation. Both of these are irrelevant considerations. The trial judge noted the jury's seven to five vote in his initial paragraph IIR449. The trial judge began his conclusory section as follows:

> The jury deliberated and, within sixty seconds, recommended that this Court sentence the defendant to life in prison by a majority of seven to five.

IIR459.

He went on to state:

> This Court can only conclude that the jury's hasty recommendation of life indicates that it was based on something other than the sound reasoned judgment required in such cases.

IIR460. It is clear that the judge relied on both the length of the jury's recommendation and the seven to five vote to devalue the jury's recommendation. Both of these are improper considerations.

This Court has rejected the length of the jury's deliberation as a factor to be considered in overriding a jury's recommendation of life. McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The jury in McCampbell deliberated for six minutes at the penalty phase. Id. at 1073.

> The trial court also classified the jury's recommendation as unreasonable because of the brevity of its penalty deliberation. The jury spent about six hours deliberating the guilt issues. At the penalty phase, the jury heard 140 pages of testimony and argument bearing on the question of life or death. They were instructed to base their verdict on the evidence presented at both proceedings. It cannot be concluded that the jury did not have sufficient time within which to consider its penalty verdict.

421 So. 2d at 1075.

Here any reliance on the brevity of the jury's deliberations is improper as in McCampbell. Indeed, the present case is similar to McCampbell in many respects. In the present case, there was a lengthy guilt phase consuming nearly 1,000 pages of evidence and argument. There is no indication how long the jury deliberated in the guilt phase but the record does reflect a jury request for numerous pieces of evidence XVIIT1802-1809. There were only 50 pages of evidence and argument presented in the penalty phase XVIIT1839-1889. The State presented no new evidence at the penalty phase. One of the most significant mitigators in the case, the disparate treatment of Ken Shapiro, was established in the guilt phase. The evidence and argument in this case was approximately one third the length of that in McCampbell. A reasonable basis for a life recommendation was established in the guilt phase. A relatively quick recommendation of life imprisonment was justified as in McCampbell.

This case is also similar to McCampbell in terms of aggravation and mitigation. The trial judge found three aggravators in McCampbell as in this case. 421 So. 2d at 1075. In McCampbell this Court stated:

> From an objective review of the record, it appears the jury could have been influenced in its recommendation for life imprisonment by the following factors: (1) appellant's exemplary employment record; (2) appellant's prior record as a model prisoner; (3) the positive intelligence and personality traits detailed through the testimony of Dr. Yarbrough which showed the appellant's potential for rehabilitation; (4) appellant's family background; and (5) the disposition of the co-defendants' cases. In *Tedder* we said: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So. 2d at 910. That is not the situation in the instant case. Given all the facts and circumstances, we find that the action of the jury was reasonable and should not have been overruled by the trial judge.

421 So. 2d at 1075-1076.

Here, as in McCampbell it was improper to rely on the brevity of the jury's deliberations to ignore several obvious bases for a life recommendation.

The trial judge's reliance on the seven to five vote is also improper. This Court has specifically condemned any reliance on the margin of the jury's recommendation of life. Craig v. State, 510 So. 2d 857, 867 (Fla. 1987). This was harmful error in this case.

The trial judge made substantial errors in his sentencing order. This case must be remanded for imposition of a life sentence or at least a judge resentencing.

POINT XVII

> THE TRIAL COURT ERRED IN FAILING TO CONSIDER LIFE WITHOUT PAROLE AS A SENTENCING OPTION.

The trial court erred in failing to consider life without parole as a sentencing option IIR449-461. This denied

Appellant due process of law pursuant to Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This subjected him to cruel and/or unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution, and Florida Statute 921.141. Beck v. Alabama, 447 U.S. 625 (1980); Simmons v. South Carolina, 512 U.S. 154 (1994).

The offense in this case took place on November 15, 1981. The Legislature amended Florida Statute 775.082(1) effective May 25, 1994 to make life without parole a penalty for first degree murder. In Re: Standard Jury Instructions In Criminal Cases, 678 So. 2d 1224 (Fla. 1996). Guilt and penalty phase of this case took place in June and August, 1995 IIR449. Sentence was imposed on July 15, 1996 IIR449-461. The trial court committed fundamental error in failing to consider the life with no parole option.

The Oklahoma Court of Criminal Appeals faced a similar issue. Oklahoma had a system where the two penalties for first degree murder were death and life in prison with the possibility of parole. The Oklahoma Legislature changed the penalties to add the option of life without parole. It was held to be reversible error to fail to consider the life with no parole option in trials and penalty phases conducted after the effective date of the statute, even though the offense was committed prior to the effective date of the statute:

> There is no question that in this case consideration of the life without parole sentence is a retroactive

> application of a punitive statute. However, our analysis may not stop here. In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available at the time he committed his crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.
>
> Accordingly, we find that the trial court's refusal to consider the possibility of imposing a sentence of life without parole provision under the provisions of 21 O.S. Supp. 1987, § 701.10 was error.

Allen v. State, 821 P.2d 371, 376 (Okl.Cr. 1991). See also Wade v. State, 825 P.2d 1357, 1363 (Okl.Cr. 1992). This rule has been applied to retrials and resentencings. McCarty v. State, 904 P.2d. 110 (Okl.Cr. 1995).

The refusal to instruct the jury and consider the life without parole option has been consistently held to be fundamental error. Salazar v. State, 852 P.2d 729, 741 n.9 (Okl.Cr. 1993); Hain v. State, 852 P.2d 744, 752-753 (Okl.Cr. 1993); Humphrey v. State, 864 P.2d 343, 344 (Okl.Cr. 1993); Fontenot v. State, 881 P.2d 69, 74 n.2 (Okl.Cr. 1994); Parker v. State, 887 P.2d 290, 299 (Okl.Cr. 1994); Cheatam v. State, 900 P.2d 414, 428-430 (Okl.Crim. 1995).

This error has been held to mandate reversal regardless of the aggravating and mitigating circumstances in a given case. Salazar; Wade; Allen; Hain. The Court explained why this error is fundamental and always requires reversal:

> The Oklahoma Legislature, as representatives of the citizens of this State, has determined in some cases, life without the possibility of parole can accomplish the societal goals of retribution and deterrence,

> without resorting to the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1975) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders")....
>
> The gravity of the death penalty and the legislature's clear determination that life without parole should be considered in sentencing a defendant who has been convicted of First Degree Murder warrant remand of this conviction for resentencing.

Salazar, supra at 739.

The conclusion of the Oklahoma Court of Criminal Appeals that a defendant who is tried and sentenced after the effective date of the life without parole option must receive consideration of this option and that this error is fundamental and always mandates reversal is supported by the decisions of the United States Supreme Court.

In Beck v. Alabama, 447 U.S. 625 (1980) the United States Supreme Court struck down an Alabama statute that prohibited the giving of lesser offenses in a capital case. The Court held that the Due Process Clause required this in a capital case because of the unwarranted risk of conviction. 447 U.S. at 638-639. The Court relied, in part, on the unique need for reliability in a capital case. The same unwarranted risk is at work here. The judge could impose death in order to avoid the possibility of release, rather than because it is the required penalty.

Assuming arguendo that this error can be harmless, it was harmful in the current case. There was substantial mitigating evidence introduced. The jury recommended life. The failure to consider this option is fundamental error.

POINT XVIII

ELECTROCUTION IS CRUEL AND UNUSUAL.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (1972)(Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has

become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

POINT XIX

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's death penalty statute is unconstitutional. Mr. Keen filed a pre-trial motion to declare Florida's death penalty statute unconstitutional IIR214-256. The trial court denied it to the extent that it asked to declare the death penalty statute unconstitutional ST 94-100. Florida's death penalty statute is violative of Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. The trial judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So. 2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course

of a felony would be inappropriate). Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment.

2. Appellate review

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259. Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

The failure of the Florida appellate review process is highlighted by the life recommendation cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder v. State, 322 So. 2d 908 (Fla. 1975) consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied.

3. Aggravating circumstances

Great care is needed in construing capital aggravating factors. Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion. The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So. 2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So. 2d 354 (Fla. 1987) (rejecting aggravator on same facts).

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction

favorable to the State, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So. 2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the State by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[1] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

[1] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

CONCLUSION

Wherefore, appellant respectfully requests that this Court grant him a new trial, a resentencing, and/or reduce his sentence to life imprisonment.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

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RICHARD B. GREENE
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 265446
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Michael Scott Keen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of February, 1998.

_____
Attorney for Michael Scott Keen