IN THE SUPREME COURT OF FLORIDA

JOHNNIE L. NORTON,

Appellant,

vs.

Case No. 88,803

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
FLORIDA BAR NUMBER 0234176

Public Defender's Office
Polk County Courthouse
P. 0. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The record on appeal herein contains 14 volumes and one supplemental volume. References in this brief to the record shall be made by indicating the appropriate volume and page number, pursuant to Florida Rule of Appellate Procedure 9.210(b)(3). References to specific exhibits shall be made by referring to the exhibit numbers.

STATEMENT OF THE CASE

On November 23, 1994, a Hillsborough County grand jury returned an indictment against Appellant, Johnnie Lewis Norton, charging him with the premeditated murder of Lillie Effie Thornton by shooting her with a firearm on November 3, 1994. (Vol. I, pp. 29-30)

Among the pretrial motions Appellant filed were motions to suppress evidence seized in an illegal search and seizure (Vol. I, pp. 98-104) and to suppress confession or statements illegally obtained (Vol. I, pp. 105-111), an amendment to which was subsequently filed. (Vol. II, pp. 247-248) A suppression hearing was held before the Honorable Robert J. Simms on April 24, 1995. (Vol. XIII, pp. 1234-1348) The court denied the motions, except for certain post-arrest statements Appellant made to Detective Rick Childers at the police station after Appellant had asked for a lawyer. (Vol. II, pp. 291, 297; Vol. XIII, pp.1272-1278, 1291-1292, 1310-1312, 1339-1340) The court found that these statements were obtained in violation of Miranda, but were voluntary. (Vol. XIII, pp. 1310-1312)[1]

In another pretrial motion, filed on January 8, 1996, Appellant moved in limine, primarily seeking to exclude from the penalty phase, if there was one, certain evidence regarding an assault against a woman named Rosa Mae Warmack. (Vol. II, pp. 319-

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[1] At Appellant's trial, the defense lodged no objections to admission of the evidence that was the subject of the motions to suppress.

322) The court heard the motion on March 1, 1996, and denied it. (Vol. XI, pp. 1034-1039)

This cause proceeded to a jury trial on February 26-March 1 and March 4, 1996, with the Honorable J. Rogers Padgett presiding. (Vol. IV, p. l-Vol. XII, p.1172) On March 1, 1996, Appellant's jury found him guilty of first degree murder, as charged. (Vol. II, p. 356, Vol. XI, p. 1026) At the penalty phase held on March 4, 1996, the jury received additional evidence from the State and the defense, and returned a recommendation by a vote of eight to four that Appellant be sentenced to die in the electric chair. (Vol. II, p. 373, Vol. XII, pp. 1044-1171)

On March 11, 1996, Appellant, through counsel, filed a Motion to Override Jury's Death Recommendation or to Grant the Defendant a New Penalty Phase Hearing with a New Jury (Vol. III, pp. 379-381), which the court heard and denied, also on March 11. (Vol. III, p. 381, Supplemental Vol., pp. 2-7)

Appellant filed a Motion for New Trial on March 13, 1996 (Vol. III, PP. 382-386), which the court heard and denied before sentencing Appellant on March 18, 1996. (Vol. III, p. 382, Vol. XIII pp. 1173-1187) Judge Padgett sentenced Appellant to death, finding a single aggravating circumstance, that Appellant was previously convicted of a felony involving the use or threat of violence to some person. (Vol. III, pp. 395, 398-401, Vol. XIII, p. 1187) After reciting the evidence offered in mitigation, which the court found to be "unrefuted," the court concluded that there was "nothing substantial or extraordinary about the mitigating facts,"

and that no statutory or nonstatutory mitigating factors had been shown to exist. (Vol. III, pp. 399-400)

Appellant filed a pro se notice of appeal on March 27, 1996 (Vol. III, p. 403), which was followed by a notice filed by counsel on April 8, 1996 (Vol. III, pp. 404-405), and an amended notice filed by counsel on July 2, 1996. (Vol. III, p. 413)

STATEMENT OF THE FACTS

Guilt Phase--State's Case

In November of 1994, Lillie Thornton was living at the Jackson Heights Apartments with her four daughters. (Vol. VI, pp. 251, 272-273) Johnny Seay, Thornton's boyfriend or ex-boyfriend, lived there off and on. (Vol. VI, pp. 251, 268-270, 279-280) Seay and Thornton had a good relationship for about five years, but they had their "ups and downs," their "little run-ins." (Vol. VI, p. 280)[2] Thornton was also seeing Appellant at around the same time she was seeing Seay. (Vol. VI, pp. 251-252, 256, 262, 270-271, 279-280) If Thornton needed a ride somewhere, Appellant was the person she would ask. (Vol. VI, p. 262)

On November 2, around noon, Thornton left with Appellant in his little gray car (which she rode in a lot) to go pay some bills; she had just received some kind of monthly check. (Vol. VI, pp. 257, 262, 273-275, 281) Johnny Seay testified that he was not upset with Thornton about anything that day. (Vol. VI, p. 282)

Thornton did not come home all night. (Vol. VI, pp. 252-256, 273-276) Although she would stay out sometimes, Thornton usually called if she was going to be very late, or out all night, but she

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[2] Prior to the beginning of testimony, the State moved in limine to exclude evidence of an incident that occurred six months before the homicide in which the Lillie Thornton hit Johnny Seay in the head with a telephone and was arrested for domestic battery. (Vol. VI, pp. 217-221) The court ruled that this evidence could not come in unless the defense had other evidence linking Seay to the killing. (Vol. VI, pp. 220-221) Appellant sought to question Seay about this on cross-examination, believing that the door had been opened, but the court would not permit it. (Vol. VI, pp. 284-285)

did not call after she left the apartment at noon. (Vol. VI, pp. 254-255, 262, 275-276, 281-282)

Star Thornton, Lillie's 13 year old daughter, had ridden in Appellant's little gray car several times. (Vol. VI, pp. 257, 266) The last time was around October 22 when mother and daughter went to order some birthday cakes. (Vol. VI, pp. 258-260) The car was in good condition, with light gray carpeting on the floors. (Vol. VI, PP. 257-260)

Sometime before 7:00 the next morning, November 3, Lillie Thornton's body was found in a field in Tampa near 30th Street and 38th Avenue where people went to dump trash, drop off stolen cars, have sex, and do drugs. (Vol. VI, pp. 287, 289-290, 296-297, 314-316)[3] There were no signs of a struggle at the scene. (Vol. VII, p. 443; Vol. IX, pp. 683, 716) There was a tire track on the back of Thornton's right pant leg. (Vol. VI, pp. 293, 308; Vol. VII, pp. 351, 448; Vol. IX, pp. 682-685) Two cubes of crack cocaine were found in her bra. (Vol. VII, p. 449, Vol. IX, p. 715)

Various items of potential evidentiary value were gathered at the scene, including photographs and plaster casts of tire tracks and shoeprints. (Vol. VII, pp. 378-383, 385-387, 389-390; Vol. VIII, pp. 574-588)

Associate Medical Examiner Dr. Robert Pfalzgraf examined the body in the field that morning, and conducted an autopsy that afternoon. (Vol. VII, pp. 441-442, 445) Lillie Thornton died from

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[3] Johnny Seay, when he was not staying at Lillie Thornton's residence, lived right around the corner from where her body was found. (Vol VI, pp. 282-283; Vol. IX, pp. 731-732)

a gunshot wound to the back of the head. (Vol. VII, pp. 446-447) Thornton would have been unconscious immediately after being shot, and dead within a few seconds or, at most, a few minutes. (Vol. VII, p. 452) The bullet did not exit her body, but embedded in part of the skull. (Vol. VII, p. 447) Pfalzgraf was able to remove the lead core and the jacket, which he transferred to Detective Bell of the Tampa Police Department. (Vol. VII, pp. 447-448) There was no stippling of the wound, and the gun was probably at least 18 inches away and level with Thornton's head when it was fired. (Vol. VII, pp. 454-457)[4] There were no other injuries, including defensive wounds, on the body. (Vol. VII, pp. 445-446) A lack of bruising to Thornton's leg indicated that she had been run over, or partially run over, by the tire of a car after she was dead. (Vol. VII, pp. 448-449) Pfalzgraf's toxicological examination showed that Thornton had metabolites of cocaine in her blood, which indicated cocaine use within the previous two or three days, as well as cocaine in her urine, which indicated cocaine use within the previous 12 hours. (Vol. VII, pp. 449-450)

Kim McDonald had known Lillie Thornton, but not her name, for a couple of months before she died; McDonald knew her as "Slim." (Vol. VI, pp. 323-324) She did not know "Slim" very well, but had seen her about six or seven times in the same area. (Vol. VI, pp.

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[4] The State's forensic firearms expert, Dominic Denio, testified that, in this case, he could not form an opinion as to how far away the gun had to be to avoid stippling, because the victim's hair would have prevented "the unburnt gunpowder particles reaching the skin with sufficient speed or force to cause" stippling. (Vol. VII, p. 428)

333-334) McDonald had also known Appellant "for numerous of years," about five or six, but did not know his last name until she asked someone after Thornton's body was found. (Vol. VI, pp. 324, 330-331, 335-336) McDonald last saw Thornton alive between 10:30 and 11:OO on the night before he body was found. (Vol. VI, pp. 325, 329) Thornton got out of Appellant's car, which was parked on 29th in front of a clothing store called "Gator's," while Appellant remained in the vehicle, (Vol. VI, pp. 326-327) Thornton went into the "dust bowl," which was "a place where people h[u]ng out in the back." (Vol. VI, pp. 327-328) There, McDonald, who was familiar with street-level drugs sales in that area, saw a "hand to hand" that "was like a transaction." (Vol. VI, p. 328) Thornton then got back into the car with Appellant, and they left going towards Lake. (Vol. VI, p. 328) The next day, Detective James Noblitt of the Tampa Police Department was showing around a picture of Lillie Thornton, and McDonald told him what she had seen. (Vol. VI, pp. 329-330; vol. VII, pp. 353-356)

On November 4, officers of the Tampa Police Department had Appellant's residence (which was 1.1 miles from the field where Thornton's body was found) and car under surveillance. (Vol. VII, p 393-394; Vol. IX, pp. 690, 707-708)[5] At around noon, Detectives Black and Pedersen, who were in plain clothes and unmarked cars, went to relieve Detectives Townley and Holland. (Vol. VII, pp. 394-395) The gray Subaru that was being watched began to move, and the

[5] The police were able to determine Appellant's address after Kim McDonald supplied them with his name and identified his picture in a photopack. (Vol. VII, pp. 356, 358; Vol. IX, p. 688)

detectives followed in their vehicles. (Vol. VII, pp. 395-396) When Appellant's vehicle accelerated, and it appeared that he had observed the officers and was trying to get away from them, Detective Black placed his blue light on his dashboard and accelerated. (Vol. VII, p. 397)[6] He and Pedersen motioned for Appellant to pull over, and Black was honking the horn as well. (Vol. VII, p. 397) At one point, Appellant did pull over, but then sped up more. (Vol. VII, pp. 397-398) Black pulled his vehicle in front and slowly tapped his brakes to bring Appellant to a stop, but he turned into the FunLan Drive-In and accelerated. (Vol. VII, p. 398) There Appellant slowed down and jumped out of his car and started running. (Vol. VII, p. 399) Black exited his vehicle, pulled his weapon, and told Appellant to put his hands up and get on the ground, which he did. (Vol. VII, p. 399-400) Pedersen chased Appellant's car down and stopped it before it could hit a fence at the side of the theater. (Vol. VII, p. 400) Black handcuffed Appellant and placed him in the back seat of Detective Holland's car. (Vol. VII, pp. 400-402)

When Detective James Noblitt arrived at the FunLan, he observed a reddish-brown stain that appeared to be blood "swiping up and down" on the passenger's side window of the Subaru. (Vol. VII, pp. 360-361) When he moved a black jacket that was on the back seat, he discovered a spent shell casing . (Vol. VII, p. 362)

Detective Rick Childers (who had observed Appellant's car

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[6] At the suppression hearing before Judge Simms on April 24, 1995, Black testified that he had the blue light on his dashboard, but it was "not activated." (Vol. XIII, p. 1322)

parked outside his residence earlier that day and seen what appeared to be blood on the passenger window, and thought the right front tire of Appellant's car was similar to the tire impression that was on Lillie Thornton's pant leg) went to FunLan and spoke with Appellant, who had not yet been placed under arrest, without reading him his Miranda rights. (Vol. IX, pp. 688-691, 693-700, 714-715, 723) Appellant was not handcuffed when Childers arrived. (Vol. IX, pp. 722-723) Childers told Appellant that he was "working the death of Lillie Thornton, and [Appellant's] name had come up in the investigation[.]" (Vol. IX, p. 694) Childers asked Appellant if he knew Thornton, and he replied that he had known her for about two or three months. (Vol. IX, p. 694) Childers asked whether Appellant had seen her on November 2. (Vol. IX, p. 695) He answered that he had picked her up at her house between 11:30 and 12:OO because she wanted to go pay some bills. (Vol. IX, p. 695) When they got to the area of 34th and Lake, Appellant's car broke down. (Vol. IX, p. 695) Thornton got out of the car and walked toward some mailboxes. (Vol. IX, p. 695) Appellant never saw her again. (Vol. IX, p. 695) He sat with his car until about 6:00 or 6:30, trying to call his brother, Trumell, to help him. (Vol. IX, pp. 695-696) Appellant left messages with his mother, and his brother finally showed up and was able to get the car started. (Vol. IX, p. 697) Appellant drove home, parked, and went to bed at 7:oo. (Vol. IX, p. 697) Appellant also told Childers that he had not gone to work that day because his car had broken down, but when

he called work he said that his mother was in the hospital. (Vol. IX, p. 698)

Childers asked Appellant to come to the police station voluntarily and look at some photographs to assist them, but he did not want to. (Vol. IX, pp. 698-699)

When Childers advised Appellant that they were going to seize his car, Appellant did not put up an argument about it. (Vol. IX, p. 699)

Childers approached the Subaru with Appellant and pointed to an area on the passenger's window which appeared to be blood. (Vol. IX, p. 699) Appellant asked where it was on the seat. (Vol. IX, p. 699) Childers said it was not on the seat, and pointed out where it was on the window, but Appellant would not respond. (Vol. IX, p. 699)

Appellant wanted a clothes basket that was in the back hatch area. (Vol. IX, p. 700) Appellant pointed out a bloody T-shirt that was in the basket, saying that he got blood on the shirt when he cut his hand about three weeks before. (Vol. IX, p. 700) Childers told Appellant that he was "not getting basically nothing out of the car." (Vol. IX, p. 700)

Childers noticed that there **was** no carpet in the vehicle. (Vol. IX, PP. 702-703) When he asked Appellant what happened with the carpet, Appellant responded that the car did not have carpet in it when he bought it three or four months before. (Vol. IX, p.

703)[7] Childers observed that the metal on the floor was not "all scratched up by people getting in and out of the car." (Vol. IX, p. 703) Childers later attempted to locate the carpeting by checking car washes, trash cans, dumpsters, etc. in the areas of Appellant's residence and the crime scene, without success. (Vol. IX, pp. 706-707, 709) Nor did he find any of the carpet, or any remnants, particles or fibers, anywhere in or around Appellant's house when a search warrant was executed. (Vol. IX, PP. 708-709) Childers observed that when he got close to the car at the FunLan, the interior smelled "fantastic." (Vol. IX, p. 707)

The 380 caliber shell casing was collected by Crime Scene Technician Mike Pozzouli, along with the bloody T-shirt. (Vol. VII, pp. 383-384; Vol. IX, p. 700)

Childers placed Appellant under arrest for murder in the first degree and robbery (because the investigation revealed that Thornton had received a check and was going to pay bills, but no currency or purse was found with the body), and he was taken back to the Tampa Police Department. (Vol. IX, pp. 704, 728-729) Childers searched Appellant and found a small amount of marijuana. (Vol. IX, p. 737)[8] During his conversation with Childers, Appellant told him that he had consumed three "joints" of marijuana and

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[7] James Ferguson of Bond Auto Sales testified that the Subaru had carpeting in it that was "[s]ort of a silver blue" in color when Ferguson sold the car to Appellant in August of 1994. (Vol. IX, pp. 747-750)

[8] Detective Black testified that he searched Appellant at the FunLan and did not find any marijuana. (Vol. VII, p. 402)

one and one-half quarts of an alcohol called "Red Bull," or something like that, from the early morning hours to the time of the interview. (Vol. IX, pp. 738, 743)

At the police department, Childers told Appellant that he had not done "a good enough clean-up job on his car," because they had found a spent casing inside it. (Vol. IX, pp. 742-743) Appellant then told Childers that he collected shell casings, and a .22 caliber shell was found in his room when the search warrant was executed, but no shell casing collection. (Vol. VIII, p. 508; Vol. IX, PP. 725-726)

Childers also told Appellant that the police had tire impressions or tire tracks at the scene, which they were going to compare with the tires on Appellant's vehicle, and that "they were similar like fingerprints." (Vol. X, p. 779) Later, in the squad room at the police department, Appellant remarked to Detective Randy Bell that he had bought the tires that were on his car the previous day from a black male at a tire store located at 21st and Nebraska. (Vol. x, p. 773) Appellant said he gave the black male $50, and there was apparently a problem with making change for the fifty dollar bill. (Vol. X, p. 773) That same day, November 4, Childers became aware of the statements Appellant had made to Bell about the tires, and went to the area of 21st and Nebraska. (Vol. X, p. 780) Childers did not find any tire store at that particular intersection, but inquired of stores at 3201 North Nebraska and

3301 Nebraska, but could not find anyone who sold Appellant the tires. (Vol. X, pp. 780-783)[9]

The Subaru was towed from FunLan to the impound lot of the Tampa Police Department, for later transportation to FDLE for further processing. (Vol. VII, pp. 363-365; Vol. IX, pp. 703-704)

The car was towed to FDLE on November 8, 1994, where Crime Laboratory Analyst Gary McCullough examined it. (Vol. VII, p. 465) Most of the carpeting had been removed, and certain areas of the driver's and front passenger's seats had been cut and removed. (Vol. VII, pp. 467-468) The large red smear on the inside of the passenger's side window, which was dried, tested presumptively positive for blood. (Vol. VII, pp. 470, 488, 493-494)[10] McCullough found a Western Auto receipt in the car dated 11-3-94, showing a time of 8:56 a.m., and a Discount Auto Parts receipt dated the same date, showing a time of 9:18:16. (Vol. VII, p. 471) He also found an Armor All cleaner bottle, a utility knife or carpet knife, a carpet brush, and air freshener in the front passenger foot well area. (Vol. VII, pp. 473-479) He found a can of carpet stain remover in the rear bench seat. (Vol. VII, pp. 476-478) The carpet brush and knife tested presumptively positive for the presence of

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[9] Childers' testimony in this regard was admitted over a defense hearsay objection. (Vol. X, p. 780)

[10] During his initial testimony, McCullough said that the window was down when the car arrived at FDLE (Vol. VII, p. 470), but was later recalled to correct his testimony by saying that the window was up when the car was brought into FDLE. (Vol. X, 764-767, 769) Appellant unsuccessfully objected when the State sought to admit a photograph of the window in the up position when McCullough was recalled, as it had never been provided to the defense. (Vol. X, pp. 765-766)

blood. (Vol. VII, pp. 482-484) There was an orange or red discoloration on the front passenger seat, as well as on some clothing in the back of the car; these areas tested negative for the presence of blood. (Vol. VII, pp. 491-492) The presumptive tests for blood McCullough ran did "not differentiate insect, animal and human blood." (Vol. VII, p. 493)

Further testing at FDLE, this time by Frank Deprospo, a forensic serologist, revealed the presence of human blood on the T-shirt from Appellant's car and on the window track into which the passenger's side window recessed when it was in the "down" position, as well as on a cloth or rag that was seized from the yard of Appellant's residence when the search warrant was executed. (Vol. VII, pp. 481-482; Vol. VIII, pp. 508, 596-598, 602) Although blood was present in the scrapings from the passenger's window, no further testing was done at FDLE, because the substance was "in very limited quantity[,]" and Deprospo wanted to preserve some for DNA testing. (Vol. VIII, pp. 601-602) When Deprospo tested the carpet brush, he was able to get a chemical indication for the presence of blood, but "was unable to go any further with that." (Vol. VIII, p. 603) There were some gold or yellowish or brownish carpet fibers or particles in the brush. (Vol. VIII, p. 617) Although the testing McCullough did for the presence of blood on the utility knife was positive, when Deprospo ran the same test, the result was negative. (Vol. VIII, pp. 600-601) Deprospo testified that this discrepancy might be accounted for if there was

only a small amount of blood on the knife, and it was consumed in the initial testing. (Vol. VIII, pp. 600-601)

The samples of blood which were in possession of FDLE were not sufficient to perform the more exclusive form of DNA testing, RFLP, and FDLE elected to send the samples to a private laboratory for DNA testing, as such a lab would have "the ability to do anywhere from five to seven additional markers" beyond the "one marker using PCR" DNA testing that FDLE could do. (Vol. IX, pp. 630-633, testimony of Billy Shumway, supervisor of the serology DNA section at the FDLE lab in Tampa)

The Forensic Identity Testing Division at Laboratory Corporation of America Holdings, or LabCorp (which was formerly known as Roche Biomedical Laboratories), in North Carolina was able to obtain DNA profiles from cuttings from a shirt, blood flakes from a window, and blood flakes from a window track. (Vol. IX, pp. 645-646) LabCorp was unable to obtain any quantifiable DNA from a rag that **was** submitted to it. (Vol. IX, p. 647) A carpet brush had human DNA on it, but LabCorp was unable to obtain a DNA profile. (Vol. IX, pp. 646, 649) The DNA profile that was established from the stains on the shirt matched the profile of Johnnie Norton. (Vol. IX, pp. 649-650) The DNA profiles from the scrapings from the window and the window track matched the profile of Lillie Thornton. (Vol. IX, pp. 650-651) The probability of randomly selecting an unrelated individual with a DNA profile consistent with the window, the window track, and Lillie Thornton was "approximately one in 6.7 million for the Caucasian population, one

in 174 thousand for the African-American population, one in 2.8 million for the Southeastern Hispanic population, and one in 6.9 million for the Southwestern Hispanic population." (Vol. IX, p. 652)[11]

Oral Woods of FDLE compared the tires from Appellant's Subaru, which were of four different tread designs, four different makes, with plaster casts of tire tracks and negatives of tire tracks that were in the field where Lillie Thornton's body was found, as well as the track on her pant leg. (Vol. VIII, pp. 515, 526, 530-531) Woods was dealing strictly with class characteristics, tread design in the tires; there were not enough individual distinguishing characteristics to make a positive match between tracks at the scene and any tire on the Subaru. (Vol. VIII, pp. 518, 528-530, 534, 539-540) Woods found two tracks to be "similar" in tread design to the left front tire on the Subaru, which was a Goodyear T Metric, and one track that "could have been made by the tread on the left front tire." (Vol. VIII, pp. 527-530, 537) With regard to the track on Thornton's pant leg, Woods concluded that there was a "similarity" to the side wall tread design of the left front tire. (Vol. VIII, pp. 530-531) Five tracks found at the scene were eliminated; they were not made by any of the four tires on the Subaru. (Vol. VIII, pp. 532, 539) Woods was unable to say when any of the tire tracks was made. (Vol. VIII, pp. 540, 543-545)

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[11] Thornton was an African-American, as is Appellant. (Vol. I, pp. 26-27)

Crime laboratory analyst Edward Guenther of FDLE attempted to obtain latent fingerprints from various items recovered from the Subaru (the Armor All, the air freshener can, utility knife, etc.) but was not able to develop any. (Vol. VIII, pp. 549-552) He also received some latent lifts taken by Gary McCullough from the exterior of the Subaru; one fingerprint and one palm print matched Appellant's prints. (Vol. VIII, pp. 550, 553-555) None matched the prints of Lillie Thornton. (Vol. VIII, pp. 557-558) Guenther also dusted various items found in the vicinity of Lillie Thornton's body, but was unable to lift any fingerprints from them. (Vol. IX, pp. 626-627) In addition to his fingerprint analysis, Guenther compared negatives of shoe tracks and one dental stone cast of a shoe track with a pair of sneakers and a pair of work boots belonging to Appellant that were seized from his residence when the search warrant was executed, (Vol. VIII, pp. 508, 558-561) None of the tracks was made by Appellant's shoes. (Vol. VIII, pp. 558-561)

Dominic Denio, a forensic firearms examiner with the FBI laboratory in Washington, D.C., compared ammunition components he received from Detective Bell of the Tampa Police Department (consisting of a bullet jacket, a bullet core, and some minute fragments) with the shell casing recovered from Appellant's vehicle, and found them to be of the same caliber (380 auto) and manufacture (Federal Cartridge Company). (Vol. VII, pp. 407-416) It was possible the bullet came from that casing, but this could ne be established with certainty where the firearm that fired the bullet was not available for testing. (Vol. VII, pp. 415-416, 433)

Millions of bullets of the type Denio examined in this case were manufactured in America the previous year. (Vol. VII, p. 434)

Denio also tested the interior of Appellant's car, which he described as a subcompact Subaru two-door with a blue interior, "for the presence of vaporous lead, which would be indicative of an atmosphere of a gunshot[,]" with negative results. (Vol. VII, pp. 416-418, 424-425) He could not say, however, "that there was a gun fired or not fired in that car." (Vol. VII, p. 420)

In September, October, and November of 1994, James Watson worked at Cast-Crete with Appellant, whom he knew as "Gummy Bear." (Vol IX, pp. 751-752) Appellant was a hard worker. (Vol. IX, pp. 754-755) "In the last year[,]" Watson had a conversation with Appellant at work during which Appellant asked if Watson was interested in buying a gun. (Vol. IX, pp. 752-753) Appellant was "short on cash" and needed money for "like a birthday party or something, buy some cakes with it or something." (Vol. IX, p. 753) But Watson "didn't have no money at the time." (Vol IX, p. 753) Appellant never showed Watsom a gun, and "didn't say it was his or belonged to somebody or what it **was** or even what kind it was." (Vol. IX, pp. 752, 755)[12]

[Following the State's case, Appellant renewed various objections and motions he had made previously, and unsuccessfully moved for a judgment of acquittal. (Vol X, pp. 787-802)]

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[12] When he **was** deposed, Watson said that he didn't "know nothing about" this case. (Vol. IX. p. 756)

Guilt Phase--Defense Case

Before Appellant's witnesses began testifying, there was a discussion among the court and counsel as to whether the defense could present testimony from **Star** Thornton that, a few hours after Lillie Thornton left with Appellant, Johnny Seay made a remark to the effect of, "looks like your mom pulled another fast one." (Vol. X, pp. 802-810) The court ruled this testimony irrelevant, and granted the State's motion in limine to exclude it. (Vol. X, p. 810)

On November 2, 1994, Appellant was living with his mother, Katie Norton. (Vol. X, pp. 817-818) Appellant called the house that afternoon between 3:00 and 4:00 because "[h]is car was stopped." (Vol. X, p. 820) Mrs. Norton saw Appellant in the yard later, between 4:00 and 5:00. (Vol. X, p. 830) She saw Trumell, who did not have a car, around 6:O0. (Vol. X, pp. 830-831) Appellant and Trumell later left together. (Vol. X, pp. 832-835) Appellant returned between 8:00 and 8:30 p.m., when Mrs. Norton and two of her daughters were watching a movie called "The Hidden." (Vol. X, pp. 818-819) Appellant was drunk, and he went to his bedroom, where he remained overnight. (Vol. X, pp. 819, 835-836, 840)

Appellant's sister, Brenda McClendon, testified that Appellant came to her house between 4:30 and 5:00 on November 2, 1994, and they drank beer. (Vol. X, pp. 849-850) McClendon **saw** Trumell at her sister's house about 6:O0. (Vol. X, pp. 854-855) She did not see Appellant with him. (Vol. X, p. 855) McClendon later saw

Appellant at her mother's house about 8:30, 9:00. (Vol. X, pp. 853, 858) He came in while they were watching a movie called "The Thing Within." (Vol. X, pp. 853, 859) Appellant was drunk. (Vol. X, p. 853) He went to bed, and was still there when McClendon left her mother's house between 10:00 and 10:30. (Vol. X, pp. 853-854, 857)

Another sister, Darlene Sheppard, testified that when Appellant first bought his car, she observed a bullet and a shell on the passenger's side in front. (Vol. X, pp. 867, 870-874) Later, one day when Appellant came to her house to put some big birthday cakes in her freezer, Sheppard noticed that Appellant had taken the carpet out of his car. (Vol. X, pp. 865-867)

Dr. J.K. Williams was an obstetrician and gynecologist who saw Lillie Thornton at Tampa General Hospital on the morning of October 27, 1994. (Vol. X, pp. 900-902) She had been admitted the previous day with pelvic inflammatory disease. (Vol. X, p.902) When she was discharged from Tampa General on October 27, she was suffering from light vaginal bleeding, either as a result of the infection or the form of birth control she was using. (Vol. X, pp. 904-905, 907-908) Williams had no information as to who brought Thornton to the hospital or took her home. (Vol. X, 908)

[After Appellant rested his case, he renewed all previous motions and objections. (Vol. X, pp. 912-913)

Penalty Phase--State's Case

All three of the State's penalty phase witnesses concerned an incident involving a woman named Rosa Mae Warmack. (Vol. XII, pp. 1073-1092)[13]

Yolanda Warmack was Rosa Mae's mother. (Vol. XII, p. 1073) Rosa Mae, who was 41 years old at the time of the penalty trial, had never worked because she was "sort of on a retarded level." (Vol. XII, pp. 1073-1074) She went to public school until about sixth grade, but was put in a special class after that. (Vol. XI, p. 1074) She had a speech problem, with a very limited vocabulary. (Vol. XII, p. 1074)

In 1985 Yolanda Warmack received a call that her daughter was in the hospital. (Vol. XII, pp. 1074-1075) When Mrs. Warmack saw Rosa Mae, "she was in real bad shape." (Vol. XII, p. 1075) She was "all bandaged an swollen, and she had lost a lot of blood." (Vol. XII, p. 1075) Hospital officials said that "she had been beaten very brutally." (Vol. XII, p. 1075) Rosa Mae

> had had a lot of trauma...that she was just beaten with a jackhammer, gashes on her face, and she had to have plastic surgery, and her finger was like beaten almost off. They had to reconnect it and everything. Her eyes was beaten closed and her mouth was like she just was just like unreal almost...; it was very sad.

(Vol. XII, p. 1076) Three pictures of Rosa Mae Warmack, taken a few days after the incident when she was recovering, were admitted

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[13] Before the penalty phase began, Appellant requested and received standing objections as to portions of the evidence about the Warmack incident that he had sought to keep out by filing his pretrial motion in limine. (Vol. XII, pp. 1058-1060)

into evidence over Appellant's objections. (Vol. XII, pp. 1076-1077; State's Exhibits Numbers 53, 54, and 55)

Harold Warmack described his daughter as an "average person" with a speech problem. (Vol. XII, p. 1079) In 1985 he received a call from a sheriff's deputy who told him Rosa had "been beaten real bad" and was in the hospital. (Vol. XII, pp. 1079-1080) When Warmack saw her her, his "daughter looked like she had been in a lion den where lions had mangled her up. He head was split up. Her hand, her face, stab wounds, that's the way she looked." (Vol. XII, p. 1080) She was in pain. (Vol. XII, p. 1080) Rosa had "several wounds in her head," including "one big gash." (Vol. XII, p. 1081) One of her fingers "was about to fall off, it was severed so bad." (Vol. XII, p. 1081) He parents were able to take her home after five or six hours. (Vol. XII, pp. 1080-1081) She continued to be "bothered with those wounds and things" that were inflicted 11 years before. (Vol. XII, p. 1081)

Warmack became aware that Johnnie Norton was the person responsible for inflicting the injuries to his daughter and located him for law enforcement before he was arrested. (Vol. XII, pp. 1081-1083)

Detective Gladys Alarcon of the Hillsborough County Sheriff's Office was involved in the investigation of the attack upon Rosa Mae Warmack. (Vol. XII, pp. 1084-1085) On March 3, 1985, Warmack was left in a vacant field, severely beaten about the head and bleeding. (Vol. XII, pp. 1085-1086) She pulled herself into a convenience store and "alerted the clerk of her injuries." (Vol.

XII, pp. 1085-1086) Warmack was kept in the hospital for several days. (Vol. XII, p. 1086) She **was** in extreme pain and on medication. (Vol. XII, p. 1086) She received plastic surgery for some of the wounds she received. (Vol. XII, p. 1086) She was very swollen and very hard to understand, and so Alarcon waited a few days to interview her. (Vol. XII, p. 1086) When Alarcon did interview Rosa Mae Warmack at her home, she was difficult to understand because of her severe injuries and her very slow speech. (Vol XII, pp. 1086-1087) Warmack told Alarcon that she had gone to a bar where she had a couple of beers and talked to different friends. (Vol. XII, p. 1087) She needed a ride home, and a black male she had met by the name of either Tom or Johnnie offered to take her there. (Vol. XII, p. 1087) Warmack got into the car with the man. (Vol. XII, p. 1087) He made two stops, at a friend's house and at a liquor store, where he purchased a bottle of wine, before he drove to an unknown, very dark area where he parked on the side of the road and demanded sex from her. (Vol. XII, p. 1087) Warmack said she did not want to have sex because she was having her period and it was very uncomfortable for her to do so. (Vol. XII, pp. 1087-1088) The man forced her to have sex with him, then hit her "real hard" with a hard object such as a blackjack. (Vol. XII, p. 1088) Warmack passed out, and when she regained consciousness, she was in a vacant field, full of blood and in extreme pain. (Vol. XII, p. 1088)

Eventually, Johnnie Norton was developed as a suspect, and Warmack picked his picture out of a photopack that Alarcon prepared

as being the person who committed the crime. (Vol. XII, pp. 1088-1090) After Appellant was arrested, he admitted to Alarcon that he did pick up Warmack from a bar. (Vol XII, p. 1091) He said he had taken her to an area after she agreed to give him sex for fifty dollars. (Vol. XII, p. 1091) He paid her the money, but then took it from her after she had it in her hand, and she became upset and hit him. (Vol XII, p. 1091) He beat her with his fist, and she fell unconscious on top of him. (Vol. XII, p. 1091) He dragged her outside the vehicle into a vacant lot, hit her a couple more times, and left her there. (Vol. XII, p. 1091)

Alarcon testified that the injuries to Warmack were consistent with being hit with some type of blunt object, "[e]specially the finger area being that it was so severely cut and the injuries about the face and the head." (Vol. XII, pp. 1091-1092)

Following Alarcon's testimony, the State introduced into evidence four exhibits, which the prosecutor characterized as "certified copies of informations and judgments and sentences." (Vol. XII, pp. 1092-1093; State's Exhibits Numbers 56-59) Appellant objected to State's Exhibit Number 56 on the ground of an improper predicate because it appeared to be "some clerk's notes" rather than a certified conviction, but was overruled. (Vol. XII, p. 1092-1093)

State's Exhibit Number 56 showed that Johnnie Norton was charged with an aggravated battery that occurred on November 13, 1983. A docket entry showed that he pled guilty on May 2, 1984, and was sentenced to two years in Florida State Prison. (State's

Exhibit Number 56) State's Exhibit Number 57 showed that Johnnie Norton entered a guilty plea to a second degree murder that occurred on February 16, 1982, and was sentenced to 20 months in prison. State's Exhibit Number 58 showed that Johnny [sic] Norton entered a plea of guilty to a resisting arrest with violence and battery on a law enforcement officer that occurred on June 8, 1981, and was sentenced to 180 days in the county jail. State's Exhibit Number 59 **was** a judgment and sentence showing that Johnnie Norton entered a guilty plea and was sentenced to 10 years in prison for aggravated battery in the Rosa Mae Warmack incident.

Penalty Phase--Defense Case

Debra Brown **was** Appellant's half-sister. (Vol. XII, pp. 1094-1095) Her mother, Katie Norton, had five children with Willie Williams before they split up. (Vol. XII, pp. 1094-1095) Katie then married Johnnie Norton, Sr., with whom she had five more children, including Appellant, who was born when Debra Brown was about six or seven. (Vol. XII, pp. 1095-1096) There were 10 children and two adults living in a three-bedroom house. (Vol. XII, pp. 1096-1097)

Appellant's father treated him differently than he treated the other children; Debra Brown did not see him punish the others, but he punished Appellant by spanking him. (Vol. XII, pp. 1097-1098) She described one incident where something happened at school when Appellant was in first or second grade, and Appellant's father reacted by cutting off all of Appellant's hair. (Vol. XII, p. 1098)

The other kids were bothering him, laughing at him, and Appellant hid in the woods to keep from going to school. (Vol XII, p. 1098)

When the adults were out, the older five children took care of the younger five. (Vol. XII, p. 1099) Some of the children would be "pounding on" Appellant, and the older children did not protect him. (Vol. XII, pp. 1098-1100) To Debra Brown, it seemed that as he **was** growing up, Appellant "had a sign on him that said 'beat me' all the time. People just couldn't get along with him." (Vol. XII, p. 1099) He was "just distant." (Vol. XII, p. 1100) She testified concerning an incident where Appellant had gone to the store and it was taking him too long to come back. When another sister went to check on him, she found that he was up a tree where two boys had chased him. (Vol. XII, pp. 1099-1100)

Debra still loved her brother in spite of what happened, and testified that she would still communicate with him and write to him if he were sentenced to life in prison. (Vol. XII, p. 1100)

Another half-sister, Darlene Sheppard Patterson, who was the oldest child in the family, discussed how the older five children "picked on" Appellant a lot as he was growing up, because they felt he was "different." (Vol. XII, pp. 1103-1104) He was singled out because he was the first of the second group of children. (Vol. XII, p. 1104) Although Darlene and Appellant "got along pretty good," she "would slap him upside the head every now and then." (Vol. XII, p. 1103)

Appellant's mother, Katie Norton, testified that there were as many as 13 children living in the three-bedroom house (which was

eventually expanded to five bedrooms); in addition to the 10 children Mrs. Norton had with her first and second husbands, there was one stepchild and two grandchildren. (Vol. XII, pp. 1106-1110) All of the male children and one of the females had been involved with the criminal justice system. (Vol. XII, p. 1112)

Appellant was quieter than the other children when he was growing up. (Vol. XII, p. 1113)

Mrs. Norton still loved his son, even though they said he did a terrible thing, and she would still support and visit her son if her were sentenced to life in prison. (Vol. XII, p. 1113)

Appellant presented the testimony of Dr. Harry Krop, a clinical psychologist, via videotape, because he was in Texas, and unavailable to testify at the time of Appellant's penalty trial.[14] (Vol. XII, pp. 1056, 1116-1123) Dr. Krop interviewed Appellant on February 21 and May 4, 1995, and administered a battery of neuro-psychological tests on one of those occasions. (Vol. XII, p. 1119) He also interviewed several family members and reviewed various written materials pertaining to Appellant. (Vol. XII, p. 1119) Dr. Krop determined that Appellant's IQ was 85, which was in the low average range compared to others in the general population, but was comparable to, and possibly even somewhat higher than, the IQs of other people who were incarcerated. (Vol. XII, p. 1120) Dr. Krop found that Appellant did better in structured, supervised types of

[14] Before the penalty phase began, Appellant asked the court to continue it to the end of the week when Dr. Krop would be available to testify live, but the court refused. (Vol. XII, p. 1056)

situations than he did in the community, and should not have any difficulty functioning in a prison population. (Vol. XII, p. 1121) Appellant had no major mental illness or intellectual limitation, and should be able to adapt well to a life sentence. (Vol. XII, pp. 1122-1123)

Appellant's final witness was Terrence Moore, the attorney who represented Appellant in 1983 when he was charged with murder. (Vol. XII, pp. 1124-1136) Although Appellant indicated to his attorney that he acted in self-defense, and there was some expert ballistics evidence which tended to support this, Appellant entered a "best interest" plea of guilty to second degree murder and received a sentence of 20 months. (Vol. XII, pp. 1125, 1127-1129) Appellant was on probation at the time of this offense, and so was facing not only a trial on the second degree murder charge, but the violation of probation as well. (Vol. XII, pp. 1125-1126) The plea negotiations called for the sentence on the murder charge to run concurrent with the violation of probation. (Vol. XII, pp. 1125-1126) Had Appellant gone to trial on the murder charge and been convicted, Moore thought there was a serious possibility that he might received a sentence in the neighborhood of 12 to 15 years. (Vol. XII, pp. 1126-1127) Even if he were found not guilty in the criminal trial, if he were found guilty of violating his probation, Appellant could very easily have been sentenced to more than 20 months. (Vol. XII, p. 1129)

SUMMARY OF THE ARGUMENT

The evidence against Appellant was purely circumstantial, and was insufficient to convict him. The evidence was either lacking in substantial probative value, particularly where the prosecution failed to tie it together, or was refuted by other evidence, such that it failed to exclude the reasonable hypothesis that someone other than Appellant killed Lillie Thornton. This hypothesis could have been bolstered if the court had allowed Appellant to present testimony indicating that Johnny Seay could have been the killer. The State utterly failed to establish any motive for Appellant to kill Lillie Thornton. At most, the evidence created a suspicion that Appellant committed the offense in question. His motion for judgment of acquittal should have been granted.

The evidence presented at Appellant's trial wholly failed to show that Lillie Thornton's death involved **a** premeditated murder. Where there **was** but a single gunshot to the head, not fired at particularly close range, and the circumstances which preceded the killing are completely unknown, the State has not established that the evidence was only susceptible to the conclusion that Thornton was killed with premeditation, and Appellant's conviction for murder in the first degree cannot stand.

The testimony of Detective Rick Childers impermissibly called the jury's attention to Appellant's failure to take the witness stand at his trial. On direct, Childers testified that the carpeting was not in Appellant's car when he observed it on November 4, 1994. On cross, defense counsel asked why, then,

Appellant was buying carpet cleaner (a can of which was found in Appellant's car) . Childers looked right at Appellant and said, "That you'll have to ask him." This error in highlighting Appellant's decision not to testify cannot be harmless here, particularly in light of the weakness of the State's case.

The prosecutor should not have asked Detective Rick Childers whether Appellant's brother, Trumell, verified Appellant's alibi; this called for hearsay. Nor should Childers have been permitted to testify that he went to the tire stores at 21st and Nebraska and was "not able to find anybody who sold [Appellant] tires." Again, hearsay was involved, and Childers' testimony in both regards improperly undermined Appellant's attempt to establish his defense.

The lower court should have held the hearing required by Richardson v. State, 246 So. 2d 771 (Fla. 1971) when defense counsel stated that he had never seen the photograph of Appellant's Subaru the State sought to introduce when it recalled Laboratory Analyst Gary McCullough. The State's duty to disclose this picture to Appellant arose as soon as it came into possession of FDLE, as an arm of the State. The photo showing the passenger's side window, which had a blood stain on it, in the "up" position was an important piece of evidence. The trial court's failure to hold a Richardson hearing cannot be shown to be harmless error.

The instruction on premeditation that was given to Appellant's jury was defective, because it relieved the State of its proper burden of proving that the accused had, prior to the killing, a fully formed and conscious purpose to take human life, formed upon

reflection and deliberation, and that at the time of the execution of this intent the accused was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such purpose into execution. The instruction propounded by Appellant was better, and should have been given. In light of the paucity of evidence of premeditation in this case, it was vital that Appellant's jury receive a full and accurate charge on this element of murder in the first degree.

Much of the testimony the State presented at penalty phase regarding the assault on Rosa Mae Warmack was improper and should have been excluded, pursuant to Appellant's motion in limine. Particularly egregious was testimony that Appellant had sexually battered Warmack, when he **was** not convicted of this offense, as well as testimony about the victim's retardation, and graphic description of how she looked in the hospital. The evidence regarding this collateral prior violent felony not only became a feature of the penalty phase, it constituted virtually the entire State's case, in that all the witnesses the State put on testified concerning Rosa Mae Warmack.

A sentence of death is not proportionate under the circumstances of this case, in which the killing itself was not particularly heinous. The State failed to provide competent and adequate proof of Appellant's alleged prior convictions for violent felonies by tying the documentary evidence to Appellant. Assuming the State's evidence was sufficient, there was still only a single aggravating circumstance proven here that was insufficient to

support a sentence of death. Furthermore, the court below misconstrued and failed to give due consideration to the evidence Appellant presented in mitigation, even though he characterized the proof as "unrefuted." This Court must also consider the possibility, in light of the relationship in which Appellant and Lillie Thornton were involved, that the instant homicide resulted from a lovers' quarrel or domestic dispute, which would further remove this case from the category of cases for which a sentence of death may be imposed. This case simply is not one of the most aggravated and least mitigated to come before this Court, and Appellant's sentence of death cannot stand.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT IT WAS APPELLANT WHO KILLED LILLIE THORNTON.

When the State rested its case, Appellant moved for a judgment of acquittal, which the court denied. (Vol. X, pp. 792-801) After presenting his case at guilt phase, Appellant renewed all motions and objections. (vol. x, pp. 912-913; Vol. XI, pp. 916-917) The evidence was insufficient to prove that it was Appellant who murdered Lillie Thornton, and the court should have granted his motion for a judgment of acquittal.

The evidence against Appellant was purely circumstantial. There was no eyewitness who saw him commit the crime, no confession, no other evidence to conclusively establish his guilt.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Appellant's conviction violates the Due Process Clause and as a matter of law the judge erred in denying the motion for judgment of acquittal because the circumstantial evidence is legally insufficient to overcome the presumption of innocence.

Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a

conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. It would be impermissible to allow the state to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. Torres v. State, 520 So. 2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So. 2d 635, 636 (Fla. 4th DCA 1981) ("Where the state fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kickasola v. State, 405 So. 2d 200, 201 (Fla. 3d DCA 1981) ("[E]vidence which furnished nothing stronger than a suspicion, even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction.") (emphasis added).

A case such as this one that rests exclusively on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that

> the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956) (emphasis added). See also McArthur v. State, 351 So. 2d 972 (Fla. 1977) and Heinev v. State, 447 so. 2d 210 (Fla. 1984).

Perhaps a good place to begin reviewing the evidence against Appellant would be with the testimony of Kim McDonald, who supposedly saw Lillie Thornton with Appellant in his car the night before her body **was** found. One might well be skeptical as to the certainty of McDonald's identification of Appellant and Thornton as the two people she had seen that night. After all, McDonald had known Thornton for only a couple of months, did not know her very well, had only seen her six or seven times, and did not even know her name; she knew her only as "Slim." (Vol. VI, pp. 323-324, 333-334) Although McDonald purported to have known Appellant for **a** number of years, she did not even know his last name until after the homicide, (Vol. VI, pp. 324, 330-331, 335-336) Furthermore, McDonald's testimony clashed with that of Appellant's witnesses, who testified that he was at home on the night McDonald supposedly saw him with "Slim;" he came in sometime between 8:00 and 9:00 and

went to bed. (Vol. X, pp. 835-840, 853-854, 858) At any rate, even if full credence is given to what McDonald said at trial, it only established the unremarkable fact that Appellant and Thornton were together at some time before she was killed. They were, after all, "seeing each other," and Thornton apparently depended upon Appellant for a large part, if not all, of her transportation needs. Significantly, McDonald said nothing about observing any arguments or difficulties between the two people that might have served as the impetus for the homicide. (Compare this case with Horstman v. State, 530 So. 2d 368 (Fla. 2d DCA 1988), in which the appellate court deemed the evidence insufficient to convict Horstman of first degree murder even though there was evidence he had been seen with the victim the night before her body was found, may have been angry with her for rejecting his advances, and a number of hairs matching those of Horstman were found on the body.)

Other evidence presented by the State was similarly lacking in significant probative value. For example, the fact that Appellant may have attempted to evade the police when they began following him after surveilling his house and residence might readily be accounted for by the fact that Appellant was in possession of marijuana; the State's own witness, Detective Rick Childers, conceded that it was a very common occurrence for a person holding drugs to run from the police. (Vol. IX, pp. 737-738) See Fenelon v. State, 594 So. 2d 292, 295 (Fla. 1992) in which this Court disapproved the giving of a jury instruction that flight could be considered as a circumstance from which guilt might be inferred.

("This Court has noted that 'flight alone is no more consistent with guilt than innocence.' Merritt v. State, 523 So. 2d 573, 574 (Fla.1988); Whitfield v. State, 452 So. 2d [548] at 550 (Fla. 1984) . ")

Several points must be made with regard to the blood found on the passenger's side window and window track of Appellant's car. Most importantly, the State failed to prove that this was Lillie Thornton's blood. During the testimony of the State's DNA expert, Meghan Clement of LabCorp, the State failed to establish that the evidence sent to that private lab for testing was the evidence collected in this case. Although the prosecutor referred to "blood flakes from what was represented to be a window" and "what was represented as being blood flakes removed from a window track of a window" as items that were submitted to LabCorp for analysis (Vol. IX, pp. 645-646), she did not once refer to any exhibit numbers or in any other way tie the submissions to Appellant's case. Nor was there any evidence as to how or when the blood got there. State witness Gary McCullough, a crime laboratory analyst with the Florida Department of Law Enforcement, acknowledged that there was no way to tell when the blood got on the window, except that it had been there long enough to dry. (Vol. VII, pp. 493-494) Lillie Thornton had been in Appellant's car many times, and the blood could have gotten there at any time. The testimony of defense witness Dr. J.K. Williams established that when Thornton was discharged from the hospital on October 27, 1994, a matter of days before the homicide, after being admitted the previous day for

pelvic inflammatory disease, she had vaginal bleeding, albeit light, either as a result of her illness or the method of birth control she was using. (Vol. X, pp. 902-905, 908) The blood could have gotten on Appellant's car if she rode in it to the hospital. Finally, although there were perhaps some inconsistencies in how much blood was on the window and track, it was apparently a very small amount, which one would not expect to find if the victim had been shot in the head while sitting in the car, as the State wanted the jury to believe; Frank Deprospo of FDLE referred to the blood on the window as being "in very limited quantity," and Billy Shumway of the FDLE DNA serology section testified that there was too little to perform the type of DNA testing that might have produced more definitive results.

As for the other items in Appellant's car that tested presumptively positive for the presence of blood, the carpet brush and the utility knife, it could not be established whose blood it **was**, or, in the case of the utility knife (which was negative for blood when it was tested a second time for the presence of blood) even whether any blood on it was from a human being. Any blood on these items might well have been Appellant's blood. He told Detective Childers that he had cut his hand about three weeks before he was stopped at FunLan and the blood on a T-shirt in the back of his car **was** his, and this was corroborated by the DNA

evidence showing a match between Appellant's blood and that on the shirt. (Vol. IX, pp. 649-650)[15]

Also inconclusive was the tire tread evidence the State presented through Oral Woods of FDLE. He could only deal with the class characteristic of tread design in attempting to equate tracks found in the vicinity of Lillie Thornton's body to the tires that were actually on Appellant's car. (Vol. VIII, pp. 528-529, 539-540) Although he found similarities between some of the tracks, including the one on Thornton's pant leg, and the left front tire on Appellant's car, which was a Goodyear T. Metric, there were not enough individual characteristics to make a positive match. (Vol. VIII, pp. 527-532, 537, 539-540) Nor was he able to state when any of the tracks had been made. (Vol. VIII, pp. 536-537, 540-545) The fact that Woods eliminated five tracks as having been made by any of the four different brands of tires on Appellant's Subaru established that other cars had been driven through that area; perhaps one of those other cars was driven by the person who killed Lillie Thornton.

It should also be noted that there was no fingerprint evidence to establish that Appellant was in that field. Edward Guenther of FDLE dusted various items from the scene, but was unable to life any prints. (Vol. IX, pp. 626-627) Guenther was able to establish, however, that seven shoe tracks from the scene were not made by

[15] However, as with the other evidence submitted to LabCorp for analysis, the State never identified the shirt by exhibit number or otherwise conclusively established that the shirt tested by the lab was the same one seized from Appellant's Subaru.

Appellant's sneakers or work boots. (Vol. VIII, pp. 559-561, 572) Again, it **may** be that one of these tracks was left by the killer's shoe.

The State's theory was that Appellant killed Lillie Thornton in his car and then cleaned the vehicle to eliminate any evidence of the offense. However, there was no definitive proof as to why the car was cleaned, or even when it was cleaned. Presumably, the carpeting was removed some time after October 22, 1994 which was the approximate date that Star Thornton saw carpeting in the car, and before November 4, 1994, when Detective Rick Childers noticed that the vehicle did not have carpeting. Appellant's sister, Darlene Sheppard, testified that the carpeting had been removed when Appellant came to her house to put some birthday cakes in her freezer, which must have been shortly after the cakes were ordered, which, according to Star Thornton, was sometime around October 22. If the carpeting was indeed removed sometime around the end of October, this was before the homicide, and would negate any suggestion that Appellant removed it in order to eliminate incriminating evidence. (Star Thornton also testified that the carpeting in the car was light gray, and Dominic Denio testified that the interior was blue, but Frank Deprospo of FDLE found not **gray** or blue, but gold or yellowish or brownish fibers or particles in the carpet brush, another conflict in the evidence which weakens the State's case.) Although the State attempted to show that the vehicle was cleaned on November 3 or 4 by introducing receipts from Western Auto dated November 3 for carpet cleaner and other items

that might be used to clean a car, the State failed to prove that the cash register at Western Auto accurately printed the dates of these transactions.[16] As for why the car was cleaned, it should be noted that there was a stain on the front passenger seat that tested negative for the presence of blood (Vol. VII, p. 491); perhaps it was this stain that Appellant, or whoever may have cleaned the car, was attempting to remove. If Appellant was trying to eradicate evidence of a crime, it seems unlikely that he would have missed the blood stain on the window and the spent shell casing in the back seat. The State's own witness, Dominic Denio, a forensic firearms examiner with the FBI laboratory in Washington, provided persuasive evidence that Thornton **was** not killed in the Subaru; Denio did chemical testing inside the vehicle "for the presence of vaporous lead, which would be indicative of an atmosphere of a gunshot[,]" with negative results. (Vol. VII, pp. 416-417)[17] This conclusion was bolstered by the fact that, according to the medical examiner, the shot that killed Lillie Thornton **came** from at least 18 inches away. Appellant's car was a very small subcompact; it would have been difficult, if not impossible, for someone to get that far **away** in order to fire a gun.

Several points must be made regarding the shell casing found in the back of the Subaru. Firstly, Appellant provided an explanation for why the casing **was** in his car--he collected shell

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[16] Undersigned counsel has received receipts from stores that did not bear the correct date of a transaction

[17] Denio could not state with certainty that a gun was or was not fired in the car. (Vol. VII, p. 420)

casings, Secondly, although the ammunition components submitted to Denio for testing were the same caliber and from the same manufacturer as the shell casing found in the Subaru, 380 auto manufactured by the Federal Cartridge Company, there **was** no way to prove that the components came from that casing. (Vol. VII, pp. 411-416, 433) Thirdly, there were millions of that type of bullet manufactured in the United States each year. (Vol. VII, p. 434) Finally, and most importantly, the State failed to link the ammunition components in its Exhibit Number 3 which it submitted to Denio for his expert analysis with the bullet fragments that were removed from Lillie Thornton. The medical examiner testified that he removed the copper jacket and lead core and that these were transferred to Detective Bell of the Tampa Police Department, but Dr. Pfalzgraf never identified State's Exhibit Number 3 as being the items he removed. And Detective Bell testified only briefly at Appellant's trial regarding statements Appellant made, but said nothing about State's Exhibit Number 3. Therefore, no connection was established between the items submitted to Denio and the bullet fragments taken from Thornton that were given to Bell.[18]

Our review of the evidence that was admitted must conclude with the testimony of James Watson, Appellant's coworker at Cast-Crete, and Appellant's own statements to the police. Watson testified that Appellant, whom he knew as "Gummy Bear," asked if

[18] However, in his cross-examination of Dominic Denio, defense counsel did ask how Denio came to the determination that the fragment taken out of the victim's skull was a 380 caliber. (Vol. VII, p. 431)

Watson was interested in buying a gun, because Appellant needed cash for "like a birthday party or something, buy some cakes with it or something." (Vol. IX, pp. 752-753) Appellant did not say the gun was his or even what kind it was. (Vol. IX, p. 755) Watson "didn't have no money at the time." (Vol. IX, p. 753) One wonders why the State bothered to present Watson's very brief testimony at all, it was so lacking in probative value. It was not even established when the alleged conversation took place. The prosecutor attempted to narrow the time frame to September, October, and November of 1994, but **Watson** testified on cross that the conversation took place sometime "[i]n the last year." (Vol. IX, pp. 751-753) (Appellant's trial took place in late February and early March, 1996.)

With regard to Appellant's statements to the police, he never admitted to any wrongdoing. Portions of his statements were consistent with other testimony, such as that he picked Lillie Thornton up around noon and took her to pay bills. Those parts of his statements which were inconsistent with other evidence merely tended, at most, to create a bare suspicion of possible guilt, without constituting compelling evidence of guilt.

Also worth mentioning is evidence that did not come in; evidence Appellant wanted to present to show that Johnny Seay may have been the person who killed Lillie Thornton, including evidence of a violent incident between the two people only months before the homicide, in which Thornton hit **Seay** in the head with a telephone and was arrested for domestic battery. Appellant had a basic right

to present evidence that someone other than himself might have committed the offense. Chambers v. Mississippi, 410 U.S. 284 (1973); Pettijohn v. Hall, 599 F. 2d 476 (1st Cir. 1979); Lindsay v. State, 69 Fla. 641, 68 So. 932 (Fla. 1915); Pahl v. State, 415 so. 2d 42 (Fla. 2d DCA 1982); Moreno v. State, 418 So. 2d 1223 (Fla. 3d DCA 1982); Siemon v. Stoughton, 440 A. 2d 210 (Conn. 1981); State v. Harman, 270 S.E. 2d 146 (W. Va. 1980); State v. Hawkins, 260 N.W. 2d 150, 158-159 (Minn. 1977). Had the court allowed Appellant's evidence regarding Seay, it would have furthered weakened the State's effort to show that the evidence pointed unerringly to Appellant, and only to Appellant, as the perpetrator.

One final factor that this Court should consider is assessing the evidence is that there was absolutely no proof or even any hint of a motive for Appellant to kill Lillie Thornton, with whom he apparently had a good relationship. Although the State may not have been legally required to establish motive, this is something that should be considered, as it affects the strength of the evidence as a whole. Jackson v. State, 511 So. 2d 1047, 1050 (Fla. 2d DCA 1987) ("where, as here, the evidence is entirely circumstantial, the lack of any motive on the part of the defendant becomes a significant consideration. [Citation omitted.];" Daniels v. State, 108 So. 2d 755, 759 (Fla. 1959) ("Where proof of the crime is circumstantial motive may become both important and potential. [Citations omitted.] ")

The defense presented alternative explanations for much of the State's evidence to show that that evidence was not necessarily consistent only with Appellant's guilt. The remainder of the evidence lacked substantial probative value. The evidence was inadequate because it did not lead to a reasonable and moral certainty that only Appellant and no one else committed the charged offense, and created "nothing more than a strong suspicion that the defendant committed the crime...." Cox v. State, 555 So. 2d 352, 353 (Fla. 1990).

A first-degree murder conviction that rests on such equivocal evidence violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the conviction must be reversed and Appellant discharged.

ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED MURDER.

When the State rested its case, Appellant moved for a judgment of acquittal on grounds that included the State's failure to prove premeditation. (Vol. X, pp. 792-801) While expressing some "concern" over this matter, the court denied the motion. (Vol. X, p. 801)[19] The evidence adduced below utterly failed to prove that Lillie Thornton's death was a premeditated murder, and Appellant's motion should have been granted.

Premeditation, as an element of first-degree murder,

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act.. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

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[19] Appellant raised the issue of the lack of evidence of premeditation again in his Motion for New Trial, which the court denied on March 18, 1996. (Vol. III, pp. 382-386)

Sireci v. State, 399 so. 2d 964, 967 (Fla. 1981) (citations omitted), cert. denied, 456 U.S. 984 (1982), overruled on other grounds, Pope v. State, 441 So. 2d 1073 (Fla. 1983); see also Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993) (evidence consistent with unlawful killing insufficient to prove premeditation); Holton v. State, 573 So, 2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991). The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 so. 2d 1019, 1021 (Fla. 1986). See also Brown v. State, 444 So. 2d 939 (Fla. 1984); Peavy v. State, 442 So. 2d 200 (Fla. 1983) .

There was no direct evidence of premeditation adduced at Appellant's trial; any evidence of premeditation was purely circumstantial. Where the State seeks to prove premeditation circumstantially, the evidence relied upon must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). And if "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. [Citation omitted.]" Hoefert, 617 So. 2d at 1048.

The recent case of Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996) is particularly instructive. There, the State relied upon the following evidence to support its circumstantial case for premeditation: "The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun

required a six-pound pull to fire." 21 Fla. L. Weekly at S67. This Court found this evidence insufficient to support the trial court's submission of the issue of premeditation to Mungin's jury, noting that there were "no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation." 21 Fla. L. Weekly at S67. The evidence in Appellant's case is even weaker with regard to premeditation. The shot that killed Lillie Thornton was not fired from particularly close range; the absence of stippling meant that the gun **was** probably 18 inches or more away from her when it was fired. (Vol. VII, pp. 454-456) There was no evidence that Appellant had used the gun before, or that he had specifically procured it in advance for any particular purpose; perhaps it was always kept in the car. There was no indication of any difficulties between Appellant and Thornton that might provide a motive for the killing, and no evidence of any threats to kill her on the part of Appellant. As in Mungin, because there were no witnesses to the shooting itself, the circumstances surrounding it, what led up to it, the motive for the killing, are completely unknown. A finding of premeditation cannot be based on such a meager record. Please see Jackson and Daniels, cited in Issue I. above.

Another very recent case, Kirkland v. State, 684 So. 2d 732 (Fla. 1996) is of similar import. Even though the victim in Kirkland died due to a severe neck wound that was caused by many gashes, suffered other injuries that appeared to be the result of

blunt trauma, and was attacked by both a knife and a walking cane, this Court determined that the circumstantial evidence was insufficient to prove premeditation. The Court noted the following as the main factors that militated against a finding of premeditation:

> First and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide.

The same considerations are present in the instant case. Furthermore, the nature of the killing in the instant case is less suggestive of premeditation than the sustained and brutal attack that must have occurred in Kirkland.

Also worthy of this Court's consideration are three other cases involving homicides by gunshot where there was insufficient evidence to establish premeditation: Terrvv. State, 668 So. 2d 954 (Fla. 1996); Rogers v. State, 660 So. 2d 237 (Fla. 1995); Jackson v. State, 575 so. 2d 181 (Fla. 1991).

Where, as here, the circumstances preceding the killing are unknown, the defendant is entitled to the benefit of that ambiguity.

Appellant's case may be contrasted with cases such as Sireci and Griffin v. State, 474 so. 2d 777, 780 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986), in which the evidence was clearly adequate to support premeditation. In the former case, the State

proved premeditation with evidence that the defendant clubbed the victim over the head with a wrench, then stabbed and cut the victim 55 times in the chest, head, back, and extremities, and finally slit his throat. In the latter case, premeditation was supported by evidence that Griffin used a particularly lethal gun; the bullets were of a special type designed to have a high penetrating ability; the victim caused no sudden provocation; and Griffin fired two shots into his victim at close range. The facts in Sireci and Griffin are completely distinguishable from those in the instant case. In this case, there was no evidence of a fully-formed conscious purpose to kill.

Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983), which involved a stabbing, and which was cited by this Court in Wilson illustrates the heavy burden the State must carry on the matter of premeditation when it seeks to prove this element by way of circumstantial evidence. Even though there was evidence in Tien Wang that the defendant chased the victim down the street and struck him repeatedly, resulting in his death, and the appellate court acknowledged that the testimony was "not inconsistent with a premeditated design to kill," the court nevertheless reversed the conviction for first-degree murder, because the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill without any premeditated design." 426 So. 2d at 1006. The evidence against Appellant was much less compelling on the issue of premeditation than was the evidence in Tien Wang.

The State made no attempt below to establish first-degree felony murder, nor was any underlying felony proven that could possibly support felony murder.[20] Therefore, if this Court finds the evidence sufficient to establish that Appellant was the perpetrator of the instant homicide, and that the evidence will support a lesser degree of the offense (such as murder in the second degree), or a lesser included offense, this Court must, as in Kirkland, and pursuant to section 924.34 of the Florida Statutes, reverse the judgment for murder in the first degree and remand with directions to the trial court to enter judgment for the lesser offense.

[20] Although Appellant was arrested for robbery as well as first-degree murder (T 728), he was never indicted for robbery.

ISSUE III

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER STATE WITNESS DETECTIVE RICK CHILDERS COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT HIS TRIAL.

Rick Childers, a detective with the Tampa Police Department's homicide division, conducted various aspects of the investigation into the death of Lillie Thornton. Among other things, Childers testified concerning his observations of Appellant's car. He testified that the carpeting was not in the car when he observed it on November 4, 1994. On cross-examination, defense counsel asked Childers why, if that was the case, Appellant was buying carpet cleaner. (Vol. IX, p. 711) Childers responded, "That you'll have to ask him [Appellant.]" (Vol. IX, p. 711) At the conclusion of Childers' testimony, the defense moved for a mistrial on the ground that this was a remark on Appellant's right not to testify against himself. (Vol. IX, pp. 745-747) Counsel noted that Childers looked right at Appellant when he made the comment. (Vol. IX, pp. 745-746) Defense counsel also requested that if the court denied a mistrial and there was a guilty verdict, a new jury be selected to hear the penalty phase. (Vol. IX, pp. 746-747)[21] The court denied all relief. (T 746-747)

Contrary to Detective Childers' testimony, Appellant's lawyer did not "have to ask" Appellant anything. The right to remain

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[21] As defense counsel noted (Vol. IX, pp. 746-747), another judge had granted Appellant's pretrial motion in limine which sought to exclude from penalty phase "[a]ny comment on Defendant's not testifying." (Vol. I, p. 179, Vol. XIII, pp. 1198-1201)

silent and not to be compelled to be a witness against oneself in enshrined in both the Florida and United States Constitutions. Art. I, §9, Fla. Const.; Amend. V, U.S. Const. It applies with equal vigor at both the guilt and penalty phases of a capital trial. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L. Ed. 2d 359 (1981); Lesko v. Lehman, 925 F. 2d 1527 (3d Cir. 1991). It is improper for the State to comment on the defendant's invocation of his right to remain silent, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), and comments volunteered by a witness or made by the prosecutor which are fairly susceptible of being construed by the jury to refer to the defendant's right to remain silent or his failure to testify are impermissible. Kirkland v. State, 684 So. 2d 732 (Fla. 1996); Jackson v. State, 522 So. 2d 802 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 153 (1988); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Kinchen, 490 So. 2d 21 (Fla. 1985); David v. State, 369 So. 2d 943 (Fla. 1979); Clark v. State, 363 So. 2d 331 (Fla. 1978). Appellant did not testify at either phase of his trial, and Childers' comment improperly highlighted for the jury his failure to take the witness stand.

Prior to DiGuilio, Childers' remark would have constituted per se reversible error. Bennett v. State, 316 So. 2d 41 (Fla. 1975). However, in DuGuilio, this Court held that such comments are subject to harmless error analysis, while emphasizing "that any comment, direct or indirect, by anyone at trial on the right of the defendant not to testify or to remain silent is constitutional

error and should be avoided." 491 so. 2d at 1139. Given the paucity of evidence to prove that Appellant committed first degree murder (please see Issue I. herein), it is impossible for this Court to **say** that the error in allowing the juror to consider this testimony was harmless; in such a close case, the jury's focus, even for a moment, on the fact that Appellant did not take the stand to explain away why he bought carpet cleaner (and to address other matters) may have been sufficient to impel them to convict him.

The trial which resulted in Appellant's conviction and his sentence of death **was** not conducted in accordance with the state and federal constitutions. Therefore, his conviction and sentence must be reversed, and he must be granted a new trial.

ISSUE IV

THE STATE SHOULD NOT HAVE ASKED IMPROPER QUESTIONS OF DETECTIVE RICK CHILDERS WHICH CALLED FOR HEARSAY, UNDERMINING APPELLANT'S EFFORTS TO PRESENT HIS DEFENSE.

On direct examination of Detective Rick Childers of the Tampa Police Department, the prosecutor questioned Childers regarding what Appellant said as to his whereabouts on November 2, 1994. (Vol. IX, pp. 695-697) Appellant told Childers that he took Lillie Thornton to pay some bills, but he had car trouble. (Vol. IX, p. 695) Thornton got out of the car and walked toward some mailboxes, and Appellant did not see her again. (Vol. IX, p. 695) Appellant tried to call his brother, Trumell, for help, and Trumell finally showed up and got the car started. (Vol. IX, pp. 696-697) Appellant then drove home and went to bed at 7:00. (Vol. IX, p. 697)

Childers interviewed Trumell Norton around 8:00 p.m. on the same day he spoke with Appellant at FunLan. (Vol. IX, p. 704) Childers was later asked to place his interview on tape. (Vol. IX, p. 705) Over Appellant's objection, Childers testified at trial that the reason for this was "to have his story stay the same for about a year or so down the road when he would come to trial." (Vol. IX, p. 705) Childers was unable to locate Trumell Norton again. (Vol. IX, pp. 705-706)

On cross-examination defense counsel established that Childers had verified "to a time limit" that Appellant was at home on the night in question by talking to Appellant's sister, and that

Childers was not necessarily implying that Appellant's family was hiding Trumell; he might have left town because he was wanted on a charge unrelated to the instant case. (Vol. IX, pp. 725-727)

On redirect, the prosecutor asked Childers whether Trumell Norton verified Appellant's story. (Vol. IX, p. 741) A defense hearsay objection was sustained, with the court rejecting the State's argument that Appellant had "opened the door." (Vol. IX, pp. 741-742)

After Childers testified, Appellant unsuccessfully moved for a mistrial on grounds that included the prosecutor's "rather blatant attempt to educate [the] jury to hearsay issues" by implying that Trumell did not "back up" his brother's alibi. (Vol. IX, pp. 745-747) Appellant renewed his motion and asked for a curative instruction, to no avail, after the State rested its case. (Vol. x, p. 790)

The problem with the State's questioning, of course, as defense counsel recognized, is that is clearly implied that Appellant's own brother, who did not testify at trial, did not and would not support Appellant's alibi, which was extremely damaging to Appellant's effort to establish his defense. The question asked on redirect called for hearsay. Although Childers did not answer the question, the very asking of it by the prosecutor indicated that Trumell did not verify Appellant's story. See Dawkins v. State, 605 So. 2d 1329, 1330 (Fla. 2d DCA 1992), in which the court reversed due to the State's improper question, rejecting the

State's argument that reversal was "not required because the prosecutor never got an answer to the objectionable question."

The defense effort was further undermined when the State presented hearsay upon recalling Childers, the final witness for the prosecution, to deal with Appellant's statement to the police on November 4 that he had bought the tires that were on his car the previous day. (Vol. X, pp. 779-783) Childers testified that he went to the tire stores in the area of 21st and Nebraska. (Vol. X, p. 780) The prosecutor then asked, "Were you able to find anybody who sold Mr. Norton tires?" (Vol. X, p. 780) Appellant's hearsay objection was overruled. (Vol. X, p. 780) Childers answered, "I was not able to find anybody who sold him tires." (Vol. X, p. 780) Appellant renewed his objection to this testimony after the State rested its case. (Vol. x, pp. 790-792)

Subject to certain exceptions not applicable here, "hearsay evidence is inadmissible." § 90.802, Fla. Stat. (1995). The hearsay rule acts not so much to prevent a witness from testifying as to what he had heard, but is rather a restriction on proving facts through extrajudicial statements. State v. Baird, 572 So. 2d 904 (Fla. 1990); King v. State, 684 So. 2d 1388 (Fla. 1st DCA 1996). The State violated this restriction by the testimony it presented. Even the trial court recognized that Childers' testimony implied that "he had to speak to somebody" at the tire stores in order to refute Appellant's contention that he had only recently bought the tires. (Vol. x, p. 792) The proper way to present this evidence would have been to call personnel from the

tire stores to testify and/or to present properly authenticated written records from the stores. Instead, the State was allowed to use extrajudicial statements of witnesses (indirectly, through Childers) who were not subject to confrontation and cross-examination because they did not appear at Appellant's trial.

The State's improper evidence seriously damaged Appellant's efforts to establish a defense, calling into question the reliability of the jury's guilty verdict. [Please see Issue I, in which Appellant discusses the weakness of the State's case.] The remedy for Appellant must be a new trial.

ISSUE V

THE COURT BELOW ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING AFTER THE DEFENSE CALLED HIS ATTENTION TO A DISCOVERY VIOLATION COMMITTED BY THE STATE.

Near the end of its case, the prosecution recalled Gary McCullough, a crime laboratory analyst with FDLE, to correct his mistaken earlier testimony that the passenger's side window had been in the "down" position when Appellant's Subaru was towed into the lab. (Vol. X, pp. 763-770) On direct examination the State sought to introduce a photograph of the car showing the window in the "up" position. (Vol. X, pp. 765-766) Defense counsel asked to approach the bench, and the following discussion ensued (Vol X, pp. 765-766):

> MR. HENDRIX [defense counsel] : The State now has a photograph that's never been provided to the defense. Ms. Cox believes that Mr. McCullough brought the proof sheet, not the photo, to the deposition, that was the deposition Mr. John Skye conducted. I don't believe my office did this deposition. I would have to go back and look prior to our involvement in the case. It's a photograph we haven't seen, and we would certainly like an opportunity to cross-examine the issue, but we would ask for that piece of evidence to be excluded. And we do not believe we were provided it; otherwise we wouldn't have asked the questions we did of him on cross.
>
> THE COURT: Do you want to say anything?
>
> MS. COX [the prosecutor] : Do I want to say anything?
>
> THE COURT: Uh-huh.
>
> MS. COX : Your Honor, I believe that based on prior discussions with Mr. McCullough, it's his belief that he turned over a copy of the

photographs to the defense, although I don't know if that's true or not because I wasn't in this depo, but it only became an issue when he said it in direct.

THE COURT: It appears to correct an error in the witness' testimony. So in the interest of justice I'll let it in.

MR. HENDRIX: When **was** that photograph developed?

MS. COX: Yesterday.

THE COURT: Okay. Thank you.

The picture was then admitted as State's Exhibit Number 50. (Vol. X, pp. 766-767)

Pursuant to Florida Rule of Criminal Procedure 3.220(b)(1)(K), the prosecutor was required to disclose the photograph to Appellant as part of her discovery obligation. The prosecutor's duty to disclose was a continuing one. Fla. R. Crim. P. 3.220(f); Brown v. State, 515 So. 2d 211 (Fla. 1987); Cumbie v. State, 345 So. 2d 1061 (Fla. 1977). "When a first degree murder trial is in progress, the rule dictates immediate disclosure." Lee v. State, 538 So. 2d 63, 65 (Fla. 2d DCA 1989). See also Brown and Cooper v. State, 336 So. 2d 1133 (Fla. 1976). And the picture in question was actually subject to the rules of discovery not when the prosecutor acquired it, which may have been the day before it was introduced into evidence, but earlier, whenever it was acquired by FDLE as an agency of the State. See State v. Coney, 294 So. 2d 82 (Fla. 1973); State v. Alfonso, 478 So. 2d 1119 (Fla. 4th DCA 1985); Griffis v. State, 472 So. 2d 834 (Fla. 1st DCA 1983); Lee. At

least a proof of the photograph was "developed at the time of submission of the case" to FDLE. (Vol. X, p. 767)

Since this Court's decision in Richardson v. State, 246 So. 2d 771 (Fla. 1971), it has been established that the trial court must conduct an inquiry when, as here, it appears the State has violated its discovery obligations. No particular "magic words" needs be uttered by defense counsel to trigger the need for a Richardson inquiry. C.D.B. v. State, 662 So. 2d 738 (Fla. 1st DCA 1995). The court has discretion to determine whether a discovery violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances. State v. Hall, 509 So. 2d 1093 (Fla. 1987) ; Wilcox v. State, 367 So. 2d 1020 (Fla. 1979). In making this inquiry, the trial court must determine, at a minimum, whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and, most, importantly, what effect it had on the defendant's ability to prepare for trial. State v. Hall, 509 So. 2d at 1096. Wilcox v. State, 367 So. 2d at 1022.

The purpose of a Richardson inquiry is to ferret out procedural rather than substantive prejudice. The court must decide whether the State's discovery violation prevented the defendant from properly preparing for trial. Id. at 1023. This rule contemplates that material not disclosed to the defense shall not be admitted into evidence. Id.

The court below utterly failed to make the three-pronged inquiry contemplated by Richardson, merely allowing the evidence in because he felt it would somehow be "in the interest of justice."

Formerly, the court's failure to hold the requisite hearing would have been "per se reversible." Brown, 515 so. 2d at 213. However, in State v. Schopp, 653 So. 2d 1016 (Fla. 1995), this Court receded from earlier cases to hold that failure to conduct a Richardson hearing is subject to harmless error analysis. The Schopp Court recognized, nonetheless, that it will be the rare case in which an appellate court will be able to find this type of error harmless. The Court wrote: "We recognize that in the vast majority of cases it will be readily apparent that the record is insufficient to support a finding of harmless error." Id. at 1021. Such is the case here. At least three factors suggest the harmfulness of the error: (1) The evidence of blood on the window was crucial to the State's case. (2) Defense counsel told the court he would not have asked the questions of McCullough that he asked on cross-examination if he had known about the photo. (3) If the window was in the "down" position when it was towed into FDLE, this would have cast doubt on the testimony of Detective Rick Childers that he observed what appeared to be blood on the window when the car was parked in front of Appellant's residence and at FunLan. Thus, the picture showing the window in the "up" position was an important piece of evidence which the defense was not fully

prepared to meet when surprised with it in the midst of trial near the end of the State's case.[22]

Appellant was denied a fair trial by the lower court's failure to hold a full inquiry into the State's discovery violation. As a result, he must receive a new trial.

[22] The photograph incident was not the first time Appellant complained to the trial court about the State's failure to provide timely discovery. Immediately before trial began on a Monday, defense counsel noted that the State had provided names of two new witnesses the preceding Wednesday, and one new witness the preceding Friday around 4:O0. (Vol. IV, pp. 3-7) The State characterized the first two as "ministerial" witnesses who might not even be called and who were referred to in the police report. (Vol. IV, pp. 3-4) The third witness, Kari McDonald, did not testify at Appellant's trial.

ISSUE VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO FLORIDA'S STANDARD JURY INSTRUCTION ON PREMEDITATED MURDER AND REFUSING TO GIVE THE INSTRUCTION PROPOUNDED BY APPELLANT.

Through counsel, Appellant filed an "Objection to Standard Instruction on 'Premeditated Murder' and Motion for Corrected Instruction on First Degree Murder from Premeditated Design." (Vol. I, pp. 55-62) He also propounded a specific instruction on premeditation that he proposed for the court to give in lieu of the standard. (Vol. I, p. 63) The court below considered Appellant's objection and motion at a hearing held on April 24, 1995, and "denied" it. (Vol. II, PP. 278-284; Vol. XIII, pp. 1353-1354)

A. Need for correct, complete, and accurate jury instructions

In considering Appellant's issue, this Court must be ever mindful that this is a capital case, in which heightened standards of due process apply. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977) ("special scope of review...in death cases"); Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 1866, **100 L.** Ed. 2d 384 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); Proffitt v. Wainwright, 685 F. 2d 1227, 1253 (11th Cir. 1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions.) ; Beck v. Alabama, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particu-

larly sensitive to insure that every safeguard is observed." Gresq v. Georqia, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion) (citing cases).

An important component of the process which is due is provision to the jury of instructions as to what the State must prove in order to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 2d 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully": "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."). It is fundamental error to fail to instruct the jury correctly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991).

The federal and state constitutional rights to trial by jury carry with them the right to accurate instructions as to the elements of the offense. In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), this Court wrote in reversing a conviction where there was an incorrect instruction on self-defense:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution . . . . We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [Citation omitted.] The same

> would necessarily be true when the same character of error is committed while charging on the law relative to the defense.

"Amid a sea of facts and inferences, instructions are the jury's only compass." U.S. v. Walters, 913 F. 2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction required reversal of conviction). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 s. ct. 1930, 56 L. Ed. 2d 468, 477 (1978).

The trial judge is charged with the responsibility of instructing the jury upon the law of the case at the conclusion of argument of counsel. Fla. R. Crim. P. 3.390(a) Generally, he should adhere to the standard instructions, Moody v. State, 359 So. 2d 557 (Fla. 4th DCA 1978), Smith v. Mogelvang, 432 So. 2d 119 (Fla. 2d DCA 1983), Florida Rule of Criminal Procedure 3.985, but the existence of standard instructions does not relieve the trial judge of his duty to correctly instruct the jury on the law, and the standards are not invariably correct. See Yohn v. State, 476 So. 2d 123 (Fla. 1985); Cruse v, State, 588 So. 2d 983 (Fla. 1991). The instruction the trial court gave to Appellant's jury on premeditated murder was not up to constitutional standards, and should not have been used.

B. Instruction on premeditated murder

Section 782.04(1)(a), Florida Statutes (1993) defines murder in the first degree. It provides for two forms of the offense, murder from a premeditated design, and felony murder. The statute defines premeditated murder as: "The unlawful killing of a human

being: When perpetrated from a premeditated design to effect the death of the person killed or any human being[.]" § 782.04(1)(a)1., Fla. Stat. (1993)

The murder statute, like all provisions in the criminal code, must be strictly construed, and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1995); see also Merck v. State, 664 So. 2d 939, 944 (Fla. 1995) This principle of statutory construction is not merely a maxim of statutory construction, but is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Citations omitted.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "'plainly and unmistakably'" proscribed. [Citation omitted.] "

In McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957), this Court construed the "premeditated design" element of first degree murder as follows (emphasis supplied):

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time that must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few

> moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

See also Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980) (quoting McCutchen). The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (which was cited by this Court in Wilson). In Owen v. State, 441 So. 2d 1111, 1113 n. 4 (Fla. 3d DCA 1983), the court wrote (emphasis supplied):

> "'Premeditation' and 'deliberation' are synonymous terms, which, as elements of first-degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and that death would be the result of the act." Sanders v. State, 392 So.2d 1280, 1282 (Ala.Cr.App.1980). Deliberation is the element which distinguishes first and second degree murder. [Citation omitted.] It is defined as a prolonged premeditation and so is even stronger than premeditation. [Citation omitted.]

Similarly, the Sixth Edition of Black's Law Dictionary defines "deliberation," in part, as follows at page 427:

> The act or process of deliberating. The act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means.

The trial court gave the following instruction on killing with premeditation to Appellant's jury (Vol. XI, pp. 1012-1013):

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass before the formation of the premeditated intent to kill and the killing, but the period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the **accused con-**vince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

The problem with the instruction given below is that it improperly relieved the State of its correct burdens of proof and persuasion as to the statutory element of premeditated design. The only attempt at defining the premeditation element was: "'Killing with premeditation' is killing after consciously deciding to do so." There was no mention of the requirement found in McCutchen that the State must prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of **a** settled and fixed purpose to take the life of a human being, and of the consequences of carrying such purpose into execution."

Additionally, the instruction relieved the State of its correct burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the instruction stated that "killing with premeditation" is killing after consciously deciding to do so, it relieved the State of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you, beyond a reasonable doubt, of the existence of premeditation at the time of the killing." Thus the jury was told that it only needed to find premeditation at the time of the killing. Finally, the instruction did not inform the jury that the premeditated design element, carrying with it the element of deliberation, required more than simple premeditation, and more than a mere intent to kill.

A jury instruction such as that given below which relieves the State of the burden of proof or of persuasion as to an element of the offense is unconstitutional. Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). In Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed, 2d 508 (1975), a defendant in Maine was charged with murder, which under Maine law required proof not only of intent but of malice. The trial court instructed the jury that malice was an essential element of the crime, but also instructed that if the prosecution established that the homicide was both intentional and unlawful, malice was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provoca-

tion. The Supreme Court held that the resulting conviction was unconstitutional because the instruction relieved the State of the burden of proving the malice element. See Sandstrom v. Montana, 442 U.S. 510, 524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (discussing Mullaney). Where, as here, a jury instruction authorizes a conviction on an improper theory of guilt, the resulting conviction is illegal. E.g. Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 1866, 100 L. Ed. 2d 384 (1988).

The instruction proposed by Appellant was as follows (Vol. I, p. 63):

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design of a premeditated one; it may exist only **a** few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of **some** reflection and deliberation on the part of the party entertaining it, and the party at the **time** of the **execution** of the intent **was** fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.[23]

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[23] Appellant cited McCutchen as legal authority for his proposed instruction. (Vol. I, p. 63)

This instruction was preferable to the charge Appellant's jury actually received, and would have gone a long **way** toward remedying the defects found in the standard instruction.

Conclusion

It was particularly important in this case that Appellant's jury be properly charged on premeditation, as its existence was very much at issue below. (Please see Issue II. in this brief.) The improper instruction given to Appellant's jury violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as well as Article I, Sections 2, 9, 16, 17, **21**, and 22 of the Constitution of the State of Florida. Accordingly, this Court must order a new trial.[24]

[24] Appellant is aware that this Court rejected an issue similar to the one he raises herein in Spencer v. State, 645 So. 2d 377 (Fla. 1994), but respectfully asks the Court to reconsider this matter in light of the arguments presented here and the particular facts and circumstances of Appellant's cause.

ISSUE VII

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL REGARDING THE ROSA WARMACK INCIDENT THAT WAS IRRELEVANT AND PREJUDICIAL.

On January 8, 1996, Appellant, through counsel, filed a motion in limine which primarily sought to exclude from his penalty phase certain evidence regarding the assault against Rosa Mae Warmack. (Vol. II, pp. 319-322) Paragraphs two through four of the motion dealt with the following evidence which the defense argued was inadmissible:

> 2. Any evidence that the victim of one of the prior crimes was "retarded." It is anticipated that the State may introduce a certified conviction in case number 85-3436, aggravated battery. While case law has held the State may go beyond the mere introduction of a certified copy of conviction and offer testimony as to the prior violent crime the testimony should only be on relevant issues, should be used with caution, and should not be overly sympathetic towards the prior victim. Finney v. State, 521 So.2d 659 [sic]. The fact that the victim in this prior case was considered by some to be retarded is not relevant to the prior conviction for aggravated battery and would be unduly inflammatory.
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> 3. Any reference to the Defendant having previously been charged with sexual battery. Again it is anticipated that the State will introduce a prior conviction for aggravated battery in case number 85-3436. Any reference to this case should be limited to the charge as indicated in the certified copy of the conviction it is anticipated the State will introduce. The Defendant had originally been charged with sexual battery but the conviction is for aggravated battery. Det. Gladys Alarcon in her deposition made reference to the fact that she had been working sexual battery cases at the time she arrested the Defendant. Any such testimony by the detective or any reference to an arrest for sexual battery

> would be improper and highly prejudicial to the Defendant. Florida Statute 921.141(5)(b) specifically limits the aggravating circumstances to convictions and not arrests.
>
> Any overly descriptive and prejudicial phrases used to describe the injuries to a prior victim. Once again it is anticipated the State will introduce a certified conviction for an aggravated battery in case number 85-3436. Witness Harold Warmack, the father of the victim in that case, was deposed and stated that when he saw his daughter after the battery she looked like she was "mangled by a lion." While such a phrase may have some literary appeal, this does not belong in the penalty phase of a murder trial. In Coney v. State, 653 So. 2d 1009 (1995), the parents of a prior victim found their daughter strangled to death and went on to describe her as being naked and bleeding from the vagina. The court stated that them indicating that she had been strangled to death was sufficient and that the court abused its discretion in allowing them to go on and testify as to her nakedness and vaginal bleeding. This additional information was not relevant and was inflammatory. Mr. Warmack's testimony should be limited to stating what he actually observed, i.e. blood, scratches, bruises, etc.

The court heard the motion in limine on March 1, 1996, and denied it. (Vol. XI, pp. 1034-1039) Before his penalty phase began, Appellant requested and received standing objections as to portions of the evidence he had sought to keep out. (Vol. XII, pp. 1058-1060)

All three of the State's penalty phase witnesses testified regarding the Warmack incident, which occurred in 1985. (Vol. XII, pp. 1073-1092) Yolanda Warmack, Rosa Mae's mother, testified that her daughter (who was 41 years old at the time of the penalty trial) had never worked because she was "sort of on a retarded level." (Vol. XII, pp. 1074, 1084) She also described Rosa Mae's

injuries when she was in the hospital, and pictures taken of Rosa Mae several days later were admitted into evidence over defense objections. (Vol. XII, pp. 1075-1077)

Rosa Mae's father, Harold Warmack, testified that when he saw his daughter in the hospital, she "looked like she had been in a lion den where lions had mangled her up." (Vol. XII, p. 1080)

Detective Gladys Alarcon of the Hillsborough County Sheriff's Office testified that she investigated the assault on Rosa Mae Warmack. (Vol. XII, p. 1085) Warmack told her that the perpetrator, who was later identified as Johnnie Norton, had forced her to have sex with him and then hit her with a hard object such as a blackjack. (Vol. XII, pp. 1087-1092) Appellant's statement to Alarcon was that he had picked up Warmack at a bar, and she agreed to have sex with him for fifty dollars. (Vol. XII, p. 1091) He paid her the fifty dollars, but then took it from her, whereupon Warmack became upset and hit him. (Vol. XII, p. 1091) Appellant beat her with his fist, and she fell unconscious on top of him. (Vol. XII, p. 1091) Appellant dragged her outside his car into a vacant lot, hit her a couple more times and left her there. (Vol. XII, p. 1091)

There are a number of problems with the evidence the State elicited from its penalty phase witnesses. With regard to the testimony that Appellant sexually battered Rosa Mae Warmack, only a conviction of a felony involving use or threat of violence will qualify for the aggravating circumstance found in section 921.141-(5) (b) of the Florida Statutes. Garron v. State, 528 So. 2d 353

(Fla. 1988). As the defense noted in its Motion in Limine, Appellant was not convicted of sexual battery in the Warmack episode; rather, he entered a plea of guilty to, and was convicted of, aggravated battery. (State's Exhibit Number 59) The State should never have been permitted to apprise Appellant's jury about conduct that did not result in a conviction in its effort to establish the prior violent felony aggravating circumstance.

Furthermore, while this Court has held that the State may introduce evidence as to the circumstances of a prior violent felony conviction, rather than just the bare fact of that conviction, Stano v. State, 473 So. 2d 1281 (Fla. 1985), the details cannot be emphasized to the point where the other crime becomes the feature of the penalty trial, or the prejudice outweighs the probative value. Stano, 473 so. 2d at 1289; Rhodes v. State, 547 so. 2d 1201, 1204-1205 (Fla. 1989). See also State v. Bey, 610 A. 2d 814, 833-834 (N.J. 1992); State v. Frazo, 594 A, 2d 232, 243-244 (N.J. 1991). Here, the testimony concerning the rape, especially when coupled with the mother's irrelevant testimony that her daughter was retarded, was extremely prejudicial, and served no purpose other than to cast Appellant in an unfavorable light. If it was necessary for the State to introduce details of the aggravated battery at all when it had the certified copy of the judgment available as evidence (see Rhodes), this testimony could have been presented without referring to the sexual battery. In Finney v. State, 660 So. 2d 674, 684 (Fla. 1995), this Court cautioned against admission of this type of "unnecessary" "highly

prejudicial evidence," which "is likely to cause the jury to feel overly sympathetic towards the prior victim."

Not only was the testimony from Warmack's father that his daughter "looked like she had been in a lion den where lions had mangled her up" speculative (there was no predicate to show that he knew what a person would look like after being mangled by a lion), but it was the type of "unnecessary and inflammatory" extraneous detail that this Court condemned in Coney v. State, 653 So. 2d 1009, 1014 (Fla. 1995). See also Rhodes, 547 So. 2d at 1205 ("information presented to the jury [which] did not directly relate to the crime for which [the defendant] was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime" was inadmissible at penalty phase).

Finally, the evidence regarding the Warmack incident did not merely become a feature of the penalty phase, it was the State's case at penalty phase (with the exception of some copies of some additional judgments and sentences that had been entered against Appellant in other cases).

The jury's penalty recommendation was hopelessly tainted by its receipt of this inadmissible evidence. Appellant's sentence of death was imposed in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, 17, and 22 of the Constitution of the State of Florida, and cannot be permitted to stand.

ISSUE VIII

THE COURT BELOW ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1, 9 (1982). This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). See also DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988).

This case is not among the most aggravated murder cases in Florida, nor is it "unmitigated." The killing was not particularly heinous, as it involved a single shot to the back of the head, and the court below found but a single aggravating circumstance, that Appellant was previously convicted of a felony involving the use or threat of violence. (Vol. III, pp. 398-399) The State's entire presentation at penalty phase dealt with this sole aggravating factor, and included evidence that should not have been presented to Appellant's jury, as discussed in Issue VII., rendering the death recommendation relied upon by the court below unreliable. Despite having heard improper testimony, four out of the 12 jurors, a full one-third of the jury, nevertheless believed that Appellant's life was worth saving, and voted not to execute him.

With regard to the State's proof of prior violent felonies, State's Exhibits Numbers 56-59 should not have been admitted at all, **because there was no showing that they related to the Johnnie** Norton who was on trial instead of some other Johnnie (or, in one case, Johnny) Norton. Ordinarily, the State would bring in a fingerprint expert to establish that the prints on the judgements and sentences matched the known prints of the defendant, but that was not done in this case. And, as defense counsel noted below, State's Exhibit Number 56 was not even a judgment and sentence. Rather, it consisted of an information for aggravated battery, and notes on a docket entry which were apparently made by an anonymous clerk. This is hardly the kind of proof that can suffice to send

a man to the electric chair.[25] Alternatively, if this Court determines that the documents were admissible, they nevertheless lacked substantial probative value because they were never adequately tied to Appellant, as by fingerprints, as discussed above, or any other means.

Furthermore, even if the prior violent felonies were sufficiently proven, and shown to relate to Appellant, this Court has consistently reduced cases involving only one aggravator to life imprisonment, even where, as here, the jury has recommended death. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 456 So. 2d 444 (Fla. 1984).

The trial court placed particular significance on the fact that one of Appellant's prior convictions for a violent felony involved a homicide, a second degree murder. (Vol. III, pp. 398-399) However, this fact would not necessarily require that Appellant be sentenced to death. See, for example, Fead v. State, 512 so. 2d 176 (Fla. 1981); Crump v. State, 622 So. 2d 963 (Fla. 1993) (trial court's erroneous finding of cold, calculated, and premeditated not harmless even though Crump had been convicted of another, similar first degree murder). Furthermore, in the context of aggravation, the court failed to consider any of the ameliorating circumstances surrounding Appellant's plea of guilty to this

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[25] The inadmissibility of the State's documents regarding prior violent felonies could, of course, constitute an independent basis for vacating Appellant's death sentence and remanding for a new penalty trial, and Appellant urges it as such in the event the Court does not find merit in Appellant's proportionality argument and does not grant him other relief.

offense, as testified to at penalty phase by his attorney at the time, Terrence Moore. Moore explained that even though Appellant asserted that he acted in self-defense, and there was ballistics evidence which supported this claim, Appellant nevertheless entered a "best interest" plea in return for a sentence of only 20 months, as he was facing the possibility of a long prison sentence for violation of probation even if he went to trial and was acquitted of the second degree murder charge. (Vol. XII, pp. 1125-1129) In addition, it does not appear that there was any similarity between the prior homicide of a male victim and the instant killing of Lillie Thornton; this Court has emphasized such similarity in cases such as Ferrellv. State, 680 So. 2d 390, 391 (Fla. 1996) ("We find Ferrell's [death] sentence commensurate to the crime in light of the similar nature of the prior violent offense [which was a second degree murder]. [Emphasis added. Citations omitted.]" See also King v. State, 436 So. 2d 50 (Fla. 1983); Lemon v. State, 456 So. 2d 885 (Fla. 1984); Harvard v. State, 414 So. 2d 1032 (Fla. 1982).

The trial court also failed to consider that all the offenses involving violence for which Appellant was convicted occurred a number of years before the instant homicide; the most recent case, the one involving Rosa Mae Warmack, arose in 1985, some nine years prior to the killing of Lillie Thornton. These episodes from Appellant's distant past, when he was much younger, thus provide little if any insight into his present character and propensity to commit acts of violence. Their weight is greatly weakened by their

chronological distance from the incident for which Appellant was being sentenced.

As for mitigation, the trial court's treatment of this aspect of Appellant's case was fatally flawed. In his sentencing order, the court dealt with mitigating factors as follows (Vol. III, pp. 399-400) :

> Evidence offered in mitigation consisted entirely of the following:
> Two of the defendant's sisters testified that when the defendant was a child the family lived in a rather small house; that there were as many as twelve children living together in that house;[26] that the older half of the children were sired by one father and the younger half by another and that the defendant was the eldest of the younger half; that his elder siblings "picked on him" and his father treated him "differently" and, in fact, punished him once by shaving his head. The sisters testified that they love their brother/half-brother and would visit him in prison were he to be sentenced to life in prison.
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> The mother of the defendant testified that the defendant seemed to be "picked on" by other children **and** that all but one of his male siblings has been to prison. She testified that she loves her son and would visit him in prison were he to be sentenced to life in prison.
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> Dr. Harry Krop, a Clinical Psychologist, testified that he interviewed the defendant twice, interviewed the defendant's family, reviewed depositions, school records and prior incarceration records; that he has determined the defendant's I.Q., at about 85, to be average to above average for prison inmates; that, in his opinion, the defendant would "institutionalize well" and increasingly adapt to prison life as he ages should he be sentenced to life in prison.
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> Attorney Terrence Moore testified that he represented the defendant in **case number** 82-

[26] Actually, the testimony was that there was as many as 13 children living in the house. (T 1110)

> 2734, First Degree Murder, and that the defendant pled guilty when the plea negotiations with the state (a reduced charged of Second Degree Murder with twenty months imprisonment concurrent with a twenty-month sentence for violation of probation) became sufficiently attractive.
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> All of the evidence offered in mitigation **was** unrefuted.
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> The court has very carefully considered and weighed the evidence offered in mitigation and finds that no statutory mitigating factor has been shown to exist. Further, the court finds that there is nothing substantial or extraordinary about the mitigating facts and, consequently, that no non-statutory mitigating factor has been shown to exist.

The court's discussion of Attorney Terrence Moore's testimony is grossly inaccurate. At no time did Moore indicate that Appellant was originally charged with first degree murder; in fact, the charging document, which the State introduced into evidence at penalty phase, clearly shows that the charge was murder in the second degree. (State's Exhibit Number 57, which appears in Volume XIV, the volume containing exhibits, at page 73) The court's erroneous belief that Appellant had been charged with first degree murder in the previous incident may have colored his view of both the evidence Appellant presented in mitigation and the weight that should be given to this prior violent felony in aggravation.

In addition, the court makes up his own standard, that the mitigating facts must be "substantial or extraordinary" before they will be considered mitigating, which enjoys no legal support. Pursuant to the United States and Florida Constitutions, the sentencer in a capital case must consider and give effect to all relevant mitigating evidence offered by the defendant. Hitchcock

v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L. Ed. 2d 347 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) ; Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). Furthermore, the trial judge must, in writing, expressly evaluate every statutory and nonstatutory mitigating factor proposed by the defendant. Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Mitigating factors must be found if "reasonably established by the greater weight of the evidence." Ferrell, 653 So. 2d at 371. While the relative weight to be given a mitigating factor is within a trial judge's discretion, that discretion must be exercised in a reasonable manner, i.e., there must be legal and logical justification for the result. See Cannakiris v. Cannakiris, 382 So. 2d 1197, 1203 (Fla. 1990); see also Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (this Court not "bound to accept the trial court's findings [regarding mitigation] when, as here, they are based on misconstruction of undisputed facts and a misapprehension of law"). And a mitigating circumstance, once found, must be given some weight; it cannot be given no weight at all. Campbell. The court below violated these principles when he devised an undefined legal standard of his own to reject arbitrarily Appellant's proffered evidence as constituting any mitigation whatsoever. Several of the mitigating circumstances that emerged have been recognized as legitimate nonstatutory mitigation, for example, Appellant's low IQ, which this Court treats as a "significant mitigating factor," Thompson v State, 648

So. 2d 692, 697 (Fla. 1994); his family background [see, for example, McCampbell v. State, 421 So. 2d 1072 (Fla. 1982) and Robinson v. State, 21 Fla. L. Weekly 5499 (Fla. Nov. 21, 1996) (difficult and unstable childhood has sometimes been considered a mitigating circumstance)]; and the fact that he would adapt well to prison life [see, for example, Songer v. State, 544 So. 2d 1010 (Fla. 1989)]. The court did not even address at least one mitigating circumstance, that Appellant was capable of gainful employment and was a hard worker, that came out during the guilt-phase testimony of James Watson, Appellant's co-worker at Cast-Crete. See Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Wasko v. State, 505 so. 2d 1314 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); McCampbell. While the trial court might not have felt these matters were entitled to much weight, he was obligated to give them some weight, and to consider them in the sentencing process.

Finally, this Court must consider that the instant homicide may have stemmed from Appellant's amorous relationship with Lillie Thornton. In many cases where a death sentence arose from a lovers' quarrel or domestic dispute, this Court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation. See Blakelv v. State, 561 So. 2d 560 (Fla. 1990); Amoros v. State, 531 So. 2d 1256, 1261 (Fla. 1988); Garron v. State, 528 So. 2d 353, 361 (Fla. 1988); Fead v.

State, 512 So. 2d 176, 179 (Fla. 1987), receded from on other grounds, Pentecost v. State, 545 So. 2d 861, 863 n. 3 (Fla. 1989); Irizarry v. State, 496 So. 2d 822, 825-26 (Fla. 1986); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Herzog v. State, 439 So. 2d 1372, 1381 (Fla. 1983); Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981); Phippen v. State, 389 So. 2d 991 (Fla.1980); Kampff v. State, 371 so. 2d 1007 (Fla. 1979); Chambers v. State, 339 So. 2d 204 (Fla. 1976); Halliwell v. State, 323 So. 2d 557 (Fla. 1975); Tedder v. State, 322 So. 2d 908 (Fla. 1975). While the evidence adduced below did not supply the circumstances surrounding the killing of Lillie Thornton, Appellant should be given the benefit of this ambiguity, particularly in light of the weak aggravation and the fact that four jurors felt that he should not receive the ultimate punishment.

For these reasons, Appellant's sentence of death cannot be allowed to stand without violating the Eighth and Fourteenth Amendments to the Constitution of the United States, as well as Article I, Sections 2, 9, and 17 of the Constitution of the State of Florida. It must be replaced with a sentence of life imprisonment.[27]

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[27] Some of Appellant's arguments in this issue dealing with the trial court's treatment of aggravating and, particularly, mitigating circumstances could serve as an independent ground for reversal of his death sentence and remand to the trial court for resentencing, and Appellant asks the Court to consider the arguments in this context as well as part of his proportionality argument.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Johnnie Norton, prays this Honorable Court for relief in the alternative as follows:

(1) Reversal of his conviction for murder in the first degree and remand with directions that he be discharged.

(2) Reversal of his conviction for murder in the first degree and remand with directions that he be adjudicated guilty of a lesser included offense and resentenced accordingly.

(3) Reversal of his conviction for murder in the first degree and remand with directions that he be afforded a new trial.

(4) Reversal of his death sentence and remand with directions that he be resentenced to life.

(5) Reversal of his death sentence and remand with directions to conduct a new penalty proceeding before a new jury.

(6) Reversal of his death sentence and remand for resentencing by the court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 4th day of March, 1997.

Respectfully submitted,

Robert F. Moeller

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 0234176
P. 0. Box 9000 - Drawer PD
Bartow, FL 33831

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

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