IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CALVIN JEROME JOHNSON, JR.,

Appellant,

v.

CASE NO.: 88,986
LOWER CASE NO.: 95-915-CF-B

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the record herein will be "R" followed by the appropriate volume and page numbers as assigned by the Clerk. References to the transcripts of trial, penalty phase and sentencing will be "T" followed by the appropriate volume and page numbers as assigned by the court reporter. References to exhibits will be the party introducing the exhibit, followed by the Clerk's number for said exhibit.

STATEMENT OF THE CASE

This is an appeal from a judgment and sentence wherein the death penalty was imposed.

On January 11, 1995, Judge L. P. Haddock, Fourth Judicial Circuit Judge, issued a warrant for the arrest of appellant for the offense of "Murder;" no degree of homicide **was** specified therein. (R. Vol. 1-2). On January 12, 1995, Calvin Jerome Johnson, Jr. was booked into the Duval County Jail, again on the unspecified offense of "Murder." (R. Vol. 1-3).

On January 13, 1995, Johnson appeared at first appearance court, where he was determined insolvent, where he exercised his claim of rights pursuant to the Fifth and Sixth Amendments of the United States Constitution relating to silence and counsel, and where counsel was appointed to represent him. (R. Vol 1-5; R. Vol. 1-6; R. Vol. 1-7).

On January 17, 1995, the Office of the Public Defender filed a certificate of conflict and motion to withdraw, citing the fact that the Office of the Public Defender represented the co-defendant ANTHONY JOHNSON. (R. Vol. I-9).

On January 27, 1995, Assistant State Attorney Jay Taylor filed an information against appellant, alleging charges of second degree murder, attempted first degree murder, home invasion robbery, burglary, armed robbery and possession of firearm by convicted felon. (R. Vol. 1-13). On February 2, 1995, the State filed its notice of intent to classify defendant as a habitual felony

offender, and its notice of intent to classify defendant as a habitual violent felony offender. (R. Vol. 1-21; R. Vol. I-22).

On March 4, 1995, the Duval County Grand Jury returned an indictment charging appellant with first degree murder, attempted first degree murder, armed robbery, burglary, and armed robbery. (R. Vol. I-25)[1]. On March 27, 1996, the State filed its notice of intent to seek the death penalty. (R, Vol. I-30).

Trial counsel filed the following motions relating to the death penalty:

a. Motion to Declare Section 921.141, Florida Statutes Unconstitutional as Applied because of Arbitrariness and jury Override in Sentencing;

b. Motion to Declare §921.141 and §922.10, Florida Statutes Unconstitutional because Electrocution is Cruel and Unusual Punishment;

c. Motion to Declare §782.04 and §921.141 Florida Statutes, Unconstitutional because of Treatment of Mitigating Circumstances;

d. Motion for Evidentiary Hearing, for Payment of Fees and Expenses of Expert Witnesses, Concerning Arbitrary Application of the Death Penalty;

e. Motion to Declare §921.141(5) (d) Florida Statutes, Unconstitutional;

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[1] Counts three and five of the indictment invoked Section 775.087, Florida Statutes, but failed to allege what subsection of Section 775.087 Florida Statutes was being invoked; count two did not allege that this subsection applied.

f. Motion for Evidentiary Hearing and for Payment of Fees and Costs of Expert Witnesses on the Constitutionality of Death Qualifications;

g. Motion to Dismiss and Declare §782.04 and §921.141, Florida Statutes Unconstitutional for a Variety of Reasons;

h. Motion for Evidentiary Hearing and for Payment of Fees and costs of Experts and Lay Witnesses on the Constitutionality of Death by Electrocution;

i. Motion to Declare that Death is not a Possible Penalty for Bid Inquiry of Jurors as to Death Qualification and Declaration that no Bifurcated Proceedings may be had;

j. Motion to Prohibit Instruction on Aggravating Factors 5(h) and 5(i);

k. Motion to Declare Section 921.141(5)(h), Florida Statutes Unconstitutional;

1. Motion to Declare §921.141, Florida Statutes (1987), Unconstitutional; and

m. Motion to Declare Section 921.141(5)(i), Florida Statutes, Unconstitutional.

(R. Vol. 1-74-179). These motions were denied. (T-Vol.XXIII-153 et seq.).

Johnson also requested that the court require the jury to consider and return a special verdict, indicating whether the jury determined first degree was based on a pre-meditation theory or on the felony murder theory. (R. Vol. I-111). That motion was denied. (T-Vol. XXIII-178). Johnson also filed a motion for

additional peremptory challenges, requesting that the trial court not limit the number of peremptory challenges in jury selection. (R. Vol. I-147). That motion was denied without prejudice to renew at trial. (T-Vol. XXIII-185).

Johnson also moved to select separate juries for the guilt and penalty phase, in order to preserve his presumption of innocence in the guilt phase. (R. Vol. I-163) . That motion was denied on April 26, 1996. (T-Vol.XXIII).

Johnson also filed a motion to sever both offenses and defendants (R. Vol. 11-237); that motion was granted as to severance of offenses, but denied **as** to defendants. (T-Vol.XXIII). Johnson also filed a second motion to sever defendants for purposes of the penalty phase, alleging that it would not be possible for a jury to consider aggravating and mitigating circumstances as to each individual, especially where the co-defendants were brothers. (R.Vol.II-241; T-Vol.XXV). That motion was denied without prejudice to renew after trial. (R. Vol. 11-245).

Hearing on non-evidentiary motions was held on Friday, April 26, **1996,** before the Honorable Hugh A. Carithers, Circuit Court Judge, (T-Vol. XXIII-23). At that time, Johnson adopted many motions of the co-defendant, including the co-defendant's motion requesting proper victim impact evidence, and the co-defendant's motion for statement of aggravating circumstances.

Hearing on the motion to sever defendants **was** held on May 27, 1996. (T-Vol.XXIV). The motion to sever defendants as to the guilt phase of the trial **was** denied; the trial court reserved ruling as

to the question of severance of penalty phase, (T-Vol. XXIV-257).

Jury selection for both appellant and the co-defendant began on June 10, 1996. (T-Vol.XXVI-299). One jury was selected to try both cases.

During the trial, Johnson made several motions to sever his trial from that of the co-defendant. Johnson's motion for judgment of acquittal as to Count III was granted in part; the trial court reduced that charge to a charge of attempted armed robbery. (T-Vol.XXXII-1597); (R. Vol. 11-308) .

Verdict forms submitted to the jury in the guilt phase did not contain a "sub" or special finding as to whether Calvin Johnson personally carried a firearm for purposes of 775.087. (R. Vol. II-257).

Appellant was found guilty of murder in the first degree, of attempted murder in the first degree, of attempted robbery with a firearm, of burglary with an assault and of armed robbery. (R. Vol. II-256-60). Appellant filed a Motion for New Trial. (Id. at 316).

Penalty phase was held on July 12, 1996. (T.Vol.XXXVII).

The trial judge entered a Sentencing Order addressing the aggravating and mitigating circumstances. (R. Vol. 111-432). The trial judge determined that the state had proved the following two aggravating factors beyond a reasonable doubt:

1. The defendant was previously convicted of other felonies involving the use or threat of violence to some person; and

2. The defendant, in committing the crime for which he is to be sentenced, was engaged in the commission of the crime of burglary.

(R. Vol. 111-33). The trial court rejected the state's contention that separate aggravating factors of "in the commission of the crime of burglary" and "committed for pecuniary gain" existed. (Id. at 434).

The trial court had determined that the defendant had proven one statutory mitigating factor, age; but determined that this factor was entitled to "very little weight." (Id. at 435). The trial court addressed the non-mitigating statutory factors presented by the defendant. The trial court rejected or gave very little or slight weight to the remaining mitigating circumstances of defendant, and concluded that the aggravating circumstances outweighed the mitigating circumstances. (Id. at 435-39). The trial court imposed the death penalty as to count one (first degree murder of Willie Gaines); a life sentence as to count two (the attempted first degree murder of Calvin Gaines); a thirty-year sentence as to count three (attempted armed robbery); and a life sentence for both counts four and five. (Id. at 439-40; Id. at 422). The trial court imposed three-year minimum sentences on counts two, three, and five. (Id.)

Appellant timely filed his notice of appeal.

STATEMENT OF THE FACTS

On December 30, 1994, Calvin Johnson was in a car being driven by Chiffon Bryant; Calvin and his brother, Anthony, were in the back seat. (T-Vol.XXIX-1080-82). Chiffon's boyfriend, Shirae Hickson, sat in the front passenger seat. (Id. at 1081). The men were helping Chiffon move; she had been evicted from her apartment. (Id. at 1079; T-Vol.XXX-1175).

Chiffon Bryant testified that as the group drove down 21st Street in Jacksonville, they saw Calvin Gaines ("Big Gaines") in his front yard, (Id. at 1082). Calvin Gaines was a crack cocaine dealer. (T.Vol .xxx-937). Bryant testified the men were laughing and joking and that she was thinking to herself, "Gosh, he is fat." (T-Vol.XXX-1089). Bryant testified there was no discussion between her passengers about what was to happen next; no one had planned any robbery or shooting. (T-Vol.XXX-1174). According to Bryant, Calvin Johnson tapped Anthony Johnson on the shoulder and said only, "There is Big Gaines right there." (T-Vol.XXX-1089). Anthony Johnson had leisurely mentioned that "Big Gaines" owed him money. (T-Vol.XXX-1090).

Anthony told Chiffon "Pull over, pull over. I can get my money now." (Id. at 1090) . Anthony Johnson directed Chiffon to pull over. (Id.). Chiffon testified both Calvin and Anthony got out of the car; according to her, both were carrying guns. (Id. at 1092). Chiffon claimed that she could see Anthony's gun tucked into his belt with his shirt pulled over it, and that she could see Calvin's gun "up under his shirt in the back of his pants." (Id.).

Chiffon described Anthony's gun as an "automatic, semi-automatic;" and as "a larger gun." (Id.). According to Bryant, Calvin carried a .22. (Id. at 1093). Bryant testified she drove away and that when she returned, she saw "Big" Gaines lying on the ground. (Id. at 1093).

Bryant testified that she had been arrested after being interviewed by Detective Scott.[2] Bryant admitted that she had lied to Detective Scott on the occasion of her first interview with him, but that she had cooperated with him afterward. (T-XXX-1107-08). Bryant was initially charged in the same information as appellant with unrelated charges of burglary of a dwelling and robbery. (R-Vol.I-13-16). Bryant testified that she had pleaded guilty to two counts of armed robbery and one count of accessory to murder. (T-XXIX-1069). Bryant also testified that her exposure would have been life in prison for the offenses. (Id. at 1072-73). Bryant testified that she was hoping to receive a good recommendation from the state for her sentencing. (Id. at 1073).

Bryant testified that Shirae Hickson was her boyfriend, and that she had two children with him. (Id. at 1074). In fact, one of the children Ms. Bryant had with Shirae Hickson was born while she was incarcerated on these charges. (T-XXX-1111). Ms. Bryant testified that she would always love Shirae Hickson, and that she wrote him letters in jail. (Id. at 1114).

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[2] In opening statement, Assistant State Attorney Jay Taylor told the jurors Chiffon Bryant was a co-defendant, and was charged with the "same crimes that these men are charged with." (T-Vol.XXVIII-788).

Bryant wrote letters to Shirae Hickson so he would know what her previous testimony had been. (Id. at 1133). In the first of her letters, she reiterated that Shirae Hickson, Anthony Johnson, and Calvin Johnson were in the car. (Id.). Bryant reiterated her entire version of the facts in a letter to Shirae Hickson. (Id. at 1133-38). Ms. Bryant's second letter instructed Shirae Hickson to stay "in contact with each other," and instructed him to "[f]lush this after you read and remember it. Flush it." (Id. at 1139). That letter again reiterated Bryant's version of the events of December 30, 1994, and pleaded with Shirae Hickson to "please try to remember all of this." (Id. at 1139-43).

In a third letter, Bryant requested Shirae to give her information in order to prepare herself for deposition. (Id. at 1144-46). In that letter, Bryant reiterated that it was only by chance that we ran into "Big" Gaines, (Id. at 1144). In the final letter Ms. Bryant wrote to Shirae Hickson while incarcerated, she explained her plea agreement with the state, and informed Hickson that she had not received a "cap." (Id. at 1147) . In her letter, Chiffon Bryant stated:

> They claim it would make me look like a more credible and better witness if I could say that I could get a long time in prison instead of testifying truthfully or maybe they plan on giving me a long time, but I have faith in God that he is not going to let that happen, that he is going to send me home soon.

(Id. at 1147).

Ms. Bryant had remarked in her letter that she and Shirae were "two lovers together forever," and that they would "stick together until this is over." (Id. at 1151). Bryant admitted that one of the reasons it was important for the two of them to stick together was so that the jury did not think that one of them was lying. (Id. at 1151-52).

Linsey Walker was driving by the Gaines' home at the same time as Chiffon Bryant, Shirae Hixon, and the Bryants. (T-Vol.XXX-1190). Walker saw Calvin "Big" Gaines with his arms up in the air and a guy with a gun in his hand. (Id. at 1191). Walker drove about two houses down, made a U-turn and drove past the Gaines' home again, (Id.). As he turned his car around, Walker saw Anthony Johnson fire shots at Calvin Gaines. (Id. at 1191-92). On cross-examination, Walker admitted he had seen "Big" Gaines and Anthony "outside fighting." (Id. at 1201). Walker claimed he saw Calvin Johnson running out of the Gaines' home. (Id. at 1192). Walker testified the man running out of the house had been between five-foot-nine and five-foot-ten. (Id. at 1202).

Shae Brookins testified that on December 30, 1994, he was working at the Silver Moon Gas Company on east Twenty-first Street near the Gaines' home. (T-Vol.XXX-1205-06). Brookins had previously purchased crack cocaine from Calvin "Big" Gaines; according to Brookins, Gaines had been selling dope around the time

of the shooting.[3] (Id. at 1214; Id. at 1216). Brookins testified that on the day of the shooting, he had walked by Gaines' front yard, and had seen Gaines "just talking" to Anthony Johnson, (Id. at 1218).

Brookins testified that he heard gunshots, then turned around to see "Big" Gaines' father come out of the house with a .25 and fall down. (Id. at 1218-19). Brookins testified that when the elder Mr. Gaines had come out, he ***was*** "shooting a .25 at them." (Id. at 1221). In a prior deposition, Brookins had stated that the other man with Anthony had "turned around and started pow, pow, pow, pow, pow," when Daddy Gaines "came out there and started shooting a .25 at them." (Id. at 1221). In Brookins' prior deposition, he had testified that he had seen Daddy Gaines come out of the house with ***a*** .25, "trying to protect his boy because he had done been shot."

Amanda Gaines testified that she lived at 1431 East 21st Street with her son Calvin Gaines, and her husband, Willie Gaines. On December 30, 1994, Mrs. Gaines was talking to a friend on the telephone, when she looked down the hall and saw "this guy" come in with her husband. (T. Vol. XXIX-972). Amanda Gaines testified that she saw the guy behind her husband, and a gun in [the guy's] hand. (Id. at 973). At trial Mrs. Gaines twice identified ***co-defendant***

[3]The state described Calvin Gaines as a drug dealer in opening statement. (T-Vol.XXVIII-786).

Anthony Johnson as this "guy" or this man.[4] (T-Vol. XXIX-984-89).

Mrs. Gaines testified that she went to the back of the house, and then came back to the front room. When she came down the hall her husband was sitting in his chair in the living room. (Id. at 973-74). Mrs. Gaines **said that the man with her husband (whom she** identified as co-defendant Anthony Johnson) **saw** her, and told her not to go into the back of the house. (Id at 975). Mrs. Gaines ran away screaming "Don't kill us, don't kill us. We don't have drugs. We don't have money." (Id. at 975).

Mrs. Gaines could not see what occurred after that, but heard a gun shot. (Id. at 977). Mrs. Gaines testified that her husband kept a gun under the edge of the sofa. (Id. at 982). Mrs. Gaines also testified that to the best of her recollection, nothing was taken from the inside of her home -- no money, no jewelry -- nothing of any value. (Id. at 992).

Willie Gaines was admitted to the hospital with five gun shot wounds; he died one week later. (Id. at 990). Assistant Medical Examiner Bonifacio Floro testified that he [Floro] had recovered three .380 bullets during the autopsy of Gaines. (Id. at 1047; Id. at 1054; Id. at 1057).

Dr. Floro testified that the gun shot wound number two to Gaines' right shoulder was a non-fatal wound, as was the gun shot

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[4] In fact, after the first time Mrs. Gaines identified the co-defendant Anthony Johnson as the shooter, the state attorney requested the judge order all black males in the courtroom to stand and remove their glasses. It was after the court had ordered this that Mrs. Gaines made the second identification of Anthony Johnson as the shooter,

wound to the upper arm. (Id. at 1059-60). Dr. Floro also testified that gun shot wound number three to the left anterior chest was also non-fatal providing that immediate treatment occurred. (Id. at 1061). Dr. Floro also indicated that gun shot wound number five to the right hand was also non-fatal. (Id. at 1063). Floro's opinion was that Willie Gaines had died from pneumonia resulting from gunshot wounds. (Id. at 1064). Floro also indicated that the seventy-six year old Mr. Gaines suffered from cirrhosis of the liver as well. (Id. at 1064).

Co-defendant Anthony Johnson testified in his own behalf. (T-Vol.XXXII-1625). Anthony Johnson testified that he knew Calvin "Big" Gaines from the neighborhood, and that earlier in 1994, he and "Big" had made side bets on some dice players. (Id. at 1627-29). Anthony Johnson testified he placed approximately $600.00 up, and "Big" Gaines said that he could cover it. (Id. at 1630). Anthony Johnson testified that "Big" Gaines was a cocaine dealer. (Id. at 1625-30). Anthony Johnson testified that he won the bet but never collected his money from Mr. Gaines.

On December 30, 1994, Chiffon "Brick" Bryant and Shirae Hickson asked Anthony Johnson to help "Brick" move, and came by to pick him up. (Id. at 1632-34). The trio then proceeded to Calvin Johnson's house, but Shirae and Chiffon would not wait for Calvin to get ready, so they went on. (Id. at 1634-35). According to Anthony Johnson, Calvin said he would take the bus and meet him at their mother's house. (Id.). 1635).

Anthony Johnson testified that he, Chiffon "Brick" Bryant, and Shirae Hickson drove to the Washington Heights Apartment Complex to visit Ms. Bryant's aunt, then went to Burger King for breakfast. (Id. at 1635-36). After that, the trio drove **by** Calvin "Big" Gaines' residence, and Anthony Johnson asked Chiffon "Brick" Bryant to pull over so that he could "catch that guy!" (Id. at 1637).

Bryant pulled over, and Anthony Johnson and Shirae Hickson got out of the car. They walked down the sidewalk to Mr. Gaines' home. (Id. at 1639). Anthony Johnson testified that he approached Calvin Gaines, who was sitting in the left driver's side of a car, and said "What's up?" (Id. at 1639). Anthony Johnson testified that Calvin "Big" Gaines "just laughed and said 'What's up guy?'" (Id. at 1639). Anthony Johnson was adamant that "Big" recognized him. (Id.).

Anthony Johnson related that Calvin "Big" Gaines had a large quantity of crack cocaine in his car, and that Anthony asked "Big" about the money from the gambling debt. According to Anthony, "Big" Gaines said "I don't have it. I don't have none of it right now and I said you don't have none of it." (Id. at 1641). Anthony Johnson testified that "Big" Gaines then decided to give him half of the debt. (Id. at 1641).

Anthony Johnson testified that he had squatted down next to the open car door in order to talk to "Big" Gaines. (Id. at 1645). Anthony Johnson testified that he heard the front door of the Gaines' residence open and someone come out. (Id.). Anthony Johnson saw an "older guy" come out of the house and call to "Big"

Gaines. (Id. at 1646). According to Anthony, "Big" Gaines said "It's alright. They are alright." (Id. at 1646-47). During this time Anthony Johnson assumed that Shirae Hickson was still waiting at the back of "Big" Gaines' car. (Id.).

Anthony Johnson testified that "Big" Gaines pulled out a large sum of money and peeled off $300.00 from it. (Id. at 1648). "Big" Gaines then offered some collateral to Anthony for the balance of the debt. (Id.). Gaines gave Anthony Johnson his cellular telephone to hold until the rest of the money was paid. (Id. at 1649).

Anthony Johnson then testified he heard the sound of a shot off the front porch of the house, and while still kneeling, looked through the opposite car window. (Id. at 1651). Anthony Johnson testified he observed an elderly guy with a gun in his hand pointed at Shirae Hickson. (Id.). Anthony Johnson testified he then kneeled down further and heard a lot more shooting. (Id. at 1652).

Anthony Johnson testified that Calvin Gaines then got out of the car and quickly ran to the back of his car near the sidewalk. (Id. at 1653). Anthony testified that "Big" Gaines then attempted to pull a gun, and that Anthony feared for his life. (Id. at 1654). Anthony testified that he attempted to reach for "Big" Gaines' gun, but that he was unable to get it away from Gaines. (Id. at 1655). Anthony Johnson testified that he then shot "Big" Gaines. (Id. at 1655-56).

Edward Mason, a four-time convicted felon, testified against Calvin Johnson. (T-Vol.XXXI-1364; 1395). Mason testified that

after looking at a newspaper clipping from The Florida Star with Calvin Johnson, that Calvin Johnson had said the police would be looking for him. (Id. at 1365). Mason, a crack cocaine user and dealer,[5] had approached Calvin Johnson because he had "needed a handgun for protection , . . [for] the things that [he] was doing on the street." (Id. at 1366). According to Mason, Calvin told him he had two guns for Mason and that if Mason sold one, he could keep the other. (Id.).

On the occasion of his encounters with Calvin Johnson, Mason was under the influence of crack cocaine. (Id. at 1396-97). Mason claimed that Johnson had told him the people involved had gone to the Gaines' home "to do a robbery" and that "the guy bucked him." (Id. at 1368). Mason testified that at the time he testified he was an inmate at the Duval County Jail on charges on sale of crack cocaine. (Id. at 1376). Mason testified he had been charged as a habitual offender in that case. (Id. at 1377). Three of Mason's four prior felonies were for cocaine sales; the fourth was for possession of a firearm by a convicted felon. (Id. at 1378; 1395-96) .

Mason testified that he had received two guns from Johnson--a .380 which was loaded and a .45 with no ammunition. (Id. at 1383). Mason testified he sold the .45, and kept the .380 for himself. Mason was supposed to have given Calvin payment for the gun, but

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[5]In opening, the sate characterized Ed Mason as a "habitual cocaine salesman." (T-Vol.XXVIII-790).

eventually he used the money to support his crack cocaine habit.. (Id. at 1384).

Firearms expert testimony established that of the thirteen shell casings and three projectiles that were submitted for examination, that there were eight fired .380 cartridge casings, and two .380 metal jacketed bullets. (T. Vol. XXXII-1555-76). Firearms expert Peter Lardizabal testified that no actual firearm had been turned into him for testing. (Id. at 1576).

Over objection from Calvin Johnson's trial counsel, the state called correctional officer Tracy Hawes. (T. Vol. XXXII-1579). Officer Hawes testified that in January of 1995, he **was** the security and operations officer for the Pre-trial Detention Center in Duval County. (Id.). Hawes testified that he was in charge of all the lock devises, keys, fire equipment and all of our "high risk inmates." (Id.). Hawes testified that on January 31, 1995, he searched the co-defendant Anthony Johnson's jail cell where he found a hand-cuff key. (Id. at 1583). No other testimony was presented regarding the source of the hand-cuff key, or about Anthony Johnson's intentions in regard to the key.

Detective Herbert L. Scott of the Jacksonville Sheriff's Office Homicide Office testified that he was responsible for the investigation into the murder of Willie Gaines and the shooting of Calvin Gaines. (T. Vol. XXXII-1519). Scott testified that in the course of his investigation he interviewed Cindy Clark on January 10, 1995. (Id.). According to Scott, Cindy Clark told him that Anthony Johnson had said to her that "he had screwed up real bad

and he should have finished the job." (Id.). Scott also testified that the co-defendant Anthony Johnson had said "the only thing that he knew about [the murder and the shooting] was what he had seen on television and that he had never hurt anybody." (Id. at 1524). Scott explained that co-defendant Anthony Johnson had told him that he [Anthony] had been hiding in the attic of a house which the detectives had previously searched. (Id. at 1524).

Detective Scott also related an out-of-court statement purportedly made by appellant Calvin Johnson. According to Scott, Calvin Johnson told him that he had been at home with Yvonne Phelps on the morning of December 30, 1994, then left and caught a bus to his mother's home at 4117 Santee Road. (Id. at 1531). Scott said that Calvin Johnson told him that he had been at his mother's house until after dark when he caught a cab from there to meet his girlfriend at her place of employment. (Id.).

PENALTY PHASE

The sole exhibits which the state introduced **at** the penalty phase were informations against appellant from previously-filed cases and the corresponding judgments and sentences. (T-Vol. XXXVII-2215; state's exhibits 3 and 4, penalty phase; T-Vol. XXXVII-2216; state's exhibits 5 and 6, penalty phase). Exhibits three and four dealt with Calvin Johnson's prior charge involving an aggravated assault against his brother and co-defendant, Anthony; exhibits five and six involved an aggravated battery upon a person named David Greenwall. The state relied upon the facts

and the evidence produced during the guilt portion of the trial for the remainder of its case in the penalty phase. (T-Vol. XXXVII-2220) .

In the penalty phase, Ruth Johnson (the mother of Calvin and Anthony Johnson) testified. (T. Vol. XXXVII-2222). Mrs. Johnson testified that she and her husband had four children, and that Calvin was the oldest. (Id. at 2223). Mrs. Johnson testified that Calvin had been twenty-three years old in December of 1994, (Id. at 2227). Mrs. Johnson testified that Calvin had attended Raines High School, where he played football; and before that he had attended Ribault Junior High School where he had played both football and basketball. (Id. at 2228). Mrs. Johnson testified that when Calvin was thirteen, he had been hit by a car while riding his bicycle. (Id. at 2228). Mrs. Johnson testified that the injuries were so severe that Calvin was required to take his school lessons at home. (Id. at 2228).

Mrs. Johnson testified that Calvin was helpful and respectful around the house and always treated the neighbors with respect. (Id. at 2229). Mrs. Johnson testified that Calvin had worked on the construction of the new Acosta bridge, and went to work everyday at 6 o'clock in the morning. (Id. at 2229-30). Mrs. Johnson also testified that Calvin had previously worked for her brother-in-law's cleaning service, Jackson and Jackson Cleaning Service in Albany, Georgia. (Id. at 22230-31).

In the penalty phase, Anthony Johnson testified about Calvin's relationship with his [Anthony's] girlfriend and their children.

(Id. at 2243). Anthony Johnson explained that Calvin Johnson was an uncle to their children, and exhibited love and affection for all of the children. (Id. at 2258). Anthony Johnson explained that both he and Calvin Johnson had been placed in foster care as children and that their father had tied them up in order to beat them. (Id. at 2258).

Anthony Johnson also testified about the incident in which Calvin Johnson had been arrested for aggravated assault--where he was the purported victim. (Id. at 2266). Anthony Johnson testified that he had not been injured in that fight and that a neighbor had called the police. (Id.). Anthony Johnson testified that as the victim in that case he had not sought to pursue any criminal prosecution against his brother Calvin. (Id at 2266). Anthony explained that it had just been a "misunderstanding," and that he did not harbor any bad feelings against his brother Calvin. (Id. at 2266-67).

Calvin Johnson testified at the penalty phase. (Id. at 2270). Calvin Johnson testified that his mother had tried to keep his father off of the boys, but that he regularly beat them. (Id. at 2271-72). Calvin testified that he and Anthony were "used to the tie up." (Id. at 2272). Calvin Johnson explained that he had an eight-year old daughter who resided in Albany, Georgia, and that he worked in Albany for his uncle, Frank Jackson. (Id. at 2272-73). Mr. Johnson also explained that he worked for Ameriforce in constructing the Acosta bridge. (Id. at 2272).

SENTENCING HEARING

Subsequent to the recommendation of the jury, the trial court held a further sentencing hearing. (T-Vol.XL). Trial counsel presented evidence that Chiffon Bryant had been sentenced to a sentence of time served--not the life imprisonment sentence which she had testified she expected to receive. (Defense Exhibit 1).

Shirley Tamul[6] testified on behalf of Calvin Johnson. Ms. Tamul testified that in March of 1988 she had been a district intake counselor with the Department of Health and Rehabilitative Services, assigned to a status offender unit. (T-Vol.XL-2396). In that position, Ms. Tamul worked with children who were ungovernable in the home, who had committed some kind of "status offense", and who were having difficulty. (Id.). Ms. Tamul explained that a status offense was an offense committed by a juvenile such as running away or not going to school, that was not a criminal offense. (Id.).

Ms. Tamul had been assigned to the Johnson family after the family had been referred to the Youth Crisis Center. According to Ms. Tamul, the children would not return to the family home, and the family refused to accept them. (Id. at 2397). Ms. Tamul explained that the bonding between the children [Anthony and Calvin] and the parents was very, very poor, particularly between the boys and their father." (Id.). Ms. Tamul described an incident where the children's father had tied up Anthony in order

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"The record reflects Ms. Tamul's last name as "Tammell;" the correct spelling is "Tamul."

to beat him. (Id. at 2397-98). According to Ms. Tamul, the boys recounted incidents of physical abuse. (Id.). In fact, in her pre-disposition report written in advance of the judicial determination where the children would have been placed at that time, Ms. Tamul noted that the children would be risk if returned to their parents' home. (Id. at 2398-99).

Ms. Tamul testified that Calvin simply didn't want to go home--that he felt that if he went home he was going to be abused. (Id. at 2400). Ms. Tamul remembered Calvin Johnson as being pleasant and always polite and courteous, According to Ms. Tamul, Calvin Johnson was never disrespectful to her or to any other of the adults, and did well in the emergency shelter care. (Id.).

Ms. Tamul testified that the co-defendant Anthony was "a real behavior problem." (Id. at 2402). She described Anthony as having been moved from facility to facility, and related the difficulty which she had in finding placement locations that would accept Anthony. (Id.). For that reason, Ms. Tamul concluded she had not been able to spend as much time with Calvin as she would have liked to. (Id. at 2400-01).

SUMMARY OF ARGUMENT

Appellant argues that the trial court erred in denying his pre-trial motions to sever his trial from that of his co-defendant, Anthony Johnson, and that the trial court erred in refusing to grant a severance on the several occasions during the trial that such a motion was made. Appellant cites Roundtree v. State, 546 So.2d 1042 (Fla. 1989), in support of this contention.

Appellant also argues that the trial court erred in permitting the state to introduce testimony relating to the co-defendant's possession of a handcuff key while incarcerated in the Duval County Jail. Appellant asserts that said evidence was totally irrelevant and so prejudicial to him that it warrants reversal of this cause for a new trial. There was no evidence tending to suggest that appellant had any knowledge of the co-defendant's possession of a handcuff key; moreover, the state introduced no evidence to establish whether the co-defendant had intended to use the handcuff key in any illegal way.

Appellant asserts that the trial court erred in the weight it assigned to the aggravating circumstance "previously convicted of felony involving use or threat of violence." Appellant cites Slawson v. State, 619 So.2d 255 (Fla. 1993), in support of his contention that the trial court would have given less weight to this aggravator had the court carefully analyzed the underlying facts of the prior cases.

Appellant next asserts that the imposition of the death penalty is disproportionate in this case when compared with other

capital cases, and relies on Voorhees v. State, 22 F.L.W. S 357 (Fla. June 19, 1997); Terry v. State, 668 So.2d 954 (Fla. 1996); and Kramer v. State, 619 So.2d 274 (Fla. 1993), for the proposition that the facts of this case do not warrant the imposition of the death penalty.

Finally, appellant argues that the trial court erred in imposing three-year minimummandatory sentences pursuant to section 775.087, Florida Statues, when the jury made no specific finding that the appellant personally possessed the handgun, or when the state had failed to allege section 775.087 in the charging document. Appellant cites Wallace v. State, 689 So.2d 1159 (Fla. 4th DCA 1997); Hernandez v. State, 621 So.2d 1353 (Fla. 1993); and Earnest v. State, 351 So.2d 957 (Fla. 1997), in support of this argument.

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE OF HIS TRIAL FROM THAT OF THE CO-DEFENDANT

Appellant filed a pre-trial motion to sever his trial from that of his co-defendant, Anthony Johnson. (R-Vol.II-237), and a pre-trial motion to sever the penalty phase from that of the co-defendant. (R-Vol.II-241). The trial court's denial of those motions, coupled with the denial of the repeated motions for severance made during the trial deprived appellant of his right to a fair trial.

At trial the state introduced hearsay testimony of Anthony Johnson's particularly incriminating statements, and introduced testimony relating to the co-defendant Anthony Johnson's alleged possession of a handcuff key while incarcerated at the pre-trial detention facility. None of this testimony was admissible as to appellant.

Florida Rule of Criminal Procedure 3.152(b) requires that the court "shall" order a severance of defendants where appropriate to promote a fair determination of guilt or innocence.

In the instant case, the trial court's denial of the pre-trial and in-trial motions for severance resulted in the jury hearing evidence which was inadmissible against appellant and which was so prejudicial against appellant as to require a new trial. The trial court's denial of appellant's repeated requests for a severance from the trial of the co-defendant constituted an abuse of

discretion. See, e.g., Roundtree v. State, 546 So.2d 1042 (Fla. 1989).

ISSUE II

THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY RELATING TO CO-DEFENDANT'S POSSESSION OF A HAND-CUFF KEY

Over objection of trial counsel for appellant, the trial court permitted testimony relating to the co-defendant's "possession" of a handcuff key while he was incarcerated at the Pre-trial Detention Facility, (T-Vol.XXXII-1579). The trial court erred in permitting this testimony to be admitted against appellant because it was irrelevant under any theory of criminal liability and because it was extremely prejudicial to appellant.

Officer Hawes testified that in January of 1995, he was the security and operations officer for the Pretrial Detention Center in Duval County. (Id.). Hawes testified that he was in charge of all the lock devises, keys, fire equipment and all of our "high risk inmates." (Id.). Hawes testified that on January **31, 1995,** he searched the co-defendant Anthony Johnson's jail cell where he found a hand-cuff key, which he said "could help facilitate an escape." (Id. at 1583). No other testimony was presented regarding the source of the hand-cuff key, or about Anthony Johnson's intentions in regard to the key. No testimony at all **was** presented to establish appellant had any knowledge of or connection with the key.

Evidence as to flight which is offered as consciousness of guilt must be weighed and measured by its degree of relevance to the issues in the case. Fenelon v. State, 594 So.2d 292 (Fla.

1992).[7] Under the rule of State v. St. Jean, 658 So.2d 1056 (Fla. 5th DCA 1995), it is necessary that there be evidence other than the "flight" [attempt to escape custody] to show that the fleeing was to avoid prosecution, In addition, in order for such evidence to be admissible against a co-defendant under the principal theory, the elements of the principal requirement would necessarily come into play.

In this case there was neither: no evidence other than the mere possession of a handcuff key by the co-defendant was introduced, and certainly no evidence was introduced to show that appellant had any knowledge of or consciously participated in the co-defendant's activities, Because this evidence was so highly prejudicial, and so far removed from any issue relating to appellant's guilt, the trial court erred in permitting the same to be introduced at the trial. In order for this evidence to have been admissible against Calvin Johnson, the actions of the co-defendant must have indicated intent to avoid detection or capture so as to be "properly translated into consciousness of guilt," LeFevre v. State, 585 So.2d 457 (Fla. 1st DCA 1991).

Because of the trial court's impermissible admission of this testimony into evidence, appellant's convictions must be reversed, and this cause remanded for a new trial.

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[7]The flight instruction was not instructed and was not given in this case.

ISSUE III

THE TRIAL COURT ERRED IN IMPOSING THREE-YEAR MANDATORY SENTENCES WHEN THERE WAS NO SPECIFIC JURY FINDING THAT APPELLANT HAD ACTUALLY PERSONALLY CARRIED A FIREARM IN VIOLATION OF 775.087, FLORIDA STATUTES

Appellant was charged in counts two, three and five of the indictment as follows:

COUNT	CHARGE
II	ATTEMPTED FIRST DEGREE MURDER [of Calvin Gaines]
III	ATTEMPTED ROBBERY [of Willie Gaines]
V	ROBBERY WITH A FIREARM [of Calvin Gaines]

(R. Vol. I-25). Counts three and five alleged a violation of Section 775.087, Florida Statutes, but neither specified which sub-provision of Section 775.087 applied. (R. Vol. 1-25-29). Count two made no reference to Section 775.087.

In its judgment and sentence, the trial court imposed the three-year minimum mandatory sentence provision of Section 775.087 (2), Florida Statutes, as to counts two, three and five. (R. Vol. III-430).[8]

The verdict forms submitted to the jurors as to counts three and five did not provide for the "sub-finding" required to impose the three-year minimum mandatory against appellant, and no such findings were made by the court. (R-Vol.II-257, 258 and 260). Moreover, count two did not allege any violation of Section

[8] Actually, Section 775.087 had also been alleged in Count I -- the first degree murder count -- but no minimum mandatory sentence was imposed as to that count.

775.087. Therefore, the trial court erred in imposing the minimum mandatory sentences as to counts two, three and five. It is clear that in order for the minimum mandatory sentence to be imposed, appellant must have personally carried the firearm - the possession of firearm which invokes the minimum-mandatory can not be decided on a principal or constructive possession theory.

Florida Statute Section 775.087 (1995), provides as follows:

> (2) Any person who is convicted of . . . murder . . . robbery, burglary or aggravated assault . . . and who had in possession a firearm," as defined in Section 790.001(6), . . . shall be sentenced to a minimum term of imprisonment 3 calendar years,

The term "possession" as used in Section 775.087(2), Florida Statutes, clearly does not encompass vicarious possession. See, Hernandez v. State, 621 So.2d 1353 (Fla.1993); Earnest v. State, 351 So.2d 957 (Fla.1977); and Wallace v. State, 689 So.2d. 1159 (Fla. 4th DCA 1997). See also Deroses v. State, 22 F.L.W. D 1841 (Fla. 3d DCA July 30, 1997).

Because the trial court erred in imposing minimum mandatory three-year sentences as to counts two, three and five, the minimum mandatory portions of those sentences should be vacated and set aside, and this cause remanded for resentencing.

ISSUE IV

THE TRIAL COURT ERRED IN ITS ASSIGNMENT OF WEIGHT TO THE AGGRAVATING CIRCUMSTANCE OF "PREVIOUSLY CONVICTED OF FELONY INVOLVING USE OR THREAT OF VIOLENCE"

In its sentencing order, the trial court determined that the following aggravating factor existed:

> 1. The Defendant was previously convicted of other felonies involving the use or threat of violence to some person: on April 21, 1989, the Defendant was convicted of aggravated assault for shooting a firearm at his brother, Anthony Wayne Johnson. On October 19, 1989, he was convicted of aggravated battery for shooting one David Greenwald. In addition, the Defendant was convicted in this cause of the contemporaneous crimes of the robbery with a firearm, and the attempted murder of a separate victim, Calvin Gaines. This aggravating circumstances has proven beyond a reasonable doubt.

(R.Vol.III-433).

The trial court erred in assigning weight to this aggravating factor. This court has previously held that it is only logical that the trial court would consider the circumstances underlying such an aggravating factor. Slawson v. State, 619 So.2d 255 (Fla. 1993).

One of the "prior crimes of violence" upon which the trial court relied involved an incident between appellant and his brother. Appellant's brother Anthony Johnson testified that he had not been injured in the fight, and that a neighbor had called the police. (R-Vol.XXVIII-2266). Anthony Johnson testified that he had not wanted to pursue any criminal charges against his brother

Calvin, and that the whole thing had been just a "misunderstanding." (Id. at 2266-67). The second crime of violence upon which the court relied was a 1989 incident involving a crack cocaine deal. The arrest and booking report for this offense indicated that Calvin Johnson fired shots because someone had attempted to steal cocaine from him. (T-Vol.XL-2417). The other evidence of "prior crimes of violence" arises from appellant's convictions for contemporaneous crimes. The evidence tending to prove the aggravator of "prior crimes of violence" in this case is simply not extensive.

Clearly, if this aggravating circumstance had been assigned the appropriate weight by the trial judge, the result of the weighing of the aggravating and mitigating circumstances would have been different. See e.g. Herring v. State, 580 So.2d 135 (Fla. 1991). When the claimed aggravating circumstances are correctly weighed, it becomes clear that the facts of this case do not merit the imposition of the death penalty, The death penalty should be vacated and this cause should be remanded for imposition of a life sentence as to Count One.

ISSUE V

THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF BURGLARY DURING THE COMMISSION OF THIS CRIME

In its sentencing order, the trial court determined that the state had proved beyond a reasonable doubt that the aggravating factor of "commission of a murder while the defendant was engaged in burglary" had been proved. (R-Vol.III-435). After a thorough review of the record, it is clear that the trial court erred in determining that this aggravating factor existed, because there was insufficient evidence to prove a burglary had occurred beyond a reasonable doubt.

There is substantial confusion about the factual scenario underlying the second aggravator which the trial court determined to exist. In its sentencing order, the trial court made conclusions of fact which were not supported by the evidence. For example, in subsection II, paragraph (A)(2), of its sentencing order, the trial court stated:

> The Defendant, and his co-defendant, Anthony Wayne Johnson, originally went to the residence of Willie Gaines for the purpose of robbing his son, Calvin Gaines, who also resided there.

(R-Vol.XXX-433-34). The testimony presented by the state was completely the opposite: state witness Chiffon Bryant testified that there had been no discussion between Anthony Johnson and Calvin Johnson regarding any robbery -- that Anthony Johnson merely asked her to stop the car so that he could collect his money from

Calvin Gaines. (T-Vol.XXX-1174). Anthony Johnson testified at trial that "Big" Gaines, who was a crack dealer, had placed a side bet on a dice game with him earlier in the year and owed him money. (T-Vol.XXXII-1627-29).

The trial court also concluded that:

> While Anthony Johnson initiated the armed robbery of Calvin Gaines, then the Defendant took Willie Gaines at gunpoint and forcibly entered the residence.

(R-Vol.III-434). Again, this finding is not supported by the evidence presented at the trial. The state presented no evidence as to anyone forcibly removing Willie Gaines from the area of the automobile to the interior of the house; the only testimony the state presented as to contact with Willie Gaines was from Mrs. Gaines. Mrs. Gaines testified that she saw Anthony Johnson come down the hallway with Mr. Gaines in the home. (T-Vol.XXIX-984-89). Mrs. Gaines testified that she saw her husband sitting in his chair in the living room with *Anthony* Johnson, but testified she was unable to see what occurred after that. (Id. at 975-77).

Moreover, the trial court's finding that "once inside, the defendant attempted to rob Willie Gaines" is not substantiated by the evidence. The only testimony offered by the state on the question of the robbery **was** that there were certain items on a coffee table that had not been there before the shooting. (T-Vol.XXIX-982-92). Mrs. Gaines testified that to the best of her recollection, *nothing* was taken from the inside of her home -- no money, no jewelry -- nothing of any value. (Id. at 992).

The trial court went on to say that:

> The record is not clear as to why the Defendant originally removed Willie Gaines from the location of the automobile of Calvin Gaines and forced him into the home. Most likely, this action was taken to insure that Willie Gaines could not interfere with the robbery of Calvin Gaines.

(R-Vol.III-34). Once again, the trial court reached its conclusions of fact without substantiating evidence, and speculates on what might have happened. There is simply not sufficient evidence to conclusively determine what actually transpired before the victim was shot.

Because the evidence does not sustain the trial court's finding that the "burglary" necessary to sustain this aggravating circumstance existed, there remains only one aggravating factor.[9] Clearly, in this instance, the aggravation does not justify the imposition of the death penalty. See argument VI, infra, and cases cited therein, This court should vacates and set aside the death penalty and remand this cause to the trial court with instructions to impose a life sentence as to Count One.

'Appellant has attacked the weight the trial court assigned to the remaining factor. See, argument IV, supra.

ISSUE VI

THE IMPOSITION OF THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED WITH OTHER CAPITAL CASES

The imposition of the death penalty as to Calvin Johnson for the first-degree murder of Willie Gaines is disproportionate when compared with other capital cases.

This court's proportionality review is not a comparison between the number of aggravating and mitigating circumstances; rather this court must consider the totality of the circumstances in a case and compare this case with other capital cases. In order to insure that "unusual punishments" (contrary to Article I, Section 17 of the Florida Constitution and of Amendment Eight to the United States Constitution) are not imposed, this court must insure that a death sentence not be imposed as a punishment for a murder in cases similar to those in which death was deemed an improper punishment,

It is clear after a review of the totality of the circumstances in this case that the shooting of Willie Gaines is not among the most aggravated and least mitigated cases for which the death penalty is reserved. The facts of this case are similar to Terry v. State, 668 So.2d 954 (Fla. 1996), wherein this court determined the death sentence to be disproportionate. In Terry, the appellant was charged with first-degree murder, armed robbery, and principal to aggravated assault. He was convicted of all the charges. During the penalty phase, the state relied on the evidence previously presented and called no witnesses. Terry

claimed four non-statutory mitigating circumstances, and as well claimed the statutory mitigating circumstance of age. The jury recommended a death sentence by a vote of eight to four; the trial judge found no mitigators and two aggravators: prior violent felony and the merged aggravators of capital felony committed while defendant was engaged in the commission of a robbery and pecuniary gain. On review, this court noted:

> . . . it is clear that the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting are unclear. . . . In the end, though, we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot. Likewise, although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances.

668 So.2d at 965.

In Terry, this court noted that "we are **also** mindful that '[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation.'" 668 So.2d at 965. As in Terry, an analysis of the aggravating and mitigating circumstances reveal that the imposition of the death penalty is not warranted in this case.

As in Terry, the aggravating and mitigating circumstances in this case do not warrant imposition of the death penalty. The trial court determined two aggravating factors existed: First, that Calvin Johnson had previously been convicted of other felonies involving the use of threat of violence to some person; and second, that Calvin Johnson committed the murder of Willie Gaines while

engaged in a burglary. (R-Vol.XXX-433-35). When carefully reviewed, these aggravating factors are minimal. One of the "prior crimes of violence" involved an incident between Calvin Johnson and his brother.

Anthony Johnson testified that he had not been injured in the previous incident, and that a neighbor had called the police. (R-Vol.XXVIII-2266). Anthony Johnson testified that he had not wanted to pursue any criminal charges against his brother Calvin, and that the whole thing had been just a "misunderstanding." (Id. at 2266-67). The second crime of violence upon which the court relied was a 1989 incident involving a crack cocaine deal. The arrest and booking report indicated that Calvin Johnson fired because someone had attempted to steal cocaine from him. (T-Vol.XL-2417). The evidence tending to prove the aggravator of "prior crimes of violence" in this case is simply not extensive, There is substantial confusion about the second aggravator which the trial court determined to exist. In its sentencing order, the trial court made conclusions of fact which were not supported by the evidence. For example, in subsection II, paragraph (A)(2), the trial court stated:

> The Defendant, and his co-defendant, Anthony Wayne Johnson, originally went to the residence of Willie Gaines for the purpose of robbing his son, Calvin Gaines, who also resided there.

(R-Vol.XXX-433-34). The state's testimony **was** completly to the opposite: state witness Chiffon Bryant testified that there had been ***no*** discussion between Anthony Johnson and Calvin Johnson

regarding any robbery -- that Anthony Johnson merely asked her to stop so that he could collect his money from Calvin Gaines. (T-Vol.XXX-1174). Anthony Johnson testified at trial that "Big" Gaines, who was a crack dealer, had placed a side bet on a dice game with him earlier in the year and owed him money. (T-Vol.XXXII-1627-29).

The trial court also concluded that:

> While Anthony Johnson initiated the armed robbery of Calvin Gaines, then the Defendant took Willie Gaines at gunpoint and forcibly entered the residence.

(R-Vol.III-434). Again, this finding is not supported by the evidence presented at the trial. The state presented no evidence as to anyone forcibly removing Willie Gaines from the area of the automobile to the interior of the house; the only testimony the state presented as to the contact with Willie Gaines was from Mrs. Gaines. Mrs. Gaines testified that she saw ***Anthony*** Johnson come down the hallway with Mr. Gaines in the home. (T-Vol.XXIX-984-89). Mrs. Gaines testified that she saw her husband sitting in his chair in the living room with Anthony Johnson, but testified she ***was*** unable to see what occurred after that. (Id. **at 975-77).**

Moreover, the trial court's finding that "once inside, the defendant attempted to rob Willie Gaines" is not substantiated by the evidence. The only testimony offered by the state on the question of the robbery was that there were certain items on a coffee table that had not been there before the shooting. (T-Vol.XXIX-982-92). Mrs. Gaines testified that to the best of her

recollection, nothing was taken from the inside of her home -- no money, no jewelry -- nothing of any value. (Id. at 992).

The trial court went on to say that:

> The record is not clear as to why the Defendant originally removed Willie Gaines from the location of the automobile of Calvin Gaines and forced him into the home. Most likely, this action was taken to insure that Willie Gaines could not interfere with the robbery of Calvin Gaines.

(R-Vol.III-34). Once again, the trial court reached its conclusions of fact without substantiating evidence, and speculates on what might have happened. There is simply not sufficient evidence to conclusively determine what actually transpired before the victim was shot; an aggravating circumstance based on such speculation and guess is insufficient. The aggravating circumstances simply do not merit the imposition of the death penalty in this case; the imposition of the death penalty in this case is disproportionate to all other capital cases. This court should vacate and set aside the imposition of the death penalty, and remand this case with instructions to impose a sentence of life.

As noted in Terry, the death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist.[10] After reviewing the facts, this court concluded that although the homicide in Terry was deplorable, it

[10]Citing Kramer v. State, 619 So.2d 274 (Fla. 1993).

was not in the category of the most aggravated and least mitigated for which the death penalty is appropriate.

A review of the facts in this case leads to the same conclusion. The facts in this case establish that the defendant's co-defendant brother had approached the victim's son to settle either some gambling or drug debts. Shots were fired; the victim's son was shot twice and the victim was shot five times. There was conflicting testimony regarding the actions of the victim; one eyewitness testified that the victim came out onto the front porch of his house firing his own .25 caliber firearm after shots were fired at his son. Other testimony indicated the possibility that the shooter had forced Willie Gaines into the house at gunpoint; however, the witness who testified as to this identified the co-defendant Anthony Johnson as the shooter of Willie Gaines. The co-defendant testified that Shirae Hickson was the only person with him at the Gaines' residence on the day of the shooting. Clearly, the testimony is not conclusive as to what exactly happened immediately prior to the shooting. While the killing of Willie Gaines may have been deplorable, it is certainly not totally clear exactly how it occurred; this homicide is certainly not among the most aggravated and least mitigated for which the death penalty is reserved.

This court recently addressed the question of proportionality of the death penalty in Voorhees v. State, 22 F.L.W. S 357 (Fla. June 19, 1997). In Voorhees, this court concluded that the evidence did not support the imposition of the death penalty. In

Voorhees, as in the instant case, the trial court had determined the existence of two aggravating circumstances.

In Voorhees, this court determined that the two aggravators were overshadowed by the mitigation and the circumstances of the murder. The same is true in the instant case: The circumstances of the murder were unclear, and could possibly have been a self-defense reaction to the victim's first-fired shots. The mitigation showed that the appellant was the product of a brutal childhood home (the child welfare officials would not even consider returning the appellant and his brother to the family home), and that he had been a hard worker. As this court noted in Voorhees:

> By ensuring that death not be imposed as a punishment for a murder in cases similar to those in which was deemed an improper punishment, proportionality prevents the imposition of "unusual" punishments contrary to article I section 17 of the Florida Constitution,

22 F.L.W. S at 361 (Fla. June 19, 1997).

Moreover, the imposition of the death penalty in this case is disproportionate when compared to the sentences of the two co-defendants, Anthony Johnson and Chiffon Bryant. Anthony Johnson received a life sentence, while Chiffon Bryant, despite protestations that she expected to receive a life sentence, received only a sentence of time served.[11] (Defendant's Exhibit No. 1 at sentencing hearing; T-Vol.XXIX-1072-73). Chiffon Bryant

[11]The state argued in closing that "Chiffon Bryant had a lifetime of reasons to tell the truth," bolstering her claim that she expected to receive life in prison. (T-Vol.XXXIV-1934).

herself had previously stated that "'[t]hey' claim it would make me look like a more credible and better witness if I could say that I could get a long time in prison instead of testifying truthfully . . . ." (T-Vol.XXX-1147).

The facts in this case, and this court's holdings in cases such as Voorhees, Terry, and Kramer, dictate that the death penalty in this case be vacated, and that this cause be reversed and remanded with instructions to sentence appellant to life as to Count One.

CONCLUSION

Because the trial court erred in denying the motions to sever appellant's trial from that of the co-defendant, the guilt phase of this trial must be reversed, and this cause remanded for a new trial, Moreover, the trial court erred in permitting evidence of the co-defendant's possession of a handcuff key. For these reasons, appellant's convictions should be reversed and this case remanded for a new trial.

The trial court erred in imposing three-year minimum mandatory sentences when there had been no jury "sub-finding" as to the question of actual possession of a firearm, and where that allegation had not been charged. Moreover, the trial court erred in the weight assigned to the aggravating circumstance "Previously Convicted of Felony Involving Use or Threat of Violence," and erred in determining the existence of the aggravating circumstance "During Commission of a Felony."

Finally, the trial court erred because the imposition of the death penalty is disproportionate given the totality of the circumstances in this case. This court should vacate and set aside the three-year minimum mandatory sentences and the death penalty in this case, and remand this case to the trial court with instructions to impose a sentence of life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Assistant Attorney General, Capital Division, Office of Attorney General, The Capitol, Tallahassee, Florida 32301;** and to **Jay Taylor, Assistant State Attorney, Office of the State Attorney, Duval County Courthouse, Sixth Floor, 330 East Bay Street, Jacksonville, FL 32202,** by regular United States Mail this 13th day of August, 1997.

Teresa J. Sopp
Attorney for Appellant