IN THE SUPREME COURT OF FLORIDA

ARTURO BENEDITH,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,368
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal is annotated in the following manner: the letter "R" is used to designate the guilty phase trial court record on appeal; the letter "P" is used to designate the penalty phase trial court record. Unless stated otherwise, all objections or motions that are listed were overruled or denied.

STATEMENT OF THE CASE

Arturo Benedith, hereinafter referred to as the Appellant, was indicted for first-degree murder from a premeditated design and robbery by the Brevard County Grand Jury on September 29, 1993. (R523) Initial court appointed counsel, Timothy J. Bradley, filed a motion to withdraw based upon a deterioration of the attorney/client relationship. (R586) Attorney Bradley's motion to withdraw was granted. (R591) Subsequent counsel, Gregory W. Eisenmenger, filed a motion to withdraw based upon the fact that Benedith filed a grievance with the Florida Bar against Attorney Eisenmenger. (R620; 63)

Appellant moved to strike the State's notice of intent to seek the death penalty. (R633; P35) Appellant moved to strike the jury panel because of the comments of Juror Baskin. (R48) The trial court denied the motion to strike the panel and gave a curative instruction. (R49) The Appellant objected to the jury venire because the venire was selected only from the northern end of the county. (R128) The trial court denied the Motion to Strike the jury venire based on insufficient facts. (R129) Appellant renewed the Motion to Strike on numerous occasions. (R335,468,527,671,796,897) Appellant motioned to exclude felony murder as a means to find first-degree murder based upon the language on the grand jury charging document. (R478; 491)

During jury selection, Appellant objected to the Court instructions concerning the weighing of evidence and requested a curative instruction. (R290, 92) Counsel subsequently moved for a mistrial based upon trial court's instructions to the jury venire. (R383, 84) Appellant made four challenges for cause against various jurors during the jury selection process

which were denied. (R522,658,661,790,897) Counsel requested an additional peremptory challenge to remove Juror Wyatt. (R897) The trial court denied the request for an additional peremptory challenge. (R897) Appellant then objected to the composition of the jury panel. (R897)

After the jury was seated, Appellant objected to trial court variations from the standard instructions, and objected to the instruction on transferred intent. (R997) In addition, the court granted the state's Motion in Limine concerning the cross-examination of state witness Lane. (R1037) The trial court also denied the Appellant's Motion in Limine precluding the state from using felony murder. (R1045) During opening statement, the Appellant made a Motion for Mistrial based on the prosecutorial comment "defendant fled to the state of New York." (R1071) During the testimony of state witness Scott Kurzawa, the Appellant objected to the question, "Did the victim discuss with you a plan for that evening?" based upon hearsay. (R1103) The Appellant also objected to testimony by Kurzawa that the victim placed an advertisement for his automobile based upon hearsay. (R1106)

Appellant objected to the state calling Larry Gilbert as a witness without making prior disclosure. The trial court conducted a Richardson hearing, and found there was no discovery violation. (R1109,1112) During the testimony of Robert Duncan, Appellant objected to the following question based on hearsay. "What did Lane indicate to you when you showed him the photo lineup?" (R1161, 1162) Also, during the testimony of John Kline, the Appellant objected to the introduction of State Exhibit #13, an American Cab business card with the letters "S U W" written on it. (R1465) Appellant requested that the deposition of Witness Loblack be published to the jury for impeachment purposes. (R1628)

The State introduced a printout from the auto tag office in Rockledge to show proof of ownership of the victim's vehicle. (R1686) Appellant objected to the introduction based on hearsay. (R1694) The court reserved ruling. (R1694) The Appellant renewed its objection to the introduction of the vehicle registration as not being self-authenticated and a discovery violation. (R1776) The trial court conducted a Richardson hearing. The trial court ruled that there was a Richardson violation, but that the violation was inadvertent and there was no significant prejudice to the Appellant. (R1788) The Appellant also objected to the introduction of State Exhibits #34 and #35 (bullets test fired from the alleged murder weapon), based on the lack of proper predicate and chain of custody. (R1822,1826, 1840) The trial court also permitted the introduction of State Exhibit #36 (the vehicle registration) over counsel objection for not being admissible as a recorded recollection. (R1849)

During the testimony of Nanette Rudolph, the Appellant claimed a discovery violation for not being provided notes of Rudolph. (R1851) The trial court denied counsel's claim relying upon Geralds v. State, 601 So.2d 1157 (Fla. 1994). (R1851) The Appellant also objected to the introduction of the alleged murder weapon for the failure to show the proper chain of custody, and insufficient evidence connecting the gun to the Appellant. (R1877)

The State rested. The Appellant moved for a Judgment of Acquittal on first-degree premeditated murder. (R1933) The trial court denied the Motion for Judgement of Acquittal; however, the trial court ruled that it would not instruct the jury on first-degree premeditated murder, but will allow that charge to go to the jury.[1] (R1938) The Appellant also made a Motion

[1] The trial court subsequently directed that only First Degree Felony Murder be placed on the verdict form. (R715, 1992, and 1993)

for Judgment of Acquittal on felony murder and robbery. (R1938; 1946) Appellant moved to strike Exhibits #36 and #38 as being improperly admitted (R1946); renewed previous motions for mistrial as well as his objection to the jury composition (R1947,1949); and moved to strike the testimony of Nanette Rudolph in regards to comparison of items not in evidence and moved for a mistrial. (R1955) Counsel also moved for a Judgment of Acquittal based on the lack of sufficient evidence for felony murder and robbery. (R1968) Thereafter, the defense rested. (R1971) After the defense rested, the State presented a proffer of testimony of witness Robert Carrasqullo. (R1980) Thereafter, the Appellant renewed all previous objections. (R1986)

During the charge conference, Appellant objected to the standard jury instruction number 3.01. (R2025) Also, the Appellant requested a jury instruction on the charge of accessory after the fact. (R2029) Appellant requested a two hour closing argument. (R2036) The trial court would permit 75 minutes of argument. (R2036) Appellant also objected to the order of the principle instruction and the added instructions made by the trial court. (R2189)
The jury found the Appellant guilty of first-degree felony murder and robbery with a firearm. (R2197) After the verdict, the Appellant moved to strike the two alternate jurors for seeing the Appellant in shackles. (R2202)

During penalty phase, the trial court allowed Detective Nichols to testify to co-defendant Terry Thomas and Nathaniel Allen's age over Appellant's objection. (P41) The Appellant objected to the state evidence in support of the prior violent felony aggravating factor on the grounds that the testimony was becoming a feature of the trial; and the prejudice of the testimony outweighed its probative value. (P46) The defense also made a motion for mistrial based on improper prosecutorial argument. (P55,57)

Appellant objected to the testimony of Gerald Garafalo asserting that the prejudice of his testimony outweighed its probative value after the previous testimony of Ross. (P96) Moreover, during the testimony of Garafalo the defense objected to hearsay testimony concerning statements made by co-defendant Velasquez concerning the prior violent felony. (P102) The Appellant objected to the testimony that Thomas Taylor was fourteen years old at the time of the crime. (P114) The Appellant objected to the testimony of Blanca Mercette on the grounds that this testimony was making the proof of the prior violent felony a feature of the penalty phase. (P121) The defense counsel subsequently moved for a mistrial based on the testimony of Mercette arguing that the testimony's prejudice outweighed its probative value. (P123) Further efforts to strike testimony by Mercette was denied over objection. (P124) The State rested in the penalty phase. (P128) After the State rested, the Appellant moved to strike the panel as being tainted by the presentation of the evidence concerning the prior violent felony. (P130)

During the Penalty Phase charge conference, the State requested instructions on felony murder and prior violent felony aggravating factors. (P143) The Appellant requested modification of the two statutory mental mitigators to be nonstatutory mental mitigators. (P147) The Appellant further objected to the addition of without possibility of parole in the penalty phase instructions. (P151) Moreover, the Appellant objected to the felony murder instruction for lack of evidence in the penalty phase. (P155) The trial court also denied Appellant's requested instruction "however mental mitigation must be considered and weighed." (P159) The trial court also denied the requested instruction concerning duress and domination. (P161) The Appellant rested in penalty phase. (P229)

During the penalty phase testimony of state witness Dr. Riebsame, the Appellant moved

for a mistrial based on the doctor's testimony that Benedith was arrested for forgery. (P250) The trial court denied the motion for mistrial, but ordered the jury to disregard testimony. (P250) The state made a proffer for the record as to why they did not seek the death penalty against the co-defendant. (P273) The State did not seek the death penalty because of age of the co-defendant, and the offer of second-degree murder was made to avoid a trial. (P273)

During the closing statement of the state, the Appellant moved for mistrial based on improper argument that the state made a misstatement of evidence claiming that Benedith had planned the murder. (P282) The motion for mistrial was denied and a curative instruction was given. (P282) Counsel for the State and Appellant objected to penalty phase jury instructions. (P320)

The Appellant objected to the release of Juror Miron based on a conflict. (P323) The State introduced a proffer that they had evidence that the Benedith's mother and sister tried to fabricate an alibi for Benedith. (P325) The jury returned a death recommendation by a vote of 10 to 2. (P336)

STATEMENT OF THE FACTS

Scott Kurzawa and John Shires were roommates in May of 1993. (R1101) According to Kurzawa, Shires used two cars, a red Nissan and a small white car. (R1101) In the early evening hours of May 5, 1993, the red Nissan was in their garage. (R1102) According to Kurzawa, Shires was going to attempt to sell one of his cars the evening of May 5th, 1993. (R1105)

George Lane was residing in Room 43 of the Colonial Motel. (R1116) Lane had six or seven prior felony convictions of crimes involving dishonesty. (R1116) After Lane came home from work, a young boy Lane knew came to his room to visit. (R1117) The boy didn't stay because Lane had to take a bath. (R1117) Subsequently, Lane left the Colonial Motel to run an errand. (R1119) Upon his return from the errand, Lane observed two black males and a "white dude" standing beside a red car looking at some papers. (R1119) According to Lane, the "white dude" had the papers and was standing in the door with the papers in hand. (R1120) One of the black males was in front of the door and the other black male was behind the "white dude." (R1120) The black male in front of the car door was the young boy that had come to his room earlier. (R1120) Four or five minutes after Lane returned to his apartment, he heard three gunshots. (R1121) Moments later, Lane peered out his window and saw the guy that came to his door earlier jump in the car real quick and the car took off. (R1121) Lane identified Benedith as being one of the black males he observed talking to the victim as he returned home from his errand minutes before the shooting. (R1122)

Lane admitted that when initially interviewed by the police, he told the police he didn't see anything because he didn't want to get involved. (R1143) Lane further testified that prior to the

shooting the young boy that came to his room earlier was trying to hide something under his shirt. (R1155) In fact, Lane's girlfriend alerted Lane that the boy was trying to hide something. (R1155) The boy kept patting his shirt, checking what was there. (R1155)

George Lane identified State Exhibit AE as the car he saw with the victim and the two black males prior to the shooting. (R1395) The car was a four door and had tinted windows. (R1394) According to Lane, when he observed the automobile it was facing south. (R1397) After the gunshots, the car sped off and turned left down a dirt road and out of sight. (R1399)

In May, 1993, Ishmael Loblack worked as an auto mechanic in Melbourne. (R1247) He lived in a trailer behind the auto repair where he worked. (R1248) On May 5th, 1993, two black males visited him, one of those black males was Benedith. (R1249) According to Loblack, Benedith wanted to paint a car that he was going to get and go to New York. (R1250) Loblack stated that they would have to come back another time. (R1250) That evening Benedith and another male returned with a red Nissan, which Loblack identified in State Exhibit AE. (R1250-51) Benedith (who called himself "Tony") stated that he got the Nissan and wanted Loblack to paint it because they were going to New York. (R1252) Loblack had known Benedith as "Tony" for about six weeks prior to the murder of John Shires from the "Daily Bread," a soup kitchen nearby. (R1259) Loblack also had picked out Benedith in photo line-ups on May 17th and June 7th. (R1262-64) During cross-examination, Loblack admitted that he began abusing drugs and alcohol from 1992 through 1994, principally alcohol and crack cocaine. (R1270-72)

INVESTIGATION

Officer Brian Bice was the first officer on the scene after the shooting of John Shires.

(R1357) Bice observed a white male lying face up in the parking lot of the Colonial Motel suffering from gunshot wounds. (R1358) As Officer Bice arrived, there were two unidentified people kneeling over the victim rendering aid. (R1364) According to Bice, the victim had a pulse, was still breathing but unconscious. (R1359) Emergency medical personnel arrived seconds later. (R1359) The victim was deceased at the hospital when Officer Bice arrived there to follow up. (R1363)

Detective Dennis Nichols was the lead investigator in the shooting death of John Shires. (R1523) According to Nichols, Benedith was 5'9" tall in May of 1993. (R1534) Nichols admitted that a person by the name of Mr. Vickers was an eyewitness to the murder, but was not interviewed by Detective Nichols. (R1556) Nichols further stated that he conducted a photo line-up with pictures of Thomas Taylor and Benedith that were shown to Ishmael Loblack and George Lane on June 17th of 1993. (R1557-60)

Robert Duncan was in charge of the Melbourne Police Department homicide unit in May of 1993, and was called to the Colonial Motel after the shooting. (R1157) As a part of his investigation, Duncan showed Lane a photo line-up. (R1161) According to Duncan, Lane identified the Benedith as one of the persons he saw on the night of the crime. (R1166) Duncan conceded that expense money had been given to witness Lane and reward money was given to witness Loblack. (R1172) According to Duncan, immediately after the shooting a red vehicle was found in front of the Colonial Motel by police. (R1190) The car that they found was a Nissan Pulsar. (R1190) The Melbourne police also located a red Nissan Sentra during the investigation. (R1196) After Melbourne police secured the Nissan Sentra, the Florida Department of Law Enforcement was contacted to process the vehicle. (R1196) Duncan also

took statements from witness Loblack and showed him the photo line-up pictures on May 7th and June 7th. (R1218,1227)

John Williams operated a boarding house in Melbourne in May of 1993. (R1435) According to Williams, Benedith stayed at his boarding house in May of 1993, and went by the name of Tony. (R1440-42) John Kline was an evidence technician for the Melbourne Police Department in May of 1993. (R1458) Kline processed evidence in the boarding house room that was used by Benedith. (R1460) From the boarding house room, Kline removed a card, a Pepsi bottle, a blue tray, and a rice bag with white powder. Kline also removed, State Exhibit #13, an American Cab business card with the letters "S U W" on it. (R1465-66)

CAUSE OF DEATH

On May 6th, 1993, Dr. Wickham, the Brevard County Medical Examiner, performed an autopsy on John Shires. (R1282) According to Wickham, Shires had three gunshot wounds; two wounds to the face and one wound in his back. (R1284-87) One gunshot embedded in Shires' jaw; one shot lodged in the vertebral column, rupturing an artery leading to the brain; and the third shot was to the victim's back and passed through his heart. (R1288) According to Dr. Wickham, the cause of death of John Shires was from the gunshot wounds. (R1301) Dr. Wickham also testified that the gunshot wounds were "distance gunshot wounds" and not at close range. (R1306)

FINGERPRINT EVIDENCE

Kelly May was a latent fingerprint analyst for the Florida Department of Law Enforcement

in May of 1993. (R1588) May processed a vehicle for fingerprints at the Melbourne Police Department on May 6th. (R1592) The car had the vehicle identification number XMX851874. (R1598) The automobile was a red Nissan, and May removed five latent prints from the hood (R1599), a print from the right fender (R1617), a latent print from the hood right fender (R1618), a latent print from the left hood (R1619), and three latent prints from the left hood fender (R1620). According to May, the left side of the vehicle was the driver's side and the right side of the vehicle was the passenger's side. (R1628)

Gary McCullough is a Florida Department of Law Enforcement crime analyst in the latent print section. (R1640) According to McCullough, fingerprints found in State Exhibit Nos. 16 and 33 both contain fingerprints belonging to Benedith. (R1650) McCullough also testified that the fingerprints found in State Exhibit Nos. 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32, also belonged to Benedith. (R1650-57)

MURDER WEAPON

Jose Cortez is a New York City police officer. (R1694) On June 10th, 1993, Cortez responded to an apartment at 1175 Vyse Avenue in the Bronx. (R1695) Upon entering the apartment, Cortez observed five individuals in a room. (R1695) One individual handed a bag to a second individual who then tossed the bag out the window. (R1695) Cortez identified Benedith as the individual who initially had the bag in his hands when he entered the apartment. (R1696) Officer Henry Pulow, a New York City police officer, retrieved the bag and brought it to Officer Cortez. (R1697) According to Cortez, a firearm was found in the black bag that was thrown out the window. (R1698)

Julio Velasquez testified that the defendant was in possession of a black bag that contained

a .32 caliber revolver on June 10th, 1993, in the apartment in the Bronx. (R1721) Velasquez further testified that on that date a person named Carlos was the one that threw the gun out the window. (R1729)

Patrick O'Shea was a New York City policeman working the ballistic section. (R1730) O'Shea testified that the .32 caliber revolver retrieved in the Bronx that he examined was inoperable. (R1731) O'Shea repaired the gun and test fired twenty-one rounds and seven test rounds. (R1733-35) According to O'Shea, he sent all the test rounds to Florida to Nanette Rudolph of the Florida Department of Law Enforcement. (R1735) Moreover, according to O'Shea, the damage to the gun did not effect the barrel or the lands and grooves of the gun. (R1741-43) Also according to O'Shea, State Exhibit #13, the cab business card with the letters "S U W" on it stands for Smith and Wesson long, the cartridge that would fit the .32 caliber revolver. (R1742)

Nanette J. Rudolph is a firearms examiner at the Florida Department of Law Enforcement. (R1792) According to Rudolph, the bullets in State Exhibit #37, the twenty-one bullets test fired in New York, and the bullets in State Exhibit Nos. 34 and 35, were fired from the same gun. (R1880)

PENALTY PHASE

Ken Ross is an assistant district attorney in Bronx, New York, who testified that he prosecuted Benedith for robbery. (P72) Ross produced a certified copy of a robbery in the second-degree conviction. New York City Police Detective Gerald Garafalo testified that the robbery in New York was Benedith's idea. (P101-103) This was told to Garafalo by co-defendant Velasquez. (P103) Dennis Nichols testified that Thomas Taylor was fourteen years

old at the time of the murder of John Shires. (P114) Also according to Nichols, Benedith was twenty-seven years old. (P115)

Blanca Mercette lived in the Bronx, New York on June 10th, 1993. (P120) On that day she was ironing when the door to her living room opened and Mercette was grabbed around the neck by Benedith. (P120) According to Mercette, Benedith entered with four others and stated it was a hold-up, where was the money, and where was the revolver. (P122) According to Mercette, Benedith had a gun and Mercette was then bound and gagged. (P122) Mercette claimed that Benedith stated many times that he was hurt, but he was going to have to kill Mercette. (P122) According to Mercette, Benedith was the leader of this group. (P123-24) Sometime thereafter, Juan Otero came home and was attacked by the group. (P125) Otero suffered a cut in the attack from a knife. (P125) According to Mercette, she uses pills so that she can sleep at night, and will never forget the day of that attack. (P125)

EVIDENCE OF MITIGATION

Christopher Olsen testified as to possible mental mitigation in this case. (P183) According to Olsen, Benedith was hospitalized in 1986, 1987 and 1993, from crack cocaine usage and anxiety attacks. (P187) During one of the admissions, Benedith was described by the professionals at Harlem Hospital as having strange affect, meaning that his emotional presentation was odd, and also poor impulse control. (P188) Benedith was prescribed anti-psychotic drugs, namely Haldol and Thorazine. (P188) According to Olsen, Benedith was diagnosed with schizophrenia chronic indifferentiated type in 1991. (P189) According to Olsen's testing and examination, Benedith has a personality disorder, schizo typical, schizoid and paranoid. (P192) A person with a personality disorder is capable of knowing right and wrong and is in touch with

reality. (P193) Under highly stressful situations, people with this disorder can exhibit psychotic behavior. (P194) According to Olsen, Benedith has a tendency to exaggerate his symptoms. (P197) In Olsen's opinion, he was not sure if Benedith was operating under an extreme emotional or mental disturbance at the time of the crime due to the lack of evidence. (P198) However, according to Olsen, at the time of committing this crime, Benedith had a psychiatric disturbance, which included mistrust of others, suspiciousness, and difficulty in relating to others. (P198)

The court took judicial notice that co-defendant Thomas Taylor entered a plea of guilty to murder in the second degree with a deadly weapon and robbery with a deadly weapon. (P212) Taylor was sentenced to twenty years followed by seven years probation. (P212)

Appellant's sister, Juanita Benedith testified on behalf of the Appellant. (P213) According to Juanita Benedith, the Appellant grew up in Honduras with her and her mother. (P214) They had a good life, a normal life with other persons in a rural area. (P214) They did a lot of agricultural work, went to school, lived at a farm with their grandparents. (P214) They would go to buy wood so that they could survive. (P214) Benedith was very helpful in everything he did in that period. (P214) According to Juanita, Appellant moved with his family to the United States when Benedith was fifteen. (P215) Some years later, Juanita noticed changes in her brother's behavior. (P216) Appellant would have hallucinations and would get very nervous. (P216) Subsequently, Benedith was receiving constant psychiatric treatment, and was in need of medical care and medication. Benedith would have hallucinations claiming that there was a diamond inside the toilet. (P216) Juanita conceded that Benedith was probably abusing drugs; however, Benedith was a good brother and very loving. (P217)

Maria Garcia is Benedith's mother. (P221) According to Garcia, Benedith grew up on a

farm with his sister and grandparents. (P222) They had a pretty life and Benedith's father lived nearby. (P222) Garcia came to the United States in 1970 when Benedith was five, to make a better life for their family. (P223) Years thereafter, Garcia was arrested and at that time she sent for her children because she missed them. (P224) Upon arrival, Benedith was enrolled in the George Washington School. (P224) Garcia stated that about four years ago she noticed a change in her son. (P227) He needed psychiatric treatment and was taking medication. (P227) She assumed the medication he took was very strong because he would be sleeping almost all day. (P227) According to Garcia, Benedith had been a very good son and brother. (P228)

Dr. Riebsame is a licensed psychologist court-ordered to do a forensic examination of Benedith. (P234) According to Riebsame, Benedith has a substance abuse disorder, a dependence on several substances including alcohol and cocaine, and there is a personality disorder, namely anti-social with paranoid characteristics and he is malingering at this time. (P235) Benedith scored an IQ between 44 and 55, or moderately mentally retarded. (P239) This low score was not consistent with other observations. (P239) Based upon discussions, Benedith exhibited an IQ of at least 100. (P242) Dr. Riebsame agreed Benedith is a schizoidal individual, a loner, detached and not interested in relationships, emotionally cold, and paranoid personality disorder. (P257) According to Riebsame a personality disorder is an enduring pattern of inner experience that deviates markedly from the individual's culture. (P268) According to Riebsame, Benedith met the criteria for the personality disorder that would reflect an emotional disturbance at the time of the crime. (P270)

SUMMARY OF ARGUMENT

POINT I: The conviction for first-degree felony murder violates the Fifth, Sixth, and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution because the evidence is legally insufficient to support the guilty verdict.

POINT II: Appellant's death sentence is disproportionate, excessive, and inappropriate, and is cruel and unusual punishment in violation of Article I, Section 17, of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. In this case, Benedith's sole aggravating factor is a conviction for attempted robbery in the second degree out of the state of New York which occurred after this murder. In review of cases where this Court has overturned a death sentence, this case qualifies as one where the death sentence is not warranted. Terry v. State, 668 So.2d 954 (Fla. 1996).

POINT III: The trial court erred in denying Benedith's Motion to Preclude the Death Penalty in this Case where there was no showing that Benedith's state of mind was culpable enough to raise to the level of reckless indifference to human life.

POINT IV: The trial court erred by denying Appellant's counsel's Motion to Withdraw before trial where Appellant filed a grievance against his counsel with the Florida Bar. Moreover, the Appellant made a request to represent himself. The trial court erred by failing to make a Faretta inquiry after Appellant made said request.

POINT V: The trial court erroneously permitted the State to make unduly prejudicial details of crimes committed upon a different victim the feature of the penalty phase, thereby depriving Mr. Benedith of a fair sentencing hearing in violation of his state and federal constitutional rights.

POINT VI: The trial court erred by permitting the introduction of evidence where its prejudicial effect is outweighed by its probative value. The business card that was recovered from the rooming house was not adequately tied to the Appellant. The failure to tie the evidence to the Appellant made its introduction improper. Furthermore, the handwriting on the business card was equally vague as to meaning and import. The testimony that the writing on the business card referred to ammunition was highly prejudicial and was improperly used by the factfinder to sustain a conviction.

POINT VII: The prosecutor's improper remarks in opening and closing argument violated Benedith's due process right to a fair trial.

POINT VIII: The trial court erred in permitting victim impact evidence that was not relevant to the issue of the uniqueness of the victim and went beyond the narrow application of the statutory scheme.

POINT IX: The trial court erred in instructing the jury that, in determining what sanction to recommend, it could consider whether the murder was committed during the course of a felony, thereby rendering the death sentence unreliable under the Eighth and Fourteenth Amendments. This aggravating factor was not present and correctly not found by the trial court. However, the jury was instructed to consider this factor and likely misapplied it in their deliberations thereby tainting the jury recommendation.

POINT X: The trial court erred in refusing to strike jurors for cause where the jurors were unqualified to serve as jurors in a capital trial.

POINT XI: The trial court erred by permitting the prosecution to inform jurors that Appellant was arrested on an unrelated matter during the penalty trial.

POINT XII: This Court must reverse his sentences because a juror saw Appellant in shackles and handcuffs.

POINT XIII: The provision of Florida's death penalty statute which allows a death recommendation to be returned by a bare majority vote violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XIV: The trial court erred in refusing to give specific jury instructions on the nonstatutory mitigating factors offered by the defense.

POINT XV: The trial court erred in sentencing Appellant outside the guidelines range for Count II, robbery with a firearm where the conviction for first-degree murder is improper.

POINT I

THE CONVICTION FOR FIRST-DEGREE FELONY MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The trial court denied the appellant's motion for judgment of acquittal on first degree felony-murder.[2] The trial judge erred by not granting an acquittal to the charge because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to show that Benedith was involved in a criminal plan to rob John Shires; the proof fails to show that Benedith killed John Shires. The demonstrative evidence of Benedith's guilt is entirely circumstantial.

EVIDENCE OF GUILT

There was very little evidence concerning the facts of the murder presented at trial. According to John Shires's roommate, Shires was going to attempt to sell one of his cars the evening of May 5th, 1993. (R1105) This testimony is collaborated by the testimony of George Lane. According to Lane, he observed two black males (Benedith & Thomas) and a "white dude" (John Shires) standing beside a red car looking at some papers. (R1119) According to Lane, the "white dude" had the papers and was standing in the door with the papers in hand. (R1120) One of the black males was in front of the door and the other black male was behind the "white dude." (R1120) Benedith's fingerprints were recovered from the both sides of the exterior of automobile that was reportedly for sale. Lane identified Benedith as being one of the black males talking to Shires prior to the shooting.

[2] The trial court denied the judgement of acquittal on first degree premeditated murder; however, the trial court did not instruct the jury on first degree premeditated murder, or have it on the jury verdict form as possible choice for the jury.

THE MURDER WEAPON

Prior to the shooting, the murder weapon was likely in the possession of the co-defendant Terry Thomas. According to the testimony of George Lane, prior to the shooting the Thomas had come by his room earlier that day. While at Lane's room, Thomas was trying to hide something under his shirt. (R1155) In fact, Lane's girlfriend alerted Lane that the boy was trying to hide something. (R1155) The boy kept patting his shirt, checking what was there. (R1155) The conduct of Thomas hours before of the shooting was consistent with concealing a firearm. Moreover, before the pre-trial deposition of Thomas was stopped, Thomas exclaimed that he was concerned that Benedith was going to be punished for something he did not do.[3] The Appellant concedes that the State provided substantial evidence that Benedith possessed the murder weapon after the murder, however, the evidence is equally compelling that in the hours before the murder the murder weapon was in the possession of co-defendant. This by inference leads to the conclusion that Thomas, and not Benedith murdered John Shires.

OTHER EVIDENCE

Ishmael Loblack testified that at the time of the shooting he was visited by two black males, one of those black males was Benedith. (R1249) According to Loblack, Benedith wanted to paint a car that he was going to get and go to New York. (R1250) Loblack stated that they would have to come back another time. (R1250) That evening Benedith and another male returned with a red Nissan, which Loblack identified in State Exhibit AE. (R1250-51) Benedith (who called himself "Tony") stated that he got the Nissan and wanted Loblack to paint it because

[3] See Appendix A wherein Thomas made a sworn statement that his initial statement to police was false, and that Benedith was facing the death penalty for something Benedith did not do.

they were going to New York. (R1252)

DISCUSSION

Admittedly, the State has provided direct and circumstantial evidence that Benedith was present at the shooting of John Shires. Placing Benedith at the crime scene is not sufficient to sustain the first degree felony-murder conviction. Collins v. State, 438 So.2d 1036, 1038 (Fla. 2d DCA 1983) The State has the burden of proving that Benedith had prior knowledge of the criminal plan to commit robbery with a firearm. See Enmund v. State, 399 So.2d 1362, 1370 (Fla.1981), rev'd on other grounds, 458 U.S. 782 (1982)

"[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). Benedith'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:

> 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 Hall v. State, 403 So.2d 1321 (Fla. 1981); McArthur v. State, 351 So.2d 972 (Fla. 1977). 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).

The following are cases where the courts have found that evidence was not sufficient and are instructive of the proper application of appellate review. The case of Valdez v. State, 504 So.2d 9 (Fla. 2nd DCA 1986) is an analogous case where there the Second District Court held the

evidence was insufficient evidence to convict on the charge of second degree grand theft. In Valdez, an eyewitness identified Valdez as the driver of a vehicle which sped away from a department store after a woman, who had stolen several men's shirts from the store, entered the vehicle. Other evidence established that the vehicle which Valdez was driving had been parked in the fire lane outside the department store prior to the woman's entry into the car. As Valdez sped away, store detectives forced the vehicle to a stop, whereupon Valdez and the woman were arrested.

During questioning by police at the time of the arrest, Valdez indicated that he had no knowledge of the woman's intent to steal. Valdez told police that he thought the woman went into the store to buy a dress for their daughter. In finding that the state failed to prove that Valdez had the specific intent to participate in the theft, the court held that:

> In order to convict someone of aiding and abetting in a crime as a principal in the first degree, the state must prove that the individual aided or abetted in the commission of the crime and had the requisite specific intent to participate in the crime. Collins v. State, 438 So.2d 1036, 1038 (Fla. 2d DCA 1983); Rich v. State, 413 So.2d 109, 111 (Fla. 2d DCA 1982); Locket v. State, 262 So.2d 253, 254 (Fla. 4th DCA 1972). Mere knowledge that an offense is being committed is not the same as participation with criminal intent. Collins, 438 So.2d at 1038. Mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation. Collins; In the Interest of R.W.G. v. State, 395 So.2d 1279 (Fla. 2d DCA 1981); Pack v. State, 381 So.2d 1199 (Fla. 2d DCA 1980).

Valdez at 10.

In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), this Court agreed with Clark's contention that the trial court erred in finding that the murder was committed during a robbery

and stated:

> While there is no question that Clark took Carter's [the victim's] money and boots from his body after his death, this action was only incidental to the killing, not a primary motive for it. No one testified that Clark planned to rob Carter, that Clark needed money or coveted Carter's boots, or that Clark was even aware that Carter had any money. There is no evidence that taking these items was anything but an afterthought. Accordingly, we find that the State has failed to prove the existence of this aggravating factor beyond a reasonable doubt.

Clark at 515. Similarly, here the fact that the victim's automobile was taken after he was shot does not establish that the attack was motivated by a desire to obtain the automobile. Of similar importance is Parker v. State, 458 So.2d 750, 754 (Fla. 1984) where, again, this Court refused to accept the trial court's finding that the murder was committed during a robbery and stated:

> Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects....This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor must be based. [Citation omitted.]

Parker at 754. In Knowles v. State, 632 So.2d 62, 66 (Fla. 1993) the defendant took his father's truck after killing his father and another person. Because there was "no evidence that Knowles intended to take the truck from his father prior to the shooting, or that he shot his father in order to take the truck, the aggravating factor of committed during the course of a robbery" could not be permitted to stand. Similarly, here the aggravator cannot be upheld where there was no evidence that Appellant intended to take property from Shires, and no evidence that he assaulted Shires in order to take his automobile.

CONCLUSION

The state failed to carry its burden in the case at bar. The state merely demonstrated that Benedith appeared at an appointment to purchase an automobile, and after the shooting left the scene. Benedith's actions could be explained in a manner consistent with innocence, i.e., Benedith drove off in an automobile he intended on purchasing after the unexplained shooting of Shires by Thomas. Pursuant to McArthur v. State, 351 So.2d 972 (Fla. 1977), as a matter of law the state's evidence is insufficient to support the verdict. The conviction rests on pure speculation. A first-degree felony 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 Benedith discharged from Florida custody.

POINT II

APPELLANT'S DEATH SENTENCE IS DISPROPORTION-ATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITU-ION, AND THE EIGHTH AND FOURTEENTH AMEND-ENTS TO THE UNITED STATES CONSTITUTION.

This Court has described the "proportionality review" performed in every capital death case as follows: Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). Accord Hudson v. State, 538 So.2d 829 at 831 (Fla. 1989); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Tillman v. State, 591 So.2d 167 (Fla. 1991). Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.

Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V, § 3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty

law. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death penalty law. See Tillman at 169.

In imposing the death penalty, Judge Moxley, Jr. found that the State had proved one aggravating circumstance that Appellant had previously been convicted of another felony involving the use or threat of violence to a person. Section 921.141(5)(b), Florida Statutes (1991). This aggravating circumstance was based on Appellant's previous conviction for attempted robbery in the second degree committed in New York after the murder here in Florida. (R1042) In mitigation, the trial court considered five separate factors, although two were given weight, two were rejected, and one was given little or no weight by the trial court. (R 1042-1045) Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment.

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 (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, 17 (Fla. 1973), cert. denied sub nom., 416 U.S. 943 (1974). See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our

harshest penalty." Fitzpatrick, 527 So.2d at 812. Appellant's case is neither "most aggravated" nor "unmitigated." Indeed, it is the one of the least aggravated death sentences ever to reach this Court. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," Fitzpatrick, at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

LEAST AGGRAVATED; MITIGATION

First, this case is not "most aggravated." No aggravating circumstance relating to intent, or indeed, to any aspect of the offense was found by the sentencer, only that Appellant had a prior conviction for a violent felony. "[T]he aggravating circumstance of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent." Fitzpatrick, 527 So.2d at 812.[4]

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, at 812. Two nonstatutory mitigating circumstances were found by the sentencing judge, and were supported by testimony. The two nonstatutory mitigating circumstances rendered the death sentence disproportionate. The sentencer found the non-statutory mitigating circumstances of emotional or mental disturbance, and impaired capacity to conform conduct.

Without question, this case is not a proper one for capital punishment. It cannot fairly be compared with other cases reversed by this Court, because, as noted, none has ever been this mitigated and non-aggravated. A look at reversal on proportionality grounds does, however, reveal that since more aggravated and less mitigated cases than Appellant's are not proper for the

[4] These are Florida's most serious aggravating circumstances, and truly define "the most aggravated, the most indefensible of crimes." Dixon, 283 So.2d at 8. Heinous, atrocious, or cruel, as an aggravating circumstance, intuitively, and in fact, plays a substantial role in the affirmance of Florida death sentences.

ultimate penalty, surely Mr. Benedith must be spared.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court accepted the sentencing judge's findings of five statutory aggravating circumstances, including those that showed culpable intent (pecuniary gain/arrest avoidance). Mr. Fitzpatrick had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot the officer while holding three persons hostage with a pistol in an office; Mr. Benedith was not engaged in the commission of a felony at the time of the offense. Mr. Fitzpatrick had been previously convicted of violent felonies; Mr. Benedith one conviction of attempted robbery in the second degree after this murder occurred. Mr. Fitzpatrick established the existence of three statutory mitigating circumstances -- extreme mental or emotional distress, substantially impaired capacity to conform conduct, and age. Fitzpatrick at 811 Mr. Benedith to a lesser extent established two of these. Mr. Fitzpatrick's crime was significantly more aggravated than Mr. Benedith's, yet this Court found Mr. Fitzpatrick's actions to be "not those of a cold-blooded, heartless killer," since "the mitigation in this case is substantial." Fitzpatrick at 812.

Moving from five down to two statutory aggravating circumstances, this Court has not hesitated to reverse on proportionality grounds, in circumstances less mitigated than Benedith's case. For example, in Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony/felony murder), when compared to two mitigating circumstances (age/unfortunate home life), "does not warrant the

death penalty." Livingston at 188.[5] In comparison, Mr. Benedith's case involved one aggravating circumstance, and three circumstances. In Proffitt v. State, 510 So.2d 896 (Fla. 1987), the two aggravating circumstances of cold, calculated and premeditated, and felony/murder, were insufficient to call for the death penalty, when Mr. Proffitt had a nonviolent history, and was happily married, a good worker, and a responsible employee.[6] Finally, in Huckaby v. State, 343 So.2d 29 (Fla. 1977), this Court affirmed two especially powerful aggravating circumstances (heinous, atrocious or cruel, and great risk of harm to many persons), but held that the two statutory mitigating factors rendered death improper (extreme mental or emotional disturbance/substantive impairment).

Turning to cases with one aggravating circumstance, even heinous, atrocious or cruel, as a single aggravating circumstance, cannot sustain a death sentence when the crime 'was probably upon reflection, of not long duration," and where drug addiction (alcohol) is a contributing factor to one's "difficulty controlling his emotions." Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Felony-murder as a sole aggravating circumstance is insufficient for death, Lloyd v. State, 514 So.2d 396, 403 (Fla. 1988); Caruthers v. State, 465 So.2d 496 (Fla. 1985), where there is at least one statutory mitigating circumstance, or evidence of drug (alcohol) abuse. Rembert v. State,

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[5] Of special importance to the Court in mitigation in Livingston and in many of the following cases is the offender's addiction to and/or intoxication from drugs, or alcohol. This overriding factor is also present in Appellant's case.

[6] "The record also reflects that Mr. Proffitt had been drinking." Proffitt, 510 So.2d at 98. Mr. Proffitt was given life on appeal despite the proper finding of a cold, calculated, and premeditated, killing. Proffitt, 510 So.2d at 898 (Ehrlich, J., concurring specially in result only).

445 So.2d 337, 338 (Fla. 1984); see also Proffitt, supra.[7]

This Court has affirmed a death sentence on two occasions where the sole aggravating circumstance related to prior violent felony conviction. See Duncan v. State, 619 So.2d 279 (Fla. 1993); Ferrell v. State, 680 So.2d 390 (Fla. 1996) These cases are easily distinguishable from the instant case. In both Duncan and Ferrell, the prior violent felony was the previous commission of a murder.

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court faced a death penalty imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert denied, 416 US 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by

[7] This Court is careful not to sustain death when felony-murder simpliciter is the only aggravating circumstance. See Proffitt, supra. It would be fundamentally incongruous to affirm when the only extant aggravating circumstance does not reflect an additional bad part of the actual killing (i.e., robbing and killing), but instead reflects a condition or status of the defendant (i.e. prior conviction for a violent felony).

> the fact that Songer did not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, at 1011.

In Penn v. State, 574 So.2d 1079 (Fla. 1991), this Court approved the trial court's finding that the murder was heinous, atrocious, or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So.2d 90 (Fla. 1984), receded from on other grounds, Preston v. State, 564 So.2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstance in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Compare Smalley v. State, 546 So.2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So.2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So.2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this case.

Penn at 1083-4. See also, McKinney v. State, 579 So.2d 80 (Fla. 1981) [Death sentence disproportionate given only one valid aggravator, and mitigation show that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history].

LACK OF EVIDENCE

In the instant case, there is a serious lack of evidence as to the circumstances upon which this murder occurred. There are serious unanswered questions as to which defendant was the shooter, and what act or occurrence precipitated the shooting. Where there is a substantial lack of evidence concerning the facts and circumstances of the murder, this Court's ability to perform its proportionality review function is impaired.

In Terry v. State, 668 So.2d 954 (Fla. 1996) the trial court found two aggravators: (1) prior violent felony or a felony involving the use or threat of violence to the person (conviction for principal to aggravated assault); and (2) capital felony committed during the course of an armed robbery/pecuniary gain. The trial court rejected Terry's age of 21 years as a statutory mitigator because there was no evidence "to suggest that [Terry's] mental or emotional age did not match his chronological age," and his age, standing alone, was insignificant. The trial court found no statutory mitigators and rejected Terry's minimal nonstatutory mitigation.

In reversing Terry's death sentence on proportionality grounds this Court noted the inability to compare this murder to others due to the lack of evidence.

> In this case, it is clear that the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting are unclear. There is evidence in the record to support the theory that this was a "robbery gone bad." 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. Our proportionality review requires a discrete analysis of the facts. Porter, 564 So.2d at 1064. As stated by a federal appellate court: "The Florida sentencing scheme is not founded on 'mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts."

> Francis v. Dugger, 908 F.2d 696, 705 (11th Cir.1990), cert. denied, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991).

This Court also made similar findings in other robbery-murder cases like Sinclair v. State, 657 So.2d 1138 (Fla. 1995), and Thompson v. State, 647 So.2d 824 (Fla. 1994). In Sinclair, which is factually very similar to the instant case, the appellant robbed and fatally shot a cab driver twice in the head. Considering these circumstances and finding there was only one valid aggravator, no statutory mitigators, and minimal nonstatutory mitigation, we vacated the death sentence. In Thompson, the appellant walked into a sandwich shop, conversed with the attendant, fatally shot the attendant through the head, and robbed the establishment. On appeal, this Court vacated the death sentence, finding there was only one valid aggravator (the murder was committed in the course of a robbery) and some "significant," nonstatutory mitigation. Thompson at 827.

CONCLUSION

One must also consider not only what was done to John Shires, but who did it. The Eighth and Fourteenth Amendments to the United States Constitution require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the role played by his cohort. See Enmund v. Florida, 458 U.S. 782 (1982); Jackson v. State, 575 So.2d 181, 190 (Fla. 1991) ("a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant....Individual culpability is key..."). In this case the evidence is inconclusive as to who fired the fatal shots, although Appellant's codefendant was likely in possession of the murder weapon hours before the shooting.

A comparison of this case to those in which the death penalty has been affirmed leads to

no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. Although this Court has affirmed the death penalty based solely on this aggravating factor, it has only been done where the prior violent felony was murder. As in Sinclair and Thompson, this Court should find that the circumstances here insufficient to support the imposition of the death penalty. This Court should find that the circumstances here do not meet the test that this Court laid down in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

POINT III

THE TRIAL ERRED IN DENYING BENEDITH'S MOTION TO PRECLUDE THE DEATH PENALTY IN THIS CASE WHERE THERE WAS NO SHOWING THAT BENEDITH'S STATE OF MIND WAS CULPABLE ENOUGH TO RAISE TO THE LEVEL OF RECKLESS INDIFFERENCE TO HUMAN LIFE.

During the penalty phase, the Appellant argued that the death penalty is unconstitutionally disproportional punishment as applied to this case. (P101-105) According to Appellant, the evidence presented at trial did not establish that Appellant's state of mind was culpable enough to rise to the level of reckless indifference to human life so as to warrant the death penalty for felony-murder, and thus, the death penalty would be unconstitutional disproportional punishment. Tison v. Arizona, 481 U.S. 137 (1987), Enmund v. Florida, 458 U.S. 782 (1982), and Jackson v. State, 575 So.2d 181 (1991).

It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant. In Enmund, the United States Supreme Court, "citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder" under the circumstances of that case. Tison, 481 U.S. at 147; cf. Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty disproportional to the crime of rape). Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison, 481 U.S. at 156. Hence, if the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently

culpable to warrant the death penalty, death would be disproportional punishment. See generally, Id.; Enmund, 458 U.S. at 782.

In Enmund and Tison, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison, 481 U.S. at 151. However, the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life. As the Court said, "we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison, 481 U.S. at 158. Courts may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However, such participation alone may not be enough to establish the requisite culpable state of mind. Id., 481 U.S. at 158 n.12.

Cases that best illustrate the application of the Enmund/Tison rule include Tison itself, and cases in which the Florida Supreme Court has applied Tison and Jackson. See, e.g., DuBoise v. State, 520 So.2d 260 (Fla. 1988) (on rehearing); Diaz v. State, 513 So.2d 1045 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988)

In Tison, the defendants were Ricky Wayne Tison and Raymond Curtis Tison, two sons of

Gary Tison. Gary was a convicted killer serving a life term for killing a prison guard during an attempted escape. Ricky and Raymond, with others, planned and executed a prison break in which they approached the Arizona State Prison with an ice chest filled with guns. They armed their father's cellmate, also a convicted killer, and broke out of jail. When their car broke down in the desert, they flagged down a passing car. Inside the car were John and Donelda Lyons, their two-year-old son and their fifteen-year-old niece. John Lyons begged the assailants for their lives. But, with Ricky and Raymond present at the scene, Gary and his cellmate walked over to the captives and fired repeated shotgun blasts into them, killing all four. The Tisons then drove away in the stolen car, continuing their flight until the police stopped them in a shoot-out at a roadblock several days later.

The Court focused on the following facts to determine Ricky and Raymond's culpability:

> Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what to do next. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.
>
> Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnapping and robbery and watched the killing after which he

> chose to aid those whom he had placed in the position to kill rather than their victims.

Tison at 151-52. On those facts, the Court determined that both Ricky and Raymond "subjectively appreciated that their acts were likely to result in the taking of innocent life," and that their respective states of mind amounted to "reckless indifference to the value of human life." Tison at 152.

In Diaz, this Court affirmed the death sentence of one of three men accused in the murder of a bar manager during a holdup. There was evidence from a witness that Diaz himself had been the triggerman. Moreover, evidence showed that Diaz and his fellow robbers each discharged a gun during the robbery. There was also evidence that Diaz's gun had a silencer. This Court concluded that Tison and Enmund were satisfied because the evidence proved beyond all reasonable doubt that "Diaz was a major participant in the felonies and at the very least was recklessly indifferent to human life." Diaz at 1048.

In DuBoise, this Court concluded that Tison and Enmund had been satisfied with proof that DuBoise and his two companions decided to grab a woman's purse in order to get some money. As they passed the victim on the street, DuBoise left their car and attempted to snatch her purse. When she resisted, the other man came to assist DuBoise. The victim recognized one of DuBoise's companions, and the three men put the victim in the car and drove to another area of town. There, while DuBoise raped her, the man whom the victim had recognized struck her with a piece of lumber. DuBoise's companions then raped the woman and both struck her with pieces of lumber.

> DuBoise was a major participant in the robbery and sexual battery. He made no effort to interfere with his companions' killing

> the victim. By his conduct during the entire episode, we find that he exhibited the reckless indifference to human life required by Tison.

DuBoise at 266.

The facts in Tison, Diaz, and DuBoise presented compelling evidence not only that each defendant actively participated in their respective crimes, but that each had a highly culpable state of mind. In Tison, the defendants armed known killers, one of whom had killed in the same situation once before. During a prolonged affair, they watched four murders, at least some of which they may have been able to stop, and then they continued on their criminal ways until the police stopped them in a shoot-out. One of the Tison brothers admitted that he was prepared to kill to get his father out of prison. In Diaz, the evidence proved that Diaz entered the bar possessing a gun equipped with a silencer, from which a reasonable inference can be drawn that he contemplated killing someone. Not only did he discharge the weapon with twelve innocent people in the bar, but a witness testified that Diaz was the actual killer. In DuBoise, the defendant kidnapped and robbed the woman, and then raped her while he watched his companions beat her to death. It was a long, drawn-out episode, like the one in Tison, during which DuBoise had the chance to stop his companions from committing murder, but he chose not to do so.

In Jackson, the evidence showed that Jackson was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. See Tison, 481 U.S. at 150-51. The entire Jackson case was based on circumstantial evidence. The totality of the record showed that Jackson previously indicated his intent to rob Phillibert's store; that Jackson was seen driving in the vicinity of the store shortly before and after the crime; that

Jackson had been driving with his brother, whose fingerprints were found on the cash register; that Jackson said afterward "we had to do it because he had bucked the jack"; and that Jackson asked his mother to tell his brother to say "he hadn't been nowhere around the hardware store and get rid of the gun." A reasonable inference could be drawn from the evidence in this record that either of the two robbers fired the gun, contrary to the finding of the trial judge. There was no evidence presented in this trial to show that Jackson personally possessed or fired a weapon during the robbery, or that he harmed Phillibert. There was no evidence that Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery. There was no real opportunity for Jackson to prevent the murder since the same took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance. No other innocent lives were jeopardized. See Jackson at 185.

Upon this record, the Florida Supreme Court found insufficient evidence to establish that Jackson's state of mind was culpable enough to use the level of reckless indifference to human life such as to warrant the death penalty for felony murder. White v. State, 532 So.2d 1207, 1221-22 (Miss. 1988) (Enmund and Tison are not satisfied in murder case with multiple defendants and no eyewitnesses where all evidence is circumstantial and the actual killer is not clearly identified).

In the present case, the totality of the record showed the following: the Appellant along with the co-defendant, Thomas Taylor, visited Ishmael Loblack prior to and after the murder requesting to have a red car painted; that George Lane testified that he saw the Appellant at the scene of the crime standing behind the victim; that George Lane also testified that before the shooting when Taylor was in his hotel room, Lane's girlfriend kept bringing to his attention the

fact that Taylor was playing with his shirt, "like he was trying to hide something." George Lane also testified that Taylor was facing and talking to the victim. This statement is important when one considers Dr. Wickham's testimony that the shooter had to be facing the victim when shots A and B were fired. A reasonable inference could be drawn from the evidence in this record that Thomas Taylor fired the gun. There is absolutely no evidence present in this trial to show that the Appellant personally possessed or fired a weapon during the robbery. Like Jackson, the Appellant had no real opportunity to prevent the murder since the same only took seconds to occur.

To give the Appellant the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. It would defeat the cautious admonition of Enmund and Tison, that the Constitution requires proof a culpability great enough to render the death penalty proportional punishment, and it fails to "genuinely narrows the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862 (1983).

POINT IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S COUNSEL'S MOTION TO WITHDRAW BEFORE TRIAL WHERE APPELLANT FILED A GRIEVANCE AGAINST HIS COUNSEL WITH THE FLORIDA BAR.

Gregory W. Eisenmenger, counsel for the Appellant, filed a motion to withdraw based upon the assertion that Benedith filed a grievance with the Florida Bar against Attorney Eisenmenger. (R620; 63) The trial court conducted a hearing on the motion and questioned appellant:

> THE COURT: Mr. Benedith, would you step down, please. What's your response to the motion to withdraw.
>
> THE DEFENDANT: Well, I want to go to trial too.
>
> THE COURT: You want to go to trial?
>
> THE DEFENDANT: Yeah, I want to go trial. But first of all, I need to subpoena all my witnesses, because I have witnesses. And I told Mr. Eisenmenger to get all my witnesses. And I don't know if he has done it yet. But he has to call every one of them. And I got it right here. So I can put it in my file.
> (R58)

The trial court denied the Motion to Withdraw. (R63)

DISCUSSION

Any accused, including Arturo Benedith is guaranteed the unassailable, fundamental constitutional rights to due process and effective assistance of counsel in capital penalty proceedings. These rights are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); see, e.g., Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60

(1942). The Florida Constitution provides the accused even greater protection to the right to counsel. Haliburton v. State, 514 So.2d 1088 (Fla. 1987) (Florida Constitution provides more protection than federal constitution, rejecting Moran v. Burbine, 475 U.S. 412 (1986)).

As explained generally in Strickland, an accused is denied effective assistance when either the government's or counsel's acts or omissions cause a breakdown in the adversarial process. Certain situations constitute denial of the rights to due process and counsel, and require a rigid per se reversible error rule whereby prejudice is absolutely presumed, making irrelevant any inquiry into prejudice.

For example, prejudice is presumed when the defendant was made to suffer actual or constructive denial of assistance of counsel altogether. E.g., Powell v. Alabama, 287 U.S. 45 (1932) (conviction reversed where all members of local bar appointed six days before high profile capital case, and Tennessee lawyer appointed to represent defendants on day of trial with local bar members' assistance). Presumed prejudice also requires reversal when law or a judicial ruling had the effect of interfering with counsel's assistance. E.g., Geders v. United States, 425 U.S. 80 (1976) (conviction reversed because court barred attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (conviction reversed because court barred defense right to summation at bench trial); Brooks v. Tennessee, 406 U.S. 605 (1961) (conviction reversed because state required defendant be first witness); Ferguson v. Georgia, 365 U.S. 570 (1961) (conviction reversed because court could not prevent defense counsel's guidance of defendant in conducting direct examination); cf. Jackson v. State, 464 So.2d 1181 (Fla. 1985) (reversing murder conviction and death sentence on direct appeal because court erroneously refused continuance and compelled counsel to proceed despite counsel's claims prior to and

during trial that he was unable to provide effective assistance due to his physical condition.)

THE DUTY OF LOYALTY

Appellant argues that in conflict of interest cases, the Florida and United States Constitutions impose on counsel a duty of loyalty, and impose on judges duties to protect an accused's right to effective assistance. In discussing what constitutes "ineffective assistance," the United States Supreme Court has made clear that "[p]erhaps the most basic of counsel's duties" is the "duty of loyalty." Strickland, 466 U.S. at 692. See also R. Reg. Fla. Bar 4-1.7 (ethical duty to avoid conflicts of interest); Id. R. 4-1.7 (comment) ("Loyalty is an essential element in the lawyer's relationship to a client."); Id. R. 4-1.16(a) (lawyer's mandatory duty to withdraw if representation will violate rules of professional conduct or law, or if mental condition impairs ability to represent client). The lawyer's duty of loyalty to his client is constitutionally compelled in a criminal trial. "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." Strickland, 466 U.S. at 688. The constitutions also impose certain concomitant duties on the trial court to protect the accused's right to zealous, loyal advocacy, one of which is "it's duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even by suggesting that counsel undertake to concurrently" represent conflicting interests. Glasser, 315 U.S. at 76; Holloway, 435 U.S. at 485. Another duty of the judge is to conduct an adequate inquiry into a timely allegation that a possible conflict of interest existed. Holloway.

When these duties are breached despite the trial court's opportunity to cure the problem,

courts follow the rigid *per se* reversible error rule whereby prejudice is absolutely presumed.[8] Prejudice is presumed and reversal is required when the trial court refuses to appoint conflict-free counsel after being shown counsel has conflicting interests that would adversely affect his representation. E.g., Glasser, 315 U.S. at 60 (actual conflict of interest affecting representation in joint trial of codefendants represented by single lawyer denied effective assistance of counsel). Likewise, prejudice is presumed and reversal is required when the trial court fails to conduct an adequate inquiry into a timely allegation that a possible conflict of interest existed. E.g., Holloway 435 U.S. at 475 (court's failure to inquire into timely allegation of potential conflict of interest denied effective assistance of counsel).

The per se reversible errors rule due to conflict applies in this case because facts on the record establish the conflict. Foster v. State, 387 So.2d 344 (Fla. 1980) (reversing murder conviction and death sentence on direct appeal due to counsel's conflict of interest); see also Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (presumed prejudice found in conflict of appellate lawyer, thus requiring habeas relief and new direct appeal).

Although the usual case is one of divided loyalties between jointly represented clients, courts have long recognized that many other conflicts reversibly taint a client's constitutional right to loyal, zealous representation. Depending on the nature of the claim and the context in which it is raised, some personal conflicts give rise to presumed prejudice, while others require a showing

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[8] When conflict claims are raised for the first time in a collateral attack of a conviction questioning the counsel's conduct, prejudice is not presumed. Instead, the accused must demonstrate that counsel's conflict adversely affected the representation and prejudiced the client. E.g., Cuyler v. Sullivan, 446 U.S. 335 (1980) (federal habeas relief denied because multiple representation was not shown to present an actual conflict of interest that adversely affected lawyer's performance).

of prejudice. The conflict issue presented here is where the accused filed a grievance with the Florida Bar. This is an actual conflict for which prejudice must be presumed.

FAILURE TO MAKE PROPER FARETTA INQUIRY

Based upon the comments of the appellant at the motion hearing, there was the assertion that appellant wished to go to trial and represent himself.[9] The plea to represent himself, although not unequivocal, was not explored further by the trial court. This is error since the trial court improperly refused to let him represent himself in violation of Faretta v. California, 422 U.S. 806 (1975).

The case of Hardwick v. State, 521 So.2d 1071 (Fla. 1988) is instructive. In Hardwick this court held that when the accused to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. See also Jones v. State, 449 So.2d 253, 258 (Fla. 1984), cert. denied, 469 U.S. 893 (1984). The right to self-representation is not absolute.

> However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so. Faretta, 422 U.S. at 835, 95 S.Ct. at 2541; Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984). This particularly is true where, as here, the accused indicates that his actual desire is to obtain different court-appointed counsel, which is not his constitutional right. Donald v. State, 166 So.2d 453 (Fla. 2d DCA 1964).

Hardwick at 1074. In the case sub judice, the trial court failed to make the appropriate inquiry. Therefore there was no inquiry concerning the appellant's ability to make a knowing and intelligent waiver, his age and mental status, and his lack of knowledge or experience in criminal

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[9] THE DEFENDANT: Yeah, I want to go trial. But first of all, I need to subpoena all my witnesses, because I have witnesses. And I told Mr. Eisenmenger to get all my witnesses. And I don't know if he has done it yet. But he has to call every one of them. And I got it right here. So I can put it in my file.

proceedings. See Johnston v. State, 497 So.2d 863, 868 (Fla. 1986).

The issue presented here does not directly concern the court's discretion to deal with a disruptive defendant. There was no evidence in this case that Mr. Benedith filed a grievance with the Florida Bar for the purpose of delaying the proceedings and impairing the administration of justice. The trial court had legitimate concerns that such delay might result, but there is no evidence that Mr. Benedith did it for that purpose -- especially given that he complained about counsel before the proceedings even began -- nor is a necessary delay a valid reason to deny one effective assistance of counsel.

The prosecutor and the trial judge both erroneously focused on whether Mr. Benedith should benefit from his own conduct. That too is not dispositive. Certainly a client has no right to manipulate proceedings to intentionally disrupt the administration of justice. Waterhouse v. State, 596 So.2d 1008, 1014 (Fla. 1992), cert. denied, 506 U.S. 957 (1992). But the focus here is on the client's constitutional right to receive -- and counsel's constitutional duty to provide -- loyal, zealous, conflict-free advocacy, and the court's duty to ensure that counsel fulfill that responsibility without embarrassing counsel by compelling them to represent a client despite the presence of a serious actual conflict.

The trial court should have permitted counsel to withdraw, appointing substitute counsel. Failure to do so, and to take other measures necessary to protect Mr. Benedith's constitutional rights, required either Mr. Benedith to represent himself or appoint new counsel. The Court should reverse the judgement sentence and remand for a new trial.

POINT V

THE TRIAL COURT ERRONEOUSLY PERMITTED THE

STATE TO MAKE UNDULY PREJUDICIAL DETAILS OF CRIMES COMMITTED UPON A DIFFERENT VICTIM THE FEATURE OF THE PENALTY PHASE, THEREBY DEPRIVING MR. BENEDITH OF A FAIR SENTENCING HEARING IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

Aggravating circumstances for the capital murder of John Shires were the State's only legitimate concerns. However, the State called witness after witness to testify about the crime of attempted robbery in the second degree including the victim Blanca Mercette herself, in virtually re-presenting the guilt phase of the trial. Mercette's victimization -- not John Shires' -- became a feature of the State's case. The prejudicial weight of this evidence under the present circumstances far outweighed its probative value. Defense counsel repeatedly objected to the State's tactics, each time being overruled. The trial court's rulings effectively allowed the jury's attention to be shifted away from what should have been its only lawful focus, rendering the jury's ultimate judgment unreliable. These errors violated Benedith's state and federal constitutional rights to due process, a fair sentencing proceeding, and his protection against cruel and/or unusual punishment. U.S. Const. Amends VI, VIII, XIV; Art. I, §§ 9, 16, 17, Fla. Const.

A. Constitutional law sets forth clear rules limiting the introduction of unduly prejudicial evidence of crimes on other victims in a penalty phase.

Constitutional law permits the State to introduce relevant collateral crimes evidence to prove an aggravating circumstance, but with some very important limitations: The evidence must not violate the defendant's confrontation or other rights; its prejudicial effect must not outweigh its probative value; and the details of the collateral offense must not be emphasized to the point where that offense becomes a feature of the penalty phase. The accused's rights are most

seriously endangered when the victim of a collateral crime testifies for the State to prove an aggravating circumstance. Finney v. State, 660 So.2d 674, 683 (Fla. 1995); see Hitchcock v. State, 673 So.2d 859 (Fla. 1996) (reversible error to make feature of penalty phase sexual crimes committed upon the juvenile sister of the murder victim for whose killing he was being sentenced, and other alleged similar acts of pedophilia); Wuornos v. State, 676 So.2d 966 (Fla. 1995) (error to prove CCP aggravator relying entirely on collateral crime evidence because evidence proved only bad character or propensity); Duncan v. State, 619 So.2d 279, 282 (Fla. 1993) (error to introduce photo of collateral murder victim when collateral crime had been proved through judgment and officer's testimony); Rhodes v. State, 547 So.2d 1201, 1204-05 (Fla. 1989) (error to introduce statement of collateral crimes victim when collateral crimes had been proved through judgment and officer's testimony); cf. Freeman v. State, 563 So.2d 73, 76 (Fla. 1990) (spouse of collateral crime victim should not have been permitted to testify in penalty phase where testimony was not essential to proof of prior felony conviction).

Finney made a special point to limit the State's use of victims of collateral crimes to prove aggravating circumstances:

> [W]e take this opportunity to point out that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. Cf. Rhodes, 547 So. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape violated defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true when there is a less prejudicial way to present the circumstances to the jury. Cf. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), cert. denied, 501 U.S. 1259, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are

presented by the victim of that offense.

> Testimony concerning the circumstances that resulted in a prior conviction is allowed to assist the jury in evaluating the defendant's character and the weight to be given the prior conviction so that the jury can make an informed decision as to the appropriate sentence. Rhodes, 547 So. 2d at 1204. However, the collateral offense need not be "retried" before the capital jury, in order to accomplish that goal. Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is unnecessary, or where the evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. See, e.g., Duncan, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor); Freeman, 563 So. 2d 75 (error to allow surviving spouse of victim of prior violent felony to testify concerning facts of prior offense where testimony was not essential to proof of prior felony conviction).

Finney, 660 So.2d at 683-84.

The purpose of the rules discussed in Finney is to prevent jurors and the trial judge from placing undue weight on crimes other than those for which the defendant is being sentenced. Yet crimes committed upon another person who was not murdered became a feature of this penalty trial.

B. Benedith repeatedly objected to the introduction of unnecessary details of crimes committed on Mercette for which he had already been convicted and sentenced, and which were not the subject of the penalty proceedings.

Ken Ross, an assistant district attorney from the Bronx, New York, testified that he prosecuted Benedith for robbery. (P72) Ross produced a certified copy of a robbery in the second-degree conviction. New York City Police Detective Gerald Garafalo testified that the robbery in New York was Benedith's idea. (P101-103) This was told to Garafalo by co-defendant Velasquez. (P103) The Appellant objected to the testimony of Gerald Garafalo

asserting that the prejudice of his testimony outweighed its probative value after the previous testimony of Ross. (P96) Moreover, during the testimony of Garafalo the defense objected to hearsay testimony concerning statements made by co-defendant Velasquez that the robbery was Benedith's idea. (P102)

The victim, Blanca Mercette testified that on June 10th, 1993, she was ironing when the door to her living room opened and Mercette was grabbed around the neck by Benedith. (P120) The Appellant objected to the testimony of Blanca Mercette on the grounds that this testimony was making the proof of the prior violent felony a feature of the penalty phase. (P121) According to Mercette, Benedith entered with four others and stated it was a hold-up, where was the money, and where was their revolver. (P122) According to Mercette, Benedith had a gun and Mercette was then bound and gagged. (P122) Mercette claimed that Benedith stated many times that he was hurt, but he was going to have to kill Mercette. (P122) The defense counsel subsequently moved for a mistrial based on the testimony of Mercette arguing that the testimony's prejudice outweighed its probative value. (P123) According to Mercette, Benedith was the leader of this group. (P123-24) Sometime thereafter, Mercette's friend, Juan Otero came home and was attacked by the group. (P125) Otero suffered a cut in the attack from a knife. (P125) According to Mercette, she uses pills so that she can sleep at night, and will never forget the day of that attack. (P125) Further efforts to strike testimony by Mercette was denied over objection. (P124)

In all, the State presented three witnesses, most of whom gave testimony about the details of Mercette's injuries and what had happened to her. This evidence about Mercette was a very substantial portion of the State's case. The State proved the prior violent felonies by introducing

judgments of conviction imposed against Mr. Benedith's after his plea to the charge of attempted robbery in the second degree. Given that guilt was not in issue and that the prior violent felony was proved with documentary evidence of the judgments of conviction, the State's evidence about the details of those crimes could have been, and should have been, severely limited. See Finney.

C. The Suggested Alternative

Appellant recognizes that this Court has previously held that the prosecution can introduce evidence regarding a prior violent felony beyond the judgment itself. However, in recent years this rule has proven to be unworkable. It has spawned tremendous litigation over the extent, nature, and source of evidence concerning prior violent felonies. Trawick v. State, 473 So.2d 1235 (Fla. 1985); Stano v. State, 473 So.2d 1282 (Fla. 1985); Tompkins v. State, 502 So.2d 415 (Fla. 1986); Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Freeman v. State, 563 So.2d 73 (Fla. 1990); Duncan v. State, 619 So.2d 279 (Fla. 1993); Finney v. State, 660 So.2d 674 (Fla. 1995). In Trawick, supra, this Court held it to be error to allow "such detailed testimony" about a prior attempted murder. 473 So.2d at 1240. In Stano, supra, this Court found the detailed testimony and argument about the prior violent felonies to be admissible. However, this Court also stated, "The State's argument about these other crimes approached the outermost limits of propriety." 473 So.2d at 1289.

This Court's frequent discussions of this issue have left litigants with a case by case balancing test regarding the admissibility of evidence concerning a prior violent felony. This test involves the source of the testimony, the emotional nature of the testimony, the relevance of the testimony, the necessity of the testimony, and the prejudice to the defendant from the testimony.

This sort of overall balancing test gives little firm guidance to trial judges or litigants as to when this testimony is admissible.

A better rule is outlined by the Oklahoma Court of Criminal Appeals in Brewer v. State, 650 P.2d 54 (Okl. Cr. 1982). The Court in Brewer dealt with the admissibility of evidence as to an identical aggravating circumstance. The Court held that defendant must be given an opportunity to stipulate to the validity of his prior violent felony convictions. Brewer at 63. If the defendant stipulates to the validity of the prior convictions, then the prosecution is limited to the introduction of the judgment and sentence on the prior felonies. The Court in Brewer went on to place strict limits on the introduction of evidence concerning the prior felony even in cases where the defendant refuses to stipulate.

> If the defendant refuses to so stipulate, the State shall be permitted to produce evidence sufficient to prove that the prior felonies did involve the use or threat of violence to the person. We emphasize that prosecutors and trial courts should exercise informed discretion in permitting only the minimal amount of evidence to support the aggravating circumstances. We do not today authorize the State to re-try defendants for past crimes during the sentencing stage of capital cases.

Brewer at 63.

The Oklahoma procedure is far preferable to the current ill-defined limits. It sets out a bright line rule for everyone to follow as opposed to the current imprecise balancing test. This procedure also satisfies all of the concerns of the capital sentencing process. If a defendant stipulates to the prior convictions, then there is no need to prove this aggravating circumstance.

The only arguable rationale for allowing evidence beyond the judgment in a case where the defendant stipulates to the prior violent felony is to determine the weight to be given the prior

violent felony. However, this purpose can be achieved by the judgement itself. A judge and jury can clearly determine what weight is to be given to the prior offense from the nature of the conviction. For example, a jury would clearly know that a first degree murder is to be weighed more heavily than a robbery. It is relatively easy to determine the seriousness of a prior offense from the nature of the conviction.

The idea that the seriousness of a prior offense can be determined by the judgment itself is consistent with the approach taken by the sentencing guidelines. Fla.R.Crim.P. 3.701-3.703. The guidelines assign a numerical weight to each prior offense based on the seriousness of the prior conviction. Thus, all prior offenses of one type are weighed equally. This is a far more objective system than introducing testimony about the prior conviction within some ill-defined limits.

The caselaw interpreting the guidelines has also strictly limited any attempt to go beyond the judgment in attempting to give more weight to prior offenses beyond their numerical ranking. For example, although the sentencing guidelines allow adding points for victim injury for the current offense, the caselaw has strictly prohibited adding victim injury points for prior offenses. Brown v. State, 474 So.2d 346 (Fla. 1st DCA 1985). The caselaw has also prohibited the finding of an escalating pattern of criminal activity based upon the commission of crimes of the same degree. Lowe v. State, 641 So.2d 937 (Fla. 4th DCA 1994). Thus, the sentencing guideline decisions have consistently held that the seriousness of a prior crime is to be determined by the nature of the prior conviction itself.

The current practice in capital sentencing of allowing evidence beyond the judgment has had several negative affects. It has resulted in persistent and increasing litigation over the precise limits of such testimony. The current procedure also increases the arbitrariness in capital

sentencing. There will be extreme variation from case to case in the availability of witnesses from prior violent felonies, in the emotional nature of their testimony and in the extent to which prosecutors and judge observe the ill-defined limits on such testimony. There will inevitably be cases where the limits are exceeded. Trawick, supra; Rhodes, supra; Freeman, supra; Duncan, supra. There will be other cases in which the evidence is used for improper purposes. Finney, supra. Finally, there will be cases in which evidence is taken to the "outermost limits of propriety." Stano, supra at p.1289. All of this will lead judges and juries to different results based on an identical prior record.

Details about the severity of Mercette's post-trauma disorder were grossly inflammatory and did not prove any legitimate aggravating circumstance at issue. Yet jurors were needlessly and prejudicially exposed to the details of what happened to Mercette and Juan Otero through the testimony of Mercette herself. The trial court erred by giving the State a free hand, and that error unduly prejudiced Benedith and denied him his right to a fair penalty determination.

POINT VI

THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION OF EVIDENCE WHERE ITS PREJUDICIAL EFFECT IS OUTWEIGHED BY ITS PROBATIVE VALUE.

During the search of Benedith's rooming house, investigators found an American Cab business card with the letters "S U W" written on it. (R1465) Patrick O'Shea, a New York City policeman working the ballistic section, testified that the letters "S U W" on it stands for Smith and Wesson long, the cartridge that would fit the .32 caliber revolver used in the murder. (R1742) The appellant objected to the introduction of the business card on relevancy grounds, that the card was not properly connected to the appellant to have any evidentiary value, and that the prejudicial value of the evidence is outweighed by the prejudice. (1465-66) The appellant argues that the introduction of the business card was error where the prejudice effect of the evidence is outweighed by the probative value. The business card is physical evidence presented by the State for the purpose of bolstering their claim that Appellant possessed ammunition and logically the murder weapon before the murder. The introduction of this evidence was unlawful for two reasons: one, because the state failed to sufficiently link the business card to the appellant; two, because the state failed to adequately demonstrate that the letters "S U W" stand for Smith & Wesson 32 caliber ammunition.[10]

In Larkins v. State, 655 So.2d 95 (Fla. 1995), the trial court initially permitted the introduction of a pair of surgical gloves into evidence over Larkins' relevancy objection, and later

[10] On June 10, 1997 undersigned counsel called gun and ammunition dealers in the local area and asked them if the letters "S U W" had any significance. All stated it had no significance, although one pointed out that S and W is commonly used for Smith and Wesson.

ordered the gloves excluded from evidence when the State was unable to time them to the crime or Larkins. In State v. Sawyer, 561 So.2d 278 (Fla. 2nd DCA 1990), the trial court granted a defense Motion in Limine excluding hair samples from being introduced into evidence. The trial court noted that the hair was relevant only if its presence in Janet's kitchen was probative of Sawyer's presence in her apartment at the time of the offense. The court noted further that the hair had been collected approximately eleven hours after the police found Janet's body, that several other unknown hairs were found on and about Janet's body, that the crime scene had been contaminated by approximately sixteen persons and heavy equipment prior to collection of the hair, and there were several other methods by which the hair may have been carried to that location, none of which were more likely than any other. The court ruled that the hair had no probative value of Sawyer's presence in Janet's apartment at the time of the murder, or that even if it was probative, its probative value is far outweighed by the danger of unfair prejudice.[11]

In upholding the ruling of the trial court the second district court held that:

> In this case, the probative value of the single hair cannot be positively identified as being from Sawyer. Even if it is his hair, it is simply not probative of proving that Sawyer was ever in Janet's apartment much less that he was there at the time of the murder in light of the extensive contamination of the crime scene. However, Sawyer could have been seriously prejudiced before the jury if this hair evidence were presented to them. Accordingly, the trial judge properly ruled it to be inadmissible.

Sawyer at 280.

The appellant asserts that it is the trial court's function to weigh the danger of unfair prejudice against the probative value of the evidence. State v. McClain, 525 So.2d 420, 422-23

[11] Section 90.403, Florida Statutes (1991)

(Fla. 1988). Furthermore, the trial court should consider the need for the evidence, the tendency of the evidence to suggest an improper basis for the jury to resolve the matter, such as on an emotional basis, the chain of inference necessary to establish the material fact, and the effectiveness of a limiting instruction. See Florida Evidence Sec. 403.1. In the case sub judice, the trial court erred by permitting evidence that only confused the jury and likely led to their erroneous conclusion that the Appellant committed this murder.

POINT VII

THE PROSECUTOR'S IMPROPER REMARKS IN OPENING AND CLOSING ARGUMENT VIOLATED BENEDITH'S DUE PROCESS RIGHT TO A FAIR TRIAL.

In Stewart v. State, 51 So.2d 494 (Fla. 1951), this Court stated the duties of counsel and the trial court concerning closing arguments:

> We have not only held that it is the duty of counsel to refrain from inflammatory and abusive argument but that it is the duty of the trial court on its own motion to restrain and rebuke counsel from indulging in such argument.

This Court further explained the special duty owed by a prosecutor:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id. at 495.

In Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), this Court again condemned improper arguments by prosecutors, stating, "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." This Court explained,

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolotti at 134.

Opening Statement

During opening statement, the Appellant made a Motion for Mistrial based on the prosecutorial comment "defendant fled to the state of New York." (R1071) This comment was prejudicial and demonstrated bad faith by the prosecution where their witness would testify that prior to the murder Benedith had plans of returning to New York.[12] The trial court erred in failing to grant the mistrial.

In Florida, as in most jurisdictions, flight from justice has long been regarded as relevant and admissible to show consciousness of guilt, and thus guilt itself. E. Cleary, McCormick on the Law of Evidence s. 271, at 655 (2d ed. 1972). Nonetheless, courts also have "widely acknowledged that evidence of flight or related conduct is `only marginally probative as to the ultimate issue of guilt or innocence.'" United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977).

The probative value of flight evidence depends on the degree of confidence with which four inferences can be drawn:

> (1) from the defendant's behavior to flight;
> (2) from flight to consciousness of guilt;
> (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and
> (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Bundy v. State, 471 So.2d 9, 20 (Fla. 1985), cert. denied, 471 U.S. 894 (1986).

The prosecutor comment that appellant fled the jurisdiction had no basis in the evidence

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[12] Ishmael Loblack testified for the state. Loblack testified that prior to the murder Benedith visited and stated that Benedith wanted to paint a car because he was going to go to New York. (R1250)

produced at trial. In fact, the State was aware that Benedith planned to return to New York before the murder occurred. This calculated misrepresentation of the evidence was prejudicial because of the danger a jury will take the propensity to flee as evidence of guilt of the crime charged. Straight v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022 (1981). Even when relevant, it is possible for such comment to have an improper prejudicial impact that outweighs its probative value. Straight at 909.

Closing Argument

In the present case, the prosecutor made remarks in his closing argument which were improper. During the closing argument, the state claimed that Benedith planned the murder. The Appellant moved for mistrial based on the improper argument that the state made a misstatement of evidence claiming that Benedith had planned the murder. (P282) The motion for mistrial was denied and a curative instruction was given. (P282)

This Court has long recognized that there are situations where the prosecutor's remarks in closing argument are so improper that they constitute fundamental error. In Pait v. State, 112 So.2d 380, 385 (Fla. 1959), this Court ruled,

> when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction cold eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.

See also, Robinson v. State, 520 So.2d 1, 7 (Fla. 1988).

Because of the prosecutor's improper remarks during closing argument, this Court should apply the Pait rule to find fundamental error in this case. The district courts have found fundamental, reversible error in cases involving multiple improper remarks by the prosecutor

during closing argument similar to the improper remarks in the present case. Knight v. State, 672 So.2d 590, 591 (Fla. 4th DCA 1996) (attacks on defense counsel and his credibility, arguing facts not in evidence, comments on right to silence) ; Pacifico v. State, 642 So.2d 1178, 1182-85 (Fla. 1st DCA 1994) (telling jury they have duty to convict, attacks on defendant's character, arguing facts not in evidence); Fuller v. State, 540 So.2d 182, 184-85 (Fla. 5th DCA 1989) (attacks on defendant and defense counsel).

The cumulative effect of the prosecutor's improper comment denied the appellant due process. This Court should reverse Benedith's conviction and remand for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUE OF THE UNIQUENESS OF THE VICTIM AND WENT BEYOND THE NARROW APPLICATION OF THE STATUTORY SCHEME.

The Appellant objected to the victim's sister, Dana Rechsteiner, testifying upon the impact her loss had on her and her family before the jury. The trial court permitted the testimony before the jury over objection. The "victim impact" evidence should have been excluded by the trial court. The introduction of the improper evidence unfairly and unconstitutionally tainted the jury's recommendation. Section 921.141(7), Florida Statutes (1992) provides:

> ...the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be presented as a part of victim impact evidence.

Florida has consistently excluded evidence designed to create sympathy for the deceased. Jones v. State, 569 So.2d 1234 (Fla. 1990). See also Lewis v. State, 377 So.2d 640 (Fla. 1979) and Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). This rule of law provides even more protection to a capital defendant at a penalty phase.

> Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. § 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate

> circumstance on which to base a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

In the case of Payne v. Tennessee, 501 U.S. 808 (1991) the United States Supreme Court held that there is no Eighth Amendment bar to victim impact evidence during the penalty phase of a capital trial. Id. at 2601. Neither Payne, nor any other United States Supreme Court case, deals with the question of whether such evidence is permissible under state law.

Since the issuance of the Payne opinion, this Court has addressed the introduction of victim impact evidence only a few times. In those cases, this Court has rejected an Eighth Amendment challenge, pointing out that Payne receded from Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). See, e.g., Jones v. State, 612 So.2d 1370 (Fla. 1992); Burns v. State, 609 So.2d 600 (Fla. 1992); and Hodges v. State, 595 So.2d 929 (Fla. 1992). When dealing with the broader contention that victim impact evidence was improperly admitted, this Court focused on the relatively minor effect that the evidence had in each particular case. See, e.g., Sims v. State, 602 So.2d 1253 (Fla. 1992) and Burns v. State, 609 So.2d 600 (Fla. 1992). In Windom v. State, 656 So.2d 432 (Fla. 1995) this Court found that victim impact evidence is separate from the weighing of the aggravating and mitigating factors, and must be relevant to the issue of the uniqueness of the victim.

So even after Payne and Windom, to be admissible, evidence must be relevant to a material fact in issue. The challenged testimony in this case was not. During the victim impact statement, the victim's sister stated:

> My mother and father divorced when I was two, JB (victim) was three, and Kelly was seven, and mom raised three children by herself. (P134)
>
> * * * * *
>
> To give you a little background history, as my mother was raising the three of us, at times she worked two to three jobs to take care of us. She worked her fingers to the bone, and both JB and I and Kelly, all appreciated her hard work. (P135)

Appellant submits that the above does not speak about the unique characteristics of the victim and instead inflames the passions of the jury and taints there sentencing recommendation. The error is not harmless in his case. The jury used the objectionable evidence to determine that Arturo Benedith should die, not to determine that he was guilty of the crimes charged.

The Appellant submits that all the jury should have been considering was the evidence in aggravation and the evidence in mitigation. They also heard victim impact evidence, but were never told how to treat this evidence. Surely the result of the above testimony was to inflame the passions of the jury and impair the sentencing recommendation. As a result, the jury voted that Arturo Benedith should die in Florida's electric chair.

POINT IX

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COMMITTED DURING THE COURSE OF A FELONY, THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The law is clear that, unless the parties agree that the judge may instruct on all the factors, the jury must be instructed on only those aggravating and mitigating factors that are supported by the evidence. See Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) ("The judge followed the standard instructions for those aggravating and mitigating circumstances for which evidence had been presented.") See also Standard Jury Instructions in Criminal Cases, 2d Edition, p. 80, ("Give only those aggravating circumstances for which evidence has been presented.")

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new

recommendation on resentencing.

Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). Accord, Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.") (emphasis added).

Thus, this Court recognizes that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because the failure to do so skews the analysis in favor of imposition of the death penalty. A jury instruction on an improper statutory aggravating factor results in the same taint. When more aggravating factors are present, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the presence of an improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable under the Eighth and Fourteenth Amendments.

There can be no conclusion other than that the jury applied the felony-murder aggravating factor in recommending imposition of the death penalty. The actions by Appellant would necessarily have been viewed by a lay person as occurring during the course of robbery with reckless regard for human life. Even if these offensive things had not been stressed, in all likelihood the jury still would have attributed weight to this factor when told by the court that it was permissible under the law that they do so.

This court dealt with the improper instruction of the HAC aggravating factor in the case of Omelus v. State, 584 So.2d 563 (Fla. 1991). In Omelus, the state stressed that three aggravating circumstances were clearly established by the evidence, specifically: (1) that the

murder was committed for pecuniary gain; (2) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (3) that the murder was especially heinous, atrocious, or cruel. The state focused especially upon the last factor, that the murder was especially heinous, atrocious, or cruel. The jury returned a recommendation of death by an eight-to-four vote. The trial judge subsequently imposed the death penalty, finding two aggravating circumstances: (1) that the murder was committed for pecuniary gain and (2) that it was committed in a cold, calculated, and premeditated manner. The trial court did not find as an appropriate aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This Court found that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. In ordering a new penalty phase this court stated:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Clearly, the instant case is analogous to the error found in Omelus. To be sure, the jury would not appreciate, however, that as a matter of law it could not properly weigh the aspects of felony murder into the equation of whether to recommend life imprisonment or the death penalty for Benedith. Indeed, the jury is presumed to have used this instruction and to have followed the law given it by the trial judge. Grizzell v. Wainwright, 692 F.2d 722, 726-27 (11th Cir. 1982),

cert. denied, 461 U.S. 948 (1983). The burden is on the State to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. See Riley, 517 So.2d at 659; Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). The State cannot meet that burden. Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

POINT X

THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS FOR CAUSE WHERE THE JURORS WERE UNQUALIFIED TO SERVE AS JURORS IN A CAPITAL TRIAL.

The Appellant challenged for cause three prospective jurors either because one stated that she would not take in to account a prior conviction in judging evaluating the credibility of a witness. (Juror Wyatt); a demonstrated unwillingness to follow the Court's instruction on aggravating factors focusing upon whether Appellant had remorse (Juror Taylor); and that a jurors intelligence was so low that the juror didn't really understand what is going on (Juror Lang). The defense exhausted their preemptory challenges and requested additional preemptory challenges. (R897) Request for additional preemptory challenges was denied. (R897) The defense stated that had they had the opportunity, they would have used a peremptory challenge on Juror Wyatt. (R897) Appellant then objected to the composition of the jury panel. (R897)

ARGUMENT

As noted by this Court, "A jury is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill v. State, 477 So.2d 553, 556 (Fla. 1985). In Singer v. State, 109 So.2d 7 (Fla. 1959), this Court established the following rule:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the time he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 2324. The foregoing rule has been consistently adhered to by this Court.

See Hamilton v. State, 547 So.2d 630 (Fla. 1989) (denial of challenge for cause of juror who had preconceived opinion which would require evidence to displace was reversible error despite juror's assurance that she could hear case with open mind); Moore v. State, 525 So.2d 870 (Fla. 1988) (refusal of trial court to grant challenge for cause to juror who gave equivocal answers concerning his ability to accept insanity as defense was reversible error; Hill v. State, 477 So.2d 553 (Fla. 1985) ("A jury is not impartial when one side must overcome a preconceived opinion in order to prevail."); See also Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986) (juror's ability to be fair and impartial must be unequivocally asserted in the record).

Appellant submits that based upon the examples set out above, the record is replete with instances where the Court wrongfully denied cause challenges. As a result, defense counsel was put in the position of having to use peremptory challenges to remove those jurors. After exhausting his peremptory challenges, Benedith's defense counsel moved for additional peremptory challenges which was denied.

It is respectfully submitted that the refusal of the trial court to strike Juror Wyatt, Taylor and Lang for cause and/or grant an additional peremptory challenge was a denial of due process and the right to a fair jury recommendation under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Constitution of Florida. The death sentence should accordingly be reversed and the matter remanded for a new penalty phase.

POINT XI

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INFORM JURORS THAT APPELLANT WAS ARRESTED ON AN UNRELATED MATTER DURING THE PENALTY TRIAL.

During the penalty phase, state witness Dr. Riebsame testified that Benedith was arrested for forgery. (P250) Defense counsel made a timely Motion for Mistrial based on the doctor's testimony. The trial court denied the Motion for Mistrial, but ordered the jury to disregard the testimony. (P250)

Florida courts have consistently recognized that it is error for the State to introduce evidence that a criminal defendant has had previous involvement with law enforcement. See, e.g., Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982) (reversible error for state to introduce testimony that defendant had previously been in prison); Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983) (reversible error for state to introduce evidence that defendant who did not testify had a prior felony past); Hardie v. State, 513 So.2d 791 (Fla. 4th DCA 1987) (reversible error for police to testify that they knew defendant prior to his involvement in case on trial); see generally Charles W. Ehrhardt, Florida Evidence, § 404.9, at 152-53 (1996) (citing cases). "It is the established law of this state dating back to 1886 that evidence of any crime committed by a defendant, other than the crime or crimes charged for which the defendant is on trial, is inadmissible in a criminal court where its sole relevancy is to attack the character of the defendant or to show the defendant's propensity to commit the crime charged." Vasquez v. State, 405 So.2d 177 (Fla. 3d DCA 1981), quashed on other grounds, 419 So.2d 1088 (Fla. 1982). Courts have recognized the presentation before a jury of such inadmissible testimony is generally

considered classic grounds for a mistrial given its prejudicial impact upon a jury. See id. at 179-80. "Erroneous admission of collateral crimes evidence is presumptively harmful." Czubak v. State, 570 So.2d 925, 928 (Fla. 1990).

The admission of the evidence about the forgery clearly harmed Appellant. The trial court's instruction to the jury, which told jurors not to consider the doctor's testimony concerning this matter was ineffective to dissipate the harm to Appellant. See, e.g., Freeman v. State, 630 So.2d 1225, 1226 (Fla. 4th DCA 1994). Indeed, the trial court's instruction only exacerbated the error by underscoring the fact that Appellant was arrested in connection with another serious offense. Therefore, this Court must reverse Appellant's sentence.

POINT XII

BECAUSE A JUROR SAW APPELLANT IN SHACKLES AND HANDCUFFS, THIS COURT MUST REVERSE HIS SENTENCES.

The jury found the Appellant guilty of first-degree felony murder and robbery with a firearm. Soon after the verdict, the Appellant moved to strike the two alternate jurors for seeing the Appellant in shackles. The motion to strike was denied. One of the alternate jurors ultimately served on the penalty phase jury.

The trial court erred by denying Appellant's motion to strike. The U.S. Supreme Court has recognized that "the sight of shackles ... might have a significant effect on the jury's feelings about the defendant." Illinois v. Allen, 397 U.S. 337, 344 (1970); see also Dickson v. State, 822 P.2d 1122, 1127 (Nev. 1992) (reversing conviction because defendant was exposed to jurors while he was in shackles); Marquez v. Collins, 11 F.3d 1241, 1243 (5th Cir. 1994) ("We agree ... that the appearance of a defendant in shackles and handcuffs before a jury in a capital case requires careful judicial scrutiny. Shackling carries the message that the state and the judge think the defendant is dangerous ...."); cf. Estelle v. Williams, 425 U.S. 501 (1976) (recognizing that due process may be violated if a criminal defendant is exposed to the jury in jail attire).

Seeing Appellant in shackles and handcuffs sent a message to the alternate jurors that Appellant is dangerous and should be killed. Thus, the error cannot be deemed harmless, and Appellant's sentences must be reversed.

POINT XIII

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY VOTE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Zant v. Stephens, 462 U.S. 862, 884-85 (1983). The jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So.2d 833, 839 n.1, 845 (Fla. 1988). When a penalty jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So.2d 1024, 1032 (Fla. 1991). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part). To the extent that Florida's death penalty scheme allows a death recommendation to be returned by a bare majority vote of the jury, it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[13]

[13] To the extent that § 921.141 allows a death recommendation to be made by a bare majority of the jurors, it is inconsistent with Rule 3.440's requirement that no verdict may be returned unless all of the jurors concur in it. The rule controls and the statute is unconstitutional to the extent of the conflict. See Haven Federal Savings and Loan Assoc. v. Kirian, 579 So.2d 730 (Fla. 1991); Bernhardt v. State, 288 So.2d 490, 491 (Fla. 1974); State v. Garcia, 229 So.2d (continued...)

Benedith recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare majority jury recommendations. See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Brown v. State, 565 So.2d 304, 308 (Fla. 1990). Whether the Sixth, Eighth, and Fourteenth Amendments require jury unanimity (or at least a substantial majority) in this state's death penalty proceedings is ripe for re-evaluation now, however, because it has become clear that a Florida penalty jury's role is not merely advisory. Under Florida's capital sentencing scheme, the penalty phase jury is recognized as a co-sentencer. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); see also Espinosa v. Florida, 505 U.S. 1079 (1992). "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987).

In Williams v. Florida, 399 U.S. 78 (1970), the Court held that a statute providing for a jury of fewer than twelve in non-capital cases does not violate the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103. Two years later, in Johnson v. Louisiana, 406 U.S. 356 (1972), the Court concluded that a Louisiana statute which allowed a substantial majority (nine to three) verdict in non-capital cases did not violate the due process clause for failure to satisfy the reasonable doubt standard. Justice Blackmun noted, however, that a seven to five standard, or less than 75 percent, would cause him great difficulty. 406 U.S. at

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[13](...continued)
236 (Fla. 1969).

366 (Blackmun, J., concurring).

Florida's sentencing scheme further violates constitutional guarantees because of its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Under the law of this state, aggravating circumstances substantively define those capital felonies for which the death penalty may be imposed. Vaught v. State, 410 So.2d 147, 149 (Fla. 1982); State v. Dixon, 283 So.2d 1,9 (Fla. 1973). An aggravating factor "must be proven beyond a reasonable doubt before being considered by judge or jury." State v. Dixon, 283 So.2d at 9. A death sentence is not legally permissible where the State has not proved beyond a reasonable doubt at least one aggravator. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Accordingly, aggravating circumstances function as essential elements, in the absence of which a death recommendation cannot lawfully be made.

Because neither unanimity nor a substantial majority is required to find an aggravating circumstance or recommend the death penalty, the Florida procedure allows a death recommendation even if five of the twelve jurors find that no aggravating factors were proved beyond a reasonable doubt, as long as the other seven jurors find one or more aggravators and conclude that these are not outweighed by mitigating circumstances. The seven jurors voting for death could each find a different aggravating factor, while five jurors found no aggravators at all, as long as each of the seven determined that his or her aggravator was not outweighed by mitigators.

When the State convinces only a bare majority of jurors that death is the appropriate sentence, a sole juror could effectively make the difference between whether the defendant lives

or dies. Such a result makes Florida's death penalty scheme arbitrary in capricious, in violation of Furman v. Georgia, 428 U.S. 238 (1972). Because Benedith's death sentence was based on a ten to two jury death recommendation, this Court should find the requirement for only a bare majority verdict unconstitutional, vacate Benedith's death sentence, and remand for imposition of a life sentence.

POINT XIV

THE TRIAL COURT ERRED IN REFUSING TO GIVE SPECIFIC JURY INSTRUCTIONS ON THE NONSTATUTORY MITIGATING FACTORS OFFERED BY THE DEFENSE.

Recognizing that this issue (R1073-77) has been repeatedly rejected by this Court,[14] appellant nevertheless relies on the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny, as interpreted by the Supreme Court of North Carolina in State v. Johnson, 257 S.E. 2d 597, 616-17 (NC 1979), and respectfully urges this Court to reconsider its position.

[14] See e.g. Finney v. State, 660 So.2d 674, 684 (Fla. 1995); Robinson v. State, 574 So.2d 108, 111 (Fla. 1991).

POINT XV

THE TRIAL COURT ERRED IN SENTENCING APPELLANT OUTSIDE THE GUIDELINE RANGE FOR COUNT II ROBBERY WITH A FIREARM WHERE THE CONVICTION FOR FIRST DEGREE MURDER IS IMPROPER.

The trial court issued a written order on the Appellant's sentence on Count II of the indictment, Robbery with a Firearm, departing from the guidelines. One written reason was the conviction for first degree murder. The Appellant argues that the judgement and sentence for first degree murder should be overturned. If this Court should grant that relief, the second stated basis for the departure sentence would also be inadequate to support a life sentence. See Hall v. State, 22 Fla. L. Weekly S175 (Fla. April 3, 1997) Therefore, Appellant should receive a guideline sentence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to:

As to Point I, vacate the conviction and sentence;

As to Points II, III, and XIII, vacate Appellant's death sentence and remand for imposition of a life sentence;

As to Points IV, VI, VII, and X, grant a new trial;

As to Points V, VIII, IX, XI, XII, and XIV, grant a new penalty phase; and,

As to Point XV, vacate Appellant's life sentence as to Count II and remand for a new sentencing proceeding pursuant to the guidelines.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

_____
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Arturo Benedith, DC #703523 (G-22-07-S), Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 16th day of June, 1997.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ARTURO BENEDITH,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,368
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

A P P E N D I X

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