IN THE SUPREME COURT OF FLORIDA

TERRY LEE WOODS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 90,833

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

TERRY LEE WOODS, Appellant,	)	
vs.	)	CASE NO. 90,833
STATE OF FLORIDA, Appellee.	)	

STATEMENT OF THE CASE

Terry Lee Woods, hereinafter referred to as the appellant, was indicted for first-degree murder from a premeditated design and attempted murder by the Lake County Grand Jury on June 28, 1993. (R5) The Office of the Public Defender filed a Motion to Withdraw based upon conflict and substitute counsel, Jeffrey M. Pfister was appointed. (R24, 22) Attorney Pfister had previously represented Timothy L. Bryant in 9 different cases, and the appellant waived any conflict. (R27) Appellant Motioned for Court-Appointed Co-Counsel, and Attorney Graves was appointed as co-counsel. (R77)

Appellant filed a Notice of Alibi listing seven witnesses claiming that appellant was at an apartment on Mike Street in Leesburg at the time of the murder. (R44) The State filed a Notice of Williams Rule Evidence: Driving the decedent's car without permission; forging a Bill of Sale of decedent's car; and Carrying a Concealed Weapon. (R554) The appellant filed 27 pre-trial motions related to the constitutionality of Florida's death penalty scheme and the disclosure of penalty phase evidence. (R185-373)

The State Motioned to Exclude all Mention of Computer Voice Stress Analyzer During Trial.(R520) The State filed a Motion In Limine precluding testimony of appellant's history for non-violent behavior. (R521) The Motion was granted. (R582)

During jury selection, appellant objected to the State's peremptory challenge of alternate Juror Haddon because Juror Haddon was black. (R740) The trial court permitted the challenge based upon the race neutral reason that the juror demonstrated an inability to weigh the credibility of witnesses. (R743)

During trial, the appellant objected to the testimony concerning out of court statements made by the victim's wife: "Terry did this... Terry did this" based upon hearsay. (R876) The trial court overruled the objection as an excited utterance. (R877) The state listed Orlando Sentinel reporter Mary Murphy as a witness during trial. (R1076) The appellant waived any Richardson violation. (R1084)

The appellant objected to the state's direct examination of Captain Gehlbach: "Are you aware of witnesses who have placed a small caliber pistol in the defendant's possession"; Overruled. (R1273) The appellant objected to the question to the victim's wife as to whether she knew the terms of the sale of her husband's car. (R1376) The trial court allowed the testimony as a state of mind hearsay exception. (R1376) The appellant objected to Captain Gehlbach testifying as to whether appellant and Timothy Bryant voices are similar as to being outside the witnesses' ability. (R1510) The appellant made a Motion for Mistrial for testimony that pictures of appellant offered into evidence were taken while the appellant was at the jail. (R1555) There was a further objection to the introduction of the photographs of appellant and Timothy Bryant. (R1557)

The State rested. (R1836) The appellant moved for a Judgment of Acquittal which was denied. (R1836) The jury returned a verdict of guilty as charged to both counts. (R2589) The appellant renewed all previous objections. (R2610)

During the charge conference and penalty phase, appellant objected to the jury being instructed on the financial gain and cold, calculated and premeditated aggravating factor. (R2565; 2567) The trial court also denied appellant's requested penalty phase instruction number 2, 3 and 6. (R2573,74) The appellant objected to the jury instruction of the prior violent felony aggravating factor. (R2726,27) The jury returned a death recommendation by a vote of 8 to 4. (R2744)

The appellant made a Motion for New Trial based upon the discovery of new evidence and jury misconduct. (R2756) The trial court denied the Motion for New Trial based upon the lack of credibility of the witness. (R3021) The trial court sentenced the appellant to death on Count I and forty years to Count II consecutive to Count I. (R3027-3031)

STATEMENT OF THE FACTS

On the evening of June 12, 1996 at approximately 9:20 p.m., Jeannie and Ben Allicock were traveling in their car down Griffin Road in Leesburg. (R860-61) Jeannie Allicock saw a female on the side of the road waiving for help and they stopped. (R863) Jean Allicock saw a lady with blood all over her. (R864) Jeannie Allicock grabbed a towel and followed with another passerby to a car down the road. (R865) At the car, Jean Allicock observed a man inside not responding to anything. (R866) They put the seat back in the car and placed the towel behind the man's head to relieve pressure. (R867) The passerby that helped Jean Allicock was an Afro-American female. (R869)

Benjamin Allicock stayed with the woman on the side of the road. (R875) The woman was bleeding profusely from the face area, so he called 911 for an ambulance. (R875) The lady kept repeating "Terry did this...Terry did this." (R876) Ben Allicock asked the woman what she was doing there that evening. (R877) The woman told Allicock that she was shot down by the ally way by Terry during a car deal. (R883) Terry had called up and asked to meet them there, and there was a discussion about money then the shooting. (R883)

Officer George Whittaker received a radio call at 9:30 p.m. to go to an area near Griffin Road. (R890) When Whittaker arrived, one lady said some people got shot. (R891) Whittaker observed one lady in the back seat of a car getting medical attention. (R891) A lady also said there was another person down the road sitting in a car. (R891) Whittaker proceeded down a dirt road and observed a car with an elderly white male behind the steering wheel unconscious and apparently shot. (R891) Whittaker searched the area with a flashlight and he found four or five cartridge casings scattered about the rear passenger door, and noticed that

the rear passenger door handle was pulled out of the panel. (R892,93)

EMT Wilbanks was dispatched to the scene, and upon arrival he encountered a woman in the roadway with bystanders. (R903) The woman was awake, alert, and had been shot. (R904) The woman (Pamela Langford) stated she had not lost consciousness and had no trouble breathing. (R904) EMT Johnson assisted Wilbanks, and was directed to the care of Pamela Langford. (R909) Langford said she was shot by "Terry." (R910) Langford appeared alert and orientated during this period. (R910-12)

Dr. Clifton Bridges was summoned to the hospital to see Pamela Langford. (R216) Langford had sustained two small caliber gunshot wounds with entrance wounds to the right side of the neck. (R217) One missile traversed the neck and exited just below the right cheek. (R217) The other missile entered the right side of the neck, traversed the soft tissue and exited the mouth. (R217) Dr. Bridges administered Demerol and Fenogrin. (R219) Demerol is a narcotic and Fenogrin is used for nausea. (R221) Langford was given Demerol at 4:30 a.m. and 7:30 a.m. the morning after the shooting. (R224) The narcotic effect of Demerol peaks within 30 minutes and then tapers off over a period of several hours. (R226) Langford did not sleep until 3:30 a.m. The lack of sleep combined with Demerol effects mental acuity. (R228)

Dr. Janet Pillow, a forensic pathologist, performed an autopsy on Clarence Langford. (R934) Langford had three gunshot wounds of entrance to the head. (R935) One wound to the right cheek; one shot behind the right ear; and one shot entered the right side of the back of the head. (R935-936) One bullet stopped into the scalp on the left side of the head and was recovered. (R936) Each of the wounds were consistent with each other and came from a small

caliber weapon. (R936)

Blood test of Langford's blood showed that his blood alcohol was .03 percent. (R938) Dr. Pillow had no opinion as to whether the shooter was right or left handed. (R943) It was unlikely that a gunman got blood on themselves or their clothing due to the size of the wounds and the area of the body where the wounds were inflicted on the victims. (R944) Moreover, Dr. Pillow could not determine which shots were fired first. (R951) Further examination of Mr. Langford showed no stippling or gunshot residue on Mr. Langford meaning that the shots were fired at a distance of over 12 to 18 inches away from his body. (R961-963) Dr. Pillow admitted that the woman seated on the passenger seat was short and the car had a tall head rest. It was more likely the shooter was right handed. (R966) However, not knowing the way each person was looking, the way the seats were positioned, and exactly where in the backseat the shooter was at the the time of the shots, Dr. Pillow could not say which side of the head rest the bullets traveled before they struck Mrs. Langford's neck. (R967)

Deputy Terry Allen was a crime scene technician called to the scene of the shooting. (R972) Allen processed the vehicle for fingerprints. (R979) Allen found two .25 caliber bullet cartridge cases in the back of the car, and four outside the passenger's side rear door. (R981-983) Allen also removed five spent projectiles from inside the vehicle. (R984) Allen did not find any usable fingerprints inside the automobile. (R985) The Langford vehicle was found on a dirt road 317 feet from Griffin Road. (R988) The shots were fired from the backseat of the vehicle. (R1027) Crime scene technician Ron Shirley lifted a latent fingerprint from the roof above the front door of the car. (R1049) A Negroid hair was found in the backseat of the Langford car. It was a female hair not belonging to Woods or his family. (R

234)

The day after the murder, Officer Petrowski observed Woods riding a red bicycle in downtown Leesburg at 11:20 a.m. (R1057) Woods was wearing a white v-neck t-shirt, black shorts and a lot of gold on his neck. (R1058) Woods rode within eight to ten feet and Petrowski said "Hello"; Woods made eye contact with Petrowski but did not say anything. (R1059) Woods kept riding in the direction of the Police Department, made no attempts to avoid the police and made no sudden movements. (R1060-67) Petrowski saw Woods 15 minutes later. Woods had changed his clothes and was no longer wearing his jewelry. (R1063)

Officer Giles, an expert K-9 handler, tracked for a suspect. (R1086-92) Tracking conditions were ideal, and Giles found evidence of flight from the area. (R1095) Giles got his dog and started the track there about ten to thirteen feet south of the front of the Langford vehicle. (R 1097-99) The tracking proceeded across a grass field, then angled off at about a 45 degree angle and across the railroad tracks to the west side. (R1100) The track continued along the railroad tracks almost at the bush line. (R1100) The track led to the Chester Street area along several houses on the north side of the road. (R1104) The track crossed over McCormack Street and continued to the intersection of Beecher Street. (R1104) The track was lost at the intersection of Beecher and Johns Street near a parking area, grocery store, and small pool hall. (R1105) The loss of the scent was indicative of the subject entering a motor vehicle and leaving the area all at one time. (R1106)

Giles also participated in the search of Woods' house. (R1110) Woods' mother, Della Swan gave written permission to search the home. (R1110) Giles found no weapons or bullets

at the home. (R1112) Giles found a traffic citation issued Woods, a receipt dated April 1st, and a second receipt and a Bill of Sale for an automobile. (R1113-15) Giles also recovered clothing from Woods, none of which had the presence of blood. (R1120) Woods had been previously observed in the area where he had lost the scent from the crime scene. (R1120) Also, during the search of Woods' house, Della Swan stated that her son was home watching a basketball game at the time of the shooting. (R1132) Finally, while searching the home Giles observed that the Woods' mother was in the process of moving. (R1121) According to Giles, Woods' mother eventually moved to a home on McCormack Street five to seven doors down to where he had lost track of the suspect from the crime scene. (R1130) At the time of the murder, the house on McCormack Street had not been built. (R1131)

Captain Gehlbach of the Leesburg Police was lead investigator. (R1152) Gehlbach questioned Pam Langford at the hospital the morning after the shooting. (R1154-55) During the interview, Langford was in tremendous amount of pain. (R1157) It was difficult to talk due to the injuries to her mouth. (R1157) Gehlbach showed Langford a photo-lineup. (R1159) Langford seemed reasonably coherent and alert. (R1160) After the interview with Langford, Gehlbach put out a BOLO for Woods. (R1159) Gehlbach questioned Langford again on June 18th and extensively on June 26th. (R1162) On both dates, Langford showed more mental alertness and was able to bring out more details of the shooting. (R1162)

After his arrest, Woods cooperated with the police and state attorney's office. (R1166) Woods admitted he left the house two times the day of the shooting. (R1167) He left his house at 9:00 a.m. to get toilet paper and 9:00 p.m. to use the pay phone to call his sister, Georgia. (R1168) The call to his sister Georgia lasted fifteen minutes. (R1168) Woods

admitted that he knew the Langfords and that he was buying an older Chevy Bellair from them. (R1168) Woods also described an incident where the Bellair was returned to the Langfords. (R 1169) Mrs. Langford became very upset during this incident and used the "F" word. (R1169) Woods also assured police that his family would verify that he returned home to watch the basketball game that started at 9:15 p.m. (R1168)

Months after his arrest, Woods contacted Captain Gehlbach to speak with him without attorneys present. (R185) The purpose of the discussion was to provide further information about Timothy Bryant concerning the homicide in Winter Garden. (R1207) Woods saw Bryant a week and a half after the Winter Garden murder. (R1207) They drove off to Bryant's father's house to retrieve weapons. (R1189) Bryant told Woods that he needed the .38 caliber handgun and a little silver handgun, type unknown, because "somebody tried him." (R1207) After picking up the weapons they left Bryant's father's house and went to Tampa to pick up Woods' daughter. (R1208-9) While leaving Tampa there was a minor incident of Bryant pulling away in the vehicle to quickly which Bryant explained as being paranoid of the police nearby. (R1208) During the trip, Bryant began polishing a small silver automatic pistol, and playing with it in the backseat. (R1211) Bryant's girlfriend told him to quit playing with the gun, it might go off. (R1211) Bryant said "Don't worry, he's a professional." (R 1211) When the group got back to Leesburg, the pistol fell out of Bryant's pocket. (R1211)

Woods also stated he also saw the little silver gun in Bryant's possession two weeks before the trip to Tampa. (R1212) Bryant said he was going to get Langford because Langford owed him for an ounce. (R1213) Langford would come down Pine Street crediting for dope from people saying that they were going to pay them back. (R1222) Woods knew

that Bryant did the shooting because Bryant had told him he did it because Langford owed him money for dope and the "man" did not come clean. (R1222) Langford's hair was tested for evidence of drug ingestion. (R1832) The testing ruled out chronic and repetitive use of drugs. (R1832) The test however could not detect infrequent drug use. (R1832)

In jail Bryant would ask Woods if he had heard anything about Leesburg. (R1222) Bryant would specifically ask if he felt they were going to find the gun. (R1222) Bryant's confession in jail was overheard by another inmate named Dewayne Jones. (R1232) At the jail, Bryant would ask Woods if they thought they were going to find the gun. (R1222)

Captain Gehlbach admitted that he did not interview Woods' alibi witnesses, principally his brother and sisters or the neighbor Phil Harris. (R1237) He further admitted that he did not get around to talking to Dewayne Jones until February of 1997 because he could not locate him. (R1232) Captain Gehlbach also admitted he forgot to put in his reports that Woods claimed to have called his sister Georgia at the time of the murder. (R1247) These investigative short comings were because Gehlbach was satisfied that Woods was the shooter based upon the statements made by Langford. (R1254)

Woods assisted Officer Carter in a criminal investigation in Winter Garden. (R 1293) Woods wore a covert wire on two occasions during discussions with Timothy Bryant. (R1293) Woods wore a wire on June 3, 1996 to help determine the weapon used in the homicide. (R1293) Woods had initially contacted the Winter Garden Police after seeing a sketch of a murder suspect on Channel 2 News that resembled Timothy Bryant. (R1294) The suspects in the Winter Garden shooting were Timothy Bryant and Robin James. (R1300) A .380 caliber automatic handgun was used in the Winter Garden homicide. (R1300)

The .380 caliber gun used in the Winter Garden homicide was produced by Timothy Bryant's father for the Winter Garden police. (R1302) Officer Carter followed Bryant's father to an area north Yalaha. (R1302) While Carter waited in a secluded wooded area, Bryant's father returned with the .380 handgun with dirt and water on his left leg as if he had been digging something up. (R1302,3) Carter did not know if anything else was buried with the .380 handgun. (R1303) Timothy Bryant and Robin James both blamed Woods for the Winter Garden homicide. (R1303) However, Bryant's girlfriend Karen Gilmore, initially provided an alibi for Bryant, then recanted it and indicated that Bryant had participated in the Winter Garden homicide. (R1304) The .380 handgun recovered by Bryant's father was the gun used in the Winter Garden homicide. (R1305) Bryant's father requested that the fact he gave up the gun to police not be made public because he feared reprisals from Bryant's associates, criminal elements in Leesburg and Yalaha. (R1308-09)

Georgia Mae Thompson is the older sister of Woods. (R1313) The night of the shooting, Thompson arrived at her mother's apartment on Mike Street at 6:00 p.m. with her young daughter. (R1314) She stayed at the house for two hours. (R1315) When she arrived at the house, Woods was there. (R1316) Thompson first watched television and then went out on the porch with her mother. (R1316) Woods had left the house for 3 or 4 minutes and then returned while Thompson and her mother were sitting on the porch. (R1316) Thompson left her mother's house at 8:00 p.m. by taxi cab. (R1316) Thompson did not receive any telephone calls from her brother the night of the shooting. (R1318)

Lake County Sheriffs and Leesburg Police Officers searched Timothy Bryant's father's residence property with a metal detector for weapons. (R1320, 1325, 1328) The search

occurred with the consent of Timothy Bryant's father. (R1328) During the search there were signs that things had been dug up recently. (R1320-21) During the search they did not find a gun or ammunition. (R1321)

Clarence Langford was a retired customs official from Miami who liked to tinker with cars in his spare time. (R1338) He would buy a car, fix it up, use it and then sell it. (R1338) Friends and family called him "Matt." (R1336) At the time of the shooting Pamela Langford owned a Taurus station wagon, and Clarence owned a blue Mazda and a white Chevrolet. (R 1338) Langford got the Chevrolet in Alabama, and he never changed the registration because he was restoring the car for the past two years. (R1339)

In March of 1996, Mrs. Langford pulled up to the house from grocery shopping. (R1342) Mrs. Langford observed her husband, her grandson and a young black man looking at the Chevy. (R 1342) Langford said this man is "Terry" and he is interested in buying the car. (R1344) The grandson Louie liked the car very much and began to cry when he realized that they had planned to sell the car and Louie's father Kevin went out to see what was wrong. (R1348) Clarence Langford decided to sell the car to Terry for $1,000.00 because Terry was such a nice young man and was really keen on the car. (R1349)

The agreement was to sell the car to Woods on installments. (R1350) Woods came back to the house on several occasions to make payments on the car. (R1351) He would come to the front door and ask for "Mr. Matt". (R1351) No one other than Woods called Langford Mr. Matt. (R1351) On one occasion Woods came to the house with a white girlfriend who had a van. (R1353) Whenever Woods made payments, Langford gave him receipts. (R1354)

Woods took possession of the car while the title was being changed in Tallahassee.

(R1356) Langford kept the car key to insure that Woods did not drive the car until the title was changed. (R1357) One evening Pamela Langford received a call from the police about the car. (R1357) The Langfords then went to a small street off Main Street where the car was located. (R1359) Woods was there, and was laughing and talking to police officers. (R1360) Clarence Langford returned home with the Chevy that evening, and he parked it in the driveway and moved his son's truck behind the car. (R1365) Later that evening at about 10:00 p.m., Woods began banging on the front door of the Langford home demanding the car. (R1366) Clarence Langford told Woods that he could not have the car until the title was changed. (R1366) Woods got extremely angry, and said that if he could not have the car now he wanted his money back. (R1367) Langford said he would give his money back when the bank opened on Monday. (R1367) Woods became more angry, began cursing and then stated "I'll get you old man." (R 1367) This scared Pamela Langford and she dialed 911. (R1367)

On Monday morning Clarence Langford went to the bank and withdrew $700.00 from the bank. (R1367) Woods returned to the house that afternoon to collect his refund. (R1369) Langford let him into the house, and Woods was very apologetic for his action the other evening. (R1369) Woods said he had been drinking. (R1369)

A few weeks later Woods contacted the Langfords. (R1376) After the call, Clarence Langford stated the car deal was on again, and Woods wanted to buy the car. (R1376) Langford told Woods that when he had all the money to come and let him know. (R1376) Woods called the Langford home the following week to see if the title had come from Tallahassee. (R1377) Pamela Langford had no trouble recognizing Woods' voice because his voice was very distinctive. (R 1377)

On a Tuesday, Woods stated he had the money, but the title still had not come from Tallahassee. (R1377) Woods stated that he did not want to keep the money because he was afraid he might spend it or his girlfriend might spend it. (R1377) Woods would pay the money immediately and have Langford sign a Bill of Sale. (R1378) Woods further arranged to have a notary public ready whom he had paid $10.00. (R1378) Woods wanted to meet that evening at 9:00 p.m. (R1378) Mrs. Langford suggested that they meet the next morning at the bank with the bank notary. (R1379) Woods refused and insisted that they meet me at 10:00 p.m. at the Library. (R1379) Clarence Langford said no way and the meeting was canceled. (R1380)

On Wednesday Woods called again. (R1380) He insisted that both Langfords sign the Bill of Sale. (R1380) Mrs. Langford told Woods that she believed that her husband could handle it alone. (R1380) Woods insisted that they both come and sign the document. (R1380) Pamela Langford did not want to go to the Library and meet with Woods that evening, but her husband insisted stating "Oh come on you know we might as well go, let's get it over and done with, we can get there and back in a half hour." (R1382) Woods called the house around 7:00 p.m. and arranged to meet at the Library at 9:00 p.m. (R1382-83)

The Langfords went to the Library in their Mazda and arrived before 9:00 p.m. (R1383) The Langford's waited a few minutes then Mr. Langford went into the Library looking for Woods. (R1384) Langford came back to the car and sat down inside. (R1384) Woods then approached from the front of the car. (R1384-85) Woods then came to the driver window and Mr. Langford said get in. (R1385) Woods then walked in front of the car past Pamela Langford in the passenger seat and got in the right passenger seat back door. (R 1385)

Woods said "Hi" and Clarence Langford said which way. (R1386) Woods asked "Where is your grandson tonight." (R1388) Pamela Langford said in Orlando with his mother. (R1388) Woods then said what is he going to do when he knows I have the car? (R1388) Langford replied he is not going to be very happy. (R1388) Woods then said he had the money "$1,100.00 big ones." (R1389) Woods asked what we were going to do with all of that money, and Langford replied deposit it in the bank until the title comes. (R1389)

They proceeded down Griffin Road. (R1406) Woods then directed the car to turn left off of Griffin Road onto a dirt road. (R1406) Clarence Langford asked why are we turning here. (R1406) Woods stated because his girlfriend lived down at the end of the road. (R1406) The road was bumpy and full of pot holes. (R1407) At one point Langford stopped the car and said he could not drive any further on this road. (R1407) Woods insisted stating that he could drive on the side of the road. (R1407) Clarence Langford said no way. (R1407) During this period Mrs. Langford stated she got a good look at Terry Woods, and that he was wearing a black t-shirt and white shorts knee length. (R1408) Woods then said he supposed he could get out of the car and go get his girlfriend and come back. (R1408) Pamela Langford then felt like there was a big explosion in her head. (R1409)

Pamela Langford next looked out the windshield and she could see Terry Woods running down the dirt road directly in front of the car in the same direction the car was pointed. (R1410-11) Langford then pressed the car horn for help then stopped fearing that Woods would hear it. (R1412) Langford then grabbed her purse and got out of the car and walked toward the lights on Griffin Road. (R1412-13) When Langford got to Griffin Road she flagged down cars. (R1413) A Van stopped and a lady asked what was wrong. (R1413)

Langford said she was shot. (R1413) Police officers asked Langford who had shot her and she said it was Terry Lewis but she could have been mistaken on the correct name. (R1428)

At the time of her interview the next morning by police she was confused and upset. (R1430) During the photo lineup interview she stated "I think it is number two, but I won't (inaudible) absolutely positive." (R1451) When asked if her glasses could help, Langford stated "It might, I don't know, because every time I have seen him, its been dark, you see; and I have only seen him once in the daylight and that was at a distance, its hard to be positive, you know." (R1452) At the photo lineup, Langford identified the appellant as the man who murdered her husband. (R 1461)

Langford admitted that when Woods approached the vehicle at the Library she did not notice any bulging around his waistband or a pistol or anything sticking out of his waist or pants. (R1481) She also stated that she had trouble making an identification at the hospital because she was very confused at the time. (R1486) Langford's daughter Melinda came to the hospital at about 3:00 a.m. to see her mother. (R1495) Melinda Langford stated that her mother would be intelligent and seem like herself and the next minute she would be real giddy like a little girl. (R1496) Sometimes Pamela Langford knew who her daughter was but other times she acted funny. (R1496)

Kevin Langford is the son of Clarence and Pamela Langford. (R1504) Kevin Langford met Woods at his house and talked to him on the phone. (R1504) Kevin Langford identified Woods as the man who had tried to buy the car from his father. (R1504)

Captain Gehlbach interviewed Timothy Bryant and Woods and listened to the tones of their voices. (R1508,9) In Gehlbach's opinion, Woods' tone of voice doesn't sound anything

like Timothy Bryants' tone of voice. (R1510) Timothy Bryant was brought into the courtroom in view of the jury. (R1511)

Pamela Langford testified that Woods approached the library on the street from in front of the Langford vehicle; however, if Woods had come from his house he would have approached from the opposite direction. (R1518) However, if Woods or someone else was coming from Timothy Bryant's apartment to the Library, they would have approached the vehicle in the same way as Pamela Langford had testified. (R1520)

Officer Hales made a traffic stop of Woods in May of 1996. (R1522) Woods was driving Langford's car, and dispatch called Langford to the scene. (R1522,24) Langford told Woods that he did not have permission to drive the car. (R1524) Officer Hales issued Woods a traffic citation, and Langford took the car back to his house until he got the rest of the money for the car. (R1524)

Wendy Farley was the reference librarian at Leesburg Library. (R1532) On June 12, 1996 the Library closed at 9:00 p.m. (R1533) Prior to closing, a man in his sixties was there waiting for someone. (R1534) Farley did not see Woods at the Library that evening. (R1535)

Sheila McBee is a fingerprint analysis for the Lake County Sheriff's Office. (R1558) There were 8 fingerprints found on Langford's vehicle. (R1566) Two of the fingerprints belonged to Clarence Langford. (R1567) None of the fingerprints belonged to Woods or Timothy Bryant. (R1568) The six other prints were not big enough to enter into the FDLE automated fingerprint identifying system. (R1570)

Timothy Bryant's father, Charles Banks, bought a .380 handgun from Bryant for $70.00. (R1584) A couple of days later, Timothy Bryant arrived at the house in a white van

with some friends. (R1585) Timothy Bryant wanted the weapon back. (R1585) Bryant said he was borrowing the gun to loan to his friend, pointing to Woods. (R1589) Banks gave the gun to his son Timothy Bryant with ammunition. (R1607) Banks denied ever having a .25 caliber gun nor burying a gun for his son. (R1615) Banks denied that his son had said he needed the gun because someone had tried him. (R1617) Banks was questioned as to what associates of Timothy Bryant was he afraid of. (R1629) Banks answered that he was afraid of the Woods' brothers. (R1629)

Mac Harris was a friend of Woods. (R1634) About a week and a half before the shooting, Woods had asked Harris where he could get a gun. (R1636)

The Tsai family owned the Candlelight Motel. (R1648) Around the time of the shooting, Woods came to the Motel to make a Bill of Sale. Wesley Tsai's asked his daughter Jamie Tsai to make the Bill of Sale for Woods. (R1652,66) Subsequently, Tsai saw Woods with a gun that was the same size as a .25 caliber automatic. (R1655,61,66) After Woods got the Bill of Sale, Tsai saw Woods put a little piece of paper and put the Bill of Sale altogether then use a pen, watched him go and write on the paper and say its good and then he would take and copy again. (R1670-71) According to Mr. Tsai, the demonstrative .25 caliber automatic seemed to be the size of the gun that Woods had that day. (R1674) Mr. Tsai had observed Woods put a small piece of paper on top of the Bill of Sale, then trace over the Bill of Sale, then he followed the lines over with a pen. (R 1675)

Anthony Archabay had a small vehicle repair shop. (R1677) On May 30, 1996, Woods asked Archabay if he was a notary. (R1677) Archabay stated that his brother Albert was a notary. (R1677) Woods then produced a paper that needed to be notarized. (R1679)

The paper had already been signed. (R1679) Archabay refused to notarize the document without the person who signed it present. (R1680)

Days before the shooting, Woods visited Greg Markland at Fiero Concepts. (R1718) Woods asked if Markland wanted to buy a gun. (R1719) Markland looked at the gun and said he was not interested. (R1719) Woods stated the gun was a .25 caliber. (R1720) Woods had also asked Markland if he knew a notary, and Markland said that when he needed a notary he went to the Library. (R 1722) Sammy James was with Markland, and also saw Woods with the small caliber automatic handgun at Markland's office. (R1738,41)

The day of the shooting, Woods visited the home of Willie Adkins. (R1751) During the visit, Woods had a small gun in his waistband with a clip in it. (R1752) That night, Adkins saw a news report of a shooting of a couple in Leesburg. (R1752)

James Walls is an expert forensic documents examiner. (R1778) In Walls' opinion, Langford probably did not sign the Bill of Sale. (R1783) There was indications of a traced signature or a simulated signature. (R1783) Langford's signature was misspelled because there was a misinterpretation of the letter design in the first name. (R1790)

DEFENSE CASE

Dewayne Jones was in the Lake County Jail from May, 1996 to January, 1997, and was in the same cell block as Woods. (R1867) Jones overheard a conversation between Woods and Timothy Bryant. (R1870) Bryant told Woods "he wouldn't worry about it because they weren't going to find the 2-5." (2-5 is a slang term for a pistol). (R1870-73)

Antoine Jones testified as an eye-witness to the crime. (R1885) Jones had previously been convicted of 12 felonies. (R1885) According to Jones, Timothy Bryant shot the two

white people by the railroad tracks. (R1886) Jones was in the bushes at the time of the shooting. (R1887) Previously, Jones told police that he saw Woods with a gun at his house. (R 1891) Jones denied telling police that he had told them that Woods was going to kill somebody. (R1891) Jones admitted telling police he saw Woods with a gun three days before the shooting. (R1893) Jones further admitted telling the police that he was at his girlfriend's house the night of the murder and did not see the shooting. (R1895) Jones also admitted telling police that someone wanted him to go to the police department and lie for Woods. (R 1896) Jones said it was Woods' mother that wanted him to lie. (R1896) Jones admitted previously stating under oath that he did not see any shooting. (R1897) Jones also admitted telling police that Woods' brother James had told Jones that Timothy Bryant did it. (R1899) Jones also said that weeks before the trial, Jones made a sworn statement before Judge Locket admitting that he was lying when he said he saw the shooting. (R1905)

Jeffrey Mulholland supervised Woods' brother Jerry Ellis, as a client at the Lake County Boys Ranch. (R1916) Jerry Ellis had a 7:00 p.m. curfew, and Jerry Ellis' mother Della Swan called Mulholland the night of the shooting reporting that Jerry Ellis had broke the curfew. (R1919) Mulholland was on the phone with Della Swan for twenty or thirty minutes when she then put Jerry Ellis on the phone. (R1919) Mulholland got off the phone with Jerry Ellis at about 8:50 p.m. (R 1919)

The night of the shooting, Alicia Hill was looking for her friend Erica around the railroad tracks. (R1926) Hill had stopped by the tile supply store on Griffin Road and walked on the railroad tracks north towards K-Mart. (R1930) Hill found Erika and while getting into the car, she noticed a car making a complete stop and two guys running around it. One got on

a bicycle and the other jumped in the back seat of the driver side of the car. (R1932) The car went straight ahead and the bicycle made a turn on Beecher Street. (R1932) Emergency vehicles arrived in that area four or five minutes later. (R1933) They then proceeded to Erika's house on McCormack Street and saw Antoine Jones hiding in the bushes. (R1934) Hill later kidded Jones about shooting the white lady and Jones became nervous and said Timothy Bryant did it. (R1937) Jones told Hill he had come to the bushes at his grandmother's house after running from the bushes by the murder scene. (R1950)

Jerry Ellis was with his brother Terry Woods at the night of the shooting. (R1953) The evening of the shooting Ellis was dropped home and saw his mother at a pay phone twenty yards from the apartment. (R1955) Ellis' mother put him on the phone with Mulholland. (R1955) Ellis' mother then went home. (R1955) Ellis talked to Mulholland from 8:15 to 8:45 p.m., and then went home. (R1955) When Ellis arrived home, his mother was ironing, his sisters were watching television, and Woods was in his room with his daughter. (R1956) Ellis watched the basketball playoff game, and Woods stayed home the entire night. (R1957)

Dr. Karen Estill performed clinical testing on Woods. (R1980) According to Estill, Woods did all his writing and testing with his left hand. (R1981) Arnetha Swan is the eight year old sister of Woods. (R2015) Arnetha Swan had not talked to Woods since his arrest. (R2016) According to Swan, the night of the shooting Woods was at home. (R2017) That night, Woods' daughter Quanteri bumped her head while they were playing around, and Woods took care of her. (R2020) They then watched the Chicago Bulls basketball game together. (R2020) Deenna Swan is the ten year old sister of Woods. (R2026) Woods'

daughter Quanteri bumped her forehead the night of the shooting while they were playing bugger man with Woods and her sister. (R2030) According to Deenna Swan, Woods stayed home the entire evening. (R2030)

Jesse Hardrick lived in the apartment next to Woods the night of the shooting. (R2037) That evening Hardrick heard Ellis Swan telling Woods to leave the little girl alone and that she was her grandchild. (R2037) Swan kept shouting out his name Terry, Terry leave that child alone. (R2037) Hardrick was sure it was Woods because Hardrick heard him. (R2038) Hardwick heard Woods at the house at approximately 8:00 p.m. in the evening. (R2038)

Della Swan Harris is the mother of Terry Woods, and she gave permission to the police to search the apartment. (R2060) The day of the shooting, Della Harris worked at the laundry while Woods watched the children. (R2067) Harris got home at 4:30 p.m. and pressed some laundry. (R2067) Harris' other son Jerry Ellis was late for his 7:00 p.m. curfew. (R2067) At 7:45 p.m., Harris called Ellis' counselor and reported the curfew violation. (R2067) Harris was on the phone with Jerry Ellis' counselor for 30 minutes. (R 2069-70) At 8:15 p.m. Ellis appeared and Harris put Ellis on the phone with Mulholland. (R2069) At 7:30 pm Harris' granddaughter Quanteri had bumped her head while playing bugger man. (R2072) After the call to Ellis' counselor, Harris returned to her apartment. (R2074) Woods was sitting on the couch with an ice pack on his daughter's head. (R2074) Harris examined the granddaughter, and told Woods to give her a bath and put her to bed. (R2074) Woods stayed home the rest of the evening kidding around with his brother Ellis and watching the basketball game. (R2076)

Prior to the shooting, Woods and Harris had seen sketches on television of suspects of

a shooting in Winter Garden. (R 2080) After seeing the one sketch that resembled Timothy Bryant, Harris said "God, that favors Terry." (R2080) After the sketches were on television, Woods contacted the Winter Garden Police. (R2082) Harris denied telling police the night of the shooting she had dozed off a little bit to ease a headache and was awakened when the basketball game began. (R2104)

STATE REBUTTAL

According to Captain Gehlbach, during all of his interviews with Woods he consistently denied that he ever possessed a gun. (R1835)

Mary Murphy is an Orlando Sentinel crime reporter. (R2116) She heard police radio traffic of a shooting, and went to the scene shortly before 11:00 p.m. (R2117) Murphy was then approached by someone and asked what had happened because he had been at his girlfriend's house all night. (R2120) Murphy told him that two people had been shot. (R2120) The person replied "they are dead, right." (R2121) Murphy replied "no they're not." (R2121) The person replied "right" or "yeah" then smiled and walked off. (R2121) Murphy felt that these comments were peculiar and attempted to follow the person. (R2121) Murphy identified Woods as the person she had talked to at the scene. (R2121) Murphy was questioned about her identification of the appellant and stated that she did not remember Woods having a mustache or a goatee the night of the shooting. (R2139) The picture of Woods taken the day after the shooting showed a mustache and a goatee. (R2139) According to Murphy, Woods had the smell of bathing soap. (R2141)

PENALTY PHASE

Dr. Karen Estill is a licensed clinical psychologist who performed testing on Woods.

(R2626) According to Estill, Woods has an IQ of 77, or the borderline of intellectual functioning. A person with an IQ of 70 or below is considered to be mentally retarded. (R2629) Woods also took a WRAT test for academic achievement. Woods had sight reading on the high school level; spelling on the 4th grade level; math on the 3rd grade level. (R2632) According to the Beck Depression Inventory, Woods does not suffer from depression. (R2633) Other testing demonstrated that Woods is somewhat insecure and has low self-estem. (2633) Moreover, Woods could be deceptive, unwilling to acknowledge psychological problems and distress. There was no indication that Woods is a psychopath or sociopath. (R2637)

During school, Woods was enrolled in specific learning disability classes. Woods was immature for his age. School officials diagnosed Woods as suffering from mental retardation and Attention Deficit Disorder. (R2640,42) Woods reported a great family upbringing, and indicated great remorse for his past action. (R2646)

Woods' brother, Jerry Ellis, testified that Woods has been a positive influence in his life, and has encouraged him to stay in school. (R2675) Woods' mother, Della Harris, testifed that Woods is one of eight children. Woods' father left in 1979, and Harris had to work to support all the children, sometimes working two jobs. (R2678) Woods dropped out of school because he was a little slow and could not keep up. Other children would laugh at him. (2680) Woods is a loving and caring father to his daughter. (R2682)

SUMMARY OF ARGUMENT

Point I:

The trial court erred in denying Woods' Motion for Judgment of Acquittal where the state failed to prove premeditation beyond a reasonable doubt.

Point II

Appellant's death sentence is disproportionate, excessive, and inappropriate, and is cruel and unusual punishment in violation of Article 1, Section 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution. There was two aggravating factors balanced against one statutory mitigating factor and seven non-statutory mitigating factors. Based upon other cases reviewed by this Court, this case is one of the more mitigated and least aggravated murders.

Point III

The trial court erred by denying Woods' Motion for New Trial where Woods presented newly discovered evidence of his innocence. There was a reasonable inference from the evidence that there was a conspiracy to murder Clarence Langford. The newly discovered evidence was in support of that inference and therefore required a new trial.

Point IV

The trial court improperly balanced the aggravating factors against the mitigating factors. There was two aggravating factors balanced against one statutory mitigating factor and seven non-statutory mitigating factors. The trial court should have found that in balancing these factors, a life sentence was appropriate.

Point V

The trial court erred in instructing the jury that, in determining what sanction to recommend, it could consider whether the murder was committed for pecuniary gain, thereby rendering the death sentence unreliable under the Eighth and Fourteenth Amendments.

Point VI

The trial court erred in finding that the murders were committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification where the finding is unsupported by the evidence.

Point VII

The trial court erred by permitting improper hearsay evidence over appellant's objection. The state of mind exception to the hearsay rule does not contemplate testimony concerning the business arrangements of the decedent.

Point VIII

Woods' death sentence, which is grounded on a bare majority of the jury's vote (8-4) is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT I

THE TRIAL COURT ERRED IN DENYING WOODS' MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PROVE PREMEDITATION BEYOND A REASONABLE DOUBT.

Woods has repeatedly claimed his innocence.[1] At trial, alibi witnesses testified under oath that Woods was at home the time of the murder. Additionally, witnesses came forward and testified that they witnessed Timothy Bryant commit the murder, or that Bryant had knowledge of the murder. Finally, weeks before the murder Woods contacted the police after seeing a sketch of murder suspects. One of the suspects resembled Timothy Bryant. Woods subsequently wore an electronic recording device on two occasions targeted at obtaining admissions from Timothy Bryant concerning a Winter Garden car jacking murder. The state's sole direct evidence of Woods' guilt is the eyewitness identification of the murder victim's wife. There is no direct evidence of premeditation.

At the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal. The trial court denied the motion. The appellant contends that the state failed to present sufficient evidence of premeditation to sustain the verdict.

This Court has the responsibility in this case to determine whether "there is substantial, competent evidence to support the judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). See also Troedel v. State, 462 So.2d 392, 399 (Fla. 1984). "Premeditation," a

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[1] Terry Woods participated in a truth verification examination conducted by Certified Truth Consultants, Inc.. This examination used Computer Voice Stress Analysis. Based upon the examination results, Woods was truthful in his denial of shooting Clarence Langford. (R122)

necessary element of first-degree murder, is a fully-formed conscious purpose to kill. Appellant recognizes that premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act. Assay v. State, 580 So.2d 610 (Fla. 1991). Whether a premeditated design to kill was formed prior to the killing is a question of fact for the jury that may be established by circumstantial evidence. Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon[2] used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Jackson v. State, 575 So.2d 181, 186 (Fla. 1991).

Terry Woods knew Clarence Langford. They previously had a disagreement concerning the sale of an automobile. The parties thereafter settled their differences. The eyewitness testimony of Langford's wife was no aid in trying to unravel the actions of the appellant. In fact, she never saw a gun or heard words that would explain appellant's actions. The state's theory is that the appellant committed the murder to prevent the victim from disputing the appellant's title to the vehicle. The trial court dismissed this theory holding that "An equally plausible hypothesis is that the victim was killed as a result of an angry dispute arising out of the sale of the vehicle." (R980)

Therefore, the evidence in this case fails to exclude a "heat of passion" killing and therefore would support, at most, a conviction of second-degree murder. See, Forehand

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[2] The gun in this case was a small caliber handgun.

v. State, 126 Fla. 464, 171 So. 241 (1936). In order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Ross v. State, 474 So.2d 1170, 1173 (Fla. 1985). If the State seeks to prove premeditation by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. See, Tien Wang v. State, 426 So.2d 1004, 1006 (Fla. 3d DCA 1983).

Tien Wang demonstrates the heavy burden that the State must carry on the matter of premeditation. Even though witnesses saw Tien Wang chase the victim down the street, strike him repeatedly, and the victim died, the appellate court held the evidence as to premeditation to be insufficient. The court acknowledged that although the testimony was "not inconsistent with a premeditated design to kill," the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill **without** any premeditated design." 426 So.2d at 1006. (Emphasis added). In Appellant's case, the State also failed to exclude the reasonable hypothesis that Woods intended to kill Langford without the requisite premeditation.

Florida law is filled with similar cases where appellate courts have found the evidence of premeditation to be insufficient. See, e.g., Rogers v. State, 660 So.2d 237, 241 (Fla. 1995) [victim grabbed defendant's gun which fired during the struggle]; Jackson v. State, 575 So.2d 181 (Fla. 1991) [evidence was consistent with theory that store owner resisted robbery, inducing gunman to fire single shot reflexively]; Clay v. State, 424 So.2d 139 (Fla. 3d DCA 1982) [defendant stated her intent to procure firearm in order to shoot victim, but she was under a dominating passion and fear of victim]; and Smith v. State, 568 So.2d 965 (Fla. 1st

DCA 1990) [killing may have occurred in the heat of passion or without premeditation where unfaithful husband killed unfaithful wife]. This Court must examine the evidence presented and also conclude that the State failed to prove beyond a reasonable doubt and to the exclusion of every reasonable hypothesis that the Appellant premeditated the murder of Clarence Langford.

POINT II

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS 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, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (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, Sec. 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, Sec. 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, Sec. 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 Lockett found that the State had proved two aggravating circumstances: 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 (1995); and the murder was committed in a cold, calculated and premeditated manner Section 921.141(5)(I), Florida Statutes (1995). The prior violent felony aggravating circumstance was based on Appellant's contemporaneous conviction for attempted murder in the first degree, and the cold, calculated and premeditated aggravating circumstance was found from the trial court's determination that the murder was a culmination of a pre-arranged plan to lure the victim to a deserted place and shoot them without witnesses present. (R980) In mitigation, the trial court considered one statutory mitigating factor and seven separate non-statutory factors which were all given some weight. (R981-82) 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 least aggravated and one of the most mitigated of 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, 527 So.2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

LEAST AGGRAVATED; MITIGATION

This is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, 527 So.2d at 812. One statutory mitigating circumstance and seven nonstatutory mitigating circumstances were found by the sentencing judge, and were supported by testimony. The combined mitigating circumstances rendered the death sentence disproportionate. The sentencer found the non-statutory mitigating circumstances of borderline intellectual functioning (retardation), no prior history of violent conduct, and appellant assisted law enforcement in the investigation in a car jacking murder.

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 nonaggravated. 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 ultimate penalty, surely Mr. Woods 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; Terry Woods was not engaged in the commission of a felony at the time of the offense. Mr. Fitzpatrick had been previously convicted of violent felonies; Terry Woods has only the contemporaneous conviction of attempted murder in the first degree. Mr. Fitzpatrick established the existence of three statutory mitigating circumstances -- extreme mental or emotional distress, substantially impaired capacity to conform conduct, and age. Id. at 811 Woods established one statutory mitigating circumstance and seven non-statutory mitigating circumstances. Mr. Fitzpatrick's crime was significantly more aggravated than Terry Woods', 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." Id. 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 Terry Woods. 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." Id at 188.[3] In comparison, Terry Woods' case involved two aggravating circumstance, and one statutory mitigating and seven non-statutory 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 had a nonviolent history, and was happily married, a good worker, and a responsible employee.[4] 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, 524 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

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[3] 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.

[4] "The record also reflects that Mr. Proffitt had been drinking." Proffitt, 510 So.2d at 898. 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).

(alcohol) abuse. Rembert v. State, 445 So.2d 337, 338 (Fla. 1984); see also Proffitt, supra.[5]

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 U.S. 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 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.

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[5] This Court is careful not to sustain death when felony-murder 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).

Songer v. State, 544 So.2d at 1011.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that, "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

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, 574 So.2d 1079, 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 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, this Court 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

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. The jury vote was by a bare majority vote of 8-4. Four jurors, even though being improperly influenced by the pecuniary gain aggravating circumstance instruction, believed 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 COURT ERRED BY DENYING APPELLANT'S MOTION FOR NEW TRIAL WHERE APPELLANT PRESENTED NEWLY DISCOVERED EVIDENCE OF APPELLANT'S INNOCENCE.

Days after the jury's verdict, the appellant filed a Motion for New Trial alleging that there was new material evidence, that if introduced at trial would have probably changed the verdict.[6] (R721) The appellant disclosed that Cynqutte Denise Bryan was "a witness to the shooting and the Defendant, Terry Lee Woods, was not the person doing the shooting and that an individual by the name of Kevin did the shooting." (R721) A hearing on the Motion for New Trial was subsequently held before the trial court. (R2755-2899; 2931-3023) After hearing, the trial court denied the Motion for New Trial finding that the new eyewitness was not credible. (R902) The appellant asserts that the trial court erred in denying the Motion for New Trial.

In Jones v. State, 591 So.2d 911 (Fla. 1991), this Court stated the quality of evidence of evidence required to sustain a Motion for New Trial as follows:

> Upon consideration, however, we have now concluded that the Hallman standard is simply too strict. The standard is almost impossible to meet and runs the risk of thwarting justice in a given case. **Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.** The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed. (Emphasis added)

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[6] The appellant subsequently amended the Motion for New Trial alleging jury misconduct which is not addressed herein. (R839)

Jones, at 914. The appellant asserts that they have met their burden with the testimony of Ms. Bryan.

In the instant case, the jury was confronted with reconciling the testimony of eyewitness Pamela Langford and Alicia Hill. Although Langford did not actually witness Woods shoot anyone, her testimony placed Woods in the car with the victim from the Leesburg library to the time of the shooting off Griffin Road. Alicia Hill had stopped by the tile supply store on Griffin Road and walked on the railroad tracks north towards K-Mart immediately before the shooting. (R1930) At that time she noticed suspicious activity. Specifically, she noticed a car making a complete stop and two guys running around the car. One got on a bicycle and the other jumped in the back seat of the driver side of the car. (R1932) The car drove on straight ahead and the bicycle made a turn on Beecher Street. (R1932) Hill then proceeded to a friend's house on McCormack Street and saw Antoine Jones hiding in the bushes. (R1934) Hill later kidded Jones about shooting the white lady and Jones became nervous and said Timothy Bryant did it. (R1937) Jones told Hill he had come to the bushes at his grandmother's house after running from the bushes by the murder scene. (R1950)

The significance of Hill's testimony that she saw Jones hiding in the bushes on McCormack Street is it collaborates the testimony of Officer Giles, the expert K-9 handler who tracked for a suspect. (R1086-92) Officer Giles testified that tracking conditions that night were ideal. With his dog, Officer Giles started the track about ten to thirteen feet south of the front of the Langford vehicle. (R1097-99) The tracking proceeded across a grass field, then angled off at about a 45 degree angle and across the railroad tracks to the west side. (R1100)

The track led to the Chester Street area along several houses on the north side of the road. (R1104) The track crossed over McCormack Street and ended in that vicinity. Hill, having no knowledge of Officer Giles testimony, placed Antoine Jones hiding in the bushes immediately after the shooting in the vicinity where Giles had tracked the suspect.

The jury no doubt struggled with this issue and with the alibi witnesses in their more than 12 hours of deliberations. By their verdict, the jury reconciled the inconsistent evidence against the appellant. If the jury believed the testimony of Bryan (eyewitness who testified that Woods was not the shooter), such testimony would probably have changed the verdict. The appellant is mindful of the case of Parker v. State[7], 641 So.2d 369 (Fla. 1994), and contend that the instant case is more analogous to the case of Jackson v. State, 646 So.2d 792 (Fla.App. 2 Dist. 1994).

In Jackson, the Second District Court reversed Jackson's first-degree conviction for consideration of Jackson's claim that his co-defendant's confession is newly discovered evidence. Jackson was convicted by a jury of first-degree murder in 1977. His judgement and sentence was affirmed in Jackson v. State, 359 So.2d 1225 (Fla.2d DCA 1978). Jackson then claimed that he learned that his co-defendant confessed to a fellow inmate in 1991 that he had framed Jackson for the murder. In reversing the trial court, the District Court held that:

> The trial court, in summarily denying the motion, failed to

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[7] In Parker, the week after the trial concluded Parker filed a motion for new trial alleging that a newly discovered witness saw a deputy shoot the victim. The court held a hearing on this allegation at which the new witness testified. After hearing the testimony and the parties' argument, the court denied the motion, holding that the testimony was "so inconsistent, incredible, uncredible, and unworthy of belief that it is in effect discarded in its entirety by the Court."

> properly address this claim. The standard for granting a new trial based on newly discovered evidence is that "the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." **The court must evaluate the weight of both the newly discovered evidence and the evidence which was adduced at trial in order to make such a determination**. (Emphasis added)

In the instant case, the trial court put great weight on the eyewitness testimony of Pamela Langford in sustaining the verdict. Any evidence that is contradictory to Pamela Langford's testimony would be viewed suspect by the trial court. The testimony of Alicia Hill was not contradictory to Langford's testimony. Moreover, the state never impeached the credibility of Alicia Hill. Her testimony was equally credible compared to Pamela Langford, and was suggestive of a conspiracy to murder Clarence Langford. Bryan's testimony further supported the conspiracy theory. After considering all the evidence, it was an abuse of discretion to deny the Motion for New Trial.

POINT IV

THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS.

The trial court's legal responsibility under its role as a sentencer is to make its own independent balancing of the case circumstances and to make its own decision on the appropriate penalty. In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) this Court outlined the Florida scheme as a five step process, each step an integral stage necessary to remove arbitrariness from the outcome as to who receives death and who does not. The first step is the evidentiary penalty phase hearing. Second is the jury's penalty recommendation. Third is the trial judge's decision as to penalty. Fourth is the requirement that the trial judge justify any sentence of death in writing. Fifth is the Florida Supreme Court's review.

The description in Dixon of steps three and four are the guideposts for the trial judge's role. Significant is that the perceived purpose of the Florida rule placing sentencing responsibility in the hands of the trial judge rather than the trial jury is to protect against those situations where a jury might inappropriately recommend death. The Supreme Court explained:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can

> no longer sentence a man to die, the sentence is viewed in the light of judicial experience.

Dixon at 8.

To a layman, any murder may seem especially atrocious, even if medical evidence indicates unconsciousness would occur within seconds of the gunshot wound. Likewise, the second and third shot fired, although in only a matter of seconds appears cold, calculating and especially heinous. To a layman, photographs of a deceased man would invite the emotions. The function of the Florida scheme is to guarantee that "the inflamed emotions of jurors can no longer sentence a man to die." The concept is to infuse the penalty decision with the light of judicial experience. It is the responsibility of the trial court "with experience in the facts of criminality...to balance the facts of this case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants."

The fourth step outlined in Dixon also aids in defining the trial judge's role as that of guarding against the unwarranted imposition of the death sentence. The fourth step required by Fla. Stat. 921.141, is that the trial judge justifies his sentence in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute. Dixon at 8.

The Court is well aware that a jury's recommendation is to be afforded great weight. That standard developed from Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), where

restrictions were placed on a trial court imposing death, despite a jury recommendation for life. While a death recommendation should also be given serious consideration, the consideration is not of an equal nature with that to be given the life recommendation. This Court addressed this distinction in Thompson v. State, 328 So.2d 1 (Fla. 1976):

> It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

The trial judge's authority to contravene the jury's recommendation is to protect defendants from lay overreaction in cases not appropriate for the death sentence, as decreed in Dixon. In the instant case, the jury's recommendation in this case was a bare majority of 8-4, that supports the likelihood that the vote was based on emotions, other inappropriate considerations or laypersons' inexperience, which is the pitfalls described in Dixon.

Inappropriate considerations that may have influenced the jury's vote include:

1. Inflamed emotions. Photographs of the deceased were sent to deliberations. Moreover, inflamed emotions by laypersons inexperienced in such matters can occur in any murder trial.

2. Prior Bad Acts/Collateral Crimes. The state made as a feature of the trial all the prior crimes and bad acts of the appellant. It was the prosecutor's argument that appellant's forgery of a Bill of Sale and possession of a firearm showed a common plan, scheme or design, and dangerousness to commit this murder. To compound the taint, the trial court wrongfully instructed the jury on the pecuniary gain aggravating factor, then the trial

court rejected the factor in the sentencing order. Although relevant evidence, its admission so highly prejudiced Woods' defense that the jury came back with this verdict.

Due to the above influences to the jury during the trial the penalty recommendation was based upon improper considerations, and the jury recommendation should be disregarded. This Court has held in several cases that a jury's recommendation may be seen as "tainted" and, therefore, not worthy of full credit. See, e.g., Trawick v. State, 473 So.2d 1235 (Fla. 1985).

IMPROPER WEIGHT OF AGGRAVATION

The trial court improperly found that aggravating circumstances exist in this case, improperly weighed them, and therefore the penalty is both disproportionate and unjust. Appellant incorporates arguments already made to the Court and here simply highlights important features and additional case authority.

(a) Prior conviction for felony involving threat of violence.

Appellant concedes proof of this circumstance but contends that the weight to be afforded it should be minor. Unlike the jury, this Court's experience in sentencing criminal defendants allow the Court to put these convictions in truer perspective, especially relative to other defendant's histories for violent felony convictions:

1. There was no prior violent incident in time.

2. The only other incident to occur in which a prior conviction for felony involving a threat of violence arose from this very incident the Court is charged to review.

Thus, the history of Terry Lee Woods fails to establish a pattern of violent criminality.

(c) Cold, calculated and pre-meditated

While the execution style shootings can demonstrate premeditation, there is no evidence that there was the "heightened premeditation" that is required for this aggravating factor. Any theories that he committed this homicide with reflection and planning to a heightened degree of premeditation is unsupported by the evidence. Due to the lack of evidence, it is equally plausible that these crimes were committed impulsively.

The evidence must prove beyond a reasonable doubt that the murder was committed with reflection and planning, a cold calculated manner without any pretext of moral or legal justification. Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Preston v. State, 444 So.2d 939 (Fla. 1984); and Jent v. State, 408 So.2d 1024 (Fla. 1981).

There must be a careful plan or prearranged design to kill as required in Rogers v. State, 511 So.2d 526 (Fla. 1987). There was no evidence of such a plan or design. A plan to kill cannot be inferred from lack of evidence, a mere suspicion is insufficient. Lloyd v. State, 524 So.2d 396 (Fla. 1988). The state's case was dedicated to providing motives for the murder upon which inferences could be drawn. The state's case specifically lacks any statements by Terry Lee Woods or others to explain this act. This lack of evidence insures that the fact-finder engage in mere speculation as to Woods' state of mind at the time of the murder. It is equally plausible that this murder was impulsive. Impulsive killings do not qualify for the premeditation aggravating circumstance. Rogers v. State, 511 So.2d 526 (Fla. 1987); Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 439 So.2d 1372 (Fla. 1983).

The Supreme Court has consistently opined that this aggravating circumstance is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). While the method of killing appears execution style, there is no evidence presented to aid the fact-finder as to what was Woods state of mind at the time of the killing.

MITIGATION

STATUTORY MITIGATION CIRCUMSTANCES

Appellant contends and the trial court found that the Age statutory mitigating circumstance has been proven to a "reasonably convinced" standard. The trial court gave this mitigating circumstance "moderate weight" due to the low intelligence and maturity of appellant.

NON-STATUTORY MITIGATION CIRCUMSTANCES

The trial court found that the seven specific non-statutory mitigating circumstances argued to the jury have been proved to a "reasonably convinced" standard. The trial court found the following non-statutory mitigating circumstances:

(1) The appellant suffers a learning disability;

(2) The appellant has borderline intellectual functioning;

(3) The appellant accepted his own parental responsibilities and helped his mother in raising his young sisters;

(4) The appellant has been a good sibling to his brother advising him to stay in school and stay out of trouble;

(5) The appellant had a difficult childhood and was deprived of a father in his formative years;

(6) The appellant had no convictions for violent offenses prior to these offenses;

(7) The appellant assisted law enforcement in the investigation of a car jacking/murder by voluntarily wearing a wire and initiating a conversation with a suspect at great risk to his own safety.

The mitigation in this case is both substantive and objective. It must be recognized and should be given significant weight. The Appellant concedes that at least one aggravating circumstance was proven, at best two. The mitigation balances well against the aggravation of this case, especially due to low-weight nature of the aggravation in relation to other cases of premeditated murder.

As noted earlier, per **Dixon**, this Court must employ its judicial experience regarding what cases are appropriate for death and what cases are not. The following is decisional authority of this Court of which appellant urges this court to rely: Defendant is mentally retarded. See Mason v. State, 489 So.2d 734 (Fla. 1986); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). Defendant has organic brain damage. State v. Sireci, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986). Defendant is an alcoholic and/or was under the influence at the time of the homicide. Nibert v. State, 508 So.2d 1 (Fla. 1987); Norris v. State, 429 So.2d 688 (Fla. 1983); Masterson v. State, 516 So.2d 256 (Fla. 1987); Fead v. State, 512 So.2d 176 (Fla. 1987). Defendant was an abused or battered child. Shue v. State, 366 So.2d 387 (Fla. 1981); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990); Lara v. State, 464 So.2d 1173 (Fla. 1985); Freeman v. State, 547 So.2d 125 (Fla. 1989); Campbell v. State, 571 So.2d 415 (Fla. 1990); and Nibert v. State, 574 So.2d 1059 (Fla. 1990). Defendant came from a deprived childhood and poor upbringing. Thompson v. State, 456 So.2d 444

(Fla. 1984); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Lara, supra; Herring v. State, 446 So.2d 1049 (Fla. 1984); White v. State, 446 So.2d 1031 (Fla. 1984); Scott v. State, 411 So.2d 866 (Fla. 1982).

POINT V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, 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.

In the instant case, the trial court agreed to give the pecuniary gain instruction over defense objection. In the State's closing argument that the death penalty was the proper sanction in this case, the state attorney spent time arguing that this crime was committed for pecuniary gain.

There can be no conclusion other than that the jury applied the pecuniary gain factor in recommending imposition of the death penalty. The great bulk of evidence presented in this case concerned matters related to appellant's purchase of the victim's vehicle. Evidence and argument was presented by the State to that end, and the prosecution devoted much effort

trying to convince the jury that this shooting was done for pecuniary gain. 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. 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 pecuniary gain motive of the murder into the equation of whether to recommend life imprisonment or the death penalty for Woods. Indeed, the jury is presumed to have used this instruction and to have followed the law given it by the trial judge. Grizzle v. Wainwright, 692 F.2d 722, 726-27 (11th Car. 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; Cockerel 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. See Archer v. State, 613 So.2d 446 (Fla. 1993) Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification based upon the following:

> Defendant approached MacArthur Harris on the street seeking a gun. Six witnesses testified to seeing the Defendant in the two weeks before the murder carrying a weapon similar to a .25 automatic. On the day before the victim was murdered and his wife shot, the Defendant called the Langfords to arrange for a meeting. The Defendant insisted that Mrs. Langford accompany her husband although there was no legitimate business reason for her presence. He arranged their meeting to occur at night, and for the Langfords to pick him up at the library....The choice of the library ensured that no neighbors or relatives would see them together with the Langfords. He told them that they were going to meet a notary public and directed them to a secluded spot. He then shot both Mr. & Mrs. Langford at close range.

(R980)

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert denied 105 S.Ct. 941; Rogers v. State, 511 So.2d 526 (Fla. 1987). "This aggravating factor is not to be utilized in every premeditated murder prosecution," and is reserved primarily for "those murders which are characterized as execution or contract murders or witness

elimination murders (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985). To support a finding of the CCP aggravator, the evidence must establish beyond a reasonable doubt that: (1) the murder was the product of cool and calm reflection; (2) there was a careful plan or prearranged design to commit murder before the fatal incident; (3) there was heightened premeditation; that is, premeditation over and above what is required for unaggravated first-degree murder; and (4) there was no pretense of moral or legal justification for the murder. Walls v. State, 641 So.2d 381 (Fla.1994). Generally, this aggravating circumstance is reserved for execution or contract murders or witness elimination type murders. See, e.g., Maharaj v. State, 597 So.2d 786 (Fla.1992); Pardo v. State, 563 So.2d 77 (Fla.1990). Simply proving a premeditated murder for purposes of guilt is not enough to support CCP; greater deliberation and reflection is required. Walls.

Specifically, the Court relied heavily upon appellant's seeking out and possessing a gun weeks before the murder. There is a reasonable hypothesis for appellant's actions concerning the gun unrelated to the murder. The time that Woods was looking for and thereafter possessing a gun was the same time that Woods had on more than one occasion volunteered to wear a wire and initiate conversation with a dangerous suspect of a recent car jacking/murder. Therefore, this does not support the finding of heightened premeditation to kill.

The jury believed Woods intended to kill his victim, as determined by their verdict of guilt for premeditated murder. More, however, is required to prove that the CCP aggravating circumstance exists beyond a reasonable doubt. There is simply insufficient proof that the murders fall under the definition of this statutory aggravating factor. It appears more likely, however, that the murders were simply done from an impulse or some sort of disorder.

Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT VII

THE TRIAL COURT ERRED BY PERMITTING IMPROPER HEARSAY EVIDENCE OVER APPELLANT'S OBJECTION.

The appellant objected to the state's direct examination of Pamela Langford as to whether she knew the terms of the sale of her husband's car to the appellant. (R1376) The trial court allowed the testimony as a state of mind hearsay exception. (R1376) This was error.

This Court described the workings of the state of mind hearsay exception in Jones v. State, 440 So.2d 570 (Fla. 1983). In Jones, seven days prior to a murder, appellant was arrested for a traffic infraction. Appellant violently resisted this arrest. Officer Ritchey was involved with this arrest and appeared at trial as a state witness. Ritchey was allowed to testify that appellant stated to him that "he was tired of the police hassling him, he had guns, too and intended to kill a pig." The testimony was permitted by the trial judge pursuant to section 90.803(3), Florida Statutes (1979)--Statements of a Person's State of Mind to Prove Subsequent Acts of the Declarant:

> The statute, in pertinent part, provides:
>
> (3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.--
>
> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.
>
> (b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

The instant case is a prosecution for first degree murder and the hearsay statement was from the victim on matters which occurred days and weeks before the murder. In a murder case ordinarily only the state of mind of the defendant is material. Downs v. State, 574. So.2d 1095 (Fla. 1991) A murder victim's statements are material and admissible under the state-of-mind exception only when (1) there is a claim of self-defense; Kingery v. State, 523 So.2d 1199, 1202 (Fla. 1st DCA 1988) (2) the defendant claims the victim committed suicide; and (3) the defendant claims the death was accidental. See Ehrhardt, Florida Evidence p. 611 1996 Edition

Based upon the above authority, it was error for the trial court to permit the hearsay testimony of Pamela Langford to prove the terms of a vehicle purchase between Terry Woods and Clarence Langford. The introduction of this evidence was reversible error because this evidence was used as a part of the circumstantial evidence to support the motive for the murder.

POINT VIII

WOODS' DEATH SENTENCE WHICH IS GROUNDED ON A BARE MAJORITY OF THE JURY'S VOTE (8-4) IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Eighth and Fourteenth Amendments requires a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A 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). 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).

Appellant 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). However, appellant maintains that allowing a bare majority of the jury to determine Woods' fate violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, 17, 21, and 22, of the Florida Constitution.

In addressing the number of jurors[8] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that

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[8] Counsel recognizes that the cited cases wrestle with the appropriate number of jurors to determine guilt/innocence rather than penalty. Appellant cites them as persuasive authority by analogy.

suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Williams v. Florida, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmun agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

Terry Lee Woods' jury recommendation was **by a slim margin**, in support that Woods be electrocuted in Florida's electric chair. **Two solitary votes** ultimately made the difference in whether Terry Lee Woods lives or dies. Such a result makes Florida's death penalty scheme arbitrary and capricious in violation of Furman v. Georgia, 408 U.S. 238 (1972). Florida's scheme further violates constitutional guarantees due to 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. Unless a capital jury finds that the State has proven at least one aggravating circumstance beyond a reasonable doubt, a death sentence is not legally permissible. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Florida's procedure currently allows a death recommendation even where five of the twelve jurors find that the State proved no aggravating factors beyond a reasonable doubt, as long as the other seven jurors conclude otherwise.

Additional constitutional infirmity is noted when one realizes that the seven jurors voting for death could each find a different aggravating factor. Such a realization makes it abundantly clear that Florida's death sentencing scheme is rife with constitutional infirmity. Terry Lee Woods' death sentence, which is based on a bare majority (8-4) vote of the jury, is

unconstitutional. This Court should vacate Appellant's death sentence and remand for imposition of a life sentence without possibility of parole. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Point I, vacate Appellant's conviction and sentence for first-degree murder and remand with instructions to adjudicate Appellant guilty of second-degree murder and resentence accordingly;

As to Points III and VII, reverse and remand for a new trial; and,

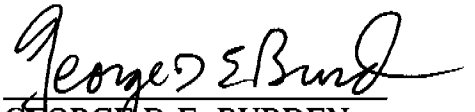
As to Point II and VIII, vacate Appellant's death sentence and remand for the imposition of a life sentence without possibility of parole;

As to Point IV, vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, for resentencing;

As to Point V, and VI, vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, for a new penalty phase.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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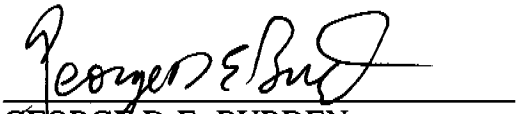
CERTIFICATE OF SERVICE

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. Terry Lee Woods, C715473-622-6-S, Florida State Prison, P.O. Box 181, Starke, FL 32091-747, this 3rd day of February, 1998.



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