IN THE SUPREME COURT OF FLORIDA

APPEAL NO.: 92,987

JASON DEMETRIUS STEPHENS,

Appellant,

v.

STATE OF FLORIDA

Appellee.

INITIAL BRIEF

Appeal from the Circuit Court
Duval County, Florida

Michael R. Yokan, Esquire
Fla. Bar No. 852856
204 Washington Street
Jacksonville, Florida 32202
(904) 354-6002
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitutional Provisions

Statutes

Rules

Statement Regarding Font Used

This Brief is printed in Courier New 12 point format.

STATEMENT OF THE CASE

Defendant Jason Stephens was charged in twelve counts of a thirteen count Indictment issued on August 7, 1997. The Indictment charged Stephens with one count of first degree murder, one count of armed kidnapping, six counts of armed robbery, two counts of attempted armed robbery, one count of burglary and one count of aggravated battery. [V1, R8-13].

At a pretrial in October, 1997, defendant's counsel indicated he was aware the State would be seeking to consolidate Stephens' case with his co-defendant's case for trial Defendant's counsel stated that Stephens wanted him to object to consolidation, but that he disagreed with is client. [V3, R440]. At a subsequent pre-trial, Mr. Stephens' other counsel ore tenus adopted Cummings Motion to Sever. [V3, R466]. The court denied Stephens' motion to sever. [V3, R494].

Jury selection commenced in the joint trial on December 8, 1997. [V6]. Immediately prior to juror selection commencing, the defendant entered pleas of guilty to Count 2, armed kidnapping of Robert Sparrow, Jr.; Count 4, armed robbery of Robert Sparrow, Sr.; Count 6, Armed Robbery of Derrick Dixon; Count 8, Armed Robbery of Roderic Gardner; Count 9, attempted robbery of Tammy Cobb; Count 10, attempted robbery of David Cobb; Count 11, armed burglary; and Count 12, aggravated battery. [V2, R232-234; V6, R3-13, 35-38].

During jury selection co-defendant Cummings sought a change of

venue. [SV, R16-71]. Defendant Stephens moved to adopt that motion. [V8, R575]. During earlier pretrial proceedings, the court stated that all motions to adopt which were not specifically addressed were granted. [V3, R530]. At the time the motion was raised the court took it under advisement. [V8, R577]. Subsequently, the court denied the motion as to both defendants. [SV, 71; V10, R967-69]. The case then proceeded to trial.

At the close of the State's case, a partial judgment of acquittal was granted for co-defendant Cummings. For Cummings, the court granted judgment of acquittal as to the armed robbery count and presented it to the jury as an attempted robbery. [V13;R1492-93]. A further disjointed conversation between the State and the court later occurred concerning that issue. The court commented during it that he guessed Stephens' counsel was going to move to set aside the plea to that count. [V14, R1724].

At the close of the State's case defendant's counsel moved for judgment of acquittal as to all counts. The court denied that motion. [V13, R1486]. Jason Stephens then took the stand and testified upon his own behalf. [V13, 1504-1575]. Stephens then rested his case.

The court informed read instructed the jury upon the crimes charged. [V15, R1905-1943]. The jury returned verdicts of guilty upon Count 1, first degree murder of Robert Sparrow, Jr.; not guilty of Count 3, armed robbery of Consuelo Brown; guilty Count 5,

armed robbery of Kahari Graham; and not guilty Count 7, armed robbery of Tracey Williams. The Court adjudicated the defendant guilty of those crimes of which he was convicted and passed the case for sentencing. [V15, R1955-1962].

A sentencing hearing was held on January 15, 1998. The State presented victim impact evidence and evidence of a prior felony in aggravation. [V4, R598-624]. The defendant presented evidence in mitigation. Family, friends and persons that had interacted with the defendant testified on his behalf. The defendant too briefly took the stand. [V4, R624-678].

The jury returned a recommendation of death by a vote of 9 to 3. [V5, R798-800; V15, R335]. The court followed the jury's recommendation and entered its Sentencing Order on April 7, 1998. The trial court sentenced the defendant to death for the first degree murder charge and to accompanying consecutive and concurrent terms of life upon the robbery and kidnapping counts. [V15, R397-98]. This appeal followed.

STATEMENT OF FACTS

Robert Sparrow, Robert Sparrow, Jr. - who was also known as "Little Robb", Tammy Cob, Tracey Williams, and Derrick Hosea Dixon were in the house when Consuelo Brown and her older son Kahari Graham arrived at Robert Sparrow's home on June 2, 1997. [V11, R. 1029-31, 1124-25; V13, R1452-53]. After she was in the home,

Consuelo Brown saw Jason Stephens walk into the house through the unlocked front door brandishing a gun. [V11, R 1031-32]. Stephens entered the house approximately ten minutes after Brown arrived. [V11-1031]. Stephens pointed the gun at Little Rob and Derrick Dixon. Consuelo Brown exchanged words with Jason Stephens and then struck him. Stephens responded by striking her on the bridge of her nose with his gun. [V11-1032-33]. Brown fell to the floor. She was dazed and her nose was bleeding. [V11, R1033, 1057].

Brown testified during cross-examination that Stephens was in the house for about five minutes before he asked anyone to lie down on the floor. [V11, R1063]. She also testified that Stephens was in the house for a total of ten or fifteen minutes. [V11, R1067].

Robert Sparrow testified that on June 2, 1997 he was at his home playing video games with a friend. He said that Jason Stephens entered his residence and put a gun to his friend's head. [V11, R1096-97, 1116-17]. Sparrow thought that his friend knew Stephens. According to Sparrow, Stephens forced his friend to put down his joy stick and then directed everyone to lay down on the floor. [V11, R1096-97]. Robert Sparrow testified that Consuelo Brown's altercation with Stephens then followed immediately. [V11, R1098, 1126-27]. He also testified that Stephens then said, "You-all think I'm playing?" and ejected a bullet from his gun to show it was loaded. [V11, R1097]. Sparrow also said that a second man entered the house at about the time of Stephens' altercation with Brown.

[V11, R1097-98, 1117].

Derrick Dixon - who also is known by his middle name Hosea - confirmed that he was playing video games with Robert Sparrow on June 2, 1997. Dixon arrived at the home at approximately eleven that morning. [V11, R1183-84]. Dixon identified Jason Stephens as the man who had entered the home and put a gun to his head. [V11, R1184-86]. Mr. Dixon related that he saw Stephens grab Robert Sparrow, Jr., by his shirt collar in the living room. [V11, R1187-89]. Dixon testified that Brown's confrontation then occurred when Brown bent over to pick up Sparrow, Jr. [V11, R1189].

Robert Sparrow described the second man that entered the house as having "plats." The second man also held a semi-automatic gun. The second man stood watch over those in the living room. The man with plats remained silent and Sparrow never learned his identity. [V11, R1098-99]. State's's witness Derrick Dixon similarly described the second man who entered as having had "plats, long plats, they was twisted up came back down to his shoulders." [V11, R1190].

Stephens told everyone in the house to get on the floor. Consuelo Brown recalled that Little Rob did not get on the floor. But, she was unsure where Kahari was at the time. [V11, R1034]. Robert Sparrow testified that Little Rob was standing in the hallway by where Stephens had entered at the time everyone was made to get on the floor. [V11, R1100, 1126]. Sparrow too was unsure

where Kahari - who seven years old at the time of the trial - was at that time. [V11, R1100]. However, during cross-examination Sparrow testified that he believed Kahari remained on the sofa the entire time until everyone was forced into the bathroom. [V11, R1129-30].

Consuelo Brown testified that Stephens then asked everyone in the house for jewelry, money and weed. [V11, R 1034, 1099-1100]. Robert Sparrow, in contrast, recalled Stephens demanding "money, jewelry or juggle." [V11, R1118-19]. And, Derrick Dixon recalled Stephens having asked "[W]here is everything at?" [V11, R1187]. However, on cross-examination by Cummings' counsel, Dixon testified that Stephens had demanded "weed." [V11, R1204].

Both children were crying during the encounter until Stephens told them to shut up. [V11, R1107]. Stephens called Robert Sparrow, Jr., "Shorty." Robert Sparrow testified:

> [A]s [Stephens] was in the bathroom, he was like, 'I'm going to take Shorty with me, and you-all think I give a fuck. Kidnapping is a federal offense. I don't give a fuck,' and you all this and that. And at that point in time he showed us his ID, he showed us his name, 'See my name.' And, 'You think I give a fuck? Because I don't care about this, and I'm going to take Shorty with me.'

[V11, R1107]. Robert Sparrow testified that Stephens indicated he would leave Robert Sparrow, Jr., at the next corner from his father's house when asked to do so by Sparrow. [V11, R1107-08, 1179]. However, Stephens testified that he did not know the

location to which Sparrow was referring. [V13, R1519].

Consuelo Brown also testified that Stephens showed his identification during the robbery. And, she testified that he told her he was also known as "Psycho." [V11, R1082-83]. Stephens testified that he revealed his identity as a means of assuring the occupants that he would not hurt the child. [V13, R1518-19]. He also testified that he identified himself so that the police would focus on finding the child rather than him. [V13, R1541-42].

Robert Sparrow testified that he saw a third man, who he identified as Horace Cummings, enter the house while Stephens was searching everybody's pockets. [V11, R1100-01]. Cummings carried a semi-automatic pistol by his side. He locked the front door after he entered. [V11, R1101]. Cummings then entered the front bedroom. Sparrow could hear Cummings searching the room. [V11, R1101-02]. Stephens and the man with dreadlocks remained in the living room while Cummings searched the room. [V11, R1102]. Cummings whispered back and forth to Stephens during the robbery. [V11, R1101, 1106].

Brown heard Stephens ask Robert Sparrow who lived in the house. [V11, R 1035]. Brown believed two other persons entered the house with Stephens, however, she did not see those individuals' faces. [V11, R 1035-36]. The others entered approximately five minutes after Stephens entered the house. [V11, R1067]. During the incident Ms. Brown heard the front door open and close "quite often." She was not aware who was coming or going. [V11, R1068,

1071, 1093-94].

Brown testified that Robert Sparrow walked from the living room into the bedroom with Stephens. He was gone from the living room for only a couple minutes. [V11, R1071]. In contrast, Sparrow testified that he never left the living room, but rather walked towards the bedroom while Stephens searched him. [V11, R1110, 1136-39]. Brown heard Jason Stephens whisper to another person to watch those in the living room before he and Robert Sparrow walked into the bedroom. [V11, R1072]. Brown believes Sparrow gave some jewelry to Stephens in the bedroom. [V11, R1072]. She heard the sound of drawers being opened while Sparrow and Stephens were in the bedroom. [V11, R1073].

Consuelo Brown heard her son say "You are choking me. You are choking me." Brown testified that she could tell her son was in the front bedroom at that time. [V11, R1036]. However, on cross she conceded she could not tell whether he was actually in the front hallway or in the bedroom. [V11, R1076-78]. Jason Stephens was in the living room at the time Brown heard her son protesting being choked. [V11, R1037, 1104]. The man with dreadlocks was in the living room at that time. [V11, R1038, 1104]. Brown testified that she could tell her son was released following his protest. [V11, R1038].

A short time later Brown and Sparrow heard their son ask, "Are you going to kill me?" [V11, R1039, 1080, 1104]. Stephens and the

man whose shoes she had seen were both still present in the living room. Little Rob was not speaking to either one of them. [V11, R1039, 1092]. Victim Tracey Williams confirmed during his direct testimony that Jason Stephens was in the living room when Robert Sparrow, Jr., complained of being choked. [V12, R1229-30]. However, during cross-examination by Cummings' lawyer, Williams acknowledged that in an earlier taped statement he had stated that he believed Stephens was standing next to Sparrow, Jr., in the living room when the comment was made. [V12, R1246].

Williams version of events largely corresponded with the testimony of other witnesses. He was present at the home on day of the robbery with his girlfriend Tammy Cobb. [V12, R1215]. He saw Stephens - who he identified in court - walk into the residence and point a gun at Derrick Dixon. [V12, R1216-18]. Consuelo Brown then stuck Stephens and he in turn struck her with his gun. [V12, R1218-20]. Stephens then demanded, "I want to know where the money and the dope at in this house." [V12, R1219-20, 1242].

Mr. Williams identified co-defendant Horace Cummings as the second person who had entered the house. He testified that Cummings entered with a handgun in hand and walked into the front bedroom. [V12, R1221-23]. Williams did not see or know when Cummings left the house. [V12, R1244]. He also described seeing a man with plats in his hair enter the house into the living room. That man too, held a gun in his hand. [V12, R1223-24]. The man with the plats

remained in the living room throughout the robbery. [V12, R1224-25]. Williams was the first person told to crawl into the bathroom at the conclusion of the robbery. [V12, R1231].

Roderic Gardner testified that Robert Sparrow is his best friend David Cobb's older brother. Gardner and Cobb went to Sparrow's home on June 2, 1997. [V12, R1252-53]. When they arrived at Sparrow's house, Cobb reached in and undid the chain lock on the front door. Cobb entered first and then Gardner followed. Upon entering the house, Gardner was told by Jason Stephens - who he identified in the courtroom - to "come on in." [V12, R1255-57]. Stephens pointed a gun at Gardner and told him to get on the floor, and then asked for money and drugs. [V12, R1257-58].

Jason Stephens then asked Gardner to hand him the car keys which were in Gardner's hand. He then asked Gardner what kind of vehicle he drove. [V12, R1259]. Gardner was then directed to crawl into the bathroom. En route to the bathroom Gardner saw a guy with plats in the living room. He also saw Little Rob and Kahari standing in the front bedroom. [V12, R1259-61]. He did not see Horace Cummings inside or in front of the house that day. [V12, R1267-68, 1271-72]. David Cobb followed him into the bathroom. He then heard Jason Stephens say that if anybody in the bathroom came out he was going to kill the little boy. [V12, R1262-63].

Gardner was driving his mother's dark green Kia that day. [V12, R1254]. The windows were a roll down type. All of the windows

and door locks worked. [V12, R1254-55, 1263-65]. Gardner testified that stains appearing in photographs taken by the State of the vehicle's console, front passenger seat and windshield were not present when he last possessed the car. [V12, R1266-67].

Witness Tammy Cobb stated that she was at Robert Sparrow's home on June 2, 1997. She testified that a man with a gun entered the house. She did not recall what he wanted, other than he did ask Robert Sparrow for the keys to his car. [V12, R1277-78, 1282]. Ms. Cobb only saw one intruder that day. [V12, R1279]. While in the bathroom she heard the man with the gun threaten to kill Little Rob if he heard any doors in the house or if he saw any police. [V12, R1280, 1283-84].

Witness David Cobb testified next for the State. Mr. Cobb testified that he was staying with Roderic Gardner on June 2, 1997. Robert Sparrow is his brother. Cobb and Gardner went to Sparrow's home on June 2, 1997. [V12, R1290-92]. Cobb found the door was chained and he attempted to unlatch it. He either succeeded in doing so, or someone unlatched it from the inside. As he walked into the home he saw a man with plats in the living room pointing a gun towards the bathroom. [V2, R1293-94]. Cobb then turned his head at which point Jason Stephens - who he identified in the courtroom - put a gun up to his head and told him to get down on the floor. [V12, R1295-96].

Roderic Gardner, who was following Cobb, then hesitated

entering the home. Stephens told Gardner not to run or he'd shoot. Cobb then told Gardner not to run. Stephens then took Gardner's necklace and keys. Cobb overheard Stephens conversing with Gardner about his car. [V12, R1297-98]. Stephens then made Gardner crawl, followed by Cobb, into the bathroom. [V12, R1298-99]. Cobb saw Robert Sparrow, Jr., standing by a door near the living room as he crawled towards the bathroom. [V12, R1305]. Cobb later heard Stephens tell Robert Sparrow that he was taking Sparrow, Jr., as insurance so that Sparrow would not call the police. [V12, R1305].

Cobb testified that Sparrow, Jr., had previously ridden in Roderic Gardner's car. The following exchange between Cobb and the State then occurred:

> Q The day before this incident happened he had ridden in the car with you?
>
> A Yes. Yes. Yes.
>
> Q Could you tell us what happened?
>
> A Well, Little Rob, I hd to pop him on the hand, because when we had got to Roderic's house, which was at the red light, he kept messing with the door, opening the door because I knew – he kept opening the door, putting the latch up and down, the window down. So when we got to Rod's, I had to pop him on the had [sic] about that. And when we got to Rod's, he opened the door by himself and got out.
>
> Q When you say you had to pop him on the hand, you're saying you had to punish him for that?
>
> A Yes, for opening the door.

[V12, R1307].

During cross-examination Cobb conceded he had not seen Cummings at the house on the day of the crime. [V12, R1308]. Cobb did recall having seen a black car with tinted windows parked in the vicinity of Sparrow's home. [V12, R1315-16].

Robert Sparrow recalled hearing Jason Stephens stating that he wanted the keys to the blue car in front of the house. Sparrow did not recall seeing Stephens obtain possession of those keys. [V11, R1145-46].

No property was taken from Little Rob. Kahari had a dollar, or two dollars, taken during the robbery. [V11, R1105; V13, R1455]. When asked if anything was taken during the robbery Sparrow replied, "Some money." He also said his cell phone was taken from the home during the robbery. [V11, R1110, 1147]. Derrick Dixon testified that Stephens searched his pockets while he was on the floor. Stephens did not take anything from Dixon. [V11, R1195].

The following exchange occurred between Cummings' counsel and Brown:

> Q After Roderic Gardner and David Cobb went into the bathroom, do you remember hearing Jason make a threat to take your son with him as insurance?
> A Yes. It wasn't like a ransom type thing it was just to insure that he got away.
> Q Something that would insure that he got away before anyone called the police; is that correct?
> A Yes.

[V11, R1075]. Robert Sparrow testified that he exited the bathroom

a minute or two after Stephens left. Finding no one in the living room, Sparrow then exited the house through a rear bedroom window. Sparrow ran down to the corner in search of his son. Finding he was not there, Sparrow told a passing police officer what had just occurred. [V11, R1108-09]. Sparrow then continued searching for his son until he learned he had been found at approximately 10 p.m. that night. [V11, R1109].

David Chase testified that he had worked for the Jacksonville Sheriff's Office for twenty years. He has worked as an evidence technician for approximately nine and one-half years. [V12, R1329]. On June 2,1 997 he was asked to process a 1996 four-door Kia that had been used in a robbery abduction. [V12, R1329-30]. The vehicle was located at a towing shop. Chase photographed the vehicle and then processed it for fingerprints. He also found two stains that appeared to be mucus and one that looked like a vomit type stain. [V12, R1330].

Chase recovered a fingerprint from the vehicle's dome light and one from a mirror above the passenger's door. [V12, R1331]. He also processed a hand print on the dash in front of the passenger seat. [V12, R1331-33, 1336, 1339-41]. The mucus like stains were on the console between the front seats and on the windshield in front of the passenger seat. The vomit like stain was in the passenger seat. [V12, R1333, 1341-42]. Chase identified, and the State moved into evidence, photographs which the officer had taken of the car.

The State also introduced the front passenger seat into evidence. [V12, R1334-38].

Officer Carol Markham testified that on June 2, 1997 she was aware from a "be on the lookout" dispatch that police were looking for a car in connection with a kidnaping. [V12, R1350-51]. At approximately 9:25 p.m., Markham was flagged down by a man on a bicycle who stated he thought the car being looked for was down the road. She followed the bicyclist to the location where the Kia was parked on Logan Street. [V12, R1351-52, 1363-64]. After Officer Markham's recruit and the bicyclist indicated a child was in the vehicle, Markham ran up to the car. She then opened the driver's side door. [V12, R1353-54].

Upon opening the door Markham saw the child laying face down in the front passenger seat. [V12, R1354-55]. The side of the child's head was touching the back of the seat and his legs were angled towards the steering wheel. [V12, R1355]. Markham testified that the child's face was compressed into the seat. She said that when she lifted his head she heard air come out of his lungs. [V12, R1355-57]. During cross-examination the officer explained that she used the word compressed because of the air which had come out of the child's lungs. [V12, R1367].

Officer Markham then removed the child from the car and attempted to resuscitate him. She checked for a pulse and did not detect one. [V12, R1356-57]. Markham found the child's mouth was

clenched shut with his tongue partially clenched between his teeth. [V12, R1358-59]. Markham also observed that the child had mucus and snot caked on his face. [V12, R1359]. She saw mucus on the seat where the child's face had been. [V12, R1360]. The officer also found that one of the child's arms was folded against his chest. The arm was stiffened and she was unable to move it when she attempted CPR. She recognized the stiffness as rigor mortis and knew the child was dead. [V12, R1365].

Medical Examiner Bonifacio Floro, M.D., next testified for the State. Dr. Floro has worked for the Duval County Medical Examiner's Office since 1976. He was qualified as an expert in forensic pathology without objection. [V12, R1367-70]. Floro testified that he conducted an autopsy upon Robert Sparrow, III. He testified that he did not observe any evidence of decomposition of the body. He also said that he found multiple "petechiae" in the face and front part of the child's belly. [V12, R1372].

Floro said that during his external examination he observed "a bit of congestion, or what we call petechiae in the right side of the face and the left side of the face of Mr. Sparrow." [V12, R1373]. Dr. Floro also observed:

> There is this characteristic conjunctival hemorrhage on the right side of the eye, on the inner part of the eye, the lower part of the eye, and also on the left side of the eye showing only on the bottom part of the white of the eye.

[V12, R1373]. He also testified that he found a "single curvilinear

marking" on the right side of the neck. And he found the front part of Robert's "chest and abdomen was congested." [V12, R1373]. Floro also found an area of discoloration on Sparrow, Jr.'s chest. And, he found a green discoloration about the left upper part of the abdomen. [V12, R1373-74]. When asked what he concluded Floro responded:

> That Mr. Sparrow died of asphyxia, which is suffocation based on my findings. I was able to rule out the possibility of hyperthermia after my autopsy and toxicological examination.

[V12, R1375]. He concluded the death was a homicide. [V12, R1376].

Floro then testified that he concluded the child died of asphyxia based upon his external examination of the body. He testified that the presence of conjunctival hemorrhage on the inside of the right eye "is a characteristic of suffocation asphyxia type death." [V12, R1376-77]. He also concluded, "The presence of severe forms of petechia in the face is another characteristic of suffocation asphyxial strangulation type of death." And, he found that the mark on Sparrow, Jr.'s neck was "an indication that something was done to the neck of Robert, squeezing the neck." [V12, R1377].

The scratch measured approximately 4 centimeters in length, which is less than one-quarter of an inch. [V13, R1431-32]. That small scratch was the one physical finding on which Floro concluded that it was possible the child had also been strangled. [V13,

R1434]. Dr. Floro said the scratch was fresh, which after repeated questioning he conceded meant the scratch occurred within 24 hours of death. [V13, R1435-39]. Floro also conceded that strangulation generally causes hemorrhaging in the soft tissue, which he did not find. [V13, R1434-35, 1343].

Floro described State's Exhibit 17 as showing petechiae on the front of Sparrow, Jr.'s body. [V12, R1384-85]. He also said that State's Exhibit 18 showed the scratch which he had described. [V12, R1385]. He described State's Exhibit 19 as showing the hemorrhage in the child's eye. State's Exhibit 20 similarly depicted the other eye. [V12, R1386].

He testified that the lividity shown in the photograph also established that the child was found face down. He explained that gravity causes blood to pool in the depended parts of the body. [V12, R1385]. The internal examination of the heart showed the surface of the heart had petechial hemorrhages. [V12, R1377].

Floro testified that the discharge from the child's mouth found at the scene would be consistent with a finding of suffocation asphyxia. However, he qualified his answer saying other conditions might give rise to a discharge in the nose or mouth. [V12, R1378]. Dr. Floro then answered yes when asked a compound question concerning if it was possible that the child "could" have been suffocated by an individual having pushed his face, nose and mouth into the car's seat. [V12, R1378].

The doctor also found cerebral edema, meaning swelling of the brain. Floro testified that swelling means that a brain weighs more than it use to weigh. He said it was "a nonspecific finding that you see in asphyxia. He then qualified his answer further saying, "Other conditions can give rise to swelling of the brain, but it is not a sole criteria for any disease, such as hyperthermia or suffocation, it occurs in many diseases. He then testified the child's brain, which weighed 1300 grams, was "kind of heavy." And, he described the condition as "a sever form of cerebral edema." [V12, R1378-79]. Floro then said that lack of oxygen is the primary cause of edema. [V12, R1379].

Dr. Floro also testified that he found a bruise on the child's lower left lip. He then opined that the bruise was consistent with the child's face having been compressed into a car seat. [V12, R1379]. He identified State's Exhibit 15 as depicting that bruise. [V12, R1388].

Floro answered yes when asked if it would be important for him to know while making an examination whether the child could open car doors and windows. He said that "our investigation" determined that no efforts had been made to exit the vehicle. [V12, R1380]. When asked if "it is easy in a case like this to determine the exact time of death," Floro said, "It is very hard, sir." He was then asked whether - based upon the assumption that the child was in the car from 3:00 p.m. until 9:00 p.m. - there was "any

conclusion as to whether the child died closer to 3:00 or closer to a later period?" Floro replied, "Well, the child most probably died during the 3:00 time than say 9:00." [sic]. [V12, R1381]. Upon cross-examination Floro conceded that the margin of error as to his time of death estimation was several hours. [V13, R1439].

Dr. Floro testified the following findings backed up his determination as to time of death: 1) there was a marked lividity when the child was found; 2) there was condensation on the body; and 3) the presence of a green discoloration in the abdomen. He testified that condensation occurs because of the difference in temperature within the body and the surrounding area. He said that the green discoloration was something "we never accounted for." Yet, he opined, "[B]ecause the child was found face down in the car, the stomach was disrupted, the contents of the stomach spilled into the abdomen and made that green discoloration." [V12, R1382].

He then testified that the green discoloration will occur slowly. "In other words, what I'm connecting it to is that the child died earlier in the game than later in the game. Okay?" [V12, R1382]. Dr. Floro concluded his testimony on direct examination by opining that his findings were not consistent with hyperthermia. [V12, R1389].

During cross-examination Dr. Floro conceded that "we see those things [petechiae] also in cases other than asphyxia." [V12, R1391]. He admitted that petechia and subconjuctivial hemorrhages

are not specific to asphyxiation. [V12, R1391]. Floro then admitted that petechia are present in cases of facial lividity, but denied that facial lividity causes subconjuctivial hemorrhages. [V12, R1392].

Dr. Floro also acknowledged that he was familiar with a treatise titled, “Spits and Fisher’s Medicolegal Investigation of Death Guidelines for the Application of Pathology to Crime Investigation. Floro has the book in his library. [V12, R1392]. He recognized the text as being authoritative. And, he conceded that the agreed with a statement in the text that petechia hemorrhages, especially in the skin and conjunctivi are often found in cases of natural death with marked facial lividity. [V12, R1394]. He then testified, “A lot of disease processes will give you petechiae, but I have ruled out those processes.” [V12, R1394].

Floro conceded on cross-examination that he had not noted a bruise on the child’s lip in the autopsy body sheets or autopsy reports produced during and as a result of his examination. [V13, R1411-12]. Dr. Floro conceded that he did not identify the bruise until four and one-half months after his examination when he diagnosed the bruise from a photograph. [V13, R1414-15]. When asked if he was confident in his diagnosis from a photograph, Floro replied, “It most probably at this point is a bruise.” V13, R1419].

Floro testified that no core body temperature was ever taken. [V13, R1420]. Floro conceded the conditions on June 2, 1997 were

right for a child left in a car to develop hyperthermia. [V13, R1420]. Floro's investigator determined that between 3:00 p.m. and 7:00 p.m. on that day the temperature was 82 degrees with the exception of having dipped one degree at some point. He also found that it was 79 degrees from 7:00 p.m. to 9:00 p.m. [V13, R1421]. However, Floro testified that he believed it was overcast because it rained at the airport at some point that day. [V13, R1421]. However, he conceded that he did not know if it had rained on the car at the location where Sparrow, Jr., was found. [V13, R1430].

Floro agreed that a car left in the sun on an 82 degree day with the windows rolled up would heat up quickly. He conceded that the temperature in a closed-up car can rise to 105 degrees within 15 to 45 minutes. [V13, R1422]. One week after the autopsy Dr. Floro still had not ruled out hyperthermia as a contributing cause of death. [V13, R1424] He said that at that point he still wanted to know whether the child could open a car door and roll down a window. After learning the child had those skills, Floro then assumed the child would have done so if the car got hot. [V13, R1425].

Floro asserted the saliva on the windshield could have occurred during the abduction. He also postulated that maybe the child was looking around trying to do something to get out of the car. [V13, R1428-29]. He also testified that he was unaware of saliva having been found on the console and the center console.

And, he conceded he did not learn of the saliva on the windshield until his deposition four and one-half months following the death. [V13, R1440-41].

The jury was informed that the State and defense counsel stipulated that a sample of the fabric from the Kia's front seat tested positive for Robert Sparrow, Jr.'s blood. [V13, R1482]. The prosecuting attorney also read the following stipulation to the jury:

> The defense counsel and State would stipulate that the defendant, Jason Stephens, pled guilty to Count No. II to kidnapping of Robert Sparrow, Jr., and Count IV, robbery of Robert Sparrow, Sr., and Count VI, to robbery of Dixon, Count VIII, robbery of victim Gardner, Count IX, the robbery of Tammy Cobb, Count X, attempted robbery of David Cobb, Count XI, burglary of the dwelling on Logan Street, and Count XII, aggravated battery on Consuelo Brown.

[V13, R1482].

Steven Frank Dunton was called by co-defendant Cummings. Dunton is employed as a medical examiner in the Metropolitan Atlanta area. [V14, R1615-16]. He performs approximately 300 to 400 autopsies per year. Dunton is board certified in pediatrics, anatomic pathology and forensic pathology. He has been licensed to practice medicine in Georgia since 1985. [V14, R1616-18].

Dunton has lectured regarding childhood deaths many times. He has special expertise in the autopsies of children. [V14, R1618-19. He performs 30 to 40 consultations per year pursuant to requests from attorneys. He is usually called by prosecution in cases where

he performed an autopsy. [V14, R1620].

Dunton has testified in court approximately 170 times concerning the cause of death. He was tendered without objection as expert in anatomic pathology and forensic pathology. [V14, R1622]. Dunton reviewed the autopsy report concerning Robert Sparrow, III, and a deposition given by Dr. Bonifacio Floro. He also reviewed Officer Carol Markham's deposition. And, he reviewed the Homicide Continuation Report. [V14, R1623].

Dr. Dunton also reviewed Floro's trial testimony and deposition from a prior case. And, Dr. Dunton reviewed weather related data concerning the day the child died. [V14, R1623, 25]. Dunton also reviewed body sheets and photographs from the autopsy and of the vehicle in which the child was found. And, he reviewed a laboratory report concerning chemistries of the child's eye fluid from samples drawn during the autopsy. [V14, R1625].

Prior to testifying Dunton had examined State's Exhibits 6 through 17, and 17 through 21, as well as Defendant's Exhibits 5 and 6. [R14, R1624-25]. The peak temperature on the day at issue between 3:00 p.m. and 9:00 p.m. was 82 degrees and remained at that level for a good part of that time. Climatological records showed that there were 13 hours of sunshine that day, the longest duration of daylight in June. [V14, R1625-26].

Dunton went to the scene of the child's death. He found there were no trees or buildings in the area which would have shaded the

car. [V14, R1626] Dunton testified that within a reasonable degree of medical certainty, “I believe the child died of hyperthermia, that is exposure of high temperatures, and resulted in changes of his body as a result of that resulted in his death.” [V14, R1627-28]. Dunton explained, "Hyperthermia is a condition that can't really be diagnosed at autopsy accurately because it doesn't leave any telltale signs at autopsy." [V14, R1627].

He explained that absent a core body temperature having been taken near the time of death, or absent the person having survived for 12 hours or more:

> You take into account the circumstances, whether or not the high heat was there, or whether or not there was another explanation of or how the child may have died, and you come to your conclusion kind of in a negative fashion, you rule other things out, if the situation is right, then hyperthermia could be very likely your correct cause of death.

1627-28. In this case, no one bothered to take a core body temperature of the body. [V14, R1672]. Dunton believed that it was irresponsible not to have taken a temperature reading under these circumstances. [V14, R1674-75].

Dunton testified that suffocation can never be completely ruled out because suffocation "can leave absolutely no signs at autopsy." [V14, R1628]. He testified that hyperthermia by itself should not cause petechiae in the face or in the eyes or anywhere else. Suffocation can cause petechiae in the face and in the lining of the eye. [V14, R1628-29, 1661-62].

Lividity happens when the blood settles, it's no longer being pumped through somebody's body because their heart has stopped, just like anything else, gravity will pull the blood down to the lowest point. [V14, R1629]. It is not uncommon for the blood to pool to such a degree that little blood vessels called venules will rupture, allowing a little bit of blood to escape from the blood vessels causing petechia. [V14, R1629].

Dunton testified that body position always has to be taken into account for you to make a decision of how petechia appear. This child's position face down, body elevated, was what Dunton believed caused the petechiae that are seen in the face and the hemorrhages seen in the eyes. [V14, R1629-20, 1673]. Dunton further testified that the autopsy conclusion that the child's brain was swollen further supported his diagnosis of hyperthermia. [V14, R1630-31, 1672]. Dunton explained that in strangulations and smotherings, swelling does not normally occur because the body or brain is not deprived of oxygen long enough for swelling to occur.

Dr. Dunton said that he believed this supports the diagnosis of hyperthermia, because that also is something that doesn't happen instantaneously. The body's temperature rises, some of the body's mechanisms to combat that begin to fail, you become deprived of oxygen over some period of time, the brain has a chance to swell, and we see what was seen in his autopsy. [V14, R1631].

Dr. Dunton testified that the discoloration of the child's lips shown in State's Exhibit 19 was caused by the child's tissues drying out after death. Mouth, lips or tongue should be focus of autopsy if suffocation is suspected. One should look for tooth impressions or bite marks. [V14, R1631-33]. He testified that scratch shown in State's Exhibit 18 did not by itself, without an examination of surrounding tissue for bruising, provided little information as to how the child died. [V14, R1633-34, 1644-45]. Dr. Floro's report did not indicate that he observed any such bruising. [V14, R1644]. He also noted that the scratch could have happened earlier in the day or even the preceding day. [V14, R1634].

Similarly, Dunton explained that the vomitous stain on the seat did not reveal the cause of the child's death. He explained that it is common to see persons regurgitate food, and to see blood tinged mucous escape from the mouth or nose from, in cases of heart attacks, automobile accidents, homicides and all sorts of things. Dunton further explained that people often vomit and defecate as they are dying. [V14, R1634-35].

Dr. Dunton was aware that some amount of blood was found in the stain on the front seat. He explained that the presence of blood did not help determine the cause of death because an array of causes of death can cause blood vessels in the lining of the nose and mouth to burst. Furthermore, in a case like Robert Sparrow's where the head is the lowest part of the body, those same blood

vessels can also rupture and blood can then escape through the mouth or nose. [V14, R1635-36].

As to Officer Markham having testified that she heard air escape from the child's lungs, Dunton testified:

> It really has nothing to do with the cause of his death. It sounds like it has more to do with the position of his body after death, that is lying across this console between the front two seats.
> * * *
> What I thing actually happened here is with the child's chest and abdomen lying across this raised console in the center, it's actually indenting the ribs and indenting the abdomen to some degree just by the past [sic] of the weight of the child's deceased body. Once that body is lifted, the ribs can expend back out to their normal position, the diaphragm may drop. And what I suspect Officer Markham probably heard was air actually being drawn into the lungs through the vocal cords rather than being expelled out, kid of like a bellows would do. This is something we see occasionally in the morgue when deceased person's positions are changed.

[V14, R1636-37].

Dr. Dunton also testified that the stains on the center console and the front windshield - depicted in State’s’s's exhibits 11 and 13, indicated that the child's face was near those surfaces at some point. In other words, the child did not remain in one position in the car. [V14, R1637-38].

Dr. Dunton opined that he would not make a cause of death determination based on the prediction that a three year old would roll down a window. [V14, R1638]. During cross by the State he

elaborated saying that the fact the child had opened the door the day before, did not tell how the child reacted in a panic situation. He also stated that he did not know what the child had been told about escaping. [V14, R1657].

Dr. Dunton has reviewed studies of temperatures reached in closed cars. Dunton testified that studies showed that with outside temperatures ranging from 82 degrees to 97 degrees the minimum temperatures measured in unshaded cars was 97 degrees the maximum was 104 degrees. He concluded, "I think the studies pretty clearly show the temperature is going to get at least into the low hundreds if not higher. [V14, R1638-39]. Dunton ended his direct testimony by explaining the studies found smaller cars and darker cars heated up faster. He feels the studies would apply to the Kia in which the child died in this case. [V14, R1640].

Dr. Dunton agreed that suffocation is a mechanical obstruction of the nose and mouth which prevents air from getting to the lungs and to the organs of the body. It takes three to five minutes on average for an adult or child to die from suffocation. [V14, R1641-42]. In response to a request from Stephens' counsel, Dr. Dunton examined the actual seat from the car in the courtroom. Dunton opined that if a child were suffocated on the seat by having his face forced down into it that you would likely see abrasions to the nose and lips. You might also find teeth impressions on the inside of the lips. Dr. Floro did not make any such findings. [V14, R1643-

44, 1677-78].

In response to a question from the State on cross Dr. Dunton explained that how long it would take for hyperthermia to cause death depended on the temperature inside the car and upon the child's compensatory mechanisms. It is impossible to predict how well a given child will compensate because that ability is individualized. [V14, R1650]. Dunton further stated, with the caveat that it was somewhat of a guess, that death would have taken from 30 minutes to several hours in this case. [V14, R1651].

Dr. Dunton agreed that he would expect the child to have suffered periods of panic and increased anxiety prior to death. He also opined that he would expect the child to have become disoriented as his temperature rose. [V14, R1672]. And, he noted that impairment of judgment also occurs at the onset of hyperthermia. [V14, R1679].

The trial court took judicial notice of climatological data for the month of June, 1997. On June 2, 1997 the minimum temperature was 65 degrees and the maximum temperature was 84 degrees. And, the average temperature throughout that 24 hour day was 75 degrees. [V13, R1583-84].

Defendant Cummings called Officer Dave Bisplinghoff to the stand. He had been a Narcotics Detective for the past three years and had been an officer for a total of ten and one-half years. [V13, R1590]. Bisplinghoff was familiar with the 1537 Logan Street

residence. The location had a reputation a drug house. [V13, R1590-91].

Officer Bernard Lynn Montgomery is a robbery detective with the Sheriff's Office. He responded to 1537 Logan Street regarding a robbery on June 2, 1997. Robert Sparrow told him that Consuelo Brown had punched the robber after the robber had grabbed the little boy. [V13, R1592-93]. Sparrow also told Bisplinghoff that the robber made him get up and go into the bedroom. [V13, R1594]. Montgomery conceded that Sparrow had been reluctant to provide police with information following the robbery. [V13, R1594-95].

Officer Theodore Jackson was one of the first officers to respond to 1537 Logan Street on June 2, 1997. Consuelo Brown told him"that one suspect had come into the house, grabbed her son by the neck, choked him, and carried him with him throughout the residence.” [V13, R1597-98].

Jason Stephens testified that he had not met Cummings prior to January 2, 1997. He said that Cummings came to his house with a couple of friends. Cummings, Stephens and Cummings’ friends went together to a mutual friend’s house on the north side of Jacksonville. They stayed there for approximately fifteen minutes. Cummings, two friends - one of who was the man with plats - and Stephens then left that residence together in one car. The car was a different one than the one they had used to travel to the mutual friend’s house. [V15, R1501-06].

Stephens and the others decided to go to the Sparrow residence because it was a known “weed house.” Stephens described “weed house” as a place at which it was known one could purchase marijuana. [V15, R1506-07]. The purpose of going to the house was to buy marijuana. Each of them chipped in $5.00 for the purchase. [V15, R1507, 1535-36]. It was decided Stephens would make the purchase.

When they arrived at the house they drove by it because no one was on the porch - an indication that no one was present to sell marijuana. They then drove by the house again and observed an adult walking into the house and a child by a car parked in front of the house. [V15, R1508]. They then parked behind the blue Chevy. Prior to Stephens getting out the car there was not any discussion of robbery or burglary. [V15, R1508].

Stephens possessed a nine millimeter silver Ruger. He had not seen any of his companion possessing guns. He carried the gun at waste level underneath his vest. [V15, R1509-10]. The little boy approached before Stephens got out of the car and told him his mommy and daddy were in the house. Stephens then walked the child into the house. [V15, R1510]. Stephens testified that the child he walked into the home was Robert Sparrow, Jr. [V15, R1538].

Stephens entered the house through the unlocked front door. He closed the door and put the chain on it. Stephens pulled out his gun and walked into the living room. [V15, R1511-12]. When he

entered the living room. Everyone was seated except for Consuelo Brown. He saw Derrick Dixon playing a Nintendo game with Kahari Graham seated beside him. Robert Sparrow, Tracey and Tammy Cobb were seated on the sofa. Consuelo Brown approached him and told him not to play with guns in the house with our kids. [V15, R1512-13].

Stephens then ejected a shell and told everyone to lay down as Robert Sparrow came at him from the sofa. Stephens had decided to rob the occupants on the way to the house. [V15, R1513-14, 1535]. Stephens asked, “Where’s the weed, the dope and the money at?” He was told, “There isn’t any.” [V15, R1515].

Cummings and the man with the plats entered after Stephens had been in the home for about twenty five minutes. [V15, R1515]. Stephens saw the man with plats carrying a firearm. He denied ever having seen Cummings with a gun. At that point, Stephens had been told where the weed was at and had taken it from a drawer in the front bedroom. [V15, R1515].

Stephens testified that Robert Sparrow, Jr., was with Stephens throughout the robbery, except when he went to the back of the house to see where he would leave the occupants. [V15, R1516]. He admitted that he directed the occupants into the bathroom. [V15, R1517]. He testified that he took Robert Sparrow, Jr., with him when he left as protection against being shot by the occupants. He acknowledged he told the occupants he was taking Sparrow as insurance. [V15, R1518].

Stephens testified that he had asked about keys to the blue car so that he had a means of escape if Cummings and the others left the scene. [V15, R1521-22]. He said that he was waived off as he approached the black car when he exited the house. He understood that to mean don't get in the car with the kid. [V15, R1522-23]. Stephens chased the other car as it pulled away. He believed they were trying to leave him. He blinked his lights and honked the horn as he followed the car. [V15, R1523, 1547, 1576-77].

Jason Stephens testified that the only thing Sparrow, Jr., asked of Stephens was whether he was going to hurt his mother. Mr. Stephens parked the car, took a cd player out it, closed the door and left in the other car. Sparrow, Jr., was seated in the passenger seat when Stephens left. [V15, R1524-25]. He testified that it only took him three or four seconds to remove the cd player. [V14, R1576]. Stephens said that he did not have any conversation with Sparrow, Jr., about remaining in the car or doing anything else. [V14, R1525, 1548].

At the house, Stephens took marijuana and crack cocaine from the occupants. He also took a necklace from the last individual who entered the house. He testified that he did not take anything from Kahari Graham, Consuelo Brown or Tracey Williams. And, he said that he took $60.00 from Robert Sparrow and $20.00 from Derrick Dixon. [V15, R1526-27]. Stephens maintained that he did not share any of the proceeds of the robbery with Cummings or any of the others with

him. [V15, R1527].

Stephens learned Sparrow, Jr., had died that night when a friend called him and asked if he had hurt the child. He then listened to television reports of the death. [V15, R1527-28]. He testified that he had admitted to the things he had done when he was first arrested.[V15, R1528, 1537-38].

Stephens maintained that he had not injured Robert Sparrow, Jr., in any fashion prior to leaving him. He left the Kia less than one mile from the Sparrow residence. [V15, R1528-29, 1548]. He tried to make the Kia easy to find by parking it in front of someone's house. [V15, R1529].

SUMMARY OF THE ARGUMENT

This case is a purely circumstantial evidence case in regards to the charge of felony murder. No witness testified that he or she saw the victim, Robert Sparrow, die. As the trial court recognized in its Sentencing Order, the cause of death in this case was unclear. It could have been either suffocation or death caused by hyperthermia. Indeed, the court gave significant weight to the fact that the defendant did not intend to kill the child as a mitigating factor in the penalty phase.

The trial court erred in denying defendant's motion for judgment of acquittal as to the murder charge at the close of the State's case. The evidence presented by the case was not

inconsistent with defendant's theory of defense that the death was an accident not causally related to the underlying felonies. The court also erred in subsequently denying defendant's motion for new trial. The first degree murder conviction was not supported by the weight of the evidence.

The court also erred by denying defendant's theory of defense instructions. The court prevented the jury from considering whether the death at issue fell within the lawful parameters of the felony murder theory. That error deprived the defendant of a fair trial.

And, the trial court erred in imposing the death sentence. The death sentence is clearly not appropriate under the facts of this circumstantial evidence case when viewed in light of controlling law and this Court's precedent.

ARGUMENT

I. **THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL REGARDING THE MURDER CHARGE**

At the close of the State's case the defendant moved for judgment of acquittal on all counts. The trial court denied the motion. [V13, R1486]. Defendant's co-defendant, Horace Cummings, also moved for judgment of acquittal. Cummings' counsel argued that his client was entitled to judgment of acquittal as to the State's theory of premeditated murder. Cummings' counsel cited the case of Mungin v. State, 689 So.2d 1026 (Fla. 1995), as grounds for his

motion. [V13, R1486-92]. The court took the motion under advisement. However, the following morning the court granted Cummings' motion as to the premeditated murder charge. [V13, R1499-1500]. The trial court erred by not also granting Stephens' motion for acquittal as to the premeditated murder charge.

In Mungin, the appellant was seen leaving the scene of a fatal shooting - a convenience store in Jacksonville - in a hurry immediately prior to the body being found. Id. at 1028. The appellant was subsequently identified by the customer who had seen him. And, a gun from which the fatal bullet had been shot was found in the appellant's home. Id. This Court held:

> In a case such as this one involving circumstantial evidence, a conviction cannot be sustained – no matter how strongly the evidence suggests guilt – unless the evidence is inconsistent with any reasonable hypothesis of innocence. A defendant's motion for judgment of acquittal should be granted in a circumstantial-evidence case 'if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.' State v. Law, 559 So.2d 187, 188 (Fla. 1989).

Id. at 1029 (citation omitted in part). This Court then assessed the evidence presented by the state which supported premeditation. While the victim was shot in the head at close range and the gun used was found in the defendant's possession, this Court found:

> [T]he evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the

> shooting, and no continuing attack that would have suggested premeditation.

Id. Accordingly, this Court found the court had erred in denying the motion for judgment of acquittal as to premeditation.

As in Mungen, the evidence of premeditation in this case was purely circumstantial. Conflicting expert testimony was presented concerning the cause of death. Indeed, the trial court found in its Sentencing Order:

> Determining the actual cause of death, either asphyxia (by suffocation or strangulation) or hyperthermia, is difficult in light of the absence of credible eyewitness testimony and conclusive forensic evidence. Although the circumstantial evidence establishes that it is more likely, than not, that young Robert died as a result of asphyxiation, the Court is unable, beyond a reasonable doubt, to determine the exact cause of death.

[V2, R387]. Thus, the evidence of premeditation in this case was far less than that presented in Mungen. As in Mungen, there was no evidence presented of a continuing attack. Furthermore, the evidence as to when Robert Sparrow, Jr., died was vague at best.

State's witness Dr. Floro testified, "Well, the child most probably died during the 3:00 time than say 9:00." [sic]. [V12, R1381]. However, during cross Floro conceded that the margin of error as to his time of death estimation was several hours. [V13, R1439]. The expert called by co-defendant Cummings, Dr. Dunton, testified that how long it would take for hyperthermia to cause death depended on the temperature inside the car and upon the

child's compensatory mechanisms. It is impossible to predict how well a given child will compensate because that ability is individualized. [V14, R1650]. He then estimated, with the caveat that it was somewhat of a guess, that death would have taken from 30 minutes to several hours in this case. [V14, R1651].

No evidence contravenes Jason Stephens testimony that following a short chase of his companions' car, he left the child in the Kia in an area where he thought the vehicle would be found. [V13, R1523, 1529, 1547, 1576-77]. Stephens testified that he had not injured Robert Sparrow, Jr., in any fashion prior to leaving him. He left the Kia less than one mile from the Sparrow residence. [V13, R1528-29, 1548]. Thus, the evidence presented by the State was not such that the jury could exclude the reasonable hypothesis of innocence that Stephens did not intend to kill the child. Indeed, the Court's Sentencing Order makes it patently clear that the evidence was not inconsistent with that theory of innocence.

Furthermore, the court also erred in denying the motion as to the murder charge under a felony murder theory. As grounds for this argument defendant adopts the authority and reasoning set forth in Section 4 of this Initial Brief. If the trial court had correctly construed the scope of the felony murder rule, the court would have found that Mr. Stephens was entitled to a judgment of acquittal as to the charge of first degree murder. The State's circumstantial evidence was not inconsistent with defendant's theory of defense

that the predicate felonies had ended prior to the death.

Thus, the trial court erred in denying defendant's motion for judgment of acquittal as to the murder charge. Accordingly, this Court should vacate defendant's conviction for first degree murder.

II THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THE MURDER CHARGE

Rule 3.600(a)(2), Florida Rule of Criminal Procedure, provides that a trial court shall grant a new trial if "The verdict is contrary to law or the weight of the evidence." The defendant filed a Motion for New Trial, which the court subsequently denied, raising that issue. [V2, R303, 306]. "The Rule allows the trial judge to act as a safety valve when the evidence is technically sufficient to prove the criminal charge but the weight of the evidence simply does not appear to support that verdict." State v. Harris, 660 So.2d 285, 288 (Fla. 5th DCA 1995).

Defendant adopts his argument set forth in the preceding section of this Initial Brief as grounds for this issue. Insofar as the verdict was based upon a premeditated murder theory, the trial court erred in not setting aside the verdict on that theory. In Fisher v. State, 715 So.2d 950 (Fla. 1998), this Court reviewed addressed whether a death sentence was warranted in a felony murder case. In Fisher, an argument ensued in Jacksonville between appellant Fisher and one Karlon "Dap" Johnson. After the fight was

broken up Fisher's nephew Derrick Cummings learned of the fight and was upset by it. He was seen later that day in a car with an "Uzi-type" gun. Id. at 951. Later that evening the appellant and others drove by Dap Johnson's house.

> The passengers in the car fired at least thirty-five shots at the house from three different nine millimeter guns, a Glock, a Luger, and an Uzi. Several bullets penetrated the kitchen door. One of the bullets traveled through the kitchen into the living room and struck five-year-old Shelton Lucas, Jr., who was sleeping on a couch with his mother. The next day the child died from this wound.

Id. at 951. Under the facts of the case, this Court found that the evidence was insufficient to support a charge of first degree murder. This Court held:

> [P]remeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. If the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained.

Id. at 952. This Court vacated the conviction for first degree murder because it could not rule out the possibility that the defendant and his companions merely intended to frighten Johnson or damage his car. Id. However, the court found:

> [T]he proof is clearly sufficient for a conviction of second-degree murder, which is defined as the 'unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.

Id.

The court's error in this case is significant, because the trial court instructed the jury during the penalty phase as though death might be warranted pursuant to a premeditated analysis. The court thus skewed the jury's analysis by suggesting to the jury that a death sentence for a premeditated murder might be justified - something the trial court itself did not believe was the case. Accordingly, the defendant's sentence should be vacated because the trial court's error prejudiced the defendant's right to a fair and impartial trial.

Furthermore, the court also erred in not finding the verdict under the felony murder rule was contrary to the weight of hte evidence. Defendant adopts the reasoning and argument found in Section Four of this Initial Brief. Under controlling law, the court should have found that the circumstantial evidence did not rebut defendant's theory of defense that the robberies, burglary and kidnapping had all ceased when Stephens parted company from an unharmed Robert Sparrow, Jr. Accordingly, this Court should set aside defendant's first degree murder conviction.

III THE TRIAL COURT ERRED IN REFUSING TO SET ASIDE DEFENDANT'S PLEA CONCERNING ROBBERY OF DERRICK DIXON, AND ERRED IN NOT GRANTING DEFENDANT A JUDGEMENT OF ACQUITTAL AS TO THAT CHARGE

Prior to the trial commencing Jason Stephens, pled guilty to

Count VI of the Indictment which charged that the defendant had committed an armed robbery of Derrick Dixon. [V13, R1482]. At trial Derrick Dixon testified that Stephens searched his pockets while he was on the floor. However, Dixon testified that Stephens did not take anything from Dixon. [V11, R1193]. Following the State resting its case, co-defendant Cummings moved for a judgment of acquittal as to the robbery of Derrick Dixon. [V13, R1489]. The State then conceded that Cummings was entitled to a judgment of acquittal as to the Dixon robbery count. [V13, R492-93].

Stephens' counsel then moved to withdraw his plea and also moved for judgment of acquittal upon that charge. The State responded, "[W]e really have no argument on that point and probably have no objection to reduction on that count." [V13, R1493]. The court then held, "Well, I don't think that can be taken care of at this time." The court then granted Cummings motion in part and reduced the charge to attempted robbery with a firearm. [V13, R1493-94].

Rule 3.170(f), Florida Rule of Criminal Procedure provides:

> The court may in its discretion, and shall on good cause, at any time before a sentence, permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgement and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted.

In Andres v. State, 683 So.2d 604 (Fla. 4th DCA 1996), the appellant

moved to withdraw his plea after he learned that the victim in a capital sexual battery case was not under 12 years of age. Id. at 605. The trial court denied the motion. In reversing the trial court's decision, the Fourth District found that the trial judge had abused his discretion by denying the motion. The court reasoned, that if true, that the victim was not under twelve, the defendant would be barred from conviction as a matter of law. Id.

As in Andres, the trial court too in this case erred by not granting Stephens ore tenus motion to withdraw his plea. The court should have granted the defendant's motion, and should have accepted the State's invitation to modify the plea tot he lesser included offense of an attempted robbery. Accordingly, this Court should vacate defendant's conviction as to Count Six, and adjudge the defendant guilty of an attempted robbery conviction upon that count.

IV THE TRIAL COURT ERRED IN DENYING DEFENDANT'S THEORY OF DEFENSE INSTRUCTIONS

During the charge conference for the guilt phase defendant's counsel requested that the court give three instructions the defense had prepared concerning whether the death at issue fell within the scope of the felony murder statute. Defendant's counsel argued that the instructions were based upon the holdings of Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1990), and Mills v. State,

407 So.2d 218 (Fla. 2nd DCA 1981). [V14, R1745]. Counsel asserted that under the felony murder statute the State had the burden to prove "the death had to occur as a consequence of a felony." He argued that the authorities cited provide that if death is not a predictable result of the felonious acts then the requested instructions were merited. [V14, R1745-46]. The trial court denied the requests without explanation. [V14, R1746].

Defendant Stephens' Special Requested Jury Instruction Number 1 provided:

> If you find that there was some definitive break in the chain of circumstances beginning with the crimes of kidnaping, robbery or burglary, and ending with the death of Robert Sparrow, III, or, if you have a reasonable doubt about it, you should find the defendant, Jason Demetrius Stephens not guilty of First Degree Felony Murder.

Defendant Stephens' Special Requested Jury Instruction Number 2 provided:

> If you find that because of the passage of time and/or the separation in space from the felonies of kidnapping, robbery and/or burglary that those felonies had been completed prior to the death of Robert Sparrow, III, or, if you have a reasonable doubt about it, you should find the defendant, Jason Demetrius Stephens not guilty of First Degree Felony Murder.

And, Defendant Stephens' Special Requested Jury Instruction Number 3 provided:

> If you find the death of Robert Sparrow, III was not a predictable result of the felonious acts of Jason Demetrius Stephens, or, if you

have a reasonable doubt about it, you should find the defendant, Jason Demetrius Stephens not guilty of First Degree Felony Murder.

[V2, R245-47].

The trial court instructed the jury:

> Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. Robert Sparrow, III is dead.
>
> 2. a) The death occurred as a consequence of while the defendant was engaged in the commission of a Kidnapping, or a Robbery, or a Burglary.
>
> 3. OR
>
> b) The death occurred as a consequence of and while the defendant was attempting to commit a Kidnapping, or a Robbery, or a Burglary
>
> OR
>
> c) The death occurred as a consequence of and while the defendant was escaping from the immediate scene of a Kidnapping, or a Robbery, or a Burglary.
>
> 4. a) The defendant was the person who actually killed Robert Sparrow, III,
>
> OR
>
> b) Robert Sparrow, III was killed by a person other than the defendant, but both the defendant and the person who killed Robert Sparrow, III were principals in the commission of an Attempt to Commit Kidnapping, or Robbery, or Burglary.
>
> In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.

[V2; R1909; V15, R255]. No further instruction was given regarding

the parameters of the crime of felony murder.

Jason Stephen's theory of defense was that the child was alive and well when he left the child in the parked Kia on June 2, 1997. [V13, R1518, 1525, 1528-29, 1548-49; V14, R1760-63]. During opening argument Stephens' counsel asserted that the evidence which would be presented would not fit within the strict definition of the crime of felony murder. [V11, R1021-28].

He specifically told the jury that he expected that Stephens would testify that he took the child as insurance to insure that he was not harmed on his way out of the home. Defendant's counsel also told the jury that Stephens would testify, "He had no reason to believe anything except that the family will come and get the child shortly, and didn't know until the next morning there was injury to the child." [V11, R1025-26]. Defendant's counsel further argued, "The evidence will show that there was absolutely no intention on Mr. Stephens' part to harm this child, and that when he left the child was unharmed." [V11, R1026]. Counsel concluded by asserting the evidence would show that the death did not fit within the definition of felony murder. [V11, R1028].

Likewise, during closing defendant's counsel argued the State had not proved a premeditated murder and had not proved a felony murder. [V14, R1760-61]. He argued that the jury's interpretation of how the death occurred depended on which expert they believed. [V14, R1763]. He then asserted that felony murder applies when

death occurs during an underlying felony. And, he asserted that the death which was distant in time and distance from the Sparrow residence did not fit within the definition of felony murder. [V14, R1764-66].

Counsel for the State then argued:

> I don't have the slightest idea, can somebody tell me what difference it makes in this case whether the child died of hyperthermia or suffocation? It is felony murder equally. The only difference is if he suffocated him, he's guilty of both premeditated murder and felony murder, and he's still guilty of felony murder. I don't have the slightest idea and cannot even envision a legal theory that, if during the course of burglary, robbery, kidnapping, you take a child, leave a child in a car, and that child dies of hyperthermia, that it's not first degree murder. I can't even begin to suggest a theory of anything other than first degree murder.

[V14, R1790-91]. The State Attorney for the Fourth Judicial Circuit then argued Stephens' counsel was making that argument in regards to the death penalty. [V14, R1791].

The State's counsel then returned to that theme arguing:

> You know, it's like saying, and I think it was said in the opening statement, 'He didn't die as a result of these murders, he died as a result of hyperthermia.' That is so absurd I can't even think of an analogy. You throw somebody off a 50 story building and you say he didn't die because I threw him off, he died because of he contact with the ground. And, again, it's applied, because in felony murder if you commit certain crimes, and even if the death accidentally occurs, as we explained in the felony murder, it's felony murder. And the reason is, you don't take a three year old during the course of those felonies, and if

> you do and he dies, under these circumstances it's felony murder.

[V15, R1810]. The State Attorney further continued his rhetoric during rebuttal asserting: "I guess there is irony in the one question, and I don't mean this cynically, but I have never known the answer to, what difference would it make if it was suffocation or hyperthermia? No I find other there is no difference." [V15, R1877].

During rebuttal defendant's counsel again urged the jury the death was not felony murder because it had occurred away from the scene of the robberies and burglary. [V15, R1891-92]. He concluded by telling the jury that at most his client might be guilty of manslaughter for having left the child in a car on a hot day. [V15, R1895-96].

In Mills v. State, 407 So.2d 218 (Fla. 3rd DCA 1981), three defendants participated in luring an individual to a hotel and holding that person hostage. The victim was ultimately killed while he was being held hostage in a hotel by one of the defendants. Id. at 220. The court addressed the appellant's argument that the underlying felony in which he had participated, a robbery, had terminated at the time of the victim's death:

> In the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing. Neither the passage of time nor separation in space from the felonious act to the killing

> precludes a felony murder conviction when it can be said, as it can be so readily here, that the killing is a predictable result of the felonious transaction. Most certainly, where Meli remained in captivity from the commencement of the felony until his death, the nexus between the robbery and his death is clear.

Id. at 221-22 (citations omitted)(emphasis added). The scope of the felony murder rule was further assessed by the court in Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1991).

In Parker, the appellant and his brother robbed an individual at gunpoint at a rest area. After his assailants left, the victim went to a nearby convenience store where he saw and confronted one of his assailants. The appellant and his co-defendant then departed in their car. A high speed chase by police ensued and one officer was killed when he was struck by another officer's car. Id. at 1050-51. The appellant was convicted of second degree felony murder and he appealed the trial court's denial of his motion for judgment of acquittal. The court held that the "in the perpetration of" language contained within the felony murder statute encompasses "the period of time when a robber is attempting to escape from the scene of the crime." The court then quoted the holding in Mills regarding a definitive break in the chain of circumstances. Id. at 1051.

The court, in Parker, then held:

> Factors to be considered in determining whether there has been a break in the chain of circumstances include the relationship between

> the underlying felony and the homicide in point of time, place and causal relationship. One commentator suggests that in the case of flight, a most important consideration is whether the fleeing felon has reached a 'place of temporary safety.'

Id. Applying that standard, the court found the robbery was not completed at the time of the death of the officer, because: the killing occurred less than an hour from the robbery; the killing occurred no more than several miles from the robbery; and the only stop made by the robbers was at a gas station to facilitate their return to a place of safety. Id. at 1052.

The holdings of Mills and Parker dictate that the trial court in Jason Stephens' case reversibly erred by not giving each of the defendant's requested jury instructions. The testimony of Drs. Floro and Dunton established that both the time and manner of the child's death was uncertain in this case. Defendant's theory of defense was that the child died from hyperthermia after Stephens had been dropped off at a place of refuge, a nearby friend's house. [V13, R1549]. The court's denial of Stephen's requested instructions barred the jury from considering defendant's theory of defense that the child's death did not fit within the definition of felony murder. Stephens' proposed Special Instructions Nos. 1, 2 and 3 squarely tracked law regarding the scope of the felony murder rule.

Jason Stephens was entitled to have the jury instructed on his theory of defense. "Defendant is entitled to have the jury

instructed on the rules of law applicable to his theory of the defense if there is any evidence to support such instructions." Bryant v. State, 601 So.2d 529, 533 (Fla. 1992), quoting, Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985); Arthur v. State, 717 So.2d 193, 194 (Fla. 5th DCA 1998)("A defendant is entitled to an instruction on his theory of defense 'however flimsy' the evidence is which supports that theory."), citing, Vazquez v. State, 518 So.2d 1348, 1350 (Fla. 4th DCA 1987). The trial court reversibly erred in this case by denying Jason Stephens' requested theory of defense instructions.

The court's instruction that "The death occurred as a consequence of and while the defendant was escaping from the immediate scene of a Kidnapping, or a Robbery, or a Burglary" did not direct or allow the jury to consider whether the child's death was a predictable result of the burglary, robberies or kidnaping. The defendant was thus deprived of due process of law under Art. I, Sec. 9, Fla. Const., and the Fifth and Fourteenth Amendments to the Constitution of the United States.

V THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE

During jury selection co-defendant Cummings sought a change of venue. [SV, R16-71]. Defendant Stephens moved to adopt that motion. [V8, R575]. During earlier pretrial proceedings, the court stated

that all motions to adopt which were not specifically addressed were granted. [V3, R530]. At the time the motion was raised the court took it under advisement. [V8, R577]. Subsequently, the court denied the motion as to both defendants. [SV, 71; V10, R967-69].

Of the first fifty-six venire persons, twelve were excused by the court for cause relating to publicity. [V5, R98-200; V6, R203-344]. In the second group of fifty-four venire persons, fourteen more were excused. [V6, R374-400; V7, R403-564]. Many of the venire persons felt particularly strong about the case because a young child had died. [V6, R91, 100, 120, 132, 295-304, 373; V7, R428].

As evidence supporting the motion the co-defendant attached a number of newspaper articles which concerned the death of Robert Sparrow, Jr., and the hunt for Mr. Stephens and Horace Cummings. [SV, R19-45]. The defendant also submitted the affidavits of two experienced criminal defense attorneys. Both of the attorneys opined that it was their belief that Stephens could not receive a fair trial due to the pretrial publicity. [SV, R46-49].

The trial court explained its rationale for denying the motion. The court found in essence that two-thirds of the jurors called stated that they felt they could be fair and impartial. The court further found that the defendant had not carried his burden of showing prejudice. And, all of the jurors seated indicated they could be impartial. [V10, R967-69].

The defendant asserts the trial court erred in its ruling. The

high degree of publicity, and the number of jurors who admitted they had been exposed to such publicity, warranted a change of venue in this case. The trial court erred by not concluding a change of venue was warranted in light the difficulty encountered in picking a jury. Defendant asserts the standard applied in Rollings v. State, 695 So.2d 278 (Fla. 1997), warranted a change of venue in this case.

VI **THE TRIAL COURT ERRED BY NOT CONDUCTING A NELSON INQUIRY**

During a pretrial hearing on October 20, 1997, Jason Stephens asked the court to appoint other counsel because he was dissatisfied with his appellate counsel. [V3, R443]. The defendant then offered to hand the court a note concerning his desire to remove obtain other counsel. The court read the note and characterized it as complaining of a lack of contact with the defendant, his mother and his priest. [V3, R444]. The trial judge stated that he agreed Stephens' counsel, Richard Nichols, should be in contact with him. He then asked if Stephens had any complaints concerning Nichols' co-counsel, Refek Eler. Stephens replied, "I ain't never seen him." [V3, R445]. The court then characterized Stephens complaints as not challenging Nichols' competence.

After asking to have a public defender appointed, and being informed the court could not do that due to a conflict, Stephens stated that his main concern was that he had not been given copies

of any paperwork. Stephens indicated that all his attorney had given him was one police report. [V13, R447]. The court responded that the judge expected Stephens would be provided copies by Mr. Nichols of all documents concerning his case. [V3, R447-48]. The defendant responded that he still wasn't going to be satisfied. [V3, R448].

n Matthews v. State, 584 So.2d 1105 (Fla. 2nd DCA 1991), the court addressed whether the trial court had properly handled the defendant's request to represent himself. The court held:

> When a defendant requests the trial court to discharge his court appointed attorney and replace him with another appointed attorney, the court should first determine whether adequate grounds exist for replacement of the defendant's attorney.

Id. at 1106, citing Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). In this case, Stephens expressly requested the court to appoint other counsel to represent him when he requested the court to discharge his counsel.

In Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), the court held:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his court appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant.

Id. at 258 (emphasis added). The record in this case shows that the

trial court never made an adequate inquiry of Stephens and his appointed counsel regarding the competency of his representation. See, Jones v. State, 658 So.2d 122, 125 (Fla. 2nd DCA 1995)(holding trial court erred because "[I]t never inquired of the appellant and his court appointed counsel as to whether there was reasonable cause to believe that counsel was being ineffective.")(emphasis in original); Taylor v. State, 605 So.2d 958, 959 (Fla. 2nd DCA 1992)(holding trial court erred by "not determin[ing] whether counsel was effectively representing [the defendant").

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guidelines 11.4.1(2) titled, “Investigation,” and Guideline 11.4.2, titled, “Client Contact,” stress the importance of prompt and ongoing contact in capital cases. The record in this case shows, that contrary to the trial court’s characterization, the defendant was challenging his counsel’s competency. Defendant’s pro se complaint regarding his complaints never made it to the court file for some reason. Defendant submits that the trial court, the clerk of court and all counsel present abdicated their duties by not ensuring that letter was properly filed. This Court should find the combination of defendant’s pro se complaint, coupled with his oral complaints, squarely challenged his counsel’s competency.

The defendant raised the issues of lack of communication and failure to keep him informed regarding the case on October 20,

1997, roughly two months prior to his first degree murder case commencing. The court reversibly erred by not conducting a full Nelson inquiry.

VII THE TRIAL COURT ERRED BY ALLOWING THE STATE TO QUERY ABOUT A STATEMENT THE DEFENDANT HAD MADE TO AUTHORITIES CONCERNING THE ELECTRIC CHAIR

The trial court reversibly erred by allowing the State during cross-examination of the defendant to elicit testimony from the defendant that he had asked authorities to help him get the electric chair. During cross by the State, the defendant identified State's Exhibit marked for identification as JJ as being a post-arrest statement he had made to an FBI agent and a Georgia Bureau of Investigation agent. [V13, R155-57]. Immediately following the defendant's authentication of the exhibit, defense counsel objected and asked to approach at sidebar.

Defense counsel informed the court that the statement was a request for the electric chair. Counsel then objected to the statement as being non-probative of matters at issue and as being highly prejudicial. [V13, R1558-59]. The State argued the statement was an admission against interest in that only a guilty person would request the electric chair. [V13, R1558-59]. Notably, the court then observed, "This case gets more unusual as we go by." The court then recognized that the State was arguing the statement

was probative of a consciousness of murder. [V13, R1559]. The court also recognized that the State would have to lay a predicate before using the statement. [V13, R1560-62]. The parties then agreed to the State questioning Stephens in the way of a proffer before such evidence was presented to the jury. [V13, R1564].

During proffer Stephens testified, "I told them about all the crimes in all my life that I have done, could they assist me in getting the electric chair." [V13, R1564]. The State then asked the defendant why he made the statement if he knew he did not kill Sparrow, Jr. Stephens responded:

> I'm talking about all the crimes in my life, with all those combined, I was hoping that I could get the electric chair. See, I knew Little Rob wasn't murdered, so in order for me to get the electric chair, I was talking about everything else I had done.

[V13, R1565]. The State then again asserted that it was an investigation against interest because it was made during an investigation into this case. Defense counsel then made the additional objection that the statement would require the defendant to refer to other crimes which are not before the jury. [V13, R1565].

Following a bench conference out of the presence of the court reporter the court ruled:

> I don't want to – I believe you can confront him with his feelings about this subject now, and if it becomes necessary to impeach him with that statement, then you can.
>
> C * *

> I think you can establish that in light of his testimony – I think you can establish that he made this statement. And you are going to have to ask him did he make this statement, did you ask for their assistance.
>
> C * *
>
> If he says yes, you don't need that statement to impeach him. I think in light of the unique testimony, in which he appears to deny any – seems to deny any criminal involvement, such a statement certainly would be admissible.

[V13, R1566-67]. Defense counsel then indicated he did not understand the court's ruling. The court responded, "He can ask him questions that go to his state of mind when he turned himself in regarding his guilt, and I think in light of his testimony he can lead him." [V13, R1568](emphasis added). Defendant's counsel then asked his understanding of the court's ruling. Stephens' counsel expressed that it was his understanding that the State was attempting to refer to the statement. The court then disjointedly responded: "I agree, but you started objecting. Although I know you laid the predicate to introduce it, but I don't know that it rebuts anything, and it is in evidence." [V13, R1568].

The jury was then recalled an in response to a question from the State Stephens admitted he was interviewed by Georgia Bureau of Investigation Agent Dean McManus and FBI Agent Bruce Pickens. The following exchange then occurred:

> Q Did you tell them that that – they were interviewing you about this Sparrow murder case?
>
> A Yes.
>
> Q Did you tell them that, or did you ask them to promise you that they would

attempt to have you executed by the electric chair within a year and a day after being returned to Florida?

A Yes.

[V13, R1568-69]. The court by allowing the State to introduce evidence of that statement forced Stephens to refer to other crimes to explain that statement. During re-direct Stephens' testified, "No, see, that wasn't a punishment for the charges I'm on now, it was the punishment for everything that I have done my lifetime." [V13, R1577].

The trial court clearly erred by admitting in Stephens' statement concerning his desire to die. The court confused Jason Stephens with his co-defendant, Horace Cummings, when he ruled the statement was admissible. The court ruled the statement was admissible because it bore upon the issue of Stephens' "state of mind when he turned himself in regarding his guilt." [V13, R1568]. However, the record is patently clear that Jason Stephens did not turn himself in to authorities. Indeed, the State made a point of that fact during its cross of the defendant. Indeed, the State elicited an admission from the defendant that he would still be on the run today if he had not been arrested in late July, 1997. [V13, R1541-42]. Thus, the trial court was simply wrong in ruling that Stephens' statement to authorities was probative of his state of mind when he turned himself in to authorities.

Furthermore, the record is devoid of any indication as to when Stephens made the statement following his arrest. Stephens

testified that he had been on the run since December 4, 1997. [V13, R1541]. In addition to the crimes charged in this case, Stephens plead guilty to five armed robberies and an attempted murder charge during the pendency of this case in exchange for concurrent life sentences and the State not using those pleas against him during the penalty phase.[1] While Stephens answered yes, when asked if the FBI and GBI agents were interviewing him about the Sparrow murder case, Stephens testified that he made that statement in reference to other crimes. His testimony to that end stands unrebutted. The fact that he was wanted for other crimes, as evidenced by his plea to an unrelated murder, further buttresses Stephens' testimony.

The trial court erred in admitting the defendant's statement because it was not relevant evidence under Fla.R.Evid. 401. In the context of evidence of flight as evidence of a consciousness of guilt, this Court has limited such evidence to that which bears a "sufficient evidentiary nexus" to the crime being tried. Escobar v. State, 699 So.2d 988, 995-96 (Fla. 1997). In Escobar, this Court held the nexus requirement is mandated because, "This is necessary in the application of this rule of law since the evidence creates an inference of a consciousness of guilt of the crime for which the

[1]The defendant entered pleas to four separate counts of robbery with a firearm in Case No. 97-9218 and to one of robbery with a firearm and one count of attempted murder in Case No. 97-9219. The defendant received life sentences upon each of those pleas. And, the parties stipulated that those offenses could not be used as aggravating circumstances in the penalty phase of this case. [V15, R844-863].

defendant is being tried." Id. at 995. This Court further held, "The ultimate admissibility issue is the relevance to the charged crime." Id. This Court found that given the time which had elapsed prior to the defendant having resisted arrest in another state, and due to a lack of evidence showing his actions were connected to the charge being tried in Florida, there was an insufficient nexus shown to make such evidence relevant. Id. at 996-97. See e.g., Redford v. State, 477 So.2d 64, 65 (Fla. 3rd DCA 1985)(evidence that defendant gave false name at time of arrest bore no relevance to crime charged); Stanley v. State, 648 So.2d 1268, 1269 (Fla. 4th DCA 1995)(officers' testimony that defendant was belligerent and threatened them was irrelevant to burglary and assault prosecution).

Similarly, in this case, the defendant's testimony during proffer that he made the statement in reference to other crimes he had committed stands unrebutted. Thus, the State failed to establish a nexus which made the statement relevant to matters at issue. Furthermore, the statement was also substantially outweighed by the danger of unfair prejudice under Fla.R.Evid. 403. The defendant will not belabor this Court with a caselaw analysis of Rule 403 as the unfairly prejudicial nature of the statement is patently evident.

Finally, the trial court also erred because the court knew the defendant's response, or explanation of that statement on re-

direct, would refer to inadmissible other act evidence. Namely, the defendant made clear on proffer that his desire to receive the chair concerned other crimes. While the State avoided eliciting that testimony, the defendant was left with no choice but to let the jury believe he wanted to die for Sparrow, Jr.'s death or to explain his statement in reference to the other acts in which it was made. Thus, admission of the statement was also contrary to Fla.R.Evid. 404. Accordingly, this Court should vacate Stephens' convictions and remand this case for a new trial.

VIII **THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH THE SENTENCE IS NOT IN ACCORD WITH THE HOLDING OF TISON V. ARIZONA, 481 U.S. 137 (1987)**

In Tison v. Arizona, 481 U.S. 137 (1987), the Court addressed when the death penalty is constitutionally permissible in non-premeditated death cases. The Court found, "The issue raised by this case is whether the Eight Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." Id. at 152. The Court answered the question stating:

> [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities know to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing

> judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. at 157-58. The Court then remanded the case to the Arizona courts to apply the Court's holding to the case at issue. In doing so, the Court noted, "We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here." Id. at 158.

Subsequently, this Court has rendered a number of decisions which dictate that Jason Stephens' death sentence be vacated as unjustified and disproportionate. In Jackson v. State, 575 So.2d 181 (Fla. 1991), the owner of a hardware store in St. Petersburg was found after he had been shot in the chest by an assailant. He died before medical personnel arrived. Id. at 184-85. Applying Tison, infra., and Enmund v. Florida, 481 U.S. 137 (1982), this Court found:

> Although the evidence against Jackson does show that he was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. The entire case is based on circumstantial evidence.
>
> C * *
>
> A reasonable inference could be drawn from the evidence it this record that either of the two robbers fire the gun, contrary to the finding of the trial judge.
>
> C * *
>
> There was no evidence that Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery.
>
> C * *

> Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder.
>
> C * *
>
> To give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of Enmund and Tison, that the constitution requires proof of culpability great enough to render the death penalty proportional punishment, and it fails to 'genuinely narrow the class of persons eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 877 (1983).

Id. at 193. Accordingly, this Court vacated Jackson's death sentence and imposed a life sentence.

Similarly, in Benedith v. State, 717 So.2d 472 (Fla. 1998), the appellant participated in the robbery of an individual's car which was accompanied by the owner's murder. Id. at 474. This Court found:

> The evidence does not prove that appellant was the actual shooter, that he procured the firearm for use in the robbery, that he possessed the firearm before or during the robbery, that he or Taylor had ever used a firearm previously in a robbery, or that he could have prevented the use of the firearm while the robbery was being committed. Based upon the evidence, a reasonable inference could be drawn that either appellant or Taylor did the actual shooting. Thus, the death sentence must be vacated.

Id. at 477 (footnote omitted). As in Jackson and Benedith, the facts of this case do not warrant imposition of the death penalty.

The record shows that the defendant conceded that he was a major participant in the charged crimes, including the crimes to which he plead, of armed burglar robbery and kidnapping. However, the evidence does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. The entire felony murder case is based on circumstantial evidence. There is no evidence which indicates that Jason Stephens intended to harm Robert Sparrow, Jr. Indeed, despite the fact that Stephens struck Consuelo Brown during the robbery when she confronted him, there is no evidence that he intended to harm anybody when he walked into the home. And, there is no evidence that Stephens expected violence to erupt during the burglary, robbery or kidnapping.

Indeed, Stephens contended the purpose of the kidnapping was to insure his escape was peaceful. [V15, R1518]. Thus, upon this record this Court must find that there was insufficient evidence to establish that Stephens' state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder. A review of Florida cases involving the death of children in similar situations reveals that no death sentences have been issued in any circumstantial evidence case comparable to Stephens' case.

There is only one case of record in which a child is reported

to have died of hyperthermia. In Mudd v. State, 638 So.2d 124 (Fla. 1st DCA 1994), the appellant was convicted for manslaughter for the death of her seven-month-old son. "The child died of hyperthermia after being left in a car seat in the back seat of the appellant's car for approximately eight hours while the appellant was at work." Id. at 124. In Mudd, the appellant was convicted of manslaughter due to the improper admission of other act evidence. The record does not indicate what charge was initially lodged against the appellant. Id.

In Jakubowski v. State, 494 So.2d 277 (Fla. 2nd DCA 1986), the defendant was convicted of third degree felony murder after a six-year-old child he babysat died from burns caused by immersion in hot water. Id. at 279. The trial court had granted a judgment of acquittal as to the charge of second degree murder. The trial judge departed upward from the guidelines and imposed a fifteen year sentence. On appeal the case was remanded due to the court having considered an improper factor. Id. at 279-80.

In State v. Freund, 626 So.2d 1043 (Fla. 4th DCA 1993), the State charged a mother with criminal child neglect in contravention of §827.05, Fla. Stat. (1989) , a second degree misdemeanor, after she left her two minor children, ages one and five, in a car alone and unsupervised. During that time, the one-year-old was injured when struck by a car. Id. at 1044. The court held that the criminal action was not barred by the denial of a petition for dependency

based upon the same facts. Id. No post-remand appellate opinion exists.

And, in McDaniel v. State, 566 So.2d 941 (Fla. 2nd DCA 1990), the appellant was convicted of third degree murder following the death of his two and one-half year old son. The child died of chronic illness and malnutrition. Id. at 941. The court found:

> Appellant, living in the same house with the victim, either knew or reasonably should have known of the infants's precarious medical situation. Culpable negligence is defined as reckless indifference or grossly careless disregard for the safety of others. The evidence was overwhelming that appellant was culpably negligent in withholding food or medical treatment from his infant son.

Id. at 942 (citations omitted). The foregoing cases show that imposition of the death penalty in Jason Stephens case would be a disproportionate penalty under the Eighth Amendment. Accordingly, this Court should vacate his death sentence.

IX **THE TRIAL COURT ERRED IN ITS ASSESSMENT AND APPLICATION OF AGGRAVATING AND MITIGATING FACTORS**

The court's consideration of defendant's convictions for offenses underlying the felony murder conviction as prior convictions under §921.141(5)(b), Fla.Stat. (1997), constitutes improper doubling. The trial court gave great weight to the fact that, "The Defendant pleaded guilty or was found guilty in the instant case of crimes of robbery, aggravated battery and burglary

with an assault." [V15, R389]. The court's finding that the underlying convictions constituted an aggravating factor is duplicative because those offenses are part of the same offense. Indeed, the express language of §921.141(5)(b), refers to a defendant having been "previously convicted" of felony involving the use of threat or violence to the person. Thus, the court's consideration of the underlying was both a doubling and constituted consideration of an aggravating factor not authorized by statute.

The court also erred in finding, "The death of this child occurred while the Defendant was engaged in or fleeing from crimes of armed kidnapping, armed robbery and burglary with an assault." [V15, R390]. The court also gave this factor "great weight."

As set forth in Section 4 of this Brief, which defendant adopts by reference, the State did not prove that the death occurred within the purview of the felony murder statute. The court is simply wrong in finding otherwise. The defendant had reached a place of temporary refuge at the time the child died of hyperthermia. Thus, the court erred in finding this aggravating factor.

The trial court failed to give due consideration to defendant's acceptance of responsibility for the majority of offenses with which he was charged. The court downplayed this fact saying the court believed it was more of a trial strategy. [V15, R397]. Yet, the court overlooked that the defendant unquestionably

cooperated with authorities from the time he was arrested. [V15, R1550-56]. By analogy to the federal sentencing guidelines, any plea of guilt to any offense which will result in an adjudication is a significant acceptance of responsibility. See, Federal Sentencing Guidelines Manual, §3E1.1.

In this case the defendant pled to one count of armed kidnapping, three counts of armed robbery, two counts of attempted armed robbery, one count of armed burglary and one count of aggravated battery. [V15, R232-34]. That is clearly a significant acceptance of responsibility. At trial the defendant candidly admitted to his role in the charged offenses, excepting the murder charge as to which defendant denied responsibility. Accordingly, the trial court erred in giving that mitigating factor little weight.

The court also erred in finding that the defendant was not remorseful. The court's primary basis for this finding was the defendant's refusal to identify one or two other individuals who were involved in the charged offense. The defendant steadfastly maintained throughout the trial that he never intended to harm or kill Robert Sparrow, Jr. He also maintained that his companions were not privy to his robbery plans prior to their walking in on his endeavor.

While the trial court may wish to encourage persons to cooperate with the State against other suspects, an individual's

refusal to help apprehend others does not bear upon that person's remorse. Indeed, until our sentencing guidelines became so Draconian in recent years the norm was non-cooperation. Some persons still revere that attitude and the judge's disdain of it has no bearing on whether Stephens is remorseful.

Stephens said he was sorry for Robert Sparrow, Jr.'s death. [V15, R674-75]. Likewise, the court's observance that at times the defendant appeared "amused" did not justify not giving this factor no weight.

The court also erred in not giving significant weight to the fact that codefendant Cummings received a life sentence pursuant to a plea bargain. [V15, R396]. Cummings, like Stephens, knew the child was being left in the car. While defendant maintains that the child's death did not fall within the definition of felony murder - if it did Cummings would be viewed as an equal participant in the offense of murder. Thus, the court should have given this factor more weight. In sum, the court erred in finding that aggravating factors outweighed mitigating factors and justified a sentence of death.

X THE COURT ERRED IN DENYING DEFENDANT'S REQUEST TO DECLARE §922.10 UNCONSTITUTIONAL

The defendant challenged the constitutionality of §922.10, Fla. Stat. (1997), because it mandates death by electrocution. [V1,

R65-68]. Defendant asserts the trial court erred in denying that motion. [V1, R69]. Defendant recognizes the weight of law may not presently support this argument, however, defendant raises this issue to preserve it for review.

XI THE COURT ERRED IN DENYING DEFENDANT'S REQUEST TO DECLARE §921.141, FLA. STAT. (1997), UNCONSTITUTIONAL

The defendant challenged the constitutionality of §921.141, Fla. Stat. (1997), as being unconstitutionally vague and overbroad. Defendant also challenged the statute as imposing disproportionate death sentences. Defendant also challenged the statute as unduly limiting mitigating evidence. [V1, R74-78]. The court denied the motion. Defendant recognizes the weight of law may not presently support this argument, however, defendant raises this issue to preserve it for review.

CONCLUSION

This Court should vacate the defendant's first degree felony murder conviction. The court erred in refusing the defendant's theory of defense instruction. Applying controlling law, it was error to sustain the jury's verdict of first degree murder in this case. Furthermore, the sentence of death imposed was clearly disproportionate under the facts of this case and precedent imposing the most severe sanction in our system.

Respectfully submitted,

_____
Michael R. Yokan, Esquire
Fla. Bar No. 852856
204 Washington Street.
Jacksonville, Florida 32202
(904) 353-8295
fax (904) 353-1341
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to **Richard B. Martel, Esquire, Assistant Attorney General**, Counsel for the State, Office of the Attorney General, The Capital, Tallahassee, Florida 32399, by hand delivery, this _____ day of March, 1999.

_____
ATTORNEY