IN THE SUPREME COURT OF FLORIDA

KEVIN DON FOSTER,	:	
Appellant,	:	
vs.	:	Case No. 93,372
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE

On May 21, 1996, a Lee County grand jury returned an indictment charging Kevin Don Foster (Appellant), Christopher Paul Black, Derek Shields, and Peter Edward Magnotti with the premeditated murder of Mark Schwebes by shooting him with a firearm on April 30, 1996. (Vol. I, pp. 6-7)

Among the pretrial motions Appellant filed, through counsel, were 12 motions for change of venue, and motions to sequester the jury during voir dire and trial, all of which were denied. (Vol. I, pp. 15-Vol. II, p. 423, Vol. III, pp. 426-531, 537-548, 574-575, 577, 578-580, Vol. IV, pp. 584-612, 618-646, 651, 681-765, 766-Vol. V, p. 799, Vol. V, pp. 803-826, 841-883, Vol. VI, pp. 887-928, 962-967, 1003, 1016, Vol. VII, pp. 1026-1028, 1032-1040, Vol. IX, p. 1197)

This cause proceeded to a jury trial with the Honorable Isaac Anderson presiding. (Vol. XIII, p. 1-Vol. XXIII, p. 2117) Immediately before the trial began, the State offered to allow Appellant to plead guilty to the indictment pending in this case, and to all charges pending in a separate information, in exchange for a life sentence for the instant homicide, and a consecutive sentence of 44 years in the other case. (Vol. XIII, pp. 9-10) Appellant declined the offer, and the State withdrew it. (Vol. XIII, p. 10)

The guilt phase of Appellant's trial was held on March 3-6 and March 9-11, 1998. (Vol. XIII, p. 10-Vol. XXII, p. 1890) During the trial, Appellant renewed his motions for change of venue and

motions to sequester the jury, and moved for a mistrial due to publicity during the trial, all to no avail. (Vol. XVII, pp. 959, 960, 967, Vol. XVIII, pp. 1132-1133, Vol. XIX, pp. 1235-1236, 1239-1241, Vol. XX, pp. 1567, 1570, Vol. XXI, p. 1776) Appellant's counsel also stating that he was not accepting the jury, citing the "far too pervasive publicity" to which the jurors had been exposed. (Vol. XVII, p. 967)

On March 11, 1998, Appellant's jury returned a verdict finding him guilty of first degree premeditated murder. (Vol. VIII, p. 1059, Vol. XXII, p. 1886)

Appellant subsequently filed several additional motions for change of venue, with no success. (Vol. IX, pp. 1157-1178, 1187-1196, 1202-1210, 1212, Vol. X, pp. 1226-1230, Vol. XI, pp. 1325-1448)

Penalty phase was held on April 9, 1998. (Vol. XXIII, pp. 1891-2117) After receiving additional evidence from the State and the defense, Appellant's jury returned a death recommendation by a vote of nine to three. (Vol. X, p. 1239, Vol. XXIII, p. 2114)

A Spencer[1] hearing was held before Judge Anderson on May 28, 1998. (Vol. XI, pp. 1294-1319)

On June 17, 1998, Judge Anderson sentenced Appellant to die in the electric chair, finding two aggravating circumstances (that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody and was cold, calculated, and premeditated), and discussing several

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

statutory and nonstatutory mitigating circumstances. (Vol. XII, pp. 1452-1473, 1475-1486)

Appellant's notice of appeal to this Court was timely filed on June 30, 1998. (Vol. XII, pp. 1489-1490)

STATEMENT OF THE FACTS

Guilt Phase--State's Case

Around 11:30 p.m. on April 30, 1996, Theresa Spees and Leona Rendziniak, residents of Pine Manor in Lee County, heard two shots. (Vol. XVII, pp. 994-996, 999, Vol. XVIII, p. 1003) A car with a very loud muffler left the area. (Vol. XVII, pp. 996, 1000, Vol. XVIII, pp. 1004-1006, 1008-1009) Rendziniak heard a lady hollering that somebody was shot, and she called 911. (Vol. XVIII, pp. 1003-1004)

When Corey Younger of Lee County Emergency Medical Services arrived at Mark Schwebes' residence on Cypress Drive at 11:37 p.m., he found Schwebes lying face down in the doorway. (Vol. XVIII, pp. 1013, 1015, 1017-1018) He had an obvious wound to the right buttock and a massive wound to the face and right side of the head. (Vol. XVIII, p. 1018) He had no pulse, no breathing, no signs of life. Vol. XVIII, pp. 1019, 1022, 1024, 1082-1083) Schwebes was completely unconscious and clinically dead. (Vol. XVIII, pp. 1024-1025)

John Glowacki, a deputy with the Lee County Sheriff's Department, arrived shortly after EMS and put up crime scene tape. (Vol. XVII, pp. 985-987, Vol. XVIII, p. 1019)

An autopsy performed on May 1, 1996[2] revealed that Mark Schwebes died from shotgun wounds to the head and pelvis. (Vol.

[2] The autopsy was performed by Dr. Wallace Graves, however, Graves had retired prior to Appellant's trial, and Dr. Carol Huser testified as to the results of the autopsy and the cause of death. (Vol XVIII, pp. 1055-1056, 1075-1084)

XVIII, pp. 1027-1028, 1054, 1078) The head wound would have killed him instantaneously. (Vol. XVIII, p. 1083)

Richard Joslin with the crime scene unit of the Lee County Sheriff's photographed the body and gathered items of evidence at Schwebes' residence, including spent casings from two .12 gauge shotgun shells, and small metallic objects consistent with pellets from a shotgun cartridge. (Vol. XVIII, pp. 1031-1039, 1043, 1047-1050) No latent fingerprints were found on the casings. (Vol. XVIII, pp. 1037-1039, 1073) On the front passenger seat of Schwebes' Bronco II that was parked in front of his duplex apartment, there was a blue plastic Wal-Mart bag that contained gloves and canned goods. (Vol. XVIII, p. 1029-1031, 1064-1066) Also on the seat were a stapler and a fire extinguisher. (Vol. XVIII, p. 1064, 1066)[3] There was no physical evidence there that connected Appellant with the crime scene. (Vol. XVIII, p. 1070)

Joslin also attended the autopsy and received small metallic items removed from Schwebes' head and pelvic region. (Vol. XVIII, pp. 1054-1058)

The other three persons indicted with Appellant testified against him at his trial. (Vol. XVIII, pp. 1085-1157, Vol. XIX, pp. 1279-1363, Vol. XX, pp. 1447-1566) Peter Magnotti entered into a plea bargain in which he pled guilty to conspiracy to commit first degree murder and various RICO crimes in return for a 32-year

[3] The fire extinguisher, cans of food, and plastic bag were processed for fingerprints; latent prints found on the fire extinguisher were insufficient for comparison, and no latents were found on the other items. (Vol. XIX, pp. 1364-1369)

prison sentence, and was required to testify for the prosecution. (Vol. XVIII, pp. 1086-1087, 1135) Christopher Paul Black pled to first degree murder and other charges in return for a life sentence. (Vol. XIX, pp. 1279-1280) Like Magnotti, his bargain required him to testify for the State at Appellant's trial. (Vol. XIX, p. 1280) Derek Shields similarly pled guilty to first degree murder and other crimes in return for a life sentence for the murder. (Vol. XX, pp. 1447-1448)

According to Magnotti, who said he was Appellant's best friend, he, Appellant, and Black formed the Lords of Chaos on April 13, 1996. (Vol. XVIII, pp. 1086-1088)[4] The purpose of the group was "to go around Fort Myers just destroying whatever [they] could." (Vol. XVIII, p. 1088)[5] Shields, Christopher Burnett, and Thomas Torrone subsequently became members. (Vol. XVIII, p. 1088)[6] Appellant thought up the name for the group, while Magnotti came up with a symbol and wrote a "Declaration of War." (Vol. XVIII, pp. 1088-1089, 1136) It was Appellant's idea for members of the group to have secret code names. (Vol. XVIII, p. 1089) Appellant's name

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[4] Christopher Black testified that the organization was formed the evening of April 12, 1996. (Vol. XIX, p. 1281) Derek Shields testified it was formed on April 16, 1996. (Vol. XX, pp. 1448-1449)

[5] In his testimony, Thomas Torrone said the goal or mission of the Lords of Chaos was to "cause havoc across Fort Myers and to grab headlines." (Vol. XIX, p. 1243) Derek Shields testified that its purpose was to "[c]ause chaos and destruction." (Vol. XX, p. 1450) Christopher Burnett testified that the goal of the group was "to perform criminal acts, vandalism, destruction." (Vol. XIX, p. 1199)

[6] Burnett testified that Appellant once said that if anyone talked about the activities of the Lords of Chaos, they would be killed. (Vol. XIX, p. 1199)

was "God." (Vol. XVIII, p. 1089) Magnotti's was "Fried." (Vol. XVIII, p. 1089)

On April 30, 1996 at approximately 4:00, Magnotti, Appellant and others went to the Edison Mall. (Vol. XVIII, pp. 1089-1090, 1138) Appellant instructed Thomas Torrone and Christopher Burnett to steal a license plate from a vehicle in the mall parking lot, and it was placed into the trunk of Derek Shields' car. (Vol. XVIII, p. 1091) The group ate at Taco Bell, then went to the home of Brad Young. (Vol. XVIII, p. 1092) They decided to go to Riverdale High School to break windows out of the auditorium. (Vol. XVIII, p. 1093)[7] There was a band function at the school; people were just leaving. (Vol. XVIII, p. 1094) After everyone left, Magnotti, Torrone, Christopher Black, and Appellant entered the school, where they stole staples,[8] canned goods, and a fire extinguisher to use to break windows. (Vol. XVIII, p. 1094) They set these items down by a pay phone outside the auditorium. (Vol. XVIII, p. 1095) Derek Shields, Brad Young, Russell Ballard, and Christopher Burnett remained outside the school, watching. (Vol. XVIII, p. 1095) Magnotti moved his car across the street to Riverdale Shores to get it out of sight. (Vol. XVIII, p. 1095) After Magnotti parked, while Black and Torrone were standing at the pay phone, a dark blue sport utility vehicle pulled up and blocked

[7] Christopher Black testified that he later learned that they were also going to burn the school, and that Appellant had a container of gasoline with him. (Vol. XIX, p. 1283)

[8] Christopher Black referred to a "stapler" (rather than "staples," being taken (Vol. XIX, p. 1350), and Tom Torrone referred to "staplers" in his testimony. (Vol. XIX, p. 1248)

Magnotti's view of the two. (Vol. XVIII, p. 1096) Appellant ran from behind one of the stone columns at the school, across the street toward Magnotti and the others. (Vol. XVIII, p. 1096) The SUV stayed parked in front of Black and Torrone for a little while, then drove away. (Vol. XVIII, p. 1096) Black and Torrone walked across the street to join the others. (Vol. XVIII, p. 1096) Black was very angry. (Vol. XVIII, p. 1098) He said that the band teacher, Mr. Schwebes, had caught them with gloves and the stolen articles and taken them, and said he was going to turn them into the campus policeman the next morning. (Vol. XVIII, p. 1098)[9] Black said, "He has to die." (Vol. XVIII, p. 1098) Appellant "got excited, he felt it could be done, [they] could pull that off." (Vol. XVIII, p. 1098) Black wanted to follow Schwebes immediately, but Appellant said it was too late, he was already gone, they could find his address from the phone book. (Vol. XVIII, p. 1099)[10] The group went to Winn Dixie, and were able to obtain Schwebes' address by calling information. (Vol. XVIII, p. 1099) Magnotti left the group for awhile, but eventually rejoined them, at Appellant's house. (Vol. XVIII, pp. 1100-1101) He found Appellant, Black, and Shields congregated around the living room table, with a road map spread out in front of them. (Vol. XVIII, p. 1102)[11] Magnotti did

[9] Testimony as to what Black said was admitted over defense hearsay objections. (Vol. XVIII, pp. 1096-1098)

[10] Derek Shields testified that Appellant did not want to follow Schwebes immediately because "he wasn't ready, he didn't have his gun." (Vol. XX, p. 1461)

[11] Derek Shields testified that he did not see anyone with a map at Appellant's house, but they a map was later consulted in the

not see anyone else in the house, where Appellant's mother, Ruby Foster, and sister, Kelly Foster, also lived, but he believed Ruby and Kelly were there. (Vol. XVIII, pp. 1102-1103, 1143)[12] They formulated a plan in which, upon arriving at Schwebes' house, Derek Shields would knock on the door and Appellant would shoot Schwebes with a shotgun. (Vol. XVIII, pp. 1103-1105) The four of them, who felt they "were the four most intelligent and capable of the group[,]" got into Shields' Cavalier, which had a bad muffler. (Vol. XVIII, pp. 1105-1107) Appellant had a ski mask, some gloves, and a .12 gauge stainless steel shotgun with a black stock and black pump. (Vol. XVIII, p. 1106) On the way to Schwebes' house, Appellant was "acting really sullen, angry." (Vol. XVIII, pp. 1107-1108) Magnotti's opinion was that "he was psyching himself up for the kill." (Vol. XVIII, p. 1107) Appellant began singing a variation of the song "Santa Claus is Coming to Town." (Vol. XVIII, p. 1108) They located Schwebes' residence and identified the car in front as being the same Bronco they had seen at the high school. (Vol. XVIII, pp. 1108-1109) They went to a store and changed the

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car when they were looking for Schwebes' residence. (Vol. XX, pp. 1498-1499)

[12] Christopher Black testified that he did not see Ruby or Kelly Foster there that night, and, to his knowledge, they were not at home; however, he remained in only one room of the house, the living room. He also mentioned that he believed Appellant had to disarm the burglar alarm in order to enter the house. (Vol. XIX, pp. 1291-1292, 1330) Derek Shields testified that he saw Appellant's mother's car and his sister's car at the house, but he did not see Ruby or Kelly Foster. (Vol. XX, pp. 1465-1466)

license plate to the one stolen earlier at the mall, then returned to Schwebes' residence. (Vol. XVIII, pp. 1109-1111)[13] On the way, Appellant loaded the shotgun with two green shells. (Vol. XVIII, p. 1111) Chris Black, who had been making jokes on the way, parked the car at a stop sign in front of the house, and Shields and Appellant exited the vehicle. (Vol. XVIII, pp. 1110, 1114, 1145) Appellant was wearing a black ski mask, gloves, and a dark jacket, and carrying the gun. (Vol. XVIII, p. 1114) They went around the front of the house, out of Magnotti's sight. (Vol. XVIII, pp. 1114-1115) He heard two shots, then saw Shields running down the driveway, followed by Appellant. (Vol. XVIII, pp. 1114-1115)[14] They jumped into the car, slammed the doors, Appellant threw the shotgun on the floorboard in the back seat, and yelled, "Go." (Vol. XVIII, p. 1116) Shields was shaking, nervous, appeared sick; Appellant seemed excited. (Vol. XVIII, p. 1117) After driving a short while, they stopped to change the tag, throwing the stolen one into some bushes. (Vol. XVIII, p. 1117)[15] They stopped at a gas station, where Magnotti filled the tank for Shields and bought

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[13] Derek Shields testified that, when they were at the high school, he had thrown away the stolen license plate, but went back later to retrieve it, at Appellant's direction. (Vol. XX, pp. 1464-1465)

[14] According to Derek Shields, Appellant was holding the shotgun, aimed at the door, when Shields knocked on it. (Vol. XX, pp. 1475-1476) Schwebes opened the door and said, "May I help you?" (Vol. XX, p. 1476) Shields ran. (Vol. XX, p. 1476) He then heard Schwebes say, "Who?" and heard a gunshot, then another one a few seconds later. (Vol. XX, p. 1476)

[15] Christopher Black testified that Appellant "wiped finger-prints" from the tag before tossing it in the "woods." (Vol. XIX, pp. 1300, 1345)

sodas. (Vol. XVIII, p. 1117) While they were driving, Magnotti asked what happened. (Vol. XVIII, p. 1117) Appellant did not want to upset Shields, and "so he said it very quietly, raised his hand in the middle of his face and off to the side and said gone." (Vol. XVIII, pp. 1117-1118) Appellant said that he also "shot him in the ass[,]" that "after he shot him in the head the body curled up into a fetal position and it was just pointing up at him." (Vol. XVIII, p. 1118)[16]

It was close to midnight when the four arrived back at Appellant's house. (Vol. XVIII, p. 1118) Black was supposed to receive credit for the killing because it was to make sure he would not get into trouble as one of the Lords of Chaos. (Vol. XVIII, p. 1119) To celebrate a job well done, they "got into a big group hug." (Vol. XVIII, p. 1119)

Appellant told Magnotti that he had used the shotgun to kill Schwebes because it would leave no ballistic traces; there was no rifling to score the bullets and identify them back to that gun. (Vol. XVIII, p. 1121)

Among other things, Derek Shields testified that Appellant said prior to the killing of Schwebes that he had to kill him so that Chris Black and Tom Torrone would not be turned in to the police. (Vol. XX, p. 1460) Shields also testified that the concern about being reported to the school resource officer "[h]ad to do with the exposure of the Lords of Chaos." (Vol. XX, p. 1461)

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[16] According to Derek Shields, when Magnotti asked if Schwebes was dead, Appellant gave a little chuckle and said, "'[H]e sure the hell ain't alive.'" (Vol. XX, p. 1477)

The next day at Riverdale High School, Magnotti told Lauriano Espino what he had done; Magnotti was "mildly" laughing and bragging about it. (Vol. XVIII, pp. 1150-1151)

That evening, Appellant, Black, and several others were at Bradley Young's apartment when news of the Schwebes killing came on the television. (Vol. XIX, pp. 1305-1306) Appellant jumped up, admitted he was the one who did it, and, according to Young, "was hooting and hollering and bragging about the event that had taken place." (Vol. XVIII, p. 1187) Black testified that Appellant described the shooting, saying that after Shields knocked on the door, Schwebes opened it, and Shields ran. (Vol. XIX, p. 1306) Appellant looked at Schwebes in the face. (Vol. XIX, p. 1306) Schwebes started to turn, and Appellant aimed at his right eye and shot, and when it hit, there was nothing but a red cloud. (Vol. XIX, p. 1306) Schwebes flipped in the air, spun around, and landed in a fetal position. (Vol. XIX, pp. 1306-1307) Appellant chambered the second round, shot Schwebes "where his leg meets his ass." (Vol. XIX, p. 1307) Black described Appellant's attitude as he was saying these things as "jovial." (Vol. XIX, p. 1307) Appellant "was saying he was laughing when he came back." (Vol. XIX, p. 1308)

Magnotti was arrested on May 3, 1996; Appellant was arrested that same night. (Vol. XVIII, p. 1086) At that time of Magnotti's arrest, the shotgun was in the trunk of his car, as were his ski mask, gloves, and newspaper clippings. (Vol. XVIII, pp. 1121-1122)

A fingerprint lifted from the shotgun matched Appellant's right ring finger. (Vol. XX, p. 1403-1404) A print lifted from the box of latex gloves also matched one of Appellant's prints, as did a print on the newspaper. (Vol. XX, pp. 1404-1406) Christopher Burnett's fingerprints were also found on the newspaper, and Peter Magnotti's prints were found "[a] number of times on one object." (Vol. XX, pp. 1410-1411)

The spent shotgun shells that were recovered at Schwebes' residence had at one time been chambered and extracted from the Mossberg shotgun found in Magnotti's car, but the State's expert could not say whether they had actually been fired from that weapon. (Vol. XX, pp. 1422-1423, 1432) The spent shells were of the type that contained number one buckshot, which is normally used for large game such as deer or wild pigs. (Vol. XX, pp. 1416-1417, 1420)

Approximately six or six and one half months after their arrest, Appellant and Magnotti had a conversation in jail during which Appellant said that he did not want Tom Torrone to testify against him and made a gesture which Magnotti assumed meant he was going to have someone kill Torrone. (Vol. XVIII, pp. 1125-1126)

Appellant also approached Magnotti about the possibility of working together for an alibi. (Vol. XVIII, pp. 1127-1130) And Magnotti received an "anonymous letter" from Appellant's mother with a newspaper clipping, and she was asking Magnotti to tell his

lawyer to contact her and tell her where he really was on the night of April 30. (Vol. XVIII, pp. 1128-1130)[17]

Guilt Phase--Appellant's Case

Appellant presented nine witnesses in his defense. (Vol. XX, p. 1577-Vol. XXI, p. 1725)

James Voorhees and Rodney Thibia testified that Appellant worked at his job with Ken Bunting Carpentry (where he was an excellent worker) on April 30, 1996. (Vol. XX, pp. 1577-1578, 1583, 1585, 1588) They normally knocked off work about 3:15 or 3:30, and dropped Appellant off at his house 45 minutes to an hour thereafter. (Vol. XX, pp. 1579, 1581, 1586, 1587) Appellant did not work on May 1, 1996, as he had to see his lawyer. (Vol. XX, pp. 1578-1580, 1585, 1587) He did work the rest of the week, Thursday and Friday. (Vol. XX, p. 1580, 1587) Attorney Richard Fuller confirmed that Appellant came into his office on the morning of May 1, 1996 to discuss his case involving a suspended driver's license. (Vol. XXI, pp. 1640-1641)

Toni Smith testified that her husband bought a four-wheeler [apparently some type of all-terrain vehicle] from Ruby Foster, and that Appellant and two of his friends helped load it onto a trailer at the Foster residence about 9:00 on April 30, 1996. (Vol. XXI, pp. 1607-1609, 1619)

Kelly Foster, Appellant's sister, saw Appellant in the yard when she arrived home from school at approximately 9:30 on April

[17] Derek Shields testified that, after they were arrested, Appellant told Shields that his (Appellant's) mother would come up with an alibi for him. (Vol. XX, p. 1479)

30, 1996. (Vol. XXI, p. 1709-1710) Kelly did not see him leave after that. (Vol. XXI, p. 1709, 1711) She was up until 4:00 a.m. doing schoolwork. (Vol. XXI, pp. 1711-1712)

Ruby Foster, Appellant's mother, testified that Appellant called her at her pawn shop after he got home from work at 4:30 on April 30, 1996. (Vol. XXI, pp. 1651-1653) He was home when Ruby arrived around 9:00. (Vol. XXI, p. 1654) After loading up the four-wheeler, Appellant came in the house a little before 9:30. (Vol. XXI, pp. 1654-1655) Ruby went to the Smiths with the four-wheeler at 9:45. (Vol. XXI, p. 1655) When she returned home about 11:04 or 11:05, Appellant was there. (Vol. XXI, p. 1656) She and Kelly went to Circle K; Appellant was there when they returned at approximately 11:20, and Ruby never saw him leave the house. (Vol. XXI, pp. 1656, 1661)

Both Ruby and Kelly recalled seeing some of Appellant's friends at the house that night, but they were not sure who was there. (Vol. XXI, pp. 1710-1711, 1655, 1678-1679)

Beginning on May 5, Ruby and Kelly went over the calendar trying to recreate events that had occurred, at the suggestion of Attorney Richard Fuller. (Vol. XXI, pp. 1671-1674, 1682-1683)

Christina Jones testified that she spoke with Appellant on the telephone from approximately 11:30-12:00 p.m. on April 30, 1996. (Vol. XXI, pp. 1622-1623, 1632-1633)

Lorri Smith testified that Appellant called her twice on April 30 to wish her happy birthday. (Vol. XXI, pp. 1694-1695) He left a message on her answering machine shortly after 11:00, then called

her again a little after midnight; it could have been as late as 12:15 or 12:20. (Vol. XXI, pp. 1694-1695, 1699-1700, 1705-1706)

Guilt Phase--State's Rebuttal

The State put on three short rebuttal witnesses after Appellant presented his case. (Vol. XXI, pp. 1730-1752) The final witness, Rebecca Magnotti, Peter's mother, testified about a telephone conversation she had with Ruby Foster, in which Ruby indicated that she and Kelly (Foster) and some others would testify that Peter spent the night of April 30 at Kevin Foster's house, where they lay on the roof or somewhere else to watch the stars. (Vol. XXI, pp. 1748-1749)[18] Rebecca Magnotti testified that she did not agree with this, because Peter did not spend the night, but came home sometime between 10:30 and 12:00. (Vol. XXI, pp. 1749-1750)

Penalty Phase--State's Case

The State's only penalty phase witness was Robert Durham, former principal at Riverdale High School, who testified about the hiring of Mark Schwebes as band director, and the loss to the school when he died. (Vol. XXIII, pp. 1915-1922) The impact of his death on the band was "devastating," but the effect went beyond members of the band. (Vol. XXIII, pp. 1920-1921) Schwebes was band director from August, 1995 until his death. (Vol. XXIII, p. 1919)

Penalty Phase--Appellant's Case

[18] Magnotti's testimony as to what Ruby Foster said came in over a defense hearsay objection. (Vol. XXI, p. 1748)

The defense presented 25 "live" witnesses at penalty phase, as well as an affidavit from Appellant's brother. (Vol. XXIII, pp. 1924-2034)

A neighbor of Appellant, Mary Ann Robinson, testified that Appellant helped her start her car once, and offered to let her borrow his family's riding lawn mower. (Vol. XXIII,pp. 1924-1925) She found him to be "very helpful" and "a nice young man." (Vol. XXIII, p. 1925)

Another neighbor, Robert Moore, who was retired from the Lee County Sheriff's Office, had known Appellant since he was 10 or 11. (Vol. XXIII, pp. 1941-1942) Appellant mowed his lawn. (Vol. XXIII, p. 1942) He was well-mannered and a hard worker. (Vol. XXIII, p. 1942)

Shirley Boyette had known Appellant for seven to 10 years. (Vol. XXIII, p. 1973) He had always been "a very kind person, very helpful person" to her. (Vol. XXIII, p. 1973)

Carol Shear's opinion was that Appellant was very caring, intelligent, gentle, polite, and well-mannered. (Vol. XXIII, p. 1996)

Robert Fike and James "Red" Voorhees praised Appellant's work at Ken Bunting Carpentry, where Appellant worked for about one and a half years. He was a good and reliable worker. (Vol. XXIII, pp. 1927-1930)

Voorhees and other witnesses also talked about Appellant's friendship with Voorhees' son, Cody, who had leukemia, from which he eventually died. (Vol. XXIII, pp. 1929-1930, 1987-1988, 1992-

1995, 2004-2006, 2031) Appellant was one of a little group who supported Cody, who was going through chemotherapy, when he was in the hospital. (Vol. XXIII, pp. 1988, 1994-1995, 2004-2005) Appellant had a lot of compassion for Cody, and was always there if Cody needed him. (Vol. XXIII, pp. 1991-1993, 1995. 2005) "It tore him up" when Cody died. (Vol. XXIII, p. 2031)

Raymond Williams and Patricia Williams testified regarding Appellant's relationship with Raymond's son, who had spina bifida. (Vol. XXIII, pp. 1932-1939) Appellant met John when they were both about 12, on a cruise ship called the Big Red Boat going to Nassau. (Vol. XXIII, pp. 1932, 1937) Appellant pushed him around in his wheelchair, played games with him, and was wonderful with him, and they "got along like real nice buddies." (Vol. XXIII, pp. 1933, 1937) Raymond Williams considered Appellant to be a nice polite young man. (Vol. XXIII, p. 1934)

Peter Albert, who was confined to a wheelchair, and Marsha Martin spoke about how Appellant helped his mother care for Albert after his wife died. (Vol. XXIII, pp. 1953-1954) Appellant helped Albert in his swimming pool, prepared meals for him, did things around his house, took him places. (Vol. XXIII, pp. 1955, 1958-1959) Albert said that Appellant was like a son to him because he was always there for him. (Vol. XXIII, p. 1959)

Marsha Martin and other witnesses also testified to Appellant's involvement with foreign exchange students. (Vol. XXIII, pp. 1947-1948, 1951-1956) Kevin Martin observed that Appellant was always polite, well-mannered, and good around kids. (Vol. XXIII, pp. 1951-

1952) Marsha Martin also told how Appellant gave her son positive advice, such as, stay away from drugs, and don't talk back to your mom. (Vol. XXIII, p. 1954)

Carol Perrella, who had known Appellant since he was six, similarly testified that Appellant always tried to give good advice. (Vol. XXIII, pp. 1960, 1963) She found him to be a "very loving young man that cared about his friends." (Vol. XXIII, p. 1961) She could trust him, and had never seen him threaten anyone. (Vol. XXIII, pp. 1960-1961)

Brian Burns was married to Ruby Foster for about five years. (Vol. XXIII, p. 1976) Appellant had "always been a good boy, a mellow boy," who was polite, and Burns had "never seen him lose his temper, get out of hand." (Vol. XXIII, pp. 1977, 1979)

Ronald Newberry, Ruby Foster's first husband, described Appellant as a "real fine person." (Vol. XXIII, p. 1945)

Elizabeth Diane Lopez had known Appellant since 1991. (Vol. XXIII, p. 1984) He would do things for her, and she loved him as a son. (Vol. XXIII, pp. 1984-1985) She had never heard anything that would indicate any violence on his part. (Vol. XXIII, p. 1985) Lopez described Appellant as "a good kid...an all American that any mother would be proud to have." (Vol. XXIII, p. 1984)

Appellant's sister, Kelly Foster, said that she and Kevin were very close. (Vol. XXIII, pp. 2009-2010) He was a "caring and compassionate person," as well as a good worker. (Vol. XXIII, p. 2010) After dropping out of high school, he obtained his GED and was taking classes at ECC. (Vol. XXIII, p. 2010) He completed a

program at a vocational-technical school for "auto cad," and was a "very excellent draftsman." (Vol. XXIII, p. 2010)

The final defense witness, Ruby Foster, testified that her son was born six weeks prematurely and suffered from allergies since birth. (Vol. XXIII, pp. 2020, 2021) His natural father abandoned him when he was about one month old. (Vol. XXIII, p. 2020)

Appellant did not finish high school because he accidentally shot himself when he was 16 and could not go back. (Vol. XXIII, p. 2019) However, after obtaining his GED, he did one semester at Lee Vo-Tech and one year at Edison. (Vol. XXIII, p. 2019)

During Ruby Foster's testimony, the defense introduced a number of pictures of Appellant and his family, as well as an award he won in high school for a French contest, his GED certificate, and his auto cad drafting award. (Vol. XXIII, pp. 2018-2031)

SUMMARY OF THE ARGUMENT

The court below should have granted Appellant's motions to move his trial to another venue. The publicity surrounding this case in the newspapers and on television and radio included not only factual presentations, but opinion pieces containing extremely inflammatory rhetoric, and most of the prospective jurors acknowledged having read or heard something about the case. In the atmosphere created by the prejudicial media coverage of Appellant and the Lords of Chaos, a fair trial could not be had in the Fort Myers area.

The court below should not have permitted the State to introduce hearsay evidence during the guilt phase of Appellant's trial through the testimony of Peter Magnotti, Bradley Young, Derek Shields, David Adkins, and Rebecca Magnotti. The evidence that came in was prejudicial in that it provided a motive for the homicide, bolstered the testimony of Shields through a prior consistent statement, and undermined Appellant's defense of alibi. He is entitled to a new trial.

The judge who presided over Appellant's trial decided Appellant's fate even before the guilt phase was concluded. His comments to defense counsel telling them to appeal his ruling on the admissibility of certain evidence to the Supreme Court show that the judge had already determined that Appellant would be convicted of first degree murder and sentenced to death before all the evidence was in. His closed-mindedness and partiality

constituted a "structural defect" in the proceedings which deprived Appellant of the due process of law and fair trial to which he was constitutionally entitled.

The "avoid arrest" aggravating circumstance was not supported by the evidence and should not have been submitted to the jury or found by the trial court to exist. The victim was not a law enforcement officer, and there was no evidence that he knew Appellant or could identify him as being one of the youths who was at Riverdale High School on the night of April 30, 1996. It is mere speculation to say that Appellant killed Mark Schwebes out of fear that he would expose the Lords of Chaos. Furthermore, the court below appears to have relied upon evidence not presented in open court and not proved at trial in his finding as to this aggravating factor, a deprivation of Appellant's right to due process of law.

The court's order sentencing Appellant to death lacks sufficient clarity and analysis with regard to its consideration of mitigating circumstances. The court did not fulfill its duty to expressly consider each of the nonstatutory mitigating circumstances proposed by Appellant. Furthermore, the court's reasons for rejecting Appellant's youthful age of 18 at the time of the offense as a statutory mitigating factor are inadequate.

A sentence of death is a disproportionate punishment for this Appellant and this homicide. The killing was not particularly heinous, as it involved an instantaneous death by gunshot, with no

other circumstances to set it apart from the norm. The "avoid arrest" aggravator should not have been found, and the remain factor, CCP, cannot support a death sentence in light of the mitigation Appellant presented. Even if this Court finds that both aggravating circumstances were properly found, they are overborne by the evidence of his young age at the time of the offense, his compassion and caring for others less fortunate, his good work record, his capacity for rehabilitation and motivation to better himself, etc., as well as the fact that none of the other participants in the killing of Mark Schwebes received a sentence of death.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN DENYING APPELLANT'S NUMEROUS MOTIONS FOR CHANGE OF VENUE, DUE TO THE PERVASIVE AND PREJUDICIAL PUBLICITY WHICH SURROUNDED THIS CASE AND INFECTED THE COMMUNITY FROM WHICH APPELLANT'S JURY WAS SELECTED.

The Sixth Amendment to the Constitution of the United States guarantees to every person charged with a crime a fair trial, free of prejudice. Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

In ruling on a motion for change of venue, a trial court should determine

> whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994).

To establish presumed prejudice, the defendant must present "evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community." Mayola v. Alabama, 623 F. 2d 992, 997 (5th Cir. 1980).

In his multiple motions for change of venue filed with the trial court, Appellant meticulously documented the pervasive and prejudicial media coverage that preceded his trial, which included extensive newspaper and television coverage not only throughout Lee County, but national coverage as well. The record made by defense counsel contains numerous newspaper articles and transcripts of television and radio broadcasts that show that the coverage given to Appellant's case was not merely factual, but also included inflammatory opinion pieces. Appellant commends to this Court review of the entire record of the media coverage of this case, and will not attempt to reproduce it all in the pages of this brief, but does wish to highlight a few of the most prejudicial aspects of said coverage. For example, there was a story in the Fort Myers News-Press on May 5, 1996, two days after Appellant was arrested, detailing alleged plans by the Lords of Chaos to commit "a mass murder of black people" at Disney World. The article quoted Appellant as telling "his comrades" in the Lords of Chaos: "Well just go around shooting every nigger we see." (Vol. I, p. 39) Another story in the News-Press that same day outlined other charges against Appellant in addition to the murder charge involved herein. (Vol. I, pp. 43) On May 7, 1996 another article about the Disney World plot appeared in the News-Press in which Peter Magnotti said that Appellant "wanted to go on a racist killing spree at the park." Appellant "talked up a plan to mug Disney characters, steal their costumes and roam the park with a silenced gun shooting black people." (Vol. I, p. 47) A piece published in

the same newspaper on May 9, 1996 referred to Appellant in the headline as "head of pack," and went on in the body of the article to call him a "psychopath," "Opie with a gun," and "a Jekyll-and-Hyde character." (Vol. I, pp. 66-73)

Several stories in the May 2, 1996 edition of the News-Press focused on the loss to the students of Riverdale High School as a result of Mark Schwebes' death, and how "[e]motions ranged from shock and disbelief to anger." (Vol. I, pp. 26-36, 122, 124)

The May 18, 1996 News-Press featured a front-page story headlined "Riverdale students heal with poetry;" inside were poems the students had written in tribute to Mark Schwebes. (Vol. I, pp. 99-104)

On June 30, 1996, an article appeared in the News-Press describing the Lords of Chaos as a "cult." The article said that Appellant was a "psychotic" who was "consumed with anarchy, the Ku Klux Klan and satanism," and compared him to Hitler. (Vol. III, p. 428)

Articles appearing in the June 6, 1996 Tampa Tribune and June 14, 1996 Ocala Star-Banner again detailed the alleged plans to shoot black tourists at Disney World. (Vol. III, pp. 444, 447)

Subsequent coverage included television coverage and articles in the June 21, 1997 and September 27, 1997 News-Press about the plea agreements entered into by the other Lords of Chaos members who were involved in the Schwebes killing. (Vol. VI, pp. 889-901, 904-915)

The media feeding frenzy continued as Appellant's trial approached. For example, in a column headlined "Old Sparky's hot jolt may await Foster" that appeared in the Fort Myers News-Press on March 1, 1998, just two days before the beginning of the trial, Sam Cook described Appellant as "one twisted kid," "a redneck, racist, pyromaniacal gun-crazed punk," with "crazed green eyes and Manson-like tendencies." (Vol. VII, p. 1038) The column also referred to other crimes allegedly committed by the Lords of Chaos in a "crime spree" that "graduated from vandalism to vehicle thefts to robbery to arson to murder." (Vol. VII, p. 1038) An article in the next day's Naples Daily News likewise referred to other crimes supposedly committed by the Lords of Chaos: setting fire to an historic Coca-Cola bottling plant, conducting an armed robbery and carjacking outside a restaurant, setting fire to a Baptist church, "setting fire to a thatched-roof aviary outside a tropical-themed restaurant, then watching as the exotic birds inside burned to death." (Vol. VII, pp. 1034-1035)

It is difficult to imagine much more inflammatory rhetoric than what was widely disseminated in this case.

This Court must also consider that many of the prospective jurors had read or heard something about this case. For example, Only two of the first 35 jurors questioned about publicity said they had not heard or read anything about the case; the others had varying degrees of familiarity with it, and most had read or heard the name of Appellant and the Lords of Chaos. (Vol. XIII, p. 11-Vol. XIV, p. 331)

When this Court's reviews a trial court's ruling denying a motion for change of venue, it must reverse if the lower court manifestly or palpably abused its discretion. Gaskin v. State, 591 So. 2d 917 (Fla. 1991). Meeting this standard should not be extremely difficult, because this Court has also observed:

> We take care to make clear...that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by a fair and impartial jury. Every precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant a change of venue.

Singer v. State, 109 So. 2d 7, 14 (Fla. 1959). See also Manning v. State, 378 So. 2d 274 (Fla. 1979) and Lozano v. State, 584 So. 2d 19 (Fla. 3d DCA 1991).

In light of the extent and nature of the publicity in this case, to which most of the prospective jurors had been exposed, this Court must find that Appellant was deprived of his right to a fair trial by the refusal of the lower court to grant him a change of venue. Amends. VI and XIV, U. S. Const.; Art. I, § 9 and 16, Fla. Const. His remedy is a new trial.

ISSUE II

THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT INADMISSIBLE HEARSAY EVIDENCE DURING THE TESTIMONY OF SEVERAL WITNESSES.

Subject to certain exceptions, hearsay evidence is generally inadmissible. § 90.802, Fla. Stat. (1997); Conley v. State, 620 So. 2d 180 (Fla. 1993). However, the State was permitted to introduce hearsay evidence, over objection, several times during the guilt phase of Appellant's trial.

One of the first examples of the State's improper use of hearsay came during the testimony of Peter Magnotti, the first of the Lords of Chaos to testify at Appellant's trial. Over Appellant's objections, Magnotti was permitted to testify to what Christopher Black said when he came across the street to join Magnotti and the others after the confrontation with Mark Schwebes. (Vol. XVIII, pp. 1096-1098) In addition to relating Black's comment that Schwebes had to die, Magnotti testified that Black said that Schwebes "had pulled in front of them, and had caught them with the gloves and the stolen articles and he had taken them and said he was going to turn them into the campus policeman in the morning." (Vol. XVIII, p. 1098) The State attempted to justify admission of the statements Black made under the hearsay exception for "statements that co-conspirators made in furtherance of the conspiracy." (Vol. XVIII, p. 1097) While there is such an exception set forth in section 90.803(18)(e) of the Evidence Code, it requires "that the conspiracy itself and each member's participation in it must be established by independent evidence" before

the exception will apply. In this case, the State had not proven the existence of a conspiracy and each member's participation in it before the statement was introduced. Furthermore, Magnotti's testimony as to what Black said Schwebes did did not come within this exception, as it was not a statement "during the course, and in furtherance, of the conspiracy," as required by the Evidence Code. And, finally, Magnotti's testimony as to what Black said Schwebes said about turning them into the campus policeman was hearsay within hearsay, or double hearsay, and, again, not a statement by one of the coconspirators during and in furtherance of the conspiracy.

Similar hearsay came in during the testimony of Bradley Young, who was also present at the high school when Black came across the street after being intercepted by Schwebes. Young testified that Black was "upset that utensils were taken by Mark Schwebes and he had, I guess, told them don't be surprised if Mr. Montgomery [the school resource officer] comes up to you tomorrow." (Vol. XVIII, p. 1183)

Derek Shields offered perhaps the most detailed rendering of what Black said after the confrontation with Schwebes, which, again came in over a defense hearsay objection (Vol. XX, p. 1458):

> He [Black] told us Mr. Schwebes had pulled up to them and asked them what they were doing, and they tried to play it off that they were using the pay phone that was right there. And they said he didn't buy it because the phone was all smashed, and he had taken the belongings they had gotten out of the school and he had taken the gloves off--you know, they had gloves on their hands and had taken them off. So he had said that Mr.

> Schwebes was going to report them to the school resource officer the next day.

This was not the only inadmissible hearsay that came in during Derek Shields' testimony. The State wanted to play a portion of Shields' taped statement to law enforcement authorities pursuant to section 90.801(2)(b) of the Evidence Code to show that he had consistently named Appellant as the triggerman. (Vol. XX, pp. 1515-1543) After a lengthy discussion and proffer of the evidence, the court ruled in favor of the prosecution. (Vol. XX, pp. 1515-1543) The jury was then permitted to hear an excerpt from Shields' interview with law enforcement in which he recounted the shooting of Schwebes and the events which preceded it. (Vol. XX, pp. 1544-1561)

Prior consistent statements generally are not admissible to bolster or corroborate a witness's trial testimony. Chandler v. State, 702 So. 2d 186 (Fla. 1997); Davis v. State, 694 So. 2d 113 (Fla. 4th DCA 1997). However, a consistent statement of a witness testifying at trial may come in where it "is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication," section 90.801(2)(b), Fla. Stat. (1997), which is the ground urged below for admitting the tape in question. The problem is that defense counsel did not expressly or impliedly charge Derek Shields with improper influence, motive, or recent fabrication in his cross-examination, which appears in the record in Volume XX at pages 1480-1514, and so this provision of the Evidence Code would not apply, and the tape remained inadmissible hearsay.

Two other examples of hearsay that was improperly admitted are at least as egregious as those cited above, if not more so. The State's eight witness at guilt phase was David Adkins, president of the band boosters at Riverdale High School. (Vol. XVIII, pp. 1159-1175) Prior to trial, Appellant had filed a motion in limine to prevent the State from eliciting hearsay testimony from this witness (Vol. VII, p. 1024), and raised the matter again before Adkins testified. (Vol. XVIII, pp. 1157-1158) Adkins attended an ice cream social at the school on the night of April 30, 1996. (Vol. XVIII, p. 1160) As he was leaving, he saw Mark Schwebes' Bronco parked near the auditorium, and there were two kids with him. (Vol. XVIII, pp. 1161-1163) As Adkins started to drive on, Appellant ran across the street carrying a plastic grocery bag. (Vol. XVIII, pp. 1163-1164) Adkins and Schwebes then went to Cracker Barrel for dinner. (Vol. XVIII, pp. 1164-1165) Adkins was permitted to tell the jury about the conversation he had with Schwebes at the restaurant. The prosecutor asked if Schwebes told Adkins what he was going to do the next morning about the confrontation with the boys, and Adkins responded: "The fact he didn't really tell me he was going to do something, he just made the comment to the boys that when they asked him if he was going to tell on them, and he just says don't be surprised if Montgomery [the school resource officer] calls you to the office tomorrow morning." (Vol. XVIII, pp. 1164-1166)

The final example of hearsay which Appellant will discuss came during the State's rebuttal case when Rebecca Magnotti, Peter

Magnotti's mother, was permitted to testify regarding what Appellant's mother, Ruby Foster, allegedly said to her in an attempt to set up a false alibi for her son. (Vol. XXI, pp. 1748-1749) This testimony was extremely damaging to Appellant's effort to establish his alibi defense.

Appellant's rights to confront and cross-examine the witnesses against him, to a fair trial, and to due process of law were undermined by the admission of the hearsay evidence discussed above. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. As a result, he must receive a new trial.

ISSUE III

THE COMMENTS OF THE COURT BELOW DURING THE GUILT PHASE OF APPELLANT'S TRIAL DEMONSTRATE THAT THE COURT HAD PREJUDGED THE CASE, AND DID NOT PRESIDE OVER THE TRIAL WITH AN OPEN MIND.

As discussed in Issue II above, the trial court overruled objections by the defense to the State introducing prior consistent statements by prosecution witness Derek Shields, and permitted the State to play a portion of Shields' tape-recorded statement to law enforcement at the guilt phase of Appellant's trial. During the discussion regarding the admissibility of the tape, the following exchange occurred among the court and defense counsel Jacobs and Rinard (Vol. XX, pp. 1538-1539--emphasis supplied):

> MR. JACOBS: Judge, we're objecting to this strongly. I think it's highly improper. If you allowed this tape where someone gives a statement for the State and after cross-examination play statement, they could do that on every witness.
>
> THE COURT: Okay.
>
> MR. JACOBS: You don't seem concerned, but I think it's highly improper.
>
> THE COURT: Tell it to the supreme court. You'll get an opportunity, I believe.
>
> MR. RINARD: I certainly hope the Court's not prejudging our case.
>
> THE COURT: Not for me to make that decision, it's for them. Guilt or innocence.
>
> MR. RINARD: It may not be going to the supreme court, Judge.

THE COURT: Whatever.[19]

The court's comments clearly show that, although the guilt phase was not over yet, he had already decided not only that Appellant was guilty of first degree murder, but that he deserved to die in the electric chair; the case would not be going to the Supreme Court unless Appellant were convicted of the crime charged and sentenced to death. Thus the court closed his mind before the State finished presenting its case-in-chief, before Appellant presented his guilt-phase defense witnesses, before the State presented its rebuttal witnesses, before the State and defense put on their cases at penalty phase. The court had predetermined Appellant's fate before all the evidence was in, and before the attorneys presented their arguments, and before the jury rendered its guilt-phase and penalty-phase verdicts.

This Court was recently faced with a similar situation in Porter v. State, 23 Fla. L. Weekly S548 (Fla. October 15, 1998), in which the Court reversed an order by Judge Anderson, the judge in the instant case, denying Porter's motion for postconviction relief. This Court determined that the judge who sentenced Raleigh Porter to death was not impartial, as evidenced by comments the judge made. As the Court observed: "In sum, due process under Florida's capital sentencing procedure requires a trial judge who is not precommitted to a life sentence or a death sentence, but rather is committed to impartially weighing aggravating and

[19] See also the court's question to the prosecutor in the midst of the defense case, when he asked what kind of aggravators the State was "looking for, or anticipating." (Vol. XXI, p. 1685)

mitigating circumstances." 23 Fla. L. Weekly at S550. Unfortunately, the comments of the court below show that he committed himself to sentence Appellant to death even before the guilt phase was completed, and Appellant was deprived of a fundamentally fair proceeding. See also Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); State v. Bloom, 497 So. 2d 2 (Fla. 1986) (circuit judge lacks authority to determine pre-trial whether death sentence will be imposed in first degree murder case) and Alfonso v. State, 528 So. 2d 383 (Fla. 3d DCA 1988) (same).

In Porter, this Court granted relief only as to sentence, determining that the issue upon which the judge lacked the necessary impartiality involved only the sentencing phase. Here, however, the trial court not only indicated his intention to sentence Appellant to death, but concluded that Appellant was guilty before he had even heard from Appellant's alibi witnesses, thus demonstrating that his mind was not open to hearing the defense side of this case, and requiring not only reversal of Appellant's sentence of death, but reversal of his conviction as well. As Justice Anstead noted in his opinion in Porter, concurring in part and dissenting in part, "[I]t is a fundamental principle of our justice system that a defendant is entitled to an impartial judge in all phases of the judicial proceedings. [Emphasis supplied.]" 23 Fla. L. Weekly at S551. Somewhat similarly, in Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991),

the Supreme Court of the United States recognized that where the judge is not impartial, a "structural defect" exists in the "constitution of the trial mechanism," which defies harmless error analysis, and that "[t]he entire conduct of the trial from beginning to end is obviously affected...by the presence on the bench of a judge who is not impartial."[20]

Appellant's rights pursuant to the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, and 17 of the Florida Constitution were violated by the "structural defect" which existed in the proceedings below. As a result, he must receive a new trial.

[20] One possible explanation for the court's animus toward Appellant may be found in the pretrial media coverage of this case, in which Appellant was portrayed as a racist who wanted to kill black people and used a racial slur when talking to fellow members of the Lords of Chaos. Please see Issue I above. Judge Anderson is himself an African-American.

ISSUE IV

THE COURT BELOW ERRED IN SUBMITTING TO APPELLANT'S PENALTY PHASE JURY, AND FINDING TO EXIST IN HIS SENTENCING ORDER, THE AGGRAVATING CIRCUMSTANCE THAT THE INSTANT HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

One of the two aggravating circumstances which was submitted to Appellant's penalty phase jury for its consideration was that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (Vol. XXIII, p. 2108) The court also found this aggravating factor to exist in his order sentencing Appellant to death, as follows (Vol. XII, pp. 1475-1477):

> 1. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 921.141(5)(e), Fla. Stat.
>
> From the evidence presented during the guilt phase of this trial, the Defendant was the ringleader of a group of young criminals known as the "Lords of Chaos." The purpose of the Lords of Chaos was, in the words of one of its members, to wreak havoc in the community and to "grab headlines." Founded by the Defendant and his best friend, Peter Magnotti, the Lords of Chaos was formed in early 1996. The Defendant's nickname was "God." Magnotti's nickname was "Fried." Other principals in the Lords of Chaos were Christopher Black and Derek Shields. Other members included Christopher Burnett and Tom Torrone. Magnotti, Black, Shields, Burnett and Torrone all testified against the Defendant at trial.
>
> On the evening of April 30, 1996, Lords of Chaos members Christopher Black, Tom Torrone and the Defendant attempted to vandalize and burn the auditorium at Riverdale High School. Their criminal plans were interrupted by

school teacher and band leader Mark Schwebes, but the Defendant ran away before he could be caught. Christopher Black and Tom Torrone were stopped by Mr. Schwebes and they were advised by him that he had also seen the Defendant.
After seizing incriminating evidence from them, Mr. Schwebes told Black and Torrone that they should not be surprised if they were called by the school resource officer, Deputy Montgomery of the Lee County Sheriff's Department. From that point forward the Defendant was inexorably connected to an imminent investigation of the Lords of Chaos. The potential for arrest and exposure was very real and quite worrisome to the Lords of Chaos.

When Christopher Black, apprehensive about his own pending arrest, angrily said "He's got to die," the Defendant immediately agreed and exclaimed "We can do it!" This statement by the Defendant clearly establishes that the dominant or sole motive for killing Mark Schwebes was to prevent or avoid arrest by Deputy Montgomery. The Defendant's statement was corroborated by fellow Lords of Chaos members in their testimony at trial. Indeed, Black in particular testified that they planned to kill Mr. Schwebes "So we all wouldn't get in trouble."

Derek Shields testified that the Defendant told him they had to kill Schwebes so Black and Torrone would not be turned into the school resource deputy, an event which could lead to the exposure of the entire Lords of Chaos gang and their leader, Kevin Foster. Indeed, each member of the Lords of Chaos knew that in the two months preceding the murder of Mark Schwebes, the group had been engaged in numerous criminal acts and each would be facing significant charges beyond those which might be presented by the exposure of their criminal conduct at Riverdale High School.

The possibility of arrest and prosecution for all of the criminal actions which had been engaged in by the Lords of Chaos was a cold reality to the Defendant, especially if members of the Lords of Chaos were questioned and disclosed to law enforcement what the Lords of Chaos had done.

> Plainly, the evidence demonstrated that the dominant or sole motive for killing Mark Schwebes was to avoid or prevent a lawful arrest. Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Consalvo v. State, 697 So. 2d 805 (Fla. 1996). The Court hereby finds that based upon the evidence presented at trial and the verdict of the jury, the witness elimination aggravating circumstance was proven beyond a reasonable doubt and the Court affords it great weight.

Appellant must first take exception with the court's statement regarding the Lords of Chaos having been engaged in numerous criminal acts in the two months preceding the murder of Mark Schwebes. In the first place, the group had been in existence less than one month at the time Schwebes was killed, and so could not have been committing criminal acts for two months. More importantly, there was no evidence presented at Appellant's trial regarding other criminal acts allegedly committed by the Lords of Chaos. (Any such evidence would have been irrelevant and highly prejudicial.) The evidence that was presented at Appellant's trial related only to the Schwebes homicide, which was the only charge for which Appellant was tried, and was the only charge contained in the indictment in the instant case. Although the Lords of Chaos members who testified against Appellant referred, almost in passing, to having pled to some other charges in addition to those relating to the instant homicide, there was no evidence that these charges arose from their membership in the Lords of Chaos, and no evidence as to when the offenses were committed, and no evidence that Appellant was involved in these offenses in any way. Over Appellant's objections, the State was allowed to introduce into

evidence at the Spencer hearing an information in a separate case charging Appellant with 27 counts, specifically to bolster "the aggravator of avoiding arrest and witness elimination." (Vol. XI, pp. 1304-1306, 1324A) However, this document contained only allegations, and was not proof of anything. See Florida Standard Jury Instruction in Criminal Cases 1.01. Appellant had not been convicted of any of the offenses charged therein. To the extent that the court may have been relying on information not presented in open court and not proved at trial in his sentencing order, Appellant was deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida. Consalvo v. State, 697 So. 2d 805 (Fla. 1996); Porter v. State, 400 So. 2d 5 (Fla. 1981). This deprivation not only invalidates the court's finding as to the avoid arrest aggravating circumstance, but invalidates the entire sentencing order.

Furthermore, the evidence that was presented at Appellant's trial failed to establish this aggravator. "Typically, this aggravator is applied to the murder of law enforcement personnel." Consalvo, 697 So. 2d at 819. In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983); Riley

v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, the State must clearly show that the dominant or only motive for the killing was the elimination of a witness. Alston v. State, 23 Fla. L. Weekly S453 (Fla. Sept. 10, 1998); Mahn v. State, 714 So. 2d 391 (Fla. 1998); Gore v. State, 706 So. 2d 1328 (Fla. 1997); Peterka v. State, 640 So. 2d 59 (Fla. 1994); Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Dufour v. State, 495 So. 2d 154 (Fla. 1986); Doyle v. State, 460 So. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 So. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). The proof adduced in Appellant's case did not fulfill these requirements. The State failed to show that the victim, Mark Schwebes, saw and could identify Appellant after the incident at the school. The court's finding above that "Christopher Black and Tom Torrone were stopped by Mr. Schwebes and they were advised by him that he had also seen the Defendant[,]" is misleading. Although Schwebes may have seen someone running away when Appellant dashed across the street to rejoin his friends, the evidence showed that Schwebes did not know who this person was; he asked Christopher Black "who the guy was that ran away[,]" and Black said he did not know. (Vol. XIX, p. 1325) Peter Magnotti testified that he never saw Appellant have

any contact with Schwebes. (Vol. XVIII, p. 1141) There was no evidence that Schwebes had ever seen Appellant in the past or had any prior dealings with him whatsoever. [Schwebes was acquainted with Black and Shields. Black testified that he and Shields were "the entire keyboard class," and "were place under his [Schwebes'] care on two or three separate occasions (Vol. XIX, p. 1285), and Shields testified that he was in Schwebes'jazz band class. (Vol. XX, pp. 1481, 1555)] Nor did the prosecution prove that Appellant, or the others for that matter, had anything to fear if Schwebes did make good on his expressed intention to contact the school resource officer. After all, Appellant was not even a student at the school (Vol. XIX, p. 1318), and the others, who did attend Riverside (Vol. XIX, p. 1325, Vol. XX, p. 1480, 1482, 1492), may have been facing nothing more serious than suspensions. It is mere speculation to say that Schwebes contact with Torrone and Black would have led to the exposure of the Lords of Chaos, with dire consequences for its members. The killing seems to have been motivated at least as much by Black's and Torrone's anger at Schwebes over being thwarted in their attempt to vandalize the school as it was by any supposed desire to avoid arrest. Indeed, Black specifically testified that he was feeling more anger than fear after the encounter with Schwebes. (Vol. XIX, p. 1286) Finally, it is important to note that the idea of killing Schwebes did not originate with Appellant, but with Christopher Black, and that Appellant never himself expressed a concern about being apprehended as a result of Schwebes' intervention.

Under these circumstances, the section 921.141(5)(e) aggravating circumstance has not been proven. Because an inapplicable factor was not only found by the trial court, but considered by Appellant's sentencing jury, he must be granted a new penalty trial in conformity with such cases as Mahn, Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE V

THE SENTENCING ORDER ENTERED BY THE COURT BELOW WILL NOT SUPPORT THE SENTENCE OF DEATH IMPOSED, AS THE COURT FAILED TO GIVE PROPER CONSIDERATION TO THE EVIDENCE PRESENTED IN MITIGATION, AND HIS FINDINGS ARE UNCLEAR.

Initially, a few words need to be said about the trial court's rejection of Appellant's age of 18 at the time of the offense as a statutory mitigating factor. In Mahn v. State, 714 So. 2d 391 (Fla. 1998), this Court reviewed some of its past decisions in which it indicated that a defendant's youthful age does not have particular significance in the capital sentencing context unless it is linked with some other factor, such as immaturity, but then went on to find that the sentencing judge in Mahn had abused its discretion in refusing to credit the defendant's age of 19 as a statutory mitigating circumstance. Furthermore, there is an irreducible minimum age for the imposition of a sentence of death. In Allen v. State, 636 So. 2d 494 (Fla. 1994), the Court held that the death penalty would constitute cruel or unusual punishment if imposed upon one who was under age 16 at the time of the offense.

In the instant case, the court offered scant support for his failure to find Appellant's age mitigating, noting the following: (1) Appellant had not attended school for two years before the murder; (2) Appellant "had traveled overseas as an exchange student and completed his GED requirement and taken other courses in preparation for life as an adult;" (3) Appellant had lost his right to have age taken into consideration because of his leadership of

"a group of criminals" and had "meticulously" planned and carried out the shotgun slaying of Schwebes. (Vol. XII, pp. 1479-1480) Far from showing any type of maturity than would vitiate the age mitigator, these facts paint a portrait of an aimless and purpose-less youth, casting about for some direction, something to give his life some meaning. The court should have found Appellant's age to be mitigating and afforded it at least some weight.

Furthermore, the court's sentencing order did not meet the minimal requirements this Court has set for the consideration of mitigating circumstances in orders imposing sentences of death. This Court has stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id. Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal v.

State, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, the Supreme Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id.; Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that trial judges should use greater care in preparing their sentencing orders so that it is clear to the reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found." With regard specifically to evidence presented in mitigation, the trial court has a responsibility under Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Citation omitted.]" See also Walker v. State, 707 So. 2d 300 (Fla. 1997) and Reese v. State, 694 So. 2d 678 (Fla. 1997).

It is difficult to ascertain from the trial court's sentencing order (Vol. XII, pp. 1475-1485) exactly what, if anything, he found to be mitigating, and how much weight, if any, he afforded any mitigation he found to exist. Particularly unclear is the court's discussion of the 23 nonstatutory mitigating circumstances Appellant identified in his sentencing memorandum (Vol. XII, pp. 1483):

> (g) In all, the Defendant has identified 23 "Non-statutory mitigators" in his sentencing memorandum, all of which "Should be given great weight."
>
> The court has considered each and every one of the non-statutory mitigators and provides each one of them very little weight individually and very little weight collectively. They run the gamut from the sublime to the ridiculous. For example, the Defendant was a premature baby. He was abandoned by his natural father at one month old. He will adjust well to prison life. The Court has considered this particular mitigator and affords it absolutely no weight whatsoever. The others have been, as stated previously, duly considered and have been afforded very little weight.

The court then went on to discuss how Appellant "presented two personalities to the World." (Vol. XII, p. 1484)

In the discussion quoted above, the court seems initially to say that he found all 23 of Appellant's proposed mitigating factors to exist, but gave them very little weight. But he then goes on to say that he "has considered this particular mitigator [to which mitigator is he referring?] and affords it absolutely no weight whatsoever." The court's findings are murky, at best, and he failed to expressly evaluate each of the proposed mitigators, which

are set forth in Appellant's sentencing memorandum (Vol. XI, pp. 1271-1282), as required by Campbell. Furthermore, a number of Appellant's proposed mitigating circumstances have been recognized as legitimate mitigating factors in decisions of this Court, for example, Appellant's good work record [see Buckrem v. State, 355 So. 2d 111 (Fla. 1978), Wasko v. State, 505 So. 2d 1314 (Fla. 1987), Proffitt v. State, 510 So. 2d 896 (Fla. 1987), Fead v. State, 512 So. 2d 176 (Fla. 1987), McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), Holsworth v. State, 522 So. 2d 348 (Fla. 1988)], his potential for rehabilitation [see Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988), McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), Holsworth v. State, 522 So. 2d 348 (Fla. 1988), Carter v. State, 560 So. 2d 1166 (Fla. 1990), McCray v. State, 582 So. 2d 613 (Fla. 1991)], his completion of his GED [see Johnson v. State, 720 So. 2d 232 (Fla. 1998), Williams v. State, 707 So. 2d 683 (Fla. 1998), Turner v. State, 645 So. 2d 444 (Fla. 1994)], his good behavior during trial [see Hardy v. State, 716 So. 2d 761 (Fla. 1998)], and the court below was required to find them and give them at least some weight, pursuant to Campbell.

"To ensure meaningful review in capital cases, trial courts must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record. [Citation omitted.]" Jackson v. State, 704 So. 2d 500 (Fla. 1997). The order entered by the court below did not fulfill this standard, and to uphold Appellant's death sentence on the basis of this flawed order would deny him his constitutional rights under the Sixth,

Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

ISSUE VI

THE COURT BELOW ERRED IN SENTENCING APPELLANT TO DEATH, AS THE ULTIMATE SANCTION IS NOT PROPORTIONALLY WARRANTED, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring), that application of the death penalty must be reserved for only the most aggravated and least mitigated of most serious crimes. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Fitzpatrick v.

State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

Kevin Foster's cause does not qualify for the death penalty under these principles. This case is not among the most aggravated murder cases in Florida, nor is it "unmitigated." The killing was not particularly heinous, involving as it did an instantaneous death by shooting, with no events preceding the killing that would have caused the victim to be in fear for his loss, or to suffer in any manner.

Furthermore, as discussed in Issue IV above, one of the two aggravating circumstances found by the court below should not have been found, leaving only the CCP aggravating factor. This Court has affirmed death sentences in cases supported by only one aggravating circumstance only where there was nothing or very little in mitigation. Jones v. State, 705 So. 2d 1364 (Fla. 1998); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Here, Appellant presented substantial evidence in mitigation through 25 "live" witnesses and an affidavit. These witnesses painted a portrait of Appellant as a hard working, non-violent, compassionate person who went out of his way to help others less fortunate than himself, such as Cody Voorhees, the young man who suffered from terminal leukemia, John Williams, the 12 year old boy with spina bifida, and Peter Albert, the gentleman who was confined to a wheelchair. Appellant also showed his potential for rehabilitation in his dedication to bettering himself by continuing his education and in the support of his friends and his sister and mother, with whom he

had a warm and loving relationship. Of course, Appellant's age of 18 at the time of the offense is another very important consideration for this Court in assessing the propriety of the sentence of death.

In Williams v. State, 707 So. 2d 683 (Fla. 1998) involved a killing arguably more heinous than the instant case, in that the victim was shot eight times, but lingered for a time before expiring. The trial court found two aggravating circumstances: the capital felony was committed by a person under sentence of imprisonment and the capital felony was committed for pecuniary gain. This Court invalidated the first factor and vacated the death sentence on proportionality grounds. The mitigating evidence included: (1) the age of the defendant, which was the same as that of the Appellant here, 18, (2) Williams was an exemplary prisoner while awaiting trial, (3) he obtained his GED while in jail, (4) Williams could be rehabilitated if given a life sentence, (5) Williams found religion in jail, (6) he intended to become involved in a prison ministry, and (7) Williams had the capacity to work hard. Appellant's mitigation is at least as strong as that presented by Williams, and he is entitled to the same result.

Even assuming, arguendo, that this Court upholds the lower court's finding that two aggravating circumstances exist, this is still not a case in which the death sentence may be allowed to stand. In Johnson v. State, 720 So. 2d 232 (Fla. 1998), the victim was shot numerous times and died a week later. The jury recommended death by a vote of nine to three, the same as in this case.

This Court upheld the lower court's findings in aggravation that Johnson was previously convicted of violent felonies, that the murder was committed while Johnson was engaged in a burglary, and that the murder was committed for pecuniary gain (which merged with the burglary aggravator), but nevertheless vacated Johnson's sentence of death. The mitigation which the Court balanced against these aggravators was: (1) Johnson's age of 22 at the time of the crime, (2) Johnson voluntarily surrendered to the police, (3) Johnson had a troubled childhood, (4) Johnson was previously employed, (5) Johnson was respectful to his parents and neighbors, (6) Johnson had a young daughter, and (7) Johnson earned his GED and participated in high school athletics. Again, Appellant's mitigating evidence was at least as strong as that presented by Calvin Johnson, and, as in Johnson, Appellant's sentence of death must be vacated in favor of a life sentence. See also Kramer v. State, 619 So. 2d 274 (Fla. 1993) (death sentence vacated even though victim was brutally beaten and trial court found HAC and prior violent felony conviction) and Urbin v. State, 714 So. 2d 411 (Fla. 1998) (death sentence vacated even though there were two legitimate aggravating circumstances, previous conviction of violent felony and murder during commission or attempted commission of robbery, which merged with pecuniary gain, in light of strong mitigation, especially Urbin's age of 17).

Finally, it is necessary to address the fact that, of the four young men who went to Mark Schwebes' residence and were indicted

for his murder, only Appellant has received a sentence of death. In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), this Court addressed the principal of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

In Slater, the defendant was the accomplice; the triggerman had entered a plea of nolo contendere to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So. 2d at 543.

In Craig v. State, 510 So. 2d 857, 870 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S. Ct. 732; 98 L. Ed. 2d 680 (1988), the Court explained:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

There, because the defendant was the planner and the instigator of the murders, rather than the accomplice, whose help had been solicited by the defendant, the disparate treatment afforded the accomplice was not a factor that required the court to accord a life sentence.

Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g, Puccio v. State, 701 So. 2d 858 (Fla. 1997); Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988); Cailler v. State, 523 So. 2d 158 (Fla. 1988); Du Bois v. State, 520 So. 2d 269, 266 (Fla. 1988); Brookings v. State, 495 So. 2d 135, 142-143 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The principles expressed in Slater and subsequent opinions of this Court are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the roles played by his cohorts. See Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

In this case, neither the person who precipitated the homicide by vowing that Mark Schwebes had to die, Christopher Black, nor the person who caused Schwebes to open the door to his residence so that the killing could occur, Derek Shields, has been sentenced to the ultimate punishment, even though they played major roles in this incident.

In Heath v. State, 648 So. 2d 660, 666 (Fla. 1994), this Court noted that it

> has approved the imposition of the death sentence "when the circumstances indicate that

> the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime." [Citations omitted.]

Under all the facts and circumstances of this case, it cannot be said that Appellant alone was "the dominating force behind the homicide" such that it would be appropriate to treat him more harshly than his codefendants. Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986). See also Dolinsky v. State, 576 So. 2d 271 (Fla. 1991), a life override case, in which the appellant was convicted of two counts of second-degree murder and one count of first-degree murder, and where this Court vacated his death sentence, even though he was a shooter and participated willingly in the crimes, in large part because other major players had not been sentenced to death.

As part of its review function in capital cases, this Court must consider "the propriety of disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. [Citation omitted.]" Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). The Court must conclude that Appellant is no more culpable than his codefendants, and that, pursuant to Slater, his death sentence must be reversed. Any other result will deprive Appellant of the due process of law and equal protection to which he is entitled and subject him to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 17 of the Florida Constitution.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authority, your Appellant, Kevin Don Foster, prays this Honorable Court to reverse his conviction and sentence and remand for a new trial. In the alternative, Appellant asks for vacation of his death sentence and remand for imposition of a life sentence, or, if that is not forthcoming, for a new penalty trial. Appellant further prays for such other and further relief as this Court may deem appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 17th day of September, 2000.

Respectfully submitted,

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