IN THE SUPREME COURT OF FLORIDA

RAYMOND MORRISON, JR.,

Appellant,

vs. CASE NO 94,666

STATE OF FLORIDA,

Appellee.

_____________________________/

INITIAL BRIEF OF APPELLANT

CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 814253

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

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IN THE SUPREME COURT OF FLORIDA

RAYMOND MORRISON, JR.,

Appellant,

vs. CASE NO. 94,666

STATE OF FLORIDA,

Appellee.
____________________________/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT AND TYPEFACE CERTIFICATE

This is the direct appeal of a conviction of first-degree murder and the sentence of death, and related convictions and sentences. The record on appeal consists of 17 volumes and 2 supplements. Volumes 1-9 contain the record. Pages therein shall be cited as "V#R#". Volumes 11-17 contain transcripts. Pages therein shall be cited as "V#T#". Both supplemental volumes are labeled "Supplemental Volume I." The first, a one-page affidavit, will not be cited. The second, a transcript of proceedings, shall be cited as "SR#".

This brief has been printed in Courier New 12 pt. type.

STATEMENT OF THE CASE

On January 23, 1997, a grand jury of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, issued an indictment against appellant Raymond Morrison, Jr. Count I charged first-degree murder of Albert Dwelle by stabbing or cutting, alternatively as premeditated murder or felony murder committed during the course of a robbery or burglary. Count II

charged armed robbery upon Albert Dwelle with a deadly weapon, i.e., a knife. Count III charged burglary of a dwelling with intent to commit a battery, with an assault or battery on Albert Dwelle. All counts were based on one brief, spontaneous episode alleged to have occurred on January 8, 1997, in Duval County. See V1R7-9.

A jury trial convened on Monday, September 21, 1998. See V11T1. Morrison moved for a judgment of acquittal at the close of the State's case and again at the close of the defense's case. Both motions were summarily denied. See V15T822-23, V15T932. On September 25, 1998, the jury found Morrison guilty as charged. See V16T1061-64, V6R983-84. The court orally adjudicated him guilty. See V16T1068.

Penalty proceedings before the same jury convened on October 8, 1998. See V16T1116. The jury returned a recommendation of death by the vote of 12-0. See V17T1307-10, V6R1058. A sentencing proceeding before the judge followed on November 12, 1998, see V10R1648, at which time the court summarily denied Morrison's motion for a new trial, see V10R1648-49, V6R990-95.

Sentencing took place on December 18, 1998. The court again orally adjudicated Morrison guilty on all counts. See V10R1675-76. Without orally stating any findings in aggravation or mitigation, the court sentenced Morrison to death on Count I, announcing that it was contemporaneously filing a sentencing order. See V10R1676. On Counts II and III the court found Morrison to be a habitual violent felony offender and sentenced him on each count to life imprisonment including a minimum

mandatory term of 15 years. See V10R1676-77. The court ordered each sentence to be served consecutively. The court also imposed $253 in court costs, and gave Morrison 707 days credit for time served. See V10R1677.

The court filed its written judgment and sentence on December 18, 1998, including a sentencing order enumerating its findings as to the death sentence. See V7R1170-94. The court found five aggravating circumstances but said it weighed four:

- Prior violent felony for a 1988 conviction of attempted robbery and a 1991 conviction of aggravated battery, given "great weight," see V7R1181;
- The murder was committed during a robbery and burglary with assault, given "great weight," see V7R1181-82;
- Pecuniary gain, which had no weight because it merged with the murder committed during a robbery aggravator, see V7R1182;
- The murder was heinous, atrocious, or cruel, given "great weight," see V7R1182-83; and
- The victim was particularly vulnerable due to advanced age and disability, given "great weight," see V7R1183-84.

The court found no statutory mitigating circumstances. See V17R1184. However, the court found and weighed eight nonstatutory mitigators:

- Good jail conduct in that Morrison presented no danger to the police when arrested, cooperated with the police during his detention, and led police to the murder weapon, given "some weight," see V7R1185;
- There will be no parole or other release from prison from a life sentence for first-degree murder, given "some weight," see V7R1185;
- Morrison cooperated with the police, given "some weight," see V7R1185;
- Morrison had an alcohol and/or drug abuse problem, i.e., abused alcohol and cocaine and most likely used the

robbery proceeds to purchase more alcohol and cocaine, accorded "some weight," see V7R1186;

- Morrison was employed, accorded "some weight," see V7R1186;

- Morrison has only borderline intellectual ability, and when combined with alcohol and drug abuse, it results in bad judgment, accorded "great weight," see V7R1186;

- Morrison has a positive family background and character. While living with his mother, grandmother, and young siblings, at an early age, he assumed responsibility for the overall operation of the home, which in turn contributed to his lack of formal education. He also was helpful to neighbors, had some beneficial contact with his children and other children, and advised his siblings to conduct themselves properly. This was accorded "some weight," see V7R1187; and

- Morrison has adjusted well while incarcerated, albeit with a record of an escape conviction,[1] given "some weight," see V7R1187.

The court rejected five nonstatutory mitigators:

- Morrison did not clearly intend to kill the victim, see V7R1184;

- The victim was unconscious and/or did not suffer for any lengthy period of time, see V7R1184-85;

- Morrison has shown sincere remorse, see V7R1185;

- Morrison had a deprived early childhood due in part to his father's absence from the home, see V7R1185-86; and

- Morrison's father and brother were in prison, see V7R1186.

Morrison timely filed a notice of appeal on December 28, 1998. See V7R1197.

STATEMENT OF THE FACTS

I. Guilt Phase

A. Before the murder

[1] The escape was for walking off a furlough. See V16T1103.

In January 1997, Albert Dwelle, 81 or 82, was living in Apt. 64 of the Ramona Apartments in Jacksonville. See V12T369, V12T391-94. He lived across from Apt. 68, in which resided Sandra Brown, a former girlfriend of Raymond Morrison Jr., and the mother of Morrison's five-year-old son. See V12T389-94. Dwelle suffered physical disabilities stemming from illnesses, some dating back to his childhood. He had diminished use of his left arm and right leg, and could not easily walk. See V12T370, V13T415-16, V13T433-36, V14T788-89, V15T804.

Dwelle went to the bank once a month to cash a check, and to the post office to make get a money order to pay his rent. See V12T369-70. He last did this on January 7, 1997, cashing a check for a little over $400. See V12T373-76. Dwelle often put money in his shirt pocket, see V12T376, and generally kept cash and two or three uncashed social security checks in the top drawer of his chest of drawers in his apartment bedroom, see V12T372-74, V12T386-87.

Dwelle collected old coins and silver medallions (fake currency), and gave some of the medallions to his cousin, William Daniel Brinson, Sr. See V12T372-73, V12T384-85, V12T379-81. Dwelle also collected old hunting knives, which he kept on a night stand by his bed, and on his bed. He smoked a pipe and used the knives to clean out his pipes. See V12T377.

Brinson last saw Dwelle at the apartment on January 7, when they returned from the post office. See V12T373-74. Brinson saw Dwelle reach into his shirt pocket to pull out some money and place it in the top chest of drawers. See V12T373-74. Brinson

had handled Dwelle's knives in the past, and that day he handled one with a black handle that looked like a hunting knife with a corkscrew on the side. See V12T378-79.

Lunches were regularly brought to Dwelle's home through the meals-on-wheels program, and they had to be put on the kitchen table for him. See V12T370-71, V13T413-15, V13T422-24, V13T434-35. He routinely left the door unlocked so that at about 11:30-11:45 a.m. the delivery person could walk in. See V13T413-18, V13T423-29. Occasionally a little boy from across the hall would walk into the unlocked apartment. Dwelle would give him fruit or cake, and the boy would leave. See V13T435-36.

B. The homicide and the crime scene

On Wednesday, January 8, Dannette Jackson delivered a meal to Dwelle without event. See V13T426-28. When Margaret Annette Key delivered Dwelle's lunch on Thursday, January 9, at about 11:35 a.m., she found the door unlocked and closed as usual. Inside, she discovered some of the previous day's meal sitting on the table, and Dwelle lying on the bedroom floor, dead. See V13T431-38. Dwelle had bled to death as the result of sharp force injuries, including stab and incise wounds about the neck area. See V15T809.

By the time police came to investigate, many people had already been in and out of the apartment since the murder, including firemen, maintenance men, meals-on-wheels personnel, and someone from the apartment complex. Officers found no broken windows, broken door jambs, or broken doors, and there was no sign of forced entry. See V13T548-49, V14T614.

Officers saw a shirt hanging on a chair with the pocket of the shirt open but empty. Over objection, Detective Terry C. Short said it appeared that something had been taken out of the pocket. See V13T553. Officers also saw knives scattered around the apartment, including a wooden-handled knife on the bed next to some knife sheaths; a couple of identification cards on the floor next to Dwelle; a number of pipes and pipe cleaners; a large bloody bath towel lying next to the victim; a coffee jar on the floor near the victim; a cigar tube; a 9-volt battery; an ID holder in Dwelle's shirt; a plastic wrap on a chair close to where Dwelle had sat; and an uncashed U.S. Treasury check for $470 as well as other papers in the top drawer of Dwelle's dresser. See V13T441-45, V13T481, V13T553-54, V14T607, V14T615-17. When police tested the items for fingerprints, they found no identifiable prints, only smudges. See V13T441-45, V13T462-64. However, police did not collect all the items for testing, did not examine evidence in other rooms, and did not use all available methods of testing the items they did recover. See V13T487, V13T475, V14T619-30.

Blood was found only in the area by the victim's body, and no blood was observed on any of the knives found in the room. See V13T555. Police used a dust electrostatic lifting kit (DELK) test and found a partial footprint not belonging to Morrison, but regarded that evidence as useless because police failed to check the feet of the many people who contaminated the crime scene. See V13T475-76, V13T485-86, V13T548, V14T630-32, V14T659. No physical evidence at the scene could be linked to Morrison. See

V14T633.

At some point after the murder, Brinson returned to clean out the apartment. He found no cash money or silver coins or medallions other than a round keg containing pennies, nickels, dimes, etc., which Detective Short had found. See V12T383-85.

C. After the murder

Police talked to Dwelle's neighbor, Sandra Brown, who is Morrison's former girlfriend. Police brought her down to the station for interrogation after advising her of her Miranda[2] rights. Though Brown was a key prosecution witness, evidence showed that she had a reputation in the community as a "big liar." V15T912. Brown also admitted she had a fight with Morrison's mother, Georgia Bell Morrison, in 1993. Brown further alleged that Mrs. Morrison had "said a little stuff to me" before testifying. Brown denied ever cutting Mrs. Morrison. See V13T410-11, V14T635-38.

Brown said she had been living in Apt. 68, across from Dwelle, whom she had seen but did not know. See V12T390-94. On Wednesday, January 8, she had been babysitting for Morrison's sister, Paula. Morrison, who did not live with Brown, had been at Brown's apartment all day. Her uncle Johnny Lee also came by. See V12T394-95, V13T405.

Some time between 8:00-9:00 p.m. Brown and Morrison went out and bought three four-packs of tall beers. Upon their return, Johnny Lee drank two or three, she had three or four, and

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Morrison drank two or three "tall boys." Other than the time they went for beers, Morrison had not left her apartment that day. See V12T396-97, V13T406-08.

At a time she could not pinpoint, her uncle left. Morrison put two steaks in the oven, seasoned them, turned the oven on, and said he was going to empty the trash and return. Brown said she saw him leave to empty the trash but he did not return. When he didn't come right back, she looked out the window through which she could see the dumpster, but she did not see him. About 10-20 minutes after he left, she went out looking for him. See V12T396-99, V13T406. First she ran into a friend, Carla. Then she went to the home of somebody she knew as "Big Man," who lived around the corner from her apartment, but she did not find Morrison there. See V12T399-V13T402.

The next time she saw Morrison was Friday morning in the Jacksonville community called Marietta. He was coming out of somebody's yard and crossing the street. She hollered out his name loud enough for him to hear, but he kept walking. He looked back but did not stop. See V13T403-04.

Harry J. Hills, who had fathered children with Morrison's mother (but is not Morrison's father), saw Morrison some morning, possibly Thursday, January 9, or Friday, January 10, in Marietta. He was unsure of the date and couldn't even remember if it was before or after Morrison's arrest. Hills said Morrison came up to him and asked him if he wanted to buy three or four coins that looked like silver dollars, but Hills declined. See V13T491-93, V13T503-07. However, Hills couldn't identify the coins, and when

shown what the State purported to be similar coins possessed by Brinson, Hills was unable to say they were of the same type as the ones Morrison possessed. See V13T493-500.

Delores Tims, who knows Morrison, saw Morrison and Hills together the day after news flashed about Dwelle's death. She did not say what day she saw that news report. Morrison had a bag in his hands, similar to a Crown Royal liquor bag. He was trying to sell Hills something, but she did not know what it was. See V14T716-21.

D. Morrison's statements and evidence introduced over objection pursuant to the court's pretrial suppression order

On January 9, Pastor/Officer Antonio Richardson interviewed some individuals at the Ramona Apartments after Dwelle's death. Detective Short told Richardson on January 10 to arrest Morrison on an outstanding writ of attachment arising from a civil custody dispute, but to bring him in for questioning on the homicide. See V15T508-14, V13T531-34.

Thereafter, Morrison made statements, almost all of which were subjects of a pretrial suppression motion. Physical evidence flowing from the statements also was subjected to a pretrial suppression motion. The court denied the motions for the most part. See V5R796-816, V2R335, V9R1482. Throughout the guilt phase Morrison renewed his objections, but the evidence came in over objection. See V13T574-75, V13T520-23, V13T582, V14T603-05. To avoid needless duplication, that evidence is detailed later in Issue V, as it arose in the suppression hearing. See infra at 56. However, here is the text of

Morrison's written statement seen by jurors:

> On Wednesday 01-08-97 at approximately 9:00 PM I had been smoking crack with Big Man. I ran out of crack and had no money. I went to Apt. 68 and sat on the steps. I was drinking a beer. I wanted a cigar. I knocked on the door of Apt. #64. The man came to the door and I ask him for a cigar. He started telling me he couldn't let me come in. I ask for a light for the cigar he gave me. He went back into his bed room to get me a light. I follow him to the bed room. He reached into his shirt pocket hanging on a chair by the bed and handed me a light. I put the lighter back on the chair. I saw money in the shirt pocket. I reached over and grabbed a few bills out of his shirt pocket. He saw me take the money. He got a knife from somewhere and began swinging it at me. I tried to grab him to defend myself and also not to hurt him. I grabbed him by the arm and turned him around so he was facing away from me. He was thrusting the knife back over his shoulders at me. I was holding his right arm and he was still thrashing the knife trying to cut me. While he was trying to cut me the knife accidentally cut across his throat. I didn't know at the time that it had cut him. I was still holding him and he got even wilder thrusting the knife and I guess he got cut again. That's when I saw he was cut.
>
> I laid him down on the floor and picked up the knife. I left the apartment and went to another part of the complex where I hid the knife under a brick.
>
> I then went to Big Mans house and got him to take me to the Chevron. We got gas and he took me to Marietta. When we got to Marietta I bought some drugs with the money I took from the old man. I then went back to Ramona Park where Big Man dropped me off and he went home. I saw my uncle Cap and I got in the car with him. I stayed with Cap until Friday morning and continued smoking dope and drinking till then.
>
> Police picked me up Friday after noon.

V2R374-75, <u>see also</u> V13T582-90.

Richardson and Short said that after giving the written statement, Morrison showed detectives where the knife was located. Until that time officers had no knowledge of the knife or its location. Officers went out with Morrison and retrieved the knife near unit 18 of the Ramona apartments, near where "Big Man" lived. Once Morrison pointed to the knife, it appeared to

be in plain view, not hidden. See V13T525-28, V13T590-94, V14T655-56, V14T739-45.

E. Forensic and scientific evidence introduced at trial

The knife found by the Ramona Apartments contained evidence of blood, but the sample was insufficient to determine whether it was of human origin. See V14T737-38. No identifiable fingerprints were found on that knife. See V14T724-25.

A PCR DNA test, which is a less discriminating test than the RFLP DNA test, was conducted on the knife by FDLE serology analyst Diane Hanson. She concluded that the blood was consistent in all six genetic markers with those in the blood of Albert Dwelle. See V14T764. Dr. Martin Tracey, a population geneticist, agreed and said the six characteristics found in Dwelle's blood, when compared to samples in a Caucasian population data base, occur in approximately one out of every 3,200 persons. See V14T689-91, V14T699-701; see also V14T765-66. However, it cannot be said that the blood on the knife was "absolutely, positively" from the victim. See V14T691. Moreover, the prosecution's experts did not use the more discriminating RFLP DNA test. See V14T694.

FDLE examiners also tested the blood on the towel found near Dwelle's body, and saliva on the Styrofoam cup Detective Short took from Morrison during his interrogation. See V13T595-96, V14T733. Hanson concluded that the blood sample obtained from the towel, like that taken from the knife, was consistent in all six genetic markers with the blood of Albert Dwelle. The DNA on the cup could not have come from Dwelle. See V14T764.

Margarita Aruzza, a forensic pathologist for the medical examiner's office in Jacksonville, performed the autopsy on the victim. See V14T784-85. Dwelle's neck suffered a long incise wound (a cut inflicted with a sharp object) and a superficial incise wound; a stab wound; and some bruising and abrasions. See V14T786-91, V15T803-06, V15T815. The long incise wound goes from left to right, and was shallow, not cutting either the jugular vein or carotid artery. The stab wound was on the left side and was deep and long, measuring 4¾ inches. See V15T105-07, V15T810-11. It would not have taken much force to cause the abrasion found on Dwelle's neck. See V15T817. Aruzza could not determine when or in what order the wounds were inflicted. See V15T815-16.

Dwelle also had superficial bruising and abrasions on the right arm, elbow, and hand, and a laceration on the right hand. See V14T786-88, V15T803-04. He had a little bruising and scrapes of the left elbow. See V14T787-88. He had abrasions on the chest. See V15T805. He had minor bruising on the right eyebrow extending to the eyelid. See V15T803. All the injuries are recent and are consistent with having been inflicted on or about the same time within 24 hours before death. See V14T803-04.

There were only minimal signs of struggle. See V15T817-18. The neck bruises are consistent with having been held from behind. See V15T805. The incise wound more likely was inflicted from behind. The stab would could have come from the front or from behind. Aligning the wounds suggested to Aruzza that the victim's head was turned toward the left and was in a headlock.

Aruzza concluded that Dwelle died of sharp force injuries combined with the stab wound. He probably aspirated blood, some of which got into his lungs. Bleeding and aspirating combined to cause death. See V15T808-10. Any knife, including the one recovered near the Ramona Apartments, could have caused the fatal injuries. See V15T814. Aruzza was unable to ascertain how long Dwelle lived after the injuries were inflicted. However, Dwelle would have lost consciousness as his blood pressure started to drop and the blood aspirated into his lungs. See V15T820.

Death would not have been immediate (within seconds) because the incise wound was shallow and did not cut critical blood vessels. Had the jugular vein or carotid artery been severed, he would have lived no more than 15 minutes. See V15T810-12. However, Aruzza could give neither a minimum nor a maximum period of time Dwelle lived or remained conscious after being fatally injured. See V17T820. Dwelle’s spinal cord was not injured, and even though there was damage immediately above his voice box, he would have been able to talk, call out, or hold a towel to his throat, Aruzza opined. See V15T810-15.

II. Penalty Phase

A. Aggravating evidence

The State introduced evidence of two prior felony convictions. Morrison was convicted of attempted robbery in Hamilton County on September 28, 1988, after being charged with robbery for a March 29, 1988 incident involving Horton Peoples.[3]

[3] The 1988 information identified him as Orten Peeples. The brief will refer to him as recorded in the transcripts.

He was sentenced to 30 months imprisonment. The investigating officer testified that Morrison hit Peoples on the jaw, busting out his false teeth and stunning him in the course of taking his wallet. Peoples was an older gentleman, possibly in his 60s. See V16T1117-22, V6R1104-09. The second conviction, dated July 15, 1991, was of aggravated battery after having been charged with armed robbery and aggravated battery for an April 1, 1991 incident in Duval County. He got a three-year sentence. See V16T1122, V6R1138-46.

The State also introduced the victim impact statement of Gloria Brinson. Brinson read aloud her prepared statement saying that Dwelle's death left an emptiness in the hearts of those who cared for him; as a child he had suffered typhoid fever and a stroke; he overcame those disabilities; he traveled; loved camping and fishing; enjoyed lengthy employment with the Jacksonville Journal as a newspaper salesman; was a man of simple means; loved to watch ball games; collected coins and stamps; was determined to make it on his own even in his weakened condition; never expected assistance but was grateful for that which he received; was a giving and generous man; would give what little food he had to his neighbors' children; is missed; and the incident has left a scar on Brinson and her family. Over objection, Brinson also was allowed to read the final sentence of her statement saying, "Albert may have lived a long life, but his unnecessary, sudden death, will haunt me and my family forever." See V16T1123-27, V6R1018-19.

B. Mitigating evidence

1. Family testimony

Raymond, 27 years old at the time of Dwelle's death, was born on October 16, 1968 to Georgia Gayle Morrison and Raymond Morrison, Sr. He has a younger sister, Paula Yvette Wilson, who was born a year after Raymond was born, and a stepbrother. See V6R1101, V16T1127-29, V17T1198-99, V16T1173-74.

In September 1970, before Raymond's second birthday, his father went to prison for murder and remained imprisoned until October 1979, shortly before Raymond's eleventh birthday. Raymond Sr. had no involvement in his son's life during all those early formative years. See V16T1174-75.

Raymond's mother worked to support the family without government assistance. She worked at a restaurant when he was only five, and then she got a job caring for the sick and elderly at nursing homes. Around the time Raymond was in seventh grade, she worked two jobs, causing her to be away from the house from mid-afternoon until late in the morning every day. See V17T1199-1200-04. Meanwhile, Raymond stayed home to take care of his younger sister, their bedridden grandmother, and others who lived with them, including a six-month-old child. See V16T1129-30, V17T1200-05.

Raymond's academics suffered throughout his busy childhood, as his school records demonstrate. He suffered from asthma, too, which contributed to his having missed a significant amount of school days. Around the age of 15, when his mother was working two jobs, Raymond decided to drop out of the seventh grade to care for the family full time. See V6R1020-25, V17T1203-04,

V17T1214-15.

He was friendly, kind, and nice to everybody. When Paula got into a lot of fights as a youngster, Raymond would extricate her from fights and discouraged fighting and violence. He would also walk her to school, take her to the movies, etc. Around the house he did most of the cooking, laundry, and made sure everybody was bathed and clothed properly. Because his grandmother was unable to care for herself, Raymond took special care of her, combing her hair, helping her to the bathroom, administering her medication, cleaning, shopping, etc. He even gave haircuts. Still he had time to cook and send the kids to school. He also helped neighbors with simple things such as taking out the trash, moving, and shopping, and did chores for one elderly neighbor in particular. He used to have cookouts for kids in the neighborhood, go to parties, have barbecues, go to the skating rinks, and take kids to the neighborhood park. See V16T1131-33, V17T1200-06, V17T1212.

Raymond's father reentered the scene when Raymond was about 12 or 13. Raymond would visit him at the work release camp, but after Raymond Sr. completed serving that final portion of his sentence, he never moved back into the house. He began paying child support and saw his children on weekends. See V16T1174-75.

Raymond Sr. said his son told him "he wanted to live his life like he wanted to live it. So, I told him I won't be in it, you know, that I would see him, talk with him, but I wouldn't have nothing. Whatever to do you have to help yourself." See V16T1176-77. When Raymond got a little older and his father

could see which way Raymond was going, Raymond Sr. talked to him about the need to get his life together, to get his life straightened out. He tried to counsel him not to drink. He said this hurts, but "you don't push your child aside because, you know, you just keep on at it until you try to get it right." See V16T1177. See V16T1177. Raymond Sr. also disclosed that Raymond's stepbrother had gone to prison. See V16T1178.

Raymond's sister and mother both said despite having gone to prison, Raymond had a good positive influence on their lives largely because he did so much to help others. He never raised his voice to his mother. He also has been a good father to his own three children, two girls and a boy. Paula stayed on the straight and narrow path due in part to his encouragement. Everybody agreed that Raymond will be missed. See V16T1131-35, V17T1178-81, V17T1212-13.

2. Psychological evaluation

Dr. Harry Krop testified as an expert via videotape without objection.[4] He concluded that Morrison suffers from borderline

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[4] Dr. Krop is a clinical psychologist whose practice is primarily in forensic psychology. He has been licensed since 1971. He has a bachelor's degree from Temple University in psychology, a master's degree and a Ph.D. in clinical psychology from the University of Miami. He did a post-doctoral internship in neuropsychology at the V.A. Medical Center in Gainesville. He was a staff psychologist there, and has been in private practice since 1977. He is an assistant professor at Nova University and has testified in Florida in criminal cases 600-700 times. See V17T1218-19.

Dr. Krop saw Morrison on three occasions. First was for a neuropsychological evaluation. He got a brief history and did a battery of psychological testing to assess different cognitive areas including intellectual ability and other neuropsychological areas. Then he did an interview with him in which he took his history, and did some personality testing. He saw him a third

intelligence and polysubstance abuse, which combined to seriously impair his ability to make judgments.

First, when asked to summarize his findings as to Morrison's educational background and intellect, Dr. Krop said:

> Well, Mr. Morrison has limited intellectual ability. He was in special education classes. He has always been in special ed. He was retained several times.
>
> He only went as far as the seventh grade and quit, at that point, when he was seventeen or eighteen years old.
>
> He has always done poorly academically, even though he was in special education classes. So he's got a limited intellectual -- I'm sorry, limited educational background, primarily because of his own learning disabilities and intellectual deficiencies. He had an IQ of 78, I believe. Full scale IQ of 78, which places him in the -- somewhere between the fifth and ninth percentile of the overall population, which basically means that for every hundred individuals in the population in general, that ninety or more of those individuals would score higher than he on this particular test.
>
> He reads pretty well, despite his lower intellectual ability. He actually can read at a high school level. He is the twenty three percentile in reading, but spelling is at the sixth percentile. Real deficiencies in terms of spelling.
>
> His math is also very poor, but his reading is actually relatively high for his overall intellectual ability.
>
> So that would be the assessment of his intellectual abilities. I feel that these are valid findings and, certainly, consistent with his academic work. Actually looking at his school records looks like he was retained in the seventh grade at least twice, and he was also retained on two occasions before that, which is why he was seventeen or eighteen years old and he was still in the 7th grade when he quit school.

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time for a clinical interview after the conviction. He reviewed Morrison's school records, the police reports in this case, and interviewed his mother. See V17T1220-21.

V17T1221-22.[5]

Dr. Krop said Morrison's low IQ placed him in the "borderline" category near the bottom of intellectual ability, just above mental retardation:

> It is classified as borderline intellectual ability. When we look at IQ and classify it, it can be classified either average, low average, and then below average is borderline. The classification below that is mentally retarded.
>
> So, he was in the classification level one step above mental retardation. But, again, to quantify it, I think the best way to look at it is that he's in the 7th or 8th percentile of the overall population.

V17T1223.

Second, Dr. Krop found that Morrison suffers from a diagnosable disorder called polysubstance abuse:

> ... the primary diagnosis for Mr. Morrison would be substance abuse. He indicated that he began drinking at the age of eleven, and he was drinking heavily, really, at least a year prior to when this offense occurred. He describes a history of blackouts.
>
> On the other hand, he indicates that he never sought treatment for his alcohol abuse.
>
> He also indicated that he has been using crack cocaine, as well as powder cocaine on a pretty regular basis, as well as marijuana, and had been drinking and using drugs around the time that this incident occurred.
>
> So, given his history, and I only have his history to go on, because we don't have any treatment records since he never sought it, it appears that this man could be appropriately diagnosed as having a polysubstance abuse problem.

V17T1223-24.

The combined effect of substance abuse and borderline intellect is that it produced serious judgment deficiencies:

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[5] At the subsequent judge-only sentencing hearing on November 12, 1998, Morrison stipulated without objection to the introduction of Dr. Sherry V. Risch's evaluation of Morrison's IQ upon which Dr. Krop relied. See V6R1080-83, V10R1652-53.

> Well, generally alcohol, as well as some of the other harder drugs that you mentioned in the terms of cocaine, will affect an individual's thought processes to the extent where judgment is usually affected and influenced. A person tends to be more easily frustrated, an individual tends to be more impulsive, and not think ahead in terms of consequences.
>
> When a person also has more limited intellectual ability, that also tends to effect the person's problem-solving skills, not look at options that are available, and tends to effect a person's judgment when you combine the two. And, obviously, you have a more serious problem in terms of a person's judgment.
>
> Also, depending on the degree of the habit that the individual has, particularly crack cocaine, an individual's functioning is highly motivated by his need to support his habit. So, an individual could engage in antisocial-type behaviors, simply for the purpose of being able to support his habit.
>
> So, you have a problem in terms of judgment, in general, both with intellectual limitations and the chronic polysubstance abuse.

V17T1223-25.

Dr. Krop found no conclusive evidence of specific brain damage, though he did find "some deficits," and there had been reports of head injuries. Dr. Krop also detected no neurological diseases. See V17T1226-27. Morrison understands the value of money and that money is needed to support a drug habit. He also knows the difference between right and wrong. See V17T1228-30. Morrison consistently indicated to Dr. Krop "that he was not culpable of these crimes, and he has indicated that those confessions were based on manipulation." See V17T1227.

Many persons who suffer borderline intellectual ability work for a living. There is no correlation between low intellectual ability and criminality. But Morrison suffers impaired judgment skills, and his use of cocaine around the time of the incident was a prime motivator. See V17T1229-32.

3. Expert rebuttal of Aruzza's opinion testimony

Dr. Peter L. Lardizabal, a forensic pathologist for 27 years, testified as an expert for the defense regarding the cause and manner of Dwelle's death.[6] He concluded that the two severe neck injuries would have caused Dwelle to lose consciousness in "one minute." See V16T1144, V16T1160.

> Well, loss of consciousness is -- because in this particular case, by the massive amount of blood loss and, also, inhalation, inhaling his own blood to producing drown phenomena, and not begin able to breathe, it took seconds to accomplish that, because of the bleeding.
>
> And loss of consciousness, because in the trajectory of the wounds, it is my contention that it produced a lot of bleeding because of the smaller arteries supplying the thyroid gland, as the thyroid cartilage was cut and perforated.
>
> And when you do that, aside from losing consciousness in a matter of seconds because of blood loss, and not being able to breathe, you -- because you aspirate your blood, it took a few more -- the whole process, I will say, from the infliction of those wounds, will be a little bit more than two minutes and few seconds for the individual to die.

V16T1144-45. "It only took him two minutes and a few second to survive." V16T1160, see also V16T1161-62, V16T1171-72 (upon court's request for clarification, Dr. Lardizabal said "it took him probably a minute and a few seconds. So two minutes and a few seconds.") Loss of consciousness and death ensued due to cardiac arrest. See V16T1145, V16T1172.

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[6] Dr. Lardizabal was appointed by the governor as Hillsborough County chief medical examiner from 1977 to 1990, and had been a medical examiner in Dade County for 14 years before that. He has performed approximately 11,000 autopsies. See V16T1138-43. Dr. Lardizabal reviewed Dr. Aruzza's autopsy report, as well as the police investigation, and numerous colored photographs of the scene and the autopsy, totaling more than 200 photos. See V16T1143.

Dr. Lardizabal agreed with Aruzza that large blood vessels in the neck, which are easy to identify, were not injured. But harder to identify -- and not mentioned in Aruzza's autopsy report -- are the upper branches of the carotid artery, which extend the length of the neck and go above the jaw. Those branches were cut. Dr. Lardizabal said one of the neck wounds produced a little bit more than a one inch long triangular defect in the thyroid cartilage on the left side, which "is worse than a tracheotomy. You can't talk, you can't breath[e]... The vocal cords are useless, rendered useless." See V16T1146. When the branches of those vessels are cut, as happened in this case, a tremendous amount of hemorrhaging produced. See V16T1146-47. "[T]hat individual wouldn't have been able to talk, or say anything after the injury of a -- the injuries inflicted by A and B of the neck region, as mentioned in the autopsy of Dr. Aruzza." See V16T1152. Thus, Aruzza was wrong to opine that an individual with these neck wounds could have yelled for help. See V16T1153.

Although Aruzza's the report did not mention whether the internal carotid artery was cut, it could have been, as well as the external carotid arteries which supply the tongue and the mandible. See V16T1170. The hyoid bone, the frame of the airway, was cut. One frame of that door collapsed. That produces asphyxia, anoxia, and would produce a loss of consciousness if "in a matter of seconds, or minutes. A minute at most." See V16T1171.

Dr. Lardizabal approximated the spread of blood surrounding the victim's head as about 14 inches wide. He also noticed that

the lungs were very light, which is an indication of traumatic anemia from bleeding. The victim lost more than one pint of blood, possibly two pints. Dr. Lardizabal concluded given the age of the victim and the amount of blood loss, he lost consciousness within a minute or two. When one loses consciousness, there is no pain or suffering. See V16T1147-49, V16T1167-68.

> Well, pain and suffering is -- you've got to have a connection with a central nervous system. In this particular case, the central nervous system is continuously [] emptying, so the pain and so-called suffering sensation goes down to practically nothing. If one even go down to the period of complete numbness, it goes down only to the period of marked anemia, and the sensation is gone. You don't even feel it.

V16T1149-50.

Dr. Lardizabal agreed with Aruzza that the injuries were suffered after some sort of struggle involving blunt trauma, and the injuries were not self-inflicted. See V16T1154-59. Death was not caused by the blunt trauma; it was caused by neck wounds damaging the blood circulation structures, causing hemorrhaging and inhalation of blood. See V16T1160-61, V16T1166-67.

Dr. Lardizabal said generally it takes about six minutes for a person to drown, though there is no hard-and-fast rule. However, drowning had nothing to do with Dwelle's death. There is no fair or legitimate comparison between drowning in one's own blood and drowning because of inhalation of water. It is not scientific to compare the two. See V16T1163-64.

Dr. Lardizabal said the victim would not have been aware of the fatal nature of the wounds. See V16T1164-65. The expert

said he does not know what the victim would have been thinking about or knows at the time he was cut. Had the carotid artery or jugular vein been severed, death would have been much quicker. Even if those vessels were cut death would not have been immediate. It just would have been quicker. See V16T1165-66.

A victim would be able to feel pain to a descending degree before losing consciousness. See V16T1168. Prior to the loss of consciousness, a person would be capable of feeling fear, possibly capable of feeling impending death, possibly able to feel hopelessness if there's no one there to help them. "But [it is] not very probable," Dr. Lardizabal said. See V16T1169.

Morrison did not testify in either phase of the trial.

SUMMARY OF ARGUMENT

1. The trial court blatantly ignored Morrison's timely and repeated pre-trial allegations of ineffectiveness of his counsel, and his timely requests of the court to replace counsel. The court failed to conduct any kind of timely and adequate review of those complaints and motions, an abrogation of the court's responsibility. See Hardwick; Nelson; Parker; Kearse.

2. The court violated Witherspoon and Witt by permitting the State to challenge for cause juror Staples simply because he was unsure whether he would "push" for the death penalty in this case, even though Staples favored the death penalty, would vote for death in an appropriate case, and personally would kill a murderer in certain circumstances.

3. The State improperly exercised two peremptory challenges, over objection, to eliminate jurors Baugh and Jones

from the petit jury solely because they had some conscientious scruples about the death penalty. The court's decision to permit these objectionable peremptory challenges wholly undermined the Witherspoon doctrine by permitting the State to do peremptorily what it is constitutionally forbidden to do for cause. In light of constitutional limitations imposed on peremptory challenges, see Batson; Neil, this was reversible constitutional error.

4. The prosecutor misled jurors in voir dire to minimize the State's burden of proof, and the court failed to sufficiently cure the error. See Wilson.

5. Police exceeded constitutional limitations by exploiting Morrison's religious anxieties and vulnerability, using his sincerely held religious beliefs against him to extract admissions of guilt. State coercion was egregious because an officer pivotal in the interrogation was an ordained minister who brought up and exploited his own and Morrison's religious beliefs during custodial interrogation. See Adams; Montano.

6. Morrison was twice barred from attacking the credibility of key state witness Sandra Brown through cross-examination and reputation evidence. See Chambers; Breedlove.

7. The court erred by denying Morrison's motions for judgment of acquittal and submitting all counts to the jury because the evidence of premeditation and burglary were insufficient. See Kirkland; Delgado; Chapman; Goodwin.

8. The HAC statute and instruction are unconstitutionally vague, and they were misapplied in this case where Morrison was unarmed and the victim attacked him with a knife, dying of knife

wounds suffered during a quick defensive struggle. See Elam.

9. The statute and instruction for murder of a vulnerable victim are vague, overbroad, and were misapplied because there was no causal link between the selection of the victim and the victim's vulnerability. See Zant.

10. The death penalty is disproportional punishment where the unarmed defendant committing a nonviolent felony was confronted by the armed victim, and death resulted from the ensuing struggle. See Kramer.

ARGUMENT

I. WHETHER THE TRIAL COURT VIOLATED MORRISON'S RIGHTS BY IGNORING HIS REPEATED COMPLAINTS ABOUT INEFFECTIVENESS OF COUNSEL, IGNORING HIS REPEATED REQUESTS FOR REPLACEMENT COUNSEL, AND FAILING TO CONDUCT A TIMELY AND ADEQUATE NELSON[7] INQUIRY

The trial court blatantly ignored Morrison's timely and repeated pre-trial allegations of ineffectiveness of his counsel, Refik Eler, and his timely requests of the court to replace Eler with a different appointed lawyer. The court failed to conduct any kind of timely and adequate review of those complaints and motions, an abrogation of the court's responsibility. The court's actions fell well short of legal and constitutional requirements, depriving Morrison of his rights to due process, a fair trial, and effective assistance of counsel. See U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const.

A. Morrison made numerous written requests to replace Refik Eler based on many allegations of ineffectiveness

[7] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), approved, Hardwick v. State, 521 So. 2d 1071, 1074-75 (1988).

On January 18, 1998, eight months before trial, the court replaced the public defender's office based on a certificate of conflict the public defender had filed arising from prior representation. The court appointed private counsel Refik Eler to defend Morrison. See V9R1450-51. A few months later, Morrison began submitting numerous pro se documents to the court, see V5R789-93, V5R820-29, V5R830-32, V5R837-41, V5R842, V5R847-48, V5R851-52, V5R858-65, V5R866-71, V5R872-76, V5R877-85, V5R886-88, V5R889-93, V5R894-99, V5R900-08, V5R909, V6R1072-74, V6R1076-78, V7R1163-64, including many that sought appointment of replacement counsel due to Eler's ineffectiveness, see V5R830-32, V5R837-41, V5R851-52, V5R858-65, V5R909, V7R1163-64.

It began with a letter to Judge Davis filed April 2 when Morrison explicitly said he was "asking the courts to asign another lawyer or let me be court counsel." V5R830. Morrison said "I am not satisfied with my court appointed attorney Mr. Refik Eler. I feel that he's not been representing me to the best of his ability." Id. He then made specific allegations of ineffectiveness: Eler did not come to see him at the jail about his case; he never returns the phone calls of his mother of fiance; he has been unable to get Eler to return many calls made over the last two weeks asking for an appeal of the trial court's suppression decision; Eler has not returned his calls to advise him as to whether there is a deadline for filing such an appeal; and that he wanted witness Fred Austin to testify at the suppression hearing, but Eler did not have him testify (or explain why Austin did not testify). See id.

On April 16, Morrison filed a pro se research memo regarding the suppression issue and repeated essentially the same allegations and request for appointment of new counsel as he made April 2. See V5R841. Without explanation, Morrison filed a letter a day later rescinding his complaint of dissatisfaction with Eler, but maintaining his concern about why Austin had not testified. See V5R842.

A month later, on May 13, Morrison filed two pro se motions in which he revived his prior motion seeking appointment of replacement counsel. In one, he asked the court "to appoint another attorney to defendant because Mr. Eler refuse to give me legal copys of my law work and refuse to come to see me about my case. He hasn't been to see me but one time since he had my case, and I want the courts to appoint new counsel, because Mr. Eler is not doing his job to represent me proper, since I'm looking at the death sentence and he don't come to see me at all and I refuse to go to trial with Mr. Eler, how can he respond to me if he don't know about my case, he won't ever come to the jail to talk to me about it. So he can't represent me in a trial. I would like to get all of these allegations on the record in court on June 13, 1998, and for the court to appoint new counsel." V5R856. In the other, he reiterated his request for a different appointed attorney and repeated his specific complaints, further stating that Eler had only spent "3 minutes" with him to discuss the case since his appointment five months earlier. See V5R864.

In a pretrial hearing on June 26, the court questioned Morrison personally, but neither Morrison's allegations of

ineffectiveness nor his request to replace counsel were ever mentioned by counsel or the court. The court merely discussed that his lawyer would not be adopting the pro se motions Morrison filed regarding suppression of evidence, and answered Morrison's question about why Austin did not testify at the hearing months earlier in which Eler's predecessor, Ron Higbee, participated as defense counsel. See SR33-41.

A few days later, on June 29, Morrison filed a pro se letter in which he again specifically alleged ineffectiveness: Eler came to speak with him only once in five months; Eler stayed only three minutes on that occasion; Eler never gave him copies of documents and transcripts Morrison requested to review the statements of officers; Eler had not contacted any of the witnesses whose names Morrison had provided; and therefore the court should replace Eler with "another appointed attorney because Mr. Refik Eler hasn't been doing his job to represent Mr. Morrison to the best of his ability." V5R909.

Morrison's repeated complaints and repeated requests for replacement of appointed counsel were totally ignored in the next three months before trial. The judge never set a hearing to discuss it. The judge said and did nothing with respect to defense counsel for three months, until the eve of trial. Then, on Friday, September 18, 1998, a mere three days before trial, Eler filed a motion for appointment of co-counsel to assist primarily in preparing a penalty phase defense. See V5R925-27. The court granted the motion that day and appointed Christopher Anderson as second chair. See V9R1519. However, even at that

time the court never asked Morrison a single question about his outstanding allegations of ineffective assistance or his outstanding request for a different lawyer.

Finally, on September 21, 1998 -- after Eler concluded jury selection -- the court raised certain questions about whether Eler had pursued some of the defenses suggested by the record. Eler indicated he had addressed the issue of alibi and intoxication. See V12T333-39. Yet not once did the court mention the various motions Morrison had filed asking for replacement counsel; not once did the court ask Eler about whether he had failed to have contact with Morrison or to provide him the discovery materials he sought to assist in the preparation of his defense; not once did the court ask Morrison to state on the record whether he had any additional concerns; and not once did the court ask Morrison on the record whether his concerns about counsel's shoddy performance had been alleviated in the waning months before trial. On December 3, 1998, after trial but before sentencing, Morrison again filed a complaint of ineffectiveness on the part of Eler and his lack of investigative efforts, thus making clear that Morrison's concerns had not been adequately addressed or resolved. See V7R1163.

In all, the court held 13 proceedings in Morrison's case between the time it appointed Eler and the day of trial, see V9R1454-59 (Jan. 22), V9R1460-63 (Jan. 30), V9R1464-69 (Feb. 13), V9R1470-75 (Mar. 6), V9R1476-78 (Mar. 12), V9R1479-85 (Mar. 19), V9R1486-93 (Apr. 14), V9R1494-1501 (May 7), V9R1502-08 (June 23), SR1-44 (June 26), V9R1508-10 (July 31), V9R1511-15 (Aug.

14), V9R1516-41 (Sept. 18), including 5 proceedings held after Morrison revived his ineffectiveness complaint in the May 13 pleadings, and not one time did the court ever hold a Nelson inquiry.

B. The court abrogated its clear responsibility to inquire into complaints of ineffectiveness and requests for replacement counsel

When a defendant makes specific allegations of ineffectiveness before trial and unequivocally requests discharge of the current appointed counsel to obtain new court-appointed counsel, it is incumbent on the trial court to make a timely and adequate inquiry into the allegations and request. The court should address both counsel and client, and conduct such inquiry as necessary to learn the facts without intruding on the attorney-client privilege. See, e.g., Hardwick v. State,521 So. 2d 1071, 1074-75 (1988) (approving Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973)); Watts v. State, 593 So. 2d 198, 203 (Fla. 1992); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992); Parker v. State, 423 So. 2d 553 (Fla. 1st DCA 1982). The court's duty is clear, unequivocal, and well settled. Yet none of this Court's precedents have approved the process -- or lack thereof -- that took occurred in this trial.

Unlike cases like Branch v. State, 685 So. 2d 1250, 1252 (Fla. 1996), and Davis v. State, 703 So. 2d 1055, 1058-59 (Fla.), cert. denied, 524 U.S. 930 (1998)where the Court held an unequivocal request for discharge of counsel did not require a Nelson inquiry, Morrison's many requests for discharge of counsel and appointment of new counsel were unequivocal. Unlike Scull v.

State, 533 So. 2d 1137, 1141 (Fla. 1988), Morrison did not moot his complaint with a subsequent expression satisfaction with counsel's performance, because he continued to express his ineffectiveness complaints and many requests for new counsel after the May 17 letter. Unlike Guidinas v. State, 693 So. 2d 953, 961-62 (Fla. 1997), and Stewart v. State, 620 So. 2d 177, 179-80 (Fla. 1993), Morrison brought timely and unequivocal written requests to the court's attention before trial. Unlike Lowe v. State, 650 So. 2d 969, 975 (Fla. 1995), Morrison's complaints were specific, not mere generalized ones. Unlike cases such as Bowden v. State, 588 So. 2d 225, 229-30 (1991), and Ventura v. State, 560 So. 2d 217, 219-20 (Fla. 1990), the court here did not conduct an adequate and timely inquiry. The only inquiry that did take place was after jury selection, and it did not mention either Morrison's motions or his specific allegations. Furthermore, it was way too late in he process to cure any defect a proper and timely inquiry could have cured.

Parker bears some similarity. The appellate court found reversible error where the trial court refused to consider, and failed to inquire into, allegations of ineffectiveness made in Parker's pro se motion to dismiss. Likewise, in Kearse, the client filed a pro se complaint of ineffectiveness and asked for new counsel to be appointed a month before trial. The court at least held a hearing on the motion, but the court's Nelson inquiry was inadequate and, hence, reversible error. In Nelson, the appellate court said the trial court should have held an inquiry when various allegations of ineffectiveness were made pro

se, including that counsel had only visited Nelson once.

The aforementioned cases are based on the constitutional obligation of a court to protect a defendant's right to effective assistance of counsel, a right embedded in both the Florida and United States Constitutions. See U.S. Const. amends. VI, XIV; art. I, §, 16, Fla. Const. A related due process right also exists, the right to a timely and adequate inquiry when allegations of ineffectiveness are made. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const.; cf., e.g., Morgan v. Illinois, 504 U.S. 719, 730 (1992) (because "we have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections," due process embodies right of inquiry regarding juror's views on capital punishment).

Moreover, a trial court has an independent duty to inquire into the effectiveness of counsel's performance when something in the record should put the court on notice of a critical failure in the process, as occurred in this case. See Nixon v. State, 25 Fla. L. Weekly S59, 61 (Fla. Feb. 3, 2000) (judge has independent duty to inquire whether defendant consents to counsel's strategy to admit guilt); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996) (judge has independent duty to affirmatively show that all possible mitigation has been considered and weighed, even when defendant waives mitigation and seeks death sentence); Lane v. State, 388 So. 2d 1022 (1980) (judge has independent duty to conduct competency hearing when reasonably necessary).

The court and defense counsel effectively sat on Morrison's

rights in this case. The failure of the trial court to fulfill its clear responsibility to conduct timely, adequate inquiries should compel this Court to reverse and order a new trial.

II. WHETHER THE COURT VIOLATED WITHERSPOON AND WITT BY PERMITTING THE STATE TO CHALLENGE, OVER OBJECTION, JUROR STAPLES WHO UNEQUIVOCALLY SAID HE SUPPORTED THE DEATH PENALTY BUT WAS MERELY UNSURE AS TO WHETHER HE WOULD "PUSH" FOR IT HERE

During jury selection, prospective juror Ken Staples was asked if the death penalty would be an "appropriate" sentence under some circumstances. He agreed it would be; he said he could ask for the death penalty; he could personally kill one who killed in Staples' own home; and he could follow the law to convict even if the death sentence was being sought. However, he said he prefers rehabilitation, and said he was unsure whether he would vote for the death penalty in this case. See V11T117-19. The State was permitted to excuse juror Staples for cause, over objection, on the ground that he was "not sure he could follow the law regarding the imposition of the death penalty." V12T293. The court's ruling violated Morrison's rights to due process, a fair trial, an impartial jury, and to be free from cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

When prosecutor Taylor first asked juror Staples for his view on the death penalty, Staples said:

> [STAPLES]: If the person is, beyond a reasonable doubt, and can't be rehabilitated, I prefer they be rehabilitated. I prefer that.
>
> If the man was in my home, killed my children, then I'd like to see that person face the death penalty.
>
> ....

... If it was happening to me, in my home, I wouldn't have any hesitation to, you know, return a blow that would kill him.

But I prefer to see a person rehabilitated, even if they have murdered somebody.

....

[THE COURT]: ... Your question was your views on the death penalty. Your response is what I need to have clarified, if you could.

[STAPLES]: If you were found guilty, I don't know if I could push for the death penalty.

[THE COURT]: Okay.

V11T117-19. The inquiry continued later in voir dire:

MR. TAYLOR: Mr. Staples, you already told us a little bit more about your thoughts. You said, I believe, that if it's proven beyond a reasonable doubt, correct, that you would prefer rehabilitation over the death penalty; is that correct?

[STAPLES]: Yes.

MR. TAYLOR: All right. Questions of rehabilitation are questions that are addressed in the sentencing phase of the proceedings. What I need to know from you is, whether your views about the death penalty would prevent you from returning a verdict of guilty, or impair your ability to return a verdict of guilty --

[STAPLES]: No.

MR. TAYLOR: -- if you believe it's been proven beyond a reasonable doubt?

[STAPLES]: No, I could find him guilty.

MR. TAYLOR: If we were to get to the sentencing phase of the proceedings and the Judge explains the law to you; that is, what aggravating factors are, in fact I told you the aggravators are the law, those laws allow the death penalty, mitigating factor are those that allow for, call for a life sentence; can you follow the Judge's law in that regard?

In other words, if you find the aggravating factors outweigh the mitigating factors, could you recommend that Raymond Morrison die in the electric chair?

[STAPLES]: I'm not sure.

THE COURT: Let me ask you this, Mr. Staples, see if I can confuse you some more.

The way this works, to give you an overview as to the way the process will proceed from here, we will select a jury to hear the case. And in the first phase of the case you'll be asked to decide only whether the State has proven Mr. Morrison guilty or not in accord with the law.

If the jury, in fact, finds Mr. Morrison guilty of

first degree murder, then we address the issue of the death penalty. At that point you will be informed as to the law to be applied in determining whether to vote to recommend the imposition of the death penalty, and these aggravating circumstances that Mr. Taylor is referring to, and mitigating circumstances, these are factors that you must weigh.

By weighing, we mean consider. And that is the things, aggravating, just as the terms mean. It will set one case apart from another case, something that's an aggravation of the circumstances, and mitigating circumstances would be things that would suggest that the death penalty not be applied.

So, the question would be whether you could follow the law, listen to the aggravating circumstances of the case, as you might imagine, the things that make the case worse; and listen to the mitigating circumstances, things such as the defendant's background and other circumstances surrounding the case, and at that point you would be asked to meet and vote individually as to whether or not you're to recommend the imposition of death penalty.

You will be given instructions to aid you in doing that.

Now, the law you'll be given will state that if you think the aggravating circumstances, or the bad circumstances outweigh the mitigating or, as it says, we'll call it good circumstances, then you would be asked to make a recommendation based on that.

So, it tries to avoid your personal views on that. It doesn't matter whether you're in favor of the death penalty, or opposed to the death penalty. We're not going to try to change anybody's opinion, but the idea is whether you can follow the law as set out by the Florida Legislature, the State Supreme Court, and the United States Supreme Court in making that recommendation, regardless of your personal views.

Now, having taken that long way around; is there anything about your personal views that would prevent you from recommending the death penalty?

Do you think the law requires it, or recommendation, if you think the law requires it?

In other words, have you made up your mind already?

Do you understand that's what I'm asking?

[STAPLES]: I understand, and I still am not sure.

THE COURT: Okay. Thank you.

V11T143-47.

The State then challenged juror Staples for cause:

MR. TAYLOR: Okay, Your Honor. Thank you.

> Beginning on the second row, the State would challenge for cause Juror No. 9, Mr. Staples, who indicated that he was not sure if he could make a recommendation of death.
>
> THE COURT: Okay. Mr. Eler, what says Defense?
>
> MR. ELER: We object, Judge. I know what he said. He was asked twice. He's not sure.
>
> Something about beyond a reasonable doubt, which means to me that he can apply the law, and he never committed, Your Honor. I'm not sure the case law indicates that's sufficient for cause.
>
> Certainly he could use a preemptory, but --
>
> MR. TAYLOR: Judge, my understanding of the law is any equivocation on their ability to follow the law on the bifurcated question, is a cause challenge, as to the death penalty. That's the reason.
>
> MR. ELER: Are you saying on that issue alone? There are a lot of folks out there that are unequivocal.
>
> MR. TAYLOR: On that issue alone, that if equivocates on either, whether his feelings about the death penalty would impair his ability in the guilt portion, or whether he was not, equivocates on his ability to recommend an imposition of death penalty, that would constitute a cause challenge.
>
> THE COURT: I'll grant the State's challenge for cause as to Juror No. 9, Mr. Staples. He did make it clear that he was not sure he could follow the law regarding the imposition of the death penalty. So, that cause is granted.

V12T292-93.

A court is prohibited from permitting the State to challenge a juror for cause in a capital case if the evidence does not prove the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. See, e.g., Farina v. State, 680 So. 2d 392, 396 (Fla. 1996); Gray v. Mississippi, 481 U.S. 648 (1987); Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968). An abuse of discretion constitutes reversible error at least as to the penalty phase. See Farina, 680 So. 2d at 398.

In Farina, juror Hudson testified that she had "mixed feelings" about the death penalty, but she would fairly consider voting for it in an appropriate case. She said she would "try" to give the State a fair shake; she would "do what I thought was right" if "totally, whole heartedly convinced"; she would vote for guilt if the person was guilty even if that meant exposure to the death sentence; and thereafter in the penalty phase she "would try to do what's right." Farina, 680 So. 2d at 396-97. The trial court permitted the State to challenge juror Hudson for cause, but this Court reversed as an abuse of discretion:

> A review of Hudson's voir dire questioning reveals that while Hudson may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath. She was qualified to serve under the Witherspoon-Witt [] standard. Thus, we find that the trial court erred in granting the State's challenge for cause, and Farina's death sentence cannot stand.

Farina, 680 So. 2d at 398 (footnote omitted).

Likewise, in Chandler v. State, 442 So. 2d 171, 174 (Fla. 1983), juror Bittner said she would "probably lean towards life rather than death," and juror Brinson said she would vote for guilt if guilt were proved, but "might go towards a life sentence" in the penalty phase. Id. at 174 nn. 4&5. The trial court permitted the state's cause challenges, but this Court reversed, holding that "it is not enough that a prospective juror 'might go towards' life imprisonment rather than death. It is not enough that he or she 'probably would lean towards life rather than death, if [the aggravating and mitigating

circumstances] were equal.'" Id. at 174 (footnote omitted). As this Court said in Farina, a juror who "'never came close to expressing the unyielding conviction and rigidity regarding he death penalty'" may not be excused for cause in the death qualification process. See Farina, 680 So. 2d at 398 (quoting Chandler, 442 So. 2d at 173-74).

Farina and Chandler should compel this Court to reach the same result here. Whereas juror Hudson never said she supported the death penalty, juror Staples said he does support the death penalty, and he could even go so far as killing a killer with his own hands. As with juror Hudson, juror Staples said he could and would vote to convict -- despite the potential punishment -- if the State proved guilt beyond a reasonable doubt. As with jurors Hudson, Bittner, and Brinson, Staples neither indicated his views on the death penalty would prevent or substantially impair him from performing his duties, nor did he indicate that he would fail to follow the judge's instructions.

In fact, the judge's confusing ramble and compound questions failed to put the only relevant question to Staples in a clear, simple and straightforward manner: Would Staples' views on the death penalty prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath? Staples never said it would, and the judge's failure to clarify the issue cannot be held against Morrison, especially when every other indication is that the juror was qualified to serve under Witherspoon and Witt. See Morgan v. Illinois, 504 U.S. 719 (1992) (reversing death sentence on due process grounds

for trial court's failure to conduct adequate inquiry determining juror's views on capital punishment); Gray v. Mississippi, 481 U.S. 648, 663 (1987) (trial judge's inadequate questioning of jurors regarding the view on death penalty precludes appellate court from deferring to what the State claimed to be the trial judge's purported finding on fact); Boulden v. Holman, 394 U.S. 478, 482 n.6 (1969) (because trial judge asked a disjunctively phrased question, the juror's feelings with respect to capital punishment were never clearly established on the record, and jurors' views thus cannot be interpreted against defendant).

At worst, juror Staples's answer, "I'm not sure," reflected some nervousness, emotional involvement, or an inability to deny or confirm that considering the ultimate punishment might have an effect on him. But, as the Supreme Court said in Adams v. Texas, 448 U.S. 38, 50 (1980), "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." The juror's views must be considered in light of the totality of his answers, not just on an isolated phrase. See Darden v. Wainwright, 477 U.S. 168 (1986).

Moreover, the trial court below predicated its decision on the fact that juror Staples would not or could not commit himself to whether he would vote for the death penalty in this case when he had not yet even heard the evidence. That is too much to ask of any juror. Witherspoon addressed precisely this situation,

saying, "... (Thus) a general question as to the presence of *** reservations (or scruples) is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direct cases." 391 U.S. at 515 n.9. "[A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing consider all of the penalties provided by state law, and that he not be irrevocable committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." Id. at 522 n.21. Furthermore, this Court need not defer to the trial court's finding in this regard. See Green v. Georgia, 519 U.S. 145 (1996) (state appellate court is free to show no deference to trial court's findings concerning juror's views on capital punishment).

Accordingly, this Court should reverse the sentence and remand for a new sentencing phase.

III. WHETHER THE COURT VIOLATED MORRISON'S CONSTITUTIONAL RIGHTS BY PERMITTING THE STATE, OVER OBJECTION, TO DO WITH A PEREMPTORY CHALLENGE PRECISELY WHAT THE CONSTITUTION FORBIDS IT TO DO WITH A CAUSE CHALLENGE: SYSTEMATICALLY AND PEREMPTORILY EXCLUDE TWO JURORS BECAUSE THEY EXHIBITED CONSCIENTIOUS SCRUPLES ABOUT THE DEATH PENALTY, EVEN THOUGH THOSE JURORS FAVORED THE DEATH PENALTY AND COULD NOT HAVE BEEN EXCLUDED FOR CAUSE UNDER WITHERSPOON AND WITT

Prospective jurors Baugh and Jones said they supported the death penalty, and their views would not in any manner impair them from following the instructions and the law. These jurors

could not have been excluded for cause under the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985), and the State did not even try to exclude them for cause. Instead, the State exercised peremptory challenges, over objection, to eliminate jurors Baugh and Jones from the petit jury because they had some conscientious scruples about the death penalty. The court's decision to permit these objectionable peremptory challenges wholly undermined the Witherspoon doctrine by permitting the State to do peremptorily what it is constitutionally forbidden to do for cause. That decision violated Morrison's state and federal constitutional rights to a fair trial by an impartial jury uncommonly willing to condemn a man to die, due process, and to be free from cruel and/or unusual punishment. U.S. Const. amends. VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

A. The State's reasons for excusing these jurors were clearly based on their Witherspoon scruples

Before trial, Morrison moved to prohibit the State from exercising peremptory challenges to strike jurors who had conscientious scruples about the death penalty and are otherwise qualified jurors not excusable for cause under the Witherspoon/Witt doctrine. The motion was based in relevant part on the right to an impartial jury guaranteed by article I section 16 of the Florida Constitution and amendments VI & XIV of the United States Constitution. See V2R273-77. The court withheld ruling during the pretrial motions hearing, electing instead to wait until jury selection. See V9R1525, SR12-13. The issue then

arose as to two jurors, Beverly Baugh and Sonya Renee Jones.

Baugh said she feels generally uncomfortable about the death penalty. But her discomfort would neither interfere with finding the defendant guilty of capital murder, nor would it prevent her from recommending death: she definitely could recommend a death sentence. See V11T116, V11T136-38, V12T255, V12T266. The State struck Baugh over objection:

> MR. TAYLOR: Judge, State will strike Juror No. 2, Ms. Baugh.
>
> THE COURT: Okay. Mrs. Baugh, No. 2 has been excused by the prosecution.
>
> Okay. Mr. Eler?
>
> MR. ELER: Judge, can I just raise an objection. This goes to the written motion that I filed, or that is pending before the Court, I should say.
>
> It's a motion to prohibit otherwise death scrupled jurors from preemptory challenges by the State because of whatever pretextual reason. It was a written motion I filed that I think the Court reserved on.
>
> Because she indicates she's for it. These a three on my scale. I'd ask the Court to inquire of Mr. Taylor, in light of my motion, to state -- these aren't Neil Slappy reasons, but reasons I cited in my motion as to why, if, for any other reason, she is a three on my scale, that he struck her.
>
> THE COURT: There's a case, Walls versus State, Florida Supreme Court, 1994, which holds, or part of the ruling is that a juror's views for or against the death penalty is a sufficient race neutral reason for preemptory challenges.
>
> Let me pull that. I can a make sure that's what we're talking about here.
>
> Okay. In Walls versus State, 641 So.2d at page 386 it reads in part: "Second Walls argues that two black jurors were excused by the State in violation of State versus Neil and Slappy. It says, both of these jurors, however, had expressed discomfort with the death penalty. This is a sufficient race neutral reason for the State to exercise its preemptory challenge.
>
> So, I'll allow the -- yes, sir.
>
> MR. ELER: Just to add supplement to the record, I'll abide by whatever ruling the Court indicates, I'm not -- just for the record, Mr. Morrison is an African American, member of accepted minority. Mrs. Baugh, however, is not. She's a white female. And the narrow issue in my objection, is that, this lady had been

> death qualified, and represents a cross section of the community, and has expressed an, I guess, not conflicting, but she's for the death penalty, but uncomfortable with it.
>
> My concern, which is address in my written motion, is the prosecutor as attempting to unconstitutionally strike someone who may be less comfortable with the death penalty by use of his preemptory challenge, which he couldn't do, because she's definitely qualified.
>
> That's the narrow issue.
>
> [THE COURT]: I'm adhere to my ruling. I'll allow the strike.

V13T306-09.

Juror Sonya Renee Jones said she supports the death penalty if the circumstances warrant it, but was uncomfortable with the idea of playing God to decide whether the man should live or die. See V11T123, V11T158-59, V11T269.[8] Nonetheless, when asked if her discomfort would prevent her from following the law as to finding him guilty and recommending the death sentence, she said, "Not at all. If the law and facts cried out and, yes, okay, this man deserves to die, I could." V11T159. The State struck Jones over objection:

> MR. TAYLOR: Judge, I would strike Mrs. Jones, Juror No. 32.
>
> THE COURT: Okay.
>
> Mr. Eler?
>
> MR. ELER: May I have a moment, Your Honor?
>
> THE COURT: Yes, sir.
>
> (Counsel and defendant conferring off the record.)
>
> MR. ELER: Judge, I'm going to make an inquiry as to Mrs. Jones. I guess it was Mrs. Jones, and the State's reasons for striking her.
>
> THE COURT: Is that one of the Neil objections?
>
> MR. ELER: Yes, sir.

---

[8] The relevant statements of juror Sonya Renee Jones (Juror 32) are easy to distinguish from those of another Jones in the venire, Melody Jones (Juror 36), because their numbers were said in court and/or questioning was done in the numerical order in which they were seated. See, e.g., V11T43-45, V11T123-24, V11T158-60.

> THE COURT: Okay. Mrs. Jones appears to be a black female, and there is an objection.
> Mr. Taylor, can you give me your race neutral reasons?
> MR. TAYLOR: Yes, sir.
> Your Honor, she indicated, although she was death qualified, I believe she passed both parts of the question, she did say she didn't want to play God, and she evidenced quite a bit of discomfort in that particular role, through both things that she said and expressions that were on her face.
> Although she said she would follow the law and could qualify, nevertheless she quivocated Enough that it makes me uncomfortable, and I would exercise a preemptroy.
> THE COURT: For the reasons stated earlier, I will find that her misgivings about the death penalty are a sufficient race neutral reason.

V13T320-21.

B. Witherspoon's principles were violated

Witherspoon held that the constitutional right to trial by an unbiased jury under the sixth and fourteenth amendments is violated as to the penalty phase of a capital trial when a state is permitted to exclude for cause any juror based on the juror's conscientious scruples against death penalty unless the juror was unable to follow the law. Cf. Morgan v. Illinois, 504 U.S. 719 (1992) (reverse-Witherspoon rule adopted under fourteenth amendment due process jury impartiality requirement, compelling court to inquire as to whether penalty jurors would impose death automatically). The Witherspoon rule is one of per se reversal when even a single juror is excluded based merely on his or her scruples. See Gray v. Mississippi, 481 U.S. 648 (1987); Davis v. Georgia, 429 U.S. 122 (1976); cf. Ross v. Oklahoma, 487 U.S. 81 (1988) (not per se reversible if trial court erroneously denied a Witherspoon challenge).

Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 469 U.S. 412 (1985), reaffirmed Witherspoon but clarified the test to be that no juror in the "death qualification" process may be excluded for cause unless "the juror's views on capital punishment would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Witt, 469 U.S. at 424. The rule is "'a limitation on the State's power to exclude...'" Id. at 423 (quoting Adams, 448 U.S. at 47-48). Thus, the State's authority is limited to excluding only "that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions and oaths." Id at 424 n.5.

The aforementioned cases deal with "cause" challenges. Appellant in this case urges the Court to apply precisely the same constitutional limitation to peremptory challenges. This is not a novel idea. Instead, it flows logically from precedent and common sense.

Rules disqualifying or minimizing the participation of jurors have long been subject to a variety of constitutional limitations. For example, the federal due process clause of the fourteenth amendment contains a distinct "right to a competent and impartial tribunal," Peters v. Kiff, 407 U.S. 493, 501 (1972), which was violated when a grand jury and petit jury were used to prosecute a man after systematically excluding African American jurors, see id. The sixth amendment right to a fair and impartial jury trial, applied to the states through the fourteenth amendment, was violated when a state systematically

excluded women from jury duty. See Taylor v. Louisiana, 419 U.S. 522 (1975). The due process and fair trial rights likewise have been held to apply to limit the State's exercise of cause challenges when selecting petit juries. For example, the United States Supreme Court applied the fourteenth amendment due process right to an impartial jury to compel courts to inquire as to whether jurors would impose death automatically upon a finding of guilt, see Morgan v. Illinois, 504 U.S. 719 (1992), or racial bias, see Ham v. South Carolina, 409 U.S. 524 (1973). The sixth amendment right to a trial by an impartial jury has been applied to cause challenges to prevent the State from excluding any juror because of conscientious scruples about the death penalty so long as the juror is capable of following the law. See, e.g., Witt; Witherspoon; Farina v. State, 680 So. 2d 392 (Fla. 1996).

Federal constitutional limitations likewise have been extended to the exercise of peremptory challenges, for, as the Court noted in Gray v. Mississippi, 481 U.S. 648, 652 n.3 (1987), "peremptory challenges ordinarily can be exercised without articulating reasons **subject to constitutional limitations**." (Internal citation omitted; emphasis supplied). Classic examples under federal law rest on the equal protection clause of the fourteenth amendment, which prohibits the exercise of any peremptory challenge to exclude any juror because of race, see Batson v. Kentucky, 476 U.S. 79 (1987), ethnicity, see Hernandez v. New York, 500 U.S. 352 (1991), or gender, see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

In Florida, years before Batson, this Court in State v.

Neil, 457 So. 2d 481 (Fla. 1984) imposed constitutional limitations on the application of peremptory challenges under article I section 16 of the Florida Constitution:

> Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury.... It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.

State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (emphasis supplied). The Florida Constitution's independent provision has been broadly applied to limit peremptory challenges as a means of ensuring juror impartiality. See, e.g., Curtis v. State, 685 So. 2d 1234 (Fla. 1996) (minority-group defendant's peremptory challenge of a member of the Caucasian majority racial group is subjected to article I section 16 analysis under Melbourne v. State, 679 So. 2d 759 (Fla. 1996) even in a majority Caucasian county and this majority Caucasian state).

All of these principles necessarily and logically flow to the present situation. What was unconstitutional under Witherspoon and Witt cannot now be constitutional if done peremptorily. In other words, the State cannot be permitted to excuse pro-capital punishment jurors with conscientious scruples through the back door when it is not permitted to excuse them through the front door. Holding otherwise, as the trial court did, simply makes no sense in light of constitutional limitations the courts have imposed on claims of juror disqualification. As the Neil and Batson lines of cases show under independent

constitutional theories, even though a peremptory challenge is not a constitutional right, its exercise can be a constitutional wrong. "[P]eremptory challenges do not conflict with the constitutional right to a trial by an 'impartial jury.'" Witherspoon, 391 U.S. at 530 (Douglas, J., concurring). But they must be reconciled so as not to violate the constitution.

The United States Supreme Court has yet to decide this issue on the merits. See Brown v. North Carolina, 479 U.S. 940, 107 S. Ct. 423 (1986) (opinions written on denial of certiorari). Appellant is aware that some judges have rejected this argument on federal grounds. See, e.g., Brown v. North Carolina, 107 S. Ct. at 423 (O'Connor, J., concurring in denial of certiorari by narrowly construing Batson); Gray v. Mississippi, 481 U.S. at 679 (Scalia, J., dissenting); Antone v. State, 410 So. 2d 157 (1982). Appellant asserts, however, that such a view is unpersuasive in light of constitutional doctrine developed in the last two decades, and it should not be applied. Instead, considerable and persuasive support for the view urged by Appellant has been voiced, and it should be followed. See, e.g., Brown v. North Carolina, 107 S. Ct. at 424-27 (Brennan, J., dissenting); Dayan, Mahler & Widenhouse Jr., Searching for an Impartial Sentencer Through Jury Selection in Capital Trials, 23 Loy. L.A. L. Rev 151, 181-91 (Nov. 1989) (arguing that peremptory challenges cannot constitutionally be used to avert Witherspoon prohibition, and permitting such use effectively overrules the doctrine); Krauss, Death-Qualification after Wainwright v. Witt: The Issues in Gray v. Mississippi, 65 Wash. U.L.Q. 507, 541 (1987) (arguing

that the rationale of Batson "would appear to compel the conclusion that Witherspoon and Witt must restrict the State's use of peremptory challenges; any other rule would allow the State to eviscerate the limitations these cases placed upon its use of challenges for cause"); Wasleff, Lockhart v. McCree: Death Qualification as a Determinant of the Impartiality and Representativeness of a Jury in Death Penalty Cases, 72 Cornell L. Rev. 1075, 1102-03 (1987) ("A prosecutor's peremptory challenges, in the very nature of the practice, would alter the attitude pattern of the jury in favor of the prosecution. There is no material difference between removing a Witherspoon-excludable for cause or by peremptory challenge. Either way, the prosecutor removes a juror that may be unsympathetic to the prosecution's case. The logic of the Lockhart dissent could lead to the elimination of peremptory challenges in capital murder trials. However, peremptory challenges have a time-honored place in trial practice and actually further jury impartiality. Their elimination in pursuit of another form of impartiality involves a tradeoff that is difficult to assess.") (footnotes omitted); Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and Constitutional Analysis, 81 Mich. L. Rev. 1 (1982) (demonstrating that prosecutor's use of cause and peremptory challenges to systematically eliminate death-scrupled jurors violates constitutional norms); see also Davis v. Minnesota, 511 U.S. 1115, 114 S. Ct. 2120, 2121 (Ginsburg, J., concurring in denial of certiorari) (writing to refute Justice O'Connor's narrow concurring view of Batson in Brown).

Moreover, independent provisions of the Florida Constitution, see art. I, §§ 9, 16, 17, Fla. Const., should be applied to prohibit the practice the trial court permitted in this case, finding, as in Gray and Davis, that the wrongful challenges were per se reversible error as to the penalty phase. Cf., e.g., Traylor v. State, 596 So. 2d 957 (Fla. 1992) (recognizing primacy of art. I, §§ 9, 16, Fla. Const.); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (rejecting the fifth amendment precedent of Moran v. Burbine, 475 U.S. 412 (1986), and applying article I section 9 of the Florida Constitution). Not only are the due process and fair trial rights to an impartial jury violated, but surely it would be "unusual" punishment to send a man to his death when the 12-0 jury vote deciding his fate was skewed from the beginning.

This Court did not address the independent constitutional grounds when it applied the federal constitution nearly two decades ago in Antone, a pre-Neil, pre-Batson decision, so that case is easily distinguished and otherwise should be overruled. Furthermore, the trial court's reliance on Walls v. State, 641 So. 2d 381, 386 (1994), was misplaced because it dealt with a racial challenge, not a Witherspoon challenge.

At bottom, the State was permitted to use cause and peremptory challenges in this case to "stack the deck" against appellant precisely against the dictates of Witherspoon. Imposition of the death penalty "by a hanging jury cannot be squared with the Constitution," Witherspoon, 391 U.S. at 523, whether the hanging jury was skewed by peremptory challenges,

cause challenges, or both. The 12-0 death recommendation in this case certainly reflects that it is was produced by a jury wholly deprived of the voices of fellow jurors who have some conscientious scruples about the death penalty. Accordingly, this Court should remand for a new penalty phase.

IV. WHETHER THE PROSECUTOR MISLED JURORS ABOUT THE STATE'S BURDEN OF PROOF

During voir dire, prosecutor Taylor told jurors "Do you all understand that you don't have to be 100%, absolutely convicted [sic] that this man committed a crime in order to return a verdict of guilty?" V11T98. Defense counsel immediately objected and moved to strike the panel, saying it was a prejudicial misstatement of law minimizing that minimized State's burden of proving guilt beyond a reasonable doubt. <u>See</u> V11T98-100. The court denied the motion but agreed to read aloud the standard jury instruction on reasonable doubt, <u>see</u> V11T101-02, telling jurors to "disregard the statement made by Mr. Taylor regarding the 100% issue," V11T101.

Although that admonishment and instruction superficially may appear to have cured the error, it did not, as the subsequent void dire of juror Jerome Beard demonstrates. Juror Beard said he would have to be "a hundred percent sure before I could put somebody's life on the line." V11T154. When the State questioned whether Beard understood the burden after the court's earlier instruction, the court stepped in:

> [BY THE COURT]: You could follow the instruction as to the state's burden, is that correct?
> Understanding the State has to prove its case beyond and to the exclusion of a reasonable doubt, you

> used the term a hundred percent. As I indicated earlier, we don't try to quantify into percentages.
> [BEARD]: He's one said a hundred percent earlier.
> [BY THE COURT]: Yes, sir, we did say that earlier. That's why we try to avoid that.

V8T155. Beard said he understood, and he would and could convict upon proof beyond a reasonable doubt. See V8T155-57.[9]

Subsequently, the court read the standard preliminary instruction on reasonable doubt to the petit jury. See V12T354. In the State's closing argument, the State again appeared confuse the burden, this time shifting the burden to the defense and claiming Morrison did not carry his burden:

> The defense, or defendant would have us believe that this elderly, disabled man attacked him, and that he was forced to defend himself. And that in defending himself, Albert Dwelle cut his own throat, twice. I guess that's what they want us to believe.
> I haven't heard the defense in this case. I'm interested in hearing it, and I know you all are interested in hearing it. I'm eager to hear what Mr. Eler has to say when he gets up here, because I haven't heard the defense yet in this case.
> I haven't heard their response, yet, to this, other than he's not guilty. That's what they told you, he's not guilty.
> Well, I'm eager to hear it, because not only is there no reasonable doubt in this case, there is no doubt whatsoever that this man did it. None whatsoever.

V15T955-56. The court read the standard reasonable doubt instruction after closing arguments in the guilt phase. See V6R971, V16T1038-39. After the trial, Morrison moved for a new trial, predicated in part on this error, see V6R990-91, and that motion was summarily denied, see V6R995.

The prosecutor's misleading remarks to minimize the State's

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[9] The State later peremptorily struck Juror Beard. See V11T319-20.

burden violated Morrison's right to a fair trial and to due process of law. See U.S. Const. amends. VI, XIV; art. I, § 9, 16, Fla. Const. This Court addressed a somewhat similar issue in Wilson v. State, 686 So. 2d 569 (Fla. 1996), wherein it questioned the propriety of the trial court's extemporaneous explanation. The trial court said:

> the State does not have to convince you to an absolute certainty of the defendant's guilt. Nothing is one hundred percent certain, nothing is absolutely certain in life other than death and taxes. So the point I'm trying to make is you can still have a doubt as to the defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to.

Id. at 570. This court found the instruction to be "at least ambiguous to the extent that it might have been construed as either minimizing the importance of reasonable doubt or shifting the burden to the defendant to prove that a reasonable doubt existed." Id. at 570. Nonetheless, in the context of other instructions given and without any evidence of juror confusion or misunderstanding, the Court said the instruction in Wilson "was not incorrect, as such," id., and that without objection, it was not fundamental error, see id.

Wilson differs materially from the instant case in two respects. First, Morrison timely objected to the misleading statement and immediately moved to strike the panel very early on in voir dire.[10] Second, the record shows that the court immediately recognized the error and attempted to cure it, but

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[10] The prosecutor's questions began at V8T66. Jury selection did not conclude until V9R325.

the attempt fell short of the mark. Had the court's admonishment been effective, a juror like Beard would not have focused on the prosecutor's erroneous statement of law in explaining his understanding of the burden. Then the State compounded the error in closing argument by effectively shifting the burden of proof to the defense.

Under these circumstances, the court reversibly erred by not striking the panel, thereby violating Morrison's rights to trial by a fair jury uninfected by the State's misleading statements and arguments about the State's burden of proof.

V. WHETHER THE COURT ERRED IN FAILING TO SUPPRESS STATEMENTS AND EVIDENCE THAT HAD BEEN EXTRACTED AFTER THE STATE USED A PREACHER/OFFICER AND THE POLICE CHAPEL TO EXPLOIT MORRISON'S SINCERELY FELT RELIGIOUS BELIEFS AND ANXIETIES

A. Facts adduced at the pretrial suppression hearing demonstrate the State's illicit use of religion

Within two days after the homicide, Morrison made to interrogating officers a number of oral statements and a written statement. In two pretrial motions, Morrison moved to suppress all of his statements as well as physical evidence seized as a result of those statements. The motions were grounded in amendments IV, V, VI and XIV of the United States Constitution; article I sections 9, 12, 16, and 23 of the Florida Constitution; and section 90.505 of the Florida Statutes (1995). See V2R329-34, V2R336-40. The court held an evidentiary hearing on November 13, 1997. See V8R1261. Most of the statements -- and physical evidence flowing therefrom -- were introduced at trial, over objection, and after the court's pretrial ruling that most of the

evidence was admissible.

1. The State's evidence at the suppression hearing

The first State actor to encounter Morrison in this case was Antonio Richardson. Richardson wears two hats, so to speak. Under one he serves as an officer with the Jacksonville Sheriff's Office working with the Jacksonville Housing Authority as liaison between the two agencies. See V8R1264. Under the other he is an ordained minister, having been in the ministry for about ten years and pastoring for three years. See V8R1273. Richardson conceded that he often wears both hats at the same time:

> I try to make it a habit all the time when I'm transporting an individual, or talk to an individual on the street, to try to share with them Christ.

V8R1271.

After Dwelle's death, Detective Short asked Richardson on January 10 to find and arrest Morrison, whom Richardson knew was wanted in connection with Dwelle's homicide and for an outstanding writ of attachment arising from a child support proceeding. Richardson got word that Morrison had been buying drinks and smoking crack cocaine all night and was now in the Marietta neighborhood. Police suspected that Morrison had been on drugs. At some time between 2:00-3:30 p.m. on the 10th, Richardson found Morrison in a trailer in Marietta. With shotgun drawn, he entered the trailer and ordered Morrison out. He handcuffed Morrison, read him his Miranda rights, and placed him in the back seat of his patrol car. Richardson said Morrison indicated that he understood those rights. He said Morrison appeared to be coherent and displayed no evidence that he was

under the influence of drugs or alcohol. See V8R1265-69, V8R1290-94, V8R1333, V8R1359.

After getting in the cruiser, Morrison asked why he was arrested. Richardson told him it was for the writ of attachment. Morrison asked if it was in reference to the "old man that was killed," and Richardson lied, telling Morrison all he knew was there was an outstanding writ of attachment. Richardson said he did not want to get involved in a homicide investigation. See V8R1269-70. Though Morrison clearly was a murder suspect, officers knew they did not have probable cause to arrest him in connection with the Dwelle case at that time. See V8R1321, V8R1375-76. Richardson said he booked him on the writ of attachment later that day, see V8R1276, V8R1375 (though there is no evidence in the record regarding that booking).

Richardson talked with Morrison throughout their journey en route to the Police Memorial Building. Richardson claimed Morrison never said he wanted a lawyer or wanted to remain silent. See V8R1271.

Richardson admitted to having initiated a discussion of religion with Morrison:

> Q [BY STATE] Do you recall how it came up?
> A [RICHARDSON] I believe I initiated the subject myself.
> Q Okay. Did you initiate it in response to something Mr. Morrison said, or was it just out of the blue?
> A Well, I don't have a real independent recollection of how the conversation was initiated. I do remember -- and I try to make it a habit all the time when I'm transporting an individual, or talk to an individual on the street, to try to share with them Christ.

V8R1271.

Richardson told Morrison he was a minister and a church pastor. He gave Morrison a piece of paper bearing his name and phone number and offered to give Morrison a ride to the church, although he said that's not "technically" an offer of counseling. However, Richardson said he would make such an offer both in the hopes of bringing the person into the church and in getting the person "right with God." See V8R1294-95, V8R1322.

Morrison told Richardson he had a problem with alcohol and crack, and he wanted to get his life straight. He said he had once been a Christian or saved and that he had backslid and that he wanted to be restored back to God. Richardson was under the impression that by saying he wanted to get his life straight, Morrison meant drugs and alcohol, not that he wanted to confess to a homicide. See V8R1272-73.

When Richardson talked to Morrison about getting Morrison's life straight, Richardson was talking about repentance, turning life back to God, repentance combined with prayer. They talked about being saved and what it feels like to be saved and how the Lord is ready to have Morrison returned to God. See V8R1273-74, V8R1360-61.

When Richardson was asked at the hearing if it would be fair to say that he was developing a spiritual relationship with Morrison as a minister at that time, Richardson said "Yes." See V8R1296. He said he told Morrison he needed to pray and do other things to change his lifestyle. Morrison at one point asked Richardson what he thinks would happen to him, and Richardson told him "that's not important, the most important

thing is your relationship with God." See V8R1296. Richardson found Morrison to be "someone who was concerned about his soul and religion." See V8R1297.

Richardson told Morrison he needed to repent, and repentance involves turning away from a lifestyle. He said only to God does one confess according to Richardson's belief or denomination, but he admitted he did tell Morrison to tell the truth to the detectives. See V8R1297. Richardson said he did not tell Morrison he would go to hell or face eternal damnation if he did not confess to his crimes. He also denied promising Morrison eternal paradise for confessing. See V8R1273-74.

Richardson first took Morrison to the Ramona Apartments where Richardson told JSO Homicide Detective Terry C. Short he talked religion with Morrison. See V8R1360-64. Richardson said he told Morrison that Short would be fair with him, that Morrison simply needed to tell the truth, that he needed to get right with Jesus or something like that. See V8R1361. "I just can't say how far the religious conversation went," Short testified. See V8R1364. Short acknowledged that this was the only time in his career that any officer confessed to telling a homicide suspect he needed to get right with the Lord. See V8R1361-62.

Richardson left the Ramona Apartments and took Morrison to the Police Memorial Building. When they arrived, Richardson did not book him on the writ of attachment; instead he took him directly to a homicide interrogation room where they continued to talk for about thirty minutes. Richardson again offered to pick up Morrison to take him to church once he gets out of his

"situation." See V8R1275.

Short and JSO Officer Thermon Coy Davis took over Morrison's interrogation around 5:00-6:00 p.m. Richardson left to conduct a church service and counsel members of his flock. See V8R1276, V8R1300-01, V8R1320-21, V8R1332-37, V8R1367.

Short read the Miranda rights, which Morrison indicated he understood, although he had some trouble with his reading ability. Officers thought Morrison did not appear to be under the influence, did not ask for an attorney, did not say he wanted to remain silent, and did not ask to speak to police as a group. See V8R1314-17, V8R1337-43.

During the first few hours Morrison made various statements to Short and Davis regarding his whereabouts. Short left the interrogation room for a few minutes at about 7:10 p.m. Davis, alone with Morrison, started telling Morrison about the death penalty's aggravating and mitigating circumstances. A few minutes later Short re-entered the room and asked Morrison to go over the details of his statements again because he found them confusing or contradictory. See V8R1322-24, V8R1364-65, V8R1368-74. Davis recalled that Morrison said "I don't want to do that.... I don't want to go through it again." Davis and Short said they understood Morrison to mean he saw no need to repeat himself when he already made the statement and an officer took notes to record it. "He said to me that he did not see any reason to have to go over it again.... he never said he would not go over it again," Short said. Short said he explained the need to go over details, and Morrison could not repeat the same

details, changing his story. See V8R1324-25, V8R1368-74.

About an hour later, at 8:15 p.m., Short told Morrison he did not believe him. He would book Morrison on the writ of attachment, he gave Morrison his business card and told him he would see him on Monday. Then Short left the interrogation room for a few minutes. See V8R1325-28, V8R1375.

Some time thereafter, while Davis and Short were together again interrogating Morrison, Davis initiated a confrontation with Morrison. Davis asked Morrison to voluntarily give a blood sample or cheek swab. When Morrison declined, Davis slammed his fist on the table and yelled at Morrison, repeatedly called him a liar, and accused him of killing an "old crippled man." Short was "startled," "scared," and "shocked," as was Morrison: "He [Morrison] kind of leaned back away from the table as I did and just kind -- I think he was as shocked as I was," Short said. Davis said Morrison appeared calm. Neither Davis nor Short thought Morrison appeared intimidated. But Morrison said he would not talk to Davis any more. Davis and Short left the room, and Short, the senior investigator, admonished Davis not to interrogate Morrison that way. Davis did not come back in to ask any questions after that. See V8R1317-21, V8R1325-28, V8R1343-44, V8R1354, V8R1370-71, V8R1375-77.

Short resumed his interrogation alone, and the subject once again turned to religion. Morrison asked Short if he was a religious person, if he believed in God, and how could he do his job deciding who would die. See V8R1349-50, V8R1377-78. Short shared his own personal religious beliefs. Then, Short said,

> I really started feeling like maybe I owed this man an obligation to go a little farther than what maybe what I had been. And I extended the invitation that if he would like to pray about it that I would afford him the opportunity to do that. He had expressed to me some concerns about a two-way mirror that's in the room and who was behind the mirror. He had asked me that a couple of times.

V8R1349-50. After Short showed Morrison that nobody was behind the two-way mirror, he asked Morrison if he wanted to pray:

> Then when I asked him if he wanted to pray, and it suddenly dawned on me -- I mean, here he is in this room where there's a two-way mirror and it's not conducive to this type of atmosphere. There is a chapel in the building right there at the other end of the building.
>
> I didn't see any reason -- there's nobody else in the building at that time of night, everything is locked up, and it was basically the effort of walking the man down to a place that was more a religious-type atmosphere. So I invited him if he wanted to do that I would escort him down to the chapel where he could actually pray if he wanted to.
>
> ....
>
> And he said, yes, he would like to do that. So along with Detective Davis -- I had Detective Davis go with us. And we escorted him down to the chapel area at the west wing of the building.

V8R1350-51. Short went into the chapel with Morrison, while Davis remained outside. <u>See</u> V8R1351, V8R1328.

> Q [BY THE STATE] ... [W]ould it be policy to allow someone who is a murder suspect to go on his own into the chapel or would he have to be escorted in --
>
> A [SHORT] No, sir. He would have to be escorted. And I explained to him that I could let him go into the chapel, but it will be necessary for me to go in with him. And he acknowledged that that was okay.
>
> Q What happened when you went in?
>
> A We went in the chapel and we went up to the pulpit area, and he knelt down. And I guess out of respect I felt I should kneel, too. I knelt down beside him. And he was rather emotional at that point, somewhat crying. I put my hand up on his shoulder just to let him know that I was there.
>
> And I really kind of just -- I honestly expected him to pray just kind of a silent prayer, and he didn't do that. He started audibly praying. And he said that

he -- I can’t remember the exact words, but something to the effect that he had done something terrible, it was the worse thing that he had ever done, and that he was going to leave it in God’s hands at this point. But he was going to leave it up to God to -- for God to show him how much it was that he wanted him to tell this detective.

Q What happened after that?

A After he got finished, I felt like I should say something. I just, God help him to feel relaxed and help us to get past this thing we’re facing, that type of verbiage, and then we ended it.

Because of the fact that he had expressed -- he was pretty emotional at that point. And because of the fact that he had expressed the concern about the room that we had been in, I asked him if he would like to just sit there in the floor in the chapel. The same basic situation to me, it was just the two of us, and a little better atmosphere maybe. And if he wanted to just sit there in the floor and we would discuss the things we needed to discuss there rather than going back to that room, maybe he’d be more comfortable there.

Q Did he accept the offer?

A He sat down flatly on the floor, cross-legged as I did, and we were about five feet apart sitting there talking. And he said, Look, I’m not going to tell you that I did this thing. And I sort of expected him to say that it wasn’t that he didn’t do it at that point.

And I kind of leaned back halfheartedly, I said, but you’re not going to tell me you didn’t do it. He said, No, I won’t tell you that I didn’t do it either, not right now. I said, Okay, that’s fair, just relax about it.

And at that point he started to get up. I figured he was finished. I got up and we walked out of the chapel. Followed by Detective Davis we started then back down the hall to the interview room.

Q Was anything said on the way back to the interview room?

A Yes, sir. Halfway down the hallway, I was walking beside of him, and he told me, he said, I will eventually tell you the things that you want to know, but right now I just need some time to think about this thing. And that was pretty much the way it was left.

V8R1351-53, see also V8R1378-81.

Short offered Morrison to have anyone brought to the Police Memorial Building to sit with and talk to get through this

traumatic period. Morrison asked for the "preacher policeman," Richardson. Both Davis and Short, who had been Richardson's training officer, claimed not to know Richardson was a minister. See V8R1306, V8R1329, V8R1334, V8R1344-46, V8R1378. But they were contradicted by Richardson who believed they did know he was a minister. Moreover, Richardson agreed that it was "common knowledge in the police department" that he was a minister. See V8R1306. Short also knew it was unusual for a suspect to have asked to speak a particular policeman. Yet Short claimed he did not plan to have Richardson, as a minister, use his religious influence to en effect pry a confession out of Morrison. See V8R1345-46.

Short and Davis called Lieutenant Foxworth for overtime authorization to call in Richardson that night to help with the interview. See V8R1328-29, V8R1382. "They told me, they said, I don't know why, but he wants to speak with you," Richardson said of the call he received at home around 11 p.m. See V8R1277. "The last thing I wanted to do was engage in another counseling session." See V8R1302. The officers were reluctant to say anything and appeared somewhat upset. They also told Richardson that Morrison had been to the chapel earlier for prayer. Nonetheless, Richardson claims he did not know why Morrison wanted to talk to him, and Davis and Short did not know why Morrison wanted to talk to Richardson. See V8R1278.

Between 11:30 p.m. and midnight, Richardson came to the Police Memorial Building in uniform. See V8R1279-81, V8R1300-01. He walked into a room with Morrison, where they were alone.

Morrison immediately said, “Have them take me to the jail,” Richardson testified. “He said, I’m ready to tell them -- arrest me on the child support charge. I’m ready to go back.” See V8R1278, V8R1302-03. He did not read Morrison his Miranda rights. See V8R1279-80.

Richardson said it was late and he was ready to go home. He got ready to walk out of the room when Morrison said “Wait a minute, wait a minute, let me talk with you.” Then he engaged Richardson in conversation. See V8R1278-79. Morrison said he did not want to talk to the other officers: “I don’t want to talk to them anymore,” Morrison said, according to Richardson. See V8R1279, V8R1308. At some point Richardson told Morrison, “Hey, these guys are for real, this is serious, you need to talk to them[.]” See V8R1308-09. He believed Morrison asked to speak to him “because he felt he could trust me.” See V8R1279. At first, Richardson said, he just thought it was the fact that this was a black suspect who would feel more comfortable talking to black officers. See V8R1304-08.

Although Richardson initially believed he was there as a police officer, see V8R1280-81, his role soon became uncertain in his own mind:

> Q [BY THE STATE] All right. Did there come a time during your conversation with Mr. Morrison when that belief [that he was called in as a police officer] became uncertain in your mind?
> A [RICHARDSON] Yes.
> Q Could you describe for us what happened to make you uncertain, in effect, in your status being there?
> A When I began to sit down and talk with him he said he wanted to tell me something, but he wanted to make sure it wasn’t going to hurt him. He started to say some things but then he stopped and he asked me to get

> the Bible. He said, Go get the Bible, get the Bible.
>
> And so, at that point, I started questioning myself I think he wants some spiritual counseling maybe. I don't know what he wants with the Bible. So I went out and got the Bible for him.
>
> ....
>
> When I brought the Bible back in he said, Now, promise me that this won't hurt me. He said, This is going to be between us. I said, Well, what do you want to tell me?
>
> I think we had prayer, something of that nature, and then I told him to go ahead and tell me. So I did promise him that it was going to be confidential.

V8R1281-82, see also V8R1304-06, V8R1383-84. "I quoted the Scripture that says we reap what we sow," Richardson recalled. See V8R1304, V8R1311. Then Morrison asked Richardson to pray with him. "He had me to pray and put my hand on the Bible, he did the same thing. And he said, in my face, he said, Officer Richardson, he didn't say pastor, he said, Officer Richardson, I did not kill him. When he said that, I assumed that he did not." See V8R1305. Richardson agreed that their conversation was confidential. The first time he ever revealed the contents of that conversation, he said, was when he was deposed by the defense in this case. He said he never told Short or Davis about the contents of that conversation. See V8R1282-83.

Richardson and Morrison spoke privately for about 1¼ hours. Short knocked on the door about halfway through, and Richardson asked for more time for them to be together alone. They continued to talk for about a half an hour or so, until about 1:30 a.m. See V8R1386-87.

Richardson went outside the room and told Short that although he's not sure which detective Morrison talked to, Morrison wanted to talk to a detective. Short went inside to

conduct the interview. Davis did not. See V8R1283-84, V8R1347, V8R1383, V8R1386-87. Morrison then asked Richardson to come back and sit with him. Short said Morrison told him "that he was willing to explain to me what had happened in reference to the case that I was working on." See V8R1347. Short did not re-advise Morrison of his Miranda rights at that time, saying "I didn't go through the whole thing. I acknowledged the fact that he -- we still had the relationship, we still had the situation as far as he didn't have to talk to me and that he was free not to. He acknowledged okay, that he wanted to talk to me now." V8R1347. According to Richardson,

> Mr. Morrison began to tell [Short] -- tell him some things about the incident, but it was different from the things that he had told me. He went through maybe two or three different stories of what had happened. And he would look over at me and then he would change it again, and he'd look at me and change it again. But I was careful not to say anything. I didn't make any hand gestures.
>
> And finally he told -- gave the same information that he related to me to Detective Short. I told him that, you know, if you want to you need to relate this information to Detective Short.

V8R1284-85. Morrison did not ask for an attorney during that session with Short and Richardson. See V8R128-86. The only time Richardson was not present was when he left for five minutes to call his wife. See V8R1286. Morrison then related a description of the incident, which was not recorded. See V8R1347-48, V8R1364-66. Without officers asking Morrison to locate the knife, Morrison asked Short if he would like him to show him where the knife was located. Short agreed, and Richardson transported Morrison in a marked patrol car to a spot at the

Ramona Apartments where two knives was recovered. Morrison was taken back to the detention facility and booked on the murder charge, and Richardson went home. See V8R1355-56, V8R1287-88.

Short said Morrison was offered food, water or coffee, and went to the restroom when he needed it. He was not threatened with a gun, he was not beaten with a rubber hose, he was not physically tortured, though he was yelled at by Davis. Short denied telling Morrison that he would get manslaughter and seven years. He denied having said to Morrison "they are not giving much time these days." Short said Morrison was promised nothing in exchange for his statements. Short said he specifically told Morrison he could not make any promises. See V8R1354-55. Richardson denies ever having told Morrison that if he talked he would get seven years on the manslaughter. See V8R1310. He denied ever telling Morrison that he would not get a substantial sentence. See V8R1311. He did, however, tell Morrison that he would reap what he had sown. See V8R1311. Richardson also acknowledged that he may have told Morrison, "If you're honest with what happened, if you tell them what happened, they might go leaner on you." See V8R1310.

The interrogation ended around 5 a.m. when officers dropped Morrison at the jail. See V8R1367.

2. The defense's rebuttal at the suppression hearing

Morrison testified on his own behalf in the suppression hearing. See V8R1390. He had been consuming alcohol and drugs up until about 2:30 a.m., about 12-13 hours before his arrest. See V8R1392, V8R1405. When Richardson first arrested him he told

Morrison he was being arrested on the writ of attachment and "I had to talk to a detective ... about a homicide." Morrison said okay and Richardson transported him to the Police Memorial Building after first going to the crime scene. See V8R1393.

While en route, after Richardson read the Miranda rights, Morrison told Richardson he did not want to talk. See V8R1406. Nonetheless, Richardson told him "You know you're going to have to talk to the officers." See V8R1406.

When they arrived, Richardson sat Morrison in an interrogation room to wait for Short and Davis. They read his Miranda rights and Morrison "told them I didn't want to talk." See V8R1394, V8R1405. "[T]hey just said okay. And then they just kept asking me questions." See V8R1394. At some point Morrison asked to call his father about getting a lawyer, but Short told him he could not call. "He didn't give me no reason," Morrison testified. "He just said I couldn't." See V8R1395.

During the interrogation, Morrison said "I don't want to talk about it. I said, Take me over to the Police Memorial Building and book me on the writ." See V8R1395-96. But the officer "just kept asking me questions." See V8R1396, V8R1407.

At some point Morrison brought up the subject of religion with his interrogator. See V8R1398. "[H]e asked me about -- he asked me what religion I was. I said Christian. So he asked me did I believe in God and, you know, we just basically went to talking about it. He went to get a Bible. That's basically what it was." See V8R1398. The interrogator "asked me did I want to pray," and Morrison said, "Sure I would." See V8R1398. At the

time, Morrison did not even know the police station had a chapel. The officer offered to take him to the chapel to pray, and Morrison accepted. See V8R1398.

Morrison said he did not ask to talk to Richardson. Officers said they were going to call the jailhouse, take his clothes, get him new clothes, and book him on the writ of attachment. See V8R1397. But instead the officer told him he called Richardson. Morrison said he did not want to talk to Richardson or any other officer. See V8R1397-1400. "I said, If you don't want to let me talk to my dad for a lawyer, I said, I don't want to talk to nobody. Just take me over to the jail. That's basically what I was telling them." See V8R1397-98, V8R1405-07. When Richardson arrived, he told Richardson he did not want to talk to Richardson, Short or Davis. See V8R1399-1400. But Richardson had told Morrison he had to talk to the police. See V8R1400. When Richardson drove Morrison to the Police Memorial Building -- before Morrison knew Richardson was a minister -- Richardson told Morrison "these guys are for real or are serious, you killed a white man, you'd better tell them everything they want to hear." See V8R1401-02.

By the time Morrison talked to Richardson in the interview room, after religion had been discussed, Morrison said he was talking to Richardson "As a minister." V8R1402. Morrison told Richardson he did not want to talk to the officers, but Richardson insisted. "He said I had to talk to them." See V8R1402. The officers denied his request to speak to a lawyer, and Davis specifically told him he would not allow

Morrison to leave until he confessed. Davis slammed the desk and told Morrison he was not going to let him talk to a lawyer until he talks to the police. See V8R1403.

Morrison said when Short came back in the interrogation room to confront him with the different versions of his story, Morrison told Short "numerous times" he did not want to talk to him. "I was through I didn't want to talk to nobody." See V8T1404. Nonetheless, Short continued. See V8T1404.

Morrison said he never told the officers that he went into Dwelle's apartment, cut Dwelle's throat, or said that he wanted to get money out of his shirt. See V8R1407. But he admitted he signed the confession, saying he had not even read it when he signed. See V8R1407.

Morrison said he does not believe it takes 13 hours for a crack high to wear off. When asked if by the time he was arrested he was out from under the influence of crack or alcohol, his answer was, "I wouldn't say I was." See V8R1410.

Georgia Morrison, Raymond's mother, also testified. She works at a nursing home in dietary work. See V8R1411. She was working on the morning Morrison was arrested. She saw him in Marietta at about 3:30 in the afternoon on a break. He had been drinking, but she did not know if he had been doing crack. She was about three or four feet from him and was able to easily discern that he was drinking. His eyes were red but his eyes are red all the time. He has a different expression on his face when he drinks, slow and slurred speech. That's they way he looked when she saw him, like he had been drinking. See V8R1412-13.

After Morrison's uncle, Fred Austin, refused to come to the hearing to testify despite numerous defense attempts, see V8R1413-18, the defense and the state later introduced a stipulation providing that had Austin testified, he would have testified to two facts. First, on the evening of January 9, 1997 and in the early morning hours of January 10, 1997, Morrison consumed, smoked or otherwise used a controlled substance, i.e., cocaine or cocaine derivatives. Second, Morrison was at that time influenced by substances to the extent his normal mental faculties were impaired, being "high," which Austin knew from having witnessed Morrison's behavior in the past. See V5R795.

3. The arguments of both parties and the court's rulings regarding the suppression hearing

The parties prepared written memoranda on the suppression issues, see V4R664-87, V5R753-79, and the court heard oral argument on December 12, see V8R1427. The sum and substance of Morrison's arguments were as follows:

- Officers interrogated him after he consistently said he did not wish to speak to police officers involved. See V2R329, V5R753-54, V8R1427-34, V8R1441.
- His right to counsel was violated when he asked for a lawyer or asked for his father to call a lawyer, but officers ignored this request. See V2R329-30, V5R753.
- His statements were obtained through compulsion, intimidation, threats, and psychological coercion, especially because of the State's improper use and manipulation of religion. See V2R329-34, V5R754, V5R775-78, V8R1440-41.
- His statements were unlawfully induced in violation of the privilege with respect to communications to clergy. See V5R753, V5R777-78, V2R333-34.
- His statements were the fruit of an unlawful search or seizure. See V2R330.

- By not recording the statements the court cannot be clear about anything that was said or done to Morrison, much of which is in dispute. See V5R778.

- The knives were seized as result of the unlawfully taken statements. See V2R336.

The State's responded by arguing as follows:

- The statements were voluntary under totality of circumstances. See V4R675-79.

- Morrison did invoke his Miranda rights as to Davis, but it was only to Davis, and that request was scrupulously honored. See V4R679, V8R1436.

- He did not unequivocally invoke right to silence in talking to Short. See V4R680-81.

- He did invoke his right to silence to Richardson, but then reinitiated. See V4R681-82, V8R1436-37.

- Assuming his discussion with Richardson was a privileged communication, it could not be considered a police interrogation. See V4R682-83.

- Fresh warnings were given by Short right before Morrison's confession and after a significant period of time had elapsed. See V4R683-84, V8R1437-38.

- Short and Davis did not know Richardson was a minister. See V8R1442.

- But Morrison's statements to Richardson in the interview room were protected communication with spiritual advisor. See V4R686-87, V8R1437-39.

The court issued its order on March 19, 1998, granting the motion to suppress statements made to Richardson, but denying the motion to suppress the statements made to Short.[11] The court also denied the motion to suppress the physical evidence. See

[11] Morrison filed a motion for rehearing, which was denied See V5R817-19.

V5R796-816, V2R335, V9R1482.[12] The court found:

- Homicide investigator Short used the unrelated writ of attachment to have Richardson arrest Morrison and bring him in for interrogation in the homicide. See V5R796-97.

- Richardson arrested Morrison at 3:30 p.m. on January 10, advised him of his Miranda rights, and Morrison appeared to understand those rights. Richardson learned that during the night before the arrest, Morrison had been drinking alcoholic beverages and smoking crack cocaine, and Morrison said he consumed alcohol and cocaine until 2:30 a.m. on January 10. Morrison was not under the influence of alcohol or crack cocaine at he time of his arrest. See V5R797.

- Morrison was not interrogated regarding the homicide while en route to the Police Memorial Building, and he made no voluntary statements concerning the killing while being transported. He did ask if he was being arrested for the killing. When told he was arrested on the writ of attachment, he did not ask for an attorney and he did not say he did not want to talk to the police. See V5R797-98.

- Richardson informed Morrison he is a minister and initiated a conversation with Morrison expressing that Morrison needed to accept and follow Richardson's religious teachings and beliefs. Richardson did not advise Morrison to confess to the murder, but he did advise Morrison to talk to detectives and tell them the truth concerning the murder. Morrison was not threatened with adverse consequences if he chose not to follow this advice. Richardson told Morrison the detectives might exercise leniency on him if he confessed. Richardson gave Morrison his name and phone number so that Morrison could contact him later to pursue the matter of religion. See V5R798.

- Richardson took Morrison to interrogation without booking him on the writ of attachment. Richardson did not inform detectives of his conversation with Morrison, but he did tell detectives that he read Morrison his Miranda rights. See V5R798.

- Short and Davis were present when Morrison arrived, and their interrogation began at 5:55 p.m. on January 10. Short advised Morrison of his Miranda rights, and Morrison signed a standard form acknowledging he had been told his rights. At the time, Morrison was coherent, able to communicate, and was not under the influence of alcohol or cocaine or any

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[12] Morrison also filed some pro se motions regarding suppression. The court declined to address them because they were not adopted by counsel. See V9R1506, SR3-4, SR34-36.

other substance. See V5R798-99.

- Morrison did not ask for an attorney, and he did not tell detectives that he did not want to answer their questions. Morrison answered questions and made statements at that time, none of which implicated him in the murder. During the interrogation, Davis hit the table with his hand where Morrison was seated and shouted at Morrison, calling him a liar and accusing him of the murder. Morrison responded to that outburst by telling Davis and Short that he would no longer talk to Davis. Davis left the room and never again interrogated Morrison. Morrison had not confessed to the murder. See V5R799.

- Morrison never asked either detective to take him from the police station to the jail to be booked on the writ of attachment. See V5R799-800.

- Morrison continued to talk with Short. Short and Morrison went to the chapel at the police station where they both prayed. Short later suggested that Morrison might like to have someone he knew come in to be with him. Morrison asked that Richardson come in to talk with him. See V5R800.

- Richardson returned to the police station around midnight on January 10 and met with Morrison. Morrison told him, while the two were alone, that he wanted to be taken to jail to be booked on the writ, thereby terminating the interrogation. Morrison had not yet made a statement implicating himself in the murder. Richardson acknowledged the demand and began to leave the room. Morrison changed his mind before Richardson left the room and called him back in to talk. The two talked for more than an hour. Richardson agreed to keep the conversation confidential, and he honored that agreement except for deposition testimony elicited by defense counsel. Richardson again encouraged Morrison to tell the detectives the truth about the murder. Morrison then agreed to talk further with Short. Richardson summoned Short. See V5R800-01.

- Short reminded Morrison of his Miranda rights. Morrison neither asked for an attorney nor indicated that he did not wish to talk to Short. Morrison then made the statements that are the subject of the pending motions. He also agreed to take the detectives to get the knife used in the murder. The knife was recovered. See V5R801-02.

- The State met its burden regarding the admissibility of Morrison’s statements. Morrison was given appropriate Miranda warnings before the statements were made. The police are not required to give complete Miranda warnings during various sessions of an on-going interrogation. See V5R802.

- Morrison's Miranda waiver was knowing and voluntary. Morrison's statements were not the product of intimidation. The outburst by Davis, the only hint of intimidation, occurred two and one-half hours before Morrison made an incriminating statement. Morrison was aware of his Miranda rights that were being waived. The fact that he consumed alcohol and cocaine until 2:30 a.m. on January 10 does not support a finding that he was under the influence of those substances when he was advised of his rights and when he was reminded of those rights immediately before he gave incriminating statements. See V5R802.

- Morrison's behavior from the time of his arrest to the time he gave the statements sought to be suppressed shows that he was sober and rational. Morrison gave the statements almost twenty-four hours after he last consumed alcohol or cocaine. See V5R802.

- The statements made to Short were made after a waiver of Miranda rights, and the waiver was knowingly and voluntarily made. The State agreed that statements made by Morrison to Officer Richardson should be suppressed. See V5R802.

B. Constitutional principles compel the conclusion that police used religion in an unprecedented fashion to overbear Morrison's will

Police took Morrison into custody for the homicide interrogation under the subterfuge of a writ of attachment. Constitutionally, he was in custody and subjected to interrogation, thereby deserving of the full protection of both his federal privilege against self-incrimination, see U.S. Const. amends V, XIV; Colorado v. Connelly, 479 U.S. 157 (1986); Mathis v. United States, 391 U.S. 1 (1968); and his federal due process rights, see U.S. Const. amend. XIV; Connelly, 479 U.S. at 157; Davis v. North Carolina, 384 U.S. 737 (1966); Darwin v. Connecticut, 391 U.S. 364 (1968); Brown v. Mississippi, 297 U.S. 278 (1936). He has even greater independent protection of due process and against compelled self-incrimination under the

Florida Constitution. See art. I, § 9, Fla. Const.; Traylor v. State, 596 So. 2d 957 (Fla. 1992); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

When a claim of coercion and involuntariness arises, an appellate court must conduct de novo review to determine whether

> "the behavior of law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined..." Rogers v. Richmond, 365 U.S. 534, 544 (1961)... it is the duty of an appellate court, including this Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-742 (1966). Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. Frazier v. Cupp, 394 U.S. 731, 739 (1969); Davis v. North Carolina, supra, 384 U.S., at 740-741.

Beckwith v. United States, 425 U.S. 341, 348 (1976); see also Arizona v. Fulminante, 499 U.S. 279, 287 (1991). The State carries a heavy burden to prove, by a preponderance of the evidence, a voluntary waiver and lack of coercion under the totality of circumstances. See Connelly, 479 U.S. at 157; Ramirez v. State, 24 Fla. L. Weekly S353 (Fla. July 8, 1999); Traylor, 596 So. 2d at 957; Roman v. State, 475 So. 2d 1228 (Fla. 1985); Snipes v. State, 651 So. 2d 108 (Fla. 2d DCA 1995); Sawyer v. State, 561 So. 2d 278 (Fla. 2d DCA 1990).

"It is by now well established that 'certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.'" Connelly, 479 U.S. at 163 (quoting Miller v. Fenton, 474 U.S. 104, 109 (1985)). In pursuance of this rule, some courts around

the country have addressed whether, and to what extent, police can implicate religion and religious values in obtaining confessions.

Generally, courts have applied the following rules and limitations. "Appeals to an accused's religious sympathies do not automatically render a confession involuntary." Noble v. State, 892 S.W.2d 477, 483 (Ark. 1995) (emphasis supplied). "This does not mean, however, that the use of religious exhortations can never reach the point of being intimidating and coercive." State v. Adams, 703 P.2d 510, 515 (Ariz. Ct. App. 1985). This Court in Johnson v. State, 660 So. 2d 637 (Fla. 1995), recognized the difference between licit persuasion and illicit religious exhortation, saying: "Using sincerely held religious beliefs against a detainee is a quite distinct issue from a simple noncoercive plea for a defendant to be candid." Johnson, 660 So. 2d at 643. Thus, "[T]he tactic of exploiting a suspect's religious anxieties has been justly condemned." People v. Kelly, 800 P.2d 516, 529 (Cal. 1990). "'[A] state law enforcement officer conducting an interrogation of one accused of crime may not use his own or the suspect's personal religious beliefs as a tool to extract admissions of guilt." People v. Adams, 192 Cal. Rptr. 290, 304 n.22 (Ct. App. 1983), approved, People v. Kelly, 800 P.2d 516, 529 (Cal. 1990), and disapproved in part on other grounds, People v. Hill, 839 P.2d 984, 1004 n.3 (Cal. 1992); People v. Montano, 277 Cal. Rptr. 327, 337 (Ct. App. 1991); see also Davis v. North Carolina, 384 U.S. 737 (1966) (law enforcement's use of religion was a factor that contributed to

producing coerced confession). "Religious beliefs are not matters to be used by governmental authorities to manipulate a suspect to say things he or she otherwise would not say. The right to worship without fear is too precious a freedom for us to tolerate an invasion and manipulation by state officials of the religious beliefs of individuals, including those accused of crime." Adams, 192 Cal. Rptr. at 302; Montano, 277 Cal. Rptr. 337. "These tactics constituted 'deliberate means calculated to break the suspect's will.'" Montano, 277 Cal. Rptr. at 337 (quoting Oregon v. Elstad, 470 U.S. 298, 312 (1985)).

Accordingly, some courts have found that police exceeded constitutional limitations by exploiting an accused's religious vulnerability, thus compelling suppression of the statements and evidence flowing therefrom. One such example is the first-degree murder case of People v. Adams, 192 Cal. Rptr. at 290. The sheriff casually knew Adams for a few years through her irregular attendance at a community church and her employment at a Christian bookstore. See 192 Cal. Rptr. at 294-95. He suggested she was having a difficult time because of her religious beliefs. He knew she professed to be a Christian and said "he would not be judgmental or think of her as less than a Christian or as 'something ugly.'" Id. at 295. He told her he would have much respect for her courage if she told the truth. He told her she would be accountable for her actions as a Christian. He made specific references to the Bible, suggesting that "God would turn his back on that individual who would become a 'reprobate who can no longer distinguish between right and wrong.'" Id. He also

suggested that she might end up in a mental institution if she did not reveal the truth because of her Christian guilt from living in sin with a man. See id. Adams made a series of inculpatory statements leading up to a final confession, which the trial court found to be an acceptable product of "religious persuasion to tell the truth." Id. at 300. But the appellate court reversed and ordered the statements suppressed. The Court said the sheriff's remarks constituted "an overwhelming and calculated appeal to the emotions and beliefs, focusing appellant's fears in an area the sheriff knew to be particularly vulnerable." Id. at 300. "The sheriff purposely played on appellant's religious anxiety," the Court said. Id. at 301. "Under the law, the crucial question is whether appellant would have made these damaging admissions leading to still more incriminating statements, without the improper pressure. The record does not support such a conclusion." Id. at 303.

Another notable murder case is People v. Montano, 277 Cal. Rptr. at 327. Officer Kincannon manipulated Montano, an 18-year-old, unsophisticated menial worker who had just entered the United States illegally eight months earlier. First he and other officers disregarded Montano's numerous requests to remain silent. Then he "aggravated the situation by using their common religion to conjure up in the defendant's mind the picture of confessing to avoid going to hell." Id. at 337. The Court condemned this practice using religion to manipulate an accused to say something he might not otherwise say. See id.

The facts in the instant case are far more egregious than in

Adams or Montano. In fact, appellant has been unable to find any other case where a police officer also was an ordained minister and wore both hats at the same time to participate in the custodial interrogation of a suspect. Richardson admittedly initiated the use of religion in the interrogation; he knew right off that Morrison was particularly "concerned about his soul and religion"; he cited chapter and verse from the Bible to Morrison; he kept exhorting Morrison to consider his relationship with God and his need to repent, further telling him to tell the detectives what he knew about the murder.

Even if Richardson did not intend to use religion and Morrison's religious vulnerability to extract a confession, surely Short did: He took Morrison to a chapel; he knelt down with Morrison in this sacred temple, eavesdropping on Morrison's conversation with God; he saw Morrison get "pretty emotional" in the chapel; he then brought Richardson to talk to Morrison for an hour and a half after learning that Morrison knew Richardson to be a preacher; and Richardson's conversation with Morrison was privileged.

Under these bizarre and unique circumstances, it cannot be said that the State carried its heavy burden of proving that Morrison would have made the statements freely in the absence of religious manipulation. This is especially true given that Morrison was an unsophisticated substance abuser with a borderline IQ, had been under interrogation for more 12-14 hours until 5 a.m., and had been intimidated by Davis. Accordingly, this Court should reverse for a new trial.

VI. WHETHER MORRISON UNLAWFULLY AND UNCONSTITUTIONALLY WAS DENIED THE RIGHT TO ATTACK THE CREDIBILITY OF A KEY STATE WITNESS, SANDRA BROWN, THROUGH CROSS-EXAMINATION AND REPUTATION EVIDENCE

Sandra Brown was a key witness for the State, for her inculpatory statements implicated Morrison at the beginning of the investigation. Yet the defense was twice barred from allowing the jury to hear evidence attacking her credibility, once through cross-examination of Brown herself, and once though the reputation evidence of Delores Tims, who lives in Brown's neighborhood. These rulings, individually and in combination, denied Morrison his statutory and constitutional rights to confrontation, to put on a defense, to a fair trial, and to due process. See U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const,; §§ 90.608(1)(b), .609(1), .612(2), Fla. Stat. (1995).

During Brown's cross-examination, Morrison tried to attack Brown's credibility by implying that Brown, who had been interrogated in this case after waiving her Miranda rights, was a suspect and thereby had in interest in deflecting suspicion away from herself. Morrison's counsel asked:

> Police ever tell you, ma'am, that when you were brought down and read your rights, detective ever tell you that he didn't believe you had nothing to do with this?
> MR. TAYLOR [FOR THE STATE]: Judge, I'm going to object to that.
> THE COURT: Mr. Eler, I'll sustain that objection.

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Later in the trial, Morrison's counsel proffered the testimony of Delores Tims, who lived in Sandra Brown's neighborhood. In the proffer, she said she did not of Brown's

reputation in the neighborhood, and knew her reputation to be untruthful. Tims also said she knew of specific acts of lying, though those acts were not what Morrison was trying to get permission to have Tims testify about. The relevant proffer said:

> Q. So, you know her as Cassandra Brown?
> A. Yes.
> Q. All right. Ma'am, where do you live?
> A. Where I live at now?
> Q. Right.
> A. Off Jammes.
> Q. All right. This person Cassandra Brown, do you know her reputation in the community for truthfulness?
> MR. TAYLOR: Objection. Improper predicate.
> THE COURT: Okay. I'll overrule the objection for now.
> BY MR. ELER:
> Q. You can answer the question.
> Do you know her reputation in the community for truthfulness?
> A. She don't tell the truth.
> Q. So, the answer is yes to that question?
> A. Yes.
> THE COURT: Those are two different questions.
> MR. ELER: That's why we're doing this.
> THE WITNESS: Yes.
> BY MR. ELER:
> Q. You know her reputation. What is that reputation; do you know?
> A. For not telling the truth.
> Q. Other question I want to ask you is; do you know whether or not Sandra Brown has ever cut anybody before?
> A. Yes.
> Q. Who has she cut?
> A. Raymond Morrison, and I can't think --
> Q. Gordon?
> A. Gordon.
> MR. ELER: Okay. All right.
> And, Judge, that would conclude the testimony that I anticipate calling Ms. Tims for.
> THE COURT: Okay. Mr. Taylor, do you have any questions on this?
> MR. TAYLOR: Yes, sir.
> BY MR. TAYLOR:
> Q. Ms. Tims, have you ever sat down and talked with any people in your community about Sandra Wright's reputation?

A. Sandra Brown?

Q. Sandra Brown, or Sandra Wright's reputation for truth, or honesty?

THE COURT: First of all, what is her name?

MR. TAYLOR: Sandra Brown is the current name, Judge.

THE COURT: Okay. Same person?

THE WITNESS: Repeat that question again.

BY MR. TAYLOR:

Q. Well, let's back up a moment. You know this individual by what name?

A. Sandra Wright.

Q. Cassandra Wright?

A. Uh-huh.

Q. And can you describe her for us?

A. Give a description of her?

Q. Yes.

A. I don't know how much she weigh. She heavyset, never combs her hair, and --

THE COURT: Do you know where she lives?

THE WITNESS: Yeah.

THE COURT: Where does she live?

THE WITNESS: Nevada Street. She stay with her mother.

THE COURT: Okay.

BY MR. TAYLOR:

Q. Okay. Now, you say she had a reputation for not telling the truth; is that right?

A. Uh-huh.

Q. You know need to answer --

A. Yes.

Q. Who have you talked with, sat down and talked with about her reputation?

A. I have never sat down with nobody to talk, like, against her. I just heard them talking against her, and I done been in a situation, known that she had lied.

Q. All right. But nobody has ever come up to you and told you that Cassandra is a liar, have they?

A. Yes.

Q. They have?

A. Uh-huh, yes.

Q. How many people have you talked with about this?

A. Well, I had an incident with her with Raymond's sister when Sandra told a lie about some things that weren't true.

Q. You know of one instance in which Cassandra told a lie to Raymond's sister?

A. That's involving me in there, in that lie, yes.

Q. When was that?

A. That was in '96.

Q. '96.

What neighborhood were you living in at that time?

> A. In Marietta.
> Q. Marietta?
> A. Uh-huh.
> Q. And that's the only incident that you know about that you were personally involved in and knew that Cassandra had told a lie?
> A. This right here, this case right here, because when she come to court it be a different story that she tells me that you all told her that I said this.
> Q. All right. That's what -- based upon what she has told you?
> A. Yes.
> Q. All right. Not based upon what you have talked with Raymond's sister, or other people in the community?
> A. No.

V15T826-30. The court barred Tims' testimony:

> MR. ELER: Okay. Well, certainly Your Honor, as I cited to the Court earlier, Section 609.1, impeachment, proof of character using reputation testimony. Sandra Brown testified in the case in chief by the State. She indicated that, as I indicated earlier, that she placed Mr. Morrison at the apartment complex where Mr. Dwelle was, at or about 8:00 or 9:00 o'clock that evening.
> Ehrhardt -- and I'm quoting from Ehrhardt, page 442 says, "By testifying, a witness places is issue the question of whether he or she is a truthful person and whether or not his or her testimony should be believed by the jury."
> Well, we now have a witness -- the Defense has a witness who is prepared to testify that she knows the reputation in the community of this Sandra Brown witness for truthfulness, and that she's not truthful.
> So, I think under Ehrhardt, under that rule it comes in.
> THE COURT: Well, what I'm going to do as to that issue, I will sustain the objection and exclude it. This witness stated her opinion that she thinks Sandra Brown is not someone to be believed, but that's not the same as the basis -- showing that she has a basis for knowing this witness' reputation.
> She referred to two incidents where she was involved, and it's her opinion that Sandra Brown was not being truthful, but that's not the same as being truthful.
> So, I understand your position. I'll sustain the objection.
> MR. ELER: Judge, I'm sorry. I'll abide by whatever ruling the Court --
> THE COURT: Yes, sir.
> MR. ELER: My understanding is I wasn't going to

> get into the two specific instances, my understanding of her direct testimony she heard from the community that Sandra Brown has a reputation, but if that's not consistent with the Court's notes --
>
> THE COURT: That's not what I heard her to say. She didn't have a basis for saying anything, other than her personal opinion as to Sandra Brown, whether she should be believed.
>
> So, I'll sustain that.

V15T834-36. The court later reaffirmed its earlier ruling:

> Before continuing with the trial, I'd like to make one observation. We discussed it earlier this morning. I ordered the transcript of the deposition testimony of Ms. Delores Tims on the issue of reputation testimony, and based on my reading of that transcript, I will adhere to my earlier ruling.
>
> It's my ruling that Ms. Tims' opinion of the witness, Ms. Brown, is subject to her personal opinion that Mrs. Morrison -- Ms. Sandra Brown, rather, is someone not to believe. There is no basis for her opinion.
>
> That doesn't go to weight, it goes to admissibility, as I understand the Evidence Code.

V15T894.

It is hornbook law that witnesses testifying at trial always place their credibility in issue. Questions relevant to credibility must be left to the jury. Thus, a party has the right to cross-examine a witness as to matters affecting that witness's credibility. This is especially true when the defendant is cross-examining his accuser for her biased, self-interested motivation. The trial court both statutorily and constitutionally is obligated to give the accused broad leeway in conducting such a crucial cross-examination. See U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const.; Delaware v. Van Arsdall, 475 U.S. 673 (1986); Davis v. Alaska, 415 U.S. 308 (1974) (impeachment of witness's credibility is proper and important function of constitutionally protected right of cross-

examination); Chambers v. Mississippi, 410 U.S. 284 (1973) (due process prohibits rigidly applying evidentiary rules to intrude on cross-examination); §§ 90.608, .612(2), Fla. Stat. (1995); Breedlove v. State, 580 So. 2d 605, 608-09 (1991) (if state witness was under investigation arising from incident at issue, defendant is allowed to cross-examine because such evidence is relevant as to bias and prejudicial motivation); see generally Ehrhardt, Florida Evidence § 608.5 (1999).

It is also hornbook law that evidence of a witness's reputation for lack of truthfulness is a relevant and admissible. See §§ 90.608(1)(c), .609(1), Fla. Stat. (1995); see generally Ehrhardt, Florida Evidence § 609.1 (1999). The trial court's analysis erroneously focused on the prohibition discussed in cases like Fernandez v. State, 730 So. 2d 277 (Fla. 1999), and Lott v. State, 695 So. 2d 1239 (Fla. 1997), where this Court made clear that specific acts of lying is inadmissible for impeachment while general reputation for lack of truthfulness is admissible. The trial court's finding is not supported on the record because the witness identified two independent bases of her testimony. The trial court simply could have permitted the witness to testify as to reputation -- which she said she knew -- and not as to specific acts of lying -- which she also knew. Cf. Hamilton v. State, 129 Fla. 219, 231-32, 176 So. 89, 93-94 (Fla. 1937) (admissible evidence is a person's general reputation formed and expressed by her neighbors or the people in the neighborhood or community in which she resided).

The court erred by not permitting the cross-examination to

bring out Brown’s bias and self-interest, and in not bifurcating Tim’s evidence so as to permit introduction of the Brown’s reputation for lack of truthfulness. Brown was a key witness, a possible assailant, and her impeachment was important.[13] The fact that Morrison’s mother testified as to Tims’ reputation does not make Tims’ evidence cumulative because Morrison’s mother’s natural bias could have undermined the weight of her testimony, and Tims’ evidence would have provided substantial corroboration. Consequently, this court should order a new trial.

VII. WHETHER THE COURT ERRED IN FAILING TO ORDER A JUDGMENT OF ACQUITTAL AS TO PREMEDITATION AND BURGLARY, AND IN SUBMITTING THE FIRST-DEGREE MURDER CHARGE TO THE JURY

Morrison moved for judgment of acquittal on all counts, including the premeditation theory, and the court denied the motions. See V15T822-23, V15T932. The jury returned a general verdict of guilt. See V6R983. The court erred by denying Morrison’s motions and submitting all counts to the jury because the evidence of premeditation and burglary were insufficient. See U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const.; § 782.04(1)(a)(1), Fla. Stat. (1995).

A. Evidence of premeditation was insufficient

The homicide erupted from the victim’s spontaneous and unexpected armed assault on the unarmed appellant during the appellant’s commission of a nonviolent crime, theft. There was no preconceived plan to kill or do any harm at all. There was no motive formed before the crime. There was no evidence he had

[13] Of course the import of her evidence would even be greater if Morrison’s statements are held to be inadmissible.

fully formed a conscious decision to kill before the killing, or that there was sufficient time to allow for reflection. He did not bring any weapon to the scene. The crime was sudden, unexpected, and quick. Nobody witnessed the killing. The most severe injury -- the throat wound -- was not even deep enough to sever major blood vessels. The only circumstantial evidence suggesting premeditation was the fact of multiple injuries. But under the totality circumstances, that is not enough.

Perhaps the best example is this Court's recent decision in Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996). Kirkland got hold of a knife and slashed the victim's throat "many" times causing a very deep, complex, irregular wound" that cut off her breathing and produced a great deal of bleeding, bringing about her death by sanguination or suffocation. Kirkland apparently also beat her with a walking cane, causing blunt trauma wounds, and there was evidence of sexual friction between Kirkland and the victim before the attack. However, this Court looked at the total record and rejected premeditation as a matter of law because of "strong evidence militating against a finding of premeditation." 684 So. 2d at 732. The Court found, first, "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide," id. at 735, the same as in the present case. "Second, there were no witnesses to the events immediately preceding the homicide," id., whereas here there were witnesses, and they refuted premeditation. "Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a

murder weapon in advance of the homicide," id., the same as the present case. "Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan," id., again the same as the present case. "Finally, while not controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties," id., similar to this case where unrebutted evidence showed Morrison had a "borderline" IQ. See also Green v. State, 715 So. 2d 940 (Fla. 1998) (no premeditation in multiple stabbing death where no preconceived plan to kill, no witnesses to crime, and defendant's IQ was exceedingly low); Norton v. State, 709 So. 2d 87 (Fla. 1997) (no premeditation where victim killed by a gunshot wound to the back of the head, had an imprint from a tire track on the back of her right pant leg, and had been disposed of in an open filed among trash and debris); Coolen v. State, 696 So. 2d 738 (Fla. 1997) (no premeditation were Coolen suddenly attacked the victim with a knife without warning or provocation, stabbing him multiple times, inflicting deep stab wounds to the chest and back as well as defensive wounds on the forearm and hand, and Coolen earlier had threatened and fought with victim); Knowles v. State, 632 So. 2d 62 (Fla. 1993) (no premeditation in fatally shooting juvenile three times, after which he killed his father); Hoefert v. State, 617 So. 2d 1046 (Fla. 1993) (no premeditation where defendant nearly fatally strangled several women during sexual assaults, but his latest victim died by asphyxiation after which he dug a hole to bury the body and then fled to Texas); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990)

(no premeditation where hijacker shot and killed officer with three shots from a 9-mm pistol, including contact wound to the head and two shot to chest, any of which would have been fatal, and defendant then tried to kill second officer); Febre v. State, 158 Fla. 853, 30 So. 2d 367 (1947) (reducing premeditated murder to manslaughter for sudden impulsive killing); Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (no premeditation with evidence of motive to kill and defendant chased victim down and struck him repeatedly with knife).

B. Evidence of burglary was insufficient

In Deglado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000), this Court made clear that a burglary is not committed when an invitee in a dwelling commits a crime therein. In this case, the only evidence of whether Morrison had permission to be in Dwelle's apartment came from Morrison himself. The evidence shows that Dwelle permitted Morrison to enter even though he felt he should not let anyone in:

> I ask for a light for the cigar he gave me. He went back into his bed room to get me a light. I follow him to the bed room. He reached into his shirt pocket hanging on a chair by the bed and handed me a light.

V2R374. Dwelle assented to Morrison's entry, pulling out a lighter and lighting Morrison's cigar. This is not the action of person who prohibited another from crossing the threshold. And not only does the direct evidence support's Morrison's claim, the circumstantial evidence does nothing to rebut it. For example, we know that Dwelle routinely invited the meals-on-wheels delivery persons to enter unannounced.

Under these circumstances, the court erred by denying the judgment of acquittal as to the burglary theory of first-degree felony murder and as to the burglary charge in Count III.

C. A new trial is the proper remedy

The court violated Morrison's constitutional due process and fair trial rights by submitting the first-degree murder charge to the jury after it should have found two of the state's three theories insufficient as a matter of law. See U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const.

In Stromberg v. California, 283 U.S. 359 (1931), one of three alternative theories upon which the jury could have relied to convict was unconstitutional. The court said that error required a new trial. See also Williams v. North Carolina, 317 U.S. 287, 292 (1942). The Court later applied the same rationale in Yates v. United States, 354 U.S. 298 (1957), to require reversal when the improper prosecution theory violated controlling law in the jurisdiction rather than a constitutional provision. The only exception is when the State has two theories and one was based on a failure of proof. See, e.g., Griffin v. United States, 502 U.S. 46 (1991); Mungin v. State, 689 So. 2d 1026, 1030 (Fla. 1995). Due process and fair trial rights also require an error to be harmless beyond a reasonable doubt, see Chapman v. California, 386 U.S. 18 (1967); Goodwin v. State, 24 Fla. L. Weekly S583 (Fla. Dec. 16, 1999), and prohibit the pyramiding of inferences, see, e.g., Andersen v. State, 274 So. 2d 228, 230 (Fla. 1973); Conine v. State, 25 Fla. L. Weekly D116, 116 (Fla. 1st DCA Jan. 5, 2000).

These cases support the notion that if the jury would have disregarded one theory because no evidence supported it, a court can presume the error harmless beyond a reasonable doubt because the jury must have relied on the one remaining valid theory. But this case is different, because the State relied on three theories, and two failed to meet the sufficiency standard. This jury cannot be presumed, beyond a reasonable doubt, to have relied on only the robbery theory when two other theories were so forcefully presented. Holding to the contrary would pyramid inferences. This argument has even more force if the Court finds that there was some -- but not enough -- evidence to support giving the burglary and premeditation theories to the jury under the applicable circumstantial evidence rule. Accordingly, this Court should reverse for a new trial.

VIII. WHETHER THE HEINOUS, ATROCIOUS, OR CRUEL STATUTE AND INSTRUCTION ARE VAGUE, UNDERSCORING THE MISAPPLICATION OF THE FACTOR IN THIS CASE WHERE THE INJURIES RESULTED FROM A STRUGGLE THAT BEGAN WHEN THE ACCUSED WAS UNARMED AND DEFENDED HIMSELF AGAINST THE ARMED VICTIM'S ASSAULT

Morrison repeatedly objected to the heinous, atrocious, or cruel statute and instruction, as well as its application on these facts, and his motions were denied. See V1R156-73, V1R174, V2R308-11, V17T1236-37, V6R1038, V17T1242, V1R156-74, SR11, SR29. The factor was argued to the jury and to the judge. See V10R1651-52, V10R1659, V17T1270, V17T1283. The judge instructed on it, see V17T1297, and found it, see V7R1182-83.

As argued in the trial court and in many previous cases, the statute and the instruction are vague in violation of due process and the prohibition against cruel and/or unusual punishment. See

U.S. Const. amends. VIII, XIV; art. I, §§ 9, 17, Fla. Const. The statute and instruction are unconstitutionally vague because they fail to inform the court and jury of the findings necessary to support the aggravating circumstance and a sentence of death. See, e.g., Espinosa v. Florida, 505 U.S. 112 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1980). Appellant recognizes that this court has rejected that argument in the past, but he urges the court to reconsider.

The vagueness problem is underscored by the misapplication of the factor on this record. The evidence here showed that this was a spontaneous theft gone bad. Morrison was unarmed when he crossed Dwelle's threshold, formed the intent to commit a theft, and the stabbing occurred during a life-or-death struggle that began when Dwelle armed himself with a knife and assaulted Morrison, causing Morrison to defend himself. Moreover, Dr. Lardizabal's thorough analysis shows that loss of consciousness and death were quick.

These facts do not show -- beyond a reasonable doubt -- that the killing fits into what constitutionally must be a narrow class of "torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So. 2d. 908, 912 (Fla. 1990) (emphasis supplied). There is no evidence that the killing was "both conscienceless or pitiless and unnecessarily torturous to the victim." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). There was no evidence that

Morrison had the requisite deliberate intent to inflict a high degree of suffering or pain. Instead, this was a killing during struggle, like an emotional rage, by one who was at least partially intoxicated. Many cases have struck down HAC in that kind of situation. See Elam v. State, 636 So. 2d 1312 (Fla. 1994) (victim was repeatedly bashed in the head with a brick in a spontaneous fight that erupted when victim confronted Elam concerning misappropriated funds); Halliwell v. State, 323 So. 2d 557 (Fla. 1975) (defendant in violent rage armed himself, struck multiple blows, and continued beating, bruising and cutting victim); see also Buckner v. State, 714 So. 2d 384 (Fla. 1998) (multiple shots during struggle); Hamilton v. State, 678 So. 2d 1228 (Fla. 1996) (struggle and multiple shotgun blasts after reloading); Santos v. State, 591 So. 2d 160 (Fla. 1991) (multiple shots during struggle).

Significantly, even the State admitted that its own evidence shows Morrison did not cut Dwelle badly enough to sever the jugular vein or carotid artery. A finding of HAC based in part on this fact shows the vagueness and arbitrariness of the HAC factor: the happenstance of the depth of a blade stroke cannot determine whether an aggravator is proved. An aggravator cannot be left to pure fortuity. And despite what the State and the court believed, there is not, nor should there be, any such thing as per se HAD for multiple knife wounds.

Accordingly, this Court should order a new penalty phase.

IX: WHETHER THE STATUTE AND INSTRUCTION FOR A MURDER OF A VULNERABLE VICTIM ARE UNCONSTITUTIONALLY VAGUE AND OVERINCLUSIVE, UNDERSCORING THE MISAPPLICATION OF THE

FACTOR HERE WHERE THERE IS NO PROOF THE VICTIM WAS SELECTED BECAUSE OF VULNERABILITY

Under the authority of section 921.141(5)(m), Florida Statutes (Supp. 1996), the trial court instructed the jury to consider the victim's vulnerability as an aggravating circumstance, see V17T1297, and the court found it proved, see V7R1183-84. The overbroad, overinclusive, automatically applicable statute and instruction, facially and as applied, fail to "genuinely narrow the class of persons eligible for the death penalty," or "reasonably justify the imposition of a more severe sentence compared to others found guilty of murder," Zant v. Stephens, 462 U.S. 862, 877 (1983), thereby violating due process, equal protection, and appellant's protection against cruel and/or unusual punishment. See U.S. Const. amends. VIII, XIV; art. I §§ 9, 16, 17, Fla. Const.; Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990) (overinclusive legislative classification violates Florida's equal protection clause). Even without objection, the unconstitutionality of this factor, instruction, and application, render the finding fundamental error.

The misapplication here underscores the Zant deficiency of this factor. The homicide erupted from the victim's spontaneous and unexpected armed assault on the unarmed appellant during the appellant's commission of a nonviolent crime. There is no evidence from which to conclude, beyond a reasonable doubt, that Morrison chose to steal from this victim because of his vulnerability. Moreover, the evidence suggests that but for

Dwelle having induced an armed confrontation, nothing more would have happened. Failing to narrow the application to homicides causally connected to the victim's vulnerability constitutes the kind of error Zant prohibits. The factor should not have been found, and this Court should order a new penalty phase.

X. WHETHER THE DEATH PENALTY IS DISPROPORTIONATE FOR A SUDDEN KILLING WHERE THE UNARMED DEFENDANT COMMITTING A NONVIOLENT FELONY WAS CONFRONTED BY THE ARMED VICTIM, AND DEATH RESULTED FROM THE ENSUING STRUGGLE

In Almeida v. State, 24 Fla. L. Weekly S336 (Fla. July 8, 1999), this Court recently explained proportionality review:

> The Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), held that the death penalty is reserved for only the most indefensible of crimes:
>
> > Review of a sentence of death by this Court ... is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes.
>
> Id. at 8. We later explained: "Our law reserves the death penalty only for the most aggravated and least mitigated murders." Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). [FN21] Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, and (2) the least mitigated of murders.

24 Fla. L. Weekly at S339 (emphasis supplied). Proportionality "is not merely a comparison between the number of aggravating and mitigating factors." Larkins v. State, 739 So. 2d 90, 93 (Fla. 1999) (citing Porter v. State, 564 So. 2d 1060 (1990)). Moreover, aggravators arising from the circumstances of the homicide in question have diminished weight in proportionality review. See Terry v. State, 668 So. 2d 954 (Fla. 1996).

This is not one of the most aggravated and least mitigated homicides. In fact, as the Court said in the analogous case of Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993) "This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s." Morrison entered the home unarmed, and while inside he decided to take money out of the pocket of the shirt hanging on the chair. Then he was attacked by Dwelle who had armed himself with a knife. A deadly struggle ensued, and Dwelle died. There is no evidence Morrison was looking to commit a violent act when he entered the apartment, and there is no evidence he was looking for a frail elderly person to batter or victimize. There was no violent forethought and no mutilation. Instead, this was a case of a spontaneous unarmed theft gone bad. Consider also that Morrison had a borderline IQ, a history of drug and alcohol abuse, had been abusing alcohol and cocaine at the time, thereby resulting in diminished judgment skills, and had other mitigation. Under these facts, the death sentence is disproportional punishment, especially when compared to equally or more egregious murders where this Court reversed on proportionality grounds. See, e.g., Hawk v. State, 718 So. 2d 159 (Fla. 1998) (bludgeoned elderly deaf couple, killing one during burglary and robbery of their home); Caruso v. State, 645 So. 2d 389 (Fla. 1994) (killed elderly couple living next door when surprised during burglary, then victim's head in visqueen); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (beat & mutilated 66-year-old woman in a rage); Elam v. State, 636 So. 2d 1312 (Fla. 1994) (picked up brick and

bludgeoned boss during spontaneous altercation when confronted about misappropriated funds, and then solicited murder of 2 witnesses); Kramer (beat victim to death during spontaneous fight); Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (stabbed drinking buddy 17 times during spontaneous fight).

CONCLUSION

For the reasons stated above, this Court should reverse and remand for a new trial, or alternatively, remand for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy of this initial brief of appellant has been furnished by delivery to Richard Martell, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and by mail to appellant Raymond Morrison, Jr., on this _____ day of ________________, 2000.

Respectfully submitted,

____

CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 814253

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

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