IN THE SUPREME COURT OF FLORIDA

SONNY RAY JEFFRIES,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC94,994
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

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STATE OF FLORIDA,	)	
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STATEMENT OF THE CASE

On October 18, 1993, the grand jury in and for Orange county returned an indictment charging appellant and Harry Thomas with one count of first degree murder in violation of Section 782.04, Florida Statutes (1993), one count of armed robbery in violation of Section 812.13(2)(a), Florida Statutes (1993) and one count of armed burglary of a dwelling in violation of Section 810.02(2)(b), Florida Statutes (1993). (Vol. XIV, R 763-765) Various motions were filed concerning appellant's competency to stand trial and after numerous psychiatric evaluations appellant was found incompetent to proceed to trial on July 19, 1994 (Vol. XIV, 858-884) and again on June 12, 1996. (Vol. XV, R 999-1003) On December 16,

1996, appellant filed a motion to suppress the seizure of his shoes on the grounds that they were seized pursuant to an illegal detention. (Vol. XV, R 1022-38) A hearing was conducted on the motion to suppress on January 27, 1997 before the Honorable Frank N. Kaney, circuit judge. (Supp. Vol. VI, R 62-86) At the hearing, the state stipulated that appellant's arrest and detention were illegal but that the seizure of the shoes should be upheld on the grounds of inevitable discovery. (Supp. Vol.VI, R 64) Following the hearing, the trial court denied the motion to suppress. (Supp. Vol.VI, R 84; Vol. XV, R 1039)

Appellant proceeded to jury trial on the charges on April 20-23, 1998 with the Honorable Robert Wattles, circuit court judge presiding. (Vols. 1-7,T 1-683) During jury selection, defense counsel objected to the state exercising a peremptory challenge to excuse an African-American juror. (Vol. I, T 331) After receiving a reason for the strike, the trial court found it to be a race-neutral reason and allowed it. (Vol. I, T 333) Prior to the jury being sworn, defense counsel renewed all prior motions and objections made toward any of the jurors. (Vol. I, T 338) When the state sought admission of the pair of Nike shoes taken from appellant, defense counsel objected to its admission based on the prior motion to suppress. (Vol. V, T 496) At the conclusion of all the evidence, the defense made a motion for a judgment of acquittal arguing that the evidence was purely

circumstantial and did not exclude every reasonable hypothesis of innocence. (Vol. V, T 538-541) Additionally, defense counsel argued that there was no evidence that a robbery was committed since it was never established when the items that appellant later pawned had been taken from the victim. (Vol. V, T 538-39) The trial court denied the motion for judgment of acquittal as well as the renewed motion for judgment of acquittal. (Vol. V, T 549-550, 553) Defense counsel objected to the trial court's giving of the instruction concerning the presumption arising from the proof of possession of recently stolen property on the grounds that there was no evidence as to when the property in appellant's possession had been stolen. (Vol. VI, T 583-586) The trial court agreed to give the instruction over the objection of defense counsel. (Vol. VI, T 586) During jury deliberations, the jury returned with a question asking "Was the time of death ever documented or put into evidence?". (Vol. VI, T 671) The trial court with agreement of counsel answered the question "No." (Vol. VI, T 671) Following deliberations, the jury returned verdicts finding appellant guilty as charged of first degree murder and robbery with a deadly weapon and not guilty as to armed burglary. (Vol. VII, T 673-674; Vol. XVII, R 1380-1382)

On August 28, 1998, Judge Wattles conducted a hearing to determine whether appellant was competent to represent himself in the penalty phase. (Vol.

VIII, R 193-266) Although Doctor Brad Fisher testified that he felt that appellant's schizophrenia could cloud his ability to choose whether he wanted to represent himself, the trial court found appellant competent to represent himself but appointed appellant's former lawyers Blankner and Marquez as standby counsel. (Vol. VIII, T 193-266; Vol. XVII R 1398)

The penalty phase of appellant's trial was conducted on September 8-9, 1998 before Judge Wattles. (Vol. X-XI, R 312-651) The trial court again questioned appellant as to his decision to represent himself and confirmed that appellant still desired to do so and found him competent. (Vol. X, R 317-345) The trial court considered appellant's pro se motions and denied a motion for new trial, a motion for judgment of acquittal and a motion for ineffective assistance of counsel which the trial court treated as a motion for a new trial. (Vol. X, T 324-326, 326-327, 328-332) The trial court also denied appellant's motion to continue the penalty phase on the grounds that he had only eleven days to prepare for the penalty phase and was only given access to the library 4 hours a day which he felt was unreasonable. (Vol. X, R 333-336) Finding that to be one of the disadvantages of self representation, the trial court denied the motion to continue. (Vol. X, R 336) During the penalty phase, the state presented no evidence other than the evidence which had been presented at the trial. (Vol. X, R 358) At the

charge conference, defense objected to an instruction on the aggravating circumstances of cold calculated and premeditated arguing that there was no evidence of heightened premeditation. (Vol. XI, R 579) The trial court overruled this objection. (Vol. XI, R 580) Defense counsel requested the instruction on the statutory mitigating factor that the defendant was under the influence of extreme mental emotional disturbance based on the evidence of his schizophrenia but the trial court denied this as being too broad and there being insufficient evidence of it. (Vol. XI, R 588) Defense counsel requested an instruction concerning the aggravating factor pecuniary gain which the trial court denied based on the fact that the defense had no law citations to support the instruction. (Vol. XI, R 591) Following deliberations, the jury returned a recommendation by a count of eleven to one that appellant be sentenced to death. (Vol. XI, R 642; Vol. XVII, R 1438)

A ***Spencer*** hearing was conducted by Judge Wattles on October 15, 1998. (Vol. XII, R 654-710) On January 22, 1999, appellant appeared before Judge Wattles for sentencing. (Vol. XIII, R 711-747) Judge Wattles found that two aggravating factors had been established beyond a reasonable doubt those being that the murder was committed in the course of a robbery and that the murder was especially heinous, atrocious and cruel. (Vol. XIII, R 722-726) However, the judge found that the factor of cold, calculated and premeditated had not been

proven beyond a reasonable doubt. (Vol. XIII, 727) Judge Wattles then discussed the mitigating factors that were suggested by defense and ultimately ruled that the aggravating factors outweighed the mitigation and imposed the death penalty for the murder count and a consecutive life sentence for the robbery conviction. (Vol. XIII, R 744; Vol. XVIII, R 1611-1613, 1599-1610)

Appellant filed a timely notice of appeal on February 16, 1999. (Vol. XVIII, R 1622) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (Vol. XVIII, R 1615)

STATEMENT OF THE FACTS

MOTION TO SUPPRESS

On January 27, 1997 a motion to suppress was conducted before the Honorable Frank N. Kaney at which the following facts were ascertained: The state stipulated that the defendant's arrest and detention in Georgia were illegal. (Supp. Vol. VI, R 64) Investigator Barbara Bergin had been investigating the murder of Wilma Martin. (Supp. Vol.VI, R 66) She had been in Ocala and gathered information concerning appellant which she was going to place into an affidavit to secure an arrest warrant the following day. (Supp. Vol. VI, R 67) Before she was able to do that, she received word that Harry Thomas had been detained in Georgia and was accompanied by a person who matched appellant's description. (Supp. Vol. VI, R 68) Bergin had intended to get a warrant anyway for appellant's arrest. (Supp. Vol. VI, R 68) After getting the warrant, Bergin would have entered it into the NCIC and alerted agencies in the areas where appellant was expected to travel. (Supp. Vol. VI, R 69) Bergin testified that appellant's shoes had become independently significant. (Supp. Vol. VI, R 70) She had obtained another pair of shoes belonging to appellant to compare the print found at the scene. (Supp. Vol. VI, R 70) When she was asked whether those prints matched, Bergin answered "they ran out the same shoes." (Supp. Vol. VI, R

70) Bergin admitted that had appellant been arrested in New Jersey without a warrant she still would have requested that the law officers there seize his shoes. (Supp. Vol. VI, R 70) Bergin admitted that some jurisdictions may in fact require a search warrant before the shoes could be seized. (Supp. Vol. VI, R 71) The date of Wilma Martin's death was August 22, 1993 and appellant was stopped in Georgia and had his shoes seized on September 10, 1993. (Supp. Vol. VI, R 71) Bergin felt that she would have obtained the shoes assuming that appellant was wearing them whenever he had been stopped. (Supp. Vol. VI, R 71) Bergin told the Georgia authorities that she wanted them to seize all of his clothing and shoes. (Supp. Vol. VI, R 72) Bergin was advised that appellant had been detained at approximately 1:30 a.m. but did not secure an arrest warrant for appellant until 1:30 p.m. the following day. (Supp. Vol. VI, R 73) Bergin admitted there were no active warrants for appellant in the meantime and that when she had been talking to the Marion County officers she had no idea where appellant was. (Supp. Vol. VI, R 75) She also had no description of what appellant was wearing. (Supp. Vol. VI, R 76) Bergin had been informed by New Jersey authorities that they had received information from appellant's fiancee that he had been washing clothes and that appellant was upset that she had not washed his black Nike tennis shoes. (Supp. Vol. VI, R 77) The town that appellant was ultimately stopped in in

Georgia, Richmond Hills, is just off I-95 on a possible route to New Jersey. (Supp. Vol. VI, R 78) The trial court denied the motion to suppress on the grounds that the shoes would have been inevitably discovered. (Supp. Vol. VI, R 84)

TRIAL TESTIMONY

Kevin Jeffries, appellant's brother, lived in Orange County, Florida where he rented a house from Wilma Martin, the victim. (Vol. IV, T 378-380) Kevin testified that his girlfriend, Kelly, would pay the rent to Ms. Martin in cash. (Vol. IV, T 382) Wilma was like a mother to Kevin's children and she took care of Kevin. (Vol. IV, T 383) Others in Kevin's family may have met Wilma. (Vol. IV, T 383) In 1993, appellant came down to Florida and was staying at his sister Tammy's house. (Vol. IV, T 383, 385) Kevin had discussed appellant with Wilma so she knew about him. (Vol. IV, T 384) A couple of months before Wilma's death, Kevin had moved out of the house that he rented from her. (Vol. IV, T 384) Kevin first learned of Wilma's death on a Sunday and spoke to the police several times about it. (Vol. IV, T 386) Kevin testified that he did not have much contact with appellant and last spoke to him about three weeks before Wilma's death. (Vol. IV, T 391, 385) Kevin never spoke to appellant about Wilma or her jewelry. (Vol. IV, T 391) Kevin did not know appellant to be much

of a drinker or to have used cocaine. (Vol. IV, T 391, 393)

Roxanne Jeffries, appellant's sister, lived in Orlando with her boyfriend Dennis Thomas in 1993. (Vol. IV, T 395) She had met Wilma Martin a couple of times and knew that she was her brother Kevin's landlord. (Vol. IV, T 396) In August of 1993, appellant came down to Florida and was staying with his sister Tammy. (Vol. IV, T 397) Appellant met Dennis' brother Harry Thomas through Roxanne. (Vol. IV, T 398) Sometime in August, 1993, Roxanne heard a conversation between appellant and Harry in which appellant said that if he had to kill someone to get money he would. (Vol. IV, T 399) Appellant suggested to Harry that they go out and rob someone and possibly kill them although no person was mentioned as a possible target. (Vol. IV, T 399) At approximately 8:30 p.m., appellant and Harry left Roxanne's house and said they were going to Disney World. (Vol. IV, T 400) A few days later, appellant had four rings that he did not have before and also had some money. (Vol. IV, T 400) Appellant told his fiancee that he had a wedding ring and an engagement ring for her and said something about the rings making her rich. (Vol. IV, T 401) Appellant never said where he got the rings and Roxanne never saw them again. (Vol. IV, T 401) On the day of the conversation between appellant and Harry Thomas, appellant was drinking quite a bit. (Vol. IV, T 403-404) Harry had also been drinking that day

but was not as drunk as appellant. (Vol. IV, T 407) Although Roxanne believed that appellant had used cocaine a couple of times she never saw him use cocaine and did not see him use it that day. (Vol. IV, T 407-408, 410) When appellant mentioned killing someone, Roxanne told him "you shouldn't say that," but admitted that she never called the police. (Vol. IV, T 405)

Dennis Thomas, Roxanne Jeffries' live-in boyfriend, and brother of Harry Thomas, testified that he had met Wilma Martin a couple of times. (Vol. IV, T 411-412) Thomas overheard a conversation between Harry and appellant concerning Wilma Martin. (Vol. IV, T 412) Appellant mentioned that Wilma collected rent money but appellant made no mention of any jewelry. (Vol. IV, T 413) Appellant said something about going to Wilma to rent a place for him and his fiancee and then made a comment that Wilma would be a good person to rob. (Vol. IV, T 414) Thomas never heard any comments about any jewelry and does not remember who said what that day. (Vol. IV, T 414-415) Thomas testified that only people who knew Wilma knew about her rent collection but admitted that he did not know what appellant knew about Wilma. (Vol. IV, T 415) Thomas heard no one talk about killing anyone that day. (Vol. IV, T 415) Although in a previous statement to police, Thomas said that appellant made statements about robbing Wilma, no one talked about killing her. (Vol. IV, T 418) Dennis Thomas

testified that appellant had been drinking on the day of this conversation. (Vol. IV, T 419)

Tammy Todd, appellant's sister, testified that in August, 1993, appellant came to Florida and stayed with her in Winter Garden. (Vol. V, T 498) Tammy learned that Wilma Martin had been killed and had a conversation with appellant about Wilma's death. (Vol. V, T 499, 504) Tammy saw appellant with some rings that he had not had before. (Vol. V, T 499) Tammy identified the rings at trial as the ones that she saw appellant with. (Vol. V, T 501) Tammy stated that her sister Roxanne's reputation for truthfulness is not good and that she is always lying to the family. (Vol. V, T 504-505)

Sgt. William Mulloy of the Orlando Police Department assisted in the investigation of Wilma Martin's murder. (Vol. IV, T 429) Mulloy identified items which were recovered from a pawn shop in Bunnell, Florida. (Vol. IV, T 430) By stipulation, the items recovered from the pawn shop in Bunnell had been pawned by appellant on August 21, 1993. (Vol. IV, T 431) Crime scene technician Ron Rogers of the Orlando Police Department processed the scene of the homicide for fingerprints. (Vol. IV, T 437) On August 22, 1993, 21 latent prints were lifted from Wilma Martin's vehicle, 5 latent prints were lifted from the laundry room, 3 latent prints were lifted from the northeast bedroom, 5 latent

prints were lifted from lamps in the living room, and one latent print was lifted from the hallway bathroom sink. (Vol. IV, T 437) On August 23, 1993, 18 latent prints were lifted from the refrigerator, 2 latent prints were lifted from the walls and cabinets in the kitchen, 5 latent prints were lifted from the kitchen clock and one latent print was lifted from plastic cup in the kitchen. (Vol. IV, T 437)

Jesse Giles, a forensic pathologist, conducted an autopsy on the body of Wilma Martin. (Vol. IV, T 439-442) The victim had multiple blunt force injuries and some sharp force injuries. (Vol. IV, T 447) Martin had a stab wound to the right side of her neck which caused no real damage. (Vol. IV, T 449) Martin had defensive injuries to her arms and hands. (Vol. IV, T 456) The cause of death was multiple blunt force and sharp force injuries. None of the sharp force injuries however would have caused death independently of the blunt force trauma. (Vol. IV, T 458) Some hairs were found on Martin's hands but they appeared to be her own. (Vol. IV, T 459)

Terrell Kingery, a senior crime lab analyst with the Orlando Regional Crime Lab was given some evidence for comparison purposes. (Vol. V, T 509-511) Kingery was given two pairs of shoes which he was asked to compare to a shoe print that had been lifted from a piece of tile in the victim's home. (Vol. V, T 511-512) There had been numerous foot wear impressions submitted to Kingery for

possible analysis. (Vol. V, T 514) Although the shoes that were seized from appellant were the same size and tread design as the shoe impression at the scene, Kingery cannot say that those shoes definitely made the impression found at the scene. (Vol. V, T 518, 515) Three pairs of shoes had been submitted to Kingery for comparison purposes, a pair of Nike air force magnums reportedly belonging to appellant, a pair of XJ-100 white tennis shoes reportedly belonging to Harry Thomas and a pair of men's Jordache sneakers belonging to an unknown person. (Vol. V, T 522) One of the impressions found at the scene did not match any of the shoes Kingery was given. (Vol. V, T 523) One of the impressions was consistent with the XJ-100 shoes belonging to Harry Thomas. (Vol. V, T 524) However, Kingery was unable to make any positive identification. (Vol. V, T 524)

Gary McCullough, the crime scene analyst and latent print examiner with FDLE, examined doors from kitchen cabinets taken from the victim's kitchen to see if there were any usable prints. (Vol. V, T 527-28) There was some red substance on the door which McCullough could not determine if it was human blood or not. (Vol. V, T 529) McCullough could see some prints on the door with his naked eye. (Vol. V, T 530) McCullough was given a set of known prints from appellant and from Harry Thomas. (Vol. V, T 530) A single fingerprint on one of

the cabinet doors was identified as matching appellant's fingerprint. (Vol. V, T 532) Although McCullough is aware that certain jurisdictions require a set number of points of similarity before a match of fingerprints can be made, Florida does not require this and he did not document how many points of similarity he found. (Vol. V, T 535-536) In fact, McCullough could not remember how many points of similarity he found. (Vol. V, T 535)

Captain Mark Long of the Richmond Hill, Georgia, police department testified that on September 10, 1993 at 12:14 a.m., he stopped a car in which appellant and Harry Thomas were riding. (Vol. V, T 476-477) Long followed the car driven by Thomas, to a gas station and confirmed that the car was wanted in connection with an armed robbery out of Marion County, Florida. (Vol. V, T 479-480) Long identified appellant as being a passenger in the vehicle and ordered him to place his hands on the windshield. (Vol. V, T 481) Appellant was placed under arrest and handcuffed but kept telling Long that he wasn't involved. (Vol. V, T 481) Long took both appellant and Thomas to the police station and verified that a warrant had been issued for the arrest of Harry Thomas out of Marion County. (Vol. V, T 481-483) There was no mention of Sonny Jeffries being wanted for any offense in Florida. (Vol. V, T 483) Appellant kept telling the officers that he had nothing to do with the robbery in Marion County but appellant

offered no resistence. (Vol. V, T 484) Harry Thomas had an injury on his leg, a six inch cut, which required treatment at a hospital. (Vol. V, T 484-485) Deputy Sheriff William Bashlor of the Bryan County Sheriff's Department in Georgia testified that he took shoes from appellant in the holding cell, which shoes were entered into evidence at trial over defense objection . (Vol. V, T 486-487, 496)

The state and the defense stipulated that the rings that were entered into evidence belonged to Wilma Martin. (Vol. V, T 525-526)

PENALTY PHASE EVIDENCE

During the penalty phase, the state presented no witnesses. (Vol. X, R 358) Doctor Michael Gutman, a psychiatrist, has evaluated appellant several times and spoke with appellant about his mental illnesses. (Vol. X, R 359-361) Gutman felt that appellant had adult attention deficit disorder. (Vol. X, R 361) Appellant has been diagnosed as paranoid schizophrenic and is inclined towards delusions and hallucinations. (Vol. X, R 365) Although the condition sometimes worsens, after hospitalization, appellant tends to get better and on medication, appellant can function normally. (Vol. X, R 365) Gutman felt that at the time of the offense, although appellant knew right from wrong he was actively schizophrenic. (Vol. X, R 366) Although the schizophrenia is in remission now, Gutman felt there was a diminution of appellant's capacity to control his behavior because of drug use and

because of the schizophrenia which takes away a person's capacity to control his behavior. (Vol. X, R 366) Gutman believes that a person can be out of touch with reality and still know something is wrong. (Vol. X, R 367) Although Gutman believed that a long term disease can affect a person's thinking and the way they view and value life as well as their behavior, he admitted that gonorrhea does not affect the brain like syphilis does. (Vol. X, R 372, 363) Gutman testified that usually schizophrenia appears in adolescence or the early twenties. (Vol. X, R 373) Most of that time in appellant's life was spent in and out of prisons. (Vol. X, R 373) In 1994, Gutman looked at jail clinic files on appellant, witness statements, police reports, and some records from prior evaluations. (Vol. X, R 373-374) Unless a person behaves in a markedly bizarre manner, most correctional officers will not see any evidence of a mental illness but instead will chalk up the behavior as simply being in jail. (Vol. X, R 374) Appellant had been given psychotropic drugs in the past. (Vol. X, R 375) Although Dr. Benson diagnosed appellant as a schizophrenic in 1990, Gutman did not because appellant had told Gutman that he lied to Dr. Benson to get out of the unit that he was in. (Vol. X, R 376) At that time, Gutman believed that appellant simply had an antisocial personality which inclined him towards criminal behavior. (Vol. X, R 377) However, Gutman now believes that appellant is schizophrenic and has had

delusions and hallucinations. (Vol. X, R 379) The very fact that appellant says he lies and fakes a mental illness is symptomatic of someone trying to cover up his schizophrenia which in clinical terms is known as dissembling. (Vol. X, R 379) The fact that appellant believes he has gonorrhea which has affected his brain is itself evidence of the schizophrenia that appellant suffers. (Vol. X, R 382) The actual facts of the murder could themselves be an indication of appellant's schizophrenia. (Vol. X, R 385) Dr. Gutman believed within medical certainty that the defendant lacked the appreciation and the capacity to conform his behavior to the requirements of law on the date of the offense. (Vol. X, R 387)

Dr. Eric Mings, a practicing psychologist, has done evaluations of appellant. (Vol. X, R 394) In 1994, Mings felt that appellant was paranoid and possibly malingering but felt he needed to be sent to the state hospital. (Vol. X, R 394) In April of 1996 appellant showed evidence of a history of mental illness which was probably schizophrenia. (Vol. X, R 394) Appellant was on medication and was improved but still delusional. (Vol. X, R 394) Dr. Mings has no opinion whether schizophrenia is linked to a venereal disease but testified that appellant is schizophrenic. (Vol. X, R 395) Although appellant told Mings that he had been faking his illness, Mings felt appellant still shows signs of paranoia which was exemplified by appellant's belief that he suffered from a long-term case of

gonorrhea. (Vol. X, R 398-399) Further examples of appellant's schizophrenia and paranoia included laughing inappropriately and appearing anxious and agitated during evaluations. (Vol. X, R 400) Additionally, appellant claimed that the CIA was out to get him because he had uncovered a financial scheme in the prison in New Jersey and was tortured because of this knowledge. (Vol. X, R 400-401) Appellant had delusional thinking regarding the gonorrhea he claimed he had since age 16. (Vol. X, R 401) Appellant also believes that he has lupus and believes that the CIA is out to assassinate him by going undercover as inmates in the prison. (Vol. X, R 401)

Catherine Rundgren, a licensed practical nurse at the Orange County Jail, identified appellant and recognized him from the jail. (Vol. X, R 418) Rundgren noted that someone from North Carolina informed them that they had received a letter from appellant stating that he was going to kill himself because of some venereal disease that he had. (Vol. X, R 419) On January 22, 1990, appellant sent a request to the medical staff stating "I've got gonorrhea, VD. I've had it since I've been almost 16. I need seriously to be treated." (Vol. X, R 420) Three days later, appellant again requested emergency treatment for gonorrhea. (Vol. X, R 420) Rundgren testified that every inmate gets a VD test for syphilis upon entry into the jail. (Vol. X, R 430) If an inmate complains of symptoms of gonorrhea,

he is given a culture and it is sent off for analysis. (Vol. X, R 430) Rundgren does not recall defendant ever being treated for gonorrhea. (Vol. X, R 431)

Dr. Brad Fisher, a clinical forensic psychologist examined records of appellant dating back to 1979 including about 6 or 8 other doctors' evaluations of appellant. (Vol. X, R 435-436) Dr. Fisher testified that he is in agreement with all the other doctors that appellant suffers from schizophrenia which, in Fisher's opinion, is chronic. (Vol. X, R437) Dr. Fisher is not aware of any gonorrhea in appellant's medical diagnoses. (Vol. X, R 438) However, as far back as 1987 or further, appellant has been diagnosed with paranoid disorder which would fit in with the schizophrenic diagnosis. (Vol. X, R 438-439) A person with this condition does not have consistent good touch with reality and although a person could act intelligently or normally in many ways he still may not be in touch with reality. (Vol. X, R 439-440) Although there was no history of violence, Fisher believed that it was possible that defendant's mental condition could include behavior that is violent. (Vol. X, R 441) Appellant's mental condition could easily have led to serious limitations in the extent to which he would have been able to appreciate the criminality of the situation. (Vol. X, R 442) Although Dr. Fisher was aware of a 1988 incident for which appellant had been arrested, he understood that there was no conviction. (Vol. X, R 445, 449) Dr. Fisher testified

that appellant had had multiple suicide gestures and attempts. (Vol. X, R 451)

Sgt. Michael Todd of the Orange County Corrections Division identified appellant and testified that special precautions were taken with appellant because of a bomb threat that he had made to the president. (Vol. X, R 478-480) This was an indication to Todd that appellant's conduct was abnormal. (Vol. X, R 484) This threat to the president was made on March 5, 1994. (Vol. X, R 485) During this time, appellant also wrote a letter to the treasurer to the State of New Jersey demanding a million dollars in unmarked bills. (Vol. X, R 485) Although there were a few other incidents with jail guards in 1998, there had been no disciplinary reports against appellant in the last two years. (Vol. X, R 489-491)

Pamela Tanner and Kathy Carsen, correctional officers in Orange County, were familiar with appellant and stated that when appellant did not get his own way he would sometimes curse and call them names. (Vol. X, R 492, 502) Neither officer felt that appellant's behavior was abnormal given the jail setting that he was in. (Vol. X, R 495,506) Tanner did admit that appellant has cried and told her that he loved her. (Vol. X, R 498)

April Mae Jeffries, appellant's sister, testified that in 1994, she received a letter from appellant stating that he had gonorrhea. (Vol. XI, R 533-534) April called her brother Tom and told him to get appellant some help. (Vol. XI, R 536)

April thought that the letter was odd but that it was sincere. (Vol. XI, R 538-540)

In addition to the live testimony, jail records were entered into evidence showing that appellant had requested treatment for gonorrhea when he was incarcerated. (Vol. XI, R 524, Defense Exhibit 1) A certified copy of a judgment and sentence that showed that Harry Thomas was convicted of second degree murder and received twenty years in a plea agreement with the state for the murder of Wilma Martin was also entered into evidence. (Vol. XI, R 529 Defense Exhibit 2) The state entered into evidence a pre-sentence investigation and a list showing appellant's prior record. (Vol. XI, R 557, State's Exhibits 3 & 4) Additionally, the state presented some victim impact evidence. (Vol. XI, R 554, State Exhibit 1)

SUMMARY OF THE ARGUMENTS

POINT I: The seizure of appellant's shoes was illegal. The state conceded that the arrest and detention of appellant was illegal. The trial court's finding that the shoes would have been inevitably discovered has no foundation in the evidence.

POINT II: The trial court erred in allowing the state to peremptorily challenge an African-American venire person where the reason given for the challenge was pretextual in nature and the trial court failed to consider the genuineness of the stated reason.

POINT III: The state's evidence was totally circumstantial and accordingly failed to exclude every reasonable hypothesis except that of guilt. There was no proof beyond a reasonable doubt that appellant committed a robbery or murder.

POINT IV: The trial court's sentencing order is erroneous in that it reflects an incorrect standard of proof applied for mitigating factors. Additionally, the trial court's findings are either not supported by the record or in some cases are directly contradicted by the record.

POINT V: The death penalty in the instant case is disproportionate when compared to other similar crimes.

ARGUMENT

POINT I

IN VIOLATION OF ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION AND THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE SHOES SEIZED FROM HIM WITHOUT A WARRANT.

Prior to trial, defense counsel filed a motion to suppress the sneakers seized from appellant in Georgia. (Vol. XV, R 1022-1038) On January 27, 1997, a hearing on the motion to suppress was conducted before the Honorable Frank N. Kaney, circuit judge. (Supp. Vol. VI, R 62-86) At the beginning of the hearing on the motion to suppress, the state's stipulated that appellant's arrest and detention in Georgia were illegal. (Vol. VI, R 64) The state then presented the testimony of investigator Barbara Bergin of the Orange County Sheriff's Department who testified that she had been in Ocala gathering information concerning appellant and was going to apply for an arrest warrant the following day. (Supp. Vol.VI, R 66-67) However, when she got home from Ocala, she was awakened at 1:30 in the morning with news that Harry Thomas had been arrested in Georgia on a warrant out of Marion County and that there was a passenger in the car that fit the

description of appellant. (Supp. Vol. VI, R 67-68) When appellant was arrested in Georgia, there were no active warrants for his arrest. (Supp. Vol. VI, R 75) Ultimately, Investigator Bergin obtained an arrest warrant some 12 hours after she was informed that appellant had already been arrested. (Supp. Vol. VI, R 73-74) Investigator Bergin had already obtained one pair of appellant's shoes to compare to the prints that were left at the scene of the crime and when asked whether those prints matched Bergin replied "they ran out the same shoes." (Supp. Vol. VI, R 70) Investigator Bergin said that after obtaining the arrest warrant, she would have entered it into the NCIC and alerted agencies in the area where she expected appellant to travel. (Supp. Vol. VI, R 69) If appellant would then have been arrested, she would have requested that the arresting agency take possession of the shoes, assuming that he was wearing them. (Supp. Vol. VI, R 71) At the conclusion of the hearing on the motion to suppress, the trial court denied the motion on the grounds that the shoes would have been inevitably discovered. To this end the trial court remarked "I think even if they let him go from Richmond Hill, where would he have gone?" (Supp. Vol. VI, R 84) Appellant contends that the ruling by the trial court was in error.

In ***Bowen v. State***, 685 So.2d 942, 944 (Fla. 5th DCA 1996) the court discussed the inevitable discovery exception to a warrant requirement:

> This rule, also known as the independent source doctrine, is an exception to the exclusionary rule. Importantly, the rule requires that the evidence discovered by illegal means be "ultimately or inevitably" discovered by lawful means. That is, the court must find that it would have been discovered independent of the constitutional violation. In such cases, the state must prove some official entity would have found the illegal evidence absent the illegal search and seizure. ***Nix v. Williams***, 467 U.S. 431, 448-50, 104 S.Ct. 2501,2511-12, 81 L.Ed.2d 377, 390-91 (1984); ***State v. Walton,*** 565 So.2d 381, 384 (Fla. 5th DCA 1990). Speculation may not play a part in the inevitable discovery rule; the focus must be on demonstrated fact, capable of verification. ***Nix***, 467 U.S. at 444 n. 5, 104 S.Ct. at 2509, n. 5. ***See United States v. Ford***, 22 F.3d 374 (1st Cir.), ***cert. denied***, 513 U.S. 900, 115 S.Ct. 251, 130 L.Ed.2d 177 (1994). ***See also United States v. Owens***, 785 F.2d 146 (10th Cir. 1986) (the determination that the evidence would have been discovered by legal means may not be highly speculative.

In ***United States v. Brookens***, 614 F.2d 1037 (5th Cir. 1980) the court, after discussing the inevitable discovery exception, squarely placed the burden of proof upon the prosecution when it stated:

> This approach does not mean that any illegally obtained evidence can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused has challenged the legality of the witness' acquisition and of the use of the witness'

> testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable probability that that witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. ***Maquire, supra*** at 315; ***see Brown v. Illinois***, 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed.2d 416 (1975). The Court then must find that reasonable probability of subsequent discovery existed based on this showing and the record generally.

In the instant case the state did not meet its burden of proving that absent the illegal arrest of appellant, the shoes would probably have been discovered. It was merely speculative that they would have been discovered, as was emphasized by the trial court when he said "I think even if they let him go from Richmond Hill, where would he have gone?" (Supp. Vol. VI, R 84) The fact remains, that appellant never should have even been taken to the police department in Richmond Hill. He should have been free to merely go on his way. A valid arrest warrant was not issued until some 12 hours later. Investigator Bergin even stated that had appellant been arrested following issuance of the arrest warrant she would have requested the shoes, **assuming he was wearing them.** (Supp. Vol. VI, R 71) It must also be emphasized that the police department had already secured a pair of shoes belonging to appellant which apparently matched a print found at the

scene according to investigator Bergin's testimony. (Supp. Vol. VI, R 70) Since it is highly unlikely that appellant was wearing two pairs of shoes at the same time, the request for the second pair of shoes was clearly speculative. It is also important to note that the victim died August 22, 1993. Appellant was not arrested until September 10, 1993. Thus, it was not a case of fresh pursuit which led to the seizure of the shoes. While it is "possible" that the shoes may have been seized it was clearly not "inevitable." ***See Ruffin v. State***, 651 So.2d 206 (Fla. 2nd DCA 1995). The trial court clearly erred in denying the motion to suppress. The error cannot be deemed harmless in light of the paucity of evidence presented at trial. There were no statements by appellant admitted at trial. The testimony of appellant's sister and her live-in boyfriend contradicted each other and the single fingerprint identification was less than convincing. The erroneous admission of the shoes and the resulting testimony of comparison to prints found at the scene, while not conclusive of guilt, was certainly an important part of the prosecution's case. Therefore, appellant is entitled to a new trial.

POINT II

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S USE OF A PEREMPTORY CHALLENGE TO AN AFRICAN AMERICAN JUROR WHERE THE REASON GIVEN BY THE PROSECUTOR WAS INSUFFICIENT AND PRETEXTUAL.

An individual's right to an impartial jury representing a cross-section of the community is guaranteed by Article I, Section 16, of the Florida Constitution and Sixth and Fourteenth Amendments to the United States Constitution. The purpose of peremptory challenges used during jury selection is to promote the selection of an impartial jury. "It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. 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 (1984); ***See also Batson v. Kentucky***, 476 U.S. 79 (1986).

In the instant case, all potential jurors filled out juror questionnaires asking various questions regarding their background and their feelings on death penalty. After reviewing the questionnaires, the parties decided which jurors did not need

to be individually questioned regarding their feelings about the death penalty. (Vol. I, T 33-35) While the parties were making their peremptory challenges, the following occurred:

> THE COURT: You're right. Margie Melvin, Number 44.
>
> MR. ASHTON [prosecutor]: We would strike Juror Margie Melvin.
>
> THE COURT: State strikes number 44.
>
> MS. MARQUES [defense counsel]: Ms. Melvin is an African American. I would ask the State explain the reason why they're striking her.
>
> MR. ASHTON: I don't agree. I don't know that she is or not. Court make any observation?
>
> MS. MARQUES: She is.
>
> MR. ASHTON: The point of Neil Challenge is the defense has to make sure the record reflects that. I'm indicating I honestly don't know if she is African American or not. If the court made that observation, fine.
>
> MS. MARQUES: Juror questionnaire reflects it.
>
> MR. BLANKNER [defense counsel]: Yes.
>
> THE COURT: Yes. Question is obviously a Neil inquiry as to race neutral reason.
>
> MR. ASHTON: Yes, your Honor. The answers to

> Questions 19, 20 and 21 are equivocal on the death penalty. That's my race neutral reason.
>
> MS. MARQUES: We have tons of jurors who are Caucasian who are equivocal on the death penalty on this jury.
>
> MR. ASHTON: The issue is for the court under Melbourne simply is that true and clearly it is. Clearly her answers are equivocal and that's the only inquiry, unless the defense is disputing the fact those are her answers. Then I think that's the end of the inquiry. I will say - -
>
> THE COURT: I'll find it's a racially neutral strike. So it's allowable. ...

(Vol. III, T 331-333) Appellant submits that the prosecutor's reason for excusing Ms. Melvin was pretextual. Additionally, appellant submits that the prosecutor incorrectly stated what the standard for evaluating peremptory challenges is.

In ***Melbourne v. State***, 679 So.2d 759 (Fla. 1996) this Court established the following three step procedure for analyzing the racial, ethnic, and/or gender neutrality and genuineness of a peremptory challenge:

> Step 1: A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, c) request that the court ask the striking party its reason for the strike.
>
> Step 2: At this point, the burden of production

> shifts to the proponent of the strike to come forward with a race-neutral explanation.
>
> Step 3: If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained.

679 So.2d at 764. This Court has recently reiterated this test in ***Rodriguez v. State,*** 25 Fla. L.Weekly S89 (Fla. February 3, 2000). As this Court explained in ***Rodriguez***, in step 3, the court's focus is on the **genuineness** and *not* the reasonableness of the explanation. Further, the relevant circumstances that the court is to consider in determining whether the explanation is pretextual includes such factors as the racial makeup as the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged venire person; or singling out the venire person for special treatment. Five non-exclusive factors to consider which would weigh against the legitimacy of a race-neutral explanation were listed by this Court in ***State v. Slappy***, 522 So.2d 18 (Fla. 1988). Of those five, there are at least two present in the instant case. The reasons listed in ***Slappy*** which are present here include: (1) the failure of the state to examine the juror or perfunctory examination on the questioned issue; (2) a challenge based on reasons equally applicable to jurors

who are not challenged by the state. A trial court is required to proceed to step 3 of the ***Melbourne*** analysis and independently consider the genuineness of the reason, given all the circumstances surrounding the strike. Failure of the trial court to do this constitutes reversible error. ***Anderson v. State***, 25 Fla. L.Weekly D314 (Fla. 3rd DCA, February 2, 2000)

In the instant case prior to the commencement of any voir dire, the parties examined the juror questionnaires and based on the answers the jurors gave to the questions regarding the death penalty, the parties decided which potential jurors had to be individually questioned regarding their views on the death penalty. In this regard it is very important to note that the defense counsel listed all the potential jurors that it felt did <u>not</u> have to be individually voir dired concerning the death penalty. (Vol. I, T 33-34) One of these jurors was Ms. Melvin, the juror at issue. In reply, the state agreed to each of the individuals listed by the defense with two exceptions, those being juror Ayre and juror Montijo. (Vol. I, T 34-35) Certainly at that point, the prosecutor had no problems with juror Melvin's answers to the questions regarding the death penalty since it agreed that she did not have to be individually questioned about them. If, as the prosecutor later contended, her answers were equivocal, it would have been incumbent upon the prosecutor to have that juror individually questioned to ascertain her views on the

subject. Thus, one of the factors listed in ***Slappy*** is clearly present: a perfunctory, if not nonexistent, questioning of the juror regarding her views on the death penalty. When defense counsel objected to the state's use of a peremptory on Ms. Melvin, the prosecutor responded that his reason for excusing her was her equivocal answers to questions 19, 20, and 21. (Vol. I, T 332) To this, defense counsel noted that there were many Caucasian jurors who were equally equivocal on the death penalty who were currently on the jury to which Mr. Ashton replied that the court could not concern itself with that since the only question was whether or not juror Melvin's answers were equivocal and if they were the inquiry had to end. This is clearly not what the law is. Under the ***Melbourne*** Test, a trial court is required to examine the reason given for its **genuineness**. In this regard the trial court must consider whether other jurors have given similar equivocal answers and had not been challenged by the striking party. In the instant case, the trial court never made any such inquiry. In fact, defense counsel's assertion was never even disputed. Rather, Ashton told the court that it was irrelevant. Under ***Anderson***, ***supra***, the failure of the trial court to consider step 3, constitutes reversible error. Notwithstanding this, a simple check of the answers that the jurors who sat on appellant's case gave to the same questions clearly highlights the pretextual nature of Ashton's peremptory strike against Ms. Melvin. All of the

jurors who ultimately sat on appellant's jury were white. This is reflected on the juror questionnaires. Juror William Meldrum did not even answer question number 21. Juror Jeffrey Riley's answers to questions 20 and 21 which asks for explanations as to whether the death penalty should always be imposed in cases of murder or never be imposed in cases of murder, included the rather simplistic "not always" and "answered above". Juror Melissa Murphy-Steen responded to question 20 whether the death penalty should always be imposed in cases of murder "No. If there is a reason [indecipherable]". Given these equally equivocal or at least questionable answers to the death penalty inquiries, Ashton's reason for excusing Ms. Melvin can be nothing more than pretextual. Appellant is entitled to a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

At the conclusion of all the evidence, defense counsel moved for a judgment of acquittal specifically arguing that the circumstantial evidence failed to exclude the possibility that appellant was not guilty of the murder and that there was no evidence that established that property was taken from the victim at the time of her murder. Although, it was established that appellant later pawned rings belonging to the victim, no evidence was presented to establish that these were stolen. (Vol. V, T 538-545) The trial court denied the motion for judgment of acquittal as well as the renewed motion for judgment of acquittal after the defense rested. (Vol. V, T 549-550, 553) Appellant asserts that the trial court erred in denying his motion for judgment of acquittal where the evidence is legally insufficient to support the verdicts. The evidence fails to exclude the reasonable hypothesis that someone other than appellant killed Wilma Martin. The state's evidence is also legally insufficient to support a guilty verdict for robbery. The evidence of appellant's guilt is entirely circumstantial.

The due process clauses of the Florida and federal constitutions protect an accused against conviction for a criminal charge except upon proof beyond reasonable doubt of every element necessary to constitute the crime with which he is charged. ***In re Winship***, 397 U.S. 358, 364 (1970). The state bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt. ***Cox v. State***, 555 So.2d 352 (Fla. 1989) In order for the state to prove premeditated first degree murder through circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. ***Long v. State***, 689 So.2d 1055 (Fla. 1997) The question of whether the evidence is inconsistent with any other reasonable inference is usually a question of fact for the jury. ***Bedford v. State***, 589 So.2d 245 (Fla. 1991), ***cert. denied***, 503 U.S. 1009 (1992). Nevertheless, a jury's verdict on this issue must be reversed on appeal if the verdict is not supported by competent, substantial evidence. ***Long, supra*** at 1058. Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction. ***Cox v. State***, 555 So.2d 352 (Fla. 1989); ***Scott v. State***, 581 So.2d 887 (Fla. 1991) Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." ***Hall v. State***, 90 Fla. 719, 720, 107 So.246, 247(1925)

One of this Court's functions in reviewing capital cases is to see if there is competent, substantial evidence to support the verdict. ***Cox, supra*** at 353; ***Williams v. State***, 437 So.2d 133 (Fla. 1983) When evidence of guilt is circumstantial, a special standard of review of the sufficiency of the evidence applies:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Jaramillo v. State, 417 So.2d 257 (Fla.1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla.1977); Mayo v. State, 71 So.2d 899 (Fla.1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
>
> * * *
>
> [However, a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. See Wilson v. State, 493 So.2d 1019, 1022 (Fla.1986). Consistent with the standard set forth in Lynch [v.

> State, 293 So.2d 44 (Fla.1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45 (Fla.1974). The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla. R. Crim. P. 3.380.

State v. Law, 559 So.2d 187, 188-189 (Fla. 1989).

A. THE UNDISPUTED FACTS

The following facts are undisputed. Wilma Martin was killed in her home. She suffered multiple blunt force injuries consistent with being kicked or stomped. Additionally, she had some sharp force injuries to the right side of her neck caused by stabbing but which did not cause any real damage. She also had some defensive injuries to her arms and hands.

Several rings belonging to Wilma Martin were recovered from a pawn shop in Bunnell Florida. The items which were recovered had been pawned by appellant on August 21, 1993.

The entire scene was processed for fingerprints and 21 latent prints were lifted from Martin's vehicle, 5 latent prints were lifted from the laundry room, 3 latent prints were lifted from the northeast bedroom, 5 latent prints were lifted from the lamps in the living room, 1 latent print was lifted from the hallway

bathroom sink, 18 latent prints were lifted from the refrigerator, 2 latent prints were lifted from the walls and cabinets in the kitchen, 5 latent prints were lifted from the kitchen clock, one latent print was lifted from a plastic cup in the kitchen sink. (Vol. IV, T 437) A red substance was found on the cabinet doors from the kitchen but no determination was made whether the substance was human or not. (Vol. V, T 529) A single fingerprint on one of the kitchen cabinets was identified as being appellant's. (Vol. V, T 532) Numerous footwear impressions taken from the scene were submitted for comparison to shoes taken from appellant and Harry Thomas and a third unidentified person. Although in some cases a comparison can yield to a positive identification that a particular impression was made by a particular shoe, no such positive identification could be made in the instant case. (Vol. V, T 515) One particular impression could have been made by the shoes that were seized from appellant. (Vol. V, T 520) One of the impressions was consistent with a pair of shoes belonging to Harry Thomas. (Vol. V, T 524)

B. THE FINGERPRINT EVIDENCE

The state relied on the testimony of a fingerprint examiner who testified that a single fingerprint found on the kitchen cabinet belonged to appellant. Fingerprint evidence however, is merely a variety of circumstantial evidence. ***Jaramillo v. State***, 417 So.2d 257(Fla. 1982); ***Mutcherson v. State***, 696 So.2d 420

(Fla. 2nd DCA 1997) For such evidence to be probative of guilt, the state must prove that the fingerprint could have been made only at the time the crime was committed. ***Amell v. State***, 438 So.2d 42 (Fla. 2nd DCA 1983) There was no such showing in the instant case. Although there was testimony that there was a red substance on the cabinet, there was no testimony that this substance was human blood. In fact, the state's expert testified that he could not tell whether it was human or not. (Vol. V, T 529) It is entirely possible that the fingerprint could have been made at a time other that the time of the murder. Indeed, there was no testimony from any of the state's witnesses that the fingerprint could only have been made at the time of the murder. Additionally, this single fingerprint was one of 58 latent prints lifted from the scene. Importantly, there is no testimony of any prints found on the knife with which the victim had been stabbed. There was testimony that appellant was going to visit Wilma Martin to see about renting a place for himself and his fiancee. (Vol. IV, T 414) If he did so, is it possible that the fingerprint could have been made at that time.

C. THE SHOE IMPRESSION

While one of the state's witnesses testified that he compared footwear impressions taken from the scene with shoes which he was given reportedly belonging to appellant as well as the co-defendant, the best that the expert could

testify to is that one of the impressions could have been made by appellant's shoe. Although it is possible for positive identifications to be made, the expert could not do so in this case. Certainly the shoes that were taken from appellant are a very common variety of shoes that can be purchased at virtually any department store or shoe store. There was no evidence of any blood on appellant's shoes.

D. THE PAWN SHOP EVIDENCE

The state and defense stipulated that several rings belonging to Wilma Martin were pawned by appellant in Bunnell Florida on August 21, 1993. However, there was no proof offered as to when these rings were taken from Wilma Martin, if in fact they were taken at all. No proof was offered as to when appellant came into possession of these rings and no proof was offered as to when the last time that Wilma Martin had possession of the rings. There certainly was no competent proof that these rings were taken at the same time that Wilma Martin was killed. It is certainly possible from the evidence presented at trial that Harry Thomas, the co-defendant, could have taken the rings and then gave them to appellant who subsequently pawned them. Again, it must be remembered that the jury found appellant not guilt of a burglary.

E. APPELLANT'S "STATEMENTS" TO HIS SISTER AND HER BOYFRIEND

Appellant's sister Roxanne and her live-in boyfriend Dennis Thomas both testified that they overheard a conversation between appellant and Harry Thomas. Beyond this fact, the testimony of Roxanne and Dennis was extremely inconsistent. Roxanne claimed that appellant said that if he had to kill someone he would and then suggested to Harry that they go out and rob someone and possibly kill them, although no person was mentioned. (Vol. IV, T 399) Dennis Thomas recalls appellant saying that Wilma Martin would be a good person to rob but never heard appellant talk about killing anyone. (Vol. IV, T 414-415) Neither Dennis Thomas nor Roxanne Jeffries could testify as to the date that this conversation supposedly occurred. While Roxanne Jeffries testified that several days after she overheard this conversation she saw appellant in the possession of some rings, the testimony that was stipulated to was that appellant pawned the rings either the same day or the day after Wilma Martin was killed. This lends credence to the fact that appellant obtained the rings at a time other than the murder.

F. THE OTHER SUSPECTS

Harry Thomas was also charged with the murder and robbery of Wilma Martin. There was shoe impression evidence which linked him to the scene. Harry Thomas pled guilty to the second degree murder of Wilma Martin. A

reasonable hypothesis of innocence is that Harry Thomas, and not appellant committed the murder alone. Harry Thomas could have given appellant the rings belonging to Wilma Martin after he, alone, stole them. Nothing in the evidence rebuts this hypothesis of innocence.

G. CONCLUSION

The state failed to present substantial, competent evidence to support convictions for murder and robbery. "[A] prima facie case of circumstantial evidence must lead to a 'reasonable and moral certainty that the accused and no one else committed the offense charged.'" ***Brown v. State***, 672 So.2d 648, 650(Fla. 4th DCA 1996). ***See also Davis v. State,*** 90 So.2d 629 (Fla. 1956). Evidence is insufficient is it shows only a strong suspicion of guilt, a bare probability of guilt, or mere presence at the scene. ***Brown***, 672 So.2d at 650. Even where the state's case against an accused creates numerous suspicious circumstances, suspicions alone cannot be the basis of a criminal conviction. ***Smolka v. State***, 62 So.2d 1255(Fla. 5th DCA 1995); ***Scott v. State***, 581 So.2d 887 (Fla. 1991) Circumstantial evidence is also insufficient when it requires a pyramiding of assumptions or inferences in order to arrive at a conclusion of guilt. ***Gustine v. State***, 86 Fla. 24, 97 So. 207 (Fla. 1993); ***Chaudoin v. State***., 362 So.2d 398 (Fla. 2nd DCA 1978)

In the instant case, the state's evidence does nothing more than create a bare suspicion that appellant was guilty of the crimes charged. As to the robbery charge there was no evidence that any property was taken by force from the victim. Additionally, the evidence is equally susceptible to a reasonable hypothesis that Harry Thomas committed the murder. The trial court erred in denying the motion for judgment of acquittal. This Court must reverse and remand with instructions to discharge appellant.

POINT IV

IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9 & 17 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE WHERE THE SENTENCING ORDER REFLECTS AN IMPROPER EVALUATION OF THE MITIGATING FACTORS BY THE TRIAL COURT.

The penalty phase of appellant's trial resulted in a jury recommendation that the death penalty be imposed. Thereafter, the trial court held a ***Spencer***[1] hearing. On January 22, 1999 Judge Wattles conducted the sentencing hearing. (Vol. XIII, R 711-747) Judge Wattles made it clear that he had already prepared his written sentencing order. After hearing briefly from appellant, Judge Wattles read his sentencing order which included his treatment of the aggravating and mitigating circumstances. Appellant contends that this sentencing order is seriously flawed.

Initially, appellant is not contending that the aggravating factors mentioned by the trial court were not sufficiently proved. However, insofar as appellant is contending that there was no proof that a robbery was committed, this aggravating factor cannot be sustained. Nevertheless, if this Court affirms the robbery

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

conviction, then based on that conviction, the aggravating factor has been proven. However, the trial court's treatment of the mitigating factors is seriously flawed in that it reflects that the trial court may have considered an improper standard of proof in assessing these factors and the trial court's conclusions on many of the factors have no basis in the record and in some cases are directly contrary to the evidence presented. In considering the mitigating factor that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, the trial court stated:

> There has been extensive evidence, testimony, and expert opinion submitted on the issue of the Defendant's mental or emotional state throughout the pendency of this case on this point. However, the Court does not find evidence which supports **beyond a reasonable doubt** that the Defendant was in fact under the influence of extreme mental or emotional disturbance at the time of the murder of Wilma Martin. Therefore, the Court does not find existence of this statutory mitigator.

(Vol. XIII, R 729; Vol. XVIII, R 1603-1604) As the trial court was getting ready to pronounce the death penalty, the prosecutor brought to his attention one "minor error" that he detected in the order. Mr. Ashton noted that the trial court indicated that the mitigating factor had not been proven beyond a reasonable doubt and noted that that was an improper standard. The trial court then stated "Yes, that is a

typographical error." (Vol. XIII, S 742) On the written findings of fact, the trial court crossed out the words beyond a reasonable doubt and wrote in "convincing the court", initialed the change and in parenthesis wrote "typographical error." Appellant contends that such statement by the trial court that the mitigating factor had not been proven beyond a reasonable doubt is not merely a typographical error but instead represents a misconception on the part of the trial court as to the proper standard to be applied to the assessment of mitigating factors. It is clear that a mitigating factor need not be proved beyond reasonable doubt but rather must be established only by the greater weight of the evidence. ***Campbell v. State***, 571 So.2d 415 (Fla. 1990); ***Nibert v. State,*** 574 So.2d 1059 (Fla. 1990). To use the phrase beyond a reasonable doubt and then classify such use as a "typographical error" simply defies logic. A typographical error occurs when one types "teh" for the word "the". Additionally, this was not something that the trial court was announcing off the cuff. Presumably, the trial court had spent a significant amount of time in the preparation of the sentencing order. At no time during the preparation of, or even the reading of the order did the trial court note this "typographical" error. Where the sentence of death depends upon a trial court exercising its undelegable duty and solemn obligation to properly consider any and all mitigating evidence, ***see Hudson v. State***, 708 So.2d 256 (Fla. 1998), this

Court cannot countenance cavalier treatment of clear errors in the sentencing documents.

Notwithstanding the trial court's use of an improper standard in evaluating this factor, the trial court's rejection of this statutory mitigator cannot be sustained by the evidence. During the penalty phase, appellant presented the testimony of Dr. Gutman, Dr. Eric Mings, and Dr. Brad Fisher. All of these doctors who had examined appellant extensively, concluded that appellant was suffering from a schizophrenic condition. Dr. Gutman testified that he believed within a medical certainty that appellant lacked the appreciation and capacity to conform his behavior to the requirements of law. Despite every attempt by the prosecutor to have these doctors discount appellant's mental problems, the evidence remained uncontroverted and clear. Although the state had a doctor appointed to examine appellant for the penalty phase, no such doctor testified. Presumably if that doctor had any different opinion than the doctors who did testify, the state would have presented them. A trial court is simply not permitted to reject such mitigation when it is presented in an uncontroverted fashion. ***Fead v. State***, 512 So.2d 176 (Fla. 1987); ***Cannady v. State***, 427 So.2d 723 (Fla. 1983) When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been

proved. ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla. 1990) Thus, it was error for the trial court to reject this mitigating factor.

In discussing the mitigating factor that the defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor, the trial court found that the mitigating factor was not present since there was no evidence to support or suggest this factor. In rejecting this factor the trial court stated:

> The record is totally devoid of any evidence of anyone else being responsible for the murder of the victim, other than argument of counsel. Assuming for argument purposes only that someone else killed the victim, the record is clear that the Defendant was a major participant in the underlying felony of the robbery of the victim and that he had a mental state of reckless indifference to human life.

(Vol. XIII, R 730-732; Vol. XVIII, R 1605) This statement by the trial court is simply incorrect. The record contains the judgment of Harry Thomas wherein he pled guilty to the second degree murder of Wilma Martin. The indictment that was returned charged both appellant and Harry Thomas with the murder and robbery of Wilma Martin. Additionally, one of the state's witnesses testified that a shoe impression found at the scene was consistent with the shoes belonging to Harry Thomas. Further, the affidavit filed in support of the arrest warrant for

appellant, clearly details evidence of Harry Thomas' participation in this offense. The trial court's statement that there was no evidence in the record except argument of counsel is incredible. Because the trial court's rejection of this mitigating factor was based on a total misunderstanding of record evidence, his rejection of this mitigating factor cannot be sustained.

Defense counsel proffered as a non-statutory mitigating factor the fact that "a great deal of the Defendant's behavior is motivated by his false belief that he suffers from an untreated venereal disease, which is slowly driving him insane and killing him." In rejecting this non-statutory mitigator, the trial court made the following statement:

> This assertion is made only through argument of defense counsel; there is no competent evidence to support this allegation, and in fact, defense admits that the premise or basis of this claim (of disease) is false (see Sentencing Memorandum, p.15, paragraph 5). The court does not find this mitigation to exist based upon the totality of the evidence as presented.

(Vol. XIII, R 737; Vol. XVIII, R 1607) This statement by the trial court is simply incorrect. Each of the doctors who testified during the penalty phase noted appellant's preoccupation with the false notion that he suffered from gonorrhea since age 16 and that such untreated disease was affecting all of his actions. The

jail nurse confirmed that appellant on several occasions had requested treatment for gonorrhea when in fact he did not suffer from it. To conclude that there is no evidence other than argument of counsel concerning appellant's unnatural preoccupation with this is simply incredible. While the premise may be false, it is still a very real thing that appellant is doing. The trial court rejection of this factor which was uncontroverted and established by a reasonable quantum of evidence, cannot be sustained.

Given the numerous factual and legal errors in the trial court's sentencing order this Court has no option but to remand the cause for re-sentencing.

POINT V

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 17, OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

In reviewing a death sentence, this Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if the death penalty is appropriate. ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988) In the instant case, the trial court found two aggravating factors, that the capital murder was committed in the course of a robbery[2] and that the murder was committed in a heinous, atrocious and cruel fashion. The trial court found several mitigating factors and there also exists valid mitigating circumstances, the proof of which is uncontroverted. This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973);

[2] Appellant is contending that there was insufficient evidence to support a robbery conviction and that the state never proved that any property was taken from the victim through force or violence. ***See*** Point III, ***supra***.

Holsworth v. State, 522 So.2d 348 (Fla. 1988) A comparison of the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionally warranted in this case. ***Blakely v. State***, 561 So.2d 560 (Fla. 1990) (death sentence was disproportionate despite finding two aggravating circumstances; heinous, atrocious and cruel, and cold, calculated and premeditated); ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988) (death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); ***Farinas v. State***, 569 So.2d 1425 (Fla. 1990) (death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the commission of a kidnapping, and the capital felony was especially heinous, atrocious and cruel); ***Fitzpatrick v. State***, 527 So.2d 809 (Fla. 1988) (death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances); ***Wilson v. State***, 493 So.2d 1019 (Fla. 1986) (death sentence not proportionately warranted despite trial court's proper finding of two aggravating circumstances and no mitigating circumstances).

In ***Kramer v. State***, 619 So.2d 274 (Fla. 1993) this Court held that the death

penalty was disproportionate despite findings by the trial court that the murder was heinous, atrocious and cruel, and that the defendant had a prior conviction for a violent felony. In that case, the evidence demonstrated that Kramer systematically pulverized the victim as he tried to get away and fend off the blows. Kramer delivered a minimum of nine to ten blows; none but the final two would have been fatal. The evidence showed that the attack began in an upper portion of an embankment and proceeded down approximately fifteen feet to the culvert, and then further down the culvert to the final resting place of the victim. The final blows which were delivered with a concrete block, were inflicted while the victim's head was lying against the cement. Additionally, the prior violent felony that Kramer had was a near identical attack on a previous victim with a concrete block. Despite these facts, this Court had no problem in reducing the penalty to life where these two aggravating factors were offset by the mitigation including Kramer's alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison. In the instant case, while the factor of heinous, atrocious and cruel is present, the remaining aggravating factor is a factor that exists in nearly every felony murder. As the trial court noted in its findings of fact, there was very little evidence of any premeditated design to affect the death of the victim in this case. Against these

two aggravating factors, appellant presented an overwhelming amount of mitigating factors: testimony regarding his mental status including the unanimous and uncontroverted diagnosis that appellant is a schizophrenic with paranoid delusions, that appellant suffers from long term alcohol and drug abuse, as well as appellant's delusional preoccupation with the false belief that he suffers from long term gonorrhea which is systematically killing his brain. The fact that one of the aggravating circumstances in this case was heinous, atrocious, or cruel does not preclude this Court's finding that the sentence of death is disproportionate. ***See Morgan v. State***, 639 So.2d 6 (Fla. 1994) (where defendant crushed the victim's skull with a crescent-wrench and a vase and stabbed her approximately sixty times and also bit her breast and traumatized her genital area thus proving that the murder was heinous, atrocious, or cruel, substantial mitigation including the age of the defendant and his mental status made the death penalty inappropriate); ***Nibert v. State***, 574 So.2d 1059 (Fla. 1990) (even when victim suffered multiple stab and defensive wounds and death was heinous, atrocious, or cruel, substantial mitigation, including diminished capacity, may make the death penalty inappropriate); ***Smalley v. State***, 546 So.2d 720 (Fla. 1989) (given substantial mitigation, death penalty was inappropriate even though killing was heinous, atrocious, or cruel).

The death penalty imposed upon appellant is disproportionate when compared to other similar murders. This Court should vacate the death penalty and remand the cause for re-sentencing to life.

CONCLUSION

Based on the foregoing reasons and authority, Appellant respectfully requests this Honorable Court to reverse his judgment and sentences and remand with instructions to discharge him. Alternatively, Appellant requests this Honorable Court to grant a new trial or remand for re-sentencing to life.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Sonny Ray Jeffries, DC#X18736, Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 3rd day of March, 2000

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MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 point.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER