IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,211

LABRANT D. DENNIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

INITIAL BRIEF OF APPELLANT

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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

INTRODUCTION

This is a direct appeal from judgments of conviction and sentences of death, entered following a jury trial before the Honorable Manuel A. Crespo of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R." and the transcript of the proceedings as "T."

STATEMENT OF THE CASE

Labrant Dennis was arrested on April 30, 1996 and charged with the murders of Marlin Barnes and Timwanika Lumpkins, burglary of Barnes' apartment, and criminal mischief. He was represented *pro bono* by Ronald A. Guralnick, Esq. He was convicted after a jury trial, on October 28, 1998, and, on February 26, 1999, was sentenced to death for each of the two murders.

STATEMENT OF THE FACTS

The Crime Scene

On the morning of Saturday, April 13, 1996, Marlin Barnes and Timwanika Lumpkins were found lying severely beaten in Mr. Barnes' apartment at the University of Miami. Mr. Barnes was a linebacker for the University of Miami football team. (T. 3096). He shared the two-bedroom apartment with two other

football players -- Earl Little and Trent Jones. (T. 3159-60, 4195).[1]

The crime was reported by Mr. Barnes' roommate, Earl Little. The night before, Little had loaned his Ford Explorer to Barnes, who wanted to go to a celebrity event on South Miami Beach. (T. 3170). Mr. Little told Mr. Barnes he needed the vehicle the next morning to pick up his daughter. (T. 3170). Mr. Little spent the night at a girlfriend's nearby apartment. (T. 3170). When he returned to the dormitory the next morning, some time between 7:00 and 7:30 a.m., he noticed that the Explorer was tilting to one side and that a tire had been punctured. (T. 3171-74, 3189-90). He went up to the apartment, which was on the third floor of the building. Although the front door was unlocked, he had difficulty opening it. (T. 3175). When he finally managed to push it open a bit, he saw Mr. Barnes lying on the floor, against the door. (T. 3177). The floor was covered with blood. (T. 3175). When Mr. Little called his name, Mr. Barnes responded and turned his head; he was breathing hard. (T. 3177-79). Mr. Little ran to his girlfriend's apartment, phoned the police, and then ran back to the dorm, arriving there a couple of seconds before the police. (T. 3179).

Both victims were still alive when the police arrived at 7:34 a.m. (T. 3205, 3213, 3215, 3329, 4217).

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[1]Another roommate, Ray Lewis, had recently decided to become a professional football player and had moved to a residence off campus. (T. 3097-98, 3160). Lewis remained very close friends with Barnes and stayed at the apartment off and on. (T. 3097-98, 3413).

Ms. Lumpkins was lying face down on the floor of one of the bedrooms. (T. 3212-13, 3238-39). She had been struck several times on the head with a blunt object, resulting in severe fractures of the skull. (T. 4413-22). She had also been struck on the back and on the left shoulder. (T. 4427-29). Injuries to her lips were consistent with having been face down on the floor when she was hit on the back of the head, and one of her front teeth was chipped. (T. 4426-27). There were injuries to her hands, consistent with an attempt to shield herself. (T. 4430-33). There were two large marks on the wall of the bedroom, which could have been caused by the impact of a shotgun barrel. (T. 3275, 3278, 3281). An earring was found on the floor next to the bed, and another 12 inches under the bed. (T. 3275-76). Ms. Lumpkins was taken to a trauma center, where she died after attempts at treatment failed. (T. 3244, 4460). The cause of death was blunt trauma to the head. (T. 4435).

Mr. Barnes was lying in the front of the apartment with his head against the front door. (T. 3210). He had been struck several times in the face and forehead, resulting in numerous lacerations and bruises, a broken nose, a fractured palate, the breakage and removal of several teeth, and a thin fracture to the occipital bone. (T. 4435-37, 4441, 4443). There was also a small abrasion near the left elbow, a bruise near the left wrist, and abrasions on the right hand. (T. 4444-45). He died some time after the paramedics arrived. (T. 3237, 3243-44).

The victims were fully clothed. (T. 3276, 3371). Barnes still had his boots on.

(T. 3371). However, his pants were unbuttoned and his penis was protruding through the fly of his underwear. (Exhibit 11).

It appeared that Mr. Barnes was knocked down and then struck several times as he lay on the carpeted area in the living room. (T. 4442-43, 4463-64). He then got up and moved around in the front of the apartment -- leaving blood on the dining table and chairs, a desk, and the walls -- but quickly collapsed where he was found, against the front door. (T. 4453, 4457-58, 4563). The medical examiner testified that Mr. Barnes would have bled "quite briskly" as a result of the wounds to the face, and would have been rendered incapable of standing in "a very relatively brief time." (T. 4458-59).[2] He bled to death as a result of the multiple head injuries. (T. 4447, 4457).

There were a few drops of blood on the threshold, from a source directly above, indicating that at some point Mr. Barnes may have been standing in the open doorway. (T. 3321, 4535-36). This was consistent with having been struck in the face while he was standing at the door, or with having tried to step outside after being struck. (T. 3321-22, 3329, 4594-95, 4605).

Although there was a large pool of blood around Mr. Barnes in the area inside the front door, no tracks were found outside. (T. 4386, 4561-62). Because of this, and

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[2]In deposition, the medical examiner testified that it would take as little as four to five minutes or "as much as 10 to 15 minutes" for the victim to bleed out, that is, until there was insufficient blood in the body to supply the vital organs, resulting in death. (R. 929-30).

because the back door was locked, the police concluded that the assailant or assailants must have left through the front door shortly before Mr. Barnes collapsed. (T. 4457, 4561-63). Detective Poitier testified that the evidence indicated that the assailant left shortly before Mr. Barnes was found by Mr. Little. (T. 3375).

The police subsequently determined that the weapon used was a broken, short-barreled shotgun recovered two weeks later from a sewer in northern Dade county, many miles from the scene of the crime. No shots had been fired. The weapon had been used as a club. Several of the victims' injuries were consistent with having been struck by various parts of the shotgun. (T. 4415-16, 4423-29, 4435-41, 4444-45, 4464). Two fragments of the trigger guard, and several wood fragments which could have come from the shotgun's forearm were found in the apartment. (T. 3287-88, 3862, 4489-90). The two metal fragments matched the front portion of the gun's trigger guard. (T. 3856, 3863-64).

An unfired shotgun shell was found on the floor in the front of the apartment. (T. 3289, 3297, 3323). There was a slight indentation on the primer. (T. 3324, 4498). The state's expert testified that the mark could have been caused by an attempt to fire the gun, or by slamming the weapon against something, but he did not know which of these two explanations was correct. (T. 4499, 4505). It was not possible to determine whether the shell had been cycled through the gun. (T. 4498).

Two gold bracelets and a championship ring were found near Mr. Barnes. (T.

3289, 3297, 3362, 3377). He had a gold chain around his neck, and $59 in cash in his pockets. (T. 3363-64). Several items of jewelry, an expensive-looking watch, and $550 in cash were found in the bedroom where Ms. Lumpkins was lying. (T. 3364-65). Her purse was also found there. (T. 3365). It contained $103 in cash, a beeper, and an address book or diary. (T. 3366).

Aside from those of the victims, the only fingerprints found were those of a student who had attended a party at the apartment a week earlier. (T. 4190-91).

Club Salvation

On the night before the homicides (April 12-13, 1996), Marlin Barnes and Timwanika Lumpkins had been at a celebrity event held at Club Salvation on South Miami Beach. They had arrived separately, and there was no evidence that either knew of the other's plans to be there. (T. 4076). Mr. Barnes drove Earl Little's Explorer to the club, accompanied by other teammates. They got there about midnight. (T. 3081, 3084, 4078). There were several hundred people at the club (up to 2,000). (T. 3015, 3132-33). Mr. Barnes went upstairs to the VIP section, where there were some 150 to 500 people. (T. 3016, 3085, 3133). There he ran into Ms. Lumpkins, whom he had known since high school. She had come with her friend Marissa Roberts. (T. 3122-23, 3126). They were together for the rest of the night and were openly affectionate. (T. 3127-28).

At about 4:00 a.m., Mr. Barnes moved the Explorer closer to the club. (T. 3087-

88, 4080). Later he, Ms. Lumpkins, and several other persons left the club together and walked over to the Explorer. (T. 3087-89).[3] Both tires on the right side had been punctured. (T. 3091). It was about 4:30 a.m. (T. 3130-31, 3134).[4]

Since the vehicle belonged to Earl Little, Mr. Barnes and his companions thought someone was "messing with Earl or upset with Earl." (T. 3102-3). They pushed the Explorer to a nearby Chevron station and called for a tow. (T. 3090-91).

The tow truck left the Chevron station at about 5:00 a.m., with Mr. Barnes and Ms. Lumpkins in the cab. (T. 3502-3, 4083). They arrived at the dormitory at about 5:30 a.m. (T. 4083). After dropping off the Explorer, the tow truck driver left, some time before 6:00 a.m. (T. 3506-7). Aside from a group of young people at an apartment building about 150 or 200 yards away, the driver did not see anyone around. (T. 3508). He had not noticed anyone following his truck from Miami Beach to the University of Miami. (T. 3507).

Labrant Dennis and Timwanika Lumpkins

Labrant Dennis was twenty-four years old at the time of the crimes. He had attended college for a year, but dropped out to join a rap group (The Dogs). The

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[3]By this time Ms. Lumpkins' ride, Marissa Roberts, had already left. (T. 3129). Ms. Lumpkins was staying with her grandmother in South Miami, not far from the University of Miami campus. (T. 4022).

[4]Selma Wade, who left with a different group of friends, testified that she walked by the Explorer at about 4:30 a.m. and heard one of the tires hissing, but did not know then whose vehicle this was. (T. 3130-31, 3134).

group achieved some success -- a few of their songs made the charts -- before breaking up in 1994. (T. 4015, 4650-51, 4677-78). After this, Mr. Dennis worked at two golf resorts (Doral and then Grove Isle), supervising the department which "set up occasions." (T. 4682).

Mr. Labrant Dennis had been Timwanika Lumpkins' boyfriend, off and on, since 1992. (T. 4265, 4321-22). Ms. Lumpkins worked for a telephone company. (T. 3119-20). They had a young daughter (Antonesha).

Mr. Dennis also had a child by another woman, Watisha Wallace, whom he had been seeing even longer than Ms. Lumpkins. (T. 3566). Mr. Dennis supported Ms. Wallace, paying her bills and her car note, and sometimes lived with her. (T. 3567). They had a joint bank account. (T. 3568). Mr. Dennis also had more casual sexual relationships with several other women (including two of the state's witnesses -- Katina Lynn and Jennifer Jordan). (T. 4335-36).

Ms. Lumpkins also dated other men during the time she was dating Mr. Dennis. (T. 273, 280, 4137-38, 4233). She had known Marlin Barnes and Earl Little since high school. (T. 3168, 3189, 4255). Mr. Dennis had long suspected that she was having a sexual relationship with Mr. Barnes. Three or four times over the years he had asked his friend Jennifer Jordan a university basketball player, whether she had seen Mr. Barnes with a girl in a red car, whom he said was his baby's mother. (T. 3143-44, 3155). He said he wanted to know "if Marlon was fucking around with his

baby's mother." (T. 3148). In March 1996, he asked her where Marlin Barnes stayed, and who stayed with him. Ms. Jordan told him that Mr. Barnes stayed at Apartment 36C with two other football players, Ray Lewis and Earl Little. (T. 3148, 3153). Ms. Jordan never did see Ms. Lumpkins and Mr. Barnes together. (T. 3143).

Mr. Dennis and Ms. Lumpkins frequently quarreled and broke up, but would get back together again, after days or weeks of separation. (T. 4280, 4321-22). The state presented evidence (over defense objection) that on half-a-dozen occasions, Mr. Dennis had become very angry at Ms. Lumpkins, and had yelled at her. (T. 4256-78, 4318-20, 4291-99, 4309-10). On one of those occasions (in the summer of 1994), as he was moving his things out of their apartment, he threatened Ms. Lumpkins and her uncle with a pistol. (T. 4309-10). On another occasion (in October or November 1995) he had threatened to blow out the brains of a man who was waiting for Ms. Lumpkins in the parking lot of her aunt's apartment. (T. 4274). In April 1996, Ms. Lumpkins' friend Dekeisha Williams saw bruises on Ms. Lumpkins' neck. (T. 4331). None of these incidents led to an arrest. Mr. Dennis had no prior convictions.

The reason for these particular quarrels is unknown or obscure. (See Argument VI). To show the defendant's jealous character, the state also introduced the testimony of Katina Lynn and Maurice French. Ms. Lynn was a nude dancer whom Mr. Dennis had met at a club in 1994. (T. 4332, 4353). She joined his rap group and began a casual sexual relationship with him which continued until the time of his

arrest. (T. 4335, 4339, 4352). She was already involved with another man, Marlin McGhee, whom she considered her "main boyfriend" (T. 4336) and was the father of two of her four children (T. 4352). Over defense objection, Ms. Lynn testified that she had "problems" with Mr. Dennis because he was "jealous" that she continued to see Mr. McGhee. (T. 4336, 4338-39). (See Argument VII).

Mr. French managed a gym frequented by Mr. Dennis, Ms. Lumpkins, and Ms. Lynn. He gave his phone number to Ms. Lumpkins, because he wanted to set up a work-out schedule with her. (T. 3978). He testified (over objection) that Mr. Dennis called him to ask if he was dating Ms. Lumpkins. Mr. French said he was not. (T. 3984). Mr. Dennis was not yelling. The two men did not argue. (T. 3984-85).

In April 1996, Mr. Dennis, Ms. Lumpkins, and their child were staying at the home of Mr. Dennis' cousin Carolyn Williams. They had been living there for about two months, but Ms. Lumpkins would not stay there all the time. (T. 4622, 4633-34). Ms. Williams' boyfriend Jessie Pitts and her children also lived there. (T. 4019). On April 6, 1996, after another quarrel, Ms. Lumpkins moved out and went to stay at the home of her grandmother. Mr. Barnes borrowed Earl Little's Explorer to help her move. (T. 3167, 3519-21). The child remained at Ms. Williams' house. (T. 3540).

Labrant Dennis and Keith Bell Go To the Police; Alibi Witnesses

On the day he discovered the crimes, Earl Little told the police that Ms. Lumpkins' former boyfriend was a member of a rap group called The Dogs. (T. 3186).

The university's coaching staff put out the word that the police wanted to speak to The Dogs about the homicides. (T. 4233-34). A friend of Mr. Dennis, Keith Bell, heard of this from a friend on the football team. (T. 3413, 3936, 4654). Mr. Bell was a close friend of both Mr. Dennis and Ms. Lumpkins. (T. 4649, 4652). He had been a member of The Dogs, and worked with Mr. Dennis at the Doral and Grove Isle golf resorts. (T. 4650-51, 4663-64). He also knew Marlin Barnes, through Mr. Barnes's mother, who was a security guard at the Doral. (T. 4652).

Keith Bell called Mr. Dennis and told him about the call he had received. (T. 4654-56, 4666-68). They decided to go to the police. Mr. Dennis came by to pick up Mr. Bell. He was with his little girl. (T. 4669). After dropping the child off at the house of Carolyn Williams, they went to the police station, arriving there about 3:00 p.m. (T. 4654-55).

After waiving his *Miranda* rights, Mr. Dennis was interviewed by Detective Romagni, while another detective spoke to Mr. Bell. Mr. Dennis said that he and Ms. Lumpkins had had a relationship for about five years and had a child together. They would argue over "extracurricular dating on both parts" and would sometimes get violent with each other. (T. 4019). He said that he had slapped Ms. Lumpkins once, and on one occasion she had slammed a door on one of his fingers. (T. 4020). He knew who Marlin Barnes was, and believed he lived on the University of Miami campus, but had never been to his apartment. (T. 4020). The previous week Mr.

Dennis and Ms. Lumpkins had argued because Ms. Lumpkins came home after midnight. She said she had been with Mr. Barnes. (T. 4021). Mr. Barnes came to the house in a black Ford Explorer and helped Ms. Lumpkins move to the house of her grandmother. (T. 4021-22). Over the course of the following week, Mr. Dennis spoke with her on the phone and was trying to reconcile with her. (T. 4022).

On the day before the homicides (Friday, April 12, 1996), Mr. Dennis went shopping with Ms. Lumpkins and their child. (T. 4022). Ms. Lumpkins bought a black dress and a pair of black high heel shoes. (T. 4022). He dropped her off at the home of her grandmother. (T. 4022, 4023). Later that evening he called her to ask if he could leave the child at the grandmother's house the following day, because he had to work that day. (T. 4023). Ms. Lumpkins told him she was going out with a friend of hers (Marissa Roberts), and asked him to drop her off at a location where the friend could pick her up. (T. 4028). He agreed and took her to the rendezvous location. (T. 268-70, 4028-29). He did not ask where she was going, because he was trying to mend the relationship and did not want to pry. (T. 4029).

After dropping Ms. Lumpkins off, Mr. Dennis went to a bachelor party. Keith Bell was also there. (T. 4672, 4676-77). Mr. Dennis was at the party from 11:15 p.m. to 1:30 a.m. (T. 4030, 4077, 4092). He then went home, changed, and, around 2:00 a.m., went to the celebrity event at Club Salvation. (T. 4030-31). He did not know that Ms. Lumpkins or Mr. Barnes would be there. (T. 4030). He was at the club for

about an hour. (T. 4033). He did not see anyone he knew. (T. 4033). After leaving the club, he went straight home. He got home some time between 4:00 and 4:30 a.m. and stayed there until about 9:00 a.m. (T. 4199, 4202-3, 4034-35).

At about 8:30 a.m., he called the house of Ms. Lumpkins' grandmother, to see if he could drop off the child. (T. 4034). He left with the child at about 9:00 a.m. and arrived at the grandmother's house at about 10:00 a.m. (T. 4035). Ms. Lumpkins was not there. (T. 4035). He waited for her and beeped her. (T. 4035). Since it was too late to go to work, he agreed to take the grandmother to the mall. (T. 4037). At about 1:00 p.m., he was paged by Keith Bell and they spoke on the phone. (T. 4038).

Mr. Dennis consented to being fingerprinted and photographed. Detective Romagni was looking for fresh injuries because of the violence evident at the murder scene. (T. 4146). There were no injuries or marks anywhere on Mr. Dennis's body or hands. (T. 4043-46).

Mr. Dennis also consented to a search of his car (a gray Mazda). (T. 4042). There were a few items of personal clothing in the car, and a cell phone. (T. 4043-44). Detective Romagni took photographs of the car. (T. 4047).

Mr. Dennis and Mr. Bell accompanied Detectives Romagni and Garafalo to the house of Carolyn Williams, where the detectives inspected Dennis' clothing. (T. 3821, 3825, 4045-46, 4157-58). Mr. Dennis returned to the station with the detectives. He was not arrested. (T. 4047).

The same day, the detectives also interviewed the two other adults at the house, Carolyn Williams and Jessie Pitts (both of whom testified at trial). (T. 4046). Ms. Williams and Mr. Pitts generally corroborated Mr. Dennis' statement that he had been home from about 4:00 a.m. until about 9:00 a.m.

Mr. Pitts had seen Mr. Dennis getting dressed to go out at about 11:00 p.m. or midnight. (T. 3525-26). Mr. Pitts went to bed, but got up around 4:00 a.m. to fix a bottle for his child. He looked out the window and saw Mr. Dennis' Mazda parked behind his vehicle. (T. 3528-29).

Ms. Williams had returned from visiting friends between 11:00 p.m. and midnight. Mr. Dennis was not there at that time. (T. 4637-39). He came home some time later. Around 2:00 a.m., Ms. Williams got up to go to the bathroom, and saw Mr. Dennis lying in the bed with his child. (T. 4640). She went back to bed and awoke at around 5:00 a.m., after Mr. Pitts got up to get his child a bottle. (T. 4641-42). She went to the kitchen to get a glass of water. The door to Mr. Dennis' bedroom was slightly open, and she could see him and his daughter watching television. (T. 4630, 4642). Ms. Williams spoke to Mr. Dennis off and on until past 7:00 a.m. (T. 4630-31, 4646). Mr. Dennis left the house some time after 8:30 a.m., and came back about noon. He told her to watch the child and left. (T. 4643-44).

Watisha Wallace's Nissan

While Detective Romagni completed his interview of Mr. Dennis, Detective

Sanchez canvassed the area of Club Salvation for witnesses. He showed the photographs of Mr. Dennis's Mazda to the attendant of the Amoco gas station located next to the club. The attendant, Nidia El-Djeije, said that she had not seen that car, but she had seen a suspicious Nissan in the early morning hours. (T. 3466, 3547). At about 4:00 a.m. she had noticed a gray Nissan parked on the station's premises and a black man standing beside it. (T. 3450-52). The man was wearing a hooded black sweater and black pants. (T. 3452, 3465, 3480-81). He wandered around the car, and lifted the hood, but did not seem to be trying to repair the engine. (T. 3451-52). Thinking that he might be stealing the car, Ms. El-Djeije called the police. (T. 3452). The man walked past the window of the gas station, heading in the direction of Club Salvation, but returned less than five minutes later and got into the car. (T. 3454-55). Ms. El-Djeije called the police again. (T. 3456). She could not identify the black man but described the car. (T. 3480). It was a gray, two door or four door, 1986 or 1987 Nissan. (T. 3463-64, 3469, 4095; Exhibit 128). She knew it was a Nissan because she saw the emblem in the front. (T. 3463-64). She told the police they would be able to identify it because it had no tag. (T. 3464, 3471).

The man drove away in the Nissan just as the police were arriving. (T. 3456). After speaking to Ms. El-Djeije, the officers drove off in the direction he had taken. (T. 3458). Just then, however, the Nissan returned. It initially parked across the street, but, less than five minutes later, it moved to the Amoco station, and parked

there, facing the Chevron station across the street. (T. 3458-60, 3462). Ms. El-Djeije called a friend at a local towing company, who arrived 15 or 20 minutes later, pulled up next to the Nissan, and told the man to leave. (T. 3460-62, 3492). The Nissan drove off. (T. 3492). At this time, Earl Little's Ford Explorer was still at the Chevron station, but already had been lifted onto a flat-bed truck. (T. 3493-94).

Mr. Dennis's girlfriend, Watisha Wallace, owned a 1992 Nissan. She was interviewed by Detective Romagni. On the weekend when the homicides occurred, Ms. Wallace went to Daytona Beach for the Black College Weekend with her friends Tracy Little and Shakia Cooper. (T. 3423, 3575). Before the trip, the three women met at the house of Shakia Cooper's grandmother, Sarah Finch. Mr. Dennis came by with his child Antonesha and spoke to Ms. Wallace for about half an hour. (T. 3427, 3429, 3435-36). Mr. Dennis came in his car and left in his car. (T. 3617). After Mr. Dennis left, the three women drove to Tracy Little's house in a rental car. (T. 3424, 3429). Ms. Wallace and Ms. Cooper left their cars car parked in front of Sarah Finch's house. (T. 3429, 3576). They finally left for Daytona Beach some time between 3:00 and 5:00 a.m. on Saturday. (T. 3429-30, 3575). Mr. Dennis spoke to Ms. Wallace on the phone several times while she was in Daytona Beach. (T. 3430-31). The three women returned to Miami on Sunday night. (T. 3430, 3576). Ms. Wallace's car was where she had left it, parked in front of Sarah Finch's house. (T. 3431, 3436, 3575, 3608, 3614). According to Ms. Wallace, Mr. Dennis would

sometimes drive her car, but could not have driven it while she was in Daytona Beach because she had not given him the key, and as far as she knew she owned the only set of keys to the car (T. 3575-76, 3582-84, 3605). Mr. Dennis was not the only person who would drive her car. She had loaned it to relatives, as well as to Zemoria Wilson and Joseph Stewart. (T. 3605-6).

Detective Romagni searched Ms. Wallace's Nissan and photographed it. (T. 4050, 4064). These photographs were subsequently shown to Ms. El-Djieje (about two weeks after she had seen the suspicious Nissan). She was not shown photos of any other vehicle. (T. 3548-49). These photos of Ms. Wallace's vehicle show a two-door, 1992 Nissan Sentra with tinted windows. (T. 3550, 3575). This model has a "much rounder body" than earlier models. (T. 3497). One of the photos shows a tag in the back window. (T. 3478; Exhibit 130). Ms. El-Djeije identified the vehicle in the photo as the Nissan she had seen, explaining that although the photo showed a tag, it was in the back window and that is probably why she had not seen it. (T. 3467, 3477, 3548).[5]

Several days after Mr. Dennis was arrested, the police seized the Nissan and searched it again. (T. 4060). The car was vacuumed, subjected to luminol testing, and

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[5]The defense unsuccessfully sought to exclude the identification of the Nissan, on the ground that it was unreliable because of the suggestive procedure of showing the witness photos of only one car. (R. 232, 234-35; T. 726-28, 731-33). (See Argument IV).

searched for hair, fibers, fingerprints, blood, and other evidence. (T. 4060, 4090). No evidence was found. (T. 4090-91). Accordingly, the Nissan was given back to Ms. Wallace. (T. 108-9, 3592).

At trial, Ms. Wallace was called as a witness by the state. Ostensibly to impeach her, the prosecution elicited, over defense objection, her admission that she had plead guilty to arson and insurance fraud stemming from her destruction of the Nissan. (T. 3593-94). These offenses occurred while Mr. Dennis was incarcerated. There was no evidence that he had anything to do either with the burning of the Nissan or the insurance fraud. (T. 2948, 2951, 4197-98). The Nissan was found burning in June 1996. An anonymous source, who was never identified, called the police and sent a letter together with a key to the car, explaining how the car came to be burned. (T. 2945-48, 3800, 4198). In October 1996, Ms. Wallace was arrested and eventually pled guilty to having hired someone to steal her car and burn it, and then reported it stolen. (T. 3593-94).

Joseph Stewart

Joseph Stewart owned the shotgun which was used in the homicides. He came to the attention of the police through his girlfriend, Zemoria Wilson, two weeks after the crimes. (T. 4117). Mr. Stewart worked at the Doral golf resort. He lived with his mother (a retired police officer), but sometimes stayed at Ms. Wilson's apartment. (T. 3621). Mr. Dennis was related to Ms. Wilson (she had two children by his uncle) and

occasionally visited her apartment. (T. 3625-26). Mr. Stewart also knew Mr. Dennis from his job at the Doral golf resort. He regarded him as an acquaintance rather than a friend. (T. 3626, 3704).[6]

According to Mr. Stewart, on April 7, 1996, Mr. Dennis and his brother came to Zemoria Wilson's apartment to show Ms. Wilson a video, and at that time Mr. Dennis asked Mr. Stewart if he had any guns he could borrow. (T. 3634-35). Stewart told him the only gun he had was a shotgun. (T. 3636). He claimed that he had found the shotgun about a year before the homicides in an "old abandoned Chevy." (T. 3629). The stock had been removed and the barrel was shorter than it was supposed to be. (T. 3630, 3632). The three men went to the home of Mr. Stewart's mother, where Mr. Stewart lived. (T. 3636-37). Stewart retrieved the gun from under his mattress and gave it to Dennis. (T. 3638).

Mr. Stewart told Mr. Dennis that he had tried the shotgun and it did not work, and he did not care if Mr. Dennis did not bring it back. (T. 3701-2). He also told Dennis that the gun was illegal because it was so short, and if he was caught with it he would "automatically got locked up." (T. 3638). Stewart gave Dennis a pillow case and a blue gym bag to put the gun in. (T. 3638-39).

According to Mr. Stewart, on the morning of the homicides (Saturday, April 13,

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[6]Mr. Stewart also knew Watisha Wallace and the mother of Marlin Barnes. (T. 3624, 3626-27). However, he said that he did not know Mr. Barnes or Ms. Lumpkins. (T. 3627, 3675).

1996), he received a phone call at work from the defendant.[7] He knew the caller was Mr. Dennis from the sound of his voice. (T. 3646). Dennis said he had "left that behind the bush" at Stewart's house. (T. 3645-46). Stewart assumed he was referring to the shotgun. (T. 3646). When he got home that afternoon, Stewart found the blue bag behind some bushes near the driveway. (T. 3648). Inside the bag was the shotgun, a knife, a pair of black pants, a sweatshirt, and a pair of black boots. (T. 3713, 3649-50, 3654). Stewart had not seen the knife before. (T. 3650). The trigger guard of the shotgun was broken and the wooden handgrip under the barrel had been broken up. (T. 3650). These had been intact when he gave the gun to Dennis. (T. 3639-40). Stewart did not notice any blood on the gun, the knife, or the bag. (T. 3687, 3689, 3708, 3728). He unscrewed the end cap of the gun and took the springs out. Shotgun shells fell out. He had not given these shells to Dennis. (T. 3651). Because "[s]omething just didn't feel right," Stewart threw the gun and the knife into a storm sewer located about a block and a half from his mother's house. (T. 3652-53).

The next morning (Sunday, April 14, 1996), Mr. Stewart was awakened by a phone call from Mr. Dennis, who wanted to know if he had found the bag. (T. 3655-56). Stewart told him he had and asked if Dennis wanted the clothes. Dennis told him he could throw them away. (T. 3656). They apparently did not discuss either the shotgun or the knife; Mr. Dennis had not told him to throw them away. (T. 3704-5).

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[7]Stewart's time card had been used to clock in at 6:32 a.m. (T. 3644, 3731).

Stewart threw the clothes and boots into a garbage dumpster behind a supermarket. (T. 3658). He kept the bag because there did not seem to be anything wrong with it. (T. 3658). He did not notice the stains on the bag. (T. 3677, 3687-88). He called Zemoria Wilson, who was in Chicago, and told her that he had got rid of the gun and the clothes. (T. 3653, 3660).

While Ms. Wilson was returning to Miami from Chicago on a Greyhound bus, she spoke to the driver about the University of Miami homicides. (T. 3417-18). The driver called the police. (T. 3419). After speaking to Ms. Wilson, two detectives went to the Doral golf resort, where Mr. Stewart worked. Ms. Wilson called him and warned him the detectives were on their way. He tried to leave but the officers arrived before he could do so. (T. 3663, 3718-19). He was interviewed by Detective Romagni. (T. 4052-53).

After relating his story to Detective Romagni, Mr. Stewart took the officers to the storm sewer where he had thrown the shotgun and knife. (T. 4053). His mother and Ms. Wilson were there. (T. 3664). The shotgun and knife were retrieved by the police. (T. 3666, 4054). They went to the dumpster where Stewart had thrown the clothing and boots, but it had already been emptied and these items were never recovered. (T. 3669, 4054-55). They then went to the house of Mr. Stewart's mother. Mr. Stewart gave Detective Romagni the gym bag. (T. 4131).

Based on fragments of the gun found at the scene of the homicides, and on the

injuries seen on the victims, the police concluded that the shotgun had been used to bludgeon the victims. (T. 3856, 3863-64, 4415-16, 4423-29, 4435-41, 4444-45, 4464, 4489). The knife was extremely dull, and presented no striations or unique marks; it was bent at the tip. (T. 4477, 4479). The state's expert testified that it could have been the object used to puncture the tires of the Ford Explorer. (T. 4483). There was blood on the gym bag which was consistent with that of Marlin Barnes. (T. 4572-73).

The day after his interview of Mr. Stewart, Detective Romagni arrested Mr. Dennis was arrested at Watisha Wallace's apartment. (T. 3574).

The police did not search Mr. Stewart's room or his car. He was not charged with anything. (T. 3712, 4134). The four shotgun shells, the end cap and the spring which Stewart removed from the gun, as well as a third fragment of the trigger guard were never recovered. (T. 3861, 4495).

Mr. Stewart testified that he did not commit the crimes and did not even know of them at the time he disposed of the gun, knife, clothes, and boots. (T. 3656, 3675). He said that he had not previously come forward with what he knew because he was afraid that he would be charged as an accessory, but now that he had given his information and testimony, he was no longer afraid of being arrested (T. 3628, 3661).

Bernadette Hardy and Deborah Scales

On the same day that Joseph Stewart was interviewed, the police also interviewed Bernadette Hardy, who lived at Zemoria Wilson's apartment, and

Deborah Scales, who lived next to Ms. Wilson. (T. 3913). It takes thirty minutes to an hour to drive to the apartment from the University of Miami campus. (T. 4196-97). According to Ms. Hardy, on the morning of Saturday, April 13, 1996, she was sleeping in Ms. Wilson's apartment with her ex-boyfriend Trenard, when she was awakened by a knock on the window. (T. 3889). She looked out and saw Mr. Dennis. (T. 3890). He was wearing a black sweater. (T. 3891). He did not have anything in his hands. (T. 3901). He was scratching his head. (T. 3891). He asked where Ms. Wilson and Mr. Stewart were. (T. 3890-91). She told him that Mr. Stewart was at his mother's house and Ms. Zemoria was in Chicago. (T. 3890-91). Mr. Dennis walked away. (T. 3891). Ms. Scales had also seen a black man banging on the window of Ms. Wilson's apartment, at about 7 a.m. (T. 3921-24). Ms. Hardy had initially told the police that Mr. Stewart was at the apartment on the morning of April 13, but she was "confused with my dates." (T. 3902).

Katina Lynn

According to Katina Lynn (the nude dancer who said the defendant was jealous of her main boyfriend) Mr. Dennis slept with her a couple of nights during the week before the homicides. He told her that Ms. Lumpkins had left him and was dating someone called Marlin. (T. 4345). He took her to a gun shop, saying that he had bought a shotgun and needed bullets for the gun. (T. 4344). She did not see what he purchased. (T. 4345). The gunshop owner could not remember what Mr. Dennis had

bought. (T. 4376-77).

Mr. Stewart Is Summoned to the State Attorney's Office

Two months after his initial interview by the police, Mr. Stewart was summoned to the prosecutor's office, to answer some questions. (T. 3719-20).[8] He told the prosecutor and the lead detective about an additional conversation with the defendant. (T. 3721, 4123). According to Mr. Stewart, after returning home from work on Sunday, April 13, 1996 (the day he had thrown the clothes and boots into the dumpster), he called Mr. Dennis and told him to come to Ms. Wilson's apartment. (T. 3657-58). When Mr. Dennis arrived (accompanied by his brother), Stewart told him, "that stuff that you gave me back I threw it away," and that he did not want to be a part of whatever was going on. (T. 3659). According to Stewart, Dennis said: "Don't worry about it. Nobody would think to come here. I just had to do what I had to do and I didn't even go in my car and something like that." (T. 3659). Stewart interrupted him, saying he did not want to hear about it. Dennis then said, "Well, I'm going to Channel Ten or something like that to clear my name." (T. 3659). Stewart testified that he did not tell the police about this initially because he was afraid and did not want to get himself "no deeper" than he already was. (T. 3674-75).

Stewart also disclosed for the first time that on the night of the homicides he

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[8]Outside the presence of the jury, the prosecutor stated that she told Stewart that he seemed to be hiding something, and asked him, "Weren't you with somebody? Didn't someone else see you, Joseph?" (T. 2937, 2973-74).

had been sleeping with a former girlfriend (Dorothy Davis) at his mother's house. (T. 3643). He said that he did not reveal this before because he was afraid that Zemoria Wilson would find out and be angry with him (T. 3674), but admitted on cross-examination that he had already told Ms. Wilson about it. (T. 3680).

Ms. Davis was interviewed by Detective Romagni. She told the detective that she had slept with Stewart twice in April, and could remember the days but not the dates. (T. 3752-57, 3765). They went over a calendar, and determined that she had spent the night with Stewart on April 12 and April 19. (T. 3789-90). Some time after the homicides, Mr. Stewart had told her that he was "kind of involved" in the University of Miami murder case, but she had cut him off because "I don't really like to know anything about him, if I can help it." (T. 3758, 3765, 3773-75). She had also spoken to Mr. Stewart's mother about the case. (T. 3748-49).

During voir dire examination of the prospective jurors, the prosecutor was approached by Venester Collier, a court reporter with over 10 years experience who was assigned to Judge Crespo's courtroom. Ms. Collier informed the prosecutor that she knew Dorothy Davis. (T. 2074). Ms. Collier was sworn and questioned by the court (outside the presence of the jury), to determine if she should be excused from duty as a court reporter in the case. Ms. Collier testified that Ms. Davis told her that she was an alibi witness for the person who had the weapon, but that after going over her calendar she believed she had not been with him at the time:

> She [Dorothy Davis] told me that the person who had the weapon that's involved in the case used her -- gave her name as an alibi witness and she said she gave a statement. But she said that after they had gone over her calendar, okay, because it happened so long ago, that she wasn't there at the time. That's all I remember.

(T. 2111-12). The court told Ms. Collier the defense would probably be calling her as a witness, and she agreed to be available for deposition. (T. 2115). That night Ms. Collier called Ms. Davis and had three phone conversations with her. (T. 4712-13). When deposed the next day, Ms. Collier was no longer sure about what Ms. Davis had told her. This led to redeposition of Ms. Davis, and a second deposition of Ms. Collier, this time before Judge Crespo. Ms. Collier was called as a defense witness at trial. She explained that at this point she no longer knew what Ms. Davis had told her and that she had simply answered the court's questions off the top of her head. (T. 4727-28). She admitted that she had told Ms. Davis that she would retract her testimony and say she knew nothing. (T. 4717). She also told Ms. Davis that she wanted to miminize her involvement, that she did not try to get Ms. Davis into trouble, and would not volunteer anything. (T. 4720).

Penalty Phase

During the penalty phase, the state presented the victim impact testimony of friends and relatives of Mr. Barnes and Ms. Lumpkins, as well as the testimony of Dr. Valerie Rao. Dr. Rao had not performed the autopsies but had reviewed the reports, and was the staff doctor on duty at the Medical Examiner's Office. (T. 5525-26,

5245). She testified that both victims had wounds indicating they had tried to defend themselves from the attack, and that the injuries would have been painful. Mr. Barnes would have been aware of what was going on until he lost consciousness as a result of the loss of blood. (T. 5242). Ms. Lumpkins would have experienced pain until the severe blow to the head which caused a hinge fracture. (T. 5235-36).

The defense presented the testimony of Mr. Dennis's two grandmothers and of his mother. They testified that he was a loving, affectionate son, grandson, and father, worked hard and took care of his children. (T. 5261, 5265-67, 5270-71, 5275, 5282-83). He did not smoke, use alcohol, or drugs. (T. 5266, 5276, 5279). He had not previously been in trouble with the police. (T. 5266, 5271, 5279).

Over defense objection that Mr. Dennis had no prior convictions (T. 5285-92), the state called Patrick McKeithan and Katina Lynn in rebuttal. Mr. McKeithan testified that in November 1995, Mr. Dennis had struck him on the head with a pistol. (T. 5296-5308). The incident was reported, but Mr. Dennis was not arrested. (T. 5300, 5306). Ms. Lynn testified that Mr. Dennis had assaulted her on three occasions and threatened to kill her if she was "messing" with her main boyfriend (Marlin McGhee) or somebody else, or if she tried to leave him. (T. 5310-26). She did not report any of these incidents to the police. (T. 5325).

SUMMARY OF ARGUMENT

I. The only evidence connecting Mr. Dennis to the crimes in this close, circumstantial case was the uncorroborated testimony of a person with involvement in the crimes. The court's failure to warn the jury that such testimony must be treated with great caution was fundamental error. II. The prosecutor's improper bolstering of the credibility of its witnesses through inadmissible hearsay, the opinion of an officer that the defendant was guilty, and the prosecutor's own unsworn testimony denied Mr. Dennis a fair trial. III. Mr. Dennis was denied a fair trial by the state's introduction of evidence that his girlfriend burned the car that the state contended was used in the crimes. Mr. Dennis had nothing to do with this incident; it had no relevance either to the case or to bias; it unfairly prejudiced the defendant, mislead the jury, and confused the issues; it was used to insinuate the existence of incriminating facts for which the state had no proof; and it was improperly introduced under the pretense of impeaching the state's own witness. IV. It was error to deny the motion to exclude the identification of Ms. Wallace's Nissan, where the unnecessarily suggestive procedure used gave rise to a substantial likelihood of misidentification. V. The state's impeachment of its own witness, Jessie Pitts, denied the defendant a fair trial. VI. The trial court erred in allowing the state to introduce unfairly prejudicial evidence of collateral misconduct. VII. The trial court erred in allowing the state to introduce testimony that the defendant had a jealous character. VIII. The

trial court erred in allowing the introduction of horrific autopsy photos that had little or no relevance to any disputed issue. IX. The trial court's sentencing order does not provide an adequate basis for appellate review and demonstrate's the unreliability of the decision to impose the death penalty, where the court relied on non-existent testimony, the procedure used to weigh the mitigators indicates they were never weighed as a whole, and the court relied on conjecture in finding that the defendant had a careful plan. X. The court erred in finding CCP where all the evidence shows that the killing was committed in a fit of rage and was not calculated. XI. The court erred in finding HAC because there was no evidence of intent to torture. XII. The court erred in giving little or no weight to the statutory mitigating circumstance that the murders were committed under the influence of extreme mental or emotional disturbance. XIII. The death sentence is disproportionate.

ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURORS THAT THEY SHOULD USE GREAT CAUTION IN RELYING ON THE TESTIMONY OF A WITNESS WHO (LIKE JOSEPH STEWART) WAS INVOLVED IN THE CRIME, WAS FUNDAMENTAL ERROR, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV.

Joseph Stewart was the state's essential witness. Without his testimony there was nothing to connect the defendant to the crimes. Stewart claimed that he gave the defendant the shotgun which (the police later determined) was used to commit the

homicides, and that the defendant returned the shotgun to him, together with a knife, black clothing, and boots -- all of which Mr. Stewart proceeded to throw away. He threw the shotgun and knife into a sewer. He got rid of the clothing and boots by throwing them into a garbage dumpster located behind a supermarket. (T. 3634-39, 3645-54, 3658). Stewart claimed he did this without knowing of any crime; according to him, he got rid of the evidence because "[s]omething just didn't feel right" and he did not want to be a part of it (T. 3652-54, 3693, 3709).

Mr. Stewart came to the attention of the police through his girlfriend, Zemoria Wilson. He told her of his involvement, she told a bus driver, and the bus driver called the police. (T. 3417-19, 3653, 3660, 3662-63, 4117). After speaking to Ms. Wilson, two detectives went to the golf resort where Stewart worked. Ms. Wilson called him and warned him the detectives were on their way. He tried to leave but the officers arrived before he could do so. (T. 3663, 3718-19). Stewart told the officers about the shotgun, knife and other articles, and showed where he disposed of them. (T. 3664, 3669, 4128). Mr. Dennis was arrested the next day. (T. 4055-56).

Two months later, Mr. Stewart was summoned to the State Attorney's Office where he was interviewed again by the prosecutor and by the lead detective, and was asked for more information (T. 3719-20), including whether he was with anyone at the time of the crimes (T. 2937, 2973-74). He now said, for the first time, that on the night of the homicides he had been sleeping with an ex-girlfriend, Dorothy Davis (T.

3642-43), and disclosed that he had a conversation with the defendant in which the defendant indicated he had not used his own car or "something like that" (T. 3659). Stewart had not revealed this initially, he said, because he did not want to get involved "no deeper" than he already was. (T. 3674-75, 3684-85, 3693). He had not previously come forward with what he knew because he was afraid that he would be charged as an accessory, but now that he had given his information and testimony, he was no longer afraid of being arrested (T. 3628, 3661).

It is clear that this essential witness had some involvement in the crimes -- at a minimum, the weapon used belonged to him and he got rid, not only of the weapon, but of other evidence as well. Without his story that the gun was momentarily out of his possession on the night of the crime, he would have been the prime suspect. It is also clear that he was trying to minimize his involvement. By his own admission, his initial statement to the police had not been completely full and candid, since, as he explained, he did not want to get in "no deeper." (T. 3675). When pressed, he came up with new information calculated to improve the state's case and exculpate himself (his alibi witness, the defendant's purported statement). (T. 3642-43, 3659).

No evidence was presented to corroborate Mr. Stewart's testimony concerning the borrowing or return of the gun, or his conversations with the defendant. According to Mr. Stewart, Zemoria Wilson and the defendant's brother were present when the defendant asked to borrow a gun (T. 3634-36), and the brother was present

when Stewart gave the gun to the defendant (T. 3636-39). However, neither Ms. Wilson nor the brother testified. No one, not even Mr. Stewart, witnessed the defendant return the gun and other items. According to Stewart, he found them in a gym bag left next to the driveway of his mother's house (T. 3648), and received a phone call from Mr. Dennis saying that he had left "that" there (T. 3645-46). Although there were records of phone calls indicating that Mr. Stewart and Mr. Dennis may have had conversations, the content of these conversations and of those which supposedly took place face-to-face were evidenced only by Stewart's testimony. His word was also the only evidence that the black clothes and boots had ever existed, since these were never recovered by the police.

The jurors should have been instructed to treat Mr. Stewart's testimony with great caution. The court's failure to do so was fundamental error and denied the defendant a fair trial and a fair penalty phase.

It is well established that the testimony of state witnesses who are involved in the crime must be closely scrutinized and treated with great caution, and the jurors should be instructed to that effect. *Padgett v. State*, 53 So. 2d 106, 109 (Fla. 1951); Fla. Std. Jury Instr. (Crim.) 2.04(b). The disfavor with which the law views such testimony arises from the well-known tendency of the witnesses to minimize their own responsibility and to escape blame by pointing the finger at someone else, *see Wolfe v. State*, 190 So. 2d 394, 395-96 (Fla. 1st DCA 1966), and the unreliability of

the testimony increases in direct proportion to the witness's attempts to distance himself from the crime, *see Lee v. State*, 115 Fla. 30, 155 So. 123, 129 (1934) (accomplice testimony was inherently weak and insufficient to convict, where instead of a full, free, and frank statement of their participation in the murder, the witnesses "were careful to place themselves in the light of curious friends [of the defendants] without knowledge of their criminal intentions"). Accordingly, the instruction should be given even if the witness denies being an accomplice. *U.S. v. Skandier*, 758 F.2d 43, 46 (1st Cir. 1985).

Although in the present case defense counsel failed to request the instruction[9], where (as here) the testimony of the witness is critical and uncorroborated, failure to give the cautionary instruction constitutes fundamental error. *See Tillery v. U.S.*, 411 F.2d 644 (5th Cir. 1969) (plain error requiring reversal not to give cautionary instruction where uncharged co-conspirator's testimony was the only evidence connecting the defendant with the offense); *U.S. v. Hill*, 627 F.2d 1052, 1053-55 (10th Cir. 1980) (failure to instruct that the testimony of accomplices must be carefully scrutinized, weighed with great care, and received with caution was plain error and

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[9]Counsel requested a circumstantial evidence instruction because the evidence was all circumstantial and Mr. Stewart's testimony was unreliable since "[a]ll of the physical evidence seems to point to Joseph Stewart. He owns it. He hid it. He lied about it. He withheld information, lied to the police." (T. 4797). The court gave a circumstantial evidence instruction, and read the standard jury instruction on weighing the evidence. (T. 4792-4800, 4812-18, 5013-16)

required reversal).

Stewart's uncorroborated testimony was "so critical that the traditional caveat as to its evaluation and use was an indispensable part of the court's charge," *Tillery*, 411 F. 2d at 647. His testimony was the only evidence linking the defendant to the crimes, and even with his testimony this was a close, circumstantial case.[10] There were no eyewitnesses to any of the crimes, and no forensic evidence directly linking the defendant to them. Nothing directly placed the defendant at the scene of the homicides. Indeed, there was evidence that Mr. Dennis could not have committed the crimes because he was elsewhere at the time they occurred.

Mr. Dennis's statement to the police that he had been at home from about 4:00 a.m. until after 8:30 a.m., was corroborated by the testimony of the two adults who lived with him, and who were interviewed by the police on the same day of the crimes. (T. 4199, 4202-3, 4034). Carolyn Williams testified that Mr. Dennis was at home from (at least) 5:00 a.m. to 8:30 a.m. (T. 4630, 4641-44, 4646). Jessie Pitts testified that he saw Mr. Dennis's Mazda parked outside the apartment at about 4:00 a.m. (T. 3528-29). This 4:00 a.m. to 8:30 a.m. period included the times when the crimes were committed at Club Salvation and the University of Miami. The tires of the Ford Explorer were punctured at Club Salvation at 4:30 a.m. (T. 3091, 3130-31, 3134). Mr.

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[10]The prosecutor's argument at trial was that Mr. Dennis "and no other man, had the motive, the opportunity, the means, the strength, and the premeditation necessary to carry out these crimes." (T. 3010, 4872, 4877).

Barnes and Ms. Lumpkins arrived at the campus apartment building in a tow truck at about 5:30 a.m. (T. 4083). They were found lying on the floor of the apartment some time between 7:00 and 7:30 a.m. by Earl Little. (T. 3189-90).

To counter the alibi testimony, the state called Bernadette Hardy and Deborah Scales to show that Mr. Dennis could not have been at home at 7:00 a.m., because at that time he was knocking on the window of Zemoria Wilson's apartment. (T. 3889-91, 3921-24). This testimony, however, itself raised a reasonable doubt as to Mr. Dennis's opportunity to commit the crimes. Ms. Wilson's apartment was several miles from the campus. Detective Romagni testified that, depending on the traffic, it takes thirty minutes to an hour to drive from the campus to the area of Ms. Wilson's apartment. (T. 4196-97). Accordingly, Mr. Dennis would have had to leave the campus no later than 6:30 a.m. in order to get to Ms. Wilson's apartment by 7:00 a.m. However, the testimony of Earl Little and the medical examiner indicates that the attack probably occurred only minutes before Mr. Little discovered Mr. Barnes, and is unlikely to have taken place as early as 6:30.

Earl Little testified that it took him five to ten minutes to run to a nearby apartment, report the crime, and run back to the dorm. (T. 3190-91). He got there a couple of seconds before the police arrived at 7:34 a.m. (T. 3179, 3205). Thus, it appears that the discovery took place much closer to 7:30 than to 7:00 a.m., which is also indicated by the fact that the police officer was working for the university at the

time (T. 3204), and surely did not need more than a few minutes to reach the scene. Mr. Barnes was still able to respond when Little called his name. (T. 3177), and was still alive when the police arrived (T. 3205, 3215). It is not consistent with the medical testimony to suppose that Mr. Barnes would have been conscious, or even alive, thirty minutes to an hour after the attack. The medical examiner, Dr. Gulino, testified that Mr. Barnes bled to death as a result of multiple head injuries. (T. 4447, 4457). Because of the nature of the wounds, unconsciousness and death would have resulted fairly quickly: Mr. Barnes would have bled "quite briskly," and would have been rendered incapable of standing in "a very relatively brief time" because of the insufficient blood supply to the brain. (T. 4457-59). It is clear that Dr. Gulino was referring to a period of only a few minutes. (T. 4457-59).[11] This would place the attack at some time between 7:00 and 7:15 a.m. If Mr. Dennis really was at Ms. Wilson's apartment at 7:00 a.m., he could not have been the perpetrator.[12]

A further difficulty in the state's case was the implausibility of the defendant

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[11]His deposition testimony confirms this: In deposition, Dr. Gulino testified that it would take as little as four to five minutes or "as much as 10 to 15 minutes" or a little longer to "bleed out," that is, until there was insufficient blood in the body to supply the vital organs, resulting in the victim's death. (R. 929-30).

[12]It is possible that Ms. Hardy and Ms. Scales may have confused the date that the defendant was at Ms. Wilson's apartment: they were interviewed more than two weeks after the crime, and Ms. Hardy said she had been confused about the dates when she initially related to the police the events of that weekend. (T. 3901-2). However, in that case there is nothing to contradict Ms. Williams and Mr. Pitts, who spoke to the police on the day the murders occurred.

committing these homicides without receiving so much as a scratch or bruise. Mr. Barnes was a linebacker for the University of Miami football team. (T. 3096). He was six feet tall and weighed 228 pounds. (T. 4435). Mr. Dennis, though athletic, is only 5'7" tall. (T. 4059). He was much smaller than Mr. Barnes and not much bigger than Ms. Lumpkins (5'5"; 142 pounds (T. 4413)). The weapon (a short-barreled shotgun with no stock), was very short. It hardly seems likely that someone as small as the defendant could have clubbed a linebacker without receiving some injury. Yet, within hours of the homicide, Detective Romagni inspected Mr. Dennis's body for injuries. (T. 4146). There were no scratches, no scrapes, no bruises, no marks or injuries of any kind. (T. 4043, 4146). Recognizing the difficulty, the prosecution theorized that Mr. Barnes had been struck a severe blow in the face immediately upon opening the door to the apartment, rendering him helpless. It based this on the fact that there were a few "straight down" drops on the threshold of the door, indicating that Mr. Barnes had been at the threshold as he bled. (T. 3321, 4535-36). However, the drops did not indicate whether Mr. Barnes had just opened the door, or was stepping outside after being attacked inside. (T. 3321-22, 3329, 4594-95, 4605).[13]

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[13]There was also other evidence inconsistent with the state's scenario of being struck upon opening the door, and which suggests that Mr. Barnes was surprised inside the apartment by someone who (unlike the defendant) did not have to knock on the door to obtain access. The photo exhibits show that Mr. Barnes' pants were unbuttoned and his penis was protruding from the fly of his underpants. (Exhibit 11). There is no indication in the record that this was the result of efforts to revive him at the scene. It is unlikely that he proceeded to open the door in that

Mr. Stewart's testimony did not directly address these reasonable doubts. His story was also inherently implausible. There is no apparent reason why Mr. Dennis would have rushed across town to deliver the gun and the other incriminating evidence to Mr. Stewart, who claimed to be not a friend, but a mere acquaintance. (T. 3626, 3704). Mr. Stewart had told Mr. Dennis that he did not want the gun back. (T. 3701-2). Was Mr. Dennis unable to find a sewer or dumpster on his own?

Acceptance of Mr. Stewart's uncorroborated story, which conveniently shifted suspicion from himself to the defendant, was essential to convict. A cautioning instruction was "an indispensable part of the court's charge." *Tillery* at 647.

In addition, a judicial warning was essential in view of the prosecution's efforts to give an official sanction to Stewart's testimony, and to make it seem that doubts about his reliability were resolved by the state's charging decisions. (See Argument II). The prosecution bolstered Stewart's credibility by eliciting the lead detective's testimony that witnesses he had interviewed, including Zemoria Wilson (who was never called to testify), corroborated what Stewart had said. (T. 4217). During closing argument, the prosecutor asserted that Stewart did not need an alibi because he had not been charged (T. 4943), and offered what amounted to her own unsworn testimony that Stewart was not pressured during the second interview to come up with additional

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condition. Rather, it appears that he must have been surprised inside the apartment (in deposition, the medical examiner suggested that he could have been about to go to the bathroom or about to have sex (R. 946-47)).

information inculpating the defendant (T. 4958-59). Thus, the jurors were led to believe that Stewart was a particularly trustworthy sort of witness. A cautionary instruction was necessary to place Stewart's testimony in "its proper light." *Tillery* at 648; *compare Boykin v. State*, 257 So. 2d 251 (Fla. 1971) (failure to give instruction not fundamental error where there was little doubt the jurors understood that the witness was to be closely scrutinized and critically considered), *vacated on other grounds*, 408 U.S. 940 (1972). Under the circumstances of this case, the failure to give the cautionary instruction in effect mislead the jury as to its essential task of evaluating the credibility of this witness. As stated in *Tillery*:

> [T]he jury must ponder the veracity of an accomplice's damaging testimony cast in its proper light. By failing to warn the jury about [the accomplice's] reliability in this case, the trial court presented the evidence to the jury in an improper perspective, and the jury may have felt bound to accept it as true.

411 F.2d at 648.

In a death penalty case, higher standards of due process and reliability apply. *See Allen v. Butterworth*, 25 Fla. L. Weekly S277, 279 (Fla. April 14, 2000) (U.S. Supreme Court has "repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases"); *Monge v. California*, 524 U.S. 721, 732 (1998) ("Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings.") (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)); *Mills v. Maryland*, 486 U.S.

367, 376-77 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); *Beck v. Alabama*, 447 U.S. 625, 638 & n. 13 (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.").

The jurors could not properly undertake the critical task of evaluating the testimony of the state's essential witness without knowing that his testimony had to be treated with great caution. The failure to warn the jurors constituted a fundamental deprivation of due process and rendered the verdict and sentencing recommendation unreliable. *See Tillery*; *Hill*.

II.

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE STATE'S IMPROPER BOLSTERING OF THE CREDIBILITY OF ITS WITNESSES WITH INADMISSIBLE HEARSAY AND OPINIONS, AND WITH THE PROSECUTOR'S OWN UNSWORN TESTIMONY, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENTS VI AND XIV.

Inadmissible Hearsay and Opinions

Over defense objection that the state was eliciting hearsay, the prosecutor was allowed to introduce the testimony of the lead detective that he knew of eyewitnesses to the defendant's abusing and threatening Ms. Lumpkins (T. 4204-10), and that he

had interviewed witnesses about the defendant's jealousy (T. 4209), the defendant's spying on her and "other persons" (T. 4209), the defendant's finding out where Mr. Barnes lived just months before his murder (T. 4209-10), the defendant's knowledge at the time of the murders that Watisha Wallace's's car was available that weekend and where it was left (T. 4210), the defendant's coming dressed in black to Zemoria Wilson's apartment at 7 a.m. asking for Joseph Stewart (T. 4210), and the defendant's possession of the murder weapon during the time of the murders (T. 4210).

Over defense counsel's hearsay objection, Detective Romagni also testified that witnesses he had interviewed, including Zemoria Wilson and Bernadette Hardy, had corroborated the statements made by Joseph Stewart. (T. 4217).

All of this was inadmissible hearsay. *See Postell v. State*, 398 So. 2d 851, 854 n. 5 (Fla. 3d DCA 1981); *Favre v. Henderson*, 464 F.2d 359, 362-64 (5th Cir. 1972); *Harris v. Wainwright*, 760 F.2d 1148 (11th Cir. 1985). Particularly egregious was the testimony that Zemoria Wilson corroborated Stewart's statements, since Ms. Wilson was not called to testify. Allowing this hearsay testimony violated the defendant's constitutional right to confront the witnesses against him. *Postell*.

Also over objection, the state was permitted to elicit Detective Hellman's testimony that he had concluded that the defendant committed the crimes because of "the domestic abuse history with the defendant and Ms. Lumpkins," and Detective Romagni's interview of Joseph Stewart. (T. 3377-79). This was not only inadmissible

hearsay, *Postell*, it was also an impermissible opinion as to the guilt of the accused, *see Glendening v. State*, 536 So. 2d 212, 221 (Fla. 1988) (an opinion as to the guilt or innocence of the accused is not admissible).

Unsworn Testimony of Prosecutor

The prosecutor offered what amounted to her own unsworn testimony that Stewart was not pressured during the second interview to come up with additional information inculpating the defendant:

> Nobody can suggest any motive whatsoever for Joseph Stewart pinning this murder on the defendant, if the defendant didn't do it.
>
> Joseph Stewart told that statement to myself and another state attorney on July 2nd in the State Attorney's Office. . . .
>
> Nobody ever threatened Joseph Stewart for being arrested for anything so the argument that Joseph Stewart came up with this because he was scared of getting arrested is observed [sic; absurd?]. . . .
>
> Joseph Stewart was out. Nobody ever said you are going to be arrested. Nobody ever said if you don't come up with some evidence you are going to be arrested. Nobody said it looks bad for you Joseph.
>
> Come on. Come on give us more.

(T. 4958-59).

This argument was patently improper and violative of the rules of ethics. *See* R. Regulating Fla. Bar. 4-3.4(e) ("A lawyer shall not in trial, . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of the cause, the credibility of a witness, . . . or the guilt or innocence of the accused."); *Thompson v. State*, 318 So. 2d 549 (Fla. 4th DCA 1975);

Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); *see also Fryer v. State*, 693 So. 2d 1046 (Fla. 3d DCA 1997); *Marrero v. State*, 478 So. 2d 1155 (Fla. 3d DCA 1985). Although defense counsel failed to object, this unsworn testimony vouching for the credibility of the state's essential witness and the propriety of the state's investigative procedure, went to the foundations of the case. The crucial issue at trial was the credibility of Mr. Stewart. The prosecutor's improper argument, together with the other impermissible bolstering to which counsel did object, compromised the jury's ability to evaluate the evidence and denied the defendant a fair trial.

III.

MR. DENNIS WAS DENIED A FAIR TRIAL AND A FAIR PENALTY PHASE BY THE STATE'S INTRODUCTION, UNDER THE PRETENSE OF IMPEACHING ITS OWN WITNESS, OF EVIDENCE THAT THE DEFENDANT'S GIRLFRIEND, WATISHA WALLACE, BURNED THE CAR WHICH THE STATE CONTENDED WAS USED IN THE CRIMES, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV.

The Prosecution's Problem: Unsatisfactory Proof for an Important Fact

One of the state's main contentions below was that Mr. Dennis did not use his own automobile during the commission of the crimes, but instead drove a Nissan owned by his girlfriend Watisha Wallace. (T. 3018-20, 4826, 4868-69, 5373). The prosecution considered this point to be not only "important and essential"(T. 2956), but the "main crux" of its case (T. 2957). The point was important to the state's argument that the crimes were carefully planned to avoid detection, and thus not only

premeditated but CCP. (T. 4826, 4968, 5373). And it was a significant part of the state's more basic contention that Mr. Dennis was the perpetrator of the crimes: If it could be shown that he actually used Ms. Wallace's car that night, this would, the state argued, undermine his alibi (T. 4868) and lend credibility to the state's star witness, Joseph Stewart, who claimed, among other things, that the defendant told him he had not been driving his own car or "something like that" (T. 3659).

However, besides Stewart's belated revelation, the evidence that Mr. Dennis actually used the Nissan on the night in question was entirely circumstantial and inconclusive. It consisted, first, of the fact that a suspicious black man in a gray Nissan was seen in the area of Club Salvation at about the time someone punctured the tires of Earl Little's Ford Explorer. When a couple of weeks later the police showed photos of Ms. Wallace's Nissan to the gas station attendant who had reported the suspicious Nissan, she said it was the car she had seen. (T. 3477, 3548). But she could not identify the driver (T. 3480), and her identification of the Nissan was of doubtful reliability because, among other things, the car she originally described was a significantly different model of Nissan (T. 3497), she was not shown photos of other Nissans, and as Detective Sanchez testified, "there must be thousands of Nissans gray in color or two doors, identical," in Dade County (T. 3549).[14]

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[14]Indeed, because of the suggestive procedure used, the identification was so unreliable that it should have been excluded, as defense counsel argued (R. 232, 234-35; T. 727-28) (see Argument IV).

In order to suggest that Mr. Dennis could have driven the Nissan, the state also presented evidence that he had a close relationship with Ms. Wallace, sometimes used her car, and knew where it was parked on the night in question. Ms. Wallace had been his girlfriend for five-and-a-half years (during the same time that he was seeing Ms. Lumpkins), and they had a child together. (T. 3566-68). He helped pay her bills (including her car payments), sometimes lived with her, and occasionally used her Nissan (as did Joseph Stewart, whom Ms. Wallace also knew). (T. 3566-68, 3575). On the weekend when the crimes were committed, Ms. Wallace had been out of town with her friends Tracy Little and Shakia Cooper. (T. 3423, 3575). She had left her Nissan parked in front of the house of Shakia Cooper's grandmother, as Mr. Dennis knew, since he came by to see Ms. Wallace before she left. (T. 3427-30, 3435-36, 3575-76). However, when Ms. Wallace and her friends returned from their trip, the Nissan was still parked in the same spot. (T. 3431, 3436, 3575, 3608, 3614).

No evidence was found in the car itself. The Nissan was searched and photographed by Detective Romagni (T. 4050, 4064), and was later seized by the police and subjected to a thorough search: It was vacuumed, luminol tested, and searched for blood, hair, fibers, fingerprints and other evidence. (T. 4060, 4090). No evidence was found. (T. 4090-91). Since nothing was found, the police returned the Nissan to Ms. Wallace. (T. 108-9, 3592).

In summary, the available proof of the state's "important and essential" point

was weak and problematic, if not legally insufficient. A reasonable juror might well find that something was lacking. The prosecution apparently thought so: It chose to clinch its argument by insinuating that if evidence was lacking, that was the fault of someone closely connected to the defendant, namely, Ms. Wallace, who had either destroyed the evidence, or was concealing the truth, or both. (T. 3593-94, 4869).

The Prosecutor's Solution

Over defense objection, the state was permitted to call Ms. Wallace to the stand and elicit her admission that she had plead guilty to charges of arson and insurance fraud stemming from her destruction of the Nissan. (T. 3593-94). Through Ms. Wallace, as well as two witnesses who investigated the arson and fraud, the jury learned that some time after the vehicle had been returned to her by the police, Ms. Wallace hired someone to burn it and then falsely reported it stolen. (T. 3593-94). The prosecution also presented testimony that the police discovered Ms. Wallace's involvement through an anonymous source, who was never identified. The anonymous source called the police and sent a letter together with a key to the car. (T. 2945-48, 3800, 4198). Over defense objection, the prosecutor also introduced several photographs of the burned-out car. (T. 3595-98; Exhibits 132-134).

In addition to objecting at trial as the evidence was introduced through Ms. Wallace (T. 3569-70, 3576-88, 3593-94, 3595-96), Detective Stafford (T. 3793-96), and insurance investigator Robert Love (T. 3839), defense counsel had also moved in

limine to exclude all evidence and testimony concerning the arson and fraud case (T. 2945-57, 2077-83, 2988-92).[15]

In responding to the defense motion, the prosecutors acknowledged that there was no evidence that Mr. Dennis, who was incarcerated at the time, had anything to do either with the destruction of the Nissan or the insurance fraud (T. 2948, 2951), and promised that evidence concerning the burning of the Nissan would be introduced solely to impeach Ms. Wallace (T. 2948-49, 2951). The prosecutor explained that the state would call Ms. Wallace to the stand and, if she said anything helpful to the defendant the state would introduce the car-burning incident to show her bias. (T. 2951). The prosecution anticipated that Ms. Wallace would give testimony that was helpful to the defendant because she was "claiming he didn't use her car." (T. 2948-49).

Defense counsel objected that the destruction of the Nissan was irrelevant, that its probative value was substantially outweighed by the unfair prejudice, and that it was improper to inject this incident into the trial through the device of impeaching the state's own witness. Furthermore, defense counsel argued, the state's argument was disingenuous and, regardless of the ostensible purpose of introducing this incident, the jury would be led to believe that the car was burned in order to destroy evidence that

[15]The issue was argued again in defendant's motion for a new trial. (T. 5082).

it was used in the homicides (T. 2945-47, 2954-56, 2979-80, 2991-92).

The trial court ruled that the state could question Ms. Wallace about this incident, but that the jurors would be instructed not to infer that the defendant was guilty of burning the car. (T. 2978, 2981-82, 2988-89).

The state called Ms. Wallace and began by eliciting testimony concerning her close relationship to the defendant, his occasional use of the car, and her leaving the car in Miami on the weekend of the homicides (T. 3565-76), all of which was also testified to by other witnesses (T. 3422-36, 4340). The prosecutor then asked Ms. Wallace whether Mr. Dennis "could" have used her Nissan while she was away. Ms. Wallace said "No." (T. 3576).

Having elicited the anticipated answer, the prosecution proceeded to introduce, over defense counsel's renewed objection, Ms. Wallace's admission that she had plead guilty to burning the Nissan (T. 3593-94, 3598).[16] Also over defense objection, the

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[16]The trial court's ruling was based in part on the prosecutor's representation that -- contrary to Ms. Wallace's claim (made outside the presence of the jury) that she as far as she knew there was only one set of keys -- the state would introduce conclusive proof that there was at least one other set of keys. (T. 3584-86). The proof actually offered was as follows: Investigator Love testified that the purchaser of a new car receives two factory keys and one valet key. (T. 3844). Detective Stafford testified that he received a key to the Nissan from an anonymous source. (T. 3800). Detective Romagni testified that when Ms. Wallace was arrested she told him that she had her keys. (T. 4064). Ms. Wallace testified that at the time of her arrest she still had her set of keys. (T. 3615). Katina Lynn testified that the defendant told her he helped Ms. Wallace pay for the Nissan and kept a key. (T. 4340).

state called two other witnesses to testify concerning the investigation of the car-burning incident and introduced several photos of the burned-out car. (T. 3594-98, 3793-3801, 3837-43). The jurors were instructed that since the destruction of the car was not a "charged crime" in this case, they should not infer that Mr. Dennis was guilty of "that act." (T. 3588, 3796, 3839).

In closing argument, the prosecution prefaced its discussion of Watisha Wallace's testimony by informing the jurors that they were entitled to "speculate" and "try to come up with different scenarios" when the evidence raised unanswered questions. (T. 4868). The prosecutor then referred to Ms. Wallace's testimony that the Nissan had been parked in the same spot when she returned and that Mr. Dennis did not have a key. The prosecutor reminded the jurors that Mr. Dennis had been arrested in Watisha Wallace's bed, and that this was the same "Watisha who a few weeks after getting that car back from the police went out and burned it. The car used in this homicide she burned and she pled guilty to burning it." (T. 4869). "What," the prosecutor asked, "is she trying to hide here?" (T. 4869).

* * * *

The car-burning incident was inadmissible for all the reasons argued by trial counsel: It had nothing to do with the defendant or the crimes with which he was charged; it had no relevance either to the case or to bias; it unfairly prejudiced both the witness and the defendant, mislead the jury, and confused the issues; it was used

to insinuate the existence of incriminating facts for which the state had no proof; and it was improperly introduced under the pretense of impeaching the state's own witness. Its introduction denied Mr. Dennis a fair trial and a fair penalty phase.

A. The car-burning incident was inadmissible because it was not relevant, either substantively or to show bias.

Since the Nissan was returned to Ms. Wallace because it contained no evidence and the police had no further use for it (T. 108-9, 3592, 4090-91), and since Mr. Dennis had nothing to do with its destruction (T. 2948, 2951, 4197-98), Ms. Wallace's destruction of the car had no relevance to the charges against Mr. Dennis, and was inadmissible for any substantive purpose.

In fact, relevance to the charges was not the state's theory of admissibility. Instead, the prosecution asserted that Ms. Wallace's crimes were admissible to show that she was biased in favor of the defendant. According to the prosecutor, since Ms. Wallace was the defendant's girlfriend and the mother of his child, and since she knew of the state's contention that the car was "used in the killings," burning the car was "obviously" meant to be helpful to the defendant and intended to protect him (T. 2951, 2953, 2956-57).

The prosecutors' argument was fallacious, contrary to the evidence, and disingenuous. As that argument itself reveals, the asserted "bias" was not a logical inference from the burning of the car, but rather an assumption based on other evidence (Ms. Wallace was the defendant's girlfriend, etc.). No bias could be inferred

from the car-burning incident itself. The purpose of introducing this incident was not to nullify a harmful aspect of this state witness's testimony, but rather to insinuate that because Ms. Wallace was the defendant's girlfriend, the car must have been destroyed to cover up evidence of his guilt for the homicides.

The only intent directly inferable from Ms. Wallace's crimes was the intent to defraud the insurance company. There are no facts in the record from which it could logically be inferred that Ms. Wallace destroyed the car in order to help or protect Mr. Dennis. Indeed, the facts preclude such an inference: That car contained no evidence and was returned to Ms. Wallace because it contained no evidence. Its destruction could not have assisted Mr. Dennis in any way. And Ms. Wallace certainly knew this. That the car was of no further use to the police was evident from the fact that they had returned it to her. Moreover, if, as the state asserted, Ms. Wallace was present during the arguments concerning the release of the car (T. 2948-49, 2953), she must have known that defense counsel had specifically asked that the car not be released to Ms. Wallace if any evidence was found (T. 54-55), and she would have heard the state's announcement that no forensic evidence was found in the car (T. 108-9).[17] Thus, even

[17]The defense was precluded by the state's objection from eliciting from Ms. Wallace herself what she knew, or had concluded, about the results of the police search. Ms. Wallace testified on direct examination that she had been present when the lawyers discussed the importance of the car. (T. 3592). However, when, on cross-examination, defense counsel asked her if she knew whether the police had found any evidence in the car, the prosecutor objected on the ground of hearsay and the objection was sustained. (T. 3609).

if it is assumed *arguendo* that the Nissan was "used in the killings," there was no logical basis for inferring that the arson was intended to protect the defendant: Based on the facts in the record, destroying the car could not have helped the defendant and Ms. Wallace knew it.

The car-burning incident was not relevant to any substantive issue or to show bias. Since it did not tend to prove or disprove a material fact, allowing its introduction over defense objection was error. *See* §§ 90.401, 90.402, Fla. Stat. (1999); Charles W. Ehrhardt, Florida Evidence (2000 ed.), p. 144 n. 1 ("§90.402 excludes, by implication, evidence which is not relevant").

Moreover, inquiry into collateral matters should not be permitted, unless there is reason to believe it may tend to promote the ends of justice and it seems essential to the true estimation of the witness's testimony by the jury. *Wallace v. State*, 41 Fla. 547, 576, 26 So. 713, 722 (1899). Evidence which is collateral to the issues at trial and serves only to show that the witness committed bad acts does not serve the ends of justice and should not be allowed by the court. *See Breedlove v. State*, 580 So. 2d 605, 609 (Fla. 1992); *McClain v. State*, 395 So. 2d 1164 (Fla. 2d DCA 1981). As summarized by this Court in *Breedlove*:

> "[T]he prospect of bias does not open the door to every question that might possibly develop the subject." *Hernandez v. State*, 360 So. 2d 39, 41 (Fla. 3d DCA 1978), *cert. denied*, 368 So. 2d 1367 (Fla. 1979). Evidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the witness or misleads the trier of fact. Therefore,

> inquiry into collateral matters, if such matters will not promote the ends of justice, should not be permitted if it is unjust to the witness and uncalled for by the circumstances. *Wallace*.

580 So. 2d at 609.

Here, the sole logical tendency of the evidence concerning Ms. Wallace's crimes was to disgrace the witness, by showing her bad character, criminal propensity, and greed, none of which was an issue in the case. Accordingly, the trial court should not have permitted the state to place this purely collateral matter before the jury. *See Breedlove*, 580 So. 2d at 609 (because detectives' criminal activities had nothing to do with defendant's case, questioning on these matters could have done nothing more than raise the possibility that they had engaged in bad acts, and would not have promoted the ends of justice); *Reeves v. State*, 711 So. 2d 561, 562 (Fla. 2d DCA 1997) (impeaching defendant's brother with questions about his incarceration for a traffic offense served only to embarrass this witness and discredit him, where, although the brother was held in the same jail as the defendant, the prosecution admitted it had no evidence the two were able to speak to each other in jail, and the inferred bias of the brother, by his familial status alone, was already present without the need to point out the fact of their simultaneous incarceration).

B. The car-burning incident was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury; and this danger was rendered a certainty when the incident was used to insinuate the existence of incriminating facts for which the state had no admissible proof or no proof at all.

Like other evidence, evidence offered for the purpose of impeachment "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (1999); *Coolen v. State*, 696 So. 2d 738, 743 (Fla. 1997) (evidence of bias is subject to section 90.403 balancing and is inadmissible when its unfair prejudice to a witness or a party substantially outweighs its probative value).

Although it had no actual relevance to any material issue, the car-burning incident had enormous potential for unfair prejudice, confusion of the issues, and misleading the jury. As defense counsel warned the court, regardless of the ostensible purpose for which it was introduced, the jurors would be led to believe that "this car was burned up because they wanted to secrete evidence because it was in fact the car used in this homicide." (T. 2955). In fact, this was manifestly the prosecution's purpose. From the prosecutor's arguments to the court and to the jury, it is clear that the state wished (1) to suggest that since Ms. Wallace was very friendly to Mr. Dennis (she was his girlfriend and the mother of his child) she "obviously" must have burned the car in order to help him (T. 2951, 2953, 2956-57), and (2) to insinuate that since the destruction of the car was intended to be helpful, Ms. Wallace must have known more than she was telling about his use of the car and about his responsibility for the murders. (T. 4869). In closing argument, the prosecutor made this explicit, asking,

"What is she trying to hide here?" (T. 4869).

The danger of unfair prejudice, confusion, and misleading of the jury was further compounded by introducing Detective Stafford's testimony that an anonymous source told the police about the circumstances leading to the burning of the car. (T. 3800). The jurors could hardly come to any other conclusion than that the anonymous report contained incriminating evidence which, for whatever "technical" reason, the state was not permitted to present. This certainly reflected the prosecutor's own view that the content of the report incriminated the defendant but was unfortunately inadmissible.[18] Since there was no other reason to mention the report at all, it can only be concluded that it was brought to the jury's attention in order to insinuate what the state knew it could not introduce directly.

In addition, the state was permitted to further emphasize the car-burning incident by introducing several photos of the burned car. (T. 3595-98). In response to defense counsel's objection that the photos were irrelevant to any issue, including that of Ms. Wallace's bias, the court explained that the photos would assist the jury "in sorting out all the weird issues that exist in this case. They are a responsible jury. . . . I think they will sift and go right to the issue." (T. 3595-96). In fact, however, the

[18]In argument to the court, the prosecutor asserted that, while it was "not going to come in" (T. 2953), Ms. Wallace told the anonymous source that this car was "used in the U.M. killings" (T. 2957) or was "supposed" to have been so used (T. 2953).

photos did not assist in sorting out any issues; they simply added to the confusion by reinforcing the impression that the burning of the Nissan had something to do with the substance of this case. In particular, the photo of the burned-out interior of the car (Exhibit 133) could have no other purpose than to suggest that any evidence in the car had been utterly destroyed. The court's hope that the jury could sort through the "weird issues" introduced by the car-burning incident and sift out "the issue," was no excuse for not performing the analysis required by section 90.403.

Even without the prosecutor's open invitation to do so (T. 4868-69), the fact that Ms. Wallace burned the car allegedly used in the homicides would naturally lead the jurors to speculate about what incriminating facts Ms. Wallace was "trying to hide" (T. 4869). The emphasis given to the car-burning incident -- through the extensive questioning of Ms. Wallace, the calling of additional witnesses, and the introduction of photographic exhibits -- and the deliberate call to speculate about its significance, made it inevitable that the jury would conclude that there had been additional evidence of guilt which could not be presented by the state because someone closely connected to the defendant had destroyed it.

C. The car-burning incident was improperly introduced under the pretense of impeaching the state's own witness.

Although, generally, a party is permitted to attack the credibility of its own witness, § 90.608, Fla. Stat. (1999), it may not call a witness it knows to be hostile for the primary purpose of introducing otherwise inadmissible testimony under the guise

of impeachment. *See Morton v. State*, 689 So. 2d 259, 264 (Fla. 1997); Ehrhardt at § 608.2.

Because "the impeachment which appears to be permitted under the literal wording of section 90.608 can be subject to abuse," 689 So. 2d at 262, it is subject to judicial limitations. Calling a witness solely to impeach her is an abusive practice because it can serve no legitimate forensic purpose: "If impeachment were the real purpose, the witness would never be called, since the most that could be accomplished is a net result of zero." 2 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 800 (6th ed. 1994), *quoted in Morton*, 689 So. 2d at 264.

Where the witness gives both favorable and unfavorable testimony, the court must consider the primary purpose of calling the witness, and balance the probative value of the proposed impeachment against its prejudicial impact. *See Morton* at 262-64) (discussing the approach of the federal courts and adopting a rule for situations where the prosecution seeks to impeach its own witnesses by prior inconsistent statements). Significant factors include whether the effect of the purported impeachment was limited to nullifying an adverse answer[19] and whether the party

[19]*See Morton* at 263 ("Several federal courts have found good faith and permitted impeachment where the government anticipated that its witness would give evidence both helpful and harmful but thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement.").

calling the witness was surprised by the direct testimony[20].

Here, it is clear from the record, including the questions asked by the prosecutor and the prosecutor's assertions during pre-trial and sidebar discussions, that the primary purpose of calling Ms. Wallace was to introduce the car-burning incident, which, with other testimony, would be used for the substantive purpose of suggesting that the car was burned to conceal evidence of the defendant's guilt.

Aside from the testimony used to "impeach" her, Ms. Wallace had little to add to the state's case: She was the defendant's girlfriend and the mother of his child; she owned a 1992 Nissan, which Dennis helped pay for and sometimes used; on the weekend of the homicides she had gone to Daytona Beach, leaving the Nissan parked in front of the house of Sarah Finch, where it was still parked when she returned. (T. 3565-76). These facts were at best only marginally helpful -- providing nothing more than occasion for speculating that the defendant may have had access to Ms. Wallace's car -- and they were cumulative, since they were also presented through other state witnesses (Tracy Little and Katina Lynn) (T. 3422-36, 4340).

If this was all the state wanted, it need not have called Ms. Wallace at all. Moreover, it could have stopped right there. Instead, having elicited all the admissible

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[20]*See* Glenn Weissenberger, *Federal Evidence* § 607.3, at 256-57 (2d ed. 1995) (surprise is an indication that the impeachment request is not merely a device to have the jury consider a statement that is not substantively admissible), *quoted in Morton* at 264.

helpful evidence Ms. Wallace had to offer, the prosecution proceeded to elicit a supposedly harmful answer which it had previously advised the court would open the door to impeachment:

> [PROSECUTOR:] Could the defendant have driven your car while you were away that weekend?
>
> [MS. WALLACE:] "No.

(T. 3576). Arguing that the answer was "completely contrary" to its case, the prosecution asserted that it now was entitled to show that Ms. Wallace was biased, noting that "we waited very carefully until we were sure the door was open to the testimony." (T. 3577).

The prosecution did not merely lie in wait for an excuse to go forward with impeachment, it set up the occasion. It knew what the answer to the question would be and had specifically identified that answer as the anticipated means of introducing the car-burning incident. In opposing defense counsel's pretrial motion to exclude the evidence of Ms. Walker's burning of the car and insurance fraud, the prosecutors asserted that not only did they intend to call Ms. Wallace, they intended to bring out the burning of the car if she should say "anything which is helpful to the defendant" (T. 2952, 2953-54). The prosecutor anticipated that there would be testimony helpful to the defendant because Ms. Wallace was "claiming [the defendant] didn't use her car." (T. 2948-49).

This is not a case where the state was surprised by the testimony of its witness

on direct examination. Nor is it a case "where the government anticipated that its witness would give evidence both helpful and harmful but thought that the harmful aspect could be nullified by introducing impeachment evidence, such as a prior inconsistent statement." *Morton* at 263. Here, the testimony supposedly "harmful" to the state was deliberately elicited by the state for the purpose of opening the door to the "impeachment" evidence. And unlike a prior inconsistent statement, the "impeachment" could not be deemed to be intended simply to nullify the particular answer. It was plainly intended to serve a substantive purpose. Indeed, that is exactly how it was used. The "harmful" answer was merely an excuse to introduce, under the guise of impeachment, a course of testimony which was designed to give the impression that Ms. Wallace had destroyed evidence of the defendant's guilt. What the jury heard was (1) that Ms. Wallace was very friendly with the defendant (she had been his girlfriend for five-and-a-half years, she was the mother of his child, she visited him while he was in jail, he had supported her in the past and she hoped he would support her in the future); (2) that she knew of the state's contention that her Nissan had been "used in the killings"; and (3) that she had burned that Nissan. The intended suggestion is obvious. The prosecutor made sure the jury got the point: "What is she trying to hide here?"

D. The prosecution's substantive use of the car-burning incident to insinuate that Ms. Wallace had destroyed, or was concealing, evidence of the defendant's guilt, was prosecutorial misconduct.

A party cannot use impeachment as a guise for submitting to the jury substantive evidence which is not otherwise admissible. *U. S. v. Peterman*, 841 F. 2d 1474, 1479 n. 3 (10th Cir. 1988) ("Every circuit has said evidence that is inadmissible for substantive purposes may not be purposely introduced under the pretense of impeachment."). Moreover, when evidence is admitted for one purpose, it is error to argue to the jury that it can be considered for another purpose. *Consalvo v. State*, 697 So. 2d 805, 813 (Fla. 1996). And it is improper for the state to insinuate incriminating facts for which there is no evidence. *See* R. Regulating Fla. Bar. 4.3.4(e) ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."); *Huff v. State*, 437 So. 2d 1087, 1090 (Fla. 1983) ("the state attorney is prohibited from commenting on matters unsupported by the evidence produced at trial"); *Ford v. State*, 702 So. 2d 279, 281 (Fla. 4th DCA 1997) ("An argument suggesting to the jury that there is evidence harmful to the accused that the jury did not hear is highly improper."); *see also Thompson v. State*, 318 So. 2d 549 (Fla. 4th DCA 1975) (fundamental error for prosecutor to argue that there was other evidence which could have been but was not introduced).

Here, the state called Ms. Wallace to the stand for the purpose of introducing, under the guise of impeachment, evidence which was then used substantively to insinuate that the defendant's girlfriend was either hiding evidence of guilt or had

destroyed it (T. 4868-69), an insinuation for which there was no evidence, and certainly no admissible evidence. This was prosecutorial misconduct, and allowing the prosecution to proceed in this fashion was reversible error. *See Huff*, 437 So. 2d at 1090-91 (error to imply defendant forged victim's name to document where there was no evidence regarding such forgery); *Jones v. State*, 449 So. 2d 313, 314-15 (Fla. 5th DCA 1984) (fundamental error to accuse defendant and defense witness of lying and to suggest, without evidentiary basis, that defendant procured the absence of prosecution witnesses); *Ford*, 702 So. 2d at 281 (attempt to insinuate that movie referred to in defendant's testimony had a sinister ending which he intentionally omitted was improper because there was no evidence of the movie's ending and the argument implied that the prosecutor had additional knowledge of an ending adverse to defendant); *Sanders v. State*, 638 So. 2d 569, 570 (Fla. 3d DCA 1994) (error to invite jury to speculate as to the contents of an otherwise inadmissible conversation, especially when state implied the existence of an identification of the defendant as a criminal perpetrator in the case); *Stewart v. State*, 622 So. 2d 51, 56-57 (Fla. 5th DCA 1993) (comment suggesting there was additional evidence of guilt that was not provided to the jury was improper and prejudicial).

E. The unfair prejudice was not cured by the court's instruction.

The trial court instructed the jury that:

> The witness, Miss Wallace, may [al]lude in her testimony to certain facts regarding or relating to the burning and

> destruction of a certain automobile, which fact may constitute a crime. That crime, if any, is not[] a charged crime in this case. Therefore, you shall not infer from said testimony any guilt or responsibility on the part of the defendant, Mr. Labrant Dennis, whatsoever for that act.

(T. 3588). A similar instruction was given before the testimony of the two investigators of the arson and insurance fraud (T. 3796, 3839), and before defense counsel's closing (T. 4883).

The instruction was inadequate to prevent or cure the unfair prejudice resulting from the introduction of Ms. Wallace's burning of the Nissan. It addressed only the possible guilt of the defendant for the crimes committed by Ms. Wallace.[21] The instruction did not tell the jury that the evidence was admitted solely to impeach Ms. Wallace, rather than as substantive evidence of the defendant's guilt for the homicides. Nor did it address the danger that the jury would conclude that the Nissan was burned to conceal evidence of the defendant's guilt for the homicides.

The unfair prejudice flowing from the suggestion that Ms. Wallace had destroyed evidence of the defendant's guilt denied Mr. Dennis a fair trial and a fair penalty phase. This was a case where the state's principal witness, Joseph Stewart, clearly had a reason to lie about his own involvement and a strong motivation to point

[21] It was ineffectual even for that purpose, since it suggested that the reason the defendant's guilt for those crimes should not be inferred was purely technical, namely that he was not charged with them, rather than, as was the truth, because there was no evidence that he had anything to do with them.

the finger at someone else. The rest of the state's case against Mr. Dennis was based on circumstantial evidence, and there was testimony placing the defendant at home at the time of the crimes. In a prosecution case as weak as this, any suggestion that evidence of guilt had been destroyed and, especially, that it had been destroyed by someone connected to the defendant, cannot be deemed harmless.

IV.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO EXCLUDE NIDIA EL-DJEIJE'S IDENTIFICATION OF MS. WALLACE'S NISSAN, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

During the early morning hours of April 13, 1996 (the day of the crimes), Nidia El-Djeije was the attendant on duty at the Amoco gas station behind Club Salvation. (T. 3447-48). At about 4:00 a.m., she noticed a suspicious-looking black man (whom she could not identify) standing beside a gray Nissan parked on the station's premises. (T. 3450-52, 3482). The man wandered around the car, and lifted the hood, but did not seem to be trying to repair the engine. (T. 3451-52).

Ms. El-Djeije called the police, twice, and described the car (T. 3452, 3456-57, 3471), but the man drove away just as the police were arriving (T. 3456). After speaking to Ms. El-Djeije, the police drove off in the direction the Nissan had taken. (T. 3458). Just then, however, the Nissan returned. It parked across the street, then came back to the Amoco station and parked there. (T. 3458-60). Ms. El-Djeije called

a friend at a local towing company, who arrived 15 or 20 minutes later and told the man to leave. (T. 3460-62, 3492). The Nissan drove away. (T. 3492). It was now nearly 5:00 a.m. (T. 3493-94, 3502-3).

During the time that the Nissan was at the station, Ms. El-Djeije observed mainly the front and back of the vehicle, from about forty feet away. (T. 3464, 3470, 3473-75). She was in the glass cabin of the station. (T. 3448-49). It was dark outside, but the area was illuminated. (T. 3463, 3481). She described the vehicle to the police as a gray, two or four door, 1986 or 1987 Nissan. (T. 3463-64, 3469, 4095; Exhibit 128). She knew it was a Nissan because she saw the emblem in the front. (T. 3463-64). The car had tinted windows. (T. 3463-64, 3484). She did not notice any damage. (T. 3741). She told the police they would be able to identify it because it had no tag. (T. 3464, 3471).

Later that day, Detective Sanchez, who was canvassing the area for witnesses, showed Ms. El-Djeije photos of Mr. Dennis's Mazda. Ms. El-Djeije said she had not seen that car before, but told the detective that she had noticed a Nissan. (T. 3466, 3547). She was sure she remembered the Nissan emblem, so the car she saw could not have been the car shown in these photos. (T. 3463-64, 3467, 3547).[22]

A couple of weeks later, Detective Sanchez showed Ms. El-Djeije photos of the

[22]In the photos of Mr. Dennis's vehicle shown to Ms. El-Djeije, the vehicle is clearly identified as a Mazda. (See Exhibit 131).

Nissan owned by the defendant's girlfriend, Watisha Wallace. Ms. El-Djeije was not shown photos of any other vehicle. (T. 3548-49). She identified it as the Nissan she had seen, explaining that although the photo showed a tag, it was in the back window and that is probably why she had not seen it. (T. 3467, 3477, 3548). According to Detective Sanchez, there was no hesitation. (T. 3548).

The photos of Ms. Wallace's vehicle show a two-door, 1992 Nissan Sentra with tinted windows. (T. 3550, 3575). This model has a "much rounder body" than earlier models. (T. 3497). Although the vehicle was actually gray, in the photos shown to Ms. El-Djeije it appears nearly white. (See Exhibit 130).[23] One of the photos shows a tag in the back window. (T. 3478; Exhibit 130). There is damage to the right side of the car and the sideview mirror on that side is missing. (T. 3550-51).

Before trial, the defense moved to exclude the identification of the Nissan, on the ground that showing the witness photos of only one car was too suggestive. (R. 232, 234-35; T. 726-28, 731-33). The trial court denied the motion. (T. 733). The photos of Ms. Wallace's Nissan were introduced at trial (Exhibit 130). Ms. El-Djeije testified that this was the car she saw that night (T. 3467), and both she and Detective Sanchez testified concerning her out-of-court identification. (T. 3477, 3548).[24]

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[23]Compare the photos of Ms. Wallace's Nissan subsequently introduced as Defense Exhibits A-D. These photos were not shown to Ms. El-Djeije.

[24]The tow truck driver also testified. He remembered the car as a silver-gray, two-door Nissan. (T. 3491-92). He was not asked to identify any photos.

* * * *

The trial court's denial of the motion to exclude the identification was reversible error because the unnecessarily suggestive procedure used gave rise to a substantial likelihood of misidentification, in violation of due process.

A defendant has a due process right to exclude identification testimony that results from unnecessarily suggestive procedures that may lead to an irreparably mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 301-2 (1967); *Neil v. Biggers*, 409 U.S. 188, 196 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Biggers*, 409 U.S. at 198. However, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114. Accordingly, "[w]hile pretrial identification obtained by unnecessarily suggestive means is normally not admissible in court, such identification is not per se inadmissible and may be introduced into evidence if found to be reliable and based upon the witness's independent recall absent the illegal police conduct." *Willacy v. State*, 640 So. 2d 1079, 1083 (Fla. 1994); *Edwards v. State*, 538 So. 2d 440, 442 n. 5 (Fla. 1989), *citing Biggers*.

A two-step analysis is used to determine the admissibility of identification testimony: "(1) did the police employ an unnecessarily suggestive procedure in

obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980), *quoting Manson*, 432 U.S. at 110.

The factors to be considered in evaluating the likelihood of misidentification include the opportunity to observe, the degree of attention, the accuracy of the witness's prior description, the level of certainty, and the time between the original observation and the identification. *Biggers*, 409 U.S. at 199-200; *Grant*, 390 So. 2d at 343; *see Pittman v. State*, 646 So. 2d 167, 171 (Fla. 1994) (applying the test in a case involving the identification of a wrecker).

"Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson*, 432 U.S. at 114.

Here, the identification procedure used -- showing Ms. El-Djeije photos of a single automobile -- was clearly suggestive. As this Court has repeatedly stated, it is "inherently suggestive" to present the witness with only one suspect for identification. *Blanco v. State*, 452 So. 2d 520, 524 (Fla. 1984); *Perez v. State*, 648 So. 2d 715, 719 (Fla. 1995); *accord Marsden v. Moore*, 847 F.2d 1536, 1545 (11th Cir. 1988); *U.S. v. Cueto*, 611 F.2d 1056, 1064 (5th Cir. 1980); *Dunnigan v. Keane*, 137 F.3d 117, 129 (2d Cir. 1998). Indeed, this is "the most suggestive and, therefore, the most objectionable method of pretrial identification." *U.S. v. Dailey*, 524 F.2d 911, 913 (8th

Cir. 1975); *accord Stovall*, 388 U.S. at 302 ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."); *Way v. State*, 502 So. 2d 1321, 1323 (Fla. 1st DCA 1987) ("use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances"); *Hudson v. Blackburn*, 601 F.2d 785, 788 (5th Cir. 1979) ("a single photograph display is one of the most suggestive methods of identification and is always to be viewed with suspicion").

The procedure was also *unnecessarily* suggestive. The officers could have obtained photos of other Nissans but simply chose not to do so. (T. 3553-54). Detective Sanchez explained that a vehicle photo line-up was not prepared "because, of course, there must be thousands of Nissans gray in color or two doors, identical." (T. 3549). Detective Romagni added: "All front ends of Nissan Sentras are going to look the same." (T. 4105). In other words, it appears that a photo line-up was not attempted because it was highly unlikely that the witness could make the "right" choice under those circumstances.

This unnecessarily suggestive procedure gave rise to a substantial likelihood of misidentification. The Nissan in the photo shown to Ms. El-Djeije is substantially different from the vehicle she described to the police. The Nissan she reported seeing was gray; the vehicle in the photo appears to be nearly white. (T. 3469; Exhibit 130). The Nissan she reported seeing was a 1986 or 1987 model; the vehicle in the photo

is a 1992 model, which has a "much rounder" body than the earlier models. (T. 3469, 3497). The Nissan she reported seeing had no tag; the vehicle in the photo has a tag plainly visible in the rear window. (T. 3471, 3478). Moreover, at the time she observed it, Ms. Djeije thought the car had four doors (T. 3470); the car in the photo clearly has only two doors (Exhibit 130). In addition, she never noticed the damage to the right side of the vehicle which plainly appears in the photographs. (T. 3741).

Ms. El-Djeije's independent recollection appears to have been limited to the fact that the vehicle she saw had a Nissan symbol. In virtually every other respect, the vehicle she originally described was different from the vehicle in the photograph she was shown. Had she been shown photos of gray Nissans conforming more closely to her description (for example, 1986 models, vehicles with no tag at all) it is highly unlikely that the state could have secured the identification it desired.

The suggestiveness of the procedure and the unreliability of the resulting identification is further demonstrated by the fact that Ms. El-Djeije was willing to defer to the photograph and make excuses for her own original observations. For example, Detective Sanchez testified that when he showed her the photographs, she stated that she "probably" did not see the tag because it was in the back window, as shown in the photo:

> She positively identified this vehicle even to the point that she remembered the vehicle didn't have a tag. When she saw this last picture, which depicts the vehicle and has a tag leaning in the back window, she goes "That's

> probably why I thought that [the car] didn't have a tag because it was in the window."

(T. 3547).

It is certain that Ms. El-Djeije did not observe any tag, anywhere, on the Nissan she saw that night. If she had, she would have mentioned it in her original description, instead of telling the police that the car could be identified by the fact that it did not have a tag. (T. 3471). Yet, confronted with the photo, she apparently felt compelled to accept it as the car she had seen, and to assume that her own observations must have been wrong or inadequate when they were at variance with the photo. The "corrupting effect" of the police procedure is manifest: Ms. El-Djeije not only "acquiesce[d] in the suggestion" entailed by that procedure, *see Manson*, 432 U.S. at 116, she was willing to set aside her own observations in order to make the desired identification.

Because the unnecessarily suggestive identification procedure created a substantial risk of misidentification, it violated due process. The trial court's denial of the defendant's motion to exclude the identification was reversible error.

V.

THE STATE'S IMPEACHMENT OF ITS OWN WITNESS, JESSIE PITTS, DENIED THE DEFENDANT A FAIR TRIAL, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENT XIV.

The defendant's statement to the police that he had been at home from 4:00 a.m. until 8:30 a.m. on the day in question was partially corroborated by Jessie Pitts, who lived with the defendant at the apartment of Carolyn Williams, and testified that he

had seen the defendant's car parked outside at about 4:00 a.m. (T. 3528-29). Mr. Pitts was called to the stand by the state, apparently for the primary purpose of discrediting this alibi witness. Over defense objection that the state was impeaching its own witness, the prosecutor confronted Mr. Pitts with copies of prior convictions. (T. 3510-12). Several of these turned out to be the convictions, not of Mr. Pitts but of his brother, but the prosecutor was finally able to obtain Mr. Pitt's admission that he had been convicted in 1997 for the possession of a controlled substance. (T. 3512-13). The prosecutor also secured Mr. Pitts' admission that he had initially refused to give the prosecutor a statement, and had only done so when compelled by the court. (T. 3517). (He had already given a statement to Detective Romagni on the day the crimes occurred. (T. 4046).) He also testified that a week before the homicides he had seen Ms. Lumpkins move out of the apartment with the assistance of a man driving a Ford Explorer (T. 3518-21); however, this information was also introduced through Mr. Dennis's statement to the police (T. 4021-22). The remainder of the examination consisted of a lengthy (and confusing) attempt to show inconsistencies between various aspects of his previous statement to the state attorney and his present testimony. (T. 3519-36).

Mr. Pitts was manifestly called for the primary purpose of destroying his credibility by showing his prior convictions, refusal to cooperate with the State Attorney's Office, and prior inconsistent statements. Allowing the state to call this

witness for the primary purpose of impeaching him with this otherwise inadmissible evidence was error. *See Morton v. State*, 689 So. 2d 259 (Fla. 1997).

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE UNFAIRLY PREJUDICIAL EVIDENCE OF COLLATERAL MISCONDUCT, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENT XIV.

Evidence of other crimes, wrongs, or acts is inadmissible where it is introduced solely for the purpose of showing the defendant's bad character or propensity, or where its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. *Bryan v. State*, 533 So. 2d 744, 746 (Fla. 1988); *Williams v. State*, 110 So. 2d 654 (Fla. 1959); §§ 90.403, 90.404(2), Fla. Stat. (1999).

Here, the prosecution was allowed to introduce testimony concerning half-a-dozen instances when Mr. Dennis and Ms. Lumpkins had quarreled during the preceding three years. According to the prosecution, these "other crimes, wrongs, or acts" (R. 1296-97) were admissible to show premeditation (T. 867-68) and jealousy, "which is really the motive of this crime" (T. 870).

However, while these incidents show that sometimes the defendant would get very angry with Ms. Lumpkins, none of them had any tendency to show that the homicides were premeditated. Nor is it clear that they had anything to do with jealousy. Indeed, in nearly all of them there is no evidence what the quarrel was

about. None of them led to an arrest. Mr. Dennis had no prior convictions. There was no evidence that he had ever been subject to a restraining order.

The more recent incidents were described by Ms. Lumpkins' friend, Dekeisha Williams. Ms. Williams testified that in February 1996, she visited the house where Ms. Lumpkins and Mr. Dennis lived with their daughter. The two women intended to go out and get a tatoo. Mr. Dennis arrived and he and Ms. Lumpkins "started screaming and fussing." (T. 4320). Mr. Dennis was saying "she's not going anywhere; where does she think she's going." (T. 4320). There is no other evidence as to what the quarrel was about. Ms. Williams further testified that in March 1996, Ms. Lumpkins was at Ms. Williams' house, when Mr. Dennis paged Ms. Lumpkins several times. (T. 4318). Ms. Lumpkins finally called him. Ms. Williams could hear him screaming at Ms. Lumpkins over the phone, telling her to get back home. (T. 4319). Ms. Lumpkins ignored him and went out. (T. 4319). Again, there is no evidence what the quarrel was about, other than that Mr. Dennis wanted Ms. Lumpkins at home and she had not returned his calls. These quarrels proved only that on those two occasions Mr. Dennis thought Ms. Lumpkins should have been at home and he was angry that she was not. They had no tendency to prove that the homicides were motivated by jealousy, much less that they were premeditated.

Three earlier incidents were related by Ms. Lumpkins' aunt Robin Gore, her aunt Karen Wallace, and her uncle Patrick McKeithan. These occurred in 1994 and

1995, when Mr. Dennis and Ms. Lumpkins lived in an apartment located in the same apartment complex as her aunts and uncle. These incidents were more inflammatory than the 1996 quarrels described by Ms. Williams, since they involved a gun and threats, but an objective examination reveals that they were equally irrelevant. The reason for two of the quarrels is completely unknown, and the reason for the third is at best obscure. The threats were clearly limited to the situations in which they occurred and had no relevance to the crimes with which Mr. Dennis was charged.

The first incident occurred in the summer of 1994. Ms. Lumpkins called her aunt Karen Wallace and her uncle Patrick McKeithan and asked them to come to her apartment because she was afraid. (T. 4291-92). When Ms. Gore and Mr. McKeithan got there, they saw Mr. Dennis putting clothes and other objects into his car. (T. 4293). Ms. Lumpkins was upstairs in front of the apartment door. Mr. McKeithan went up and stood beside her. (T. 4309). Mr. Dennis took a 9 mm pistol out of the car and waved it around. (T. 4293, 4309). He pointed it in the direction of Ms. Lumpkins and Mr. McKeithan and said he would "kill her stupid ass right now." (T. 4310). Ms. Lumpkins ran into the apartment, locking her uncle out. (T. 4293). Dennis told McKeithan, "Punk nigger, I ought to kill you right now, too." (T. 4310). Mr. Dennis then left. (T. 4294, 4310).

There is no evidence that this incident had anything to do with jealousy. Indeed, there is no evidence as to what Mr. Dennis was angry about. Nor did the

threats made during the course of this incident have any tendency to show that the murders committed two years later were premeditated. The threat was limited to the situation in which it occurred, and appears to have been simply an expression of momentary anger. After making the same threat to Mr. McKeithan, the defendant left. There is nothing to indicate that he intended to carry out the threat at some later time, or that it was intended to get Ms. Lumpkins to do or refrain from doing something. Indeed, since he was leaving with his things, it seems that at that time he wanted nothing more to do with her and her relatives.

The second incident occurred in November 1995. Ms. Lumpkins was staying at the apartment of her aunt Robin Gore because of "problems" she was having with Mr. Dennis. (T. 4294-96). Mr. Dennis came to the apartment to talk to her. (T. 4296-97). She came out and they argued. He looked very angry. Ms. Lumpkins' uncle saw that Mr. Dennis had a 9 mm pistol in his pocket. (T. 4297-99). The uncle was unable to hear the conversation. (T. 4298). Again there is no evidence that jealousy was involved.[25] The only apparent purpose of introducing this was to show that the defendant was the kind of man who carried a pistol in his pocket.

The third incident occurred in October or November 1995. Ms. Lumpkins had come to Ms. Gore's apartment with her child. (T. 4258-59). She planned to go out

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[25]In the penalty phase, the uncle would testify that this incident had culminated with the defendant striking him on the head with the pistol. (T. 5296-5300).

with a friend that night. (T. 4259). While Ms. Lumpkins was getting ready, Ms. Gore went out to take a walk. (T. 4260). As she was returning to the apartment, she saw Mr. Dennis, who ducked behind a tree. (T. 4262, 4264). He was wearing black warm up pants, and a black pullover with a hood (or a hat). (T. 4264, 4282). Ms. Gore turned to go back into the apartment, just as Ms. Lumpkins was coming out. (T. 4265). Ms. Gore told her that Dennis was hiding behind a tree. Ms. Lumpkins ran into the apartment and locked her aunt out. (T. 4266). According to Ms. Gore (who testified over defense counsel's hearsay objection), Ms. Lumpkins said that Dennis had been carrying a gun. (T. 4266-69). Ms. Gore banged on the door and Ms. Lumpkins let her in. (T. 4272). Ten minutes later, Mr. Dennis knocked on the door and asked to speak to Ms. Lumpkins. (T. 4272-73).

Ms. Lumpkins came to the door and spoke with Mr. Dennis for about ten minutes. (T. 4273-75). Ms. Gore "couldn't hear what they were talking about." (T. 4275). However, she did hear him say that "if anything terrible happened, he was going to blow his brains out," which Ms. Gore thought referred to the man who was waiting for Ms. Lumpkins in the parking lot. (T. 4274). After talking with Ms. Lumpkins, Mr. Dennis left, but he called her five minutes later from the pay phone down the street. (T. 4275-76). Ms. Lumpkins did not go out with her friend. Instead, she called up Marlin Barnes and went out with Barnes and his friends. (T. 4277-78).

This is the only instance when it appears that the quarrel may have had

something to do with Ms. Lumpkins going out with another man. Yet, even here, it is not clear that the defendant's anger was the result of jealousy. Aside from the fact that the record does not reveal who the other man was[26], or where Ms. Lumpkins was going with him, the defendant's statement indicates that his concern was motivated by something other than jealousy. He did not, as a jealous boyfriend might, threaten to kill the man (or Ms. Lumpkins) if Ms. Lumpkins went out with him. Instead, the threat was to kill him "if anything terrible happened" (T. 4274), whatever that might mean. This single ambiguous statement, which is all Ms. Gore heard of the ten-minute conversation, had little if any probative value. It was made with reference to an unknown person for an unknown reason in the context of a quarrel whose basis is also unknown.

In summary, while these incidents showed that Mr. Dennis would sometimes become very angry with Ms. Lumpkins (and her uncle), they did not tend to show that Mr. Dennis committed the crimes with which he was charged or that the crimes were premeditated. The fact that he often carried a pistol, and was capable of threatening people with it, suggests bad character, but was not relevant to any issue. In none of these incidents was there a threat to kill or harm Ms. Lumpkins if she went out with another man. The threats that were made were all limited to the situation in which they occurred, and reflect nothing more than the fact that the defendant was angry at

[26]It was not Marlin Barnes. (T. 4277).

the time. And, whether or not the defendant's relationship with Ms. Lumpkins was characterized by excessively jealous behavior, that trait was not shown by these incidents because their context (i.e., the reason for the angry behavior) is not known.

These collateral incidents should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The danger of unfair prejudice is clearly shown by the use to which the prosecution put these incidents, which went well beyond their actual, quite minimal, probative value. They were used to demonize the defendant, branding him as a "classic" domestic abuser, the stereotypical jealous, violent, abusive boyfriend, and to argue that he acted in conformity with that character on the night in question. (T. 4824-26, 4852-54, 4947-48, 4967). Allowing their introduction into evidence denied the defendant a fair trial.

VII.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE TESTIMONY IN ITS CASE-IN-CHIEF THAT THE DEFENDANT HAD A JEALOUS CHARACTER, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENT XIV.

As part of its effort to show that Mr. Dennis must have committed the crimes because he was a jealous person, the prosecution introduced the testimony of Katina

Lynn that she had had problems with the defendant because he was jealous.

Ms. Lynn was a nude dancer whom Mr. Dennis had met at a club in November 1994. (T. 4332, 4353). She joined his rap group and traveled with the group around the South. (T. 4335). Within a month, Ms. Lynn began a casual sexual relationship with Mr. Dennis which continued until the time of his arrest. (T. 4335, 4339, 4352). At the time she met Mr. Dennis, Ms. Lynn was already involved in a relationship with another man, Marlin McGhee, whom she considered her "main boyfriend" (T. 4336) and was the father of two of her four children (T. 4352).

Over defense objection, Ms. Lynn testified that she had "problems" with Mr. Dennis because he was "jealous" that she continued to see Mr. McGhee. (T. 4336, 4338-39). In allowing this testimony, the trial court explained that regardless of who the jealousy was directed to, "it's jealousy" and "I believe if he is a jealous person, it would be pertinent for this person to know. I'm going to allow it." (T. 4339).

The court's ruling was error. It is well settled that "[e]stablishing that a defendant had a certain character trait in order to show he acted in conformity with that trait on a certain occasion is forbidden by the rules of evidence." *Flanagan v. State*, 625 So. 2d 827, 829 (Fla. 1993); § 90.404(1), Fla. Stat. (1987). The defendant had not put his character in issue, and, accordingly, the state could not introduce testimony, such as that of Ms. Lynn, to show that he was a "jealous person" for the purpose of showing that he had acted in conformity with that trait at the time of the

crimes. *See Flanagan*, 625 So. 2d at 829 (introduction in capital sexual battery prosecution of testimony that the defendant fit child sex offender profile was an impermissible attack on the defendant's character); *Carter v. State*, 687 So. 2d 327, 329 (Fla. 1st DCA 1997) (in prosecution for lewd and lascivious assault on a child, it was error to introduce statements which were offered to show that the defendant was the sort of person who would molest a 13-year-old girl); *Erickson v. State*, 565 So. 2d 328, 331 (Fla. 4th DCA 1990) (testimony that defendant had a personality characteristic of being attracted to children inadmissible); *Gore v. State*, 719 So. 2d 1197, 1120 (Fla. 1991) (improper to introduce collateral crimes committed against persons other than the victim because they could only demonstrate defendant's bad character and propensity to commit crime); *Robertson v. State*, 25 Fla. L. Weekly D900 (Fla. 3d DCA April 12, 2000) (in prosecution for murder of girlfriend it was error to allow introduction of earlier assault on ex-wife because it was relevant solely to establish the defendant's bad character).

VIII.

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF HORRIFIC AUTOPSY PHOTOS WHICH HAD LITTLE OR NO RELEVANCE TO ANY DISPUTED ISSUE, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENT XIV.

The prosecution introduced 43 autopsy photographs of the victims (Exhibits 168-211), of which at least 25 came in over defense objection that they were

duplicitous or inflammatory or both (Exhibits 171, 173, 175-77, 179-80, 182-83, 185-89, 191-93, 195, 198, 201-2, 204-5, 208-9, 211). (T. 4391-4409). As the prosecutor conceded, virtually all of the autopsy photos were "inflammatory" (T. 4409). The ostensible purpose for introducing them was to show the nature of the injuries, and in particular to show that they were caused by the shotgun recovered by the police. However, several of these photos were not only especially horrifying, they served very little legitimate purpose, and their shocking nature was largely a product of the autopsy itself:

- Exhibit 198 shows the inside of the skull of Marlin Barnes after the brain had been removed by the medical examiner. The supposed relevance was that it showed an inside view of a fracture of the occipital bone which had already been shown from the outside in another photo. (T. 4404-5, 4443-44).

- Exhibit 187 shows the inside of the skull of Timwanika Lumpkins after the top of the skull had been sawed off by the medical examiner and the brain removed. The supposed relevance was that it showed that Ms. Lumpkins suffered a "hinge fracture." (T. 4401, 4421-22). Nothing in particular turned on this fact. There was no dispute concerning the fact that the injuries to the head were severe.

- Exhibit 185 shows the back of Ms. Lumpkins with the skin and

underlying tissues peeled away to either side. This dissection was supposedly introduced to show a hematoma resulting from blunt trauma to the back. (T. 4394-95, 4429). The fact that Ms. Lumpkins had been struck on the back did not require so horrific a demonstration. Moreover, the trauma to the back was also shown in another photo (Exhibit 186).

- Exhibits 188, 189, 192, and 193, are photos of Ms. Lumpkins' skull after the skin had been removed. The medical examiner referred to them in testifying about the various fractures. (T. 4401-3, 4417-20). However, neither the severity of the injuries nor the nature of the fractures were in dispute, and the jurors were also shown several other photos of these injuries, as they appeared before the removal of the skin.

These photos had little relevance to any disputed issue. What marginal probative value they might have had was overwhelmed and defeated by their extremely shocking nature. They should have been excluded. *See Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990) ("photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance"); *Thompson v. State*, 619 So. 2d 261, 266 (Fla. 1993) (error to allow introduction of autopsy pictures which were not essential, given the other photographs introduced); *Copertino v. State*, 726 So. 2d 330, 334 (Fla. 4th DCA 1999) (improper to introduce autopsy photographs which served no purpose other than to highlight the horror of the victims' injuries).

IX.

THE SENTENCING ORDER IS REPLETE WITH ERRORS, CONJECTURE, AND CONCLUSORY ASSERTIONS, PROVIDING AN INADEQUATE BASIS FOR APPELLATE REVIEW AND DEMONSTRATING THE UNRELIABILITY OF THE COURT'S DECISION TO IMPOSE THE DEATH PENALTY, IN VIOLATION OF FLORIDA LAW AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV.

When the trial court imposes a sentence of death, it must "set forth in writing [the] findings upon which the sentence of death is based." § 921.141(3), Fla. Stat. (1999). The trial court "must exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances." *Lucas v. State*, 417 So. 2d 250, 251 (Fla. 1982). And the results of the weighing process "must be detailed in the written sentencing order and supported by sufficient competent evidence in the record." *Ferrell v. State*, 653 So. 2d 367, 371 (Fla. 1995); *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990). The failure to comply with these requirements "deprives this Court of the opportunity for meaningful appellate review." *Ferrell*, at 367. As this Court stated in *Walker v. State*, 707 So. 2d 300, 319 (Fla. 1997):

> If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

707 So. 2d at 319.

The sentencing order in this case contains numerous errors which not only preclude adequate appellate review but also call into question the reliability of the trial

court's findings and its ultimate decision to impose the death penalty.

First, the trial court's rejection of the statutory mitigator of no significant prior criminal activity is based entirely on non-existent testimony. After stating that while Mr. Dennis had no prior convictions his criminal activity short of conviction was enough to disprove this mitigator, the court set forth the following factual analysis:

> The evidence established that the long amorous relationship between the victim, Timwanika Lumpkins and the Defendant, LABRANT DESHAWN DENNIS, was indeed a violent one:
>
> (A) Family members testified regarding long periods of arguments and anger in the relationship. That during these arguments the Defendant would physically abuse Ms. Lumpkins.
>
> (B) That family members observed on more than one occasion the physical marks of abuse on Ms. Lumpkins.
>
> (C) That Ms. Lumpkins related these incidents of physical abuse of her by the Defendant to different family members.
>
> (D) That at times after these periods of physical abuse there would be a separation but the couple would almost invariably reunite. However, that during these periods Ms. Lumpkins feared the Defendant.
>
> (E) That an uncle of Ms. Lumpkins testified that the Defendant was obsessive and possessive in his relationship with Ms. Lumpkins that he would react violently at times towards her.
>
> This court rejects the existence of this statutory mitigating circumstance and gives it no weight.

(R. 3261-62) (underlining of proper names omitted).

Every single one of these five assertions is factually incorrect. No one, and certainly no "family member," testified to seeing the defendant "physically abuse"

Ms. Lumpkins. Not a single "family member" testified to observing "marks of abuse" upon her, or as to what may have happened between "periods of physical abuse." Not a single "family member" testified that Ms. Lumpkins had related "incidents of physical abuse." Nor did Ms. Lumpkins' uncle ever testify that the defendant was "obsessive and possessive" toward Ms. Lumpkins.

Although the state did present testimony which the prosecution believed established an abusive relationship -- including the testimony of an uncle and two aunts concerning arguments and threats, the testimony of a friend that she witnessed arguments and saw bruises, and the defendant's statement to the police that he had once slapped Ms. Lumpkins -- the court's order does not refer to any testimony other than that of family members, and nowhere in the record does any family member testify to witnessing any "marks" or incidents of "physical abuse" (T. 4253-85, 4286-4304, 4304-13, 5191-95, 5295-5308).

In short, the order ignores the evidence the state did present and relies instead on non-existent testimony. Such an order cannot provide an adequate basis for review, and no confidence can be placed in the result. It certainly does not reveal the "thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty" required for meaningful appellate review. *See Walker*, 707 So. 2d at 319.

The court relied on non-existent testimony in other portions of its order as well.

For example, in its discussion of the felony-murder and HAC aggravators the court states that Mr. Barnes was struck with the shotgun with such force that pieces of the firearm were embedded in his brain (R. 3255, 3257), and that the bones in Ms. Lumpkins' face were crushed or fractured (R. 3255, 3258). In fact, however, there was no testimony that fragments of the gun were found in anyone's brain -- the two metal fragments and the nine wood fragments recovered were all found on the floor of the apartment (T. 3287-88) -- and there was no testimony that Ms. Lumpkins suffered any facial fractures -- the fractures were in other parts of the head (T. 4413-22). While there is no question that the injuries were severe, these additional lurid facts -- which the court evidently found very significant, since the order mentions them twice -- were purely imaginary.

In addition to relying on testimony which no one else heard, the order displays some confusion as to the weighing process. The trial court found (the state having conceded the point) that the capital felonies were committed under the influence of extreme mental or emotional disturbance, but gave this statutory mitigator "little or no weight" because the defendant's "well thought out and methodically executed plan to commit these murders negate [sic] this mitigating circumstance from outweighing the aggravators." (R. 3262). Similarly, the trial court found the non-statutory mitigators proposed by defense counsel to be insignificant because "[t]hey simply do not rise to the level of outweighing either the quantity and/or severity of the

aggravating circumstances." (R. 3263). This procedure of assigning "little or no weight" to each mitigator if it does not "outweigh[] the aggravators" (R. 3262) (i.e., if it does not preclude the death penalty all by itself), renders the weighing of mitigation an illusory, academic process. Under this procedure, any mitigating circumstance which does not conclusively demonstrate the inappropriateness of the death penalty is effectively given a weight of zero. The fact that mitigation may have a cumulative weight does not appear to have been considered. This is not the process contemplated by the statute or required by the constitution. At the very least, the court's statements make it uncertain whether the mitigating circumstances were ever weighed as a whole. *See Lamb v. State*, 532 So. 2d 1051, 1054 (Fla. 1988) (remanding for resentencing where trial court's statement that certain factors did not rise "to the level of a mitigating circumstance to be weighed in the penalty decision" made it uncertain whether the trial court properly considered all the mitigating evidence or whether it found that the aggravation outweighed the aggravation).

Moreover, the court's order simply takes as a given, without adequate analysis, the key fact upon which it based its rejection of the statutory mental mitigators and its finding of CCP. The court's rejection of the two statutory mental mitigators was based on the conclusory assertion that there was a "well thought out and methodically executed," or a "well thought out and deliberate," plan (R. 3262). With regard to the emotional distress mitigator, the court reasoned as follows:

> The court finds from the evidence that the Defendant's realization that this long relationship with Timwanika Lumpkins, his longtime lover and the mother of one of his children caused him to be affected with emotional distress. However, his well thought out and methodically executed plan to commit these murders negate this mitigating circumstance from outweighing the aggravators. The Court gives this mitigating circumstance little or no weight.

(R. 3262). With regard to the substantial impairment mitigator, the court's entire analysis was as follows:

> Again, the evidence showed that this mitigating circumstance was not established and it is clear that the Defendant appreciated his criminality by the well thought out and deliberate plan which he undertook and executed and his meticulous actions in trying to avoid detection. The court gives this mitigating circumstance no weight.

(T. 3262).

The supposed "plan" was also the basis for the court's finding of CCP. (R. 3259-60). However, as set forth in Argument X, the court's discussion of the CCP aggravator is as conclusory as its discussion of the mental mitigators, and simply takes for granted that everything that happened must have been planned, merely because it happened.

This sentencing order was not the product of the "reasoned judgment needed to support a death sentence." *See Lucas*, 417 at 251. Moreover, this Court cannot review a judgment that is premised on misapprehensions of the record. Accordingly, if this Court declines to order a new sentencing hearing before a jury, this case must at least be remanded for a new sentencing hearing before a judge. *See Santos v. State*,

591 So. 2d 160, 164 (Fla. 1988); *Scull v. State*, 533 So. 2d 1137, 1143-44 (Fla. 1988).

X.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

A finding of CCP requires that the state prove beyond a reasonable doubt (1) "that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)"; (2) "that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)"; (3) "that the defendant exhibited heightened premeditation (premeditated)"; and (4) "that the defendant had no pretense of moral or legal justification." *Gordon v. State*, 704 So. 2d 107, 114 (Fla. 1997), *quoting Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994); *Woods v. State*, 733 So. 2d 980, 991 (Fla. 1999). Unless all these elements are established, a finding of CCP will not be upheld. *Gordon*, 704 So. 2d at 114.

Although CCP can be established by circumstantial evidence, that evidence "must be inconsistent with any reasonable hypothesis of innocence which might negate the aggravating factor." *Gordon*, 704 So. 2d at 114, *quoting Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992); *Woods*, 733 So. 2d at 991. A suspicion that a plan to kill existed is not enough. *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995).

The CCP aggravating factor is intended to apply to "execution or contract-style killings" and will not be sustained where the evidence suggests that the murder was in a fit of rage. *See Douglas v. State*, 575 So. 2d 165, 167 (Fla. 1991); *Mitchell v. State*, 527 So. 2d 179, 182 (Fla. 1988).

Here, all of the evidence points to a rage killing, rather than a planned, execution-style murder. The murders were not shown to be "cold." To the contrary, the state argued, and the trial court agreed, that the murders were committed while under the influence of extreme mental or emotional disturbance. (R. 3262). In view of this and of the state's argument that the motive for the murders was jealousy, it is at the very least a reasonable hypothesis that the murders were committed in the heat of passion, while in a jealous rage, and were not the product of cool and calm reflection. Such murders have been held not to be CCP, even when there is some evidence of planning. *See Douglas*, 575 So. 2d at 166-67 (killing arising from dispute associated with love triangle not CCP, although the defendant obtained a rifle, tracked down his ex-girlfriend, abducted her and her husband, tortured her by forcing her to have sex with her husband, and finally, at the conclusion of this four hour episode, bludgeoned and shot the husband to death as the woman watched); *Santos v. State*, 591 So. 2d 162 (Fla. 1991) (killings not CCP where defendant who was involved in a highly emotional domestic dispute with the victim and had threatened to kill her, shot both the victim and her child after chasing them down the street).

The manner in which the murders were committed also indicates that they were the product of a fit of rage. Bludgeoning the victims with a useless shotgun suggests a rage killing, rather than calm reflection. The fact that there were multiple blows is not enough to show CCP. *See Campbell v. State*, 571 So. 2d 415 (Fla. 1990) (killing not CCP where defendant entered apartment and stabbed murder victim numerous times, stabbed victim's daughter in the back and head, then returned to the father stabbing him in the back many times as he fell to the floor); *King v. State*, 436 So. 2d 50 (Fla. 1983) (killing not CCP where defendant struck the victim on the head with a heavy steel bar then obtained a pistol from another room and shot her twice).

In addition, the murders were not shown to be the result of "a careful plan or prearranged design to commit murder before the fatal incident (calculated)" or to show heightened premeditation. The court's order states that upon learning that Ms. Lumpkins had moved out with the help of Mr. Barnes, the defendant "began a thoughtful, purposeful, deliberate and inevitable [sic] plan to murder the victims herein" (R. 3259). As evidence of this, the court set forth the following facts: the defendant obtained "a non-working shotgun" and returned it to its owner after using it to bludgeon the victims; he was driving the car of another girlfriend; this car, which had a license tag in the back window, was seen in the vicinity of the night club where the victims had gone to attend a party; the defendant punctured the tires of the vehicle Mr. Barnes was driving; and the defendant knew where Mr. Barnes lived. (R. 3260).

However, no plan can be inferred from the facts listed by the court unless it is assumed that everything that happened was intended to happen. They are at least equally consistent with the absence of a plan. All of the inferences drawn by the court from the set of facts listed are conjectures which are contrary to the evidence:

Contrary to the court's assertion, the fact that Mr. Dennis borrowed a non-working shotgun from Mr. Stewart and then returned it to Stewart does not show that he "took pains to obtain and use a weapon that could not be traced to him" and this is certainly not the "only inference" that could be drawn (R. 3260). Much less traceable clubs could have been used, without the need to involve anyone else. Moreover, Stewart testified that he told Mr. Dennis that since the gun did not work he did not care if it was not returned to him. (T. 3701-2). Returning it, together with other evidence, rather than disposing of it himself, only created an unnecessary risk of detection. Surely, he did not need Mr. Stewart to find a sewer or a dumpster.

In addition, not only was the shotgun inoperable, the defendant *knew* it would not work, because Joseph Stewart told him so. Mr. Stewart testified that he told Mr. Dennis that he had tried to fire the shotgun and it did not work. (T. 3701-2). Rather than suggesting a careful, well thought out plan, this suggests that the murders may not have been planned at all. The purported plan -- to borrow a non-working shotgun from an acquaintance, use it to bludgeon to death a linebacker and his girlfriend at the apartment which (as Mr. Dennis knew) the linebacker shared with two other football

players, and then, to avoid detection, give the shotgun back to its owner, together with any other incriminating evidence -- is so contrary to common sense that it cannot be accepted even as a conjecture. It is far more likely that the shotgun was taken to the apartment as a bluff to intimidate the victims rather than to use it as a weapon.

The prosecutor suggested that perhaps he thought the gun would work anyway, pointing to the fact that an unfired shell with a small indentation on the primer was found on the floor. However, the state's expert testified that it was not possible to tell whether the mark on the primer was caused by an attempt to fire the gun or by slamming the weapon against something. (T. 4499, 4505). Nor was it possible to determine whether the shell had been cycled through the gun. (T. 4498). The state also presented the testimony of Katina Lynn that she had accompanied the defendant to a gun shop, and that he told her he needed to buy "bullets" for a shotgun he had purchased. (T. 4344). What he actually purchased at the gun shop is unknown (T. 4345, 4376-77), but even if it was shotgun shells, this did not show that the gun was in working condition at the time of the homicides. The only direct evidence as to its operability was the testimony of Mr. Stewart, who said that the gun did not work and that he had told Mr. Dennis it did not work.

The court speculated that puncturing the tires was intended to give Mr. Dennis time to arrive at the apartment ahead of the victims. (R. 3260). However, this could not have been the "plan" because at the time the tow truck left the area of the club

(about 5:00 a.m.) the Nissan that Mr. Dennis was supposedly driving was still at the gas station by the club. (T. 3493-94, 3502-3, 4083).

Contrary to the court's assertion, the fact that Mr. Dennis was at Club Salvation, some hours after Mr. Barnes and Ms. Lumpkins had arrived there, does not show that he was "following and/or stalking the victims." (R. 3260). Indeed, the evidence showed that he had *not* been following Ms. Lumpkins. After taking her to the location where she had agreed to meet her friend Marissa Roberts, he went to a bachelor party, and was there until 1:30 a.m. (T. 4029-30, 4672, 4676-77, 4689). There was no evidence that Mr. Dennis knew that Ms. Lumpkins was going to be at Club Salvation, or that she would meet Mr. Barnes there. In fact, it appears that neither Ms. Lumpkins or Mr. Barnes knew that the other would be there. (T. 4076).

The evidence was also insufficient to support the theory that Mr. Dennis began to plan the murders from the time that Ms. Lumpkins moved out of his apartment, a week before the crimes (R. 3259). It is true that Ms. Lumpkins moved out after they had quarreled because Ms. Lumpkins was out late with Marlin Barnes. (T. 4021). However, the defendant and Ms. Lumpkins had quarreled and separated before, and then got back together again (T. 4280, 4321). His actions during the week following the break-up are consistent with an intent to mend the relationship. He continued to share custody of the child, indeed, the child remained at his home. (T. 3540). Mr. Dennis and Ms. Lumpkins continued to speak to each other. On the day before the

murders he took her shopping, and then gave her a ride to meet her friend Marissa Roberts, so she could go out that night. (T. 4022, 4028-29). Even assuming *arguendo* the state's hypothesis (for which there was actually no evidence), that he saw Ms. Lumpkins and Ms. Barnes together at Club Salvation and became jealously enraged, this does not show that a pre-existing plan was set in motion. To the contrary, it indicates that the killings were neither cold, nor calculated, nor highly premeditated.

XI.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS OR CRUEL IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

The HAC aggravating circumstance "is proper only in 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 or enjoyment of the suffering of another." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990). It does not apply in the absence of evidence that the defendant intended to cause unnecessary and prolonged suffering, *e.g. Cheshire*; *Bonifay v. State*, 626 So. 2d 1310, 1313 (Fla. 1993), even where such suffering actually occurs, *e.g. Teffeteller v. State*, 439 So. 2d 840 (Fla. 1983); *Mills v. State*, 476 So. 2d 172, 178 (Fla. 1985).

Here there was no evidence of intent to torture. To the contrary, this was a crime of passion which evidently took only a matter of minutes and in which the

blows were all directed at the head, with such force that the victims would likely be rendered insensible. The HAC aggravator does not apply under such circumstances. *See Buckner v. State*, 714 So. 2d 384, 390 (Fla. 1998) (where the defendant shot the victim twice, then three more times after the victim begged for his life, it was error to find HAC because "the entire episode took only a few minutes and no evidence reflected that Buckner intended to subject the victim to any prolonged or torturous suffering"); *Bonifay*, 626 So. 2d at 1313 (HAC not properly found where the record did not demonstrate intent on the defendant's part to inflict a high degree of pain or to otherwise torture the victim; fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find HAC absent evidence that the defendant "intended to cause the victim unnecessary and prolonged suffering"); *Porter v. State*, 564 So. 2d 1060 (Fla. 1990) (HAC not shown where the record was consistent with the hypothesis that the crime "was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful") (original emphasis); *Kearse v. State*, 662 So. 2d 677, 686 (Fla. 1995) (HAC was improperly applied where, although the victim suffered numerous gunshot wounds, there was no evidence that the defendant intended to cause the victim unnecessary and prolonged suffering); *Robertson v. State*, 611 So. 2d 1228, 1233 (Fla. 1993) (error to find HAC where the evidence did not establish that the defendant shot the victim "with the intention of torturing her or with the desire to inflict a high degree of pain or with the enjoyment

of her suffering"); *Santos*, 591 So. 2d at 163 (HAC did not apply because "the murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims").

XII.

THE TRIAL COURT ERRED IN GIVING LITTLE OR NO WEIGHT TO THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE MURDERS WERE COMMITTED UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION

The trial court found that the homicides were committed while under the influence of extreme emotional disturbance, but gave that factor "little or no weight," because the court believed that there was a "well thought out and methodically executed plan to commit these murders." (R. 3262). This was error, because, as set forth in Argument X, there was insufficient evidence to support a finding of a plan. *See Morgan v. State*, 639 So. 2d 6, 13 (Fla. 1994) (court's sentencing order was "confusing at best" where in considering the mitigator of extreme mental or emotional disturbance, the court stated that the defendant was "in a rage" but knew what he was doing and that it was wrong, and further stated that no evidence existed to prove this factor, but added that the factor "is proven but did not play a major part in the happening of the tragedy").

XIII.

THE DEATH SENTENCE IS DISPROPORTIONATE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

This was a crime of heated passion arising from violent emotions brought on by jealousy associated with a love triangle. This Court has found the death penalty disproportionate in such cases. *See Halliwell v. State*, 323 So. 2d 557 (Fla. 1975) (death sentence disproportionate where the defendant, who was in love with the victim's wife, became violently enraged at the victim's treatment of her, and beat him to death with a breaker bar); *Douglas v. State*, 575 So. 2d 166, 167 (Fla. 1991) (death sentence disproportionate where the defendant, who had been involved in a relationship with the victim's wife, abducted the victim and his wife, tortured them over a four-hour period by forcing them to perform sexual acts at gun point, hit the victim so forcefully in the head with the rifle that the stock shattered, and then shot him in the head); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985) (death penalty disproportionate for bludgeoning murder of wife; HAC); *Farinas v. State*, 569 So. 2d 425 (Fla. 1990) (felony murder (kidnapping) and HAC in aggravation; defendant's obsessive behavior and jealousy tended to establish that the murder was committed under the influence of extreme mental or emotional disturbance and the murder was the result of a heated, domestic confrontation); *see also Wilson v. State*, 493 So. 2d 1019 (Fla. 1986).

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences must be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Assistant Attorney General FARIBA N. KOMEILY, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this _____ day of June, 2000.

_____
LOUIS CAMPBELL
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