

THE SUPREME COURT OF FLORIDA

ROBERT RIMMER,

CASE NO. 95,318

Appellant,

vs.

L.T. 98-12089CF-10B

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court, in and for
Broward County, Florida;
James I. Cohn, Circuit Court Judge

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The parties are referred to as they stood in the trial court, the prosecution, State of Florida, and the defendant, Robert Rimmer. References to the record-on-appeal are by the symbol “R” followed by the appropriate page number. The supplemental record-on-appeal is designated by the symbol “SR” followed by the appropriate page number.

Your undersigned attorney appears as a specially appointed appellate public defender pursuant to this court’s instructions for the appointment of conflict-free counsel.

STATEMENT OF THE CASE

Robert Rimmer and codefendant Kevin Parker were charged jointly via indictment with first degree murder of Aaron Knight (Count I), first degree murder of Bradley Krause, Jr. (Count II), armed robbery of Aaron Knight (Count III), armed robbery of Bradley Krause, Jr., (Count IV), armed kidnaping of Aaron Knight (Count V), armed kidnaping of Bradley Krause, Jr. (Count VI), armed robbery of Joe Louis Moore (Count VII), armed kidnaping of Luis Rosario (Count IX), attempted armed robbery of Luis Rosario (Count X), and aggravated assault upon Kimberly Davis-Burke (Count XI). (R 2112-2115)

Prior to trial, defendant Rimmer was court ordered to stand in a live line-up pursuant to a prosecution request for same. (R 2103-2105) The state also filed notice of intent to seek the death penalty and habitualization upon conviction. (R 2124-2127)

Pretrial motions to suppress out-of-court identifications of defendant, to suppress physical evidence and to sever defendants were filed on behalf of Robert Rimmer. (R 2160-2180; 2235-2238;) After an evidentiary hearing, the motion to

suppress physical evidence was denied as was the motion to exclude pretrial identifications and to sever defendants. (R 2186-2187; 2193-2195)

Joint trial proceedings of defendant Rimmer and codefendant Parker resulted in verdicts of guilty as charged as to all counts and as to both accused. (R 2266-2277; 2283-2293) Defendant Rimmer's renewed motion to sever defendants in the penalty phase proceedings was granted and they were conducted accordingly. (R 1820-1997; 2298-2300)

The jury returned an advisory sentence of death pursuant to a vote of nine to three as to each of defendant's two murder convictions. (R 1991-1994; 2320) Codefendant, Kevin Parker, received a life recommendation which sentence was imposed by the trial court. (R 2343)

Thereafter, a *Spencer* hearing was conducted. (R 1999-2063) Following the submission of sentencing memorandums by the respective parties, Robert Rimmer was sentenced to death by execution for the murder of Aaron Knight and a like sentence for the murder of Bradley Krause, Jr. (R 2344-2351; 2383-2399)

As to his remaining convictions, defendant was sentenced to life imprisonment as a violent habitual offender on counts three through nine, thirty years on count ten and lastly, ten years on count eleven. (R 2344; 2352-2399)

Timely notice of appeal to this court followed. (R 2420) This brief is filed in

support thereof.

STATEMENT OF THE FACTS

MOTION TO SUPPRESS PHYSICAL EVIDENCE HEARING:

In a written motion to suppress physical evidence, defendant sought to exclude a day planner/organizer and contents seized from Robert Rimmer's 1978 Oldsmobile motor vehicle. He also sought the exclusion of various electronic equipment which was seized from defendant's rental storage unit. The basis for suppression of the organizer was its absence from the list of items authorized to be seized from the Cutlass pursuant to a search warrant for the vehicle. Because a receipt in the organizer led to the existence of the storage unit and the subsequent seizure of its contents, exclusion of these electronic items was also sought. (R 2161-2163; 2235-2236)

The application and affidavit for the search warrant of the 1978 Oldsmobile sought the seizure of a number of items identified as follows: (1) fingerprints belonging to the suspect, (2) firearms used by the suspect, (3) shell casings and/or projectiles, ammunition used during commission of the crime, (4) trace/microscopic evidence of the crime, (5) blood and/or other bodily fluids belonging to the victims

or suspect, (6) materials transferred from the scene of the crime by the suspect, (7) duct tape used during commission of the crime, (8) various personal property belongings of Aaron Knight, Bradley Krause, Jr., Joe Moore taken during the commission of the crime, (9) cellular phone or parts thereof taken from the victim Joe Moore during commission of the crime, (10) a pair or part thereof of Kicker brand and Solo-Baric brand sound system taken during commission of the crime, and (11) motor vehicle stereo sound system parts, component parts and motor vehicle alarms, alarm systems and alarm component parts taken in the commission of the crime. (R 2165)

It was acknowledged in the application that the vehicle sought to be searched was not the so called “get-a-way” vehicle used in the robbery/murders but rather was owned and operated by Robert Rimmer at the time of his apprehension. (R 2166) An inventory filed subsequent to execution of the warrant indicated the seizure of (1) an organizer with various papers, (2) a pair of blue jean shorts, (3) a .380 bullet, (4) two holsters and (5) a pair of black oxford shoes. (R 2168-2169)

In an application and affidavit thereafter filed for the issuance of a search warrant for the rental storage unit, the same affiant, detective Anthony Lewis, recited the prior seizure of documents from Robert Rimmer’s Oldsmobile. (R 2170-2173)

Among those papers was a rental agreement between defendant and Extra Space Storage Rentals for unit number ten along with a receipt for rent paid days after the

homicides. (R 2172) A warrant issued on this application yielded the sought after property which consisted primarily of electronic components taken during the subject robbery. (R2174 - 2175)

At the evidentiary hearing, Officer Kenneth Kelley testified that he participated in the vehicle chase which culminated in Robert Rimmer's arrest. (SR 67-72) During the police pursuit, a number of items were thrown from defendant's automobile and later recovered by law enforcement. (SR 71-72) Mr. Rimmer's Oldsmobile was towed from the arrest scene in Fort Lauderdale to the City of Wilton Manors Police Department because, according to Officer Kelley, it was "their" case. (SR 72-73)

Detective Anthony Lewis had sought and obtained an arrest warrant for Robert Rimmer which then caused defendant's arrest in Fort Lauderdale and the seizure of his Oldsmobile automobile. (SR 87-88) The detective thereafter filed for and received a search warrant for defendant's residence, his Ford Probe vehicle, and his Oldsmobile. (SR 89-90) Nothing of consequence was found at the home or in the Probe. (SR 89-90)

In a search of the Oldsmobile, the police seized personal papers of Robert Rimmer including a rental agreement between him and a self-storage unit. (SR 90-92) As a result of the seizure of this written lease, a search warrant was obtained for the storage facility which in turn yielded a substantial portion of the electronics stolen

from the Audio Logic store. (SR 92-93) Subsequent forensic processing of these items revealed Robert Rimmer's latent fingerprints. (SR 93-94)

At this suppression hearing, detective Lewis testified that he and Deputy John Howard conducted the actual search of the Oldsmobile and it was not he, but Howard, who located and took possession of a personal paper organizer found somewhere in the vehicle other than the glove compartment. (SR 97-98) Deputy Howard then turned over the organizer and its papers, which included the rental storage lease agreement, to detective Lewis. (SR 98; 102) The detective described the organizer as zippered, rather than strapped. (SR 92-92; 101-102) At trial, detective Lewis reversed himself to say it had a strap fastener rather than a zipper. (R 1190-1193)

A cursory search of the Oldsmobile at the time of defendant's arrest failed to yield anything of evidentiary value. (SR 98-101) The organizer itself was not listed on the subject search warrant as an item to be seized. (SR 102) At the time the detective obtained the search warrant he had no "probable" expectations as to what would be found within the Oldsmobile. (SR 102-103) The murder weapon and stolen firearm had previously been recovered by police and therefore detective Lewis didn't expect to find them within the organizer. (SR 104-105) Also already recovered was Joseph Moore's wallet and driver's license. (SR 97; 108)

This completed all the evidence at the suppression hearing. (SR 111) Ten days

later, the trial judge entered a written order denying defendant's motion to suppress physical evidence. (SR 2194-2195)

At a subsequent supplemental hearing on the issue of suppression of the lease agreement and contents of the self-storage unit, the state agreed that detective Anthony Lewis and Deputy John Howard had provided some conflicting testimony as to where and by whom the "organizer" was found within defendant's vehicle. (SR 2235-2236; R 3-7) According to detective Lewis' earlier testimony, the subject personal "organizer" was located by Deputy Howard from a part of the automobile other than the glove compartment. (SR 98) Deputy Howard, however, denied it was he who found the organizer but rather said it was detective Lewis who located the organizer in the vehicle's glove compartment. (R 8)

Because no one from law enforcement could testify as to the reason for the "organizer's" seizure and since it was not listed in the search warrant as an item to be seized, the defense again sought its exclusion from use as evidence. (R 8-10) The prosecution asserted that it was a question of weight, rather than admissibility. (R 10)

Upon consideration of this additional factual circumstance, the trial judge again denied the defendant's motion to suppress physical evidence. (R 11) This ruling remained the same when defendant renewed his suppression motion during trial. (R 510-513; 544; 1128-1129; 1187) At trial, detective Lewis changed his prior testimony

and stated it was he who seized the “organizer” from the glove compartment of defendant’s Oldsmobile. (R 1190-1192)

MOTION TO SUPPRESS OUT-OF-COURT IDENTIFICATION HEARING:

In a pretrial motion to exclude out-of-court identifications by witness Kimberly Davis-Burke and Joe Louis Moore, defendant alleged that the identification process had been irreparably tainted by impermissibly suggestive procedures utilized by the investigating detective. (R 2176-2178) It was asserted that lead detective Anthony Lewis suggested that the proper selection in a photospread would be Robert Rimmer’s image in position number three which in turn led to both witnesses picking out defendant in a subsequent live line-up following his arrest. (R 2177)

At the evidentiary hearing, Michael Dixon testified that he was a partner in the Audio Logic store where the murders took place. (SR 4-5) As a result of viewing a police sketch of the gunman sought by authorities, Mr. Dixon was able to provide biographical information of a customer which led to the name of Robert Rimmer. (SR 5-15) The witness then identified defendant Rimmer’s photograph as a person who had patronized his mobile electronics business on several occasions in the months immediately preceding the homicides. (SR 8-15)

Joseph Louis Moore was at the Audio Logic store and was an eyewitness to the

murders. (SR 19-24) He described the gunman as a brown skinned black male, five feet ten inches tall, weighing one hundred fifty to one hundred sixty pounds and wearing baggy clothes and a baseball cap. (SR 21-22)

Days later, the witness was presented with a photospread by lead detective Anthony Lewis. (SR 25) Joseph Moore selected the image of Robert Rimmer. (SR 26) At a subsequent live line-up, the witness picked out the person of Robert Rimmer. (SR 26-27) These identifications came despite Joseph Moore's statement to police that the gunman had his cap pulled down low over his eyes. (SR 27-28)

Subsequent to the photospread, detective Lewis advised Mr. Moore that Robert Rimmer had been arrested and at the time was in possession of the witness' wallet. (SR 29-31) Detective Lewis also told him that his fellow eyewitness, girlfriend Kimberly Davis-Burke, had made the same photospread selection. (SR 31-33) Although Robert Rimmer was the only individual in the live line-up whose image appeared in the photospread, Joseph Moore stated his live line-up identification was not based on his prior photo line-up selection of the same person. (SR 35)

Kimberly Davis-Burke also witnessed the murders while at the Audio Logic store with her boyfriend, Joseph Moore. (SR 36-42) She described the gunman as a black male, five feet eight to five feet nine inches tall, wearing a baseball hat. (SR 37-38) At one point, the witness was right next to the perpetrator. (SR 38-39; 51-52)

Days later, Ms. Davis-Burke was shown a photospread by detective Lewis shortly after Joseph Moore was given the same opportunity. (SR 42-43) The witness selected two images as possibly being the gunman. (SR 42-44) One photo chosen was of Robert Rimmer which caused detective Lewis to advise her that, coincidentally, that was the person her boyfriend, Joseph Moore, believed the gunman to be. (SR 44, 49-50) At a subsequent live line-up, Ms. Davis-Burke picked the person of Robert Rimmer who was the only person in the live line-up whose image was in the photospread. (SR 44-46)

In her photospread selection, the witness used a process of elimination which left the final two images. (SR 45-46) Ms. Davis-Burke settled on a final choice of Robert Rimmer only after detective Lewis told her about her boyfriend's preference. (SR 46-50)

The robbery-murders took place over a period of approximately ten minutes. (SR 50-51) Her first choice for the gunman was image number six who was not Robert Rimmer. (SR 53-54) Ms. David-Burke only changed her final selection as a result of information provided to her. (SR 54-55) In a post-photospread identification police statement, the witness said that she only expressed a second choice of Robert Rimmer "because after you [detective Lewis] told me that Joe [Moore] picked him, I paid more attention to it. I paid more attention to it and thought it sort of looked like

him. (SR 50; 95-96)

Louis Rosario, a third eye witness to the homicides, was also shown the subject photospread by detective Lewis but he was unable to recognize any of the images displayed. (SR 55-59) The same result took place at the live line-up days later. (SR 59-60) In court at the evidentiary suppression hearing, Mr. Rosario did not recognize Robert Rimmer as being the gunman in the Audio Logic store. (SR 60)

Deputy John McMahon compiled a sketch of the gunman after interviewing eyewitnesses Kimberly Davis-Burke and Joseph Moore. (SR 61-64) After drawing the suspect from information provided by Ms. Davis-Burke, the finished product was shown to Mr. Moore who agreed with it and made no changes. (SR 64-66) The sketch was more a product of the former than the latter. (SR 67)

Lead detective Anthony Lewis of Wilton Manors constructed the photospread containing Robert Rimmer's image which was subsequently displayed to witnesses Joseph Louis Moore, Kimberly Davis-Burke and Louis Rosario. (SR 75-77) The defendant's photo was in the number three position or right upper corner in the six photo spread. (SR 78)

When Joseph Moore was shown the photospread, he selected number three, the image of defendant Rimmer. (SR 78-80) Thereafter, the detective displayed the photo line-up to Kimberly Davis-Burke who chose image number six as the gunman in the

Audio Logic store. (SR 80-81; 95) Ms. Davis-Burke also selected image number three, Robert Rimmer, as the possible perpetrator which resulted in detective Lewis advising her that Joseph Moore had chosen photo number three. (SR 81-82) Thereafter, the detective advised both Kimberly Davis-Burke and Joseph Moore that each had selected image number three. (SR 96)

At the subsequent live line-up where Robert Rimmer appeared in the number four position, defendant was selected by both Joseph Moore and Kimberly Davis-Burke. (SR 84-86) Louis Rosario was unable to make any identification of those standing for the live line-up. (SR 86-87)

Robert Rimmer's physical characteristics were six feet one to six feet two inches tall and approximately one hundred ninety pounds in weight. (SR 105; 111) The defendant had lost some weight and was down to one hundred seventy five/one hundred eighty pounds at the time of the live line-up. (SR 105-106) Robert Rimmer did not wear eyeglasses at the time of his live line-up. (SR 106-107)

By way of a written order, defendant's motion to exclude the out-of-court identifications of Kimberly Davis-Burke and Joseph Louis Moore was denied. (R 2194) A renewed motion for suppression made during trial was likewise rejected. (R 1171-1175; 1211)

MOTION TO SEVER DEFENDANTS HEARING:

In a pretrial motion to sever his case from codefendant Kevin Parker, defendant set forth a post-arrest statement of Parker which made reference to his acquaintance with Robert Rimmer. (R 2179-2180) It was asserted by defendant that because his defense at trial would be one of identity, any reference to the pair knowing each other would be inadmissible and prejudicial hearsay. (R 2179) The trial judge refused to sever the defendants but thereafter excluded this particular statement from evidence during trial. (R 1242-1245)

TRIAL PROCEEDINGS

JURY SELECTION:

In questioning by the court, prospective juror David Vandeventer, initially stated he could not under any circumstances recommend the death penalty. (R 64) Mr. Vandeventer acknowledged that until recently, he had been an advocate of the death penalty. (R 107) Upon further inquiry, the prospective juror expressed at least a tentative ability to make a death recommendation and became equivocal in his inability to vote for an advisory death sentence. (R 107-109) Nevertheless, David Vandeventer was stricken for cause upon motion of the prosecution. (R 109-110)

Prospective juror Gwendolyn Sthilaire was the subject of the prosecution's first peremptory strike. (R 380) Because of her minority status, the defense challenged the state to provide a race neutral reason for the excusal. (R 380)

In response, the prosecutor stated that when he asked Ms. Sthilaire for her opinion regarding the death penalty, the prospective juror stated: “that’s the mystery question”. (R 380) The trial judge found that answer, as well as another, to be “sufficient, good faith, non-pretextual race neutral” reasons. (R 380) Ms. Sthilaire, however, never responded as the prosecutor indicated. Her answer of “that’s the mystery question” came in response to the prosecutor’s question as to her opinion of the “two or three causes of crime”, not to any inquiry regarding the death penalty. (R 276) In the only question put to her regarding the ultimate penalty, the prospective juror indicated her ability to recommend such a punishment. (R 296)

In all other aspects, Gwendolyn Sthilaire was fully competent to serve as a juror, having previously been selected on a criminal case whose jury could not reach a unanimous verdict. (R275-276) Her expressed ability to be fair was unchallenged. (R 276)

GUILT PHASE:

Police dispatcher Maureen Reed authenticated the radio transmissions of a high speed vehicle chase which culminated in Robert Rimmer’s arrest. (R 572-583) Mention was made of items being thrown from the automobile driven by defendant. (R 583-586) The date was May 10, 1998. (R 576-577)

David Akers was the initial police officer to arrive at the scene of a reported

shooting. (R 587-589) The time was 12:35 p.m. on May 2, 1998, and the location was the Audio Logic store at 1006 West Oakland Park Boulevard in Wilton Manors, Florida. (R 588-590) Upon entering the business, Officer Akers found Aaron Knight bound with duct tape and dead from a gunshot wound to the head. (R 592-594) A second individual, Bradley Krause, Jr. was similarly restrained and shot but was still alive. (R 592-594) The crime scene was secured and a B.O.L.O. (be on the lookout) was put out for a dark colored Ford Probe with one headlight stuck in the upright position and occupied by three black males. (R 595-599)

A shell casing was recovered in a pool of blood near one victim. (R 601) The Broward Sheriff's Office crime lab was called in for crime scene processing. (R 600)

Michael Dixon was a partner in the Audio Logic store with decedent Aaron Knight. (R 611-617) Bradley Krause, Jr., was a store employee. (R 614-618) Mr. Knight kept a Walther P.P.K. . 380 firearm on the premises in a desk drawer. (R 624-625) It was missing following the shootings. (R 628)

Mr. Dixon, who was not on the premises at the time of the shootings, told of the ransacking of the store and missing merchandise with a wholesale value of \$12,000.00 (R 625-627) The vast majority of the stolen inventory was recovered and returned to the witness by the Sheriff's Office. (R 648-666) Approximately a dozen items were not recovered. (R 681-683) The witness identified Robert Rimmer as a prior

customer with an older model Oldsmobile who had a stereo system installed in December, 1997. (R 628-643) Subsequent complaints by defendant as to the system's performance were addressed by the witness. (R 643-647) Mr. Rimmer was always laid back and polite in his dealings with Michael Dixon. (R 669-670) At worst, the defendant was a bit frustrated with his sound amplifier which problem was apparently corrected by the witness. (R 646; 678; 680)

John Howard of the Broward Sheriff's forensic unit processed the crime scene at the Audio Logic store. (R 685-689) Photographs were taken, shell casings and a projectile fragment collected, a scene sketch constructed, a baseball hat and duct tape collected, and latent fingerprints lifted. (R 689-703; 743-749) Two automobiles, a blue Oldsmobile and a purple Ford Probe, owned by Robert Rimmer were also processed, one of which yielded a round of .380 ammunition. (R 710-720; 750-754) An organizer was located in the glove compartment that included papers which led to a storage facility and the recovery of an array of electronics. (R 720-726) Latent fingerprints were subsequently developed off the latter. (R 725-730; 736-743)

Nothing in the Ford Probe had any connection with the Audio Logic store. (R 750-754) The notebook/organizer was specifically located in the Oldsmobile by detective Anthony Lewis and seized by him. (R 753-754)

Louis Rosario was a customer at Audio Logic at the time of the incident

awaiting installation of electronic equipment. (R 763-766) He was ordered to the floor by a black male armed with an automatic handgun. (R 767-771) The witness had his hands duct taped behind his back while the store was robbed over a twenty minute period. (R 772-776) Thereafter, a car was started, but almost immediately someone exited and returned to store employees Aaron Knight and Bradley Krause, Jr. and shot each in the head before fleeing. (R 776-779) Mr. Rosario broke his restraints and ran to a nearby business to notify authorities. (R 779)

When shown a photographic lineup containing defendant's image by detective Lewis, he was unable to identify anyone as being the perpetrator. (R 780-781) A subsequent live line-up attended by the witness likewise resulted in no identification of Robert Rimmer who was standing as a participant. (R 781) Previously, Louis Rosario had advised detectives he would probably be able to make an identification of one of the robbers. (R 783-784) There was no conversation between either of the perpetrators of the crime and the two homicide victims that would indicate they were known to one another. (R 781-782)

Kimberly Davis-Burke was also a customer at Audio Logic on the day in question. (R 784-786) Both she, her boyfriend and child were in the waiting area when a person she identified as codefendant Kevin Parker entered the store. (R 784-796) A second black male was seen by her and described as 5'9" and less than 175

pounds, wearing a white “T” shirt, khaki pants and a baseball hat. (R 796-798)

Robert Rimmer was identified by her as being that individual. (R 798-799)

During the robbery, her boyfriend Joe Moore, was restrained with duct tape and placed on the floor while she and her child sat on the ground. (R 800-803) The two perpetrators removed the store’s inventory and placed it in a purple Ford Probe. (R 803-806) A third robber helped move the stolen merchandise. (R 805) He was described as a young black male. (R 805)

Robert Rimmer removed the cash register receipts and a firearm from the storeroom/office. (R 806-808) Before finally departing, defendant shot Aaron Knight and Bradley Krause, Jr. (R 809-813; 869-870)

The witness met with a police artist for the preparation of a composite sketch. (R 813-814) Later she viewed a photospread where she selected two photographs that resembled the person who committed the crime. (R 814-815) At a subsequent live line-up, Ms. Davis-Burke selected Robert Rimmer as the person who did the shooting. (R 816-817)

The witness stated that she didn’t observe the gunman wearing eyeglasses as was consistent with the police artist’s sketch and her pretrial deposition. (R 833-834) She described the shooting suspect as five foot nine inches tall, or one to two inches taller than herself. (R 834-835) The Ford Probe was said to have alloy wheels and

was exited on the passenger side by the gunman just prior to the actual shootings. (R 835-837) The shooting perpetrator wore his baseball cap down low over his eyes. (R 838) The witness had occasion to observe the gunman on and off during the ten to twenty minute robbery. (R 839-840) At one point defendant drove her car, a white Dodge Dynasty, out of its spot in a work bay so as to move the Ford Probe into its place. (R 800-804; 837-839)

Ms. Davis-Burke acknowledged that when viewing the photospread containing defendant's image, she first selected a photograph of another person as the gunman. (R 841-842) Photo number three, portraying Robert Rimmer, was also picked after a suggestion by detective Lewis that her boyfriend Joe Moore had just made that choice. (R 841-845; 857-858; 860) Her selection of images three and six merely represented those who most closely fit her memory of the gunman rather than a definitive identification. (R845-846) The witness also conceded an identification of a third person she now claims to be codefendant Keith Parker. (R 867)

Joe Louis Moore was at the Audio Logic store with his girlfriend, Kimberly Davis-Burke, when confronted by a black male, five feet seven to five feet nine inches tall, one hundred sixty to one hundred seventy pounds in weight, wearing baggy jeans, "T" shirt and ballcap. (R 870-879) The perpetrator was armed with a handgun and he ordered the witness to the floor. (R 879-881) In court, Robert Rimmer was

identified as that individual. (R 881-882)

Mr. Moore was restrained with duct tape and personal property, including his wallet and cellular phone, was taken from him. (R 886-887) Store inventory was loaded in a purple Ford Probe automobile with peeling window tint that Rimmer had backed into one of the store's work bays. (R 887-891; 907) The cash register receipts and a handgun were removed by defendant. (R 891-894) Both Aaron Knight and Bradley Krause, Jr. were shot before Robert Rimmer departed. (R 895-898) Mr. Moore then ran to a nearby business for assistance. (R 899)

Days later, Joe Moore assisted in making a composite sketch of the gunman.(R 900) When shown a photospread, the witness selected image number three, Robert Rimmer. (R 900-901) A similar identification was subsequently made from a live line-up. (R 902-903)

The gunman, according to Joe Moore, wore no eyeglasses, had a reddish brown color to his skin, weighed one hundred fifty to one hundred sixty pounds and was three to five inches shorter than the witness himself. (R 902-907) After Mr. Moore and Ms. Davis-Burke were shown the photospread, detective Lewis advised them that both had made the same selection. (R 904-905) Joe Moore fully expected Robert Rimmer to be in the live line-up he was requested to attend. (R 908)

Police artist John McMahon drew a sketch of the gunman after meeting with

witnesses Kimberly Davis-Burke and Joe Moore. (R 913-916) No eyeglasses or facial hair was placed on the depicted suspect. (R 924)

Jenette Mallard was codefendant Kevin Parker's ex-girlfriend and she had known Robert Rimmer to associate with him. (R 925-937) On the date of the incident, Parker had taken her automobile into a stereo repair shop to have the speakers checked. (R 937-940; 959-960) Parker saw the people at the Audio Logic store but left without further explanation to her. (R 940-951) Ms. Mallard was threatened by detective Lewis that she would be jailed if uncooperative with authorities. (R 956-957) Nothing was found in her vehicle that would indicate its association with the crimes being prosecuted. (R 959-962)

Bonnie Shinn, property manager of a storage rental facility, rented a space to Robert Rimmer on May 7, 1998. (R 969-974) The contents and original lease documents were seized by the police pursuant to a search warrant. (R 975-976)

Kenneth Kelly, a K-9 officer and his canine partner, Noro, assisted in the apprehension of Robert Rimmer in the early morning hours of May 10, 1998, following a twelve minute high speed vehicle chase and a much shorter foot pursuit. (R 978-993) A throwing motion was observed on three occasions and items were then sought out by other police officers. (R 993-996) Robert Rimmer sustained puncture wounds from Noro and facial injuries from Officer Kelly. (R 996-997)

Officer Chester Janie recovered a wallet found along the police chase route on Sunrise Boulevard at Middle River. (R 1003-1009) Identification inside was in the name of Joe Louis Moore. (R 1009)

Officer Richard Babe also located an item along the chase path. (R 1011-1013) A firearm was shown to a Sheriff's forensic deputy who removed it from the Third Avenue Bridge area. (R 1013 - 1015) Patrol Officer Richard Rodriguez recovered a second firearm near Andrews Avenue and Broward Boulevard which he turned over to investigative detectives. (R 1015-1019) Deputy Terry Gattis processed the Third Avenue Bridge firearm for latent fingerprints. (R 1023-1026)

Fred Stenger assisted fellow detective, Anthony Lewis, by showing a photospread to Kimberly Davis-Burke which contained codefendant Parker's image. (R 1028-1035)

Firearm examiner, Carl Haemmerle, testified that casings found at the murder scene were fired from the Vikale brand firearm located at the Third Avenue Bridge. (R 1027; 1035-1051) A live round found in defendant's Oldsmobile had been cycled through the Walther P.P.K. handgun taken from the Audio Logic store. (R 717-720; 1052-1057)

John Ercolano, a mobile electronics installer, had contact with Robert Rimmer several months prior to the shootings when the former worked at Car Tunes audio

store in Fort Lauderdale. (R 1068-1975; 1079-1080) The defendant was complaining of problems with the stereo installed by Audio Logic. (R 1075-1078; 1082)

Associate medical examiner Eroston Price performed autopsies on both deceased, Aaron Knight and Bradley Krause, Jr. (R 1083-1090) Each died as a result of gunshot wounds to the head. (R1107-1108; 1113-1114) Mr. Knight died instantly and Mr. Krause immediately lost consciousness upon being shot. (R 1114)

Deirdre Bucknor, a fingerprint examiner, testified that the known standard fingerprints of Robert Rimmer matched those latent prints taken from the various items seized from defendant's self-storage unit. (R 1117-1133) Defendant Rimmer's prints were not found on the duct tape taken from the body of Aaron Knight nor were they found in Ms. Davis-Burke's Dodge Dynasty. (R 1139-1145) Latent prints lifted from the store's office door, glass front door, cash register and storage room shelf did not match Robert Rimmer. (R 1139-1145) Numerous other latent lifts from the stolen sound equipment did not belong to defendant. (R1145-1148)

Anthony Lewis, the lead investigating detective, traced two Florida vehicle registrations to Robert Rimmer - a Ford Probe and an Oldsmobile. (R 1159-1168) The detective displayed a photospread to witnesses Joe Louis Moore and Kimberly Davis-Burke with the former selecting defendant's image and the latter selecting an unknown image as well as defendant's. (R 1168-1174) Detective Lewis advised Ms.

Davis-Burke that fellow witness Joe Moore had already picked out Robert Rimmer as his choice for the gunman who committed these crimes. (R 1174-1175)

After defendant's arrest, the Oldsmobile and Ford Probe were impounded and later searched. (R 1179-1184) Nothing of consequence was found in the Probe while the Oldsmobile yielded defendant's personal papers found within his "day planner". (R1184-1185; 1193) Although detective Lewis claimed he found the item in the glove compartment, he had previously sworn that it was another detective who had done so. (R 1190-1193) Included in the organizer was Robert Rimmer's lease agreement for a self-storage unit which subsequently yielded the stolen electronics from Audio Logic. (R1196-1202) A video surveillance camera recorded defendant at the storage facility unloading property from his vehicle. (R 1203-1208; 1511)

Detective Lewis agreed that at the time of Robert Rimmer's arrest one week after the homicides, the defendant was approximately six feet two inches tall and weighed one hundred ninety to two hundred pounds. (R1252) The detective further acknowledged that the Ford Probe automobile owned by defendant was viewed by him at the same time and that the Probe vehicle sought by police had a visible defective tint job. (R1253)

Before displaying the photospread to Joe Moore, detective Lewis advised him he should eliminate any subjects who looked less like the gunman and pare it down

to the image it could possibly be. (R1254-1256) When shown the photospread, Ms. Davis-Burke selected an image other than Robert Rimmer as the gunman she observed. (R 1256)

Contrary to various trial testimony, detective Lewis stated he had authored a sworn statement that the gunman entered the passenger side of the Ford Probe rather than the driver's. (R1073) Finally, the detective taunted Robert Rimmer upon his arrest, that the pain inflicted upon him by the dogs would be less than that he would receive from the electric chair. (R1274)

This completed the prosecution's presentation. (R 1274) Defendant Rimmer's motion for directed verdicts of acquittal was denied. (R 1275-1278)

For the defense, corrections officer Kwame Riely, testified that he booked Robert Rimmer into the Broward County Jail in March, 1998 for a misdemeanor charge. (R 1284 - 1290) At the time, defendant wore eyeglasses. (R 1290-1292)

Fort Lauderdale police officer John Gonzalez assisted in the surveillance of Robert Rimmer on the morning of defendant's arrest. (R 1295-1297) At the time, Mr. Rimmer was wearing eyeglasses. (R 1298)

Optician Fred Butterfield testified that Robert Rimmer received prescription eyeglasses from his eyeglass store in February and May, 1998 pursuant to an order from Doctor Ralph Brucejolly. (R 1306-1313) The second pair of glasses were

duplicates of the originals. (R 1314-1315)

Optometrist Ralph Brucejolly performed an eye examination of Robert Rimmer which determined defendant was nearsighted to such a degree that when not wearing corrective lenses, the defendant would be considered legally blind. (R1320-1324) These eyeglasses would be necessary for defendant to operate a motor vehicle. (R 1329-1330)

The defendant's wife, Joanie Rimmer, told of her husband's sever inability to see without the corrective lenses which he wore constantly. (R 1343-1345) Ms. Rimmer drove the couple's Ford Probe while her husband operated an Oldsmobile Regency. (R 1345) Never had she observed her spouse to operate his motor vehicle without his eyeglasses. (R 1356)

On the day of the shootings defendant had plans to go fishing with their son and in fact left with the boy and various fishing equipment. (R 1346-1347; 1354-1355) The pair left home between eight and nine a.m. returning around three-thirty in the afternoon. (R 1354-1356)

Following Robert Rimmer's arrest, his mother obtained a replacement pair of eyeglasses since defendant's original pair were taken from him by arresting police officers. (R 1384-1385) She initiated no communication with investigating authorities on her husband's behalf because she knew they would simply ignore her. (R 1383-

1384)

This finished Robert Rimmer's evidentiary presentation. (R 1385) The prosecution then offered rebuttal evidence. (R 1385, 1391)

Police officer John Welker was at the city credit union several months prior to the murders when he encountered Robert and Joanne Rimmer who were both arrested as a result of a domestic altercation between the two. (R 1391-1399) Although Officer Welker remembered no eyeglasses on defendant, the pertinent booking sheet by Deputy Riely indicated otherwise. (R 1290-1292; 1397)

Rodney Blish, a fellow Fort Lauderdale police officer, was of the same remembrance as to defendant's eyewear. (R 1399-1403)

Finally, Officer Kenneth Kelly was recalled to speak about his own poor vision which he said approximated defendant's. (R 1404) According to the witness, he is able to operate his vehicle without his eyeglasses and not crash. (R 1404-1405) The officer only wears his corrective lenses when he wants to see clearly, like when on a police call. (R 1408-1409) Defense objections to Officer Kelly's ability to see without his glasses was overruled. (R 1387-1390; 1404; 1407)

In surrebuttal, Joanne Rimmer testified that, contrary to the testimony of Officers Welker and Blish, it was she driving the Ford Probe during the encounter at the credit union. (R 1412- 1413) This vehicle as depicted in a prosecution introduced

photograph does not have alloy wheels or defective tint. (R 1518-1519)

This completed all the evidence in the case. (R 1413) Renewed motions for judgment of acquittal were denied. (R 1416-1417)

CLOSING ARGUMENT:

In his closing argument to the jury, the prosecutor: repeatedly described the shooting as an “execution”; asserted that defendant “blew his [victims] brains out; compared himself to a dentist in questioning a witness; referred to his military service; advised that only a guilty verdict speaks the truth; reiterated lessons taught to him in law school; stated that the “right thing” to do is convict; said that from his “perspective” there was no reasonable doubt; and analogized the juror’s role to that of a baseball player. (R 1478; 1491; 1493; 1495-1496; 1501; 1531-1533; 1544)

PENALTY PHASE:

Based on the jury’s verdicts of guilt on both counts of first degree murder, penalty phase proceedings were conducted on each defendant individually. (R 1722-1739)

By way of a motion in limine, the defendant sought to prohibit the prosecutor from eliciting through cross-examination of his mental health expert, any information regarding criminal history. (R 1814, 1822-1828) The court deferred any ruling pending a proffer at the appropriate time in the proceedings. (R 1828)

The prosecutor, in his penalty phase opening statement again described the shootings as “vicious, brutal execution style killings”. (R 1814-1842) Additionally, the prosecutor spoke of other capital cases and what jurors in those cases needed as evidence before recommending the death penalty - that the victim was a “good person” and that the defendant was a “bad person”. (R 1842)

Over defense objections, Stacy Daley, offered victim impact evidence on behalf of her boyfriend, Bradley Krause, Jr. (R 1851-1852) The witness spoke of their engagement, his employment and how his last visit to his family in Chicago was not known to Mr. Krause at the time to have been his last. (R 1853) This latter statement was over defense objections. (R 1764-1765) Similarly, David Knight, father of Aaron Knight, told of his son’s passion for bodybuilding and love of friends and music. (R 1855-1859)

Police sergeant George Jerabek confirmed a prior conviction of Robert Rimmer for armed robbery and aggravated assault. (R 1860-1862) No one was shot during the incident. (R 1862) Detective Robert Edgerton validated another case which resulted in conviction of defendant for attempted armed robbery with a firearm. (R 1863-1865) Again no one was shot or hurt in that criminal episode. (R 1865-1866)

This completed the prosecutions’ presentation in the penalty phase. (R 1866)

For the defense, Louis Rimmer, the defendant’s father, told of his ex-wife’s

kidnaping Robert and his two brothers from their Cleveland home and their removal to North Carolina. (R 1867-1870) The defendant's mother told the children that Cleveland had been blown up and that their father was dead. (R 1869) Louis Rimmer located his kids and returned them to Ohio pursuant to his court order of custody. (R 1870)

Robert Rimmer's mother was a violent individual who exhibited her behavior in front of the children. (R 1870-1871) At age thirteen, the defendant went to live with his mother in Fort Lauderdale. (R 1871-1872) Louis Rimmer maintained a good relationship with his son whom he described himself as being an excellent father. (R 1872-1875)

Melanie Friczinger, manager of an assisted living facility, was Robert Rimmer's employment supervisor. (R 1876-1877) She described defendant as an excellent employee in his duties as the dietary supervisor who was well liked by the seniors and staff who lived and worked at the facility. (R 1877-1878) Rene Zalzibar, director of human resources at the assisted living facility, testified that defendant earned a vocational scholarship as a result of his work performance. (R 1878-1881)

Henry Morris, a close friend of defendant's since early childhood, recounted Robert Rimmer's bible teachings, church attendance, and Christian ministry to neighborhood gang kids. (R 1881- 1883) The defendant assisted the witness during

an especially difficult time when suicide was contemplated. (R 1883-1885)

Clinical psychologist, Martha Jacobson, testified outside the presence of the jury that she evaluated and tested Robert Rimmer and formed certain opinions as a result thereof. (R 1886-1887) As to the presence of mental illness in defendant, his prior criminal history as provided by defendant, did not effect that opinion. (R 1887-1888) Nevertheless, the trial court ruled that the prosecutor could still elicit on cross-examination, any criminal history revealed to the psychologist by the defendant. (R 1889)

Before the jury, Dr. Jacobson, a diplomat from the American College of Forensic Examiners, stated she administered three psychological tests to Robert Rimmer and conducted a mental status examination. (R 1893-1894) The defendant was not malingering. (R 1895; 1902) Testing showed Robert Rimmer to exhibit paranoia, mania, psychopathic deviance and bizarre thought processes. (R 1896-1897) Mr. Rimmer met the criteria for a diagnosis of schizophrenia, a mental disorder which involves a disturbance in the brain chemistry. (R 1899) He also was considered to be suffering from depression. (R 1901) The defendant sometimes experienced hallucinations. (R 1902-1903)

It was Dr. Jacobson's opinion that Robert Rimmer's mental illness was chronic and long-standing. (R 1903 - 1904) His diagnosed schizophrenia is known as a

serious mental illness. (R 1904) Individuals who are schizophrenia, generally do not go into remission without treatment. (R 1904) Robert Rimmer had an average I.Q. and appeared to be truthful in his disclosures to the psychologist. (R 1906, 1933) Dr. Jacobson had no question in her mind that defendant suffered from a schizophrenic disorder. (R 1934)

Based on the trial court's prior ruling, the prosecutor was permitted to cross-examine Dr. Jacobson regarding defendant's criminal history including his prior prison incarcerations and eight felony convictions. (R 1912, 1914, 1929) This prior criminal history was obviously more than that introduced by the prosecution during its presentation. (R 1860-1866) There, the state put into evidence, proof of three violent felonies. (R 1952)

The defendant's wife, Joanne Rimmer, testified that her husband was not only a good father to the two children of their marriage, but was as well to the witness' child from a prior relationship. (R 1935-1939) Mr. Rimmer would take all three children to places such as the park, zoo and fishing hole. (R 1939) The defendant helped the kids with their homework and participated in the school's parent-teacher association. (R 1939-1940) Books were the gift of choice at Christmas. (R 1940)

Mrs. Rimmer stated that her husband worked at the assisted living facility during the day while attending vocational school in the evenings which was funded

via his employer-awarded scholarship. (R 1940) Around the home defendant would share in the housework. (R 1941)

The witness restated her love for husband Robert Rimmer while indicating he was deserving of it. (R 1941) Joanne Rimmer did not want to see her husband executed in Florida's electric chair. (R 1941)

Defendant's step-daughter, Gisel Charles, spoke of defendant as her father who took her places, helped her with her homework and participated in her school activities. (R 1941-1943) The child loved the person she called her daddy. (R 1942-1943)

This completed all penalty phase evidence. (R 1943) During his closing argument for a death recommendation, the prosecutor told the jury that there were no "winners" in the case and that he "feels sorry" for the families involved. (R 1949-1950) The prosecutor stated that the psychologist presented by the defense, "...did what she was paid to do"... that she gave "a non-opinion on some mental mumbo-jumbo, with no factual basis to support it". (R 1951) This mental health "mumbo-jumbo" theme was again repeated in the prosecutor's argument. (R 1958) Further, the prosecutor described and compared Robert Rimmer to other prisoners within Florida's prison population. (R 1958-1959) He also argued that a prisoner can be released from a Florida prison by way of controlled release. (R 1951-1952) He also

recited the victim impact evidence previously presented on behalf of both decedents. (R 1959-1960)

Additionally, the prosecutor recited a “law enforcement” saying relating to the dangerousness of their profession. (R 1960) He, unlike the court and defense counsel, refused to properly address Dr. Jacobson. (R 1951) As he did in his guilt phase closing, the prosecutor exhorted the jurors “to do their job” and return two death recommendations. (R 1961)

The trial court instructed the jury that they could consider the victim impact evidence presented in their determination of the two decedent’s uniqueness as individual human beings and the resultant loss to the community members by virtue of the deaths. (R 1985) This was a state proposed instruction which was given in lieu of defendant’s special instruction on victim impact evidence. (R 1762-1767) The jury returned an advisory sentence as to each victim by a count of nine to three. (R 1990-1994)

SPENCER HEARING:

The state introduced additional victim evidence in the form of written statements of five individuals, Debra Winkelman, Grandma Dott, Buzz Kilmore, Victoria Brukalla, and Sarah Krause. (R 2001) These were received over defense objection as an inappropriate attempt by the prosecution to bolster the jury’s death

recommendation. (R 2002-2003)

Bradley Krause, Sr., father of decedent Bradley Krause, Jr., asked the trial judge to follow the jury's death recommendation. (R 2003-2004)

On behalf of Robert Rimmer, neuropsychologist Michael Walczak, testified that he examined the defendant subsequent to the penalty phase recommendation. (R 2007-2009) A battery of psychological tests showed no neuropsychological damage but there was an indication that defendant suffered from a clinical disorder of schizo-affective. (R 2009-2010) It is a combination of bizarre thinking, schizophrenia, and mood disorder. (R 2010-2011) It is considered a severe mental condition. (R 2011) Robert Rimmer does not acknowledge his mental illness. (R 2011 - 2012) Further, the psychologist found defendant to have experienced hallucinations and not to be malingering. (R 2011-2012, 2033-2034) Mr. Rimmer's mental disorder is "fueled by anger" which turned inward becomes "depression". (R 2013)

Dr. Walczak would have liked to have reviewed Robert Rimmer's prison records from prior incarcerations but could not do so due to time and financial restraints which were imposed by the court. (R 2038) Nevertheless, the psychologist stated that no more time or money was needed to conclude that Robert Rimmer suffered from schizo-affective disorder.

Lilly Rimmer described her ex-husband, the defendant's father, as a parental

failure. (R 2046-2050) Robert Rimmer eventually became angry at the constant fighting between his parents and his father's lack of attentiveness. (R 2049- 2050) The defendant ping-ponged back and forth between parents upon their separation. (R 2050-2052) At an early age, defendant was in an accelerated program for gifted students but he faltered in high school. (R 2052-2053) Robert Rimmer was a protective, loving considerate son to her, a good brother to his siblings and an excellent father to his own children. (R 2053-2054)

The prosecutor completed his Spencer hearing presentation by arguing to the trial judge that Robert Rimmer was "a worthless piece of fecal matter...whose death should come prior to natural causes". (R 2059) Robert Rimmer merely responded that the prosecutor appeared "to be an angry fellow". (R 2060)

SENTENCING:

After a review of sentencing memorandums and a presentence investigation report as to the non-capital felony convictions, the court proceeded to sentence. (R 2066) Robert Rimmer was sentenced to death for his two first degree murder convictions and imprisonment on the remaining felony convictions. (R 2081-2083)

In imposing a sentence of death for the murders of Bradley Krause, Jr. and Aaron Knight, the trial judge noted the jury's nine to three recommendation for death and he found the following aggravating circumstances to exist: (1) that defendant was

previously convicted of a felony and under a sentence of imprisonment at the time he committed the murders, (2) that defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, (3) that the capital felony was committed while the defendant was engaged in the commission of the crimes of robbery and/or kidnaping, (4) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, (5) that the capital felony was especially heinous, atrocious, or cruel, and (6) that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 2383-2393)

No statutory mitigating factors were found to have been established by the evidence although the circumstance that the defendant was under the influence of extreme mental or emotional disturbance at the time the capital felony was committed was proposed by the defense and briefly discussed by the trial judge. (R 2393-2394)

Non-statutory mitigating circumstances were found to exist at least to some degree as follows: (1) the defendant's family background with his difficult upbringing; (2) the defendant's work history as an excellent employee; (3) the defendant's help and ministry to others, (4) the defendant's role as a good father, and (5) defendant's mental health difficulties. (R 2394-2397)

SUMMARY OF ARGUMENT

Point I

Physical evidence, including defendant's day planner (and contents) along with electronic items seized as a fruit thereof, should have been excluded from use as evidence. The defendant's personal organizer was not an item authorized to be seized by a search warrant for his vehicle. A lease agreement within the organizer resulted in an additional search of defendant's rental storage space which yielded the electronic equipment taken in the robbery-burglary of the Audio Logic store. These fruits of the initial illegal day planner seizure formed a substantial portion of the prosecutor's presentation and their improper admission cannot be considered harmless. Reversal with instructions for a new trial is appropriate.

Point II

The pretrial identifications of defendant by eyewitnesses Joseph Louis Moore and Kimberly Davis-Burke were infected with unnecessarily suggestive police procedures. Detective Lewis gave the witnesses information which clearly suggested to them that Robert Rimmer was likely the gunman they observed at the crime scene. Only defendant's image appeared in each and every photospread and live line-up. No

showing was made by the prosecution that any in-court identification would be independently reliable rather than a product of the suggestive police procedure. Both witnesses provided initial descriptions to police that varied substantially from the physical characteristics of Robert Rimmer. Accordingly, the police procedures employed were conducive to irreparable mistaken identification. Reversal with instructions for a new trial is appropriate.

Point III

Prospective jurors David Vanderverter and Gwendolyn Sthilaire were improperly dismissed. Mr. Vanderverter had initially expressed his opposition to the death penalty but when asked if he could follow the court's instructions on the law and return a recommendation of death if appropriate, the prospective juror stated that he "guessed" he could. Accordingly, David Vanderverter was not subject to his "cause" disqualification since he never indicated "unequivocally" in the "final inquiry" that he could not vote to recommend the death penalty where the law requires it. The improper exclusion of this venireman requires defendant's sentence of death be vacated.

A second prospective juror, Gwendolyn Sthilaire, was dismissed pursuant to the prosecution's first peremptory challenge. When asked for a race-neutral reason for excusing this member of a racial minority, the prosecutor offered a justification which

was factually incorrect and without any record support. Consequently, there could be no finding that the prosecutor's reason was "genuine" as is required. Ms. Sthilaire was otherwise fully qualified to serve. Reversal with instructions for a new trial is appropriate.

Point IV

Police officer Kenneth Kelly's testimony regarding his personal and individual ability to see without his prescription glasses was improperly admitted. This evidence was not relevant to rebut testimony that Robert Rimmer wore corrective eyewear and could "hardly see" without it. Not only was there no factual predicate offered by the prosecution that allowed for a scientific conclusion that the witness' vision without corrective lenses would be comparable to defendant's vision in a like circumstance, but each had a different degree of impairment. As such, there was no "logical tendency" of the officer's abilities to prove or disprove those stated abilities of the defendant. Reversal with instructions for a new trial is appropriate.

Point V

A mistrial should have been declared after the prosecutor made reference to defendant's exercise of his pretrial right to remain silent. The trial judge improperly permitted the questioning of Robert Rimmer's wife regarding her conversations with him relating to the homicides for which he was arrested. These questions by the

prosecutor were clearly designed to adduce the absence of a denial of criminal participation by defendant. Because any comment which is “fairly susceptible” of being interpreted as bearing on a defendant’s right to remain silent is strictly prohibited, this solicitation by the prosecutor of Robert Rimmer’s silence was error. Reversal with instructions for a new trial is appropriate.

Point VI

Various improper comments by the prosecutor in the presence of the jury denied Robert Rimmer fundamental fairness in his trial proceedings. The prosecutor’s appeal to the juror’s emotions, his denigration of the person of defense counsel, his expression of his personal belief in the adequacy of the state’s proof, his belittlement of the theory of defense, his suggestion of the existence of evidence of defendant’s guilt that he was not allowed to present, and his reference to defendant’s pretrial silence combined to deprive Robert Rimmer of a fair trial. Reversal with directions for a new trial is appropriate.

Point VII

Defense psychologist, Martha Jacobson, was improperly questioned by the prosecutor regarding defendant’s prior criminal history as communicated to her by the accused. Prior to her penalty phase testimony, Dr. Jacobson advised the court via a proffer that, although she elicited certain information from defendant regarding his

criminal history, this specific information did not play a “significant or relevant” part of her evaluation of any present or past mental condition. Nevertheless, the trial judge ruled that because the psychologist received criminal history information from Robert Rimmer, it was then somehow “used” by her in formulating her professional opinion, despite Dr. Jacobson’s unequivocal testimony to the contrary. The extensive criminal history of defendant which was then provided to the jury deprived him of a fair trial. Reversal with instructions to conduct a new penalty phase proceeding is appropriate.

Point VIII

During the penalty phase, the prosecutor made numerous improper and prejudicial comments to both the judge and jury. These remarks included the prosecutor’s denigration of the defense mental health expert; his reference to mental disorders suffered by other Florida prisoners; his assertion that death is the morally correct sentence; his statement that Florida has a “release program” for sentenced inmates; his appeal to the emotional fears of jurors “to do their jobs” in this case of “vicious and brutal executions” and finally, describing Robert Rimmer as a “worthless piece of fecal matter...whose death should come prior to natural causes”. These improprieties in the prosecutor’s conduct during the penalty phase proceedings and sentencing hearing deprived defendant of a fair result. Reversal with instructions to conduct a new penalty phase and sentencing proceeding is appropriate.

Point IX

The trial judge improperly found the existence of the statutory aggravating circumstance of “heinous, atrocious, or cruel”. Each death was instantaneous or near-instantaneous by gunfire. There were no additional acts during the twenty minute robbery designed to “inflict a high degree of pain or to otherwise torture” the two victims. Accordingly, this crime is not properly set apart from the norm of capital felonies in the absence of “the conscienceless or pitiless crime which was unnecessarily torturous to the victim”. Reversal with instructions to conduct a new sentencing hearing is appropriate.

Point X

The penalty phase jury instruction improperly permitted the consideration of victim-impact evidence in the sentencing recommendation. Although told not to use any victim-impact evidence as support for an aggravating circumstance or in rebuttal of a mitigating circumstance, the jury was none the less advised to consider it to demonstrate the victim’s uniqueness and the resultant loss to the community. By not being told how to properly factor the victim-impact evidence into their sentencing decision, the jury was not instructed on the law in a clear and uncontradictory manner. Consequently, Robert Rimmer was denied fundamental fairness. Reversal with instructions to conduct a new penalty phase proceeding is appropriate.

POINT I ON APPEAL

THE TRIAL COURT ERRED IN DENYING
ROBERT RIMMER'S MOTION TO
SUPPRESS PHYSICAL EVIDENCE; A
PERSONAL ORGANIZER AND/OR ITS
CONTENTS WERE NOT ITEMS
AUTHORIZED TO BE SEIZED BY A
SEARCH WARRANT FOR DEFENDANT'S
AUTOMOBILE

Robert Rimmer's motion to suppress physical evidence sought to exclude a personal day planner/organizer and contents that were seized from his Oldsmobile automobile. It was a lease agreement within the organizer that led police to a rental self-storage unit which yielded the electronic equipment taken in the robbery-burglary of the Audio Logic store.

The items of property listed in the application to be searched for and authorized by the warrant to be seized from defendant's Oldsmobile were (1) fingerprints belonging to the suspect, (2) firearms used by the suspect, (3) shell casings and/or projectiles, ammunition used during the commission of the crime, (4) trace/microscopic evidence of the crime, (5) blood and/or other bodily fluids

belonging to the victims or suspect, (6) materials transferred from the scene of the crime by the suspect, (7) duct tape used during the commission of the crime, (8) various personal property belongings of Aaron Knight, Bradley Krause, Jr., and Joe Moore taken during the commission of the crime, (9) cellular phone or parts thereof taken from the victim Joe Moore during commission of the crime, (10) a pair or parts thereof of Kicker brand and Solo-Baric brand sound system taken during the commission of the crime, and (11) motor vehicle stereo sound system parts, component parts and motor vehicle alarms, alarm systems and alarm component parts taken in the commission of the crime. (R 2165; SR 180 - 189) It was acknowledged in the application for search warrant that the Oldsmobile automobile sought to be searched was not used in the actual commission of the crimes under investigation but rather was a second vehicle owned by Robert Rimmer and operated by him at the time of his arrest. (R 2164-2167) As indicated in the inventory filed subsequent to execution of the warrant, one item seized¹ was “an organizer with various papers”.

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It was unclear as to who actually seized the organizer from the Oldsmobile. Detective Lewis testified at the suppression hearing that it was Deputy Howard who located it from someplace other than the glove compartment. (SR 97-98; 102) At trial, detective Lewis changed his testimony and said it was he, and not Deputy Howard, who located and seized the organizer from the glove compartment of the vehicle. (R 1190-1192) Likewise, at the suppression hearing, detective Lewis, described the day planner/organizer as a “zippered” type item but at trial conceded it had no zipper and was merely strapped shut. (SR 91-92; 101-102; R 1190-1193) At the evidentiary motion to suppress, no one from law enforcement testified as to the reason for the seizure of the organizer. (R 8-10)

(R 2168-2169)

One of the documents found among Robert Rimmer's personal papers in the organizer was "an agreement for rental of storage space". This lease between defendant and a self-storage facility then formed the probable cause basis for a subsequent search warrant of the rental premises and the seizure of the stolen stereo equipment. (R 2161-2175; 2235-2236; SR 190-199)

At the time of the initial impoundment of the Oldsmobile, a cursory search failed to yield anything of evidentiary value. (SR 98-101) The organizer itself was not listed in the search warrant as an item to be seized and at the time of its issuance, the affiant on the application, detective Anthony Lewis, had no "probable" expectations as to what would be found within the vehicle. (SR 102-103) In fact, property sought after in the application and set forth in the search warrant to be seized had already been recovered by police, included the murder weapon, firearm stolen from the store's office and Joseph Moore's wallet. (SR 30-31; 97; 104-105; 108)

The lease agreement and electronics were obtained through an illegal search and seizure and they were put into evidence against Robert Rimmer in violation of the Fourth Amendment to the Constitution of the United States and Article 1, Section 12 of the Florida Constitution. Both declare the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Both

prohibit the issuance of a warrant but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or things to be seized.

General searches have long been deemed to violate fundamental rights. *e.g.* *Boyd v. United States*, 116 U.S. 616, 624, 6 S.Ct. 524, 529 (1886); *Weeks v. United States*, 232 U.S. 383, 391, 34 S.Ct. 341, 344 (1914) “The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927)

In enacting the laws governing the issuance and execution of search warrants, Florida as was Congress, was diligent to limit seizures to things particularly described. *Florida Statute 933.04* provides that a search warrant cannot be issued except upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person and thing to be seized. *Section 933.05* prohibits the issuance of a search warrant in blank and requires all search warrants to be based on probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized. *Section 933.06* mandates that the judge or magistrate, before issuing the

warrant, have the application of some person for said warrant duly sworn to and subscribed and further requires that the affidavit must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. *Section 933.08* prohibits the service of the search warrant by any person other than the officers mentioned in its direction. *Section 933.11* requires that a copy of the original search warrant be delivered to the person named therein or in his or her absence, to some person in charge of or living on the premises and also that a specific written inventory of the property taken and receipt for same be provided. *Section 933.12* requires the officer executing the search warrant to return it after service along with a verified copy of the true inventory of the property taken. *Section 933.13* requires that a copy of the inventory be provided upon the request of any claimant or any person from whom property is taken. *Section 933.14* provides if the property or papers taken upon execution of the search warrant are not the same as that described in the warrant or it appears that the property was seized by an unreasonable search, the return of said property may be ordered. *Section 933.16* provides for punishment of any person who maliciously and without probable cause procures a search warrant to be issued. Finally, *Section 933.17* provides for punishment of any officer who in executing a search warrant willfully exceeds his or her authority or exercises it with unnecessary severity. Substantial compliance with these statutes relating to the

issuance and execution of search warrants is required. *see e.g. North v. State*, 32 So.2d 915 (Fla. 1947); *Loehrke v. State*, 722 So.2d 867 (Fla. 5th DCA 1998)

When an item not specifically named in the search warrant is seized by the executing police officer, Florida courts have excluded the property from use as evidence. For example, in *Perez v. State*, 521 So.2d 262 (Fla. 2d DCA 1988), the defendant sought suppression of a stolen V.C.R. taken pursuant to a warrant specifying cocaine and guns. In excluding the V.C.R., the court found that because it was not listed in the warrant, its seizure ran afoul of the constitutional and statutory requirements that items seized pursuant to a warrant be described with particularity. In addition, the court held that the subject warrant's use of general language of "stolen property" did not legally suffice in meeting the "particularity" requirement of the Fourth Amendment to the *United States Constitution* or Article I, Section 12 of the *Florida Constitution* and *Florida Statute 933.05*. Finally, the court determined that there was no "plain-view exception" since the incriminating nature of the V.C.R. evidence was not immediately apparent on its face as mandated by *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971) and *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149 (1987). *see Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990)

Again, in *Sims v. State*, 483 So.2d 81 (Fla. 1st DCA 1986) the defendant moved

to suppress stolen building materials seized from his home pursuant to a search warrant which listed only a blue wheelbarrow with no description to identify it from any other blue wheelbarrow. In excluding the items from use as evidence, the court noted the “total insufficiency of the description”. The court further observed that any determination of the sufficiency of the warrant is limited solely to an examination of the warrant itself and the supporting affidavit. *see also Johnson v. State*, 660 So.2d 637 (Fla. 1995)(search warrant language describing “any other items” is of questionable validity as authorizing an illegal general search)

Similar to the instant case is *Purcell v. State*, 325 So. 2d 83 (Fla. 1st DCA 1976) where officers obtained a second search warrant based solely on their original illegal search which had authorized them to seize stolen photographic equipment described in the warrant and contraband found in plain view. After locating the property described in the first warrant, the officers continued in a systematic search which resulted in the seizure of hidden drugs and a locked trunk. Believing that the trunk contained more illegal contraband, a second warrant was obtained based on the earlier seizure of drugs from various areas of defendant’s rental storage facility. In suppressing the drugs found on both occasions, the court noted that the searcher, having an adequate warrant, need not disregard evidence of crime or contraband appearing in “plain sight” in the execution of the warrant, but the searcher and the

search are otherwise confined to the objects specified in the magistrate's warrant.

Just as in *Purcell*, the warrant authorizing the search and seizure of items from Robert Rimmer's storage space was the direct result of the original illegal seizure of documents from defendant's automobile.² Because the electronics evidence was obtained through exploitation of the initial constitutional violation it should have been excluded from use as evidence. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963) Any "good faith" exception to the exclusionary rule as enunciated in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) is inapplicable. Indeed, the court in *Leon* indicated that the exception should not be available where the warrant is facially deficient in failing to particularize the place to be searched or the things to be seized on the basis that the executing officer cannot, under such circumstances, reasonably presume the warrant to be valid. 104 S.Ct. at 3422; *United States v. Accardo*, 749 F.2d 1477 (11th Cir. 1985); *State v. Lee*, 471 So.2d 195 (Fla. 4th DCA 1985); *State v. Ross*, 471 So.2d 196 (Fla. 4th DCA 1985)

Because the personal organizer and its contents were not items authorized to be seized by the search warrant for Robert Rimmer's Oldsmobile automobile and because

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Not only was the lease agreement seized from defendant's organizer but other personal papers were as well. Although not objected to, Robert Rimmer's employment pay stubs were taken and introduced as evidence. (R 1185; 1489-1490; 1368-1370) These documents were then argued by the prosecutor to be proof of defendant's inability to purchase the electronic items found in the rental storage facility. (R 1489-1490)

their incriminating character was not readily apparent, they should have been excluded from use as evidence along with the fruits thereof in the form of electronic equipment. *Wong Sun*, *supra* The particularity requirement stands as a bar to exploratory searches by officers armed with a general warrant. *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748 (1976) Its manifest purpose is to prevent general searches. *Carlton v. State*, 449 So.2d 250 (Fla. 1984) By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the particularity requirement ensures that the search will be carefully tailored to its justifications and will not take on the character of the wide-ranging exploratory searches that the Constitutional Framers intended to prohibit. *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016 (1987) As previously observed by this court, “...the requirement limits the searching officer’s discretion in the execution of a search warrant, thus safeguarding the privacy and security of individuals against arbitrary invasions by governmental officials”. *Carlton supra* at 251-252. *see also United States v. Foster*, 100 F.3d 846 (10th Cir. 1996)(evidence, including items authorized by search warrant, suppressed when police exhibited total disregard for the warrant’s terms by seizing everything of value in suspect’s house when warrant authorized seizure of only drugs and guns)

The error in admitting the electronics equipment cannot be considered harmless

within the meaning of *Florida Statute 924.051 (1999)* or *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) In the trial judge's instructions, the jury was advised that they could find defendant guilty of first degree murder through the theory of felony murder. (R 1578-1580) Armed robbery and armed kidnaping were the underlying felonies defined to the jury. (R 1579-1580) Additionally, jurors were told that proof of possession of recently stolen property, unless satisfactorily explained, gave rise to an inference that the person in possession of the property knew or should have known that the property was stolen. (R 1587)

In the prosecutor's opening statement, he told of the police finding the receipt for the storage unit in defendant's automobile which resulted in a court ordered search thereof. Found in the storage facility was the bulk of the stolen electronics which had Robert Rimmer's fingerprints on them. (R 537-539)

During trial, thirty-seven boxes taken from the storage facility and which had contained various stereo equipment were introduced into evidence. (R 2270-2273) Fingerprint cards reflecting defendant's latent prints lifted from the boxes were also presented to the jury. (R 2275)

In closing argument, the prosecutor argued Robert Rimmer's guilt based on his possession of the stolen electronics in the rental facility. (R 1489) He argued for a guilty verdict of first degree murder based on felony murder. (R 1599-1501) During

deliberations, the jury requested and received the day planner/organizer. (R 1616; 1626; 2281)

It is clear that the improperly seized personal papers of defendant and fruits thereof in the form of stolen property, formed a substantial part of the prosecutor's presentation. Accordingly, reversal with instructions for a new trial is appropriate.

POINT II ON APPEAL

THE TRIAL COURT ERRED IN NOT EXCLUDING THE PRETRIAL AND TRIAL IDENTIFICATIONS OF ROBERT RIMMER BY EYEWITNESSES JOSEPH MOORE AND KIMBERLY DAVIS-BURKE; THE IDENTIFICATION PROCEDURE EMPLOYED BY THE POLICE WAS UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION.

In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967), the Supreme Court recognized a defendant's due process right to exclude identification testimony that results from unnecessarily suggestive procedures that may lead to an irreparably mistaken identification. Again, in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972), the court noted that it is the likelihood of misidentification that violates a defendant's right to due process and thus the inquiry is the reliability of the identification testimony. The focus of the inquiry is on the reliability of the identification testimony in view of the "totality of the circumstances". see *Manson v. Brathwaite*, 432 U.S. 98,

97 S.Ct. 2243 (1977)

The first, in a two-step analysis to determine the admissibility of identification testimony, is whether the identification procedure itself was impermissibly suggestive. *see Biggers*, 409 U.S. 198-199 Eyewitness to the crime, Joseph Louis Moore, selected Robert Rimmer's image from a photospread despite earlier statements to police that the gunman had a baseball cap pulled down low over his eyes. (SR 27-28) Subsequent to the photospread, but before the live line-up, detective Anthony Lewis advised Mr. Moore that Robert Rimmer had been arrested and in was possession of the witness' wallet at the time. (SR 29-31) The detective also let the witness know that his girlfriend, Kimberly Davis-Burke, who also was an eyewitness, as well picked the image of defendant. (SR 31-33) Robert Rimmer was the only individual in the live line-up whose image appeared in the photospread displayed to witness Joseph Moore. (SR 35)

A prephotospread description of the gunman provided by Mr. Moore was a brown skinned black male, five feet ten inches tall weighing one hundred fifty to one hundred sixty pounds wearing baggy clothes and a baseball cap. (SR 21-22; 27) During the robbery-murder, the witness was laying face down on the floor for a period of twenty to thirty minutes. (SR 23-24) Some difficulty in providing a description was a result of the baseball cap worn by the gunman which was pulled down over his

eyes. (SR 27-28) When on the floor, witness Moore was able to obtain only glimpses of the gunman when he walked by. (SR 28) Robert Rimmer was, at this time, six feet two inches tall and weighed almost two hundred pounds. (R 1252)

The suggestive elements in the process leading up to the live line-up, made it all but inevitable that Joseph Louis Moore would select Robert Rimmer whether or not he was in fact the gunman. *see Biggers*, 490 U.S. at 198-199; *Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 1129 (1969) (a police procedure whereby accused was first placed in lineup and after no positive identification was made, a one-to-one confrontation was arranged with robbery victim who made only a tentative identification until subsequent lineup at which victim identified accused, was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process) A defendant's right to due process of law includes the right not to be the object of suggestive police identification procedures that create a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968) The live-lineup identification made of Robert Rimmer by witness Joseph Louis Moore should have been excluded as a result of the impermissible comments of detective Lewis which clearly suggested to the identifying witness that defendant "was more likely to be the culprit". *see Jarrett v. Headley*, 802 F.2d 34, 41 (2d Cir. 1986); *United States v. Archibald*, 734 F.2d 938, 940 (2d Cir.

1984)

Because this pretrial identification procedure was unduly suggestive, the witness' in-court identification of defendant by Joseph Moore should similarly have been disallowed. There was no showing by the prosecution that an in-court identification would be independently reliable rather than a product of the suggestive police procedure. The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. at 190-200, 93 S.Ct. at 382-383; *Manson v. Brathwaite*, 432 U.S. at 114, 97 S.Ct. at 2253.

At the evidentiary hearing, witness Moore said that the person identified in the live line-up appeared to have lost weight since the commission of the crime, some ten weeks earlier. (SR 27) While laying face down on the floor on his stomach, the witness was only able to "peek" at the gunman who wore a baseball cap low on his head. (SR 23-24; 27-28) The physical description given by Joseph Moore varied greatly from Robert Rimmer's characteristics. (SR 21, 27; R 1250) Consequently, it cannot be said that Joseph Louis Moore's in-court identification of defendant rested on his independent recollection of the gunman rather than upon the illegal live line-up.

see Gilbert v. California, 388 U.S. 263, 277, 87 S.Ct. 1951, 1963 (1967) (the state may not adduce any evidence of an unconstitutional pretrial lineup identification and may only use a trial identification when there exists by clear and convincing evidence that the in-court identification is based upon observations of the suspect independent from the lineup identification. *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939 (1967); *see Frisco v. Blackburn*, 782 F.2d 1353 (5th Cir. 1986); *see also United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992) Consequently, both the live line-up identification and the in-court identification of Robert Rimmer by witness Joseph Louis Moore should have been excluded from use as evidence in the prosecution's presentation.

Of similar import is the identifications made of defendant by witness Kimberly Davis-Burke who initially described the gunman as five feet eight to five feet nine inches tall, wearing a baseball hat. (SR 37-38) At a photospread presentation by detective Lewis, Ms. Davis-Burke selected an image other than defendant as being the gunman she encountered in the Audio Logic store. (SR 42-54) The witness made a second selection of Robert Rimmer only after detective Lewis advised her that her boyfriend, Joseph Moore, had done so. (SR 44-50; 95-96) In a subsequent live line-up, defendant was the only person standing whose image was in the photospread. (SR 44-46) Not surprisingly, Kimberly Davis-Burke selected Robert Rimmer. (SR 44-46)

Based on detective Lewis' impermissible suggestive remarks to the witness, her photospread, live line-up and trial identifications should have been excluded from use as evidence. During the ten minute robbery described by Ms. Davis-Burke, she was told not to look at the gunman and she complied with that direction. (SR 50-52) Although the witness' testimony at the suppression hearing was that she made her two selections prior to the detective's suggestion, her post-photospread police statement indicates otherwise. (SR 54) In the recorded exchange, Ms. Davis-Burke stated that she only expressed a second choice of Robert Rimmer "because after you [detective Lewis] told me that Joe [Moore] picked him, I paid more attention to it. I paid more attention to it and thought it sort of looked like him". (SR 50; 95-96) There is no question that this identification procedure was impermissibly suggestive based on the detective's comment. *see Gilbert*, 388 U.S. at 270 n.2, 272 (pretrial identifications prejudicial and in-court identifications possibly tainted when numerous witnesses viewed lineup and made identifications in each other's presence)

It is equally clear that the live line-up and trial identifications lacked a clear and convincing showing of reliability in view of the witness' limited opportunity to view the gunman at the time of the crime, the inaccuracy of the witness' description of the gunman prior to the identification and the significant level of uncertainty expressed by the witness when identifying the gunman at the confrontation. *see Manson*, 432

U.S. at 114-115, 97 S.Ct. at 2253. As was the case with witness' Moore's identification, the trial judge made no specific findings regarding the suggestive identification procedures or their taint of any in-court identifications. (R 2194) *see Edwards v. State*, 538 So.2d 440 (Fla. 1989)(although the trial judge did not make any specific findings as to taint, it appears that the pertinent facts were developed at the suppression hearing and at trial so as to constitute a record adequate for review)

The basic concern with respect to procedures employed in pretrial identifications by witnesses "has been to eliminate or minimize the risk of convicting the innocent". *Macias v. State*, 673 So.2d 176, 179 (Fla. 4th DCA 1996) While the reliability of properly admitted eyewitness identification is normally a matter for the jury, there are some cases such as here, where the procedures leading up to an eyewitness identification are so defective as to make the identification constitutionally inadmissible as a matter of law. *Foster*, 394 U.S. at 442 n.2, 89 S.Ct. at 1128 n. 2. In *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967) it was observed:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification...A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

“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, 93 S.Ct. at 381.

It is submitted that the suggestive identification procedures employed by detective Lewis violated Robert Rimmer’s right to a fair trial resulting in a denial of due process. The live line-up and in-court identification of defendant by witness Joseph Louis Moore should have been suppressed from use as evidence. The photospread, live line-up and in-court identification of defendant by witness Kimberly Davis-Burke should have similarly been excluded. Reversal is appropriate.

POINT III ON APPEAL

THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JURORS DAVID VANDERVENTER AND GWENDOLYNSTHILAIRE; THE FORMER WAS IMPROPERLY DISMISSED FOR CAUSE BASED ON HIS DEATH PENALTY VIEWS WHILE THE LATTER WAS EXCUSED PEREMPTORILY WITHOUT A SUFFICIENT RACE NEUTRAL REASON

In response to a group inquiry from the trial judge, venireman David Vandeventer expressed his opposition to the death penalty. (R 64) The prospective juror stated that in the past he had been a staunch supporter of capital punishment but, due to recent health problems, he had retreated from that view. (R 107-108) When asked if he could follow the court's instructions on the law and return a recommendation of death if appropriate, Mr. Vandeventer stated that he "guessed" he could. (R 108)

Consequently, this prospective juror was not one of those individuals who could not and would not conscientiously obey the law with respect to one of the issues in a

capital case and thus be subject to removal for cause. *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S.Ct. 1758, 1760 (1986) Clearly, “jurors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court’s instructions”. *Johnson v. State*, 660 So.2d 637, 644 (Fla.), *cert. denied*, 517 U.S. 1159, 116 S.Ct. 1550 (1995); *Penn v. State*, 574 So.2d 1079 (Fla. 1991) Venierman David Vandeventer was only subject to disqualification if he indicated “unequivocally” in the “final inquiry” that he could not vote to recommend the death penalty where the law requires it. *e.g. Sanchez-Velasco v. State*, 570 So.2d 908, 915-916 (Fla.), *cert. denied*, 500 U.S. 929, 111 S.Ct. 2045 (1990) (trial judge properly disqualified only those venirepersons who indicated unequivocally in final inquiry that they could not vote for death penalty and no venireperson was eliminated who indicated in any way that he or she could follow the law).

Mr. Vandeventer was improperly removed for cause by the trial judge even though his views on capital punishment would not have presented or substantially impaired the performance of his duties as a juror in accordance with his instructions and oath. *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852 (1985); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2251 (1980) (clarifying decision in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968) It is of note that the prospective juror, at the time of his questioning and excusal, had not been given an adequate explanation

about the roles jurors play in a capital case. Had venireman Vandeventer been provided some guidance as to a juror's responsibility for weighing aggravating and mitigating factors, his answers may have been different or at least more illuminating. *see Castro v. State*, 644 So.2d 987, 988 (Fla. 1994); *see also Johnson v. State*, 696 So.2d 326, 332 (Fla. 1997)(prospective juror properly excused only when he made it unmistakably clear his inability to be impartial about the death penalty)

When a venireperson is improperly excluded in a capital case, a death sentence must be vacated. *see Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045 (1987); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399 (1976) The *Davis* court established a *per se* rule that requires the vacation of a death sentence when a juror who is qualified to serve is nonetheless excused for cause. “[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.” *Davis* , 429 U.S. at 122, 97 S.Ct. at 399.

This court has not hesitated to set aside sentences when prospective jurors are improperly dismissed over the defendant's objection. In *Chandler v. State*, 442 So.2d 171 (Fla. 1983), for example, the court vacated death sentences when two jurors were dismissed for cause over defense objection. It was observed that “at least two of

venire members for whom the state was granted cause challenges never came close to expressing the unyielding conviction and rigidity regarding the death penalty which would allow their excusal for cause under the *Witherspoon* standard.” 442 So.2d at 173-174.

Again in *Farina v. State*, 680 So.2d 392 (Fla.1996) the court set aside a death sentence when a review of the prospective juror’s questioning revealed that while she may have equivocated about her support for the death penalty, her views on the ultimate punishment did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath. The *Farina* court noted that the erroneous exclusion of the venirewoman was not subject to harmless error analysis “because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, which goes to the integrity of the legal system.” 680 So.2d at 398; *see Chandler*, 442 So.2d at 174 (dismissal of jurors who were otherwise qualified to serve under the *Witherspoon-Witt* standard is not subject to harmless error analysis - even if the prosecution could have peremptorily challenged the same juror)

In the absence of an unmistakable and final assertion by prospective juror David Vandeventor that his death penalty views would substantially impair the performance of his duties as a juror, his dismissal for cause upon the state’s request was improper. Reversal with instructions to conduct a new penalty phase proceeding is appropriate.

A second prospective juror, Gwendolyn Sthilaire, was the subject of the prosecution's first peremptory strike. (R 380) Because of the venireperson's racial minority status, the defense requested that the state provide a race-neutral reason for the excusal. In response, the prosecutor stated that Ms. Sthilaire's inability to provide an answer to his death penalty inquiry was of concern to him. Specifically, the prosecutor recited that when posed a death penalty question, prospective juror Sthilaire stated "that's the mystery question". (R 380) Based on that justification by the state, as well as the venirewoman's prior jury service, the trial judge sustained the peremptory challenge. (R 380)

The prosecutor's "death penalty-mystery question" justification cannot be considered "sufficient, good faith and non-pretextual" as stated by the trial judge, because it was factually incorrect and without any record support. Gwendolyn Sthilarie's answer of "that's the mystery question" came in reply to the prosecutor's inquiry to her regarding her opinion of the "two or three causes of crime". (R 276)

Every person charged with a crime is entitled to a fair trial before an impartial jury chosen from a venire which represents a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975) Accordingly, the right to peremptory challenges is to "aid and assist" in the selection of an impartial jury and is not to be used "as a scalpel to excise" an identifiable group from a representative

cross-section of society for to do so would “encroach upon the constitutional guarantee of an impartial jury.” *State v. Neil*, 457 So.2d 481, 486 (Fla. 1984) The appearance of discrimination in court proceedings “is especially reprehensible since it is the complete antithesis of the court’s reason for being - to ensure equality of treatment and evenhanded justice”. *State v. Slappy*, 522 So.2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873 (1988)

In the present case a timely objection to the dismissal of Ms. Sthilaire was lodged with a request for a race-neutral reason for the state’s peremptory challenge. *see Melbourne v. State*, 679 So.2d 759, 764 (Fla. 1996) The required race-neutral explanation given by the state could not satisfy the requirement that it be “genuine” as required by *Melbourne*, since it was not supported by the record. *cf. Floyd v. State*, 569 So.2d 1225, 1229-1230 (Fla.), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2912 (1990) (it is the state’s obligation to advance a facially race-neutral reason supported by the record); *see also Bullock v. State*, 670 So.2d 1171, 1172 (3d DCA 1996)(prosecutor’s conclusion that prospective juror was reluctant or non-responsive was not supported by the record); *Warren v. State*, 632 So.2d 204, 206 (Fla. 1st DCA 1994)(prospective juror’s inattentiveness not supported by the record)

There was nothing in the responses of Gwendolyn Sthilaire that would indicate she was in any way unqualified to serve. In the single inquiry put to her regarding the

death penalty, the prospective juror indicated her ability to recommend such a punishment if appropriate under the facts and circumstances of the case. (R 295-296) Ms. Sthilaire had previously served on a jury in a drug related prosecution that was unable to reach a unanimous verdict. (R 275-276) The prospective juror liked to read and expressed her ability to be fair and impartial. (R 276; 367)

It is submitted that the state's peremptory challenge of venire member Gwendolyn Sthilaire violated Robert Rimmer's constitutional right to trial by an impartial jury. *see generally Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S.Ct. 1712, 1722-1724 (1986); *Wright v. State*, 586 So.2d 1024, 1029 n. 7 (Fla. 1991)(state's improper challenge of a single juror was dispositive); *Thompson v. State*, 548 So.2d 198, 202 n. 4 (Fla. 1989)(no requirement of a showing of systematic racial discrimination; the issue is not whether several jurors were excused because of their race, but whether any juror has been so excused, independent of any other) Reversal is appropriate.

POINT IV ON APPEAL

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY FROM POLICE OFFICER KENNETH KELLY REGARDING HIS ABILITY TO SEE WITHOUT PRESCRIPTION EYEGLASSES; THE WITNESS' EYESIGHT WAS NOT RELEVANT TO REBUT TESTIMONY THAT ROBERT RIMMER HAD VISION DEFICIENCIES FOR WHICH HE WORE GLASSES.

Eyewitness description of the gunman indicated an absence of eyewear. (R 833-834; 902-907; 924) In his defense, Robert Rimmer presented the testimony of his optician, Fred Butterfield. (R 1307-1308) Pursuant to a prescription from Doctor Ralph Brucejolly, the defendant received prescription eyeglasses from Mr. Butterfield's optical store in both February and May, 1998. (R 1307-1313) The two pair were identical. (R 1314-1315) According to the prescription, it called for a right eye correction of minus 250 and a left eye correction of minus 300. (R 1315 - 1316)

Optometrist Ralph Brucejolly had written the corrective lens prescription for Robert Rimmer following an eye examination. (R 1317-1320) The defendant's vision was a minus three meaning that he could only clearly see an object at one foot that a

person with normal vision would see at twenty feet. (R1322-1323) Both eyes were tested without glasses as being 20/400. (R 1325-1326) Without corrective lenses, defendant's nearsightedness was to such a degree that he would be considered legally blind. (R 1322-1324) Without eyeglasses, a person with this impairment would have to squint their eyes and get up close to the object or person being viewed. (R 1323) Dr. Brucejolly testified that if he wore no glasses, Robert Rimmer would not be able to operate a motor vehicle in traffic without finding himself in an accident. (R 1329-1330)

The defendant's wife, Joanie Rimmer, stated that during their three year marriage, her husband has worn eyeglasses. (R 1343-1344) Without them, Robert Rimmer could "hardly see". (R 1344) Consequently, he wore eyeglasses "all the time" and especially when driving. (R 1345, 1356, 1361) Robert Rimmer's driver's license contained a corrective lenses restriction. (R 1535)

As corroboration, corrections officer Kwame Riely testified he booked defendant into the county jail for a misdemeanor charge in March, 1998. (R 1284-1290) At that time, Robert Rimmer wore eyeglasses. (R 1290-1292) Similarly, police officer John Gonzalez, stated that on the morning of defendant's arrest, the witness observed him wearing eyeglasses. (R 1298)

In rebuttal, and over defense objection, police officer Kenneth Kelly was

permitted to testify about his own ability to see without his corrective eyewear. (R 1387 - 1390) The defense argued that since the witness could not offer any evidence as to Robert Rimmer's ability to see without glasses, his individual and strictly personal abilities, standing alone, were not relevant. (R 1389-1390) The trial judge, however, ruled that Officer Kelly's personal individual abilities were of probative value and not inadmissible as being lay opinion. (R 1389-1390) Thereafter, Officer Kelly testified that he wore eyeglasses for his uncorrected vision of 2300 for each eye. (R 1404) Despite having prescription lenses, the witness had driven his automobile without incident and can view a person five or six feet away. (R 1404-1407)

When doing police work, the officer must wear his corrective lenses as they make things clear to see. (R 1408-1409) The eyewear assists his vision and they are required to be worn when driving as part of his driver's license restriction. (R 1409) Despite the legal obligation to wear corrective lenses when driving, Officer Kelly testified that he has gone without them. (R 1409)

Relevant evidence is evidence tending to prove or disprove a material fact. *Florida Statute 90.401* In order for evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the issue of the action. *McCormick, Evidence § 185* (4th ed. 1992)

There was no factual predicate offered by the prosecution that allowed for a

scientific conclusion that the witness Kelly's vision without corrective lenses would be comparable to defendant Rimmer's vision without glasses. Additionally, each had a different degree of impairment.

Witness Kelly's testimony was in essence a lay opinion as to defendant's ability to see without glasses. As such, it was akin to permitting a police officer of a similar weight to a defendant charged with drunk driving, to testify as to his own personal ability to drive a motor vehicle after consumption of a set amount of alcohol in order to allow the fact finder to make a judgment regarding the accused's impairment. There simply was no "logical tendency" of the officer's abilities to prove or disprove those abilities of the defendant. *see State v. Taylor*, 648 So.2d 701, 704 (Fla. 1995)(relevancy has historically referred to whether the evidence has any logical tendency to prove or disprove a fact)

Officer Kevin Kelly's testimony should have been excluded. Reversal is appropriate.

POINT V ON APPEAL

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AS A RESULT OF A PROSECUTORIAL REFERENCE TO THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT; THE PROSECUTOR IMPROPERLY MADE INQUIRY OF DEFENDANT'S WIFE AS TO THE ABSENCE OF HER HUSBAND'S DENIAL OF THE CRIMES CHARGED.

Joanne Rimmer was called as a defense witness to establish her husband's alibi for the time frame of the shooting. (R 1343) Mrs. Rimmer testified that on the morning of the shootings, defendant took his son fishing while she went to the laundromat. (R 1354-1355) After leaving with their fishing equipment sometime before 9:00 a.m., the witness next saw the pair around 3:30 p.m. in the afternoon. (R 1355) The subject shootings had taken place around noontime. (R 587-590) Although fish were caught, they were released. (R 1356)

During cross-examination, the prosecutor engaged the witness in a series of questions regarding conversations with her husband since he was arrested for the homicides. (R 1378-1379) Specifically, Mrs. Rimmer was asked if in her sixty

conversations with her husband, she ever made inquiry of him as to the crimes charged. (R 1379) Defense objection that the prosecutor was attempting to elicit Robert Rimmer's silence by way of his failure to deny involvement when speaking to his spouse was overruled. (R 1379-1380) Thereafter, the prosecutor inquired if Joanne Rimmer ever asked her husband "about the double murder" to which she responded in the negative. (R 1380) Clearly, these questions had but one objective and that was to adduce the absence of a denial of criminal participation by Robert Rimmer.

Initially, it must be noted that the conversations between Joanne and Robert Rimmer were protected by a statutory privilege and should never have been addressed by the prosecutor. *Florida Statute 90.504* (a party to valid marriage may refuse to disclose and prevent his or her spouse from disclosing confidential communications between the spouses made during the marriage); *see Koon v. State*, 463 So.2d 201, 203-204 (Fla.) , *cert. denied*, 472 U.S. 1031, 105 S.Ct. 3511 (1985)(reversible error to compel wife to testify to confidential communications between her and defendant-husband) Furthermore, any comment, direct or indirect, deliberate or spontaneous, made by any state witness, court witness or defense witness (unless invited or deliberately procured by the defense) which bears on a defendant's right to remain silent is strictly prohibited. *Clark v. State*, 363 So.2d 331, 334-335 (Fla. 1978);

Harris v. State, 381 So.2d 260, 261 (Fla. 5th DCA 1980) If a comment is “fairly susceptible” of being interpreted as a comment on silence, it is treated as such. *Kinchen v. State*, 490 So.2d 21 (Fla. 1985); *David v. State*, 369 So.2d 943 (Fla. 1979) *cf.* *State v. DiGuilio*, 491 So.2d 1129, 1135-1139 (Fla. 1986)(fairly susceptible test is still subject to harmless error rule)

Robert Rimmer had no legal obligation to speak to anyone, including his spouse, about his involvement or lack of involvement in the crimes for which he was charged. In turn, the prosecutor had no legal right to invade the marital privilege and adduce defendant’s failure to affirmatively deny criminal activities in conversations with his wife. It just may have been that counsel for Robert Rimmer admonished him to speak to no one about his legal predicament. Whatever the case, the solicitation of defendant’s silence was error. *e.g.* *Torrence v. State*, 430 So.2d 489, 490 (Fla. 1st DCA 1983)(question asked on cross-examination of defendant as to whether he had ever told anyone else his story was inconsistent with defendant’s constitutional right to remain silent and constituted an improper suggestion designed to discredit defendant’s story); *King v. State*, 407 So.2d 251, 252 (Fla. 4th DCA 1981)(prosecutor’s efforts to belittle story told by defendant on the stand by asking if defendant had ever told anyone else the story during five or six months before trial was an invasion of defendant’s constitutional right to remain silent); *Weiss v. State*,

341 So.2d 528, 530 (Fla. 3d DCA 1977)(comments made by prosecutor with respect to defendant's pretrial silence while he was under investigation by police department for which he worked violated his constitutional right against self-incrimination)
Reversal is appropriate.

POINT VI ON APPEAL

THE PROSECUTOR COMMITTED
INTENTIONAL MISCONDUCT BY
VIRTUE OF HIS VARIOUS COMMENTS
BEFORE THE JURY; THESE NUMEROUS
IMPROPER AND HIGHLY PREJUDICIAL
STATEMENTS DENIED ROBERT
RIMMER A FAIR TRIAL

It is the duty of a prosecuting attorney in a trial to refrain from committing acts that would or might tend to effect the fair and impartial trial to which the defendant is entitled. *Stewart v. State*, 51 So.2d 494, 495 (Fla. 1951) “The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with dignity worthy of the client.” *Kirk v. State*, 227 So.2d 40, 43 (Fla. 4th DCA 1969)

During the course of the trial, the court heard argument regarding the admissibility against defendant Rimmer of a post-arrest remark made by codefendant Parker. (R 1238-1245) This particular statement had been the factual basis for

defendant's motion to sever defendants. (R 3-7, 1239) Much to the disagreement of the prosecutor, the trial judge excluded the subject comment. (R 1242-1245)

This adverse ruling caused the prosecutor to then conclude his direct examination of the lead investigating detective with the statement that “[g]iven the court’s ruling, I have no further questions of detective Lewis at this time.” (R 1251) Appropriately, defense objection to the remark was sustained with instructions to the jury to disregard it. (R 1251) Later the trial judge admonished counsel to cease the extraneous comments in the presence of the jury regarding the court’s evidentiary rulings. (R 1353)

Additional improper remarks of the prosecutor included his exhortation in opening statements that at the conclusion of the evidence he would again ask the jury “to do the right thing” and “return a verdict of guilty on all counts of the indictment”. (R 520) The prosecutor’s “fairly susceptible” comment during trial on the defendant’s pretrial right to remain silent is set forth in Point V above. (R 1378-1380)

In closing argument, the prosecutor repeatedly referred to the shootings as executions in stating: “State’s 62 in evidence is a photograph of Arron Knight at death, a death that occurred very violently, with an execution shot to the head”; State’s 63 in evidence is a photograph of Bradley Krause, Jr., at death, a death that occurred ... when he was executed with a shot to the head”; Aaron Knight and Bradley Krause,

Jr....were executed...by that defendant, Defendant Rimmer.” (R 1478) The prosecutor insinuated that if counsel in closing argument was to reiterate testimony in detail (as both defense counsels did), it would be “insulting the intelligence” of the jurors. (R 1483) Continuing, the prosecutor asserted that defendant Rimmer “...blew his [Aaron Knight] brains out by shooting him in the back of the head.” (R 1491) The prosecutor compared himself to feeling “kind of like a dentist” when questioning a witness who was not responding as anticipated. (R 1493)

References to his military service and a “tactical movement for ground troops” was injected into the prosecutor’s summation over defense objections. (R 1495-1496) Repeating his prior urging to the jury in opening statements, the prosecutor again asked them “to do the right thing” and convict Robert Rimmer as charged. (R 1501, 1532, 1545)

Following closing argument by defendant Ritter’s attorney, the prosecutor recited a purported “first day of law school lesson” which resulted in his characterization of opposing counsel’s summation as being nothing more than “a whole lot of argument” without any legal or factual substance. (R 1531, 1540) The prosecutor’s personal opinion was voiced in response to defense counsel’s assertion of reasonable doubt by stating, “...frankly, from my perspective, sitting over there, still have yet to hear it.” (R 1533) Finally, the prosecutor asked jurors to think of

themselves as baseball players who were being thrown pitches off the plate by defense counsel which they should not “go after”. (R 1544-1545)

All of the various comments by the prosecutor were improper. Exhorting the jury to “do the right thing” and suggesting that it has a duty to decide the case one way or the other has no place in the administration of justice. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038 (1985); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992); *ABA Standards for Criminal Justice*, 3-5.8(c) and 4-7(c) Repeated characterizations of the defendant’s conduct as an “execution” in an attempt to instill emotional fear are not permitted. *see Urbin v. State*, 714 So.2d 411, 420 n. 9 (Fla. 1998); *Campbell v. State*, 679 So.2d 720, 723-725 (Fla. 1996); *King v. State*, 623 So.2d 486, 488 (Fla. 1993) Disparaging or denigrating the person of defense counsel by insinuating that he or she was “insulting the intelligence” of the jurors or trying to throw them off the true evidence has long been prohibited. *see Barnes v. State*, 743 So.2d 1105, 1106-1107 (Fla. 4th DCA 1999); *Alvarez v. State*, 574 So.2d 1119, 1121 (Fla. 3d DCA 1991) The prosecutor’s statement that he himself had not heard any reasonable doubt in the case, amounted to his personal belief in the guilt of the defendant and was therefore impermissible. *see Grant v. State*, 171 So.2d 361, 365 (Fla.1965) References to defense counsel’s summation being nothing but argument without a factual or legal basis amounts to calling it “misleading and a smoke screen”

which characterization is not allowed. *Waters v. State*, 486 So.2d 614, 616 (Fla. 5th DCA 1986) Additionally, the prosecutor's suggestion to the jury that inculpatory evidence was not allowed to be presented at trial which would have provided a further basis for finding defendant guilty was simply inappropriate. *Landry v. State*, 620 So.2d 1099, 1101-1102 (Fla. 4th DCA 1993); *Thompson v. State*, 318 So.2d 549, 551 (Fla. 4th DCA 1975), *cert. denied*, 333 So.2d 465 (Fla. 1976)(and citations contained therein)

Finally, the prosecutor's pointed reference to his military service was nothing more than a blatant appeal to juror's emotions so as to personalize him in their eyes. Such military references are obviously improper. *see Ruiz v. State*, 743 So.2d 1, 6-7 (Fla. 1999)

The above improper remarks, coupled with the comment on defendant's pretrial silence, deprived Robert Rimmer of a fair trial. Although several of the impermissible statements went without defense objection, relief is still warranted. *Ruiz*, 743 So.2d at 7 (when the properly preserved comments are combined with additional acts of prosecutorial overreaching, the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted); *Cochran v. State*, 711 So.2d 1159, 1163 (Fla. 4th DCA 1998) (cumulative effect of prosecutor's comments so egregious as to warrant reversal); *Knight v. State*, 672 So.2d 590, 591 (Fla. 4th

DCA 1996)(if improper comments rise to the level of fundamental error, then multiple objections are not necessary)

This court in *Ruiz* noted its continuing concern over “the lack of propriety and restraint exhibited in the overzealous prosecution of capital cases...” 743 So.2d at 9 n. 8 quoting *Nowitzke v. State*, 572 So.2d 1346, 1356 (Fla. 1990) Also observed was the particular “need for propriety where the death penalty is involved”. *Ruiz*, 743 So.2d at 9 n. 8 quoting *Garcia v. State*, 622 So.2d 1325, 1332 (Fla. 1993) “It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office”. *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985).

The present prosecutorial misconduct rises to the required level so that a new trial is the “only proper remedy”. see *Garron v. State*, 528 So.2d 353, 358 (Fla. 1988); see also *Hill v. State*, 477 So.2d 553, 556-557 (Fla. 1985)(once again we caution prosecutors to note that repeated failure to curb this misconduct adds fuel to the flame of those who advocate the adoption of a per se rule of reversal for such misconduct) Reversal is appropriate.

POINT VII ON APPEAL

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DR. JACOBSON REGARDING DEFENDANT'S EXTENSIVE CRIMINAL HISTORY; THIS EVIDENCE WAS NOT ADMISSIBLE SINCE THE PSYCHOLOGIST DID NOT RELY UPON IT TO ANY SIGNIFICANT DEGREE IN HER EVALUATION AND OPINION AS TO THE EXISTENCE OF A MENTAL DISORDER.

Prior to the testimony of defense mental health expert, Dr. Martha Jacobson, the prosecutor announced his intent to cross-examine her regarding Robert Rimmer's extensive criminal history. (R 1814-1815; 1822-1828) In a proffer outside the presence of the jury, Dr. Jacobson testified she evaluated and tested Robert Rimmer. (R 1887) The psychologist also conducted a clinical interview where she elicited certain information from him regarding his extensive criminal history. (R 1887) No such information was given to the psychologist by defense counsel because he didn't want to open the door to that area of inquiry. (R 1822-1824)

As to the criminal history given by Robert Rimmer, Dr. Jacobson stated unequivocally that this information did not play “a significant or relevant” part of her evaluation of any present or past mental condition. (R 1888) The defendant’s prior criminal acts and prison sentencing “did not affect” her opinion “as to the presence of mental illness”. (R 1888) Despite Dr. Jacobson’s unwavering declaration in this matter, the trial judge ruled that because she elicited criminal history information from Mr. Rimmer that was then “used” by her in formulating opinions, it was admissible. (R 1889) This was obviously a misstatement given the psychologist’s testimony. (R 1888)

The trial court’s reliance on *Jones v. State*, 612 So.2d 1370, 1374 (1992) was clearly misplaced. In *Jones*, the defendant opened the door for such an examination by directly questioning the mental health expert as to his consideration of the defendant’s juvenile, psychiatric, and psychological history as contained in materials provided and which specifically set forth prior criminal acts committed by him. Unlike the psychologist in *Jones* who stated he relied upon the accused’s criminal background in diagnosing him, the mental health expert here testified she simply did not rely upon defendant Rimmer’s criminal past. (R 1888) Accordingly, it was not proper for the prosecutor to “fully inquire” into a history that was not even utilized by the expert to determine whether the expert’s opinion has a proper basis. *Florida*

Statute 90.704 (facts upon which an expert bases an opinion may be those made known to him before trial); *Florida Statute 90.705* (on cross-examination the expert shall be required to specify the facts relied upon)

In the absence of direct examination into a general subject, there is no authority to allow cross-examination of an expert into matters that are not relevant and material. *see Johnson v. State*, 608 So.2d 4, 10 (Fla. 1992)(proper for a party to inquire into the history utilized by the expert to determine whether the opinion has a proper basis) As a result of allowing cross-examination into an area not relied upon by Dr. Jacobson, the jury was improperly informed of Robert Rimmer's "eight prior felony convictions". (R 1929) Reversal is appropriate.

POINT VIII ON APPEAL

THE PROSECUTOR COMMITTED INTENTIONAL MISCONDUCT BY VIRTUE OF HIS VARIOUS COMMENTS DURING THE PENALTY PHASE PROCEEDINGS; THESE IMPROPER AND PREJUDICIAL STATEMENTS DENIED ROBERT RIMMER A FAIR SENTENCING DECISION.

As he did throughout the guilt phase, the prosecutor during the penalty phase proceedings repeatedly described the shootings as “vicious and brutal executions” of Bradley Krause, Jr. and Aaron Knight. (R 1842, 1951) The prosecutor asserted that the defense mental health expert “did what she was paid to do...[to] give...[the jury] a non-opinion on some mental mumbo-jumbo, with no factual basis to support it”. (R 1951) Dr. Jacobson’s testimony was again described as “legal mumbo-jumbo”. (R 1958) The prosecutor asserted that Florida’s prisons are full of individuals who, like defendant, suffer from anti-personality disorders. (R 1958-1959) In addition, the prosecutor expressed his personal sympathy for the families and stated that there are

no “winners” in the case. (R1949-1950) Once more, the jury was exhorted to “do your job” and return the “morally” correct death sentence. (R 1845, 1961) Finally, the prosecutor recited the substance of the victim-impact evidence presented and advised the jury that while Florida has no more “parole”, it does release prisoners through a “conditional release” program. (R 1951-1952; 1959-1960)

At the *Spencer* hearing, the prosecutor finished his request for a death sentence by describing the defendant as “a worthless piece of fecal matter...whose death should come prior to natural causes”. (R 2059) This remark caused Robert Rimmer to observe that the prosecutor appeared “to be an angry fellow”. (R 2060)

Improprieties in the prosecutor’s conduct during penalty phase proceedings deprived Robert Rimmer of a fair sentencing. The final prosecutorial comment is appropriately governed by the court’s observation that although “the rule of objective, dispassionate law...may sometimes be hard to abide, the alternative - a court ruled by emotion - is far worse”. *Jones v. State*, 705 So.2d 1364, 1367 (Fla. 1998) A fair reading of the record reveals a prosecutor unable to refrain from injecting “elements of emotion and fear into the jury’s deliberation”. *King v. State*, 623 So.2d 487, 488-489 (Fla. 1993) The prosecutor “ventured for outside the scope of proper argument”. *Garran* , 528 So.2d at 359.

Based on the foregoing as well as the argument and authorities set forth in Point

VI above (improper prosecutorial conduct in guilt phase closing arguments), it is submitted that the death sentences must be set aside and a new penalty phase proceeding conducted. Reversal is appropriate.

POINT IX ON APPEAL

THE TRIAL COURT ERRED IN FINDING THAT THE TWO MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL; NO EVIDENCE WAS PRESENTED TO DEMONSTRATE ANY INTENT ON DEFENDANT'S PART TO INFLICT A HIGH DEGREE OF PAIN OR TO OTHERWISE TORTURE THE VICTIMS.

In his sentencing decision the trial judge improperly relied on the aggravating factor that the murders of Bradley Krause, Jr. and Aaron Knight were especially heinous, atrocious, or cruel. (R 2073-2075; 2390-2391) The sentencing order recited the testimony of the three surviving eyewitnesses who described the tension they experienced during the fifteen to twenty minute robbery which preceded the two shootings. (R 2073-2075; 2390-2391) While there is no question that fear and emotional strain would exist in any person being restrained and robbed at gunpoint, the ultimate shootings themselves were, as the court acknowledged, “quick deaths”. (R 2073; 2390)

Moreover, no evidence was presented to demonstrate any intent on Robert Rimmer's part to "inflict a high degree of pain or to otherwise torture" the two decedents. *Stein v. State*, 632 So.2d 1361, 1367 (Fla. 1994) (nearly instantaneous shooting deaths in the course of a robbery does not warrant a finding of heinous, atrocious, or cruel) Though the subject murders can easily be characterized as "vile and senseless", they do not rise to the level of being "especially, heinous, atrocious, or cruel" as contemplated by *Florida Statute 921.141 (5)(h)*. see *Bonifay v. State*, 626 So.2d 1310, 1313 (Fla. 1993)(absent evidence of intent to inflict a high degree of pain or to otherwise torture the victim, fact that victim begged for his life or that there were multiple gunshots is an inadequate basis for finding aggravating factor of heinous, atrocious, or cruel); *Street v. State*, 636 So.2d 1297, 1303 (Fla. 1994)(emotional stress based on impending death is insufficient to support a finding of heinous, atrocious, or cruel)

Each decedent herein was the subject of a single gunshot wound administered within seconds of each other. There was no evidence that either of the victims before that time knew he was to be shot. There were no additional acts by defendant so as to set this crime apart from the norm of capital felonies - "the conscienceless or pitiless crime which was unnecessarily torturous to the victim". see *Lewis v. State*, 377 So.2d 640, 646 (Fla. 1979); *Brown v. State*, 526 So.2d 903 (Fla. 1988); *Hartley*

v. State, 686 So.2d 1316 (Fla. 1996) Because of the quick deaths by gunshot with no additional acts, the aggravating circumstance of heinous, atrocious or cruel cannot apply. e.g. *Maggard v. State*, 399 So.2d 973 (Fla. 1981)(execution style shooting unaccompanied by additional acts not heinous, atrocious, or cruel); *Kampff v. State*, 371 So.2d 1007 (Fla. 1997)(directing a pistol shot straight to the head of the victim does not tend to establish aggravating circumstance of heinous, atrocious, or cruel); *Mendez v. State*, 368 So.2d 1278 (Fla. 1979)(multiple gunshots to head of submissive victim in execution style in absence of evidence setting it apart from the norm of capital felonies is not heinous, atrocious, or cruel); *Burns v. State*, 609 So.2d 600 (Fla. 1992)(gunshot causing rapid unconsciousness followed by death not heinous, atrocious, or cruel); compare *Wyatt v. State*, 641 So.2d 1336 (Fla. 1994)(finding that murders were especially heinous, atrocious, or cruel was supported by evidence that victims were subjected to at least twenty minutes of physical abuse prior to their deaths and that victims were actually aware of their impending deaths) Although an execution-style slaying evidencing a cold, calculated design to kill, may fall into the category of heinous, atrocious, or cruel, the mere existence of premeditation, as was present herein, does not. *Armstrong v. State*, 399 So.2d 953 (Fla. 1981)(nothing in the statute nor in the decisions interpreting same, support the proposition that the factor of heinous, atrocious, or cruel is established by the existence of premeditation)

The present case is much less aggravated than *Donaldson v. State*, 722 So.2d 177 (Fla. 1998) where the victims were killed after being held at gunpoint for several hours. This court repeated its position that the heinous, atrocious or cruel aggravator “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 to or enjoyment of the suffering of another”. 722 So.2d at 186, quoting *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990) It was further explained:

...we have held that “an instantaneous or near-instantaneous death by gunfire” does not satisfy the HAC aggravating factor. *Robinson v. State*, 574 So.2d 108, 112 (Fla. 1991); *see also Maharaj v. State*, 597 So.2d 786 (Fla. 1992)(rejecting HAC aggravator despite execution-style killing of victim after interrogating him). “Execution style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim.” *Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 86, 139 L.Ed.2d 43 (1997)

722 So.2d at 186

In rejecting the finding of heinous, atrocious, or cruel, it was noted:

Here, the trial judge relied on the fact the victims were forced into the house at gunpoint, kept there against their will for several hours while Donaldson and his accomplices interrogated them. Further, the

trial court speculated that the victims undoubtedly heard Donaldson order Sykosky to kill them. In contrast, the evidence reveals that the victims were assured repeatedly that they were not going to die and the murders occurred quickly. As in *Robinson*, the evidence in this case does not establish that the defendant intended or that the victim suffered an acute awareness of their impending deaths, or that Donaldson intended to cause them unnecessary pain or prolonged suffering. Mere speculation that the victims may have realized that Donaldson intended to do more than interrogate them is insufficient. *See Hartley*, 686 So.2d at 124. Accordingly we find the evidence insufficient to establish the HAC aggravator as the murders in this case did not fall outside the norm of capital felonies.

722 So.2d at 187

In the instant case, there was no evidence of any physical or mental torture nor was there evidence that during the twenty minute robbery, the victims were made aware of their impending death. The two deaths were instantaneous or near-instantaneous by gunfire. *see also Ferrell v. State*, 686 So.2d 1324 (Fla. 1996)(finding that murder was heinous, atrocious, or cruel was not supported by evidence that victim was shot five times after being brought to a remote area as there was no evidence that person who did the shooting deliberately shot the victim to cause him unnecessary suffering), *cert. denied*, 520 U.S. 1173, 117 So.2d 1443.

Moderate weight was assigned to this aggravating circumstance in the trial judge's sentencing order. (R 2390-2391) Absent its existence, the trial court may very well have concluded that a life sentence on each homicide to be the more appropriate sentence. Consequently, this court should vacate the death penalty and direct that a new sentencing proceeding be held. *see Bonifay*, 626 So.2d at 1313 (“because we cannot determine what effect finding the heinous, atrocious, or cruel aggravator had in the sentencing process, we vacate the death penalty and direct that a new sentencing proceeding be held”) Reversal is appropriate.

POINT X ON APPEAL

THE TRIAL JUDGE ERRED IN PERMITTING THE JURY TO CONSIDER VICTIM-IMPACT EVIDENCE IN THEIR SENTENCING DECISION; ALTHOUGH TOLD NOT TO USE THIS EVIDENCE IN SUPPORT OF AGGRAVATION OR IN REBUTTAL OF MITIGATION, THE JURORS WERE NONETHELESS ADVISED THAT VICTIM-IMPACT EVIDENCE COULD BE CONSIDERED IN THEIR ADVISORY SENTENCE.

Early in the proceedings, the trial judge expressed his difficulty in understanding the probative value of victim-impact evidence in death penalty litigation since the jury was not permitted to use it in support of aggravation. (R 33-34) Despite his concern that the victim-impact statements proposed by the prosecution did not relate to any statutory aggravating circumstance, the trial judge felt constrained to allow their presentation. (R 1766)

Thereafter, and over defense objection, the girlfriend of Bradley Krause, Jr. and the father of Aaron Knight, each read victim-impact statements to the jury. (R 1850-1859) Both the prosecutor and defense submitted proposed special jury instructions to guide the jury in their consideration of this evidence. (R 1766-1767) The trial

court rejected defendant's proposal and instead instructed the jury as follows:

Now, you have heard the evidence relating to the impact of the victim's death in this case. This evidence should not be considered by you as evidence of an aggravating circumstances or rebuttal of a mitigating circumstance. This evidence may be considered to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community members by the victim's death.

The defendant concedes, as he must, that such statements of "victim impact" showing the "victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" are properly admitted in Florida. *e.g. Damren v. State*, 696 So.2d 709, 712-713 (Fla. 1997); *Moore v. State*, 701 So.2d 545, 550-551 (Fla. 1997)

To function effectively and justly, jurors must be instructed on the law in a clear and uncontradictory manner. *Butler v. State*, 493 So.2d 451, 452 (Fla. 1986)(the court should not give instructions which are confusing, contradictory, or misleading); *Finch v. State*, 156 So.2d 489 (Fla. 1934); *see also Burns v. State*, 699 So.2d 646, 655 (Fla. 1997)(Anstead, "J", dissenting and concurring)

As instructed, the jurors were not told how to factor the victim-impact evidence they had heard into their sentencing decision, if they were to consider it at all. *compare, Alston v. State*, 723 So.2d 148, 160 (Fla. 1998)(proper for trial court to give

instruction regarding victim-impact evidence: you shall not consider the victim evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter) Because of the lack of clear and uncontradictory instructions regarding the victim impact evidence, the defendant was denied fundamental fairness. *see Shannon v. State*, 463 So.2d 589, 590 (Fla. 4th DCA 1985)(trial court has obligation and thus erred in instructing jury that force could be used in certain circumstances to resist an unlawful arrest and in the next breath, stating that a person is never justified in use of any force to resist an arrest)

The fact that the jury was told that the victim impact evidence was not to be weighed but merely considered begs the question of how to apply its admission into evidence in a constitutional manner. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980)(where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly and capricious action) The use of the victim-impact evidence in the manner presented below created a situation where the death penalty could be inflicted in an arbitrary and capricious manner as a result of unbridled discretion. *see Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976) Reversal with instructions to conduct a new penalty phase proceeding is

appropriate.

CONCLUSION

Based on the foregoing arguments and citations of authority, it is submitted that Robert Rimmer's convictions must be set aside with instructions to afford him a new trial or alternatively, to vacate his death sentences and order that a new penalty phase proceeding be conducted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida, by delivery/US Mail this _____ day of June, 2000.

PATRICK C. RASTATTER/164634