IN THE SUPREME COURT OF FLORIDA

CHARLES ANDERSON,)
)
Appellant,)
)
vs.) CASE NO.
)
STATE OF FLORIDA,)
)
Appellee.)
)
________________________)

INITIAL BRIEF OF APPELLANT

On Appeal from the Seventeenth Judicial Circuit of Florida, in and for Broward County, Florida.

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CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the lower court. The record volume will be referred to by Roman numeral. The page number will be referred to by Arabic numeral.

STATEMENT OF THE CASE

Charles Anderson was indicted for first degree murder. He was found guilty as charged on February 11, 1999. III572. The jury recommended death by a vote of eight (8) to four (4). IV733. The trial judge sentenced Mr. Anderson to death. V933-56.

STATEMENT OF THE FACTS – GUILT PHASE

This case involves the death of Keinya Smith. The primary issue at trial was identity. However, there also was a question as to the degree of the homicide. The State's entire case was circumstantial. Dana Turner said she heard loud arguing from the Anderson residence. XIII1014. She claimed that Mr. Anderson said "You told them something You told him. Why was he shooting at me?" XIII1017. She claimed that this was at 3-4 a.m. early on Saturday morning, January 15, 1994. XIII1017. She said "I don't know. He was just shooting. I didn't tell him nothing". XIII1017. The argument went on a few minutes. XIII1018.

John Gowdy, stated that on January 16, 1994 he was driving from Clewiston to Miami on U.S. 27. XIII1023. He saw a body on the side of the road soon after they entered Broward County. XIII1023. The body was in the grass median between the two lanes. XIII1024. It was about 7 p.m. and was very dark. XIII1024. Headlights would periodically illuminate the area. XIII1024. He saw the car in front of him make a U-turn and head back towards the body and he did the same thing. XIII1024-5. He saw the first car go into the

median and then get back into the lane. XIII1029. The car then left. XIII1029. Gowdy went to a gas station and then to a Florida Highway Patrol station. XIII1030.

Gowdy described the car as follows:

> "The rear end I noticed had–it was some area reflected, bumper stickers on the bumper. Something like in the back window sill. I don't know if it was stuffed animals, hats, whatever." ...
>
> The front end – this – this car had the bright lights on and – and I saw like all four of the lights illuminated, which was indicating it was like an older model car." XIII1032.

He could not tell the color of the car. XIII1033. He stated that "It was a darker bluish, grayish–grayish like color ... It was really dark grayish." XIII1033. He claims the headlights are like those of Mr. Anderson's car. XIII1034. He claims that the reflector on Mr. Anderson's car also appears similar. XIII1034. He said that the car was an older, American made car. XIII1034. He could <u>not</u> identify Mr. Anderson's car. XIII1034. He left Clewiston about 7 p.m. XIII1038. When he had originally been shown a picture of Mr. Anderson's car he said "It wasn't dark like this. It wasn't dark at all like this here. To me it looked grayish like." XIII1039. He originally thought that this was an accident. XIII1047. He stated that he originally told the police that the car had a bumper sticker. XIII1048. He was then shown a picture of a reflector and said "I guess that could have been it". XIII1048. He's consistently said that he's "not sure" whether it is the car. XIII1050. What he saw is consistent with an accident or an intentional killing. XIII1051.

Thomas Cowart, of the Florida Highway Patrol (FHP) received a report of a body on U.S. 27, at about 7:30 p.m. on January 16,

1994. XIII1052. The area had two north bound lanes and two south bound with a sixty foot divided grass median area in between. XIII1055. XIII1055. He eventually saw a red spot on the inside pavement area and some clothing items, one of which was a Publix name tag with the name "Keinya" on it. XIII1057. There were two areas found and that he feels that the northbound one happened first. XIII1066.

George Jobes, stated that during the early morning of January 17, 1994 he and his sons found a body lying near the road in Holiday Park. XIII1069.

Kevin Vaughn, of the FHP, stated that finding clothing on both side of a roadway, ninety feet apart, is unusual in a traffic accident. XIV1151. FHP was told the car was last seen heading north. XIV1213. He claimed that the police theory was that the person "either thrown or pushed or jumped out of a car traveling northbound" and then was later run over in the median. XIV1228.

The following stipulation was read to the jury:

> It has been stipulated between – between parties that Keinya Smith is dead. That she died on January 16, 1994. And that she died as a result of blunt force trauma inflicted by a motor vehicle.
>
> It is further stipulated between parties that the items of evidence found on U.S. 27 by Lieutenant Vaughn and Detective Foley, including jewelry, blood stains, name tags and hair and scalp, originated from Keinya Smith.

XV1360-1361.

Mark Suchomel, of the BSO, participated in the search of Mr. Anderson's car 7-10 days after the incident. XV1383-4. He took impressions of the tires. XV1383-4. The right front tire was a general brand, Ameritech 4, and the other three were Remington Maxxum's. XV1385-6. He described the car.

> It is a medium blue Cadillac, 1981 Cadillac, two door I believe it was. With a – not a half vinyl, but almost like a half stainless steel top with a partial vinyl top in dark blue, and the rest of the vehicle was dark blue with chrome trim along the sides along the bottom.

XV1392.

There appeared to be some damage underneath the radiator; the splash guard appeared to be cracked, and an area appeared to have been wiped. XV1394-5. He stated that the collection of grease and soil samples and sending them to the FBI was "a last ditch effort in this case". XVI1475.

Jose Tomas, records custodian for Publix, testified concerning Keinya Smith. On January 14, 1994 she clocked in at 4:00 p.m., out at 6:45 p.m., back in at 7:01 p.m., and out at 9:05 p.m. On January 16, 1994 she clocked in at 11:08 a.m., out at 3:05 p.m., back in at 3:35 p.m., and then out at 6:01 p.m. XVI1487.

Officer Terry Gattis testified concerning the search of Mr. Anderson's car on January 24, 1994. XVI1491-3. The car was a blue 1981 Cadillac. XVI1493. He saw what looked like blood on the side of the front passenger's seat and on the arm rest between the two front seats. XVI1494. The Cadillac emblem was missing. XVI1495-6. The splash pan appeared to be cracked. XVI1504. He has no idea how the dents and scratches got there. XVI1522.

Officer Richard Walsh, of the Miami Dade Police Department, stated that a 911 call had been received from 19125 Northwest 37th Avenue in Miami at 1:05 a.m. on January 15, 1994 and the call was a hang up. XVII1568. A 911 operator called back and dispatched police to the house. XVII1571-3.

Patrick Allen testified that in January 1994, he was working as a bag boy at Publix and Keinya Smith worked at the same store.

XVII1578. They became friends and he gave her a ride home on January 12, 1994. XVII1579. She lived in north Dade at 191st and 37th Avenue. XVI1579-80. After he dropped her off, he went north and saw a black Eldorado behind him. XVII1580. He claimed that the car followed him into his apartment complex. XVII1582. He went up to his apartment and then the car left. XVII1582.

On Friday, January 14, 1994 Keinya Smith got off at 9:05 p.m. and he gave her a ride. XVII1585. He had a handgun in his car. XVII1585. They went by his apartment, he went in and she did not. XVII1585. He took her home and the same black car was parked there and begins driving towards him and pushing him from behind. XVII1586. He claimed they got up to 85 miles an hour. XVII1587. He was steering with his left hand and shooting at the other car with his right. XVII1588. He shot his own car and eventually the other car stopped pushing him and he went home. XVII1589.

He came to work at a little before 6 p.m. on Sunday, January 16, 1994, right before Keinya Smith got off. XVII1590. He never complained to the police about being chased on January 12 or 14, 1994. XVII1591. He had previously stated on deposition that Keinya Smith had come up to his apartment and was now denying this. XVII1597. On January 12,1994 he saw two Miramar police officers that he knew and he told them nothing about being chased. XVII1603. He identified the car from photographs. XVII1604. He has never identified the driver. XVII1606-7.

In 1994, he told the police that he did not know who picked Keinya Smith up on the last night that she worked and that he did not see her leave. XVII1618. <u>For the first time</u>, in October, 1998 he claimed that he saw Mr. Anderson, in the black Eldorado on

Sunday, January 16, 1994. XVII1650. He did <u>not</u> see Ms. Smith get in the car, but saw her walking in that direction. XVII1648. His time card shows that he worked from 5:05 p.m. to 10:48 p.m. on Sunday, January 16, 1994. XVII1658.

Fred Boyd compared tire cast impressions taken at the scene where the body was found with the four tires on Mr. Anderson's car. XVII1687. Three of Mr. Anderson's tires were Remington's and one was a general tire. XVII1687-8. Of the four impressions that he compared; one could <u>not</u> have been made by Mr. Anderson's car, one could have been made by the car, and two were of no value. XVII1698. The tire cast that was consistent with Mr. Anderson's tire was consistent with the general tire and not the Remingtons. XVII1688. This is not a positive id, but it is consistent with the tire. XVII1709.

Jerry Robbins, an investigator for FHP, took a phone call from John Gowdy on January 19, 1994. XVII1717. His note says:

> Mr. John Gowdy called and stated he saw a gray four door car. He said it was spinning its tires in the grass just after the victim was hit.

XVII1719.

James Gerhart stated that the grease marks on the green Publix jacket "could have been" made by two coils from underneath Mr. Anderson's car, but he can't say that they were. XVIII1737-9. He has no idea how many consistent coils are on the road. XVIII1743. Two of the coils from Mr. Anderson's car could <u>not</u> have made the impression. XVIII1742.

Officer Roy Cao, of the Miami-Dade Police Department, testified that he responded to a hang up 911 call from the home of Edwina Anderson, on January 15, 1994 at approximately 1:05 a.m.

XVIII1748. He and another officer approached the house, heard two people arguing and knocked on the door. XVIII1749. Charles and Edwina Anderson came to the door. XVIII1751. Edwina said there had been no physical contact that night. XVIII1758.

Officer Elias Thomasevich went to the scene were Keinya Smith was found on January 17, 1994. XVIII1761. On the same day he went to Edwina Anderson's house. XVIII1762-3. He spoke to Mr. Anderson:

> Mr. Anderson did discuss – he said he didn't have any information about the homicide, but did discuss a boy that apparently had dropped her off a couple of times and that he had tried to ascertain who that boy was and that he had followed him on two occasions with his vehicle following his vehicle. Mentioned that his name was Patrick Allen....
>
> Q What other discussions did you have with the defendant, Mr. Anderson?
>
> A Well, he did discuss the fact that he had on the second occasion, apparently this boy that he had followed, I guess was trying to get away from him from the way he described it to me, and that the boy had shot at him, fired several rounds at his car or in his direction. He said that he did then come home and got into a verbal altercation with Keinya. And at one point he admitted that he slapped her, Keinya.

XVIII1769-1770.

Mr. Anderson allowed the police to search his car. XVIII1772-3. He denied any knowledge of the death of Ms. Smith. XVIII1777.

> Well, we continued to talk about the night that Keinya was missing. At one point I start to tell him that I believe he was in fact the one that picked her up. We continued on that, that line of speaking as far as my part. At one point he says "Okay, yeah", he says, "I picked her up but I didn't kill her." I then try to elaborate on that, try to get him to speak about that. And he immediately said that he was just being facetious.

XVIII1780-1781.

George Anderson, a cousin, was supposed to pick Keinya up on January 16, 1994. XVIII1791. He interviewed several Publix employees who worked on January 16, 1994, and none said they saw Mr. Anderson on that day. XVIII1791. He looked at Patrick Allen's car and saw no evidence of damage from another car. XVIII1793. However, he did see a bullet hole. XVIII1795.

Mr. Anderson consistently cooperated, never refused to answer any questions and freely consented to the search of his car. XVIII1799-1801. Patrick Allen told him that the reason he did not report the January 14th incident is that he was worried that "he would probably be arrested" for firing his gun. XVIII1807.

Andronda Brown is Keinya Smith's cousin and shared a room with her from October, 1993 until Keinya's death in January, 1994. XVIII1843-6. Mr. Anderson was there almost every day. XVIII1889. She claimed that about 1:30 a.m. on Saturday January 15, 1994 she heard a car screech and Keinya got out of the car and Mr. Anderson went after the car. XVIII1848-9. She claimed that Mr. Anderson came back five minutes later "screaming and shouting that the boy shoot at him." XVIII1849. Mr. Anderson hit Keinya one time. XVIII1851,78. She never saw any other violence in the time that she stayed there. XVIII1884. Keinya then went in the kitchen and got a knife. XVIII1852. She claimed that Mrs. Anderson was holding Mr. Anderson; Keinya said "let me call the police;" dialed 911 and then hung up. XVIII1853. The police called back and Charlene Anderson answered the phone and hung up when her mother told her to. XVIII1854. The police knocked on the front door and Mr. and Mrs. Anderson went to the door and spoke to them. XVIII1855. After the police left, Charles Anderson went to Keinya's locked bedroom

door and "said that he's gonna wait in Publix for 24 hours. If he can't get Patrick, then he's coming after her." XVIII1857. He left. XVIII1859. Keinya went to work on Sunday, January 16, 1994. XVIII1859. Mrs. Anderson's car was broken for several weeks before Keinya's death. XVIII1862. Mr. Anderson treated Keinya and her the same. XVIII1869. Keinya normally came straight home from work and when she came home late on Friday January 14th both Mr. and Mrs. Anderson were very upset. XVIII1870.

Donna Marchese tested several sites in the car that were suspected to have blood, but most turned out to be negative. XIX1929-34. She got a positive presumptive test for blood on the green jacket and on the splash pan of the car, but could not get any DNA results. XIX1936-7. The presumptive test for blood is not specific for human blood, it can be animal blood. XIX1943. Blood off the car seat of Mr. Anderson's car matched the DNA profile of Keinya Smith. XIX1943. There is no way for a DNA test to date a blood sample. XIX1978. Dr. Martin Tracey stated that the chance of a random match 1 in 8.3 million in the Caucasian data base and 1 in 6.5 million in the African-American data base. XIX1993.

Bruce Ayala compared a fiber from the brake cable of Mr. Anderson's car with one from blue pants found at the scene. XIX2023-58. He stated that "the fiber from the brake cable could have come from the pants". XIX2054. He tested 12 other fibers from Mr. Anderson's car which did <u>not</u> match any item of clothing found at the scene. XIX2058.

Lisa White, who was Mr. Anderson's probation officer in Miami in 1994 testified that in November, 1992 he was placed on 10 years probation for attempted capital sexual battery on Keinya Smith and

that no contact with Ms. Smith was a condition of probation. XIX2061. On January 18, 1994 he reported to her and told her that Keinya Smith had recently died and then allegedly said "Since she is dead will this bring the family back together." XIX2061.

Amelia Stringer, stated that on January 16, 1994 she and her boyfriend, John, were driving south on U.S. 27 from Clewiston to Miami at about 7 p.m. XIX2071. He was driving and she was in the front passenger seat. XIX2072. He said he saw a person, so she sat up. XIX2073. He made a U-turn at the next turn. XIX2073. She saw a car in front of them making the same U-turn. XIX2073. She stated: "It was a dark car. It was either a gray, a black." XIX2074. The car in front made the U-turn and then they made the U-turn. XIX2075. She looked back and saw the person laying on the ground sit up. XIX2075. She saw the car in front run over the person on the ground. XIX2076. She claimed the car ran over the person and then got back into traffic. XIX2079. The car left and headed north on 27. XIX2077. They went to a gas station and then to a trooper station. XIX2077.

In her original police statement, the only description she could give of the car was that "it is a big dark car". XX2094. She never positively identified the car. XX2094. She was shown a picture of Mr. Anderson's car and said that "it could have been the car." XX2094. She claims that it was "a dark car and a similar shape and size." XX2097. She never said anything to the police about a reflector on a bumper. XX2106. She never said anything about the number of doors or headlights. XX2108-9. The State and defense rested and motions for judgment of acquittal were denied.

XX2111,2120-5. The jury returned a general verdict of first degree murder. XXI2348.

PENALTY PHASE FACTS

The State called the medical examiner, Dr. Joshua Perper. XXVIII2620. He described the injuries to Keinya Smith as follows:

> A This young woman had numerous bruises and scratches on the body; both on the face, the front of the body, and on the back. And those were obviously a result of her being under some kind of motor vehicle, because those injuries were associated with grease, which is present under a car.
>
> The person also had severe, both external and internal; laceration. There was a laceration of the back of the head, which you just saw in the photographs which were shown you. In addition to that, she had laceration of the front of the pelvic area....
>
> A In addition to that, the deceased had received internal injury. She had fractures of the hips on both sides, both in the front, on the side, and in the back, which were in the – this was an indication that those were crushing injuries.
>
> In addition to that, her most severe injury was her fracture of the neck in the area of the second vertebra. That is the second bony segment of the spine of the neck and the disk. This injury was associated with a fracture which most likely compressed and injured the spinal cord. that is the – that is the cord of nerves which emerges from the brain.
>
> Those were basically – and there were in addition to that, pelvic fractures in the area of the lower body....
>
> Q Are those painful injuries?
>
> A If the person is – is awake. Yes.

XVIII2625-7.

He stated that "the survival following the accident in this case was very short. Seconds to minutes at the most." XXVIII2632. Death would have taken 20 seconds to 3 minutes. XVIII2634-5.

Edwina Anderson testified that when she married Mr. Anderson in 1980, her daughter, Keinya, was 5 years old. XXVIII2643. Keinya was working at Publix in January, 1994. XVIII2644. She claimed that in 1990, Keinya claimed that Mr. Anderson had sex with her. XXVIII2645. She "monitored it." XXVIIII2646. She later confronted Mr. Anderson and he admitted it. XXVIII2646.

> Q Did Keinya say that Charles Anderson would undress her?
>
> A Yes.
>
> Q Did Keinya tell you that Charles Anderson would forcibly pin her to the bed?
>
> A Yes.
>
> Q Did she tell you that he inserted his penis inside her vagina on several occasions?
>
> A Yes.
>
> Q Did Keinya tell you that he would also perform oral sex on her by licking her vagina?
>
> A Yes.
>
> Q Did Keinya tell you that she tried to resist, but Mr. Anderson would over power her and hold her down?
>
> A Yes.

XXVIII2646-2647.

Charles Anderson lived with her, Keinya, the other three children, and her niece in January, 1994. XXVIII2647-8. The police came early Saturday morning, January 15, 1994 and then left when they were told that everything was ok. XXV2647-8. Mr. Anderson was very upset and kept saying "that Keinya had the boy to shoot at him." XXVIII2649. She claimed that he said "I'm going to be in prison, but somebody going to be dead, I betcha that." XXVIII2649.

Mrs. Anderson explained how the sexual activity was reported.

Now, isn't it true, Mrs. Anderson, that at that point this finally did come to the attention of the authorities, Charles was in a drug rehabilitation program....

A Yes.

Q And you knew for many years Charles had a problem with cocaine?

A Yes.

Q And that had been a problem that also affected your family, is that correct?

A Yes.

Q And in that program, while getting treatment, Charles disclosed to his counselors that there had been another problem besides his addiction to cocaine. He admitted that he was having a sexual relationship , or had had a sexual relationship in the past with his step daughter, your daughter Keinya, correct?

A Yes.

Q And that is how this situation eventually came to the attention of the authorities?

A Yes.

Q But your understanding was that the sexual relationship between Charles and Keinya had ended at some point prior to Charles going in to treatment for his drug addiction, correct?

A Yes.

XXVIII2657-2659.

She and Charles <u>both</u> hit Keinya on the night the police came.

XXVIII2676. Keinya grabbed a knife. XXVIII2676.

She also described the extent of Mr. Anderson's drug problem.

Charles had a drug problem and he was in and out of the drug rehab, and when he - when he - when he came out and stayed clean for several months, he seemed to be a good person. I mean, this went on and on and on for years.

XXVIII2685.

Lisa White, probation officer, stated that the conditions of Mr. Anderson’s probation, included not having any contact with Keinya Smith and not to leave Dade County without permission. XXIX2706-13. Mr. Anderson was participating in a program for Mentally Disordered Sex Offenders (MDSO). XXIX2716. Mr. Anderson had a long term drug problem and had tried almost every illegal drug. XXIX2718.

Officer Luis Estopinan, of the Miami-Dade Police Department, testified concerning his investigation of the allegations of sexual abuse of Keinya Smith in October, 1992. He claimed to have taken the following statement from Ms. Smith:

> Keinya told me when she was approximately five or six years old she was sexually assaulted by her step father, who was Mr. Anderson, the defendant at this time.
>
> She told me that – she said about five or six years old, that the defendant initially began to fondle her with his hands. That he would touch her breasts and her vaginal area with his hand over the clothing and eventually underneath the clothing....
>
> She said eventually when she was about ten years old the defendant, Mr. Anderson, began to actually have sexual intercourse with her, meaning that he would undress her and that he would actually, with his penis, he would insert his penis in her vagina. And she said this happened numerous times....
>
> Q Did she indicate to you whether or not she wanted the victim to have – I’m sorry – the defendant to have sexual intercourse with her?
>
> A I did ask her. She said every time it happened, it happened against her will.

XXIX2731-3.

Mr. Anderson told him that he had a sexual relationship with Ms. Smith and that it had ended about two years earlier. XXIX2739. Mrs. Anderson had known about the contact for several years. XXIX2741. The reason it came to the attention of the authorities is that Mr. Anderson told his drug counselors. XXIX2741-2. Charlene Anderson read a victim impact statement. XXIX2761-2763. The State rested. XXIX2763.

The defense called Perry King, a retired barber from Tampa, Florida. XXIX2801-2. He's known Charles since he was a boy. XXIX2801. He cut Charles' hair and had three daughters that went to school with him. XXIX2802. One of his daughters dated him. XXIX2802. He often came to visit him and called him. XXIX2803.

> Q How would you describe the nature of your relationship with Charles Anderson?
>
> A Well, he was – he came from a family, a hard working family. His daughter was – his father, pardon me. He always cut yards and he had a good business And he would take some of the boys with him to work. They was well disciplined. Good manners. Respectful. And he would never talk foolish talk. You would never see him on the block talking like some of the fellows I knew. Everything he said was constructive and I think when he went to the Coast Guard he was trying to better his education and that's what I do know about Charles.
>
> And he would come by my house. He even taught my wife how to make a cake, a particular cake he knew how to make, and she said "Charles has been here. He was visiting."
>
> Another year he came, I saw a tree in the yard. She said "Well, Charles came and set this tree in the yard." That is what I know about Charles.
>
> Q What would you be able to tell the jury about Charles in addition to what you said. What type of person he was, the character and the kind of person he was and is.

A He has always been a good fellow, not a violent fellow. When he come to the shop if he even didn't come for a hair cut, he would stay in the shop and talk hours to different fellows especially some of the – the older fellows. He always talked about business. He was one of those, "yes, ma'am" and "no, ma'am" type – type fellas.

Q Did you ever have any problems with Charles during the course of his growing up, or the years that you ever known him later on?

A No. I never had any troubles. He always respected me and I had a lot of respect for Charles.

XXIX2803-4.

Charles grew up with his parents and 8 children in a two bedroom house in Tampa. XXIX2805. He described Charles' relationship with adults:

Q How would you describe Charles as a child in terms of the adults in the community. Was he the kind of child that would give the adults a problem and they would have to always be telling him what to do?

A No. They wouldn't, because like you say, you – he was very disciplined. He was a disciplined young man. I think all the people in the community, they all knew Charles. They had no problem with Charles.

XXIX2807.

Charles graduated from high school in 1972, enlisted in the Coast Guard in 1973 and served until 1978. XXIX2808.

Jerome Anderson, Charles' younger brother, described him:

Q How was your brother as he was growing up? How would you describe him as a brother?

A Well, he was very outgoing. Very bright student. Very family oriented. Helpful, I guess. As far as, you know, it was someone you could talk to if you had a problem, something like that.

Q You described him as family oriented. Could you go a little further for the jurors to explain what you mean by family oriented?

> A I mean, first I was one of the younger ones. If I got into trouble, something like that, he would take it upon himself to find out what kind of trouble it was. Something he could help, or something like that....
>
> For instance, if I had a problem with, as you know, what it was, I could come and talk to him, you know. He could give me some advice, because he was, you know, he was fairly intelligent that he would give me advice, depending on what I asked him for.

XXIX2815-2816.

He was "very intelligent, very smart, and he was a very good athlete." XXIX2821. Charles turned down college scholarships to serve in the Coast Guard. XXIX2823-4. In the late 80's Charles came back to Tampa and helped him with his lawn service. XXIX2818. He was aware that Charles later developed a drug problem. XXIX2819.

> Q Did it seem like when you saw your brother and realized he had become under the influence of drugs in his life, did he seem like he had changed substantially?
>
> A Oh definitely. It wasn't the Charles that I knew. I mean point blank, his personality had changed. I mean, he was an unpredictable type of person.

XXIX2882.

Gloria Jones, Mr. Anderson's sister testified that her brother was always on the football and track teams growing up. XXIX2830. She knew that he developed a drug problem as an adult. XXIX2834.

Lisa Chester stated that she had known Mr. Anderson for 5 years. XXIX2837. Her mother, Billie Chester, is engaged to Mr. Anderson. XXIX2843. She described Mr. Anderson:

> Q Have you had an opportunity to speak to him about his children and witnessed the way he attempted to interact with his children by phone and through other means while he has been incarcerated?
>
> A Yes, sir.

Q Do you – based on those contacts what is your opinion regarding the way he tries to relate to his children?

A I believe that, um, Mr. Anderson is a very caring father. That he really cared about his children and no matter what, you know, what it took or what ever he had to do to take care of them, you know, he would do that.

Q What type of things would he try to do? I mean, he has been in custody now for five years. How would he still try to provide some sort of guidance to his children, being in custody?

A Well, I guess, um, we do have – I have contact. I could, you know, see the children or when ever, you know, if they had a family, things, or whatever. Um, so I guess their family members, maybe, well, through my mom, if they needed something, like clothing or if they weren't doing well in school, or they needed some guidance or some uplift, he would be able to prove that for them....

He, you know, he just was really caring, I mean, a lot of times maybe they didn't – let's say Devon didn't have a hair cut, I mean, there was money that was issued to he could have his hair cut, different things like that. He just really, you know, wanted to see about the kids basically. I knew he really cared about them.

XXIX2838-40.

Patricia Anderson, Mr. Anderson's sister, testified that Charles had always been a positive influence on her and her children. XXIX2845-51. Charles was in the band when he was in school. XXIX2852. He was a skilled baker, who would often bake cakes for the family. XXIX2852. Charles Walker, a neighbor of Mr. Anderson's when Charles was growing up, said that the offense is out of character. XXX2899. He also stated that he appeared to be a good parent. XXX2898. Rosemary Walker testified that she and her husband lived next door to Charles Anderson from 1956 until he joined the Coast Guard in 1973. XXX2904. She described Charles' conduct as a child:

Q What kinds of things, nice things if any, that you can recall he did do as a child. Was he a helpful child around the neighborhood?

A Well, he – well, as I said, when they would come home in the afternoon they always had some type of chore to do. And when I would notice them they would be outside playing, you know, so he didn't do anything to stick out to say "This guy is doing something wrong." He participated in the school activities at his school and as he grew up he went into the service....

Q He was respectful?

A Very respectful, yes. So I felt that that was something – you know, because I have been thinking about him and nothing negative – nothing negative I could say about him.

Q In all those years?

A In those early years nothing negative.

Q Would you – would you say that would carry through until his teen years?

A In his teen years also, Even when he – even when they got cars that they could drive, I mean, you didn't see any of the – any of the wild driving and what not.

My son had a car and they got – you never saw that type of acts around them. So when they said this happened, I just couldn't believe it....

Q Is there anything about Charles in those – let's say up until his teen years now that stood out in your mind, or stands out in your mind to this day that is special about him, or something nice he did?

A He was very smart.

Q Okay. And that was obvious to you being a teacher, of course?

A Very smart.

XXX2911-13.

Charles influenced her son to go in the service. XXX2915. The offense was completely out of character. XXX2916.

Billie Chester testified that she's known Charles since 1993. XXX2918. She met him about 9 months before his arrest through her work with the Small Business Administration. XXX2919. She's continued to see him. XXX2920. She described their relationship:

> When I first met Charles on April 25th, 1993, a Sunday afternoon – or evening, I'm sorry, we sat down and he began telling me some of his past. He told me that if anything ever came up for what ever reason, he would always be truthful to me. And he was since – since day one....
>
> We talked a great deal about our kids. I – I could see in his eyes and expressions on his face how much he loves his kids.
>
> He told me that he was not with his ex-wife and he was residing in a half way house. But due to the fact that his ex-wife would work at night, Charles would go by his house and Edwina would leave his kids. He would cook, clean, help the kids with their homework, give them baths and put them to bed. When she would come home Charles would return. Charles would leave and go to the half way house.
>
> Charles is a very loving man, a caring man who I love deeply.

XXX2924-5.

She also spoke about Mr. Anderson's continued concern for his children from jail.

> Q The jury heard testimony he has telephone contact with one of your grand children. Lisa's child?
>
> A Yes, sir.
>
> Q Is that agreeable to you?
>
> A Yes. He's fine. Chris loves him a lot.
>
> Q Do you have – you had opportunity to observe the way Charles Anderson has attempted to stay in touch with his natural children, the children of Edwina?
>
> A Yes, I have.

Q Can you tell the jurors about that?

A Um, like on birthdays he tries to make sure that they get gifts. On Christmas he went to all lengths to make sure they had presents for Christmas. He tries to call [t]hem on the phone to tell them – to let them know he really loves them, even though what is going on he still cares about them.

Q Do you feel that – let's talk about your grand child now. Do you feel that in some ways Mr. Anderson would continue to be a role model to your grand children if allowed to live his life out in prison?

A Yes. He would be.

She and Mr. Anderson plan on getting married. XXX2931.

Marlene Anderson, Charles' mother, stated that she and her husband raised 8 children in a two bedroom house. XXX2940. His father had a lawn service and she worked in a cafeteria. XXX2941. Her husband had a third grade education and she had a 7th grade education. XXX2953. Charles graduated from high school and served in the Coast Guard. XXX2953. He was active in sports and the band. XXX2954. He was a good child. XXX2947. He regularly went to school and worked in his father's lawn business. XXX2936.

Charles Anderson testified that he served 5 years in the Coast Guard and was honorably discharged. XXX2959. He testified concerning some of his accomplishments in the Coast Guard.

Q Does that form list certain achievements or awards that you received during the course of your Coast Guard career?

A Yes, it does. It – it has a National Defense medal. It has, um, Coast Guard pistol marksmanship ribbon. The marksmanship ribbon – marksman does, you know, undermine a little bit of what it was, a sharp shooter, but the – because it is all marksman, that is why they put marksman ribbon. It is a qualification mark. Coast Guard rifle marksmanship with a bronze E attached. Means expert. So I qualify for expert, the highest that you can get.

Cutterman insignia. It is an insignia that you achieve after being qualified to run a small boat operations or small boats and their navigation. And that is what that is.

I – I don't see here – it doesn't have – and I asked you about it today, I went to a navigation school in New York County, Virginia to achieve that. I don't see that here, but I guess that is why they put the marksman or Cutterman insignia.

Q Okay. Thank you, Mr. Anderson.

A Sure.

Q Let me show you next what has been marked as – this one has not been marked. I apologize. Let me just have a moment.

This has been marked as N for identification. This also relates to the Coast Guard service?

A Yes, it does.

Q And what does that reflect?

A This is a certificate from the Coast Guard Band. I was in basic training. I was in – I was in Honor Guard in band. We travelled around the country playing gigs, you know, Washington, everywhere they had people enlisted in service, Coast Guard Day U.S.A.; and all the branches of service, when they had this day, we appeared to – in ceremonial – it was like a ceremonial company. That is what this is about. I was in the band section of it.

XXX2960-1.

He also described some of his achievements in high school.

I was in band. Actually I started band in junior high school, um, and I played for I think three years there. And I went to high school and I played. I think the first year I was also in the chorus. I ran track and football. There was always a conflict as to who wanted me to do what. So I – I quit several activities and I played football and ran track. But I did – I think I sang in the chorus and I think it was 10th grade, and played in the band 10th grade, and, ah, then I didn't do that anymore until I got transferred to another school in 12th grade and I sang in the chorus. And, you know, did football, ran track; and that is the whole thing.

He graduated from high school and was honorably discharged from the Coast Guard as a Third Class Petty Officer. XXX2961-3. He had 1½ years of college. XXXI3129. He was first exposed to drugs on the West Coast in the Coast guard. XXX2979-80. In 1983 he became hooked on crack cocaine. XXX2982. He started to fondle Keinya, when she was 8-9, while he was on drugs. XXX2987. He stated that he never would have attempted to have sex with her had he not been addicted to crack cocaine. XXXI3128. She never resisted the sexual activity. XXXI3068. Keinya and her mother both supported a plea to probation when it came to light. XXXI3126. During his incarceration, he has tried to help kids and has worked as an English teacher. XXX2969. The jury recommended death by a vote of 8 to 4. XXXI3293. The trial judge imposed the death penalty. V932-56.

SUMMARY OF THE ARGUMENT

1. The evidence is legally insufficient to support a verdict of first degree murder. The State failed to prove identity. Assuming arguendo that the issue of identity is proven, the evidence fails to prove either premeditation or felony murder.

2. The trial court erroneously admitted collateral bad act evidence. This court erred in allowing the nature of the offense for which Mr. Anderson was on probation. Bain v. State, 422 So. 2d 962 (Fla. 4th DCA 1982); McIntosh v. State, 424 So. 2d 147 (Fla. 4th DCA 1982).

3. The trial court erroneously admitted evidence concerning other traffic homicide cases. Nowitzke v. State, 572 So. 2d 1346, 55-56 (Fla. 1990).

4. The trial court improperly admitted non-responsive personal opinion testimony on the issue of intent.

5. Inflammatory, irrelevant photos were admitted, over objection, in the guilt phase. Almeida v. State, 748 So. 2d 922, 929-30 (Fla. 1999).

6. The State engaged in improper guilt phase argument.

7. The State was improperly allowed to pursue a theory of felony murder, without notice to the defendant. Shepard v. Rees, 909 F.2d 1234 (9th Cir. 1989).

8. The State engaged in improper penalty phase argument.

9. The State introduced numerous improper photos in the penalty phase.

10. The evidence was legally insufficient to support several aggravating circumstances.

11. The death penalty is disproportionate.

12. The death sentence violates the United States and Florida Constitutions in light of Apprendi v. New Jersey, ___ U.S. ___, 120 S.Ct. 2348 (2000).

13. The felony murder aggravator is unconstitutional.

ARGUMENT

POINT I

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION OF FIRST DEGREE MURDER.

The evidence is insufficient for first degree murder. It is insufficient as to identity. Mr. Anderson is entitled to be discharged. Assuming arguendo, that this Court finds the evidence to be sufficient as to identity, the verdict must still be reduced to second degree murder, as the evidence is insufficient for

premeditation or felony murder. The conviction in this case is in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution.

The evidence of identity was entirely circumstantial. Mr. Anderson consistently asserted his innocence. The State introduced the testimony of two eyewitnesses to this incident. Neither identified Mr. Anderson's car. Their descriptions of the car contained both similarities and differences with Mr. Anderson's car. Neither identified the driver. The circumstantial evidence is insufficient.

This Court has outlined the special standard of review for sufficiency of the evidence in circumstantial evidence cases.

> A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

State v. Law, 559 So. 2d 187, 188-9 (Fla. 1989) (footnotes and citations omitted).

This Court has also stated:

> > This Court has long held that one accused of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.
>
> Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977). Circumstantial evidence must lead "to a reasonable and moral certainty

> that the accused and one else committed the offense charged." Hall v. State, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. Williams v. State, 143 So. 2d 484 (Fla. 1962); Davis; Mayo v. State, 71 So. 2d 899 (Fla. 1954).

Cox v. State, 555 So. 2d 352, 353 (Fla. 1989).

The circumstantial evidence in this case is insufficient as to identity. The evidence fell into three categories. (1) An incident 2 days before the death of Keinya Smith. (2) Testimony of 2 eyewitnesses to the offense. (3) Scientific evidence.

The State attempts to make much of an incident two days earlier. However, at most this incident shows that both Mr. and Mrs. Anderson were distraught over Keinya Smith returning home from work three hours late on a Friday night.

Andronda Brown is Keinya Smith's cousin and shared a room with her from October, 1993 until Keinya's death in January, 1994. XVIII1843-6. She claimed that about 1:30 a.m. on Saturday January 15, 1994 she heard a car screech and Keinya got out of the car and Mr. Anderson went after the car that had dropped her off. XVIII1848-9. She claimed that Mr. Anderson came back five minutes later "screaming and shouting that the boy shoot at him." XVIII184-9. She claimed that Mr. Anderson hit Keinya one time. XVIII1851,7-8. Keinya then went in the kitchen and got a knife. XVIII1852. Keinya said "let me call the police; dialed 911 and then hung up. XVIII1853. The police knocked on the front door and Mr. and Mrs. Anderson both spoke to them. XVIII1855. She claimed that Charles Anderson went to Keinya's locked bedroom door and "said that he's gonna wait in Publix for 24 hours. If he can't get Patrick, then he's coming after her." XVIII1857. He left soon thereafter.

XVIII1859. Keinya normally came straight home from work and when she came home so late on Friday January 14th both Mr. and Mrs. Anderson were very upset. XVIII1870.

Officer Roy Cao, of the Miami-Dade Police Department, responded to a hang up 911 call from the home of Edwina Anderson, on January 15, 1994 at approximately 1:05 a.m. XVIII1748. He and another officer approached the house, heard what appeared to be two people arguing and knocked on the door. XVIII1749. Charles and Edwina Anderson came to the door. XVIII1751. Edwina said there had been no physical contact that night. XVIII1758.

Patrick Allen testified that in January 1994, he was working as a bag boy at Publix on Miramar Parkway and that Keinya Smith worked as a cashier at the same location. XVII1578. He became friends with her and that he gave her a ride home on January 12, 1994. XVII1579. After he dropped her off, he began heading north and he saw a black Eldorado behind him. XVII1580. He claimed that the car followed him into his apartment complex, he kept driving and ultimately the car kept going when he pulled into the police station. XVII1581-2. He went up to his apartment and then the car left. XVII1582. He said that the car looked similar to the Cadillac Eldorado. XVII1582.

On Friday, January 14, 1994 when Keinya Smith got off at 9:05 p.m. she was standing out front of Publix. XVII 1584. He gave her a ride. XVII1585. He had a handgun in his car that night. XVII1585. He eventually took her home and the same black car was parked there and begins driving towards him and eventually begins pushing him from behind. XVII1586. He claimed that eventually he

was steering with his left hand and shooting at the other car with his right. XVII1588.

He stated that he came to work at a little before 6 p.m. on Sunday, January 16, 1994, which was right before Keinya Smith got off. XVII1590. He never complained to the police about being chased and/or bumped on January 12 or 14, 1994. XVII1591. He claimed that on January 12,1994 he saw two Miramar police officers that he knew and he told them nothing about being chased. XVII1603. He identified the car from photographs. XVII 1604. He has never identified the driver. XVII1606-7. This incident shows that both Mrs. and Mr. Anderson were distraught over Keinya's late return home and does little to show the identity of the perpetrator.

The testimony of the two eyewitnesses, Mitzi Clark and John Gowdy, adds little as to identity. John Gowdy, stated that on January 16, 1994 he was driving from Clewiston to Miami on U.S. 27. XIII1023. He saw a body on the side of the road soon after they entered Broward County. XIII1023. It was in the median between the two lanes. XIII1024. He saw the car in front of him make a U-turn and head back towards the body and he did the same thing. XIII1024-5. He saw the first car go into the median, hit the body, then get back into the lane and leave. XIII1029.

Gowdy described the car as follows:

> "The rear end I noticed had–it was some area reflected, bumper stickers on the bumper. Something like in the back window sill. I don't know if it was stuffed animals, hats, whatever. The front end – this– this car had th bright lights on and – and I saw like all four of the lights illuminated, which was indicating it was like an older model car."

XIII1032. When he was shown a picture of Mr. Anderson's car, he did not identify it. XIII1034. He admitted that when he had

originally been shown a picture of Mr. Anderson's car he said "It wasn't dark like this. It wasn't dark at all like this here. To me it looked grayish like." XIII1039. He originally thought that this was an accident. XIII1047. He originally told the police that the car had a bumper sticker. XIII1048. He was then shown a picture of a reflector and said "I guess that could have been it". XIII1048. He stated that what he saw is consistent with an accident or an intentional killing. XIII1051.

Jerry Robbins, an investigator for FHP, took a phone call from John Gowdy on January 19, 1994. XVII1717. His note says:

> Mr. John Gowdy called and stated he saw a gray four door car. He said it was spinning its tires in the grass just after the victim was hit.

XVII1719.

Amelia Stringer stated that she and her boyfriend, John, were driving south on U.S. 27 from Clewiston to Miami at about 7 p.m. XIX2071. He was driving and she was in the front passenger seat. XIX2072. He made a U-turn at the next turn and then said he had seen a person laying on the ground. XIX2073. She said she saw a car in front of them making the same U-turn. XIX2073. She stated: "It was a dark car. It was either a gray, a black." XIX2074. The car in front made the U-turn and then they made the U-turn. XIX2075. She looked back and saw the person laying on the ground sit up. XIX2075. She claimed the car ran over the person and then got back into traffic. XIX2079. The car left and headed north on 27. XIX2077.

In her original police statement, the only description she could give of the car was that "it is a big dark car". XX2094. She never identified the car. XX2094. She was shown a picture of Mr.

Anderson's car and could only say that "it could have been the car." XX2094. She never said anything to the police about a reflector on a bumper. XX2106. She never said anything about the number of doors or headlights. XX2108-9.

The testimony of Mr. Gowdy and Ms. Clark does little to show that Mr. Anderson was the perpetrator. Neither could identify the car or the driver and much of Mr. Gowdy's description of the car was inconsistent with Mr. Anderson's car.

The scientific and crime scene evidence fails to prove identity. Mark Suchomel, of the BSO, participated in the search of Mr. Anderson's car 7-10 days after the incident. XV1383-4. He took impressions of Mr. Anderson's tires. XV1383-4. The right front tire was a general brand, Ameritech 4, and the other three were Remington Maxxum's. XV1385-6. There appeared to be some damage underneath the radiator, the splash guard appeared to be cracked, and an area appeared to have been wiped. XV1394-5.

Officer Terry Gattis testified that he saw what looked like blood on side of the front passenger's seat and on the arm rest between the two front seats. XVI1494. The Cadillac emblem was missing. XVI1495-6. The splash pan appeared to be cracked. XVI1504. He has no idea how the dents and scratches got there. XVI1522.

Fred Boyd compared tire impressions taken at the scene where the body was found with the four tires on Mr. Anderson's car. XVII1687. Three of Mr. Anderson's tires were Remington's and one was a General tire. XVII1687-8. Of the four impressions that he compared; one could <u>not</u> have been made by Mr. Anderson's car, one could have been made by Mr. Anderson's car, and two were of no

value. XVII1698. The tire cast that was consistent with Mr. Anderson's tire was consistent with the general tire and not the Remingtons. XVII1688. This is not a positive id, but only is consistent with the tire. XVII1709.

James Gerhart stated that the grease marks on the green Publix jacket "could have been" made by two coils from underneath Mr. Anderson's car, but he can't say that they were. XVIII1737-9. He has no idea of how many consistent coils are on the road. XVIII1743. Two of the coils from Mr. Anderson's car could <u>not</u> have made the impression. XVIII1742.

Donna Marchese, of the BSO, tested several sites in the car for blood, but most turned out to be negative. XIX1929-34. She got a positive presumptive test for blood on the green jacket and for blood on the splash pan, but could not get any DNA results. XIX1936-7. The presumptive test for blood is not specific for human blood, it can be animal blood. XIX1943. Blood off the car seat of Mr. Anderson's car matched the DNA profile of Keinya Smith. XIX1943. There is no way for a DNA test to date a blood sample. XIX1978. Dr. Martin Tracey stated that the chance of a random match of the stain on the seat was 1 in 8.3 million in the Caucasian data base and 1 in 6.5 million in the African-American data base. XIX1993.

Bruce Ayala compared a fiber from the brake cable of Mr. Anderson's car with a fiber from blue pants found at the scene. XIX2023-58. He stated that "the fiber from the brake cable could have come from the pants". XIX2054. He tested 12 other fibers from Mr. Anderson's car which did <u>not</u> match any item of clothing. XIX2058.

The scientific evidence in this case does nothing to establish who was driving and does little to establish the car in question. The testimony that Mr. Anderson's splash guard was cracked is virtually meaningless in a 13 year old car. The tire impression evidence is of limited value. Four impressions were compared to Mr. Anderson's car. One could <u>not</u> have been made by Mr. Anderson's car, one could have, and two were of no value. The tire that was consistent was a general tire and there was no showing how many of these tires were in circulation. Similarly, the coil impression testimony is of little value as there was no testimony as to how many consistent coils there are on the road. The only piece of scientific evidence that is of any significance is the DNA evidence. However, given the circumstances of the case it is of limited value. A small spot of blood on the passenger seat of the car matched the DNA of Keinya Smith. However, there was no evidence as to the age of this stain. Mr. Anderson was Keinya's stepfather and it is undisputed that he was a constant source of transportation for her. A small amount of blood such as this could have been placed at any time. None of the scientific evidence constitutes proof doubt of identity.

The evidence falls far short on identity. The evidence in this case is similar to that found to be insufficient in <u>Terranova v. State</u>, 764 So. 2d 612 (Fla. 2nd DCA 1999). The Court, in a well reasoned opinion by Justice Quince sitting as an Associate, stated:

> While many witnesses were presented, the evidence that supported the State's theory that Terranova committed the murders can be summarized as follows:
>
>> Some weeks prior to the murders, Terranova's wife left him and began living with Emerine. Terranova went to great lengths to determine where they were living and lied to the police by saying he did not

> know where the victims lived. On at least two occasions prior to the murders, Terranova made statements that could be taken as threats against the decedents. On the day before the murders, Terranova went to the bank with his wife, and they got into a heated argument. The bullets that were removed from the bodies of the victims matched bullets that were shot from a .38 caliber gun that Terranova owned at some point. A recitation of the alibi testimony offered by Terranova's mother and her boyfriend was contradicted by other witnesses. Although this evidence suggests Terranova had a motive and possibly an opportunity to kill the victims, it falls far short of the kind of evidence needed to support first degree murder.
>
> Our courts have long held that a conviction based on circumstantial evidence cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. See State v. Law, 559 So. 2d 187 (Fla. 1989), and M.P.W. v. State, 702 So. 2d 591 (Fla. 2d DCA 1997). While the question of whether the circumstantial evidence is inconsistent with any reasonable inference is generally a question of fact for the jury, the jury's determination must be supported by competent, substantial evidence. See Long v. State, 689 So. 2d 1055 (Fla. 1997). Evidence that creates nothing more than a strong suspicion that a defendant committed a crime is not sufficient to support a conviction. See Scott v. State, 581 So. 2d 887 (Fla. 1991). Terranova's hypothesis of innocence was simply he did not commit these murders. The evidence offered by the State is insufficient to point to only Terranova as the perpetrator of these crimes.

Id. at 2475 (footnote omitted).

The evidence in this case is also similar to the evidence which this Court held to be insufficient in Cox v. State, 555 So. 2d 352 (Fla. 1989) and Scott v. State, 581 So. 2d 887 (Fla. 1991).

Assuming arguendo, that this Court finds that the evidence of identity is sufficient, the conviction must be reduced to second degree murder as the evidence is legally insufficient to prove premeditation or felony murder. This Court has outlined the proof of premeditation in Norton v. State, 709 So. 2d 87 (Fla. 1997).

> Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as the nature of the act to be committed and the probable result of that act.
>
> Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986))....
>
> To prove premeditation by circumstantial evidence, "the evidence relied upon by the State must be inconsistent with every other possible inference that could be drawn." Id.; accord Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997). Where the State fails to exclude all reasonable hypotheses that the homicide occurred other than by premeditated design, the defendant's conviction for first-degree murder cannot be sustained. Coolen, 696 So. 2d at 741; Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993); Hall v. State, 403 So. 2d 1319, 1321 (Fla. 1981).

709 So. 2d at 92.

The evidence of premeditation is deficient in many of the same ways as that found to be deficient in Norton, Green v. State, 715 So. 2d 940 (Fla. 1998), and Kirkland v. State, 684 So. 2d 732 (Fla. 1996). In Norton, the victim was shot in the back of the head and the defendant had made extensive efforts to conceal the crime. Id. at 93. This Court held this was manslaughter. Id. In Kirkland, this Court described the evidence of premeditation as follows:

> The State asserted that the following evidence suggested premeditation. The victim suffered a neck wound that caused her to bleed to death, or sanguinate, or suffocate. The wound was caused by many slashes. In addition to the major neck wound, the victim suffered other injuries that appeared to be the result of blunt trauma. There was evidence indicating that both a knife and a walking cane were used in the attack. Further, the State pointed to evidence indicating that friction existed between Kirkland and the victim insofar as Kirkland was sexually tempted by the victim.

684 So. 2d at 734-5. This Court held this evidence to be insufficient to show premeditation.

The evidence of premeditation in this case is also legally insufficient. The evidence is equally consistent with the driver losing control of the car and the death being an accident.

The evidence of felony murder is also legally insufficient. The only felony which the State argued was kidnapping. The elements of kidnapping are:

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat of confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>
> 1. Hold for ransom or reward or as a shield or hostage.
> 2. Commit or facilitate commission of any felony.
> 3. Inflict bodily harm or to terrorize the victim or another person.
> 4. Interfere with the performance of any governmental or political function.

Fla. Stat. § 787.01(1)(a). The only prong relied on by the State was the "intent to inflict bodily harm or terrorize" theory.

There is no evidence that the deceased was forced into Mr. Anderson's car. Indeed, the circumstantial evidence points to her entering voluntarily. Mr. Anderson frequently picked her up from work. There is no evidence that the deceased was "forcibly, secretly ... confined". Holyrod v. State, 172 So. 700 (Fla. 1937); Gordon v. State, 145 So. 2d 896 (Fla. 2nd DCA 1962). The evidence is legally insufficient for premeditation or felony murder.

The evidence is legally insufficient of identity. Discharge is required. Assuming arguendo, that this Court finds the evidence as to identity to be legally sufficient the verdict must be reduced to second degree murder as the evidence of both premeditation and felony murder are insufficient. Assuming arguendo, that this Court

finds the evidence to be insufficient on only one prong, a new trial is required. Delgado v. State, ___ So. 2d ___, 25 Fla. L. Weekly S631 (Fla. August 24, 2000).

POINT II

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL BAD ACT EVIDENCE.

This issue involves the trial court's admission of collateral bad act evidence and allowing it to become a feature of the case. The trial court admitted collateral bad act evidence over defense objection and allowed it to become a feature of the case in the guilt-innocence phase. The evidence included the following: (1) Mr. Anderson was on probation for attempted capital sexual battery. (2) An alleged incident in which Mr. Anderson supposedly chased State witness Patrick Allen, in his car. (3) An alleged incident in which he supposedly struck Keinya Smith. Mr. Anderson did not take the stand in the guilt phase and did not place his character in issue. The admission of these incidents, individually and cumulatively, denied Mr. Anderson due process of law pursuant to Mr. Anderson due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. The prejudice of this evidence outweighed any possible probative value. Fla. Stat. § 90.403.

Appellant made a pre-trial motion to exclude collateral bad act evidence. III483-6,489-92. Argument was held on this motion. IX265-304. The trial court allowed the materials into evidence over defense objection. The prosecutor agreed to a continuing objection to all collateral bad act evidence. XVII1553-4.

The State called Lisa White, Mr. Anderson's probation officer, and the following colloquy took place:

> Q Now, on November 24, 1992 was the Charles Anderson that you just pointed out placed on ten years probation for the attempted sexual battery on Keinya Smith, a minor?
>
> A Yes.

XIX2060. The prosecutor argued that Mr. Anderson "was on probation for attempted capital sexual battery on a minor" XIII983.

The State claimed that Mr. Anderson's alleged motive was to avoid being prosecuted for violation of probation for having contact with Keinya Smith. IX266. This argument is tenuous at best. The State's evidence shows that he had regularly been in contact with Keinya Smith without any apparent fear of repercussions. XVIII1835. This "motive" is speculative.

Assuming <u>arguendo</u>, that Mr. Anderson's probation status is relevant, the underlying offense is not. Defense counsel specifically objected on these grounds. IX285-294. This aspect of the issue is controlled by <u>Bain v. State</u>, 422 So. 2d 962 (Fla. 4th DCA 1982) and <u>McIntosh v. State</u>, 424 So. 2d 147 (Fla. 4th DCA 1982). In both cases the defendant took the stand and volunteered that he was on parole and the prosecutor was allowed to cross-examine as to what offense. The Court found it to be reversible error. The argument for the admission of the underlying charge is even weaker in this case as the defendant did not take the stand and did not put his character in issue.

The error is similar to that in <u>Taylor v. State</u>, 508 So. 2d 1265 (Fla. 1st DCA 1987). In <u>Taylor</u>, the defendant was charged with witness tampering. The State was allowed to bring out that the

pending charges were battery and indecent exposure of sexual organs. The Court reversed and stated:

> The appellant contends that the introduction of this evidence within the context of this case was for the purpose of character assassination, was inflammatory and was not relevant to any element of the crime of offering pecuniary reward to a witness. We agree and reverse for a new trial. The fact that appellant was charged with a crime is an essential element of the state's case. Fischer v. State, 429 So. 2d 1309 (Fla. 1st DCA 1983). However, the nature of the charges is not essential in this case. Machara v. State, 272 So. 2d 870 (Fla. 4th DCA), cert. den., 277 So. 2d 535 (1973).
>
> Accusations of sexually deviant behavior are inherently denigrating. Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA), rev. den., 424 So. 2d 763 (1982). The charge of such conduct, unanswered, cannot be said to have produced no harmful or prejudicial effect on the jury toward appellant. In the prosecution of cases such as this one, the evidentiary relevance of the specific criminal charges must be weighed against their prejudicial effect. While the general fact that appellant was charged with a crime is relevant to appellant's motive in tampering with a witness, any relevance of the specific criminal allegations of sexually deviant behavior is far outweighed by its prejudicial effect.

508 So. 2d at 1266-67.

The error here is very similar to that held to be improper in Garron v. State, 528 So. 2d 353 (Fla. 1988).

> The evidence admitted includes the testimony of Linda Garron that appellant had previously engaged in sexual misconduct with his two stepdaughters. This activity took place more than two years prior to the killings. The state claims that the evidence is relevant to show appellant's motive for killing his wife and stepdaughter in that he was attempting to prevent his wife from taking the stepdaughters away to avoid his improper advances....
>
> In this case, however, the alleged sexual misconduct in no way resembles the act for which appellant was convicted. Moreover, the prior acts are far too remote in time to support any allegation that they could have provided appellant with a motive for the killings.

> As such, the only possible issue for which this evidence could be used is to prove character and propensity. As the statute states, these issues are not valid grounds for the admission of similar fact evidence. A danger of unfair prejudice arises if alleged acts of sexual misconduct are put before the jury when such evidence is not relevant to prove a material issue. This danger renders the evidence inadmissible. Here, the inflammatory effect of this type of evidence played a role in the conviction of appellant.

528 So. 2d at 357-8.

The trial court also erred in admitting the testimony of Patrick Allen regarding an alleged incident in which Mr. Anderson supposedly chased Patrick Allen with his car on two occasions; four days before the homicide and two days before the homicide. XVII1573-1592. The incident with Allen was inflammatory and had no relevance. The error here is similar to that in Jackson v. State, 451 So. 2d 458 (Fla. 1984). In Jackson, the trial judge had admitted evidence that the defendant had pointed a gun at a witness had stated that he was a "thoroughbred killer". Id. at 460. This Court held this to be reversible error. Id. at 461.

The incident in which Mr. Anderson allegedly struck Keinya Smith two days earlier was also improperly admitted. The State introduced aspects of this incident through different witnesses. Andronda Brown, Officer Roy Cao, Troy Vernon, and Dana Turner. XIII1008-22,XVIII1747-60,1814-42. Assuming arguendo, that some of this testimony had some marginal relevance. The prejudice of this evidence outweighed its probative value. Fla. Stat. § 90.403. Additionally, it was improperly allowed to become a feature of the case. Steverson v. State, 695 So. 2d 687 (Fla. 1997); Henry v. State, 574 So. 2d 73 (Fla. 1991).

The improper admission of collateral bad act evidence is

> "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

Straight v. State, 397 So. 2d 903, 908 (Fla. 1981).

In the present case, the error is clearly harmful. Assuming arguendo, that the evidence is legally sufficient to support the charge (See Point I); it is by no means overwhelming. Keen v. State, 504 So. 2d 396, 401 (Fla. 1987). The error here is harmful. Perhaps most egregious is the injection of the completely irrelevant factor of the nature of the prior offense. The introduction of the highly inflammatory charge of attempted capital sexual battery was prejudicial error. A new trial is required. Assuming arguendo, that this Court finds the evidence is harmless in the guilt phase, it is harmful in the penalty phase given the close vote of 8 to 4. Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991).

POINT III

THE TRIAL COURT ERRED IN ALLOWING A WITNESS TO TESTIFY CONCERNING OTHER TRAFFIC HOMICIDES.

This issue involves the admission of testimony concerning other traffic homicides. The admission of this evidence denied Mr. Anderson due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. Additionally, any possible probative value of such evidence was outweighed by its prejudice. Fla. Stat. 90.403.

The following took place during the direct examination of Kevin Vaughn, investigator for the Florida Highway Patrol.

Q (prosecutor): Tell us what happened next.

A (witness): After I was northbound I looked – I had already picked up all the evidence southbound and was getting ready to clear the scene essentially....

DEFENSE COUNSEL: I object to what is typical or not typical, Judge.

THE COURT: You want to lay a foundation for that? I will sustain it at this time....

DEFENSE COUNSEL: My objection is based on relevancy, not on any lack of a predicate. I think it is irrelevant what is typical or atypical. Mr. Anderson's on trial here for his life. It doesn't matter what goes on in other cases. It matters what is going on in this – this case.

THE COURT: Overruled. I will allow him to testify.

THE WITNESS: It is not typical we would find evidence of a hit and run on both sides of the road ninety feet apart, and essentially where the evidence is all south-bound, there is evidence also that is north of the southbound evidence. So how would that evidence get there unless something had transpired previously? And it appeared that the evidence that we located and found was connected with the evidence that we found southbound. So at that time I felt that maybe this was not a traffic hit and run, a traffic case. I thought it was –

DEFENSE COUNSEL: I object to opinions he formed on that, or what he thinks. It is irrelevant. It is a final determination to be made by the jury. It is not up to him to tell the jury what the final conclusions are.

THE COURT: Overruled. He can testify to that.

Q Go ahead, sir.

A So I – it was a – not a traffic homicide at this point. I didn't think it was a traffic homicide, because of the circumstances of the evidence being in different locations so far apart in different directions. So I felt that we needed the assistance of the Broward Sheriff's Office homicide unit to see if we could get a homicide detective out there.

XIV1151-4.

The Florida courts have consistently condemned this type of testimony. Nowitzke v. State, 572 So. 2d 1346, 55-56 (Fla. 1990); Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991); Williams v. State, 619 So. 2d 1044 (Fla. 4th DCA 1993); Shelton v. State, 654 So. 2d 1295 (Fla. 4th DCA 1995); Cyprian v. State, 661 So. 2d 929 (Fla. 4th DCA 1995); White v. State, 730 So. 2d 715 (Fla. 4th DCA 1999). In Nowitzke, this Court stated:

> Finally, the state attorney elicited irrelevant and prejudicial rebuttal testimony about the criminal behavior patterns of drug addicts from Roy Hackle, one of the arresting officers. Over numerous defense objections, Hackle testified that he knew drug addicts who both stole from their families to support their drug habits and committed homicides in connection with narcotics deals.
>
> This entire line of questioning was completely improper. Testimony concerning past crimes that did not involve the defendant cannot be introduced to demonstrate that the defendant committed the crimes at issue in the present case. See e.g., Whitted v. State, 362 So. 2d 668, 673 (Fla. 1978); Jenkins v. State, 533 So. 2d 297, 299-300 (Fla. 1st DCA 1988), review denied, 542 So. 2d 1334 (Fla. 1989). The only purpose of such testimony is to place prejudicial and misleading inferences in front of the jury. See Whitted, 362 So. 2d at 673; Jenkins, 533 So. 2d at 300.

572 So. 2d at 1355-6.

In Lowder, the Court further explained this rule.

> On the second point, we hold that every defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminal in general. Florida courts have frequently criticized the use of testimony from police officers regarding their experience with other criminals as substantive proof of a particular defendant's guilt or innocence.
>
> In Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990), the supreme court held that testimony concerning past crimes that did not involve the defendant could not be used to prove that the defendant committed the crimes at

> issue. In that case the court rejected, as completely improper, a police officer's statement that he knew drug addicts who stole from their families and committed homicides to support their drug habits. The only purpose of testimony regarding criminal behavior patterns "is to place prejudicial and misleading inferences in front of the jury." Id. at 1356. Accord Dawson v. State, 585 So. 2d 443 (Fla. 4th DCA 1991) (rejecting, as prejudicial, police officer's statement that people on crack generally rob and steal to get money).
>
> Similarly, in Hargrove v. State, 431 So. 2d 732 (Fla. 4th DCA 1983), the court condemned, as irrelevant, the testimony of a police officer that, based on his experience, the post-arrest statement of the defendant that "I don't mess with the stuff" is a phrase uttered frequently by drug dealers in an attempt to throw suspicion off themselves. See also Osario v. State, 526 So. 2d 157 (Fla. 4th DCA 1988) (officer's testimony concerning his experience with common drug-courier practices was irrelevant and prejudicial); Kellum v. State, 104 So. 2d 99 (Fla. 3d DCA 1958) (testimony that other police offices committed larceny was irrelevant in prosecution of police officer for larceny); Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976) (where defendant gave post-arrest denial of involvement in robbery, it was error for prosecution to elicit irrelevant testimony from arresting officer that eighty percent of the one-thousand individuals he had arrested over his career had also denied involvement in the crime).
>
> Based on the sound rationale of those cases, we hold that it was also error to allow a police officer to testify as an expert to a relationship between possessing $1,290 in cash and dealing in narcotics. Any probative value the expert testimony might have had was substantially outweighed by its prejudicial impact. § 90.403, Fla. Stat. (1989). Further, the defendant's possession of cash was nonexpert evidence the jury was free to consider, along with other competent evidence such as the amount, condition, sources, and given reason for carrying the currency, in a common-sense resolution of the disputed issue.

589 So. 2d at 935-6 (footnote omitted).

The error in this case is indistinguishable from the cases cited. The error was harmful. The evidence of premeditation is extremely thin. See Point I. This error could have tipped the

balance. A new trial is required. Assuming arguendo, that this Court finds the error as to guilt, it is harmful as to penalty. The jury could have used this to support the "cold, calculated, and premeditated" aggravator. A new penalty phase is required.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING NON-RESPONSIVE OPINION TESTIMONY AS TO THE INTENT OF THE PERPETRATOR.

This issue involves the admission of non-responsive opinion testimony as to intent. This denied Mr. Anderson due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. The testimony was also improper opinion testimony pursuant to Fla. Stat. 90.701.

The following took place during the direct examination of Amelia Stringer.

Q What did you see next?

> A Well, while John was waiting to get – he was driving. While he is waiting to get back onto U.S. 27 to go south, I looked out the back window and I saw – I didn't know who it was. But I saw this person kind of sitting up, like they are – like if you were laying down and you are sitting yourself up....
>
> So I saw that out of the back passenger window. And then as we were getting ready to get in line next to – you know, get in between traffic, like waiting for no cars to come, is when I saw this car in front of us run over whoever that was that was there trying to get up. And that surprised me. It shocked me. And I – I said, you know, "They ran over them." And the car that ran over that person continued. And again, traffic is still going, so that the car got off of – out of traffic and ran over this person and then got back in traffic. And that is what was shocking, because the other cars didn't blow – or they didn't have to swerve or stop. And to me that – that made it that it wasn't an accident, that it

> was intentional, because – and I am only using myself as an example –
>
> DEFENSE COUNSEL: I object as non-responsive.
>
> PROSECUTOR: I asked her what happened next....
>
> THE COURT: I am going to allow it.

XIX2074-6.

The testimony was non-responsive. The witness was asked what had happened and instead of recounting facts, she proceeded to give her opinion as to the intent of the perpetrator. It was also improper opinion. Lee v. State, 729 So. 2d 975 (Fla. 1st DCA 1999).

> The admission or exclusion of lay opinion is governed by section 90.701, Florida Statutes. The statute allows a lay witness to testify about what he or she perceived in the form of inference and opinion when:
>
> > The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inference or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party.
>
> § 90.701, Fla. Stat. Additionally, this court, in Shiver v. State, stated that "in criminal cases, a witness may testify that a person was angry, threatening, or pretty mad." 564 So. 2d 1158, 1160 (Fla. 1st DCA 1990). But, "a witness should not testify to the undisclosed intention or motive of a third person." Id., citing Branch v. State, 96 Fla. 307, 118 So. 13 (1928). The Shiver court went on to note that "the Florida Supreme Court and numerous other jurisdictions have permitted witnesses to give their opinion about another's mental state ... provided such testimony otherwise satisfies the [section 90.701(1), Florida Statutes] rule requirements that the testimony be incommunicable in the form of objective, observed facts, and not be misleading." Shiver, 564 So. 2d at 1160.
>
> In the case at bar, Cassady testified that Lee "appeared to have something on his mind that he appeared to want to talk to somebody about" before he gave a taped statement. This testimony is forbidden by Shiver as testimony

> relating to the undisclosed intention or motive of a third person. It is also forbidden under section 90.701(1), Florida Statutes because, under the facts of this case, it is likely its admission could mislead the trier of fact and prejudice Lee. To admit a police officer's testimony that Lee "appeared to have something on his mind that he appeared to want to talk to somebody about" could imply to the jury that the police officer, with his extensive law enforcement experience, could tell Lee had a guilty conscience and was, therefore, likely guilty.

729 So. 2d at 978-9.

This Court had a similar analysis in Kight v. State, 512 So. 2d 922 (Fla. 1987).

> During proffer McGoogin testified that in his opinion Hutto was encouraging Kight to cut his throat. Kight now argues that McGoogin's lay opinion that Hutto was urging Kight to harm him was admissible under section 90.701, Florida Statutes (1985) because McGoogin was merely testifying as to his perception of Hutto's words and actions. We cannot agree.
>
> Although it may have been McGoogin's perception that Hutto was urging Kight to harm him, this is not the type of lay opinion testimony which is admissible under section 90.701. Under section 90.701, before a lay witness may testify in the form of inference and opinion the party offering the testimony must establish that "the witness cannot [otherwise] readily, and with equal accuracy and adequacy, communicate what he had perceived to the trier of fact" and that the witness' "use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party." Kight has failed to establish that McGoogin could not have otherwise communicated his perceptions concerning Hutto to the jury. To the contrary, the record reflects that on direct examination McGoogin adequately explained to the jury that Hutto "placed his hand on [Kight's] hand and started pressing the knife against me." On cross examination McGoogin explained that after Hutto asked Kight "What the hell are you going to do?", Hutto "put [his hand] on [Kight's] hand, pressing the knife around my throat." In this case, McGoogin's perception of the incident was adequately conveyed to the jury, thus, equipping it with the information necessary to draw the inference urged by the defense. There was, therefore, no

> need to resort to testimony concerning McGoogin’s interpretation of the situation.

512 So. 2d at 928-29 (footnote omitted).

The testimony in this case was the sort of improper lay opinion testimony condemned in Lee and Kight. The error was harmful as there was very limited evidence of premeditation.

Assuming arguendo, that this Court finds this evidence harmless as to guilt, it is harmful as to penalty. The jury could have used this improper evidence to support the “Cold, Calculated, and Premeditated” aggravating circumstance. The jury’s vote for the death penalty was only 8 to 4. Any error could have tipped the balance. Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991). At the very least a new penalty phase is required.

POINT V

THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY PHOTOGRAPHS.

This issue involves the trial court’s admission of two inflammatory irrelevant photographs of the deceased. The admission of this evidence denied Mr. Anderson due process of law pursuant to Article I Sections 2, 9, 12, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by its prejudice. Fla. Stat. 90.403.

The trial court admitted two photographs in evidence over defense objection. The first involves a photograph of the deceased’s body face down, including her bare buttocks (State Exhibit I) XIII1070-2. The second photo is an upper shot of the deceased’s body, showing her only wearing a bra (State Exhibit M-7)

XV1346-55. These photos had no relevance. In evaluating this issue, one must keep in mind the following stipulation.

> I am going to read to you a stipulation. It states that it has been stipulated between – between the parties that Keinya Smith is dead. That she died on January 16, 1994. And that she died as a result of blunt force trauma inflicted by a motor vehicle.
>
> It is further stipulated between the parties that the items of evidence found on U.S. 27 by Lieutenant Vaughn and Detective Foley, including jewelry, blood stains, name tags and hair and scalp, originated from Keinya Smith.

XV1360-1. The primary contested issues in the guilt phase were the identity of the car and the identity of the driver. This Court has recently outlined the standard for the admission of potentially prejudicial photos.

> To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So. 2d 922, 929-930 (Fla. 1999) (emphasis in original) (footnote omitted. See also Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. 1990); Reddish v. State, 167 So. 2d 858, 863-4 (Fla. 1964); Wright v. State, 250 So. 2d 333 (Fla. 2nd DCA 1971).

In the present case, the photos were particularly prejudicial. The deceased was a teenager and the defendant is an adult male. The photo of the deceased's bare buttocks and her upper body wearing only a bra could only serve to inject a highly inflammatory sexual element into the case. The error here is especially prejudicial when combined with the error in Point II.

These two errors; individually, and in combination, were prejudicial. The evidence in this case was solely circumstantial. Virtually any error could have tipped the balance. This highly inflammatory evidence was prejudicial. A new trial is required. Assuming arguendo, that this Court finds the error harmless in the guilt phase, it was harmful as to penalty. Omelus.

POINT VI

THE TRIAL COURT ERRED IN DENYING MR. ANDERSON'S MOTION FOR MISTRIAL DURING CLOSING ARGUMENT.

In discussing Appellant's act of going to the police station, the State compared him to a drug dealer from Miami:

> The problem becomes, if you refuse to go to the police station, more attention is drawn to you, because as we try to analyze the situation, "Well, that is how a guilty person would act, so I got to go. Oh, they want to look at my car." How many drug traffickers have you heard about that say "Go ahead, search my car", as they are driving kilos of cocaine out of Miami –

T2295. The court sustained the defense objection that the argument was outside the evidence, and directed the jury to disregard it, but denied appellant's motion for mistrial. XXIIT2295,2317-18.

The court erred in denying the motion for mistrial. In determining prejudice, the Court considers both preserved and unpreserved errors. Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994); Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999); State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994); Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000).

The State's argument comparing Appellant to persons "driving kilos of cocaine out of Miami" improperly commented on matters outside the evidence. Pacifico v. State, 642 So. 2d 1178, 1184

(Fla. 1st DCA 1994); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Other improper arguments added to the prejudicial weight of the drug courier argument. First, the State asserted that defense counsel was seeking to "shroud you in fog", with an extended metaphor concerning the prosecutor's own personal experience of driving through his neighborhood. XXII2269-70.

The State may not make such disparaging remarks regarding the defense. See Brown v. State, 733 So. 2d 1128 (Fla. 4th DCA 1999) (termed defense a "smokescreen"), Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) (same). Cf. Miller v. State, 712 So. 2d 451, 453 (Fla. 2d DCA 1998); U.S. v. Boldt, 929 F.2d 35, 40 (1st Cir. 1991) ("favorite defense tactic"). The cases disapprove of attacking opposing counsel. See Valdez v. State, 613 So. 2d 916 (Fla. 4th DCA 1993) ("the defense really doesn't give you an accurate story"), Owens Corning Fiberglas Corp. v. Morse, 653 So. 2d 409 (Fla. 3rd DCA 1995) ("He is excellent at confusing issues. He is excellent at hiding the ball. He is a master of trickery.").

During his argument the prosecutor continued to put forward his own life experiences while associating Appellant with criminals. First, he made clear to the jury that he is a loving father, telling a story about taking his son to Port Everglades to see the USS JFK. XXII2274. In this story, he compared the State's circumstantial evidence to the aircraft carrier's huge anchor line:

> ... And it's anchored by a rope, that has a strand wrapped around a strand wrapped around a strand; and if you take the time and you start sawing, saw one and it pops, saw another one it pops, but the reason it is done that way is so that you have to go through every single one in order to break that ship free.

Thus, the State put the burden on the defense to eliminate every single item of evidence before the jury could acquit. The State may not shift the burden of proof. Freeman v. State, 717 So. 2d 105 (Fla. 5th DCA 1998) (fundamental error occurred when prosecutor improperly bolstered police witnesses' testimony, shifted burden of proof, referred to facts not in evidence and attacked defense's theory of case); Milburn v. State, 742 So. 2d 362, 364 (Fla. 2nd DCA 1999) (error to deny motion for mistrial after sustaining objection to argument shifting burden of proof regarding insanity defense); Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998); Sackett v. State, 764 So. 2d 719, 723 (Fla. 2nd DCA 2000).

The State engaged in personal epithets:

> It is a good thing that all criminals aren't as smart as Albert Einstein. I suggest to you we would never get convictions. They are like fish. They only get caught when they start to open their mouth. "I have nothing to hide."

XXII2273. "[E]xcessive vituperation or ridiculous epithets are out of place and should not be indulged in criminal prosecutions." Washington v. State, 98 So. 605 (1923). Proper final argument does not include likening the defendant to an animal. Cf. Johnson v. State, 88 Fla. 461, 463-64, 102 So. 549, 550 (1924) ("Neal Johnson went out there for what cats and dogs fight for" and "Neal Johnson is a brute"); Goddard v. State, 143 Fla. 28, 36-37, 196 So. 596, 600 (1940) ("skunk", "bestial"); Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (no one could make prosecutor say defendant is a human being; "It is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness."). In addition to violating these rules, the above argument improperly presented the prosecutor as an expert in

criminal behavior, commented on matters outside the record, and associated Appellant with criminals in general. Cf. Dean v. State, 690 So. 2d 720 (Fla. 4th DCA 1997) (evidence and argument about behavior patterns of criminals; citing cases).

The prosecutor returned to relating personal life experiences to the jury with a tale about his stable childhood growing up in a household with three siblings and a mother and father. XXII2279-81. He related how his mother was able to deduct that he had taken cookies from the cookie jar based on his propensity[1] coupled with crumbs left on the floor. This story trivialized the case and the State's burden, while also telling the jurors that they could base their verdict on a determination of propensity on Appellant's part.

The State, in its discussion of the aircraft carrier's anchor line, told the jurors that the case would fail only if every strand of evidence was refuted. It later returned to this notion when discussing the options on the verdict forms, including option D (not guilty): "Certainly the D goes without explanation. The defendant is not guilty. If you find that I didn't prove anything to you, then mark the box. Case is over." XXII2283 (e.s.). This argument improperly put on the defense the onus of disproving the State's entire case, rather than requiring the State to prove every element of the offense beyond a reasonable doubt.

The State engaged in a long discussion shifting to the defense the burden of proving that there were "probable" doubts regarding the case. "Probable doubt" is an unconstitutional standard. The

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[1] His mother told him that she knew he had taken cookies because "you were the only one that loved sugar cookies, and whenever I would come into the kitchen, on the tile floor you forgot that the crumbs were left, and the brand new sugar crunched under my feet." XXII2280.

State’s argument at pages 2290-92 uses the term “probable” at least 10 times in discussing various doubts concerning the State’s case.

The prosecutor told the jury, with no evidence to support it, that Appellant selected the witnesses, that he chose who would observe the crime, adding that he, the prosecutor had no choice in the matter, “I take the case as I get it.” XXII2298. He continued in this vein (XXII2298-99):

> He is the person that made the case. Not the State. Not the State. Murder is not a spectator sport, thank God. Because people can’t say positively it was him behind the wheel? Does that make him any less guilty?
>
> Because people won’t come in under oath and say “that is definitely the car that I saw mow her down and leave her in that grotesque position that I have described”, does that mean he is not guilty?
>
> The fact that people can’t say that “This fiber could have come from those pants and those pants alone”? Does that make him any less guilty? The only person with a motive to kill her and leave her like this?

These is no law that a paucity of evidence makes a defendant guilty. The State has the constitutional burden of proving guilt. It may not shift or abandon this burden by claiming that gaps in the evidence cannot mean that the defendant is not guilty. Further, there is no evidence that Appellant “selected” the witnesses in the case. Argument is confined to relating the law to the facts of the case. Taylor v. State, 330 So. 2d 91 (Fla. 1st DCA 1976); Seckington v. State, 424 So. 2d 194, 195 (Fla. 5th DCA), dismissed, 430 So. 2d 452 (Fla. 1983).

The prosecutor again placed himself in the community, holding himself out as a good neighbor, friendly to the children and families living near him. He told a story about a riddle told to

him by a little girl living across the street from him.[2] XXII2301-2303. The nub of the story was that the prosecutor over-analyzed the riddle, ignoring an obvious answer. His proposition was that the jury should not over-analyze the evidence, and instead base its verdict on the fact that only Appellant had a motive to kill. XXII2302-2303. He concluded: "Who has the motive in this case? Where does all the evidence lead back to? One person. That is enough for felony first degree murder." XXII2303.

The argument relieved the State of the burden of proving each element of the offense beyond a reasonable doubt, contrary to the Due Process and Jury Clauses of the state and federal constitutions. Further, the fact that the evidence points to the defendant also does not establish the elements of murder. The State's argument again relieved it of its burden of proof.

The State's argument deprived Appellant of a fair trial by a jury focused on the law and evidence of the case, as guaranteed by the Jury and Due Process Clauses of the state and federal constitutions. This Court should reverse and order a new trial.

POINT VII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY MURDER.

Appellant was denied due process of law by allowing the State to pursue felony murder pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. This issue involves two aspects. (1) Appellant would urge this Court to

[2] This story contrasted the prosecutor with Appellant, who had been convicted of attempted sexual battery on a child.

recede from its prior decision in Knight v. State, 338 So. 2d 201, 204 (Fla. 1976) and hold that it is improper to allow a felony murder prosecution when the indictment only alleges premeditation. Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986). (2) Under the facts of this case, it was improper to allow the State to pursue felony murder. Shepard v. Rees, 909 F.2d 1234 (9th Cir. 1989).

The indictment only charges premeditation. I1. Mr. Anderson filed a motion to prohibit felony murder due to a lack of notice. I182-3. During the charge conference, the State brought up felony murder for the first time.

> (Prosecutor): Does the defense have an objection to doing a felony murder first degree?
>
> (Defense Counsel): I would object to it, yes. I don't think there has been any evidence of it in this case, in this particular case. You know, I mean, you pushed the premeditation buttons with the Williams rule and the things, the collateral crime evidence from the day before, certain statements that you have introduced, and ... what is the underlying felony.
>
> PROSECUTOR: Kidnapping....
>
> PROSECUTOR: My theory is – give me your comments, Eddie – is that it is a kidnapping. She doesn't live out there. There is no business. There is no – all that is out there is Everglades. It is at night. It is with 48 hours of his making the threat through the locked door that Adronda Brown testified to.
>
> THE COURT: Well, the defense theory is it is easier to convict on a felony murder. You didn't want it.
>
> PROSECUTOR: Right, but –
>
> DEFENSE COUNSEL: I know. We are just thinking out loud right now I think.
>
> THE COURT: Yes.
>
> DEFENSE COUNSEL: Yes, of course I think this is, you know, a lot of times and usually on the murder 1 cases the felony murder, in my experience, the cases I have

> handled so far, the premeditation really hasn't – they charge it as premeditated but it is really a felony murder case usually. So they go for it. But this is a real surprise to me.
>
> THE COURT: Surprises me. I know from the State, from day one from the time they are picking the jury that it is, you know – they are going to charge felony murder.
>
> DEFENSE COUNSEL: Right.
>
> THE COURT: I mean, they are talking about that in voir dire.
>
> DEFENSE COUNSEL: You mean premeditated murder.
>
> THE COURT: Yes.
>
> PROSECUTOR: I traditionally don't.
>
> THE COURT: I was just surprised.
>
> DEFENSE COUNSEL: So we would object to a felony murder instruction in this case.

XX2150-51.

The prosecutor argued two theories of felony murder; that the homicide could have occurred during a kidnapping or that it could have occurred while escaping from a kidnapping. XXI2281-2,2299-2301. The jury was instructed on felony murder and returned a general verdict of guilt. XXI2323-5,2348.

In Givens, the defendant was charged with first degree murder and the prosecution proceeded on a theory of murder by torture. The Court held this was a violation of the Sixth Amendment.

> We agree with Givens that the information was constitutionally inadequate to support a charge of murder by torture. The brief factual recitation in the information, while sufficient to provide notice of a charge of ordinary first-degree murder, does not suggest the special elements of murder by torture. Cf. Gray v. Raines, 662 F.2d 569, 570-72 (9th Cir. 1981) (information charging forcible rape did not provide adequate notice of charge of statutory rape since the two offenses require

> proof of different elements). Nor does the information's mere citation to a statutory section which defines the degrees of murder – and identifies murder by torture as one type of first degree murder – provide adequate notice of the charge. United States v. Rojo, 727 F.2d 1415, 1418 (9th Cir. 1983). From the information, Givens might reasonably have believed that the state had to prove intent to kill or intent to inflict grievous bodily harm in order to obtain a conviction for first-degree murder. He would therefore have seen little reason to dispute evidence suggesting instead an intent to cause cruel pain and suffering. He also would not have been warned of the need to show that he had not acted for the purpose of revenge, extortion, persuasion, or any sadistic purpose. We therefore conclude that the information did not provide notice adequate to enable Givens to prepare a defense against the charge of murder by torture.

786 F.2d at 1380-1381. This Court should follow Givens and prohibit felony-murder unless charged.

Assuming arguendo this Court does not revisit Knight, reversal is still required case due to the unique circumstances of this case. In Sheppard, the Court held there was a Sixth Amendment violation due to the circumstances of the case.

> On July 22, 1981, both the prosecution and defense rested. Each side then submitted and argued their requested jury instructions to the court. Again, there was no mention by the prosecutor of felony-murder. The instructions were apparently settled, and the matters of final arguments and charging the jury were continued to the following day.
>
> On the next morning, the prosecution, for the first time, requested that instructions on robbery and felony-murder be given in conjunction with those on first-degree murder. Defense counsel immediately objected to the State's request:
>
>> I object strenuously to the giving of any instructions based on any theory of first degree murder on the felony-murder theory. I would indicate that we went over instructions yesterday morning and no mention was ever made of any theory of felony-murder justification for a first degree murder verdict by the jury. I wasn't until this morning that Mrs. Nedde gave us or made the request

> of the Court to give the instructions that the Court has just indicated.
>
> ... It never occurred to me that the People would ever go forward on a theory of felony-murder,....
>
> I would note that at no time has a robbery ever been charged in this case. It was never charged in the Municipal Court; there was no holding on that issue by the magistrate at the end of the preliminary hearing. There was no robbery charge ever filed in Superior Court in an Information. Mrs. Nedde has filed several amended Informations that never included a robbery charge. And suddenly, after we've already gone over all the instructions, we've gone home and prepared our arguments, the time comes to argue the case, Mrs. Nedde is submitting a felony-murder theory.

909 F.2d at 1234-1235.

The present case is similar to Sheppard. Here, both defense counsel and the judge expressed surprise at the felony murder theory. Reversal for a new trial is required.

POINT VIII

THE STATE'S PENALTY ARGUMENT WAS FUNDAMENTAL ERROR.

The State's egregious penalty phase argument denied Mr. Anderson due process of law pursuant to the Fifth, Sixth and Eighth Amendments to the Federal Constitution and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution.

The prosecutor improperly brought up notorious killers.

> But sometimes defense attorneys like to take it a step further. I doubt that you will hear it here, but they like to take a step further and they say that is only for the Dahmers and of the person, Danny Rollins, who killed all those people up in north Florida, or the Ted Bundys of the world.

XXXII3153-54. (Later in the same paragraph, the State also referred to John Gacey.)

The State then likened Appellant to one of these.

> You see, in this case one of the aggravators is that that man over there, Charles Anderson, has been convicted of a felony involving violence or a threat of violence. He's been convicted eleven times of that type of crime. But that is only one aggravator.
>
> Danny Rollins killed and killed and killed. But that is only one aggravator. Do you see how that applies? You look at aggravators, you weigh them against the mitigators and then you come – you come to a well reasoned decision.

XXXII3154.

Linking appellant to Rollings was improper. See People v. Kelley, 370 N.W.2d 321 (Mich. 1985) (reversing conviction because prosecutor's reference to John Wayne Gacey created likelihood that the jury would compare defendant's character with Gacey's) and People v. Pullins, 378 N.W.2d 502 (Mich. 1985) (admonishing state not to equate defendant with Sirhan Sirhan or Charles Manson.

After discussing Appellant's testimony, the prosecutor told the jury that, in his personal view, the case was appropriate for the death penalty:

> I know this is a decision you don't want to make. I know that in 99 percent of the cases it is not the appropriate decision. I know that.
>
> In this case that is the right decision. For him and what he did as an adult.

XXXII3163.

This argument parallels argument which this Court disapproved in Brooks v. State, 762 So. 2d 879, 901-902 (Fla. 2000). There, the State told the jury that it did not seek the death penalty in every case, but said that the present case demanded that penalty. This Court wrote that while it was factually accurate to say that the State did not seek death in every case, the statement was "also

irrelevant and tends to cloak the State's case with legitimacy as a bona-fide death penalty prosecution, much like an improper 'vouching' argument." Id. 902.

The prosecutor then claimed that he and the jury shared a terrible chilling feeling during Appellant's cross-examination (XXXII3170-71):

> Now, tell me. Yesterday did anybody get a chill during Mr. Anderson's cross examination?
>
> [brief reading of testimony concerning area where murder occurred]
>
> Anybody get a chill when he said "We used to go fishing out there all the time", like right down your spinal cord? "Past there." Past where she was murdered. "Past there."
>
> I'm sorry. I - I think my next question was so telling. I am jumping out of my suit.
>
> [brief reading of further testimony about fishing in the area]
>
> Reading it still sends chills twenty-four hours after he said it.

Thus, the prosecutor conveyed his own physical sense of horror at appellant's testimony, suggesting that he and the jury shared this chilling sensation, "right down your spinal cord", a creepy feeling to make one jump out of one's clothes.

As already noted, the state compared appellant to Danny Rollins. Later in the argument, it compared Keinya to Sir William Wallace, the great Scottish martyr Braveheart (XXXII3173-74):[3]

> And that is when this 18 year old - who would be comparable to William Braveheart, but only in that little

[3] Moviegoing jurors would recall that this hero was rewarded for his courage by being tortured to death.

> home in Carol City - put her foot down and said "I am not going to take this anymore." ... .

The prosecutor contrasted appellant's and Keinya's accounts of the prior violent felonies, and said:

> "Is he the type of person that you would rely upon in your most important of affairs? I would suggest you go to the window and make sure it was raining, if he told you it was raining outside, before you went out and got your umbrella."

XXXII3177.[4]

This argument echoes argument condemned in Ruiz, 743 So. 2d at 5-6.

> "Let me tell you one thing, if that guy were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom on what he said [up] there."

This Court concluded that such argument was improper in that it invited the jury to convict Ruiz of first-degree murder because he was a liar. The prosecutor announced that he did not believe appellant's testimony about the prior violent felony aggravator: "Baloney, Mr. Anderson. You said to that little girl 'Oh, it would hurt the family so don't tell'. We don't believe you. That is not

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[4] In general the State's argument contains various dehumanizing remarks about appellant. In addition to this remark about not trusting him on even the most trivial matters, the prosecutor (as already mentioned) asserted that Appellant's testimony caused a chill to go through his spine, and likened his case to that of Danny Rollings. The prosecutor also referred to appellant as "a taker": "See, in life there are takers and there are givers. Charles Anderson is a taker. He takes from people. He stole Keinya's virginity. He stripped her of her safety. And he took away her life." T3174. He also termed appellant "meaner than mean" T3166. This Court has disapproved of the systematic use of such dehumanizing comments. See Brooks, 762 So. 2d at 900 (citing to, inter alia, Bonifay v. State, 680 So. 2d 413, 418 n. 10 (Fla. 1996)).

true." XXXII3178. The first person plural either implied that the prosecutor and the jury should be as one in disbelieving Appellant.

The State may not argue that law enforcement believes in the defendant's guilt. Martinez v. State, 761 So. 2d 1074 (Fla. 2000); Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998). Likewise, a prosecutor may not express belief in the veracity of the witnesses, Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984), or state personal beliefs about the evidence, Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994), or directly or indirectly vouch for a witness's credibility, U.S. v. Eyster, 948 F.2d 1196 (11th Cir. 1991). The argument here violated these principles.

The State urged jurors to consider Keinya's character as compared with Appellant's:

> He took away an 18 year old young lady who had just graduated from the Florida Bible Christian College. She had her whole life ahead of her. She did well academically. She excelled in athletics. She worked. She took care of the family. Not Charles Anderson. He was too busy out doing whatever he does.
>
> She was the one that was there changing diapers and bathing the children and putting them to bed; Charlene, and Devon, and Sierra. She was the one, because Edwina, in order to support the family, had to work all the time. Because he couldn't hold a job. He couldn't hold a job. That is what he took away.
>
> Does that mitigate against any of these, the elimination of the witness, the cold, calculated premeditated manner in which he killed her? ....

T3178-79.

The State then addressed Keinya at length as though she were in the courtroom T3179-82. In this imaginary confrontation he dwelt at length on her fear, repeating his comparison of her to the martyred Braveheart. Expanding the heinousness circumstance to

include incidents that did not occur at the time of the murder, he said: "Was it heinous when you finally said 'Let's call the police. Let me call the police.' Was it heinous when you refused to go to work because you were afraid of him the following day on Saturday? ... . Tell me Brave Heart, was it?" XXXI3179-80.

Continuing in this vein, the State introduced the jury into the drama: "Was it cruel, Keinya? Tell me. Tell the jury." XXXII3182. It concluded this dramatic apostrophe: "Tell me Brave Heart. Tell them." Id.

The prosecutor then turned back to the jury:

> I'm sorry. This is not something that I draw any enjoyment from, contrary to what he would have said yesterday. In our society sometimes people have to pay the price. They have to take responsibility for what they have done.
>
> Now, it is his turn finally to have it rest at his door step, instead of somebody else's.
>
> Hear how quiet it is in here now? It is the quiet of understanding, for you now know what it is that you must do.

XXXII3182-83. Thus, the prosecutor expressed his personal view that the jury had a duty to sentence him to death.

This Court has disapproved such "do your duty" argument. See Brooks, 762 So. 2d at 903-904 (find "egregiously improper" argument urging jurors to "follow the law, do your duty"; citing to Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998) ("I'm going to ask you to do your duty") and Garron v. State, 528 So. 2d 353, 359 (text and n. 10) (Fla. 1988)(determining prosecutor misstated law in arguing to jury it "is your sworn duty as you come in and become jurors to come back with a determination that the defendant should die")).

The prosecutor concluded his argument by allying the jury with him in not enjoying this duty as they fulfilled it (T3184):

> ... . And I am not suggesting you should take delight or pleasure or any enjoyment from doing what you must now do.
>
> You will do the right thing and you will do it, because in this case it is exactly that. It is the right thing to do. The right thing to do.

This argument was but a variation on the improper theme of telling jurors that it was their duty to vote for death. Cf. Brooks, Urbin and Garron.

Appellant acknowledges that defense counsel did not object to the State's arguments. Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994) says in this regard:

> The failure to object to improper prosecutorial comments will not preclude reversal where the comments are so prejudicial to the defendant that neither rebuke nor retraction would destroy their influence in attaining a fair trial. Wilson v. State, 294 So. 2d 327, 328-329 (Fla. 1974).

Likewise, this Court in Brooks cited with favor Cochran v. State, 711 So. 2d 1159, 1163 (Fla. 4th DCA 1998):

> "Taken individually, in a different case, the prosecutor's comments may not have been so egregious as to warrant reversal. However, the remarks must be viewed cumulatively in light of the record in this case. Here, the improprieties in the prosecutor's closing argument reached the critical mass of fundamental error...."

Brooks, 762 So. 2d at 899.

The prosecutor's argument at bar reached that high (or low) standard. There was a close penalty vote (8-4) and Appellant's credibility was in issue. The case for mitigation was strong, as evidenced by the jury's vote even in the face of the State's

argument. The State's argument amounted to a denial of due process. This Court should order resentencing.

POINT IX

THE TRIAL COURT ERRED IN THE ADMISSION OF INFLAMMATORY PHOTOGRAPHS IN THE PENALTY PHASE.

This issue involves the admission of several photographs of the deceased in the penalty phase. XXVIII2612-17. The admission of this evidence denied Mr. Anderson due process of law pursuant to Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and. Any possible relevance of this evidence is outweighed by its prejudice. Fla. Stat. 90.403.

The State was allowed to introduce several photographs of the deceased, over objection. Several of these photos were extremely gruesome. The deceased was found partially clothed. Two of the photos showed her after she was disrobed at the medical examiner's office. XXVIII2615. One of these included a full view of her genitals. XXVIII2615. These photos were an inflammatory attempt to introduce a sexual element into the case.

Photos of the deceased "must be probative of an issue that is in dispute." Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999). In light of the guilt phase stipulation, these photos do not meet this test. See Point IV. The courts have closely scrutinized photos of the deceased that reflect post-mortem changes or procedures done in the medical examiner's office. Czubak v. State, 570 So. 2d 925 (Fla. 1990); Reddish v. State, 167 So. 2d 858, 863 (Fla. 1964); Beagles v. State, 273 So. 2d 796, 798 (Fla. 1st DCA 1978); Wright v. State, 250 So. 2d 333, 337 (Fla. 2nd DCA 1971);

Rosa v. State, 412 So. 2d 891 (Fla. 3d DCA 1982); Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990).

In the present case, a teenage female victim was taken to the medical examiner's office and disrobed. Nude pictures were then taken of her. The introduction of this evidence was highly improper. The error here was clearly harmful. This is especially true since the jury's vote was only 8 to 4. See Omelus.

POINT X

THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING CIRCUMSTANCES IN THIS CASE.

"It is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The lack of known facts surrounding the killing itself prohibit the finding of the aggravating circumstances. Gore v. State, 599 So. 2d 978, 987 (Fla. 1992); King v. State, 514 So. 2d 354 (Fla. 1987). Trial courts may not draw "logical inferences" to support a finding of a particular aggravating circumstance. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). Of course, when relying on circumstantial evidence to find an aggravating circumstance, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravator. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The trial court speculated as to facts and used this speculation to form a hypothesis how the aggravators might have existed, which did not prove the aggravators beyond a reasonable doubt as required.

1. AVOID ARREST

The trial court found as an aggravating circumstance that the crime was committed for the purpose of avoiding or preventing a lawful arrest pursuant to Fla. Stat. 921.141(5)(e).

This aggravating circumstance is typically found in the situation where the defendant killed a law enforcement officer. Mikenas v. State, 367 So. 2d 606 (Fla. 1978). If the victim is not a police officer, the circumstance cannot be found unless the evidence clearly shows that elimination of the witness was the sole or dominant motive for the murder. Scull v. State, 533 So. 2d 1137 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Riley v. State, 366 So. 2d 19 (Fla. 1978). Even where the victim may know the defendant, this factor is not applicable unless witness elimination was the only or dominant motive. Geralds; Perry. The fact that the victim knew or could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Id.

The trial court found this aggravating circumstance by accepting the State's hypothesis that Appellant killed Keinya Smith because she was going to report him for coming into contact with her. However, this is merely a weak hypothesis. Smith had never threatened to report Appellant even though she could have done so many times. Speculation that witness elimination might have been the motive for the murder will not support this aggravator. Floyd v. State, 497 So. 2d 1211 (1986). A number of witnesses could have reported Appellant for violating his probation. There was testimony that Appellant regularly picked up Smith at work. Edwina Anderson testified that Appellant was still living at her residence (the same residence as Smith).

Another motive for Appellant, if guilty, was the shooting incident with Patrick Allen. Appellant believed the Keinya Smith participated in getting Allen to try to kill him. XVIII2649. Appellant's motive for the killing would be due to Smith's involvement in the attack on him and not due to fear of having his probation violated. The evidence was not inconsistent with this reasonable hypothesis which would negate avoid arrest. Geralds.

2. FELONY MURDER

The trial court concluded that the felony murder aggravating circumstance existed based on speculation that a kidnapping occurred because the "evidence strongly suggests" that Keinya jumped from the vehicle. An aggravating circumstance cannot rest on what the evidence "strongly suggests" it must be proven beyond a reasonable doubt. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Robertson v. State, 611 So. 2d 1228 (Fla. 1993). The State simply did not show beyond a reasonable doubt that a kidnapping occurred. No one observed Appellant abduct Smith from Publix. In fact, there was testimony that Appellant often picked up Smith from Publix. No one saw Appellant confine Smith in any form or manner while she was in his car. It simply is not known why or how Smith exited Appellant's vehicle or what occurred inside the vehicle. Kidnapping has not been proven beyond a reasonable doubt.

The trial court's belief that the evidence "suggests" that Smith "jumped out" of the vehicle cannot support the felony murder circumstance beyond a reasonable doubt. Without knowing what occurred between Appellant and Smith during the car ride, it cannot be said beyond a reasonable doubt that Smith jumped or was ejected

from the car. The evidence does not support kidnapping beyond a reasonable doubt and the aggravator is not proven.

3. CCP

In order for this aggravator to apply, the defendant must have had a "careful plan," Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992) (i.e. calculated), and the actions must have been due to a lack of passion. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (i.e. cold). Thus, this aggravator is usually reserved for those murders characterized as "executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982).

The crux of the trial court's hypothesis is that prior to picking up Smith Appellant had a careful prearranged plan to drive Smith to a remote location and kill her. However, there was no testimony from any witness that Appellant had a careful plan to kill Smith.

This Court has rejected CCP in cases which are stronger than this case. In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992) it was emphasized by the trial court in finding CCP that the defendant admitted to driving to get the passengers lost in a isolated area so they could not locate the body. This Court struck down CCP noting that at best this showed that "Clark decided to murder Carter at some point during the drive," but was not sufficient to show a prearranged plan to kill.

In Gore v. State, 599 So. 2d 978 (Fla. 1992), this Court held the kidnapping someone and taking them to an isolated area where she is ultimately killed is not sufficient:

> Here, the evidence established that Gore carefully planned to gain Roark's trust, that he kidnapped her and took her to an isolated area, and that he ultimately killed her. However, given the lack of evidence of the

> circumstances surrounding the murder itself, it is possible that this murder was the result of a robbery or sexual assault that got out of hand, or that Roark attempted to escape from Gore, perhaps during a sexual assault, and he spontaneously caught her and killed her. There is no evidence that Gore formulated a calculated plan to kill Susan Roark.

599 So. 2d at 987 (emphasis added). Terry v. State, 668 So. 2d 954, 965 (Fla. 1996) (rejecting CCP because "we cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot").

In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), this Court recognized that, even where evidence could be interpreted consistent with CCP, where the evidence was susceptible to other interpretations CCP will be stricken:

> Thus, although one hypothesis could support premeditated murder, another cohesive hypothesis is that Geralds tied the victim's wrists in order to interrogate her ...
>
> In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. Consequently, the trial court erred in finding this aggravating circumstance.

601 So. 2d at 1164. Likewise, here there was a reasonable interpretation other than CCP. The evidence was consistent with Appellant and Smith getting into an argument during the ride and Smith either jumping or being pushed from the vehicle as an aftermath of the argument. Appellant then struck Smith with his vehicle in anger. Certainly, the weapon used – a weapon of opportunity – is consistent with the lack of a careful plan. See Geralds (one of the facts inconsistent with CCP was the weapon used – a knife in the kitchen – a weapon of opportunity).

The trial court makes two observations in attempting to support its hypothesis. First, that Appellant told Edwina Anderson that he was "not going to prison and somebody was going to be dead, I bet you that." V941.[5] This simply is not evidence of cool and calm reflection by someone who has a careful plan to kill another. Instead, it is a statement made as a result of emotion and tends to negate CCP.[6] The trial court also noted that Appellant had a motive to kill Smith in that she could turn him in for violating his probation. However, motive does not equate with a cool and calm, careful plan to kill. Furthermore, Smith never reported Appellant even though she had many opportunities to do so. A number of people could have turned in Appellant for violating his probation and it could be said that he had the same motive to kill them. However, this does not mean that Appellant had a prearranged plan to kill them. CCP must be stricken.

4. HAC

Any murder could be characterized as heinous, atrocious or cruel ("HAC"). However, to avoid such an overbroad and unconstitutional application of HAC, restrictions have been placed on the HAC aggravator. It is well-settled that the aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Bonifay v. State, 626 So. 2d 1310, 1313

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[5] The trial court misunderstood Anderson's testimony. She testified that Appellant said he was going to prison.

[6] Edwina Anderson also testified that Appellant was still upset at the time he made this statement. XVIII2649. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (although killing was clearly calculated, it was not the result of "calm and cool reflection" and thus not cold).

(Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). Also, any "instantaneous or near instantaneous" death does not qualify as HAC. Donaldson v. State, 722 So. 2d 177, 186 (Fla. 1998).

The trial court acknowledged that the death of Keinya Smith was quick. This was supported by the medical examiner's findings that death would be quick upon impact. HAC does not apply. See Donaldson, (Fla. 1998) (HAC not appropriate where death near instantaneous without evidence of intent to physically or mentally torture victim). In another case involving death by running over the victim with a car, HAC was deemed inapplicable. Scott v. State, 494 So. 2d 1134 (Fla. 1986) (HAC did not apply where victim run over and pinned under car and died by suffocation). The present case, where death was instantaneous, is much less egregious than in Scott where the victim died by suffocation while pinned under the car.

The trial court's speculation does not support HAC. The trial court's order builds its conclusion of HAC on speculation:

> "Something happened on Keinya's last ride of her life. The defendant terrorized her enough to make her jump."

V938. Under Knight v. State, 746 So. 2d 423 (Fla. 1998), the trial court's admission that "something happened," but did not know what happened during the ride, requires that HAC be stricken:

> However, as to HAC, we conclude that the trial court's description of the victims' ordeal during the time they were being abducted up to and including the time they were murdered was largely based upon conjecture and speculation. While the trial court's speculation as to what took place may well have occurred, there simply is no evidence in the record to fill in this void in the tragic episode or to rule out other possible scenarios. There simply is no evidence of what took place between the victims and Knight during the trip in the automobile

> before the execution-style killings took place. Hence, we conclude that the trial court erred in finding this aggravator.

746 So. 2d at 435 (emphasis added). The trial court's conclusion that Smith jumped out after being terrorized is pure speculation. It is not know whether Smith jumped out or was pushed and there was no evidence that Appellant terrorized her at this time. "Something" may have "happened," but this does not prove HAC.

Despite its own conclusion that death was quick, the trial court wrote that "one can imagine her horror and mental anguish" immediately before being hit by the car. V939. The trial court also noted that Smith was "possibly realizing" that the vehicle was turning to "come back and get her". V939. This type of speculation to support HAC has been rejected in Knight and in other cases. Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996) (emphasis added) ("... the evidence reflects that the murder was carried out quickly. Speculation that the victim ***may*** have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is insufficient to support this aggravating factor"); Donaldson.

The trial court's hypothesis of an execution murder by car does not fit HAC. Execution style murders are generally not considered to be HAC unless there is evidence that the defendant intended to mentally or physically torture the victim. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993); Donaldson. There is no evidence that Appellant intended to torture Keinya Smith. In fact, Smith died in a quick and unprolonged manner. The trial court cites to three cases to support the HAC finding, but each one involves the defendant intentionally and deliberately inflicting

mental torture and anguish for his own enjoyment. Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994) (20 minutes of abuse including undressing and raping wife in front of husband and then executing husband and wife as they begged for their lives and then telling final victim "listen real close to hear the bullet coming" before firing nonfatal shot to victim's head); Henyard v. State, 689 So. 2d 239 (Fla. 1996) (raped and shot mother in close proximity of her two children and then killed each child while they begged for their mother); Preston v. State, 607 So. 2d 404 (Fla. 1992) (abducted convenience store clerk and forced her to disrobe and walk at knifepoint through dark field before killing her). These cases are very different from hitting someone with a car. There simply was no intent to torture in this case. The HAC aggravator does not apply under these circumstances. Buckner v. State, 714 So. 2d 384, 390 (Fla. 1998) (where the defendant shot the victim twice, then three more times after the victim begged for his life, it was error to find HAC because "the entire episode took only a few minutes and no evidence reflected that Buckner intended to subject the victim to any prolonged or torturous suffering"); Bonifay, 626 So. 2d at 1313; Kearse v. State, 662 So. 2d 677, 686 (Fla 1995); Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993).

5. Prior Violent Felony

Appellant had prior convictions for attempted capital sexual battery. Appellant was placed on probation for these attempts. Over objection, the trial court permitted the State to present evidence to the jury for the completed crime for which Appellant was never convicted – capital sexual battery. To find the

aggravator the trial court utilized the evidence of the crimes for which Appellant was not convicted instead of the attempt crimes:

> Because the sexual batteries were attempts the court allowed testimony of the actual facts.... Edwina Anderson, Keinya Smith's mother, testified that Keinya came to her in 1990 and told her she had been sexually abused by the defendant. She told her mother that the defendant would undress her, forcefully pin her to the bed and insert his penis.

V933. The trial court then made it clear that he was finding a prior violent felony based on the completed crime even though it recognizes that Appellant plea bargained to "attempts" only:

> ... although these eleven attempted capital sexual batteries were "attempts" for plea bargain purposes, <u>there is no doubt</u> they were actually capital sexual batteries. This aggravating circumstance was proved beyond a reasonable doubt and given great weight.

V931. In other words, the trial court disregarded the prior plea agreements between the State and Appellant and made its finding of prior violent felony based on crimes for which Appellant was never convicted. This Court in <u>Donaldson v. State</u>, 722 So. 2d 177(Fla. 1998) held it was error to consider evidence of a prior crime for which the defendant was not convicted (principal) when he plea bargained to another crime (accessory after the fact):

> It is axiomatic that penal statutes must be strictly construed. <u>Cabal v. State</u>, 678 So. 2d 315 (Fla. 1996); <u>Merck v. State</u>, 664 So. 2d 939 (Fla. 1995) (resentencing required where State improperly introduced juvenile adjudication as evidence of prior violent felony conviction); <u>Trotter v. State</u>, 576 So. 2d 691 (Fla. 1990). Accordingly, we conclude that while section 921.141(5)(b) permits the State to present evidence of prior violent felony conviction as an aggravating circumstance, it specifically limits the evidence to that of a violent crime <u>for which the defendant is actually convicted</u>.

722 So. 2d at 184 (emphasis added).

This Court held that in going behind the plea bargain the trial court had allowed the State to rescind its prior agreement:

> The State successfully prosecuted another person for the second-degree murder in question and expressly dismissed the charge of principal to second-degree murder against Donaldson. Indeed, the State expressly agreed with Donaldson, in exchange for his evidence against Barnes, to allow Donaldson to plead guilty to the entirely separate and lesser crime of accessory after the fact.
>
> In effect, the State was allowed in this case to rescind its 1991 agreement and decision not to prosecute Donaldson as a principal, by now attempting to prove here that Donaldson was actually a principal in the 1991 murder.

722 So. 2d at 184-185 (emphasis added). Obviously, such an action should not be allowed and only the evidence of the "attempts" should be permitted. Attempts do not qualify as a prior violent felony. In order for an offense to qualify as a prior violent felony, violence must be an inherent element of the offense. Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994). Violence is not an inherent element of an attempt. It was error to let the State present evidence and argument respecting an attempt as a prior violent felony. Additionally, attempted capital sexual battery is a "strict liability" offense and includes consensual sex as long as defendant is over 18 and the victim is under 12.

Obviously all criminal activity involves some threat of violence, however remote. Strict construction of the statute requires that the circumstance apply only to felonies which are life-threatening. See Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981) ((5)(b) "refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Citing cases.). In Mahn v. State, 714 So. 2d 391 (Fla. 1998), this Court

made it clear that robbery is not a prior violent felony because that circumstance is limited to "life-threatening" felonies:

> Mahn argues that the trial court erroneously found his 1992 robbery conviction to support the prior violent felony aggravating circumstance. As we stated in Lewis v. State, 389 So. 2d 432, 438 (Fla. 1981), the finding of a prior violent felony conviction aggravator only attaches "to life-threatening crimes in which the perpetrator comes in direct contact with the human victim."[7]
>
> ______________
>
> [7] We have also recently held in Robinson v. State, 692 So. 2d 883 (Fla. 1997), that purse snatching is not a crime of violence sufficient to constitute robbery.

Likewise, in this case, an attempt is not a life-threatening felony and therefore does not qualify as a prior violent felony. It was error to find the prior violent felony circumstance based on the offense of attempt.

POINT XI

THE DEATH PENALTY IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Proportionality review is a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996). Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (proportionality review requires that circumstances be both the most aggravated and least mitigated).

As explained in Point X, the evidence did not support any aggravating circumstances in this case. Thus, the death penalty must be vacated. Assuming arguendo, that one of the aggravating circumstances exist, the death sentence will be affirmed only where there is either nothing or very little in mitigation as explained by this Court in Almeida, supra. In this case it cannot be said that this was the least mitigated case.

Appellant was a well-disciplined respectful child. XXXIX2803-4,2807. The trial court recognized Appellant's good behavior as he grew from child to man as a mitigating circumstance. Appellant was a hard worker who was non-violent. XXIX2803-4. Appellant turned down a college scholarship to serve his country in the Coast Guard. XXIX2823-4. It was at this point that Appellant's life changed. He developed a drug problem with crack cocaine during this time. XXIX2819,2834. Appellant's personality changed. XXIX2882. A number of witnesses recognized that Appellant's criminal activity was out of character. XXX2898,2916. Appellant had always been recognized as a positive influence on others. XXIX2845-51. The trial court recognized that Appellant's drug addiction changed his life. The change of personality from a good respectful person due to drug addition explains Appellant's actions.

The trial court recognized the mitigating circumstance that society will be protected by a life sentence in Appellant's case. V956. The trial court also recognized as a mitigating circumstance that Appellant "has an insight into the dilemma that faces the many young men who end up in prison [and] ... can help those men turn their lives around." V953. Appellant has always been recognized as a positive influence on others XXIX2845-51. Appellant's future

usefulness is very powerful mitigation. The usefulness in turning the lives of other young men around can only be described as the strongest form of rehabilitation. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988); Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988). Evidence as to the possibility of rehabilitation is so important that its exclusion requires reversal. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

This mitigation is not insubstantial and it cannot be said that there was no, or very little, mitigation present in this case. [7] The death penalty should be vacated.

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[7] The trial court's sentencing order found 13 mitigating circumstances present in this case including the following:

> The Defendant suffers from sexual dementia, a form of mental illness.
>
> The Defendant confessed to his sexual relationship with Keinya during drug addiction counseling.
>
> The Defendant suffered from addiction to illegal drugs during his life and it was apparent from the testimony that it changed his personality, and his life, for the worse.
>
> The Defendant comes from a good family, seven brothers and sisters.
>
> The Defendant was a good child, obedient and helpful.
>
> The Defendant helped Edwina take care of his three natural children.
>
> The Defendant loves his children.
>
> The Defendant sends gifts to his kids while in custody.
>
> The Defendant is a very caring person.

POINT XII

THE DEATH SENTENCE VIOLATES APPRENDI V. NEW JERSEY, ___U.S. ___, 120 S.Ct. 2348 (2000).

This issue involves several related errors which combine to render the death sentence unconstitutional under the Florida and United States Constitutions. Apprendi v. New Jersey, ___ U.S. ___, 120 S.Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). These errors include: (1) The jury made no finding of aggravating circumstances. (2) The jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty. (3) The failure to instruct the jury that this finding must be beyond a reasonable doubt. (4) The jury's recommendation of death was only by a vote of 8 to 4. (5) The indictment contains no notice of aggravating circumstances.

Mr. Anderson filed a Motion for Statement of Aggravating Circumstances. I134-138. He filed a Motion to declare Fla. Stat. 921.141 due to the fact that the jury's penalty recommendation is only by a bare majority. I188-9. He filed a Motion For Statement of Particulars as to aggravating circumstances. II202-3. Mr. Anderson filed a Motion to Declare 921.141 unconstitutional which

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The Defendant enlisted in the U.S. Coast Guard and served for 5 years.

Society would be protected by the Defendant serving a sentence of life in prison.

The Defendant earned money playing the market while in custody. He can thus still be a productive member of society.

The Defendant has a gift for poetry and an insight into the dilemma that faces the many young men who end up in prison. He can help those men to turn their lives around.

contained a specific objection that the jury does not make findings of aggravating circumstances. I146-7. Thus, all of the issues were raised in the lower court.

Apprendi requires a rethinking of the role of the jury in Florida. The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999).

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

This case shows several violations of Apprendi. Under Apprendi the jury must find the aggravating circumstances. The aggravating circumstances actually define which crimes are potential death penalty cases.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them - facts in addition to those necessary to prove the commission of the crime - whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. The jury must also find aggravating circumstances. This fact is also recognized by Fla. Stat. 921.141(7).

> **(7) Victim impact evidence.** – Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence.

It is only upon proving aggravating circumstances that the defendant becomes eligible for the death penalty.

The idea that the jury must find aggravating circumstances is further supported by the analysis in Apprendi. First, the proof of the aggravating circumstances is often "hotly disputed" as was the bias issue in Apprendi. 120 S.Ct. at 2354-5. Secondly, at least two of the aggravators at issue here; (6)(e) "The crime was committed to avoid arrest". (6)(f); "The crime was committed in a cold, calculated, and premeditated manner" directly relate to Mr. Anderson's intent during the offense. The Court in Apprendi heavily relied on this aspect.

> The text of the statue requires the factfinder to determine whether the defendant possessed, at the time he committed the act, a "purpose to intimidate" on account of, inter alia, race. By its very terms, this statue mandates an examination of the defendant's state of mind – a concept known well to the criminal law as the defendant's mens rea.... It is precisely a particular mens rea that the hate crime enhancement statue seeks to target. The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."

120 S.Ct. at 2364 (footnote omitted).

Third, it must be noted that four out of five aggravators at issue here directly relate to the offense itself. (6)(e) Avoid

arrest. (6)(f) CCP. (6)(h) Especially heinous, atrocious, or cruel. (6) (d) During an enumerated felony (kidnapping). The Court relied on this factor in Apprendi in explaining why the exception it had previously approved in Almendarez-Torres v. United States, 523 U.S. 224 (1998) should not be extended.

> New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U.S. at 230, 244, 118 S.Ct. 1219, New Jersey's biased purpose inquire goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

120 S.Ct. 2366. Here, only the prior violent felony aggravator (6)(b) could conceivably fit in this exception. It should be noted that Apprendi specifically notes that Almendarez-Torres may have been incorrectly decided. Id. at 2362. In the concurring opinion of Justice Thomas, he specifically states that Almendarez-Torres was incorrectly decided. Id. at 2378-80.

The difference between the two potential penalties, death and life imprisonment, is of the greatest magnitude.

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The Court in Apprendi relied on the potential difference in finding constitutional significance to the increase.

> The constitutional question, ... is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased – indeed, it doubled – the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence.

120 S.Ct. At 2354.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Florida law requires not only the presence of aggravators, but that they are sufficiently weighty to warrant the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). There was no jury finding that the aggravating circumstances are sufficiently weighty to call for the death penalty.

Apprendi was also violated in that the jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. As to the first aspect the jury was told:

> It is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

XXXII3266-7. The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty.

The jury was also given no guidance as to by what standard it would determine whether aggravating circumstances outweigh mitigating circumstances.

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment with a minimum term of 25 years before possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, you will – it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

XXXII3270. Not only does this instruction fail to tell the jury that it must find <u>beyond a reasonable doubt</u> that aggravating circumstances must outweigh mitigating circumstances, it affirmatively tells them that mitigating circumstances must outweigh aggravating circumstances. This violates <u>Apprendi</u>'s requirement that any fact which increases the punishment, with the possible exception of recidivism, must be proven beyond a reasonable doubt.

An additional violation of <u>Apprendi</u> is the fact that the jury's verdict in support of death was only by a vote of eight to four. In <u>Johnson v. Louisiana</u>, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In <u>Apodaca v. Oregon</u>, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In <u>Burch v. Louisiana</u>, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that <u>Apodaca</u>

was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. Under either test, a verdict of eight to four violates the Federal Constitution after Apprendi.

The Florida courts have held that unanimity is required in a capital case. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992). The eight to four verdict is in violation of this rule.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. I1-2.

The reasoning of Apprendi is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), this Court stated:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So.2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal

> episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

457 So. 2d at 1387. The District Courts of Appeal have consistently held that a three year mandatory minimum can not be imposed unless the use of a firearm is alleged in the indictment. Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999). The requirements of Apprendi must apply to the penalty phase of a capital case under the Florida and Federal Constitutions. Mr. Anderson's sentence must be reduced to life imprisonment or the case must be remanded in light of Apprendi.

POINT XIII

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(d)) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d)) violates the Florida and United States Constitutions. Its use renders Mr. Anderson's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Anderson filed a motion to declare this aggravator unconstitutional I184-185. The jury was instructed on this aggravator and the trial judge found it. XXXII3267-3273;V934-935.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(2)2.

Under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410 (1982). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or the federal constitution. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State

v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should declare this aggravator unconstitutional.

Assuming arguendo, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. The evidence of premeditation is very limited in this case. See Point I. It is unconstitutional to use the underlying felonies to make the offense first degree murder and also to use them as aggravating circumstances.

The error in this case is clearly harmful. The jury’s vote for death was only eight to four. The erroneous consideration of this aggravator could well have tipped the balance towards death.

CONCLUSION

For the foregoing reasons, Mr. Anderson's conviction and sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LESLIE CAMPBELL, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of November, 2000.

____
Attorney for Charles Anderson