IN THE SUPREME COURT OF FLORIDA

STEVEN M. EVANS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC95-993
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

STEVEN M. EVANS,)
)
Appellant,)
)
vs.) CASE NO. SC95-993
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

(R) Consisting of Volumes I through XX; Pages 1-2370 consisting of various pleadings and pretrial

hearings.

(T) Consisting of Volumes I-XI; pages 1-2069.

(SR) Consisting of the one volume supplemental record on appeal; Pages 1-53; transcript of the video deposition of Dr. E. Michael Gutman.

STATEMENT OF THE CASE

On May 10, 1996, the State of Florida indicted Steven M. Evans, Appellant, a/k/a/ "L.A."; Edward Francis, a/k/a "Jersey"; and Gervalow Ward, a/k/a "Dred", for the first-degree murder of Kenneth M. Lewis, a/k/a "Capone." The State also charged Evans, Francis and Ward with one count of kidnaping. (R XII 614-15) The trial court appointed the Office of the Public Defender to represent the indigent Steven M. Evans. (R XII 620)

On September 18, 1996, the Office of the Public Defender filed a motion to withdraw as counsel citing an irreconcilable conflict of interest. (R XII 623-25) On October 2, 1996, following a hearing, the trial court granted the motion and appointed private counsel to represent Steven M. Evans. (R XII 630)

On September 23, 1996, Steven M. Evans filed a *pro se* Demand for Speedy Trial and Demand for Discovery. (R XII 626-28) At a September 30, 1996, hearing, Appellant's *pro se* Demand for Speedy Trial was struck by the trial court. (R XIII 629)

On March 2, 1998 the trial court entered an Order Appointing Experts for both Competency and Sanity Evaluation naming E. Michael Gutman, M.D. and Alan S. Berns, M.D. (R XII 759-63) Both experts found Evans incompetent to proceed and the court agreed. (R XII 768-784) On June 5, 1998, the forensic

administrator of Florida State Hospital, Chattahoochee advised the court that Evans was competent to proceed without medication. (R XII 801-06) On June 29, 1998 the court ordered further examination of Evans to determine whether he was competent to proceed. (R XII 809-13) Both experts and the trial court now found Evans competent to proceed. (R XIII 815-26) On September 14, 1998 the court ordered further examinations of Evans. (R XV 1294-98) Dr. Berns found Evans' competency to proceed was "borderline" and therefore not sufficient to proceed and Dr. Gutman found Evans incompetent to proceed. (R XV 1307-19) On October 14, 1998 the trial court again found Evans incompetent to proceed and ordered his involuntary commitment. (R XV 1327-30)

Appellant filed numerous pretrial motions dealing with the capital sentencing procedure. These included a motion to prohibit any reference to the advisory role of the jury (R XIII 839-40); a motion for interrogatory penalty phase verdict (R XIII 856-59); a written objection to standard jury instruction on reasonable doubt (R XIII 899-907); a motion to preclude death as a possible punishment and/or to question the prosecutor regarding his good faith in seeking the death penalty (R XIII 882-84); motion for findings of fact by the jury (R XIII 979-80); motion to declare Florida Rule 3.202 unconstitutional (R XIII 1000-09); several motions to declare certain provisions of Section 921.141, Florida Statutes, unconstitutional as

applied (R VIII 878-881)(1094-98)(1107-30); {921.141(2) (R XIV 1099-1106)};{921.141(7)} (R XIII 949-67)}; {921.141(1) (R XIV 1013-16)}, {921.141(5)(N) (R XIV 1131-34)}; {921.141(5)(h) (R XIV 1151-63)}; {921.141(5)(g) (R XIV 1171-76)}; {921.141(5)(I) (R XIV 1135-50)}; {921.141(5)(d) (R XIV 1182-85)}; {921.141(5)(e) (R XIV 1164-70)} {921.141(5)(f) (R XIV 1186-90)}. Appellant also attacked the constitutionality of the statute based on the fact that a bare majority of the jury is sufficient to recommend death. (R XIV 1080-81)

Appellant also filed a motion in limine requesting the exclusion of the plans of a purported robbery before the incident; that Evans was a gang leader; any physical violence towards Shana Wright the night of the incident; and any physical evidence recovered from the car driven by Shana Wright. (T I 47; T VII 1323-26) The court deferred ruling until a jury was selected, then ruled that as long as the gang activity does not become a feature at the trial, it was going to allow the relationship between the parties explained to the jury. (T I 48)

A jury was selected, and the defense made a motion to disqualify State Attorney Linda Drain and the entire office of the state attorney in this case because Drain was the prosecutor and Evans was the victim in a matter that very likely will be a mitigator in this case. (T I 8,9) The trial court denied the motion stating that

"the State does this at their own risk." (T I 12) The State subsequently announced that State Attorney Drain would not participate in the penalty phase of the trial in an abundance of caution. (T I 52)

The defense then made a motion that the Court make a finding as to Mr. Evans' competency to proceed to trial. (T I 17) Dr. Gutman changed his earlier opinion as to Evans' competency to stand trial, and believed Evans incompetent to stand trial. (T I 15) The Court requested that Dr. Gutman and other state experts appear the next day to testify as to Evans' competency to stand trial. (T I 21)

Dr. Michael Herkov visited with Mr. Evans the previous Saturday for 45 minutes. (T I 104) After reviewing Dr. Gutman's report and meeting with Evans, Dr. Herkov concluded that Evans was competent to proceed. (T I 104) Dr. Allen Berns testified that he had last seen Evans on March 9, 1998, and after reviewing Dr. Gutman's deposition and other documents provided by the defense, Evans was competent to proceed to trial. (T I 107)

Dr. Gutman testified that on March 18, 1999 he found Mr. Evans marginally competent to stand trial although he suffered paranoid schizophrenia and was in marginal remission. (T I 109-12) Thereafter, Dr. Gutman read the deposition material from people who were there at the time of the alleged offense, and the fact that Evans would not entertain any consideration of the not guilty by reason of

insanity defense. (T I 114) These items together provided strong evidence to believe that Evans was paranoid at the time of the offense and his mental illness may very well have prompted the behavior and actions that occurred at the time of the alleged offense. (T I 115) Since the offense, Evans was in a "disassembling mode"[1], therefore he could not adequately aid in his own defense. (T I 116) Evans required help by a psychiatrist to bring out information about his illness and his paranoia and fully apprise him of all the details of the defense of not guilty by reason of insanity. (T I 115) Dr. Gutman concluded that Evans is not competent to stand trial because he is delusional about wanting to be non-delusional. (T I 116) The Court found that Evans was competent to proceed. (T I 130)

During opening statement the State provided hearsay statements of the victim that he had not left the group behind but rather was scared and went around the block and came back and saw that everyone was gone. (T IV 686) The defense objected based upon hearsay and relevance. (T IV 688-89) Court overruled the objection stating it was opening statement and not evidence. (T IV 688) The defense moved for mistrial. (T IV 688) Court denied motion for mistrial. (T IV 688)

---

[1] A form of paranoid schizophrenia where the individual wants so hard to look like he is sane. (R VI 115)

During the trial, the defense requested a standing objection to Evans' plans to rob somebody in Sanford. (T VI 1132) Blane Stafford's testimony that "Dred returned to the apartment, and stated that there was nobody out there" was entered over defense hearsay objection. (T V 933) The defense objects to the repeated reference about gangs and gang activity. (T VI 1125; VII 1248) The prosecution asked state witness Amanda Taylor, a latent print examiner for the Orlando Police Department, the following question: "And did you compare those to prints from the records of the Orlando Police Department of Steven Maurice Evans?" (T VI 1107) The defense moved for a mistrial on the grounds that the above question made a reasonable inference that Evans was previously arrested or convicted of some offense which is improper character evidence. (T VI 1109) The trial court denied the motion for mistrial. (T VI 1109) The defense made repeated objections to the introduction of the 22 caliber shell casing based on relevancy. (T VII 1217; 1358) The court ruled that since there had been testimony "out there" that the weapons were seen in the car by Shana Wright, the court permitted the evidence in over defense objection. (T VII 1223)

The defense moved to strike expert Fisher's opinion as to the shoe impressions because it is not an opinion to any degree of scientific certainty. (T VII 1323) The court admitted the opinion of expert Fisher over defense objection. (T

VII 1323) Fisher testified that the shoe impressions were made by a Reebok shoe. (T VII 1332) Defense moved to strike the opinion of expert witness Fisher and moved for a mistrial because the shoes taken from Evans were Nike shoes. (T VII 1334) The state admitted that Fisher had compared Francis' shoes to the cast impressions because he wrongfully submitted those shoes to her on the witness stand. (T VII 1340) Defense renewed all of the earlier objections, moved to strike and move to disqualify witness Fisher from any further testimony in the matter, and rejected a curative instruction and renewed the motion for mistrial. (T VII 1342) The court gave a curative instruction admonishing the jury to not consider any reference to the Reebok shoes that was presented to the jury and not to draw any inference whatsoever from the testimony that was given. (T VII 1345)

The state rest. (T VII 1369) The defense moved for a judgment of acquittal as to count I arguing that the evidence showed that Evans had a depraved mind with the craziness, the drinking, the drugs, supporting second degree murder. (T VII 1370) Evans also requested a judgment of acquittal as to kidnaping arguing that at best the evidence proved false imprisonment because the victim came to the house armed with a gun pointed at the door to rob them. (T VII 1370) The court denied the motions for judgment of acquittal. (T VII 1372) The defense rested and renewed motions for judgment of acquittal and motions for mistrial. (T VIII 1404)

The defense renewed previous objections to the premeditated murder and the reasonable doubt jury instruction, and a verdict on the theory of guilt. (T VIII 1411) The state rested without rebuttal. (T VIII 1413)

During closing argument, the prosecutor stated "the OG, he is the leader". (T VIII 1452) The trial court overruled the objection. (T VIII 1452) The prosecutor further argued "Jersey said that Dred did it, again, to protect the OG, to protect the leader". (T VIII 1458) The defense objected saying that the defense is repeatedly referring to OG and other things in making the gang a feature of the trial, and moved for a mistrial. (T VIII 1459) The trial court denied the motion for mistrial and admonished the prosecutor not to make references of that nature. (T VIII 1459) The prosecutor further argued "he (Ward) told you that when he made his deal, his deal was to testify against both Edward Francis and the defendant against both of them, not one against both." The defense objected and moved for a mistrial because the prosecution violated the courts early ruling regarding the Francis trial. (T VIII 1464) The trial court denied the motion for mistrial. (T VIII 1464)

The jury found the defendant guilty of murder in the first degree as charged in the indictment. (T VIII 1530) The jury found on the special verdict for count I and II that Evans displayed or threatened to use a firearm in the commission of the

each offense. (T VIII 1533) The jury also found Evans guilty as charged in the indictment of kidnaping. (T VIII 1533)

The appellant objected to the HAC and CCP jury instruction based on the lack of evidence, and that Evans was in a rage, and acting like a crazy man at the time of the offense. (T X 1841) The appellant's objection was denied. (T X 1845) The defense made a motion to strike the word emotional in the statutory mitigating factor under the influence of extreme emotional disturbance jury instruction. (T X 1851) The court denied the defense's special instruction on mercy. (T X 1867) The court denied the special jury instruction provided by the appellant on HAC. (T X 1868) The appellant sought to introduce the court orders finding Evans incompetent. (T X 1973) The trial court denied the introduction of the court orders. (T X 1976) The defense rests. (T X 1981) The defense renewed their objection to the jury instruction weighing aggravating and mitigating circumstances. (T XI 2055)

The jury recommended the death penalty by a vote of 11 to 1. (T XI 2061) On April 19, 1999, appellant filed a motion for new trial. (R XX 2250-58) The appellant filed a memorandum in support of life. (R XX 2271-88) The state filed a memorandum in support of death. (R XX 2260-68) At the Spencer hearing, Evans requested that the hearing be waived and the court adopted the recommendation of

the jury. (R X 513) Pursuant to Koon v. Dugger,[2] the court allowed the defense counsel to proffer what it wished to present and discussed it with Evans to determine whether he is freely and voluntarily waiving his right to present that evidence. (R X 516) Evans objected to counsel presenting additional doctor reports that supported the mental mitigation. (R X 531) Evans also objected to the introduction of the depositions of co-defendants Ward and Francis. (R X 534) The court would not consider the depositions. (R X 541)

In sentencing Steven M. Evans to death, the court filed written findings of fact on June 8, 1999. (R XX 2324-37) The court concluded that the State proved five aggravating circumstances: (1) Evans had been under sentence of imprisonment at the time of the murder; (2) Evans was previously convicted of a felony involving violence; (3) that the murder was committed during the commission of a kidnaping; (4) that the murder was committed in a cold, calculated and premeditated manner; and (5) that the murder was especially heinous, atrocious and cruel. (R XX 2326-29)

The trial court concluded that two statutory mitigating circumstances applied: (1) that the capital felony was committed while Evans was under the influence of extreme mental or emotional disturbance; and (2) that the capacity of Evans to

[2] 619 So.2d 246 (Fla.1993)

appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. (R XX 2330-32) The court discussed seven categories of nonstatutory mitigation. (R XX 2332) The court rejected nonstatutory mental mitigation. (R XX 2332) The court gave little weight to the substance abuse issues. (R XX 2333) The court gave no weight to the disparate treatment of the co-defendants. (R XX 2334) The court gave little weight to family, community and character issues. (R XX 2334) The court gave no weight to the repeated head injuries and disappointments suffered by Evans. (R XX 2335) The court found the claims that there was a previous altercation with Lewis showing that Evans was "disturbed" and that the victim Lewis was unconscious at the time of the shooting unsupported by the evidence. (R XX 2336)

The trial court ultimately concluded that the aggravating factors outweighed the mitigating circumstances and sentenced Steven M. Evans to die in Florida's electric chair. (R XX 2336) The trial court sentenced Evans to 121.25 months for the non-capital conviction. (R XX 2302)

On June 30, 1999, Appellant filed a notice of appeal. (R XX 2339) This Court has jurisdiction.[3]

---

[3] Art. V, §3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Guilt/Innocence Phase

Shana Wright was Evans' girlfriend and shared an apartment at the Palms apartments in the beginning of February of 1996. (T IV 723) Two other men came to live in the apartment known as "Jersey" and "Dred." (T IV 725) On April 26, 1996 Wright was borrowing her brother Jeffrey Wright's car for the day. (T IV 726) Wright loaned the car to Evans and then went to bed at 8 p.m. (T IV 728)

Evans, and associates Edward Francis, Gervalow Ward and Kenneth M. Lewis went to Sanford to rob some fellow for "5ks" of dope. (T VI 1132) When the group arrived in Sanford, Ward was placed under a truck armed with a 38 caliber handgun and a shot gun. (T VI 1133) While Ward was laying under the truck, he saw brake lights cut on in the car, then the car backed up and took off. (T VI 1134) Ward ran out to Evans and thought that Francis and Lewis had left him behind. (T VI 1135) Ward subsequently saw Francis over by some bushes. (T VI 1135) The group then put up some guns under the tool shed. (T VI 1135)

The group then went to Mark Quinn's house to use the phone. (T VI 1136,38) Evans called Shana Wright and told her to get the bag with the money and get out of the house because someone was coming to rob the money. (T IV 729, 787) Evans also told Wright to report her brother's car stolen. (T IV 730)

Wright went to a neighbor's house and called the police and reported the car stolen. (T IV 730) After using the phone, the group with Stafford and Quinn got in Quinn's truck and returned to Orlando. (T VI 1139) Before they had gotten to the apartment, L.A. told Ward that he thought "Capone" left to rob Shana. (T VI 1142) When the group arrived at the Palm Apartments they looked for Shana Wright and could not find her, so Evans beeped her. (T VI 1140)

Evans arrived back at Wright's apartment and Wright came out from her friend's apartment. (T IV 735) Wright told Evans that the money was in the house. (T IV 735) Evans and Wright returned to the apartment with the rest of the group. (T IV 737-39) Evans was acting very strange and he started to beat his girlfriend Shana Wright. (T IV 736; 789)

The strange behavior continued at his girlfriend's apartment, where he began pacing back and forth and started to look kind of weird. (T VII 1275) Evans had an expression on his face, he looked like the joker in Batman. (T VII 1276) Evans would pace back and forth sit down get up and pace back and forth again. (T VII 1276) Evans looked like he was bouncing off the walls. (T VII 1276) Francis remarked "what's wrong with this joker." (T VII 1276) One minute Evans would be mad, the next minute he would be laughing. (T VII 1277) Francis also remarked "this joker is shot out." (T VII 1277) During all this time Evans was drinking

Tahecian Breeze (a cheap wine) and smoking marijuana. (T VII 1278) According to Blane Stafford, Evans was acting like he was crazy. (T VI 1014) Evans was looking like his mind just wasn't quite right. (T VI 1014) Before the shooting Evans was drinking Champagne, Old English Malt Liquor and smoking marijuana. (T VII 1204; VI 1014)

When Capone returned to the apartment, Ward got on the left side of the door and Francis got on the right side of the door and Evans was in the middle armed with a gun.[4] (T VI 1143) When Capone knocked on the door, Ward grabbed the door and swung it open. (T VI 1144) Ward grabbed his shirt and Jersey grabbed the other side of his shirt and pulled him in to the apartment and took the guns that he had off of him. (T VI 1144; V 913) Capone had a sawed off shot gun and a 22 caliber gun. (T VI 1144) Capone was asked why he left everyone behind in Sanford. (T VII 1258) Capone replied " I didn't leave you" and said he was looking for the group. (T VII 1258)

Once the guns were removed from Capone, the whole group jumped on him. (T VI 1145) Ward, Jersey, LA, Mark Quinn and Stafford all punched Capone. (T VI 1145) Wright never saw Evans hit Capone. (T IV 762) Later Wright and Evans

[4] Blane Stafford testified that Dred and Dray grabbed guns waiting for the man from the car to enter the apartment. (T V 911) Then he testified that L.A., Dred and Jersey had guns in their hands. (T VI 1003)

were in her bedroom and saw the other guys beating Capone in the livingroom. (T IV 742; 762) Members of the group punched Capone, asking why he had left them. (T VI 1146,V 918) The beating of Capone went on for ten to fifteen minutes. (T VI 1150)

After the beating stopped, Evans told Jersey to go get something to tie Capone up with. (T VI 1151) Jersey hesitated, and Evans stated that "if he didn't go get it, he's going to be next." (T VI 1151) Jersey looked at Evans strangely and went to tying up Capone. (T VII 1260) Jersey tied up Capone, and Evans took a blue scarf and made a knot in the middle and put it in Capone's mouth and tied it around the back of his head. (T VI 1152)

Next, the police were sighted outside the apartment, so the men all went into the back bedroom. (T V 924) Outside the apartment, Wright told the police officer that the reported stolen car came back. (T IV 745) The officer stated that he would have to check it out. (T IV 745) The officer looked in the car and found a gun. (T IV 746) Wright stated that the gun did not belong to her. (T IV 745) The police asked Wright if they could use her telephone, and Wright went into the apartment and got her phone and brought the phone to the police. (T IV 746) After the police used the telephone, Wright went to work at UCF. (T IV 749)

After the police officers left, the men came out of the back room and drank

champagne together. (T V 928) Quinn did some pressure point thing on Capone, and then Evans took his turn.[5] (T VI 1155) Evans then got the 22 caliber handgun and told somebody to get a shampoo bottle. (T VI 1157) Evans took the shampoo bottle and cut out the top of it, and put like a Winn Dixie plastic bag stuff in the bottle, then took the revolver and put it in the shampoo bottle. (T VI 1158) Evans then taped the shampoo bottle around the barrel. (T VI 1158) Evans then told Ward and Jersey to come on, and as they hesitated, Evans yelled "bring your asses on." (T VI 1159) Ward then went outside the apartment and looked around to see if anybody was outside. (T VI 1159)

Ward returned and told Evans that there was nobody out there. (T VI 1159) Ward, Francis and Evans then walked with Capone to a ditch in the back of the apartment. (T VI 1160) When they got to the ditch, Evans pushed Capone and he fell in the water. (T VI 1161) Evans then told Capone "we are the last three, we are the last three, we are the last three mother fuckers that you left. We are the last three mother fuckers that you are going to see on this earth." Evans then put the shampoo bottle to Capone's head and shot him four times in the head and the fifth time it missed and went into the water. (T VI 1161) The group then ran back to the

[5] The pressure point area was the little "v" of bone right below the throat area of Capone. (V6p1155)

apartment and Evans directed the group to pack up all the clothes. (T VI 1163)

The group was gone five minutes. (T V 935) When they returned back to the apartment, Evans commented about how the gun did not make any noise. (T V 935) Evans, Jersey and Ward all got blood on their clothing. (T VI 1164) Evans had blood and a white material on his shoes and on the bottom of his pants.[6] (T VI 1165; V 937) Evans took the clothes off and put them in a bag. (T V 937) The group then got everything together, and left the apartment in Mark Quinn's truck. (T V 938) During the return trip to Sanford, Evans threw the bag with his clothes into a dumpster. (T V 941)

After work that afternoon, Wright saw Evans at the downtown bus terminal. (T IV 750) Evans told Wright then he had to get a new suit "because he got brains all over it." (T IV 754) Evans told Wright that Jersey wanted to do it but Evans told him no that it was an "O.G." call. (T IV 754) Later that evening Wright gave a statement to the police and did not tell them about Evans' statements because she

---

[6] In his initial statements to police, Ward said that Jersey did the shooting and L.A. had nothing to do with the crime. (T VI 1182) Ward stated that it was Jersey's friend that got killed after they got in a fight. (T VI 1182) Ward admitted that his story changed when the state offered him a plea bargain for his testimony. (T VI 1190) The plea bargain offer was that the state would drop the murder charge against him and allow him to plead to the single charge of kidnaping. (T VI 1191) Francis admitted that he gave audio taped statements to the police where he claimed that some guy named Dred actually did the shooting. (T VII 1283)

was scared. (T IV 756)

Dr. Wilson A. Broussard, Jr. was the medical examiner called to investigate the death of Kenneth Lewis. (T V 822) Dr. Broussard found Lewis' body in a prone position face down along a drainage canal behind the Palms Apartments. (T V 824) The victim had a bandana around the head tied in the back, a blue and white bandana around the face. (T V 825) The victim's hands were tied around the back with some type of telephone type cord, and the police had marked some shell casings of a small caliber near the body and there was some trauma from gunshot wounds to the back of the head. (T V 825) The victim had a gag in his mouth consisting of a piece of cloth. (T V 852)

The cause of death was multiple gunshot wounds to the head. (T V 830) The victim had some abrasions on the upper lip and the two front incisor teeth were acutely fractured. (T V 853) There was also lacerations and contusions to both eyes and a deep muscle contusion to the neck. (T V 854;889) There were no defensive wounds found on the victim. (T V 860) There was also an abrasion that had characteristics of a thermal burn on the left upper shoulder chest region below the clavicle. (T V 862) The fractured teeth and lacerations to the teeth could have been caused by the insertion of the cloth gag material into the victim's mouth. (T V 871) The blow to the victims head could have caused unconsciousness. (T V 875)

The victim was under the influence of moderate cocaine use taken three to four hours before death. (T V 878; 887;893) It was possible for someone standing next to the body firing shots to get blood and brain matter on their legs or pants. (T V 884)

Dennis McDowell, a crime scene technician, processed the crime scene at the Palms Apartments both at the drainage canal and in the apartment. (T VI 1064) McDowell located shoe prints in the area of the canal, and photographed them and used dental material to cast the shoe print impression. (T VI 1068) McDowell also collected fingerprints from a 1980 blue Oldsmobile that was in the area of the apartment. (T VI 1077)

Crime scene technician Jose Aquino recovered five spent shell casings near the head of the victim. (T VI 1087) Aquino and McDowell collected 24 print cards of fingerprints lifted from the apartment and automobile. (T VI 1096) Evans' fingerprints were removed from the right passenger door glass of the blue Oldsmobile. (T VI 1119) Evans' fingerprints were also recovered from papers located inside the 1980 blue Oldsmobile. (T VI 1119)

Todd Pursley, a member of the Orlando Police Department, questioned Shana Wright in the early morning hours at the Palms Apartment in Orange County, Florida. (T VII 1226) During the search of the vehicle by Officer Pursley, he

recovered a spent 22 caliber shell casing. (T VII 1227)

Crime scene technician Lewis Knack took a pair of shoes from Evans and placed them in the custody of the Orlando Police Department on May 2, 1996. (T VII 1306) Expert witness Fisher then compared state exhibit U, the shoes taken from Evans and compared them with state's exhibit G, J, M, and L and found that there were two foot wear impressions that could have been made by the left shoe in state exhibit U. (T VI 1346)

Nanette J. Randolf is a ballistics and firearm expert for the Regional Crime Laboratory. (T VII 1356) Randolf compared the shell casings that came from the crime scene with a shell casing found in the automobile outside Shana Wright's apartment and stated that the shell casings came from the same gun. (V7p1357)

Evans testified on his own behalf, and denied ever knowing Gervalow Ward. (T VII 1384) Evans knew Edward Francis who he met through Mark Quinn, a car detailer. (T VII 1384) Evans admitted knowing Shana Wright but denied that she was a girlfriend, or that he had ever been in her apartment. (T VII 1384) Evans denied being involved in the murder in any way. (T VII 1385) Evans admitted to having a prior felony conviction and being convicted of escape for leaving a work release center. (T VII 1398)

PENALTY PHASE

Evans was convicted of robbery with a firearm or destructive device as a principle and received a sentence of 5 ½ years in the Department of Corrections with credit for 179 days served on February 3, 1994. (T VIII 1581)

DEFENSE CASE

Linda Lee Evans is the mother of the appellant. (T VIII 1583) Evans has one brother and one sister, with the brother Marvin having a learning disability. (T VIII 1584) Evans was born out of wedlock as a result of rape by the father. (T VIII 1586, 1587) Evans' father paid no child support, and kept sporadic contact with Evans until he died of sclerosis of the liver. (T VIII 1587) After Evans was born, he was sent to live with his grandmother so his mother could get some schooling. (T VIII 1588) When Evans was six his mother got married. (T VIII 1589) At that time, Evans was taken from his grandmother and then lived with his mother and her husband, Marvin Evans. (T VIII 1589) While growing up, Evans would help out with babysitting his younger brother and sister, and would help get their breakfast in the morning for them. (T VIII 1590) Evans was real responsible around the home, and would take care of his younger brother. (T VIII 1591) The Evans's family joined the Jehova Witness church in 1975, and the appellant was active in the church until the age of 19. (T VIII 1592)

As a child, Evans suffered a head injury while riding a bicycle. (T VIII 1598) For about three or four years after the accident he suffered with severe migraine headaches. (T VIII 1598) Evans suffered another head injury in a car accident where his head struck the steering wheel and he was hospitalized. (T IX 1604) Evans had more headaches and he was a little bit more moody, and he started to isolate himself in dark rooms. (T IX 1605)

After Evans got married his mother got a call after the birth of Otis saying that Evans was acting a little bit strange. (T IX 1607) Evans had gone out with a friend, and when he returned he was saying I shouldn't have drunk it, I know I shouldn't have drunk it. (T IX 1608) Evans was acting really really strange and he had hit the wall a couple of times and then he went outside and was walking around. (T IX 1609) Evans then walked through a plate glass door. (T IX 1609) Evans then walked through the neighborhood with his underwear. (T IX 1609) Evans' mother asked what he was doing and Evans answered I don't know what happened. (T IX 1609)

Evans' stepfather observed Evans having a conversation with himself at one particular time including answering to himself. (T IX 1643) When Evans was sixteen or seventeen years old, his father caught him masturbating in his room, and he had to go in front of the church and explain why he had done that. (T X 1806)

Besides this incident, Evans followed his religious beliefs. (T X 1808) Evans thereafter committed adultery and was disassociated from the church. (T IX 1612) When someone becomes disassociated from the church they will be counseled by the elders of the congregation. (T X 1829) Also, contact is diminished with other church members because the person made a decision not to conduct themselves in the Christian manner. (T X 1829) Evans joined a gang called the eight-tre gangsters in 1982 when he was age 17. (T IX 1622) Evans was a caring and loving father. (T X 1830)

Dr. Gutman was appointed by the court to examine Evans, and did so on four occasions between March 1998 and March 1999. (ST 6) Gutman had previously testified over 800 times in state and federal court. (ST 5) During the first visit, Evans thinking was tangential or "off base," although he was orientated to time and place. (ST 9,10) Evans spoke in neologisms[7] which is a sign of psychosis. (ST 11) Evans did not discuss the charges but rather that religious organizations and the correction officers were plotting against him. (ST 12) Gutman concluded that Evans was mentally ill and suffered a dissociative disorder not otherwise specified. (ST 14)

---

[7] Neologisms are newly created words using common words and putting them together with no basis in reality. (ST 11)

On Gutman's second visit Evans had returned from three months of treatment at the state mental hospital and was more organized but paranoid. (ST 23) Evans looked better and his paranoid thinking came through wherein Gutman thought that Evans had a paranoid schizophrenic illness. (ST 23) On the third visit Evans had deteriorated and was grossly psychotic. (ST 31) Gutman diagnosed Evans as suffering from paranoid schizophrenia provisional.[8] (ST 31)

After evaluating Evans the forth time, Gutman reviewed the depositions of witnesses who observed Evans' behavior at the time of the offense. (ST 39) At the time of the offense Evans was acting very strangely like the artificial canned character Gutman observed during his first visit with Evans. (ST 39) Based upon what Dr. Gutman had seen, heard and read about the offense, Dr. Gutman stated that within a reasonable degree of medical certainty Evans was suffering from paranoid schizophrenia at the time of the murder. (ST 40,41) Evans' conduct at the time of the offense was substantially impaired at the time of the offense where his paranoia manifested in making accusatory statements to the victim that may not have had any basis in reality. (ST 43) Evans' form of mental illness at the time of the offense is an extreme mental disturbance. (ST 45) Dr. Gutman further

[8] Dr. Gutman gave Evans an actual diagnosis of paranoid schizophrenia but left the diagnosis open to further evaluation because Evans was so out of it. (ST 31)

concluded that Evans is not competent to stand trial because he has a rare form of paranoid schizophrenia known as a dissembling where Evans hides his illness because he does not want to have the image of being mentally ill. (ST 45-47)

Dr. Allan Berns was a court-appointed expert that examined Evans on October 16, 1997. Evans had pressured speech, and was observed to be grandiose, hyper-verbal and somewhat argumentative. (T IX 1718) There were also reports that Evans thought the corrections officers were mentally attacking him, and he talked about numerology and free masonry. (T IX 1723) The appellant talked about officers being against him because he had been accused of having an affair with one of the officer's ex-wifes. (T IX 1723) There were also reports of Evans spreading feces in the jail cell, and not bathing, and had various reports of abnormal behavior in the jail. (T IX 1723)

Dr. Berns concluded that Evans was suffering from a psychotic disorder otherwise specified, ruling out the delusional disorder and ruling out bipolar disorder, also known as manic depression. (T IX 1724) Dr. Berns concluded that Evans was not competent to stand trial because he had bizarre preoccupations about numerology and free masonry, and his thoughts would become somewhat disorganized and tangential, and recommended that he be transferred to the forensic unit of the state hospital for further evaluation and treatment. (T IX 1731)

Concerning sanity at the time of the offense, Dr. Berns did not have sufficient documentation to make an opinion. (T IX 1733) Evans had a low average range IQ. (T IX 1737)

Dr. Berns examined Evans again in July of 1998 and found him competent to stand trial. (T IX 1743) Dr. Berns could not detect any overt signs and symptoms of psychosis or impaired reality. (T IX 1744) Dr. Berns evaluated Evans again on September 12, 1998. (T IX 1748) Evans seemed to be somewhere between the first visit, but he was bordering on being paranoid and delusional. (T IX I748) Dr. Berns concluded that his competency to stand trial was borderline at best. (T IX 1749) Dr. Berns examined Evans again in March of 1999 and he did not observe any abnormalities in the speech or thought processes. (T IX 1750) Berns concluded that Evans was competent to stand trial. (T IX 1750) After reviewing depositions and witness statements, Dr. Berns concluded that Evans suffered from a bipolar disorder at the time of the incident. (T IX 1754) Bipolar disorder is a severe mental disorder and Evans could easily have had an intense, angry aggression impulse control which could have explained his behavior at the time of the murder. (T IX 1756) Bipolar disorder is considered a major mental illness. (T IX 1786)

Dr. Michael Herkov is the confidential defense psychologist. (T X 1882)

Herkov first met with Evans in February of 1998 for the purpose of determining his competency. (T X 1883) Evans' behavior was very bizarre, and was actively psychotic, having difficulty communicating with pressured speech.[9] (T X 1885)

Dr. Herkov met with Evans again in March, and found Evans' behavior was similar to the February visit. (T X 1891) Dr. Herkov also spoke to the correctional officers, and they relayed to him that the defendant's behavior was very erratic and at times he was psychotic or bizarre, and other times he was more cooperative. (T X 1894) Evans would be verbally aggressive or abusive with really no provocation. (T X 1894) Evans would also engage in self-defeating behaviors like stuffing up the plumbing in his cell and getting all the dirt all over the cell knowing that he was still going to be in there. (T X 1894) Evans appeared to have grandiose ideas and thoughts. (T X 1895) Evans would try to present himself as being very intellectual, and saw himself as a very high ranking member in some little quasi mason-like organization. (T X 1896) Evans also had poor hygiene which is often a good indicator of serious mental illness. (T X 1898) Dr. Herkov diagnosed Evans as having a psychotic disorder not otherwise specified and was incompetent to stand trial. (T X 1900)

---

[9] Evans would talk very fast when he talked and he had a flood of ideas in a sense that his thoughts did not follow a logical train of thought. (T X 1885)

Dr. Herkov met Evans again in July 1998 after he returned from Chattahoochee State Mental hospital and found that he was competent to proceed. (T X 1906) Dr. Herkov recommended that Evans receive psycho-tropic medication to stabilize him because he had been restored to competency. (T X 1908) Since Evans suffers from a bipolar disorder (manic depression) the medication would prevent Evans from deteriorating. (T X 1908) Bipolar disease is a serious mental illness where in the manic stage can become very psychotic with hallucinations and delusions that require hospitalization. (T X 1911) Dr. Herkov met with Evans again in September of 1998, and after that meeting he made the diagnosis that Evans suffered from the mental illness of bipolar disease. (T X 1921)

Dr. Herkov examined the depositions of all of the participants in the murder, and Evans' behavior at the time of the murder was consistent with the onset of bipolar disease. (T X 1938) At the time of the murder, Evans ingested alcohol and marijuana, and these drugs would exacerbate or make worse the manic phase of his mental illness. (T X 1939) However, Dr. Herkov did not find sufficient evidence to say that Evans was psychotic at the time of the crime. (T X 1950)

SUMMARY OF THE ARGUMENTS

Point I: On the eve of trial, Court appointed mental health expert Dr. Gutman advised the court that Steven Evans was not competent to stand trial. Dr. Gutman further advised the court that the issue of whether Steven Evans was sane at the time of the offense needed to be further investigated. The court ignored this testimony and found Steven Evans competent to proceed. The trial court abused its discretion in having the trial proceed.

Point II: The murder of Kenneth Lewis occurred while Steven Evans was enraged because victim Lewis left him behind in Sanford. Moreover, Evans suffers from mental illness. The murder of Kenneth Lewis was not a result of cool, calm reflection and therefore, the trial court erred by finding the CCP aggravating factor.

Point III: Kenneth Lewis received a beating for 15 minutes from his fellow gang members as punishment for leaving them behind in Sanford. Steven Evans directed Lewis outside the apartment and shot him multiple times in the head causing his death within seconds. The trial court erred in finding this murder especially heinous, atrocious or cruel.

Point IV: The trial court improperly balanced aggravating and mitigating factors by giving improper weight to two aggravating factors, wrongfully finding three aggravating factors and giving improper weight to a statutory mitigating factor.

Point V: The comparison of the facts of this case to other cases reviewed

by this Court demonstrates that the death penalty is disproportionate to other similarly culpable defendants that have been sentenced to life imprisonment.

Point VI: The state made an improper reference to Steven Evans' criminal records in the Orlando Police Department. The trial court erred in denying Evans' motion for mistrial.

Point VII: The state made Steven Evans' involvement in gang activity a feature of the trial. The trial court erred in permitting this evidence over continued and strenuous objection.

Point VIII: A death sentence grounded on a split vote is unconstitutional under the Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING EVANS TO BE COMPETENT TO STAND TRIAL.

After the jury was selected, the defense made a motion that the Court make a finding as to Mr. Evans' competency to proceed to trial. (T V 17) Court-appointed expert, Dr. Gutman changed his earlier opinion as to Evans' competency to stand trial, and believed Evans incompetent to stand trial. (T VI 15) The Court requested that Dr. Gutman and the other state experts appear to testify as to Evans' competency to stand trial. (T VI 21)

Dr. Michael Herkov visited with Mr. Evans the previous Saturday for 45 minutes. (T VI104) After reviewing Dr. Gutman's report and meeting with Evans, Dr. Herkov concluded that Evans was competent to proceed. (T VI 104) Dr. Allen Berns testified that he had last seen Evans on March 9th, 1998, and after reviewing Dr. Gutman's deposition and other documents provided by the defense, Evans was competent to proceed to trial. (T VI 107)

Dr. Gutman testified that on March 18, 1999 he found Mr. Evans marginally competent to stand trial although he suffered paranoid schizophrenia and was in

marginal remission. (T VI 109-12) After the last meeting, Dr. Gutman read the deposition material of events going back from people who were there at the time of the alleged offense, and details of what happened, and the fact that Evans would not entertain any consideration of the not guilty by reason of insanity defense. (T VI 114) This all combined provided strong evidence to believe that Evans was paranoid at the time of the offense and his mental illness may very well have prompted the behavior in the actions that occurred at the time of the alleged offense. (T VI 115)

Since at the time of the offense Evans was in a "disassembling mode",[10] he could not adequately help and aid in his own defense. (T VI 116) Evans required further help by a psychiatrist to bring out information about his illness and his paranoia and fully apprise him of all the details of a criminal defense of not guilty by reason of insanity. (T VI 115) Dr. Gutman concluded that Evans is not competent to stand trial because he is delusional about wanting to be non-delusional. (T VI 116) The Court found that Evans was competent to proceed. (T VI 130)

Rule 3.210(a), Florida Rules of Criminal Procedure provides:

> A person accused of a crime who is mentally incompetent to stand trial shall not be

---

[10] A form of paranoid schizophrenia where the individual wants so hard to look like he is sane. (VIp115)

proceeded against while he is incompetent.

Rule 3.211(a)(1) sets forth some considerations in determining the issue of competence to stand trial. These include, inter alia, a defendant's capacity to disclose to his attorney pertinent facts surrounding the offense; his ability to relate to his attorney; and his ability to assist his attorney in planning his defense. The constitutionally mandated standard for determining an individual's competency, is whether the accused has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); and Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979).

Florida courts have taken the view that in a competency determination, the trial judge is the finder of fact. A trial court's decision on this issue will not be reversed on appeal unless an abuse of the exercise of his discretion appears. Fowler v. State, 255 So.2d 513 (Fla. 1971) and King v. State, 387 So.2d 463 (Fla. 1st DCA 1980).

The mere numerical tabulation of the mental health experts reports submitted during the competency hearing supports the conclusion that Evans was competent

to stand trial. However, the ultimate determination of competence is within the discretion of the trial judge. The Florida Supreme Court has stressed that psychiatric reports are "merely advisory to the court, which itself retains responsibility of decision." Block v. State, 69 So.2d 344, 346 (Fla. 1954). That determination, of course, is subject to review by the appellate court upon an entire record.

> ...The question of whether or not Appellant suffered from a clinically recognized disorder or psychosis is a question of fact, viewed by the usual clearly erroneous standard. If we decide that the evidence requires a finding of that mental disorder, then the further decision as to competency or incompetency is a matter upon which the appellate court assumed a greater decisional role and takes a "hard look" at the record. (Citation omitted)

Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980).

In the case at bar, Evans was involuntarily committed to the state mental hospital on two occassions based upon the unanimous agreement of mental health experts that Evans was not competent to stand trial. However, the trial court was presented with three different diagnosis: Dr. Berns testified that Evans suffer from a bipolar disorder and that there is a strong possibility of mental illness; Dr. Herkov testified that Evans suffers from a psychotic disorder not otherwise specified (a

"catch all" diagnosis[11]) ; and Dr. Gutman on the eve of trial changed his diagnosis to one that Evans is a "dissembler" which is a rare form of paranoid schizophrenia.

During the competency hearing, Dr. Gutman's testimony put the trial court on notice that because of Evans' mental condition he was not able to assist in the defense of not guilty by reason of insanity. Dr. Berns had not seen Evans in over a year, and based his testimony only upon reviewing records and concluded that Evans was competent to stand trial. The trial court should not have given much wieght to Dr. Berns' testimony. Dr. Herkov had recently visited Evans and opined that he was competent although he could not specify his mental disorder.

Appellant asserts that competency to proceed to trial is not only can the accused answer questions, understand the nature of the charges and who are the major participants in the courtroom. The record supports that Evans was competent in these areas. However, competency also relates to the ability to relate to and assist counsel in the preparation of the defense. This is a problematic issue because the trial court is confronted with deciding the issue of whether an accussed is able but unwilling to assist counsel (competent) or unwilling and **unable** to assist

[11] Amended Sentencing Order. (R XX 2330)

because of mental illnesss (incompetent). Based upon an expert that had last seen Evans over a year before, and an expert that could not provide a precise diagnosis, Judge Cohen found Evans to be competent to stand trial. However, a close review of the evidence at trial clearly shows that this ruling was error.

When the victim Capone had moved the get away car in Sanford, Evans believed that meant Capone had left him behind with the intent of stealing his money in Orlando. Capone shows up in Orlando one hour after Evans returned, and provided a plausible explanation for his actions, but Evans still believed that Capone's actions were motivated by the plan to rob him. This is consistent with Dr. Gutman's diagnosis.

Moreover, according to co-defendant Francis, when Evans arrived back at his girlfriend's apartment in Orlando, he began pacing back and forth and started to look kind of weird. (T VII 1275) Evans had an expression on his face, he looked like the joker in Batman. (T VII 276) Evans would pace back and forth sit down get up and pace back and forth again. (T VII 1276) Evans looked like he was bouncing off the walls. (T VII 1276) Francis remarked "what's wrong with this joker." (T VII 1276) One minute Evans would be mad, the next minute he would be laughing. (T VII 1277) Francis also remarked "this joker is shot out." (T VII 1277) This is consistent with Dr. Gutman's diagnosis.

According to Blane Stafford, at the time of the offense Evans was acting like he was crazy. (T VI 1014) Evans was looking like his mind just wasn't quite right. (T VI 1014) At trial and under oath after watching the entire trial, Evans denied ever knowing co-defendant Gervalow Ward. (T VII 1384) Evans testified that he knew co-defendant Edward Francis who he met through Mark Quinn, a car detailer. (T VII 1384) Evans admitted knowing Shana Wright but denied that she was a girlfriend, or that he had ever been in her apartment. (T VII 1384) Evans denied being involved in the murder in any way. (T VII 1385) This is consistent with Dr. Gutman's diagnosis.

Dr. Gutman had it right that Evans suffers from paranoid schizophrenia, and was not sane at the time of the offense. Due to the illness, he was convinced that the victim was out to rob him the night of the murder without a rational basis. After being stranded in Sanford, Evans by all accounts was acting crazy. Since Evans is a dissembler he denied any involvement in the crime and in his delusion precluded his defense team from asserting the defense of not guilty by reason of insanity. Appellant submits that Judge Cohen's ruling constituted an abuse of discretion. Due process was violated thus entitling Appellant to a new trial.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

In finding that the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, the trial court wrote:

> After having been left behind in Seminole County, Defendant, Mr. Frances, Mr. Ward, and two others who had not been involved in the initial home invasion scheme made their way back to Orlando. At Defendant's direction, they lay in wait for Mr. Lewis to return. When he did, Defendant proceeded to orchestrate the beating of Mr. Lewis. He had Mr. Lewis gagged and bound, first by chain, then with telephone cord. Defendant fashioned a homemade silencer, placed it onto a handgun and, while Quinn and Francis escorted Mr. Lewis to the culvert, informed the victim of his intent to murder him. He then executed Mr. Lewis who was completely helpless to resist, shooting him in the head six times. (R XX 2324)

Like all aggravating circumstances, this one must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The State failed to meet its burden of proof in this case.

This Court set forth the definitive commentary on Section 921.141(5)(i),

Florida Statutes (1995) (the CCP aggravating factor), in Jackson v. State, 648 So.2d 85, 89 (Fla. 1994):

> in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)...; and that the defendant exhibited heightened premeditation (premeditated)...; and that the defendant had no pretense of moral or legal justification.

(Citations omitted). A pretense of justification is **any** color able claim based at least partly on uncontroverted evidence, even though such evidence is insufficient to excuse the murder. Walls v. State, 641 So.2d 381 (Fla. 1994). "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). This Court has "consistently held that application of this aggravating factor requires a finding of ... a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

The record in this case is absolutely devoid of **any** evidence that Steven M. Evans planned and calculated the killing of Kenneth Lewis well in advance of the shooting.[12] The totality of the evidence indicates that the shooting was quickly accomplished in seconds and was probably the product of rage or passion. The **apparent** motive (although the State's theory is lacking in this regard) was anger and rage.

Kenneth Lewis had left Evans and other gang members in Sanford during an attempted home invasion. When Evans arrived back at his girlfriend's apartment in Orlando, he began pacing back and forth and started to look kind of weird. (T VII 1275) Evans had an expression on his face, he looked like the joker in Batman. (T VII 276) Evans would pace back and forth sit down get up and pace back and forth again. (T VII 1276) Evans looked like he was bouncing off the walls. (T VII 1276) Francis remarked "what's wrong with this joker." (T VII 1276) One minute Evans would be mad, the next minute he would be laughing. (T VII 1277) Francis also remarked "this joker is shot out." (T VII 1277) At the time of the offense Evans was acting like he was crazy. (T VI 1014) Evans was looking like his mind just wasn't quite right. (T VI 1014)

---

[12] In fact, the State failed to prove an advanced "plan" of **any** duration, much less a plan of **lengthy** duration.

The facts of this case show a killing in a fit of rage or panic. This type of homicide does not qualify as cold, calculated, and premeditated without any pretense of moral or legal justification. See, e.g., Crump v. State, 622 So.2d 963, 972 (Fla. 1993); Mitchell v. State, 527 So.2d 179 (Fla. 1988); and Jackson v. State, 648 So.2d 85 (Fla. 1994). Kenneth Lewis betrayed the gang, and Evans was angry. The trial court found that both statutory mental mitigators were present at the time of the murder because of Evans mental illness. This should eliminate the application of this aggravating factor.

This Court has rejected this particular aggravating factor in other cases where the proof was much greater than in the instant case. See, e.g., Barwick v. State, 660 So.2d 685, 696 (Fla. 1995) (defendant selected his victim in a calculated manner and armed himself but only planned to rape, rob, and burglarize -- not kill); Douglas v. State, 575 So.2d 165 (Fla. 1991) (following prison release, defendant kidnapped girlfriend and her new husband at gunpoint, led them to a remote location, forced them to have sex at gunpoint [like a last meal], then shattered the man's skull with the stock of the rifle and fired several shots into his head); and Irizarry v. State, 497 So.2d 822 (Fla. 1986) (ex-wife killed and her new lover

critically injured in machete attack by defendant who had a prearranged alibi[13]).

The State failed to meet its burden of proving this circumstance beyond a reasonable doubt. The State failed to show **any** evidence of a calculated plan. The State clearly failed to prove that the killing was the product of cool and calm reflection. The shooting was accomplished in a matter of seconds, not minutes. Finally, there was at least a **pretense** of moral or legal justification. At the very least, he acted in an emotional frenzy, panic, or fit of rage when he became angry that Kenneth Lewis had betrayed him and the gang. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

---

[13] This Court's opinion did not directly address whether the aggravating factors were improperly found; it simply reversed the death sentence as disproportionate under the circumstances.

POINT III

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

In finding that the murder was especially heinous, atrocious or cruel, the trial court wrote:

> He had watched his executioner prepare the means of his death, and one can only imagine the terror Mr. Lewis suffered during the long walk down the stairs, behind the apartment complex, around a fence and down the banks of a culvert, knowing all along that he would soon be dead. Steven Evans then erased any hope Mr. Lewis might have had by formally pronouncing sentence, telling him he was going to die. (R XX 2324)

Appellant submits that the court's finding of this particular aggravating circumstance misinterprets the evidence. The State failed to meet their burden of proving this aggravator beyond a reasonable doubt.

(a) The victim was unaware that he was about to die.

Kenneth Lewis clearly knew that he had made a mistake in coming to Shana Wright's apartment. The situation had immediately deteriorated when Lewis was beaten by his fellow gang members as punishment for leaving them in Sanford. Lewis had no clue that the assailants were going to kill him. In fact, the co-defendant's testified that they had no idea that Evans was going to murder Lewis

when they took him outside to the culvert were Lewis was shot .

(b) Appellant did not intend for Lewis to suffer.

Evans was intensely angry at Lewis for leaving him in Sanford and as found by the court operating under an extreme mental disturbance. This also militates against finding this circumstance. In Porter v. State, 564 So.2d 1060 (Fla. 1990), this Court rejected a finding of the circumstance since the murders were crimes of passion rather than designed to be painful. In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court held that killings committed in an "emotional rage" were not heinous, atrocious, or cruel. Evans' mental and emotional defects militate against the application as well as the weight, if found, to be given this aggravating circumstance. See, Michael v. State, 437 So.2d 138 (Fla. 1983); Jones v. State, 332 So.2d 615 (Fla. 1976); and Huckaby v. State, 343 So.2d 29 (Fla. 1979). Additionally, Evans ingestion of alcohol and marijuana militates against a finding of this circumstances. See, e.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988).

The trial court focused inappropriately on the fact that Kenneth Lewis was in terror at the time his wounds were inflicted. It is completely irrelevant if Lewis were unconscious, which the medical examiner could not rule out. Dr. Broussard conceded that he had no way of determining if Lewis was in fact conscious or unconscious. (T V 875) Therefore, it is abundantly clear from the record that the

trial court was absolutely wrong in writing, "He had watched his executioner prepare the means of his death." There was no evidence that Lewis knew he was to be shot, therefore, the trial court reliance on the terror Lewis was suffering "during the long walk" prior to his death was speculation and misplaced.

In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), this Court announced the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." In the realm of first-degree murders, Kenneth Lewis' shooting was "ordinary." Even viewing the seriously flawed and contradictory evidence in the light most favorable to the State, Steven Evans shot Kenneth Lewis in a fit of anger and rage.

Evans pushed Lewis down on the ground, stated to Lewis "we are the last three, we are the last three, we are the last three mother fuckers that you left. We are the last three mother fuckers that you are going to see on this earth." Evans then put the shampoo bottle to Capone's head and shot him four times in the head and the fifth time it missed and went into the water. (T VI 1161) The entire incident lasted a matter of seconds. It was over in less than a minute. Evans certainly did not intend for Lewis to suffer. When the encounter began, Lewis had no reason to believe he was about to die. He only knew that Appellant was angry.

Florida law reserves this particular aggravating factor for killings where the victim was tortured, e.g., Douglas v. State, 575 So.2d 165 (Fla. 1991), or forced to contemplate the certainty of their own death,[14] e.g., Sochor v. State, 619 So.2d 285 (Fla. 1983). There must be "such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The factor applies to torturous murders, "as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908 (Fla. 1990). Furthermore, the defendant must have intended to cause the victim "extreme pain or prolonged suffering." Elam v. State, 636 So.2d 1312 (Fla. 1994).

This Court has refused to uphold this aggravating circumstance in other, factually similar cases. Brown v. State, 526 So.2d 903, 906-7 (Fla. 1988) (HAC improperly found where victim shot in the arm, begged for his life, then shot in the head); Rivera v. State, 545 So.2d 864 (Fla. 1989) (defenseless police officer shot three times within sixteen seconds held not to be HAC or CCP); Street v. State, 636 So.2d 1297 (Fla. 1994) (defenseless police officer watched his partner being

[14] The trial court's conclusion that Kenneth Lewis knew he was about to die is not supported by the evidence. In reality, the entire event took place in seconds. Less than a minute, and it was over.

killed with the knowledge that he was next held not to be HAC or CCP); Green v. State, 641 So.2d 391 (Fla. 1994) (victim's hands tied behind back, victim driven a short distance, and victim knew defendant had gun were not adequate "additional acts" to justify HAC); Clark v. State, 609 So.2d 513 (Fla. 1992) (HAC improperly found even though victim was probably conscious after the first shot and therefore was probably aware of his impending death prior to the second shot); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979) (HAC improperly found where victim shot in the chest, attempted to flee, then shot in the back); Burns v. State, 609 So.2d 600 (Fla. 1992) (trooper shot once during struggle causing rapid unconsciousness followed by death within a few minutes); Ferrell v. State, 686 So.2d 1324 (Fla. 1996) (HAC not supported where victim was shot five times after being brought to remote area); Amoros v. State, 531 So.2d 1256 (Fla. 1988) [murderer fired three shots into the victim at close range]; Teffeteller v. State, 439 So.2d 840 (1983) [victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain, and knew he was facing death]; Elam v. State, 636 So.2d 1312 (Fla. 1994) [victim was bludgeoned to death with a brick to his head and had defensive wounds, the attack lasted for about one minute]; McKinney v. State, 579 So.2d 80 (Fla. 1991) [HAC not shown where semiconscious victim suffered seven gunshot wounds on right side of body and two acute lacerations on head]; Hallman v. State,

560 So.2d 233 (Fla. 1990) [guard killed with single shot to the chest with death probably occurring within a matter of a few minutes]; and, Williams v. State, 574 So.2d 136 (Fla. 1991) [defendant restrained bank guard, then shot her with little delay].

Several opinions from this Court are practically indistinguishable from Lewis' shooting. In Kearse v. State, 662 So.2d 677 (Fla. 1995), the victim sustained extensive injuries from the numerous gunshot wounds, but there was no evidence that Kearse "intended to cause the victim unnecessary and prolonged suffering." Kearse, 662 So.2d at 686, quoting Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993). The medical examiner in Kearse could not offer any information about the sequence of the wounds and stated that the victim could have remained conscious for a short time or rapidly gone into shock. The taxi driver who arrived at the scene as the shooter sped away described the victim as "dead or dying." Kearse, 662 So.2d at 686. This Court could not find beyond a reasonable doubt that the murder was heinous, atrocious, or cruel. (Emphasis added).

This Court must also remember that Appellant suffers from mental illness, and his motive was apparently based on his rage and resulting anger at Lewis for leaving him in Sanford. The mental state of the perpetrator is an important factor in determining whether or not the State has proven this aggravating circumstance

beyond a reasonable doubt. There must be proof that the defendant **intended** to inflict pain or was utterly indifferent to it. Generally, murders committed in the heat of passion are not heinous, atrocious, or cruel. See, e.g., Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Santos v. State, 591 So.2d 160, 163 (Fla. 1991); and Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990).

Appellant wants to make sure this Court understands what the shooting was **not**. Kenneth Lewis' shooting was **not** a long, drawn-out affair. Appellant did not intend for the victim to suffer. This Court has upheld a finding of HAC where shootings are separated from "ordinary shootings" by additional acts and a perpetrator's intent that the victim suffer. See, e.g., Hannon v. State, 638 So.2d 39 (Fla. 1994) (victim witnessed his friend and roommate savagely stabbed -- victim pled for his life, ran upstairs, hid under bed before being shot six times as he huddled, defenseless); Lucas v. State, 613 So.2d 408 (Fla. 1992) (defendant stalked and threatened victim for days before shooting, then savagely beat victim as she pled for her life before he finished her off with additional shots); and Rodriguez v. State, 609 So.2d 493 (Fla. 1992) (defendant bragged that he shot victim first in the knee and then in the stomach before victim ran over 200 feet pleading for his life only to be chased down and shot a fourth time behind car where he sought cover).

This Court rejected the HAC circumstance in Shere v. State, 579 So.2d 86

(Fla. 1991), where the victim suffered ten gunshot wounds. The victim in Shere died quickly. This Court also pointed out the importance of the defendant's intent:

> Likewise, there is no evidence to suggest that Shere desired to inflict a high degree of pain. Four of the wounds were potentially fatal, which is an indication that they tried to kill him, not torture him.

Shere, 579 So.2d at 96. Similarly, Steven Evans' shooting of Kenneth Lewis occurred very quickly, a matter of seconds. Less than one minute. Although Evans clearly intended to kill Kenneth Lewis, he did not intend for Lewis to suffer. The evidence does not prove the existence of the aggravating circumstance beyond a reasonable doubt.

POINT IV

THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS.

The trial court's legal responsibility under its role as a sentence is to make its own independent balancing of the case circumstances and to make its own decision on the appropriate penalty. In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) this Court outlined the Florida scheme as a five step process, each step an integral stage necessary to remove arbitrariness from the outcome as to who receives death and who does not. The first step is the evidentiary penalty phase hearing. Second is the jury's penalty recommendation. Third is the trial judge's decision as to penalty. Fourth is the requirement that the trial judge justify any sentence of death in writing. Fifth is the Florida Supreme Court's review.

The description in Dixon of steps three and four are the guideposts for the trial judge's role. Significant is that the perceived purpose of the Florida rule placing sentencing responsibility in the hands of the trial judge rather than the trial jury is to protect against those situations where a jury might inappropriately recommend death. The Supreme Court explained:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound

> by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die, the sentence is viewed in the light of judicial experience.

Dixon at 8.

To a layman, any murder may seem especially atrocious, even if medical evidence indicates unconsciousness would occur within seconds of the gunshot wound. Likewise, the second and third shot fired, although in only a matter of seconds appears cold, calculating and especially heinous. To a layman, photographs of a deceased man would invite the emotions. The function of the Florida scheme is to guarantee that "the inflamed emotions of jurors can no longer sentence a man to die." The concept is to infuse the penalty decision with the light of judicial experience. It is the responsibility of the trial court "with experience in the facts of criminality...to balance the facts of this case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants."

The fourth step outlined in Dixon also aids in defining the trial judge's role as that of guarding against the unwarranted imposition of the death sentence. The

fourth step required by Fla. Stat. 921.141, is that the trial judge justifies his sentence in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute. Dixon at 8.

The Court is well aware that a jury's recommendation is to be afforded great weight. That standard developed from Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), where restrictions were placed on a trial court imposing death, despite a jury recommendation for life. While a death recommendation should also be given serious consideration, the consideration is not of an equal nature with that to be given a life recommendation. This Court addressed this distinction in Thompson v. State, 328 So.2d 1 (Fla. 1976):

> It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

The trial judge's authority to contravene the jury's recommendation is to

protect defendants from lay overreaction in cases not appropriate for the death sentence, as decreed in Dixon. In the instant case, the jury's recommendation in this case was a majority of 11-1, that supports the likelihood that the vote was based on emotions, other inappropriate considerations or laypersons' inexperience, which is the pitfalls described in Dixon.

Inappropriate considerations that may have influenced the jury's vote include:

1. Inflamed Emotions. Photographs of the deceased were shown to the jury. Moreover, inflamed emotions by laypersons inexperienced in such matters can occur in any murder trial.

2. Improper Character Evidence. The prosecution asked state witness Amanda Taylor, a latent print examiner for the Orlando Police Department, the following question: “And did you compare those to prints from the records of the Orlando Police Department of Steven Maurice Evans?” (T VI 1107) The defense moved for a mistrial on the grounds that the above question made a reasonable inference that Evans was previously arrested or convicted of some offense which is improper character evidence. (T VI 1109)

3. Gang Activity. The state made as a feature of the trial Evans’ gang activity. During the trial, the defense requested a standing objection to the gang’s plan to rob somebody in Sanford. (T VI 1132) The defense had to object

to the repeated reference about gangs and the reference of the gang activity during trial and in closing argument. (T VI 1125; VII 1248)

4. Mental Mitigation. The jury was bombarded with testimony from mental health experts on statutory mental mitigation that is not within the ordinary experience and understanding of the layperson.

Due to the above influences to the jury during the trial the penalty recommendation was based upon improper considerations, and the jury recommendation should be disregarded. This Court has held in several cases that a jury's recommendation may be seen as "tainted" and, therefore, not worthy of full credit. See, e.g., Trawick v. State, 473 So.2d 1235 (Fla. 1985).

IMPROPER WEIGHT OF AGGRAVATION

The trial court improperly found that aggravating circumstances exist in this case, improperly weighed them, and therefore the penalty is both disproportionate and unjust. Appellant incorporates arguments already made to the Court and here simply highlights important features and additional case authority.

A. The trial court erred in instructing the jury and also in concluding that the murder was especially heinous, atrocious, or cruel (HAC); during the course of a felony; and cold, calculated and premeditated (CCP).

1. HAC

Appellant objected to any instruction at all on this particular aggravating

circumstance contending that the evidence did not support it. (T X 1841) The trial court overruled that objection and ultimately concluded that the murder was especially heinous, atrocious, or cruel. (R XX 2324) In order for the HAC aggravating circumstance to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla.1992). Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental **torture** of the victim. Hartley v. State, 686 So.2d 1316 (Fla. 1996) In this case, gang members repeatedly struck the victim in the apartment for 15 minutes, then tied him up. The police arrived investigating a car theft, and the victim was placed in a back room. After the police left, the evidence reflects that the murder was carried out quickly. Speculation that the victim may have realized that the gang members intended more than punishment is insufficient to support this aggravating factor.

2. Felony Murder

In Terry v. State, 668 So.2d 954, 965 (Fla. 1996), this Court recognized that a contemporaneous conviction (especially under a principal theory) diminishes the weight that should be given to this aggravating factor. The trial court found that the

murder was committed while Evans was engaged in the commission of kidnaping.[15] (R XX 2323) The court wrote that:

> Mr. Lewis was seized by Defendant and his assoicates bound and gagged. At one point, Mr. Lewis was forcibly moved into a back bedroom while the police were at the door to the apartment investigating a reported theft of an automobile. Subsequently, he was forced, at gunpoint, out of the apartment where he met his demise....

(R XX 2323) Appellant is mindful that the jury found Evans guilty of kidnapping, however, the evidence recited by the trial court simply does not support a finding that the murder was committed during the commission of a kidnaping. The slight movement of Kenneth Lewis on the apartment grounds down to the culvert is insufficient asportation to support a finding of this aggravating factor. The State failed to meet its burden of proving this circumstance beyond a reasonable doubt.

3. Cold, calculated and pre-meditated

While the execution style shootings can demonstrate premeditation, there is no evidence that there was the "heightened premeditation" that is required for this aggravating factor. Any theories that he committed this homicide with reflection and planning to a heightened degree of premeditation is unsupported by the

[15] §921.141(5)(d), Fla. Stat.

evidence. Due to the lack of evidence, it is equally plausible that these crimes were committed impulsively through intense rage.

The evidence must prove beyond a reasonable doubt that the murder was committed with reflection and planning, a cold calculated manner without any pretext of moral or legal justification. Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Preston v. State, 444 So.2d 939 (Fla. 1984); and Jent v. State, 408 So.2d 1024 (Fla. 1981).

There must be a careful plan or prearranged design to kill as required in Rogers v. State, 511 So.2d 526 (Fla. 1987). There was no evidence of such a plan or design. A plan to kill cannot be inferred from lack of evidence, a mere suspicion is insufficient. Lloyd v. State, 524 So.2d 396 (Fla. 1988). The court found this aggravating factor because Evans, in a rage, spent minutes before the shooting making a silencer on the murder weapon. This aggravator requires cool, calm reflection to qualify as heightened premeditation. Where there is not cool, calm reflection before the murder it is an impulsive killing. Impulsive killings do not qualify for the premeditation aggravating circumstance. Rogers v. State, 511 So.2d 526 (Fla. 1987); Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 439 So.2d 1372 (Fla. 1983).

The Supreme Court has consistently opined that this aggravating

circumstance is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). While the method of killing appears execution style, Evans state of mind at the time of the killing was of intense anger and rage, and therefore was not an act based on cool and calm reflection.

B. The weight of the "under sentence of imprisonment"and "prior violent felony conviction" circumstance aggravator is slight.

1. Under sentence of Imprisonment

Appellant concedes that the evidence is sufficient to support the trial court's finding that the murder was committed by a person under sentence of imprisonment or community control.[16] However, the state conceded in their sentencing memorandum that since Evans escape involved not returning to the work release center from his assigned job it should only be given "some" weight by the trial court. The state opined that "were this a situation where the murder was somehow connected to the escape this aggravating circumstance would be entitled to great weight." (R XX 2261) By the state's own admission the trial court should have given this aggravating circumstance very little weight.

2. Prior conviction for felony involving threat of violence.

[16] §921.141(5)(a), Fla. Stat.

Appellant concedes proof of this circumstance but contends that the weight to be afforded it should be minor. Unlike the jury, this Court's experience in sentencing criminal defendants allow the Court to put these convictions in truer perspective, especially relative to other defendant's histories for violent felony convictions:

1. There was no prior violent incident in time.

2. Evans was merely a principle in the prior robbery.

In the state's sentencing memorandum, it conceded that this aggravating circumstance should have lesser weight: "The state acknowledges the fact that the Defeandant was merely a principle in the prior robbery which lessens the weight which the court should accord this aggravating circumstance." (R XX 2261) Thus, the history of Steven Evans fails to establish a pattern of violent criminality.

STATUTORY MITIGATION CIRCUMSTANCES

The trial court found that the two mental statutory mitigating circumstances have been proven to a "reasonably convinced" standard. The trial court gave the influence of extreme mental or emotional disturbance statutory mitigating circumstance "substantial weight" due to the totality of the testimony of the three mental health experts. The trial court also found the statutory mitigating

circumstance "appreciate the criminality of his conduct and conform his conduct to the requirements of law was substantially impaired," but gave it improper weight. The trial court wrongly focused upon the "appreciate the criminality of his conduct" prong of the factor and misinterpreted the evidence in analyzing the applicability of the "conform his conduct to the requirements of law was substantially impaired" statutory mitigating circumstance.

The three mental health experts agree that Mr. Evans suffers from mental illness, and all three agreed that stress and drug use exacerbated his mental health condition. According to the lay witnesses, Evans began to act strangely after he already returned to Orlando and beat-up Shana Wright with apparently no provocation. Therefore, the trial courts reliance on Evans capability "of making his way to a nearby residence and securing transportation back to Orlando" and "managed to get back to Orlando before Mr. Lewis so that he could await his victim's arrival" is irrelevant in determining the weight of this statutory mental mitigating factor. Moreover, the trial court statement "Defendant was in control enough to interrogate Mr. Lewis" is very misleading. The undisputed evidence was that:

> Mr. Lewis knocked on the door, Ward grabbed the door and swung it open. (T VI 1144) Ward grabbed his shirt and Francis grabbed the other side of his shirt and pulled him in to

> the apartment and took the guns that he had off of him. (T VI 1144; V 913) Lewis possessed a sawed off shot gun and a 22 caliber gun. (T VI 1144) Lewis was asked why he left everyone behind in Sanford. (T VII 1258) Lewis replied " I didn't leave you" and said he was looking for the group. (T VII 1258) The guns were removed from Lewis, and the whole group jumped on him and punched him. (T VI 1145) Wright never saw Evans hit Lewis. (T IV 762) Later Wright and Evans were in her bedroom and saw the other guys beating Lewis in the livingroom. (T IV 742; 762) Members of the group punched Lewis, asking why he had left them. (T VI 1146,V 918) The beating of Lewis went on for ten to fifteen minutes. (T VI 1150)

The foregoing was hardly a reasoned controlled interrogation, but rather a mob beating. The remainder of the trial courts sentencing order detailed actions by Evans to avoid detection.

In addressing the second prong of the factor, the trial court identified Dr. Gutman's opinion that Evans' mental condition prevented him from conforming his conduct to the requirements of law, and that "the other doctors were less sure." The other doctors were not sure because of the lack of evidence caused primarily from the inability or unwillingness of Evans to talk to them about the murder. The trial court dismissed the lay testimony as to Evans' conduct at the time of the murder as ambiguous. The lay witnesses Wright, Stafford and Francis each described Evans conduct in different terminology, but they were all consistent in that Evans was acting very strangely at the time of the murder.

The trial court wrongly reasoned that since Evans avoided detection, that lessens the weight to provide this statutory mitigating factor. The appellant does not need to prove both prongs of this factor, but rather one. Appellant provided uncontroverted expert testimony and lay witnesses that he was suffering from a mental illness at the time of the murder to the extent that his ability to conform his conduct to the requirements of law was impaired. Other experts did not contradict this finding but rather testified that they did not have sufficient evidence to offer an opinion. Moreover, the state provided no evidence to rebut this factor, but argued that Evans' actions to avoid detection trumps this factor. The trial court wrongly adopted this rationale. This factor should have been given substantial weight.

NON-STATUTORY MITIGATION CIRCUMSTANCES

The trial court found that the seven specific non-statutory mitigating circumstances argued to the jury have been proved to a "reasonably convinced" standard. The trial court found the following non-statutory mitigating circumstances:

(1) The appellant had a history of alcohol and substance abuse;

(2) The appellant drank alcohol and took drugs the evening of the murder;

(3) The appellant helped his mother in raising his mentally challenged younger brother and sister;

(4) The appellant was a contributing member in church activities;

(5) The appellant served as a volunteer Explorer with local firefighters;

The mitigation in this case is both substantive and objective. It must be recognized and should be given significant weight. The Appellant concedes that at least two aggravating circumstances was proven, at best three which the state conceded should not be given much weight. The mitigation balances well against the aggravation of this case, especially due to low-weight nature of the aggravation in relation to other cases of premeditated murder.

As noted earlier, per **Dixon**, this Court must employ its judicial experience regarding what cases are appropriate for death and what cases are not. The following is decisional authority of this Court of which appellant urges this court to rely: Defendant is mentally retarded. See Mason v. State, 489 So.2d 734 (Fla. 1986); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). Defendant has organic brain damage. State v. Sireci, 502 So.2d 1221 (Fla. 1987). Defendant is an alcoholic and/or was under the influence at the time of the homicide. Nibert v. State, 508 So.2d 1 (Fla. 1987); Norris v. State, 429 So.2d 688 (Fla. 1983); Masterson v. State, 516 So.2d 256 (Fla. 1987); Fead v. State, 512 So.2d 176 (Fla. 1987). Defendant was an abused or battered child. Shue v. State, 366 So.2d 387 (Fla.

1981); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990); Lara v. State, 464 So.2d 1173 (Fla. 1985); Freeman v. State, 547 So.2d 125 (Fla. 1989); Campbell v. State, 571 So.2d 415 (Fla. 1990); and Nibert v. State, 574 So.2d 1059 (Fla. 1990). Defendant came from a deprived childhood and poor upbringing. Thompson v. State, 456 So.2d 444 (Fla. 1984); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Lara, supra; Herring v. State, 446 So.2d 1049 (Fla. 1984); White v. State, 446 So.2d 1031 (Fla. 1984); Scott v. State, 411 So.2d 866 (Fla. 1982).

POINT V

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

The trial court imposed a death sentence here after finding five statutory aggravating factors. (R XX 2330) As previously set forth, the findings of cold, calculated and premeditated murder, felony murder and an especially heinous, atrocious or cruel murder were improper both legally and factually. Only two statutory aggravating factor may properly be said to have been proven beyond a reasonable doubt, that being that Evans had a prior felony conviction and was under confinement. This Court has rejected imposition of the death penalty based solely on this one statutory aggravating factor and where, as here, substantial mitigation exists, the death penalty is disproportionate to the offense. See Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988)

Even assuming that the felony murder, CCP and/or the HAC statutory factor(s) apply, a death sentence is disproportionate where other defendants who committed similar crimes received life sentences rather than death sentences.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five

statutory aggravating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence because "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811.

Like Fitzpatrick, this is not the most aggravated and unmitigated of most serious crimes. When the facts of this crime are compared to those of the following cases where death sentences were ruled to be disproportionate, it is evident that the death sentence must be reversed and the matter remanded for imposition of a life sentence: Blakely v. State, 561 So.2d 560 (Fla.1990)(death penalty disproportionate despite finding that murder was especially heinous, atrocious or cruel and cold, calculated, and premeditated, without pretense of moral or legal justification); Amoros v. State, 531 So.2d 1256 (Fla.1988); Garron v. State, 528 So.2d 353 (Fla.1988); Fead v. State, 512 So.2d 176 (Fla.1987), receded from on other grounds, Pentecost v. State, 545 So.2d 861, 863 n. 3 (Fla.1989); Proffitt v. State, 510 So.2d 896 (Fla.1987); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Wilson v. State, 493 So.2d 1019 (Fla.1986); Ross v. State, 474 So.2d 1170 (Fla.1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla.1981); Blair v. State, 406 So.2d 1103 (Fla.1981); Phippen v. State, 389 So.2d 991 (Fla.1980); Kampff v. State, 371 So.2d 1007 (Fla.1979); Menendez

v. State, 368 So.2d 1278 (Fla.1979); Chambers v. State, 339 So.2d 204 (Fla.1976); Halliwell v. State, 323 So.2d 557 (Fla.1975); DeAngelo v. State, 616 So.2d 440 (Fla. 1993).

Comparison of the facts of this case to those of the preceding cases shows that the death penalty is here disproportionate because other similarly culpable defendants have been sentenced to life imprisonment. Accordingly, the death sentence should be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole for twenty-five years.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER A STATE WITNESS REFERRED TO APPELLANT'S PRIOR CRIMINAL RECORD.

The prosecution asked state witness Amanda Taylor, a latent print examiner for the Orlando Police Department, the following question:

> Q: And did you compare those to prints from the records of the Orlando Police Department of Steven Maurice Evans?" (T VI 1107)

The defense moved for a mistrial on the grounds that the above question made a reasonable inference that Evans was previously arrested or convicted of some offense which is improper character evidence. (T VI 1109) The defense further stated there was no predicate for the state to ask such a question because they had just took a break in the trial so that Taylor could compare prints rolled that day from Evans with the prints gathered at the crime scene. Without comment, the trial court denied the motion for mistrial. (T VI 1110)

"[A] defendant's character may not be assailed by the State in a criminal prosecution unless good character of the accused has first been introduced." Young v. State, 141 Fla. 529, 195 So. 569 (1939). See also, §90.404(1), Fla. Stat. (1995). In Hardie v. State, 513 So.2d 791 (Fla. 4th DCA 1987), five police officers

were allowed to express their opinions as to the identity of the people depicted in a videotaped recording of the commission of the crime. The appellate court reversed because the testimony created the distinct impression that Hardie had been involved in other criminal activities or had a prior record. The identification at trial was based on the policemen's prior knowledge and contact with the defendant. Hardie v. State, 513 So.2d at 792. The appellate court concluded that the officers' testimony that they were acquainted with Hardie, as well as direct references to "other investigations," made it inconceivable that the jury would not have concluded that Hardie had been involved in prior criminal conduct.

The same conclusion can be drawn in Steven Evans' case. The prosecutor and witness were both law enforcement personnel, and his question was clear. Reference to Steven Evans' "records of the Orlando Police Department of Steven Maurice Evans" could mean nothing but a criminal history. This is especially true when one considers that the question was related to fingerprints. The jury undoubtedly concluded, from the prosecutor's remark, that Steven Evans had a prior criminal "record."

Even a reference to "mug shots" can be grounds for a new trial. See, e.g., Russell v. State, 445 So.2d 1091 (Fla. 3d DCA 1984). Another appellate court acknowledged that a police officer's statement that he had had other occasions to

"run across [the defendant]" arguably did carry an inference of prior criminal conduct. Coit v. State, 440 So.2d 409 (Fla. 5th DCA 1983). This Court has held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity of the crime that is demonstrated as evidence of guilt of the crime charged." Straight v. State, 396 So.2d 903, 908 (Fla. 1981). Accord Peek v. State, 488 So.2d 52, 56 (Fla. 1986).

Even if this Court finds the error harmless in the guilt phase, substantially different issues arise during the penalty phase of a capital trial that require an analysis *de novo*. Castro v. State, 547 So.2d 111 (Fla. 1989). The State cannot demonstrate beyond a reasonable doubt that there is no reasonable possibility that error below affected the jury's verdict of guilt and the resulting death recommendation. See State v. Lee, 531 So.2d 133 (Fla. 1988).

POINT VII

THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL EVIDENCE WHICH THE STATE COULD NOT TIE TO THE CRIME DENIED STEVEN EVANS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The defense made timely objection to the introduction of irrelevant and prejudicial evidence which the state could not tie the crime to Steven Evans concerning shell casings and gang activity/other bad acts.

SHELL CASING

Evidence technicians dispatched to the crime scene collected a lot of evidence from the apartment complex. The entire crime scene was dispersed, and police grabbed anything they thought **might** be of value. Appellant did not object to much of the evidence introduced at his trial. However, the defense made repeated objections to the introduction of the 22 caliber shell casing based on relevancy. (T VII 1217) Defense counsel pointed out that there was no evidence linking the shell case to Evans or the murder. The State failed to establish that their exhibit was involved in the crime in any way. The court ruled that since there had been testimony out there that there were weapons seen in the car by Shana Wright, the court is going to allow the evidence in over defense objection. (T VII 1223)

GANG ACTIVITY/OTHER BAD ACTS

The following are the references the state made to gang activity over objection: Edward M. Francis, known by the nickname "Jersey" was a member of the "Cryps" gang in Orlando Florida. (T VII 1242) Francis was in a cell of the Cryps gang called "the rolling sixties". (T VII 1243) Through Francis' association in the gang, he met an individual by the name of "Dred." (T VII 1243) Francis had a blue bandana hanging out of his pocket, which the Cryps wear, and L.A. approached him as another Cryps member. (T VII 1245) The defendant told Francis that he was also a member of the Cryps cell known as the "8-TRE". (T VII 1247) Through the defendant, Francis and "Dred" got involved in the 8-TRE gang. (T VII 1250) During closing arguments, the prosecutor stated "the OG, he is the leader". (T VIII 1452) The trial court overruled the objection. (T VIII 1452) The prosecutor further argued "Jersey said that Dred did it, again, to protect the OG, to protect the leader". (V8p1458)

In the evening of April 25, 1996 Francis traveled to Sanford with Dred, L.A. and Capone. (T VII 1251) The purpose of the trip was to rob some big dope dealer. (T VII 1252) Francis' role was to go to the front door with a gun. (T VII 1252) Before the crime could take place, L.A. came around and told Francis to come back to the original spot that we were at because someone had taken the car.

(R 1253) It was determined that the car was taken by Capone. (R 1253)

All relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (1995). Relevant evidence is evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. (1995). The State failed to prove the relevance of the shell casing introduced at Evans' trial. Defense counsel pointed out that it was found some distance from the crime scene. (T1201-5) Defense counsel contended that there was no nexus between the shell casing and Evans. However, the trial court allowed the introduction of the shell casing. Where the State failed to establish relevance, the court should have excluded the evidence. Any slight probative value was outweighed by the substantial prejudice. §90.403, Fla. Stat. (1995).

Likewise, the gang activity had relevance to explain how the co-defendants got acquainted. However, the relevance of this evidence is marginal at best to prove the murder of Kenneth Lewis. Any slight probative value was outweighed by the substantial prejudice. §90.403, Fla. Stat. (1995).

Moreover, the plan to conduct a home invasion of a drug dealer hours before the murder was not relevant at all. The fact that Evans was left behind by Lewis in Sanford was relevant. What matter in factual dispute or matter needed to provide the jury with a better understanding of the issues in dispute was served by the introduction of testimony that hours before the murder there was a plan to commit

a home invasion? There is none, and the state's motive to introduce evidence of this activity was to inflame the passions of the jury. Any slight probative value was outweighed by the substantial prejudice. §90.403, Fla. Stat. (1995).

Thus, the probative value of the testimony about the Shell Casing, Gang Activity and planned Home Invasion was far outweighed by its unfair prejudice. Additionally, the trial court's failure to exclude the bad acts evidence was error. The combination of these errors denied Evans a fair trial.

POINT VIII

STEVEN EVANS DEATH SENTENCE WHICH IS GROUNDED ON A SPLIT JURY VOTE OF (11-1) IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Kenneth Lewis had left Evans and other gang members in Sanford during an attempted home invasion. When Evans arrived back at his girlfriend's apartment in Orlando, he began pacing back and forth and started to look kind of weird. (T VII 1275) Evans had an expression on his face, he looked like the joker in Batman. (T VII 276) Evans would pace back and forth sit down get up and pace back and forth again. (T VII 1276) Evans looked like he was bouncing off the walls. (T VII 1276) Francis remarked "what's wrong with this joker." (T VII 1276) One minute Evans would be mad, the next minute he would be laughing. (T VII 1277) Francis also remarked "this joker is shot out." (T VII 1277) At the time of the offense Evans was acting like he was crazy. (T VI 1014) Evans was looking like his mind just wasn't quite right. (T VI 1014) In the penalty phase, after the testimony from three mental health experts that Evans suffers from mental illness, the jury recommended by a split vote of 11-1 that Evans should be executed for the murder of Kenneth Lewis. This recommendation is flawed and should be overturned.

The Eighth and Fourteenth Amendments requires a heightened degree of

reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So.2d 833, 839 n.1, 845 (Fla. 1988). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on split vote jury recommendations. See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). However, Appellant maintains that allowing a split vote of the jury to determine Evans' fate violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, 17, 21, and 22, of the Florida Constitution.

In addressing the number of jurors[17] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a

[17] Counsel recognizes that the cited cases wrestle with the appropriate number of jurors to determine guilt/innocence rather than penalty. Appellant cites them as persuasive authority by analogy.

means of legitimating society's decision to impose the death penalty." Williams v. Florida, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmun agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

Florida's scheme violates constitutional guarantees due to its failure to require unanimity in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Unless a capital jury finds that the State has proven at least one aggravating circumstance beyond a reasonable doubt, a death sentence is not legally permissible. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Florida's procedure currently allows a death recommendation even where five of the twelve jurors find that the State proved no aggravating factors beyond a reasonable doubt, as long as the other seven jurors conclude otherwise.

Additional constitutional infirmity is noted when one realizes that the seven jurors voting for death could each find a different aggravating factor. Such a realization makes it abundantly clear that Florida's death sentencing scheme is rife with constitutional infirmity. Steven Evans' death sentence, which is based on a

split (11-1) vote of the jury, is unconstitutional. This Court should vacate Appellant's death sentence and remand for imposition of a life sentence without possibility of parole. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate his convictions and remand for a new trial as to Points I, VI and VII. As for Points II, III, IV, V and VIII vacate Steven Evans's death sentence and remand for the imposition of a sentence of life in prison without possibility of parole.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Steven M. Evans, DC# 330290, Florida State Prison, P.O. Box 747, Starke, FL., 32091 this 2nd day of May, 2000.

_____

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

_____

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER