IN THE SUPREME COURT OF FLORIDA

LAWRENCE JOEY SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC01-2103
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

The Pasco County Grand Jury indicted the appellant, Lawrence Joey Smith, and his codefendant, Faunce L. Pearce, for Count One, the first-degree premeditated murder of Robert Crawford on September 14, 1999, and Count Two, the attempted first-degree premeditated murder of Stephen Tuttle on the same date. [V1, 5-6]

Smith was separately tried by jury before Circuit Judge Maynard F. Swanson, Jr., on April 30 to May 3, 2001. [V10, 1, 3; V15, 710] The court denied the defense motion for judgment of acquittal. [V 670-71] The jury found Smith guilty as charged on both counts. [V4, 689, 691] The penalty phase trial was held on May 4, 2001. [V16, 840] The jury recommended death by a vote of 8 to 4. [V16, 688] The Spencer hearing held on July 13, 2001. [V9, 1661]

On August 17, 2001, the court sentenced Smith to death for Count One, first-degree murder and to life imprisonment for Count Two, attempted first-degree murder. [V9, 1587-95, 1698, 1700-26]

Defense counsel filed a notice of appeal to the Second District Court of Appeal on August 31, 2001. [V9, 1596] He filed an amended notice of appeal to this Court on October 1, 2001. [V9, 1737]

STATEMENT OF THE FACTS

Voir Dire

There is no indication in the record that the prospective jurors were sworn prior to their questioning on voir dire, nor that defense counsel objected to failure to swear them. [V10, 1-10]

The prosecutor made the following comments to the prospective jurors without objection by the defense:

> Here's the situation. You found the existence of an aggravated circumstance or circumstances proven beyond a reasonable doubt. You found that that [sic] aggravating circumstance or circumstances justify the imposition of the death penalty. You go back to the evidence, you look to mitigating circumstances. If you find that there are no mitigating circumstances, your job is over. Your recommendation to the Court is the verdict of death.
>
> If, however, after reviewing the evidence, you find the existence of mitigating circumstances, then the weighing process begins. And this is not a numbers game. It's not, "Well, there's three aggravators over here, and four mitigators over here. Four versus three, four wins." It's not like that. It's a weighing situation. If you find, based upon this weighing situation that the aggravating circumstances outweigh the mitigating circumstances, then your recommendation to the Court is one of death. If you find that the aggravating circumstances are outweighed by the mitigating circumstances, then your recommendation to the Court is one of life.

[V10, 95-96]

Trial Evidence

Faunce Pearce wanted to buy a book of 1,000 geltabs of acid (LSD) for $1,200. On the evening of September 13, 1999, he went to the home of Bryon Loucks, Loucks' girlfriend, and her son, Ken Shook, at We Shelter America, 3600 Land O'Lakes Boulevard, in Pasco County. [V12, 293-94, 300-04, 308, 322-23; V13, 396] Shook called his friend Stephen Tuttle. [V 12, 303, 323; V13, 391, 415] Tuttle called Amanda Havner. She tried to get a book of geltabs, but could only get one for $1500. [V12, 343] Tuttle then called Tanya Barcomb and told her he wanted a book of acid. [V12, 343; V13, 373] A book of acid normally sells for $1,000 to $1,700. Barcomb told him she would call someone to find out. [V13, 373] Tuttle called Barcomb back. She told him she could get the acid, but Barcomb and her fiance Chris DiRosa actually were planning to make fake geltabs to rob them. [V13, 374-75] Tuttle denied calling anyone to try to get the acid. [V13, 391]

Havner picked up Tuttle and Robert Crawford and went to We Shelter America. They told Pearce they could get the drugs. [V12, 300, 303-04, 323-24, 344, 392-93] Tuttle denied talking to Pearce about the drug transaction. [V13, 393] Pearce gave the $1200 to Shook, who gave it to Tuttle. [V12, 304, 324, 344; V13, 393] Pearce told them, "This is your life. Bring back the money or the dope." [V12, 355; V13, 412-13] Shook and his friends departed to get the

drugs. [V12, 304, 324, 344] Pearce remained at the house with Loucks for about two and a half hours. [V12, 304]

Shook and his friends went to Johnny's house, where Barcomb and DiRosa were staying, before they could make the fake geltabs. Barcomb, DiRosa, and Havner then went to the Palms of Livingston. [V12, 324, 345; V13, 374-76, 393-94] DiRosa and Barcomb went into an apartment. DiRosa put the money in his shoe. [V13, 376] DiRosa hit himself in the face to make it appear that he had been "jacked." [V13, 377] When they returned to the car, DiRosa was holding his eye. They told Havner they were jacked at gunpoint. [V12, 346; V13, 377] When they returned to Johnny's house, they told Tuttle, Shook, and Crawford they had been "ripped off" and did not get the drugs. [V12, 324, 346-47; V13, 378, 394]

Barcomb called Chippy, her drug dealer, and told him they had been jacked and needed $1,000. Chippy told her she had jacked Pearce and Butterfield. [V13, 378, 386] Barcomb told Tuttle, Crawford, Havner, and Shook that Chippy would meet them at the Palms of Livingston and get them the money. [V13, 378] Havner, Shook, Crawford, and Tuttle went to the Palms of Livingston. Shook knocked on the door, but no one answered. [V12, 324-25, 347-48; V13, 394-95] They returned to Johnny's house to confront Barcomb. [V12, 348] Havner snuck into the house. Barcomb said she did not have the money. Johnny's dad told Havner to leave or he would call the

police. [V12 348; V13, 379-80] Shook knocked on the door. A man answered the door and told them to leave or he would call the police. [V12, 325]

Meanwhile, Loucks pressed redial on the phone, and Barcomb answered. She was hysterical. She said the kids were there demanding that she return the money, but she had been ripped off. [V12, 305, 327] Loucks told Pearce what Barcomb said. Pearce was angry and said he had to go find out where his money was. [V12, 305-06]

Shook and his friends returned to We Shelter America. [V12, 306, 325, 327, 348; V13, 395] They told Pearce that Barcomb had taken the money. [V12, 349; V13, 396] Pearce waved a black pistol and ordered them into the office. In the office, Pearce was waving the gun around and threatening them. [V12, 306-07, 314, 327-28, 335-36, 349-50, 355-56; V13, 396-97, 413] Pearce said, "It's time to pay the consequences," and, "We're going to get this money back." Havner called Barcomb, who said she could not get the money back. [V12, 307-08, 313] Havner told Barcomb, "Well, they are here and they have a whole bunch of guns, and they are going to kill us if we don't get the money." [V13, 380] Barcomb said Chippy was going to take care of it, and she was going to call Havner's brother. [V12, 350]

Barcomb went to Joseph Havner's door, handed him a phone number, and said his sister was in trouble. [V13, 365, 382] Barcomb and DiRosa then went to the Double Tree hotel. Barcomb called the

Hillsborough County Sheriff's Office from a gas station and told them to send officers to We Shelter America because her friends were in a hostage situation. [V13, 382-83]

At We Shelter America, Pearce grabbed Amanda Havner by the throat, slammed her head against the wall, and pointed his gun at her head. [V12, 308, 315, 329, 336, 350-51, 356; V13, 397, 413] Pearce told Havner to shut up or he was going to shoot her. [V12, 351] He also threatened Tuttle. [V12, 356-57] Tuttle begged Pearce to allow him to leave, but Pearce replied that he wanted his money. [V13, 399] Loucks asked Pearce to stop, and Pearce put the gun down. Havner said she could call Chippy to try to get the drugs. Pearce called Chippy. [V12, 308-09, 326] Pearce also called his friend Teddy Butterfield for help. [V12, 329, 352, 357; V13, 423]

Butterfield was at Damian Smith's house, a duplex connected to Pearce's house. Heath Brittingham was also there. Joey Smith was in the park. Pearce wanted Butterfield to get Smith and go to We Shelter America. Butterfield, Joey Smith, and Brittingham got a ride from Nathan Smith. They took their firearms at Pearce's request. [V13, 423, 444, 464-65] Butterfield had a small .25 or .22 handgun. Brittingham had a 12-gauge shotgun. Joey Smith had a 9 mm. [V13, 424, 440-41, 465] Butterfield and Brittingham had been involved in prior drug deals with Pearce. [V13, 460, 467-68, 496]

Joseph Havner called We Shelter America and asked Amanda when she was coming home. She uncharacteristically answered that she would be home right away. [V12, 352-53; V13, 366] Joseph drove to We Shelter America, and Pearce allowed Amanda to drive away. [V12 309, 330, 352-53; V13, 367-68] Before Amanda left, Pearce told her he was going to take the boys home. [V12, 353]

Pearce put his gun to Tuttle's head, took him outside the office, and forced Tuttle to lie face down on the ground. Pearce stood over Tuttle with the gun and threatened to kill him. [V12, 316, 332, 336; V13, 399-400] Pearce forced Tuttle to perform an oral sex act. [V13, 400]

Butterfield, Joey Smith, and Brittingham arrived at We Shelter America. [V12, 310, 321, 332, 336-37; V13, 400-01, 424, 465] They had two pistols and a shotgun. [V12, 310, 330; V13, 401, 440, 465, 485] Brittingham testified that Smith spoke to Pearce, but Brittingham could not hear what they said. [V13, 466] Pearce told them Tuttle and Crawford were going to show them where the people who ripped him off lived. They were there as backup for getting the money back from the drug dealers. [V13, 424-26, 441-42] Butterfield and Brittingham denied that they or Smith ever threatened Tuttle or Crawford. Pearce was holding a .40 caliber pistol, but he was not threatening anyone. [V13, 424-25, 441-42, 467-69] Smith said they were going to take care of business. [V12, 310, 330, 332] Smith,

Butterfield, and Brittingham did not threaten Shook or point a weapon at him. [V12, 330, 337] Shook testified that they appeared to be under the influence of drugs; they were "all messed up." [V12, 338] Butterfield denied that he, Smith, or Brittingham had been drinking or taking drugs that night. [V13, 454]

Pearce was in charge. [V12, 316, 337; V13, 401, 414] They were going to take Tuttle and Crawford in Pearce's car. Loucks told Pearce he would not allow him to take Shook. Loucks offered to take the boys home and to give Pearce his money in the morning. [V12, 310, 329, 332] Pearce refused the offer. He said he was not going to hurt the boys. He would take them down the road, punch them in the mouth, and make them walk home. [V12, 311]

Pearce threatened Tuttle and Crawford with his gun when he ordered them to get in the car, although Tuttle said Pearce was not pointing the gun at him at that time. [V12, 311, 333; V13, 402] Tuttle did not remember being verbally threatened by anyone other than Pearce. [V13, 417] Pearce told Loucks to wait by the phone without calling law enforcement. He said Loucks would hear from the boys. [V12, 311]

Two deputies came to We Shelter America after Pearce drove away with Butterfield, Smith, Brittingham, Tuttle, and Crawford. Loucks told the deputies they had just left in the car. [V12, 311, 333] The deputies wanted to look in Loucks' house to see if Tuttle and the

other boys were there. [V12, 311-12] The deputies received a message that Tuttle and Crawford had been shot in the back of the head. Shook then told them what had happened. [V12, 334] Later on, Butterfield threatened Shook and called him a narc or a snitch two or three times. [V12, 338-39] Butterfield denied threatening Shook. [V13, 455]

Pearce's car was a brown Firebird, Trans Am, or Camaro with T-tops. Tuttle and Brittingham said the T-tops were off the car, while Butterfield said they were on the car. [V13, 402, 411-12, 427, 445, 456, 469-70, 491] Pearce was driving, Smith was in the front passenger seat, Butterfield was in the left rear passenger seat, Crawford was in the middle, Tuttle sat on Crawford's lap, and Brittingham was in the right rear passenger seat with the shotgun between his legs. [V13 402-03, 416, 428-29, 470-71, 502] After leaving We Shelter America, Pearce drove south on U.S. 41, turned right on State Road 54, then drove about three to ten miles. [V13, 403, 428-30, 471-72] While they were driving on 41, Smith said his 9 mm pistol jammed and exchanged it for Pearce's .40 caliber pistol. [V13, 429-30, 471-72, 491-92]

Pearce turned the car around and stopped on the side of the road. Pearce ordered Tuttle to get out of the car on the passenger side. Smith got out of the car first and stood between the door and the car while Tuttle crawled out. [V13, 404-05, 410, 430, 432, 450-

52, 472-73, 492] In a deposition, Tuttle did not recall anyone getting out of the car other than himself. [V13, 410-11] Butterfield testified that Pearce told Smith to break Tuttle's jaw. [V13, 430] Brittingham testified that Pearce said, "Pop him in the fucking jaw." Smith replied, "F that," then spun around and shot Tuttle in the back of the head. [V13, 473-74] Butterfield heard, but did not see, the gunshot. [V13, 430, 432, 445, 453] Smith got back in the car. [V13, 432, 475] Brittingham testified that Pearce asked, "Is he dead," and Smith replied, "Yeah, he's dead. I shot him in the head with a F'ing .40." [V13, 475]

Pearce drove about two hundred yards, then stopped the car again. Smith got out and stepped to the other side of the door. Pearce told Crawford to get out of the car. [V13, 432-33, 455, 475] According to Brittingham, Crawford said, "Don't. Please don't." Smith fired a shot, Crawford fell, then Smith stood over him and fired again. [V13, 475-76] Butterfield said he saw two gunshots. [V13, 432-33, 445]

Butterfield testified, "When Joey got back in the car, he had made a statement that that was the 13th or 14th people that had been -- that he had shot." [V13, 433] Defense counsel objected and moved for a mistrial on the ground Butterfield implied that Smith had committed other murders and that was irrelevant and extremely prejudicial. [V13, 433-34] The court ruled, "I will deny it. The Court

specifically finds it was part of the testimony." [V13, 434] In a deposition, Butterfield denied that anyone said anything after Smith got back in the car. [V13, 453-54]

Pearce drove back down 54 and turned south on U.S. 41. Smith turned around inside the car, pointed the .40 caliber pistol at Butterfield, and said, "Snitches are bitches and bitches deserve to die." [V13, 435, 447-48] Brittingham testified that Smith told them that if they said anything he would kill them. [V12, 477] Tuttle was putting on his hat after getting out of the car when everything went black. His next memory was getting up off the ground and walking up the road. He felt a hole in the back of his head and used his thumb to apply pressure to the wound. [V13, 405] A truck driver picked him up and drove him to a convenience store. [V13, 406, 512-14] Deputies Lattice and Bruce went to the convenience store around 2:30 a.m. and found emergency medical technicians treating Tuttle. [V13, 515-17, 521-23] Bruce began interviewing the truck driver and another witness. Tuttle was airlifted to a hospital. [V13, 523-24] Meanwhile, Lattice was called to State Road 54. He found Crawford lying beside the road, breathing but unconscious. Emergency medical technicians arrived to treat him. Lattice began securing the scene, and Bruce and other officers arrived. [V13, 518-20, 524-26]

Crime scene technicians (CST) found and photographed two shell casings underneath Crawford's body. [V14, 553-54, 559-61] A video-tape of the scene where Crawford's body was found showed only one shell casing. [V14, 543-51] CST Condit determined that the distance from the intersection of U.S. 41 and State Road 54 to the scene was 1.53 miles. [V14, 557-58]

Pearce stopped at a closed gas station and put the guns in the trunk. Pearce drove to a restaurant. He told Butterfield and Brittingham to go inside while he called Chip. [V13, 435-36, 477] Pearce drove to a grocery store and dropped off Butterfield and Brittingham. [V13, 436, 447, 478] Pearce drove to Chip's house. [V13, 448-49] Butterfield went across the street to call his girl-friend. [V13, 436, 449] Pearce and Smith returned and picked them up about 30 to 40 minutes later. [V13, 436, 449-50, 479] Pearce drove to the highest part of the Howard Franklin Bridge. Smith wrapped the .40 caliber pistol in newspaper and threw it off the bridge. [V13, 436-37, 479-80, 501]

Pearce drove back to his house. [V13, 437, 480] According to Butterfield, Smith went to the cottage where he was staying to pack so Pearce could drive him to the bus station. Butterfield went in Pearce's house, argued with his girlfriend, then went to bed with her. [V13, 437-38]

Brittingham drove Smith and his girlfriend Holly to the bus station, but they could not get tickets because of a hurricane. [V13, 480-81] Brittingham took them to the Kent Grove area, then went home and fell asleep. [V13, 481, 501] Nathan Smith woke him up, then Brittingham drove to Damian Smith's house. [V13, 481]

Detective James Bucenell was called to the shooting scene on September 14. [V14, 645-46] He notified Crawford's family of his death. He spoke to Bryon Loucks at the Land O'Lakes substation. [V14, 647] He contacted Butterfield and brought him to the substation. [V14, 648] Butterfield testified that deputies woke him up at gunpoint and questioned him. He initially lied and told them he got out of Pearce's car on U.S. 41 before anything happened. [V13, 438, 444] Bucenell received a call from Detective Weekes, who had found Brittingham. Bucenell went there and spoke to Brittingham. [V14, 648-49; V13, 482] Bucenell contacted Butterfield's girlfriend and learned that Brittingham tried to get a bus to Missouri.[1] [V14, 649] The girlfriend, Melissa Williams, pointed out two houses in Kent Groves where Smith might be located. [V14, 651] Bucenell got help from other officers so they could go to both houses at once, but they did not find Smith. [V14, 651-52] A man showed Bucenell another

[1] Defense counsel objected to the admission of hearsay. The prosecutor argued that the statement was offered not for the truth of the matter asserted, but to show how the officer located Smith. The court instructed the jury not to consider the statement for the truth of the matter asserted. [V14, 649]

house where the officers found and arrested Smith. [V14, 652-53] At the Sheriff's Office substation, Detective Moe interviewed Smith and told him he was under arrest for the attempted murder of Tuttle and the first-degree murder of Crawford. [V14, 665-66] Pearce surrendered to Moe eight days later. [V14, 665] Several days after the shooting, Moe showed Tuttle a photo pack containing Smith's photo, but Tuttle was not able to identify Smith. [V14, 667]

Dr. Marie Hansen, an associate medical examiner, went to the scene to observe the body, then conducted the autopsy at her office. [V14 582, 587-88] The body was identified as Robert D. Crawford, age 17. [V14, 588] The prosecutor and defense counsel stipulated to Crawford's identity as the deceased. [V14, 669] Dr. Hansen found that one bullet entered the left side of the left arm, went at an upward angle through the arm muscles, broke the clavicle (collar-bone), causing a piece of bone to make a hole in the side of the neck, and went up the neck to the back of the throat where it was recovered. [V14, 589, 591, 599-600] A second bullet entered the upper right side of the head, went through the brain at a slight downward angle, exited the left side of the head, and was recovered from the base of the right or left thumb.[2] [V14, 589-93, 597-98, 600] It was more likely that the wound through the arm occurred

[2] Dr. Hansen appeared to be confused about which thumb the bullet lodged in, testifying both that it was the right thumb and that it was the left thumb. [V14, 597]

before the wound to the head. Crawford could have survived the wound to the arm. The wound to the head would cause unconsciousness within 10 to 15 seconds and cessation of breathing within a couple of minutes. [V14, 602] The cause of death was multiple gunshot wounds. [V14, 603]

There was no stippling around the gunshot wounds, so the gun was either in contact with the skin, or it was fired from a distance of more than two to three feet. [V14, 603-04] Because there was no stippling on Crawford's shirt or hat, it was most likely that both gunshots were fired from more than two or three feet. [V14, 604-06]

CST Keppel attended the autopsy and received Crawford's clothing, a bullet recovered from his right hand, and a bullet recovered from his throat. [V14, 554-56] CST Whonsetler performed a gunshot residue test on Smith on September 14, but not on Butterfield, Brittingham, or Pearce. No evidence of the result of the test on Smith was presented. [V14, 573-75]

On September 15, Brittingham and Butterfield showed Detective Bucenell where Smith threw the gun off the Howard Franklin Bridge into Tampa Bay. [V13, 439; V14, 654] They also showed him the location where Tuttle was shot, about two-tenths of a mile west of the place where Crawford was shot. [V13, 439; V14, 654-55] Butterfield was never charged with any offense in this case. [V13, 445-46]

On September 17, CST Whonsetler, Deputy Long, and other officers went to the Howard Franklin Bridge to search for a weapon, but an approaching hurricane prevented its recovery. [V14, 566-69, 577-78] CST Condit and Detective Moe went to the Seminole County Sheriff's Office in Sanford where a Firebird believed to have been used in this case had been recovered. No blood was found on the exterior or interior of the car, which was taken back to the Pasco County Sheriff's Office in Land O'Lakes. Condit found 21 fingerprints on the car. [V14, 562-66] Detective Moe testified that they went to Sanford to seize the car at a residence, and that none of the fingerprints were of evidentiary value. [V14, 662-63] FDLE fingerprint analyst Steven Starke testified that it is not unusual to find 20 to 25 fingerprints of no comparison value. [V14, 610-13]

Deputy Long recovered a gun and magazine from the bay on September 22. [V14, 570-72, 578-80, 663] Starke examined this gun and found no fingerprints of any comparison value. [V14, 613-14] FDLE firearms examiner Christopher Trumble determined that the gun was a .40 caliber Smith & Wesson semiautomatic pistol. [V14, 615-21] He also received the magazine, ten unfired cartridges, two fired projectiles, and two fired .40 caliber Smith & Wesson cartridge cases. [V14, 622, 625-26, 633-34] Trumble determined that the pistol was operable. [V14, 626] The two fired projectiles were fired from the pistol. [V14, 634-35] The two fired cartridges were

fired from the pistol. [V14, 636] Generally, a fired cartridge would travel two to eight feet upon ejection from a gun. [V14, 639]

The court determined that Smith voluntarily exercised his right to remain silent and not testify. [V14, 672-77] The defense rested without calling any witnesses. [V14, 679]

Guilt Phase Closing Argument

Near the end of the prosecutor's closing argument, he asked the jury, "So where does the gun go, folks?" He slammed the gun down on the defense table and said, "It goes right there." Defense counsel Hernandez moved for a mistrial because the prosecutor's act in smashing the gun at the defense table was improper and prejudicial. The court denied the motion for mistrial. Defense counsel Robbins complained that his left ear was ringing as though a firecracker had gone off in it, there was an audible gasp from the crowd, he could not hear from his left ear, the noise was louder than a gunshot, and the jury was startled. [V15, 792-93] The court admonished the prosecutor, "Don't do that again." [V15, 794]

Penalty Phase

The prosecutor moved into evidence Smith's conviction for the attempted first-degree murder of Stephen Tuttle, adopted the evidence presented during the guilt phase of trial, and rested without presenting any other evidence. [V16, 849]

Mae Smith, Joey Smith's mother, testified that he was born on July 6, 1977, in Sexton, Missouri. [V16, 850-52] Joey was a very bright, loving, and happy-go-lucky child who attended a course for gifted children at Shawnee College when he was seven. [V16 852-53] When Joey was born during Mrs. Smith's second marriage, she had an adopted daughter who was 18, another daughter Deborah who was 17, a

son Tommy who was 15, and another son Hank who was 9. [V16, 854] Jim Crane was the father of the other children, while Joey's father was Lawrence Smith. Joey was very close to his father, brothers, and sisters. [V16, 854-55] Joey's father died of a heart attack when Joey was ten. Joey was devastated and could not accept his father's death. [V16, 856] Jim Crane then spent a lot of time with Joey, but he also died of a heart attack within six months. Joey then became a quiet boy who kept to himself and did not have any close friends. [V16, 857] When Joey was 21 in early 1999, he came to Florida because his brother Tommy said there were jobs available here. [V16, 858] Tommy was hospitalized with cancer in April, 1999, and died on October 18, 1999. Joey was devastated by his illness and death. [V16, 859-64]

Margaret Newton, Joey Smith's aunt, testified that he was a happy boy who loved his father. [V16, 865-66] He was very smart and attended an advanced class in college. [V16, 867] He was a very good artist. [V16, 867-68] Joey was devastated by his father's death. [V16, 868] He dropped out of school after the eighth grade. [V16, 869]

Deborah Crane, Joey Smith's half sister, testified that Joey was a very good kid who liked to fish and discover things. Joey did very well in school and went to the gifted program at the college, where he took computer courses at the age of eight. [V16, 870-72,

875] Joey had a very good relationship with his father. Joey was ten when his father died. He became very distant, quiet, and upset. Her father, Jim Crane, took Joey under his wing and was very good to him. [V16, 873] Mr. Crane died of a heart attack six months later. Joey was very upset. [V16, 874] Joey dropped out of school after the eighth grade. [V16, 875] Joey came to Florida in March, 1999. Tommy was diagnosed with cancer in April, rapidly declined, and died in about six and a half months. Joey felt that someone very close to him was taken away again. [V16, 875-77]

In August, 1999, Joey was living in a separate one room cottage in back of Faunce Pearce's shack. [V16, 878-79] Ms. Crane went to Pearce's house with Joey around 11:00 p.m. one night in August and remained there until about 5:00 a.m. Pearce was using drugs in her presence and sold drugs to Teddy and another young man. Pearce was very hateful, mean, and dominating. He was very bossy towards Joey. Pearce talked about guns with another young man who lived there. [V16, 879, 883-87]

The prosecutor asked the court to instruct the jury on the cold, calculated, and premeditated (CCP) aggravating circumstance. [V16 888] Defense counsel objected to that instruction on the ground that there was no evidence of planning. [V16, 898, 904] The court overruled the objection and gave the CCP instruction. [V16, 905, 969-70]

The court found that Smith freely and voluntarily waived his right to testify upon advice of counsel. [V16, 907-13]

Penalty Phase Closing Argument

The prosecutor told the jury, without objection:

> If you find no mitigating factors, if you find that the evidence is devoid of mitigation, then your obligation is to return a verdict to the judge recommending a sentence of death.

[V16, 922]

> If you find ... that the aggravating factors outweigh the mitigating factors, then your recommendation to the Court will be that Joey Smith die.

[V16, 923]

Spencer Hearing

An extensive presentence investigation report (PSI) was prepared.[3] [V4, 707-764; V5, 765-965; V6, 966-1166; V7, 1167-1367; V8, 1368-1521] Defense counsel submitted a sentencing memorandum. [V8, 1522-33] Several friends and relatives of Smith submitted letters in mitigation. [V8, 1535-54] The court acknowledged that it had read those documents at the Spencer hearing held on July 13, 2001. [V9, 1661-64] The court had also read victim impact state-

[3] The criminal history section of the PSI showed that as a juvenile Smith had been caught placing nails in people's tires at age 12, and at age 15 he was placed in a youth center for four burglaries. As an adult, Smith was convicted of a drug possession offense which occurred on May 14, 1993, and of burglary and stealing offenses committed on March 9, 1994. [V4, 711-12]

ments from Robert Crawford's relatives, and heard a brief statement by Crawford's mother. [V9, 1664-65] Smith addressed the court, asserting his innocence, inadequate investigation by law enforcement, and that the actual killer was allowed to go free in exchange for his testimony blaming Smith for the crime. [V9, 1667-70] Defense counsel and the prosecutor presented arguments concerning the aggravating and mitigating circumstances. [V9, 1671-81]

Sentencing

In support of the death sentence, the court found three aggravating factors were proved: 1) prior conviction for a violent felony, the attempted murder of Stephen Tuttle (considerable weight); [V9, 1557-60] 2) crime committed while Smith was engaged in or an accomplice in the commission of a kidnapping (considerable or great weight); [V9, 1560-63] and 3) the crime was cold, calculated, and premeditated (great weight). [V9, 1563-77] In support of the CCP aggravator, the court found, "After the killing, the Defendant announced to the people in the automobile: 'That's twelve and thirteen, eight more to go and I'll match Billy the Kid'." [V9, 1576]

In consideration of mitigating factors, the court found: 1) under extreme duress or substantial domination of another person -- not established (no weight); [V9, 1578-79] 2) ill effects from the death of his father figures at an early age -- established (very little weight); [V9, 1581] 3) age of 22 with no signs of immaturity

-- not established (no weight); [V9, 1581] 4) emotional distress caused by declining health of brother -- established (very little weight); [V9, 1582] 5) love and support of family -- established (very little weight); [V9, 1582] 6) good student as a child, showed great promise until father died when Smith was 10 years old -- established (little weight); [V9, 1582] 7) inadequate representation -- not established (no weight); [V9, 1583] 8) Smith cares for children -- not established (no weight); [V9, 1583] 9) use of alcohol and drugs at time of murder -- not established (no weight); [V9, 1583-84] and 10) history of drug abuse -- established (little weight). [V9, 1584]

The court explained its weighing process:

> The aggravating factors far outweigh the mitigating factors and as such requires [sic] that the appropriate punishment in this case is death.
>
> ... [T]he legislature of this state has required that death must be imposed when the aggravating factors far outweigh the mitigating factors, and this court must be guided by this law. Ours is a country of law, not men, and the law of this state requires the result to be rendered hereafter.

[V9, 1585]

SUMMARY OF THE ARGUMENT

Issue I Lawrence Joey Smith's due process right to a fair trial was violated when the trial court denied his motion for mistrial in response to state witness Butterfield's testimony that Smith said Crawford was the thirteenth or fourteenth person he had shot. This testimony was irrelevant to any material issue at trial and was extremely prejudicial evidence of Smith's bad character and propensity to commit violent crimes. There was no proof at trial that Smith actually shot anyone before shooting Tuttle and Crawford in the present case. The prejudicial effects of this evidence on the jury outweighed its probative value. The admission of such evidence is presumed harmful because of the danger that the jury will take the bad character or criminal propensity thus shown as evidence of guilt of the crime charged. Smith is entitled to reversal of his convictions and a new trial, or at the very least, reversal of the death sentence and a new penalty phase trial with a new jury.

Issue II Smith's right to a fair trial was violated when the trial court denied his motion for mistrial after the prosecutor demonstrated to the jury that Smith was responsible for shooting the victims by loudly slamming down the pistol used as the murder weapon on defense table during closing argument. The prosecutor's misconduct cannot be deemed harmless because it was directed to the principal issue in the case -- who shot the victims, it was deliberate, and

it prejudiced Smith by injecting elements of fear and emotion into the jury's consideration of the case. Smith is entitled to reversal of his convictions and remand for a new trial.

Issue III The record in this case fails to show that the prospective jurors were sworn for their examination on voir dire. The rule requiring the swearing of prospective jurors for voir dire is designed to protect the defendant's constitutional right to an impartial jury by ensuring that the jurors respond truthfully to inquiries by the court and counsel. Failure to swear the prospective jurors creates an unacceptable risk that Smith's right to an impartial jury was violated. Violation of the right to an impartial jury is structural error which cannot be deemed harmless. Smith is entitled to a new trial, or at the very least, to have this case remanded for the trial court to determine whether the prospective jurors were actually sworn for their voir dire examination.

Issue IV The prosecutor misled both the jury and the trial court about the correct rule of law for weighing aggravating and mitigating circumstances by repeatedly stating that the jury must recommend death if the aggravating circumstances outweigh the mitigating circumstances. The prosecutor's misconduct cannot be found harmless because the trial court actually applied the prosecutor's misstatement of the law in its sentencing order in concluding that death was the appropriate sentence for Smith. No objection was

required to preserve the trial court's error in the sentencing order for review by this Court. Because the prosecutor succeeded in misleading the court, it cannot be presumed that he did not mislead the jury. Smith is therefore entitled to a new penalty phase trial before a new jury.

Issue V The trial court erred by instructing the jury upon and finding the unproven aggravating circumstance that the murder was cold, calculated, and premeditated. The evidence considered by the court did not prove that Smith had a careful plan or prearranged design to kill Crawford before the fatal incident. Thus, Smith is entitled to a new penalty phase trial before a new jury.

Issue VI The trial court erred by relying on an unproven statement by Smith, "That's twelve and thirteen, eight more to go and I'll match Billy the Kid," in finding that the cold, calculated, and premeditated aggravating circumstance had been proved. No evidence was presented at trial or during the penalty phase proceeding to establish that Smith made that remark. Moreover, the unproven remark concerns Smith's future dangerousness, an improper nonstatutory aggravating factor. The court also violated due process by failing to notify Smith or his counsel that the court intended to rely on evidence not presented during trial or the penalty proceedings, and by failing to give Smith or his counsel an opportunity to rebut or

contradict such evidence. Smith is entitled to resentencing by the court.

Issue VII Florida's death sentence statute is unconstitutional on its face because it does not comply with the Sixth and Fourteenth Amendment requirements that a death qualifying aggravating circumstance must be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt. The facial invalidity of the statute is fundamental error which can be raised for the first time on appeal. Violation of the Sixth Amendment right to jury trial is structural error that can never by harmless. Smith is entitled to be resentenced to life.

ARGUMENT

ISSUE I

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT DENIED HIS MOTION FOR MISTRIAL WHEN BUTTERFIELD TESTIFIED THAT AFTER SHOOTING CRAWFORD APPELLANT SAID THAT WAS THE THIRTEENTH OR FOURTEENTH PERSON HE HAD SHOT.

Butterfield testified that after shooting Robert Crawford, [V13, 432-33] "When Joey got back in the car, he had made a statement that that [sic] was the 13th or 14th people that had been -- that he had shot." [V13, 433] Defense counsel objected and moved for a mistrial on the ground Butterfield implied that Smith had committed other murders and that was irrelevant and extremely prejudicial. [V13, 433-34] The court ruled, "I will deny it. The Court specifically finds it was part of the testimony." [V13, 434]

The trial court's reason for denying the motion for mistrial is inexplicable. If Smith's statement had not been introduced into evidence as part of a witness's testimony there would have been no reason to move for a mistrial. Perhaps the word "testimony" is a stenographic error by the court reporter. The court may have said, or at least meant to say, that the statement was part of the "res gestae." If so, the court was wrong. In Bryan v. State, 533 So. 2d 744 (Fla. 1988), the defendant was convicted of first-degree murder,

kidnapping, and robbery. Bryan argued on appeal that the court erred by admitting the state's evidence that Bryan had committed a bank robbery three months before the charged crimes, and had stolen a boat a week before the charged crimes. The state argued that evidence of the other crimes was admissible as part of the res gestae. This Court rejected the state's argument, stating, "Res gestae has no clear meaning and has been criticized as a convenient ambiguity which is not only useless but harmful." Id., at 746. This Court found that the true test for admissibility of evidence of other crimes is relevancy and that such evidence is admissible if it is relevant for any purpose except showing bad character or propensity. Id., at 746-47.

"[M]otions for mistrial are addressed to the trial court's discretion and should be granted only when necessary to ensure that a defendant receives a fair trial." Keen v. State, 775 So. 2d 263, 277 (Fla. 2000) (quoting Terry v. State, 668 So.2d 954, 962 (Fla. 1996)). The trial court abused its discretion by denying defense counsel's motion for mistrial because Smith's due process right to a fair trial[4] was violated by the admission of Brittingham's testimony about Smith's alleged statement that Crawford was the thirteenth or four-teenth person he had shot.

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[4] See U.S. Const. amend. XIV; Art. I, § 9, Fla. Const.

Smith's statement, as reported by Brittingham, was remarkably similar to the defendant's statement in Jackson v. State, 451 So. 2d 458 (Fla. 1984). In Jackson, Dumas, a state witness in a capital murder trial, testified that Jackson pointed a gun at him and boasted of being a "thoroughbred killer" from Detroit. Defense counsel objected "to the relevancy of this line of questioning." The trial court overruled the objection. Id., at 460. Although the state challenged the sufficiency of the objection to preserve the issue for appeal, this Court found the objection to have been adequate. Id., at 461. This Court held that the testimony was impermissible and prejudicial, explaining,

> We envision no circumstance in which the objected to testimony could be "relevant to a material fact in issue," nor has the state suggested any. The testimony showed Jackson may have committed an assault on Dumas, but that crime was irrelevant to the case sub judice. Likewise the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2). As the Third District Court of Appeal said in Paul v. State, 340 So. 2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 953 (Fla. 1977),
>
> > [t]here is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs form the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy

> except as to the character and propensity of the defendant to commit the crime charged, it must be excluded [citing to Williams].

Id., at 461; accord Peek v. State, 488 So. 2d 52, 55-56 (Fla. 1986). This Court found that the "thoroughbred killer" error and another error (in allowing the state to impeach its own witness) were prejudicial and necessitated reversal of the conviction and remand for a new trial. Jackson, at 463.

Brittingham's testimony about Smith's admission to shooting numerous other people before shooting Tuttle and Crawford was impermissible and prejudicial for the same reasons as the "thoroughbred killer" testimony in Jackson, so this Court should reverse Smith's convictions and remand for a new trial.

Florida courts have found reversible error in other cases similar to this case and Jackson. In Czubak v. State, 570 So. 2d 925 (Fla. 1990), the defendant was convicted and sentenced to death for first-degree murder. A key state witness, during cross-examination, volunteered that he knew Czubak was an escaped convict. The trial court denied defense counsel's motion for mistrial. This Court held that the escaped convict remark was inadmissible because it had no relevance to any material fact in issue. Evidence of collateral crimes, wrongs, or acts committed by the defendant is not admissible where its sole relevance is to prove the character or propensity of the accused. Id., at 928. This Court rejected the state's argument

that Czubak was required to ask for a curative instruction because it would not have overcome the error. Id., at 928 n.*. This Court also found that the error in denying the motion for mistrial was not harmless because the evidence against Czubak was largely circumstantial and because "[e]rroneous admission of collateral crimes evidence is presumptively harmful." Id., at 928.

In Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990), Delgado was convicted and sentenced to life for first-degree murder based on eyewitness testimony. Delgado's former girlfriend testified for the state that she and Delgado had used drugs and that Delgado told her that he had killed ten men. The Second District held that this evidence should have been excluded as irrelevant, relying on this Court's decision in Jackson. Id., at 84-85. The Second District noted that the state failed to prove that Delgado had in fact committed any prior killings, and that any probative value was far outweighed by the obvious danger of unfair prejudice. Id., at 85. The Second District held that the error was not harmless. It quoted this Court's decision in Straight v. State, 397 So. 2d 903, 908 (Fla.), cert. denied, 454 U.S. 1022 (1981), that the erroneous admission of collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

Delgado, at 86. The court reversed and remanded for a new trial. Id., at 87.

In Arsis v. State, 581 So. 2d 935 (Fla. 3d DCA 1991), a robbery, aggravated battery, and false imprisonment case, the Third District relied on Jackson to hold, "the trial court committed reversible error in denying the defendant's motion for a mistrial when the state introduced evidence ... that prior to the charged offenses, the defendant told his accomplices that 'he robbed taxicabs for a living.'"

The courts of other states have also found error in cases similar to this case and Jackson. In Snelson v. State, 704 So. 2d 452 (Miss. 1997), the defendant was convicted of capital murder, kidnapping, and third degree arson. A state witness, Goode, testified that while he was leaving the scene of the incident, he told Snelson that he could not believe that Snelson had shot the victim and Snelson replied, "[d]on't worry about it. That's my third or fourth." The trial court sustained the defendant's objection, overruled his motion for mistrial, and instructed the jury to disregard the statement. Id., at 455. After the court's instruction to disregard the statement, the prosecutor refrained from making further references to the statement. Id., at 457. The Mississippi Supreme Court reviewed the denial of the motion for mistrial using the abuse of discretion standard of review. Id., at 456. The court determined

that "the introduction of Snelson's alleged remarks to Goode after the commission of the crime had such a prejudicial effect that it cannot be concluded that such remarks did not influence the jury." Id., at 457. The court applied the familiar axiom that one cannot "unbake an apple." It held that the trial court erred in failing to declare a mistrial because it could not conclude that the testimony did not inflame or improperly influence the jury. Id., at 458. The court reversed and remanded for a new trial. Id., at 459. Aside from the Mississippi trial court sustaining the defense objection and giving a curative instruction, Snelson is virtually identical to Smith's case, so this Court should agree that the denial of Smith's motion for mistrial was also reversible error.

In Commonwealth v. Reynolds, 708 N.E.2d 658 (Mass. 1999), the defendant was convicted of first-degree murder and burning a motor vehicle. Over defense counsel's objection, the trial court admitted a police officer's testimony that the defendant told him, "you know, in Spain, the drug dealers are easy to rob." The Massachusetts Supreme Court, upon reversing for a new trial on another ground, held that the statement to the officer should not have been admitted because "[e]vidence of prior bad acts is not admissible to show that the defendant has a criminal propensity or is of bad character." Id., at 665. The court explained,

> The defendant admitted only that he committed another, entirely unrelated crime. He

> did not reveal any knowledge of the circumstances of this crime. The prejudicial effect of this statement far outweighed its minimal probative value. There is a danger that the jury dispensed with proof beyond a reasonable doubt because the defendant appeared to be a mad man likely to commit the crime charged.

Id.

In People v. Nino, 665 N.E.2d 847 (Ill. 3d DCA 1996), the defendant was convicted of first-degree murder, aggravated arson, and aggravated discharge of a firearm. The state introduced other crime evidence that all members of the defendant's gang committed drive-by shootings and smoked marijuana. The trial court overruled defense counsel's objection and denied his motion for mistrial. The Illinois appellate court held that the evidence of drug use and drive-by shootings was "entirely unrelated" to the case at hand and should not have been admitted. Id., at 856. The court reversed and remanded for a new trial because of this error and other instances of improper conduct by the state. Id.

The trial court abused its discretion by denying defense counsel's motion for mistrial when Butterfield testified that Smith said Crawford was the thirteenth or fourteenth person he had shot. The testimony was not relevant to any material fact in issue; it was relevant solely to Smith's bad character or propensity. Jackson v. State, 451 So. 2d at 461; Czubak v. State, 570 So. 2d at 928; Delgado v. State, 573 So. 2d at 85-86; Commonwealth v. Reynolds, 708 N.E.2d

at 665. Butterfield's testimony did not prove that Smith actually committed prior crimes in which he shot people. Jackson, at 461; Delgado, at 85; Dibble v. State, 347 So. 2d 1096, 1097 (Fla. 2d DCA 1977). Smith's prior criminal history as revealed in the PSI shows that he had never before been convicted of shooting anyone. [V4, 711-12] Defense counsel's objection and motion for mistrial on the ground Butterfield implied that Smith had committed other murders and that was irrelevant and extremely prejudicial [V13, 433-34] was sufficient to preserve the issue for appeal. Jackson, at 461. Defense counsel was not required to ask for a curative instruction because it would not have overcome the error. Czubak, at 928 n.*; Cooper v. State, 659 So. 2d 442, 443 (Fla. 2d DCA 1995). As stated in Snelson v. State, 704 So. 2d at 458, one cannot "unbake an apple."

This Court cannot conclude that the error was harmless pursuant to State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Although the state's permissible evidence of Smith's guilt was strong, that is not the test for harmless error. In DiGuilio, this Court adopted the harmless error test stated for federal constitutional error in Chapman v. California, 386 U.S. 18, 24 (1967). DiGuilio, at 1134-35. This test

> places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the convic-

> tion.... Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. [Emphasis added.]

Id., at 1135.

> The test is not a sufficiency-of-the-evidence ... or even an overwhelming evidence test.... The question is whether there is a reasonable possibility that the error affected the verdict.... If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139.

As this Court explained while affirming a reversal for a new trial for the improper admission of evidence of other crimes in State v. Lee, 531 So. 2d 133, 137 (Fla. 1988),

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Butterfield's testimony that Smith said Crawford was the thirteenth or fourteenth person he shot was a substantial part of the state's case even though it was not repeated in the rest of the trial because of the substantial impact the testimony must have had upon the jury.

The trial court's error in admitting Butterfield's testimony about Smith's statement cannot be found harmless beyond a reasonable doubt because the prejudicial effects of the testimony outweighed its probative value. Sexton v. State, 697 So. 2d 833, 837-38 (Fla. 1997); Czubak v. State, 570 So. 2d at 928; Cooper v. State, 659 So. 2d at 444; Delgado v. State, 573 So. 2d at 85; Snelson v. State, 704 So. 2d at 457; Commonwealth v. Reynolds, 708 N.E.2d at 665. Also, the improper admission of evidence of other crimes "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So. 2d 903, 908 (Fla.), cert. denied, 454 U.S. 1022 (1981); Peek v. State, 488 So. 2d 56; Delgado, at 86.

Even if this Court were to find that admission of Butterfield's testimony that Smith said Crawford was the thirteenth or fourteenth person he shot was not harmful as to the jury's determination of Smith's guilt, it cannot find that the error was harmless as to the jury's close 8 to 4 recommendation of death. [V16, 688] Because there was no evidence that Smith had ever been convicted of shooting anyone prior to shooting Tuttle and Crawford, the testimony was evidence of a nonstatutory aggravating circumstance for purposes of the penalty phase of trial. In Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997), this court found testimony that the defendant would

kill again was evidence of nonstatutory aggravation which was not harmless. This court opined that "our turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute." Id. In Castro v. State, 547 So. 2d 111, 115 (Fla. 1989), this Court held that the erroneous admission of irrelevant collateral crimes was harmless as to guilt because Castro had confessed to the first-degree murder and robbery with which he was charged. However, this Court concluded that the error was not harmless as to the penalty phase of trial because evidence of Castro's criminal propensity and bad character "improperly tended to negate the case for mitigation ... and may have influenced the jury in its penalty phase deliberations." Id., at 116.

Based upon the foregoing arguments and the facts and circumstances of this case, this Court must reverse Smith's convictions and remand for a new trial. In the alternative, this Court must vacate the death sentence and remand for a new penalty phase trial before a new jury.

ISSUE II

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT DENIED HIS MOTION FOR MISTRIAL WHEN THE PROSECUTOR SLAMMED THE MURDER WEAPON DOWN ON DEFENSE TABLE AFTER ASKING THE JURY WHERE THE GUN GOES.

Near the end of the prosecutor's closing argument, he displayed the gun used as the murder weapon and asked the jury, "Where does this gun go?" He argued that Brittingham had a shotgun and Butterfield had a .22 or .25 small-caliber weapon. He argued that Smith had to get out of the car for the victims to get out. [V15, 791] Next he argued that Pearce could not have fired the .40 caliber weapon because of the trajectory of the bullet. [V15, 792] He then asked, "So where does the gun go, folks?" He slammed the gun down on defense table and said, "It goes right there." Defense counsel Hernandez moved for a mistrial because the prosecutor's act in smashing the gun at the defense table was improper and prejudicial. The court denied the motion for mistrial. [V15, 792-93] Defense counsel Robbins complained that his left ear was ringing as though a firecracker had gone off in it, there was an audible gasp from the crowd, he could not hear from his left ear, the noise was louder than a gunshot, and the jury was startled. [V15, 793] The court admonished the prosecutor, "Don't do that again." [V15, 794]

"[M]otions for mistrial are addressed to the trial court's discretion and should be granted only when necessary to ensure that a defendant receives a fair trial." Keen v. State, 775 So. 2d 263, 277 (Fla. 2000) (quoting Terry v. State, 668 So.2d 954, 962 (Fla. 1996)). The motion for mistrial should have been granted in this case because the prosecutor's conduct in slamming the murder weapon down on defense table during closing argument violated Smith's due process right to a fair trial by injecting elements of emotion and fear into the jury's deliberations. See Urbin v. State, 714 So. 2d 411, 419-420 (Fla. 1998); King v. State, 623 So. 2d 486, 488-89 (Fla. 1993); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988); U.S. Const. amend. XIV; Art. I, § 9, Fla. Const.

The prosecutor's conduct in this case was similar to conduct condemned in Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA (1994). During closing argument in Taylor, the prosecutor banged on a table with the hammer used as the murder weapon ostensibly to demonstrate the force of the blows upon the victims. Id., at 1132-33. The First District quoted King, at 488, in ruling that "closing argument 'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.'" Taylor, at 1134. The court concluded that the act of striking a table with the murder weapon combined with the prosecutor's conjecture concerning the child victim's dying words were

harmful error because the "activities were designed to evoke an emotional response to the crimes or to the defendant, and fall outside the realm of proper argument." Id., at 1134-35.

In the present case, the prosecutor's act of slamming the gun on defense table could not have been justified by any claim that he was demonstrating the acts committed by Smith, because Smith was accused of shooting the victims with the gun, not of beating them with it. It is even clearer here than in Taylor that the prosecutor's purpose in slamming down the gun was to inject elements of fear and emotion into the case. Such deliberate misconduct by the prosecutor must not be tolerated, especially in a capital trial where the defendant's life is at stake.

In another similar case, United States v. Calhoun, 726 F.2d 162 (4th Cir. 1984), a deputy sheriff was accused and convicted of violating the civil rights of Hebb for beating him to death with a flashlight after he was arrested and handcuffed. The Fourth Circuit found two separately reversible errors in the case. The second error occurred during the cross-examination of Calhoun, when the prosecutor sharply struck counsel table with a flashlight similar to the one used to strike Hebb to emphasize the seriousness of the blows inflicted on Hebb. The trial court sustained defense counsel's objection and told the prosecutor not to do it again. The Fourth Circuit found that the trial court's action was insufficient to cure the

error because the nature of the force used by Calhoun was the only real issue at trial and because there was no doubt that the prosecutor's improper act was calculated and deliberate. Id., at 164. The court noted that the reversal was based on the actual prejudice suffered by the defendant, finding that the prosecutor's conduct could not be dismissed as harmless. Id., at 164 n.4.

In this case, as in Calhoun, the prosecutor's conduct in slamming the murder weapon down on the defense table was directed to the primary issue in the case, i.e., who shot the victims. The misconduct was certainly deliberate; the prosecutor made no attempt to argue that it was inadvertent. It was prejudicial to Smith because it injected elements of fear and emotion into the case.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), this Court explained the special duty owed by a prosecutor in a criminal trial:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id., at 495; accord Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998).

In Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), this Court condemned improper arguments by prosecutors, stating, "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profes-

sion and their office." In Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999), this Court explained,

> A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.

Further, in Gore v. State, 719 So. 2d at 1202, this Court declared:

> While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike "foul blows." See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id.

The prosecutor's foul blow in this case cannot be deemed harmless under the standard of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Although the state's permissible evidence of Smith's guilt was strong, that is not the test for harmless error. In DiGuilio, this Court adopted the harmless error test stated for federal constitutional error in Chapman v. California, 386 U.S. 18, 24 (1967). DiGuilio, at 1134-35. This test

> places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively

> stated, that there is no reasonable possibility that the error contributed to the conviction.... Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. [Emphasis added.]

Id., at 1135.

> The test is not a sufficiency-of-the-evidence ... or even an overwhelming evidence test.... The question is whether there is a reasonable possibility that the error affected the verdict.... If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139.

As argued above, the prosecutor's improper conduct in slamming the murder weapon down on the defense table during closing argument was addressed to the principle issue in the case, the identity of the shooter. The conduct was deliberate, and it was prejudicial to Smith because it was calculated to arouse the jury's fears and emotions. There is at least a reasonable possibility that this misconduct contributed to and affected the jury's verdict. Thus, the prosecutor's improper conduct cannot be deemed harmless and requires reversal as in United States v. Calhoun.

In addition, the prejudicial effects of this misconduct should be considered in conjunction with other acts of prosecutorial miscon-

duct at Smith's trial. As argued in Issue I, supra, the prosecutor elicited Butterfield's improper testimony regarding unproven and uncharged prior violent acts by Smith, that Crawford was the thirteenth or fourteenth person Smith shot. As argued in Issue IV, infra, the prosecutor misled both the jury and the trial court regarding the law governing the weighing of aggravating and mitigating circumstances by asserting that certain circumstances require the imposition of the death penalty. Under these circumstances, it is impossible for the state to carry its burden to show beyond a reasonable doubt that the prosecutor's misconduct did not affect the jury's verdict of guilt and death recommendation in this case.

> When the properly preserved comments are combined with additional acts of prosecutorial overreaching ... we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.

Ruiz v. State, 743 So. 2d at 7. Smith's convictions and sentences must be reversed and this case must be remanded for a new trial.

ISSUE III

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO RECORD THAT THE PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE.

There is no indication in the record that the prospective jurors were sworn prior to their questioning on voir dire, nor that defense counsel objected to failure to swear them. [V10, 1-10]

Florida Rule of Criminal Procedure 3.300 requires that the prospective jurors must be sworn prior to their examination on voir dire. Rule 3.300 provides, in pertinent part:

> (a) Oath. The prospective jurors shall be sworn collectively or individually, as the court may decide. The form of oath shall be as follows:
>
> "Do your [sic] solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?"
>
> * * * *
>
> (b) Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both the state and defendant shall have the right to examine jurors orally on their voir dire.... The right of the parties to conduct an examination of each juror orally shall be preserved.
>
> (c) Prospective Jurors Excused. If, after the examination of any prospective juror, the court is of the opinion that the juror is not qualified to serve as a trial juror, the court shall excuse the juror from the trial of the cause. If, however, the court does not excuse the juror, either party may then challenge the juror, as provided by law or by these rules.

Both the federal and state constitutions guarantee the right of the accused to trial by an impartial jury. U.S. Const. amends. VI and XIV; Art. I, § 16(a), Fla. Const. Rule 3.300 protects the right of the accused to trial by an impartial jury by providing a mechanism for determining which prospective jurors may be disqualified or biased and for removing such prospective jurors. It is necessary to swear the prospective jurors for voir dire to impress upon them their duty to provide truthful answers so that the court and counsel may make reasoned decisions regarding their qualifications, possible biases, and whether they should be excused. Failure to swear the prospective jurors creates an unacceptable risk that unqualified or biased jurors will not be honest in their responses so that the court and counsel cannot properly evaluate their ability to serve as impartial jurors. This, in turn, may cause the unknowing and unintentional violation of the defendant's right to an impartial jury.

The standard of review for a question of fact is whether the court's ruling is supported by competent substantial evidence. State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998). The standard of review for a question of law is de novo. Glatzmayer, at 301 n.7; Butler, at 101.

In this case the trial court did not make any ruling regarding the swearing of the prospective jurors. However, the absence of any

record of the prospective jurors being sworn means that there is no competent substantial evidence in the record to establish that they were sworn. This Court must determine the legal consequences of the absence of any record that the prospective jurors were sworn for voir dire. This is a question of law subject to de novo review.

Counsel for appellant found only two Florida cases dealing with claims that the record failed to show that the prospective jurors were sworn for voir dire. In Gonsalves v. State, 26 Fla. L. Weekly D2530 (Fla. 2d DCA Oct. 19, 2001), the Second District concluded from a supplemental record supplied by the state that the prospective jurors were sworn for voir dire and denied the defendant's claim that they had not been sworn on that basis. Because the prospective jurors in Gonsalves were sworn, the Second District's opinion provides no direct guidance on the legal consequences of failure to swear them. However, the Second District made two helpful observations. First, the court said, "The purpose of this oath [required by Rule 3.300(a)] is to ensure that prospective jurors truthfully answer questions about their qualifications to serve as part of a particular jury." As argued above, this serves the greater purpose of protecting the accused's constitutional right to an impartial jury. The court also noted that problems were presented by the issue of whether the oath was administered "because of an apparently common practice in the trial courts to comply with rule 3.300(a) in a common jury

pool room but then fail to recite the compliance for the record in each case." The court encouraged trial judges "to include on the record either the swearing of the prospective jurors or to recite that the prospective jurors were properly sworn prior to questioning."

Appellant would suggest that there is another reason why the oath required by Rule 3.300(a) needs to be administered in the courtroom immediately prior to questioning of the prospective jurors on voir dire. For purposes of the speedy trial rule, Fla. R. Crim. P. 3.191(c), trial commences "when the trial jury panel for that specific trial is sworn for voir dire examination ...." See Stuart v. State, 360 So. 2d 406, 409 (Fla. 1978); Moore v. State, 368 So. 2d 1291, 1292 (Fla. 1979). In Stuart, at 409, this Court expressly rejected the state's argument that trial commenced with the swearing of the weekly jury venire at the beginning of the week. In Moore, at 1292, this Court rejected the Fourth District's holding that trial commenced when the initial oath was administered to the total jury venire without regard to the time when the oath was administered to prospective jurors and the voir dire commenced in a specific case. Thus, trial courts ought to swear the prospective jurors for voir dire in court and on the record prior to their examination to establish a proper record that the requirements of both Rule 3.300 and Rule 3.191 have been satisfied.

The second Florida case is Martin v. State, 27 Fla. L. Weekly D1008 (Fla. 5th DCA May 3, 2002). The Fifth District simply held that the absence of a record of the prospective jurors being sworn prior to voir dire examination is not fundamental error. The court reasoned that upon timely objection the jurors could have been sworn, or the trial judge could note for the record that the jurors had already been sworn; also, Martin waived any issue regarding jury selection by accepting the jury without objection.

The Fifth District's fundamental error analysis in Martin suffers from a fatal flaw. The defendant's waiver of his constitutional right to an impartial jury cannot be presumed from a silent record. In Brookhart v. Janis, 384 U.S. 1, 4 (1966), the United States Supreme Court ruled:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, ... and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461.

Because the oath required by Rule 3.300 is designed to protect the defendant's right to an impartial jury, his counsel's failure to object to the failure to swear prospective jurors for voir dire is insufficient as a matter of federal constitutional law to waive his right to trial by an impartial jury. Waiver of that right requires a

record that clearly establishes that the defendant intentionally relinquished or abandoned it. Since there is no record that Smith knowingly and voluntarily waived his right to trial by an impartial jury, this Court cannot presume that he did so. See State v. Upton, 658 So. 2d 86 (Fla. 1995). Therefore, failure to swear the prospective jurors for voir dire must constitute fundamental error.

Moreover, the failure to swear the prospective jurors for voir dire can never be harmless error. In Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993), the United States Supreme Court ruled that violation of the right to jury trial is structural error which can never be harmless.

Because of the absence of any Florida case correctly dealing with the failure to swear the prospective jurors, an examination of Alabama law on the subject should help this Court to resolve this issue. In Holland v. State, 668 So. 2d 107, 108 (Ala. Crim. App. 1995), the record was silent as to whether the prospective jurors had been sworn before voir dire examination. The Alabama Court of Criminal Appeals remanded the case with instructions to conduct an evidentiary hearing to determine whether the jury was placed under oath. If the trial court determined that the oath was not administered, or if it could not determine whether the oath was administered, the appellate court directed the trial court to set aside the

defendant's conviction and grant him a new trial or other relief consistent with the opinion.

In Johnson v. State, 2001 WL 1520614 (Ala. Crim. App. Nov. 30, 2001), the defendant petitioned for post-conviction relief from a robbery conviction on the ground that his trial counsel was ineffective for failing to object to the trial court's failure to swear the jury venire prior to voir dire. The trial court summarily denied the petition. The Court of Criminal Appeals found that the claim was facially meritorious. The court ruled, "The failure to swear a jury venire is reversible error, and we will not assume from a silent record that the venire was sworn." The court remanded to the trial court to determine whether the venire was sworn.

In Ex parte Hamlett, 815 So. 2d 499 (Ala. 2002), the defendant petitioned for post-conviction relief from a conviction of trafficking in cannabis on the grounds that the venire was not properly sworn before the voir dire examination began, although the petit jury selected from the venire was properly sworn, and that his trial counsel was ineffective for failing to object. The trial court denied the petition, and the Court of Criminal Appeals affirmed on the ground that the members of the venire were asked the qualifying questions. The Alabama Supreme Court found that was an inadequate basis for denying relief and remanded for the trial court to determine whether the venire was properly sworn.

This Court should agree with the Alabama Court of Criminal Appeals in Johnson that the failure to swear prospective jurors for their voir dire examination is reversible error. Rule 3.300 is designed to protect the defendant's constitutional right to trial by an impartial jury. Failure to comply with the rule created an unacceptable risk that this right was violated in a way that can never be shown from the record. Waiver of the right cannot be presumed from a silent record. Violation of the right can never be harmless error. Therefore, this Court should reverse Smith's convictions and sentences and remand for a new trial. In the alternative, at the very least this Court should follow the example of the Alabama appellate courts and remand this case for an evidentiary hearing to determine whether the prospective jurors were sworn, with directions to vacate Smith's convictions and sentences and grant him a new trial if the court determines that the prospective jurors were not sworn.

ISSUE IV

APPELLANT IS ENTITLED TO A NEW PENALTY PHASE TRIAL BECAUSE THE PROSECUTOR MISLED THE JURY AND THE COURT UPON THE LEGAL STANDARD FOR WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES.

It is well established under Florida law that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Cox v. State, 27 Fla. L. Weekly S505, S508 (Fla. May 23, 2002) (quoting Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996)); Brooks v. State, 762 So. 2d 879, 902 (Fla. 2000); see also Gregg v. Georgia, 428 U.S. 153, 203 (1976) (holding that a jury can dispense mercy, even where the death penalty is deserved). It follows that the trial court is neither compelled nor required to impose the death sentence where it finds that the aggravating factors outweigh the mitigating factors. Like the jury, the trial court must be permitted to dispense mercy even where the death penalty is deserved.

In Smith's case the prosecutor misstated Florida law on the weighing of aggravating and mitigating circumstances by urging, both during voir dire and closing argument, that the jury was required to recommend death in two situations: (1) when the jury found one or more aggravating factors and no mitigating factors, and (2) when the

aggravating factors found by the jury outweighed the mitigating factors.

During voir dire the prosecutor stated, without objection by the defense:

> Here's the situation. You found the existence of an aggravated circumstance or circumstances proven beyond a reasonable doubt. You found that that [sic] aggravating circumstance or circumstances justify the imposition of the death penalty. You go back to the evidence, you look to mitigating circumstances. If you find that there are no mitigating circumstances, your job is over. Your recommendation to the Court is the verdict of death.
>
> If, however, after reviewing the evidence, you find the existence of mitigating circumstances, then the weighing process begins.... If you find, based upon this weighing situation that the aggravating circumstances outweigh the mitigating circumstances, then your recommendation to the Court is one of death.

[V10, 95-96]

During penalty phase closing argument, the prosecutor argued, without objection:

> If you find no mitigating factors, if you find that the evidence is devoid of mitigation, then your obligation is to return a verdict to the judge recommending a sentence of death.

[V16, 922]

> If you find ... that the aggravating factors outweigh the mitigating factors, then your recommendation to the Court will be that Joey Smith die.

[V16, 923]

The prosecutor's misstatements of the law on weighing aggravating and mitigating circumstances in determining whether to recommend death was error under this Court's decisions in Cox, Brooks, and Henyard. However, in Cox, at S508, this Court found both that the error was not fundamental and that it was harmless on two grounds. First, the prosecutor in Cox made an additional statement during voir dire:

> Well, maybe I'm being a little too simplistic here. What the law says is that you need to weigh the evidence against and weigh it in the other direction, and depending upon which way it balances out, that is supposed to decide your recommendation. You're supposed to make your recommendation based on the weight. It's not worded that way, but that's a short rendition.

Id. Second, "the trial court did not repeat the prosecutor's misstatements of the law during its instruction of the jury -- indeed, the trial court's instructions properly informed the jury of its role under Florida law." Id. In Henyard, at 250, this Court also found the error to be harmless because the comments occurred on only three occasions during an extensive jury selection process, the misstatement was not repeated by the trial court when instructing the jury, the jury was advised that statements of the prosecutor and defense lawyer were not to be treated as the law, and Henyard did not contend that the jury was improperly instructed.

In Smith's case, however, the prosecutor's misstatements of the law were expressly relied upon by the trial court in the sentencing order:

> The aggravating factors far outweigh the mitigating factors and as such requires [sic] that the appropriate punishment in this case is death.
>
> ... [T]he legislature of this state has required that death must be imposed when the aggravating factors far outweigh the mitigating factors, and this court must be guided by this law. Ours is a country of law, not men, and the law of this state requires the result to be rendered hereafter.

[V9, 1585]

In reviewing the trial court's findings on aggravating circumstances, this Court "reviews the record to determine whether the trial court applied the correct rule of law ...." Bowles v. State, 804 So. 2d 1173, 1177 (Fla. 2001); Gore v. State, 784 So. 2d 418, 432 (Fla. 2001); Rogers v. State, 783 So. 2d 980, 993 (Fla. 2001). It must follow that the trial court must also apply the correct rule of law in weighing aggravating and mitigating circumstances to determine whether life or death is the appropriate sentence. Therefore, the trial court erred by applying the wrong rule of law when it said that the law requires the imposition of death when the aggravating factors outweigh the mitigating factors in its sentencing order.

The trial court's application of the wrong rule of law in its sentencing order does not need to be preserved for appeal by objec-

tion in the trial court. Counsel for appellant is unaware of any capital case in which this Court has required a contemporaneous objection to a legal error in the trial court's sentencing order.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b) as amended in 1999 (to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed) were entitled to argue fundamental sentencing errors for the first time on appeal. In order to qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious. "In determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence." Id., at 99. Defendants appealing death sentences do not have the benefit of using Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The failure to apply the correct rule of law in weighing aggravating and mitigating circumstances to determine whether to sentence a convicted murderer to life or death is a matter of fundamental error. The error is apparent from the record, and it is

certainly serious, since it concerns the legality of the imposition of the death penalty. Imposition of the death penalty goes beyond the liberty interests involved in ordinary sentencing issues to reach the defendant's due process interest in sustaining his life.

Moreover, the trial court's failure to apply the correct rule of law to the weighing process cannot be harmless. Because the trial court in this case believed that it was required to impose death when it found that the aggravating factors outweighed the mitigating factors, it is certain that the court did not even consider the possibility of extending mercy to Smith by sentencing him to life despite the result of the court's weighing process. Thus, the court's application of the wrong rule of law necessarily contributed to or effected the sentence and rendered the error harmful under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Because the trial court's error in applying the wrong rule of law to the weighing process was both fundamental and harmful, this Court must, at the very least, reverse the death sentence and remand this case for resentencing.

This Court should also require that the resentencing proceeding be conducted before a newly empaneled jury. In both Cox and Henyard this Court reasoned that because the jury was properly instructed, the prosecutor's misstatement of the rule of law applicable to the weighing process could not have effected the jury's sentencing

recommendation. In Smith's case this Court cannot be confident that the prosecutor's misstatements of law did not effect the jury's recommendation because it knows that the misstatements did effect the trial court's sentencing decision. Because the same judge who legally instructed the jury on the weighing process was misled to apply the wrong rule of law to its own weighing process, there is at least a reasonable possibility that the same misstatements of law had the same effect on the jury as they had on the judge. Therefore, this Court must remand for resentencing before a new jury.

ISSUE V

APPELLANT IS ENTITLED TO A NEW PENALTY PHASE TRIAL BECAUSE THE COURT INSTRUCTED THE JURY UPON AND FOUND THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN THE ABSENCE OF PROOF THAT SMITH HAD A CAREFUL PLAN OR PREARRANGED DESIGN TO COMMIT MURDER BEFORE THE FATAL INCIDENT.

The prosecutor asked the trial court to instruct the jury on the cold, calculated, and premeditated (CCP) aggravating circumstance.[5] [V16 888] Defense counsel objected to that instruction on the ground that there was no evidence of planning. [V16, 898, 904] The court overruled the objection and gave the CCP instruction. [V16, 905, 969-70] In support of the death sentence, the court found that the CCP aggravating circumstance had been proved and gave it great weight. [V9, 1563-77]

In reviewing the trial court's findings of aggravating circumstances, "this Court reviews the record to determine whether the trial court applied the correct rule of law for each applicable aggravator and, if so, whether such finding is supported by competent, substantial evidence." Bowles v. State, 804 So. 2d 1173, 1177 (Fla. 2001); Gore v. State, 784 So. 2d 418, 432 (Fla. 2001); Rogers v. State, 783 So. 2d 980, 993 (Fla. 2001).

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[5] § 921.141(5)(i), Fla. Stat. (1999).

The CCP aggravating factor requires proof beyond a reasonable doubt of four elements: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); accord Guzman v. State, 721 So. 2d 1155, 1161 (Fla. 1998); Hardy v. State, 716 So. 2d 761, 765-66 (Fla. 1998).

In Smith's case the court applied the correct rule of law in finding the CCP aggravator. [V9, 1563-77] However, the trial court erred by instructing the jury upon the CCP factor and finding that CCP was proven because the evidence did not establish that Smith had a careful plan or prearranged design to commit murder before the fatal incident.

The court made the following findings in support of the careful plan or prearranged design element of CCP:

> 2. The murder of Crawford was the product of a careful plan or prearranged design to commit murder before the fatal incident, to wit:
>
> a. Defendant arrived at Pearce's location with a 9mm handgun. Pearce was in no danger requiring a firearm to protect himself and no need for a gun was shown other than to be used in some fashion.
>
> b. Defendant and Faunce Pearce had a secret pow-wow. This is not cited to prove a

conspiracy, for such would be speculation. Rather, it is cited to show that Defendant and Pearce had the opportunity to conspire.

c. The murder scene was in a deserted area of Pasco County, several miles from where the ride in the automobile began. If the killing was spontaneous, it is beyond belief that it was mere coincidence that the decision to kill just happened to occur in a deserted section of the county.

d. At the murder scene, Faunce Pearce had made a U-turn in the road and pulled over to the right shoulder of the road. Why did he not merely pull to the shoulder of the road in the same direction he was driving? No explanation for this U-turn was given and the court cannot speculate as to the reason for it. However, this fits very nicely into a possible plan to drive to a deserted section of the county, make sure no automobiles are approaching from either direction to disrupt the proceedings, and carry out the execution in seclusion.

e. In the ride to the murder scene the two victims, Robert Crawford and Stephen Tuttle, were sitting in the backseat of the automobile between two armed men with the Defendant and Pearce, both armed, in the front seat and with the only conversation being between Defendant and Pearce about exchanging firearms. The atmosphere was very tense. If there had been no prearranged plan, then why did Defendant know that it was necessary for him to have an operative firearm? If the purpose of the trip was to intimidate someone who had ripped off the victims in a failed drug deal, then what difference did it make if Pearce or Defendant had the operating firearm?

However, if the purpose of the trip was for the Defendant to kill the victims while Pearce sat behind the wheel of the automobile prepared to make a fast get-away, then it was necessary for Defendant to have the operating firearm.

[V9, 1572-74]

The problem with the court's findings is that they are based primarily upon speculation from circumstantial evidence and not proven facts. The few facts recited by the court that were proven were not sufficient to support a finding that Smith had a careful plan or prearranged design to commit murder before the fatal incident as required by Jackson. In Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), this Court ruled that when the evidence supporting an aggravating circumstance is entirely circumstantial, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. Accord Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998). The State has the burden of proving aggravating circumstances beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). "Moreover, even the trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden." Id., at 1232.

Regarding the court's paragraph 2.a., the state proved that Smith arrived at We Shelter America armed with a 9 mm handgun. [V12, 309-10, 329-30; V13, 400-01, 424, 440, 465] However, the court ignored the state's evidence that Pearce called Butterfield and requested him to come to We Shelter America, to bring Smith, and to bring firearms. [V12, 329, 352, 357; V13, 423, 444, 464] There was no evidence that Smith knew why Pearce requested his help. Moreover,

Smith's 9 mm handgun was not the murder weapon. Crawford was killed by gunshots fired by a .40 caliber handgun. [V14, 622, 625-26, 633-36] Therefore, Smith's compliance with Pearce's telephone request did not show that Smith was aware of any careful plan or prearranged design to murder Crawford before the fatal incident.

Regarding paragraph 2.b., Brittingham testified that Smith spoke to Pearce, but Brittingham could not hear what they said. [V13, 466] The trial court correctly observed that it could not speculate as to what was said in this conversation, [V9, 1573] so this evidence could not be relied upon to determine that Smith had a careful plan or prearranged design to kill Robert Crawford. The court ignored the state's evidence that Pearce told Butterfield, Brittingham, and Smith that Tuttle and Crawford were going to show them where the people who ripped him off lived. [V13, 424-25] The court ignored the state's evidence that Butterfield, Brittingham, and Smith did not threaten Tuttle or Crawford at We Shelter America. [V13, 424-25, 467] The court also ignored the state's evidence that Pearce told Bryon Loucks that he was not going to hurt the boys. Pearce said he would take them down the road, punch them in the mouth, and make them walk home. [V12, 311] The evidence ignored by the court showed that Smith was not aware of any careful plan or prearranged design to murder Crawford while he was at We Shelter America. See Bedford v. State, 589 So. 2d 245, 253 n.5 (Fla. 1991)

(jury could have rejected CCP because there was evidence of a plan to scare the victim by taking her to the Everglades and leaving her, but no evidence of a prearranged plan to kill her).

Regarding paragraph 2.c., it is true that the murder scene was in a deserted area of Pasco County, several miles from where the ride in the automobile began. [V13, 403-04, 428-30, 471-72, 475, 518, 524; V14, 558] However, the state did not prove that Smith had anything to do with selecting the location for the crime. Pearce was driving the car. [V13, 402-03, 428, 470] There was no evidence that he consulted Smith about where to go. Therefore, the location of the offense did not show that Smith had a careful plan or prearranged design to murder Crawford before the fatal incident.

Regarding paragraph 2.d., it is true that Pearce made a U-turn before pulling over to the side of the road at the location where Stephen Tuttle was shot and injured. [V13, 403-05, 430-32, 472-74] Again, the evidence proved only that Pearce was driving, [V13, 402-03, 428, 470] and there was no evidence that he consulted Smith about where, when, or why to make the U-turn. The court correctly observed that no explanation for the U-turn was given and that it could not speculate as to the reason. [V9, 1573] However, the court did speculate, with no evidentiary basis, that the turn "fits very nicely into a possible plan to drive to a deserted section of the county, make sure no automobiles are approaching from either direction to

disrupt the proceedings, and carry out the execution in seclusion." [V9, 1573-74] A finding of CCP cannot be based upon speculation about a possible plan, the state was required to prove the existence of the plan beyond a reasonable doubt. Hardy v. State, 716 So. 2d at 766; Robertson v. State, 611 So. 2d at 1232.

Regarding paragraph 2.e., it is true that Crawford and Tuttle were sitting in the back seat between Butterfield and Brittingham, Pearce was in the driver's seat, Smith was in the front passenger seat, [V13, 402-03, 416, 428-29, 470-71, 502] and all four were armed. [V12, 310, 330; V13, 401, 424-25, 440-42, 465-69, 485] It is also true that Smith and Pearce had a conversation about exchanging firearms. In fact, Smith exchanged his 9 mm handgun for Pearce's .40 caliber handgun because his 9 mm weapon jammed. [V13, 429-30, 471-72, 491-92] Counsel for appellant will concede for the sake of argument that the "atmosphere was very tense." [V9, 1574] However, the remainder of the paragraph consists of nothing but the trial court's speculation, without any evidentiary basis, that "the purpose of the trip was for the Defendant to kill the victims ...." [V9, 1574] Smith's act of exchanging firearms with Pearce because Smith's gun jammed proved that Smith did not have a careful plan or prearranged design to murder Crawford before the fatal incident. If Smith had such a plan or design he would have brought a functional firearm with him; instead, he had to resort to a weapon of opportunity. See

Farinas v. State, 569 So. 2d 425, 431 (Fla. 1990) ("The fact that Farinas had to unjam his gun three times before firing the fatal shots does not evidence a heightened premeditation bearing the indicia of a plan or prearranged design."); Guzman v. State, 721 So. 2d at 1162 (CCP not proven where defendant killed victim of burglary using sword found in victim's motel room).

The proven facts relied upon by the court do not amount to competent substantial evidence of a careful plan or prearranged design to commit the murder of Robert Crawford before the fatal incident. See Crump v. State, 622 So. 2d 963, 972 (Fla. 1993) ("[T]he evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the crime began."). At most, the proven facts relied upon the court show only that Smith may have begun to think about shooting Tuttle and Crawford during the car ride when he exchanged guns with Pearce. That hardly amounts to a careful plan or prearranged design. See Clark v. State, 609 So. 2d 513, 515 (Fla. 1992) (CCP not proved when Clark decided to murder victim during drive in woods to scene of crime). The evidence ignored by the court gave rise to a reasonable hypothesis of innocence: Smith did not have a careful plan or prearranged plan to kill Crawford before the fatal incident; instead, he reacted spontaneously to the events as they happened. See Padilla v. State, 618 So. 2d

165, 170 (Fla. 1993) (CCP did not apply where the murder was a spontaneous act).

Because the state's circumstantial evidence proved a reasonable hypothesis that Smith did not have a careful plan or prearranged design to kill Crawford, the trial court erred both by instructing the jury on the CCP aggravating factor over defense counsel's objection and by finding that the CCP factor had been proved. See Mahn v. State, 714 So. 2d at 398 (error to find CCP when there was reasonable hypothesis that CCP did not apply); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (error to instruct jury on unproven aggravating factor); Geralds v. State, 601 So. 2d at 1164 (same as Mahn). This Court has observed that the CCP factor is one of the most serious aggravating factors. Cox v. State, 27 Fla. L. Weekly S505, S511 (Fla. May 23, 2002); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The trial court gave the CCP factor great weight in sentencing Smith to death. [V9, 1577] The court also found that five mitigating circumstances had been established.[6] [V9, 1581-84] Therefore, the trial court's erroneous CCP jury instruction and finding must have

[6] The court found the following mitigating circumstances were established: Smith suffered ill effects from the death of his father figures at an early age; [V9, 1581] emotional distress caused by the rapidly declining health of Smith's brother; [V9, 1582] love and support of his family; [V9, 1582] Smith was a very good student as a child and showed great promise until his father died when Smith was 10 years old; [V9, 1582] Smith had a long history of drug abuse. [V9, 1584]

effected both the jury's close 8 to 4 vote to recommend death [V16, 688] and the trial court's imposition of the death penalty, so the errors cannot be deemed harmless under the standard of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). See Padilla v. State, 618 So. 2d at 170-71 (where elimination of CCP aggravator left two valid aggravators and one mitigating factor, this Court found it necessary to remand for a new sentencing proceeding before a new jury). The death sentence must be vacated, and this case must be remanded for a new sentencing proceeding before a new jury. Id.; Archer v. State, 613 So. 2d at 448; Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1963).

ISSUE VI

APPELLANT IS ENTITLED TO RESENTENCING BECAUSE THE COURT RELIED UPON AN UNPROVEN STATEMENT IN FINDING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR AND THE UNPROVEN STATEMENT CONTAINED THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS.

In the sentencing order, in support of the cold, calculated, and premeditated aggravating circumstance,[7] the court found, "After the killing, the Defendant announced to the people in the automobile: 'That's twelve and thirteen, eight more to go and I'll match Billy the Kid'." [V9, 1576] This finding was both erroneous and prejudicial to Smith because there was absolutely no evidence at trial that Smith made the statement quoted by the court. Instead, state witness Teddy Butterfield testified that after shooting Crawford, "When Joey got back in the car, he had made a statement that that was the 13th or 14th people that had been -- that he had shot." [V13, 433]

As argued in Issue I, supra, Butterfield's testimony was irrelevant evidence of prior uncharged and unproven crimes which was so prejudicial to Smith that the court committed reversible error when it denied defense counsel's motion for mistrial. The court's unproven version of the statement was even more prejudicial to Smith than Butterfield's testimony. Billie the Kid was a legendary gun-

[7] § 921.141(5)(i), Fla. Stat. (1999).

slinger renowned for killing approximately twenty-one people. The court's version of Smith's alleged statement implied that Crawford was the twelfth or thirteenth person Smith had killed, and that his ambition was to match Billy the Kid by killing eight more people.

The latter part of the unproven statement, "eight more to go and I'll match Billy the Kid," is particularly egregious because it is evidence of future dangerousness, a prohibited nonstatutory aggravating circumstance. In Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997), this court found testimony that the defendant would kill again was evidence of nonstatutory aggravation which was not harmless. This court opined that "our turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute." Id. Similarly, in Miller v. State, 373 So. 2d 882, 885-86 (Fla. 1979), this Court held that it was reversible error for the trial court to consider as a nonstatutory aggravating factor the possibility that the defendant might commit similar acts of violence if he were released on parole based upon the defendant's allegedly incurable and dangerous mental illness.

The court's error in finding the unproven statement is also similar to the trial judges' errors in Gardner v. Florida, 430 U.S. 349 (1977), and Porter v. State, 400 So. 2d 5 (Fla. 1981). In Gardner, the United States Supreme Court held that the Florida

sentencing judge denied Gardner his constitutional right to due process of law[8] by using portions of a presentence investigation report without notice to Gardner and without an opportunity to rebut or challenge the report.

In Porter, the trial judge found two aggravating circumstances, commission for pecuniary gain and commission to avoid arrest. A substantial portion of the basis for those findings was the deposition testimony of one of the state's witnesses. The deposition testimony was not proven at trial. Relying on Gardner, this Court held that the trial judge deprived Porter of due process of law by relying on the unproven deposition testimony without advising Porter and his counsel and without giving them the opportunity to rebut it. This Court vacated Porter's death sentences and remanded for resentencing by the trial judge.

In Smith's case, the record on appeal does not contain any deposition testimony by Butterfield, nor any other source for the trial court's version of Smith's alleged statement. Nor is there any record that the trial court notified Smith or his counsel of its intent to rely on evidence not proven at trial, nor is there any record that Smith and his counsel were given any opportunity to rebut or challenge whatever evidence, if any, the trial court relied upon.

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[8] U.S. Const. amend. XIV; see also, Art. I, § 9, Fla. Const.

Pursuant to Kormandy and Miller, the trial court committed reversible error by considering evidence of a nonstatutory aggravating circumstance. Moreover, based upon Gardner and Porter, the trial court violated Smith's right to due process of law by considering evidence not proven at trial without notice or an opportunity to rebut or challenge the evidence. These errors cannot be considered harmless under Chapman v. California, 386 U.S. 18 (1967), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), because they affected the court's decision to impose the death sentence. Therefore, this Court must vacate the death sentence and remand to the trial court for resentencing for the murder of Robert Crawford.

ISSUE VII

APPELLANT IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS AND RIGHT TO JURY TRIAL REQUIREMENTS THAT A DEATH QUALIFYING AGGRAVATING CIRCUMSTANCE MUST BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

In Jones v. United States, 526 U.S. 227, 243 n. 6 (1999), the United States Supreme Court ruled:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000), the Court held that the same rule applies to state proceedings under the Fourteenth Amendment.

The Court distinguished capital cases arising from Florida[9] in Jones, at 250-51. In Apprendi, at 2366, the Court observed that it had previously

> rejected the argument that the principles guiding our decision today render invalid state

[9] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984) (rejecting argument that capital sentencing must be a jury task), and Hildwin v. Florida, 490 U.S. 638 (1989) (determination of death-qualifying aggravating facts could be entrusted to a judge following guilty verdict and death recommendation of jury).

> capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649 ... (1990)[.]

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001).

However, in Ring v. Arizona, 2002 WL 1357257 (U.S. June 24, 2002), the United States Supreme Court overruled Walton v. Arizona and held that the Sixth and Fourteenth Amendments to the United States Constitution require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

Lawrence Joey Smith was sentenced to death pursuant to section 921.141, Florida Statutes (1999). Section 921.141(2) governs the advisory sentence rendered by the jury in this case and provides:

> (2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based on the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute, on its face, does not require any express finding by the jury that a death qualifying aggravating circumstance has been proven. Moreover, this Court has never interpreted this statute to require the jury to make findings that specific aggravating circumstances have been proven. See Randoph v. State, 562 So. 2d 331, 339 (Fla.), cert. denied, 498 U.S. 992 (1990); Hildwin v. Florida, 490 U.S. 638, 639 (1989). Consequently, the statute plainly violates the Sixth and Fourteenth Amendment requirements of Jones, Apprendi, and Ring, and is unconstitutional on its face.

Smith's case illustrates how section 921.141 violates the requirement that the jury must find a death qualifying aggravating circumstance. Pursuant to section 921.141, the jury was instructed to consider three aggravating circumstances: 1) prior conviction for a violent felony,[10] the attempted murder of Stephen Tuttle; 2) crime committed while Smith was engaged in or an accomplice in the commission of a kidnapping;[11] and 3) the crime was cold, calculated, and premeditated.[12] [V16, 696-71]

The jurors were instructed that it was their duty to

> render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to jus-

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[10] § 921.141(5)(b), Fla. Stat. (1999).

[11] § 921.141(5)(d), Fla. Stat. (1999).

[12] § 921.141(5)(i), Fla. Stat. (1999).

> tify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

[V16, 968] The jurors were also instructed:

> If one or more aggravating circumstances are established, you should then consider all of the evidence tending to establish one or more mitigating circumstance, [sic] and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence to be imposed.

[V16, 973] The jurors were further instructed that "it is not necessary that your advisory sentence be unanimous." [V16, 973] The jurors were never instructed that they had to agree on the existence of at least one death qualifying aggravating circumstance. The jury ultimately returned an advisory sentence recommending that the court impose the death penalty by a vote of eight to four. [V4, 688] The advisory sentence did not contain any express finding that any aggravating circumstance had been proven.

Consistent with the instructions given in Smith's case, the eight to four death recommendation could have been made up of three jurors who found that the only aggravating circumstance proven beyond a reasonable doubt was prior violent felony conviction, three jurors who found only that Smith had committed or was an accomplice in the commission of a kidnapping, and two jurors who found only that the murder was cold, calculated, and premeditated. Thus, it is entirely possible that Smith's jury recommended death without a finding by

seven or more jurors that one or more particular death qualifying aggravating factor or factors had been proven beyond a reasonable doubt. That result would clearly be unconstitutional under Ring.

Moreover, in the absence of an express finding by the jury that any aggravating circumstance had been proven beyond a reasonable doubt, there is no possibility of knowing whether any of the eight jurors who recommended death had found the existence of any aggravating factor. It is entirely possible that one or more of those eight jurors completely disregarded the court's instructions and recommended death without even considering aggravating circumstances. Their death recommendation may simply reflect their personal opinion that death was the appropriate penalty in this case without regard to the statutory requirements. That result would also be unconstitutional under Ring.

Furthermore, because Ring overruled Walton, there is no longer any valid reason why the Jones and Apprendi requirement that an aggravating sentencing factor must be pled in the indictment should not apply to capital cases. In Ring, at n.4, the United States Supreme Court pointed out that Ring did not contend that his indictment was constitutionally defective. As a result, the Supreme Court did not decide that question in Ring.

The Ring decision essentially makes the existence of a death qualifying aggravating circumstance an element to be proved to make

an ordinary murder case a capital murder case. Because the Supreme Court applied the Jones and Apprendi requirement that a jury find the aggravating sentencing factor beyond a reasonable doubt to capital cases in Ring, it would appear the Supreme Court ought to hold that the Jones and Apprendi requirement of alleging the aggravating sentencing factor in the indictment also applies to capital cases once that issue is presented to the Court. Therefore, this Court should find that section 921.141 is unconstitutional on its face because it does not require a death qualifying aggravating factor to be alleged in the indictment charging first-degree murder. In the absence of an allegation of a death qualifying aggravating factor, an indictment does not charge a capital offense, and no death sentence can constitutionally be imposed for the charged murder.

This argument is also illustrated by Smith's case. Count One of the indictment charged only the first-degree premeditated murder of Robert Crawford on September 14, 1999, without alleging any statutory aggravating circumstance to qualify the offense as one for which the death penalty could be imposed. [V1, 5] Although Count Two of the indictment charged the attempted first-degree premeditated murder of Stephen Tuttle on the same date, [V1, 5] and Smith's conviction for Count Two became the prior conviction of a violent felony aggravating factor during the penalty phase, Smith had not been convicted of the attempted murder at the time the indictment was

returned so the attempted murder of Tuttle could not have qualified as an aggravating circumstance at that time. More importantly, under Florida law, "Conviction on one count in an information [or indictment] may not be used to enhance punishment for a conviction on another count." State v. McKinnon, 540 So. 2d 111, 113 (Fla. 1989); Sullivan v. State, 562 So. 2d 813, 815 (Fla. 1st DCA 1990). Therefore, the state could not rely on the allegations of Count Two of Smith's indictment to qualify the charge of first-degree murder in Count I as a capital offense.

In Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised a fundamental error. In State v. Johnson, 616 So. 2d 1, 3-4 (1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process interests.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b) as amended in 1999 (to allow defendants to raise sentencing errors in the trial court after their

notices of appeal were filed) were entitled to argue fundamental sentencing errors for the first time on appeal. In order to qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious, for example, a sentencing error which affects the length of the sentence. Id., at 99-100. Defendants appealing death sentences do not have the benefit of using Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The facial constitutional validity of the death penalty statute, section 921.141, Florida Statutes (1999), is a matter of fundamental error. The error is apparent from the record, and it is certainly serious, since it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes beyond the liberty interests involved in sentencing enhancement statutes, like the habitual offender statute in Johnson, to reach the defendant's due process interest in sustaining his life.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the

statute violates the defendant's right to have the jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Thus, Florida's death penalty statute, section 921.141, is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence must be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt as set forth in Jones, Apprendi, and Ring. The issue constituted fundamental error, and the error can never be harmless. This Court must reverse Smith's death sentence and remand for resentencing to life.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse his convictions, vacate his death sentence, and remand this case to the trial court for the following relief: (1) a new trial pursuant to Issues I, II, and III; (2) a new penalty phase trial with a new jury pursuant to Issues IV and V; (3) resentencing pursuant to Issue VI; or (4) resentencing to life pursuant to Issue VII.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of July, 2002.

CERTIFICATION OF FONT SIZE

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