SUPREME COURT OF FLORIDA

CASE NO.: SC01-2113

LOWER TRIBUNAL NO.: 00-8117-CFA

RICHARD MCCOY A/K/A JAMIL RASHID,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Fourth Judicial Circuit
In and For Duval County, Florida

INITIAL BRIEF OF APPELLANT, RICHARD MCCOY A/K/A JAMIL RASHID

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STATEMENT OF THE CASE AND OF THE FACTS

In this brief, the Appellant, Richard Lee McCoy, a.k.a. Jamil Rashid[1], will be referred to as "the Appellant," "the Defendant,"or "Mr. McCoy." The Appellee, State of Florida, will be referred to as "the Appellee," or "the State."

References made in this brief to the Record on Appeal, including references to the trial testimony and other transcribed proceedings, will be designated by the symbol (RA-), followed first by the volume and then the page of the Record on Appeal. References to the Appendix to this brief will be designated by the symbol (AP-).

Statement of the Case

On June 13, 2000, Shervie Elliott, an ABC Liquor Store manager, was murdered during an early morning robbery of an ABC Liquor Store located at 3059 West Edgewood Avenue, Jacksonville, Florida. (RA-I-1-2; RA-11-12) A Duval County Grand Jury, on July 13, 2000, returned an Indictment charging Mr. McCoy

[1]The State and the defense entered into a written stipulation regarding the use of the two names of the Defendant in the Indictment, and the explanation thereof to be given to the jury. (RA-II-322)

with first degree murder, armed robbery, and armed burglary. (RA-I-8-10) A second Indictment, returned April 5, 2001, (RA-II-292-294); (AP-I) charged Mr. McCoy with first degree murder and armed robbery. The State filed a "Notice of Intent to Seek Death Penalty." (RA-I-19) The Defendant served a "Notice of Intention to Claim Alibi."(RA-I-37-38), and then supplemental alibi notices (RA-I-52-53); (RA-II-310-311).

Trial was held in Jacksonville, Florida before Circuit Judge Peter L. Dearing and a jury on May 21, 2001, through May 25, 2001. (RA-VII; VIII; IX; X; XI; XII; XIII) The jury found Mr. McCoy guilty of first degree murder and armed robbery (RA-II-387-390); (RA-XIII-1214-1217). After a penalty phase hearing conducted on June 28, 2001, (RA-XVI), the jury recommended by a seven to five vote to impose the death sentence. (RA-XVI-1488-1491); (RA-III-433). On July 23, 2001 (RA-VI-1026-1051) and July 31, 2001 (RA-VI-1015-1025), Judge Dearing conducted a Spencer hearing. Then, in a written "Sentencing Order" of August 9, 2001, (AP-II) which he read in open court, the judge followed the jury's recommendation and sentenced Mr. McCoy to death on the first degree murder charge, and life imprisonment on the armed robbery charge. (RA-III-488-496) A Judgment and Sentence to that effect was entered on August 9, 2001. (RA-III-481-487) (AP-III)

The Defendant timely filed a "Motion For New Trial"(RA-II-399-405), and a

"Motion For New Penalty Phase Hearing." (RA-III-434-436) Judge Dearing denied both of these motions. (RA-II-405); (RA-III-436) A Notice of Appeal to this Honorable Court was timely filed. (RA-III-500). Mr. McCoy remains in custody.

Statement of the Facts

The trial of this case was relatively brief, the evidentiary portion being completed in three and one half days. The State's case centered around four pieces of evidence.

The videotape. First, there was a surveillance video of the robbery inside the ABC Liquor store.[2] (RA-X-614- 622); (State's exhibit 51)The surveillance video, as can be gleaned from the trial transcript as well as from viewing it, was made in very dim light, and the human figures depicted on the video were difficult to see. The prosecutor admitted that the jury could not see the face of the perpetrator. (RA-IX-476) The State maintained that the body habitus of the killer resembled that of Mr. McCoy, and alluded to this on closing argument (RA-XII-1120); the defense maintained that it didn't, and, on closing argument, pointed out portions of the surveillance video for the jury to review which showed that the perpetrator was much larger and more muscular than Mr. McCoy. (RA-XII-1159-1162)

[2]An explanation of the operation of the ABC Liquors' video surveillance system is found in (RA-IX-599-600), through (RA-X-605-606).

The evidentiary significance of the video was that it showed the time that the perpetrator entered the liquor store (approximately 8:20 a.m.); how long he was alone with the victim in the storeroom where the victim was murdered; (RA-X-621); (State's exhibit 51) and what time the perpetrator left the store. (approximately 8:33 a.m.) The video also showed that the perpetrator acted alone. (RA-X-614-622)

What the surveillance video didn't show was the actual homicide. The murder took place in the store room of the ABC Liquors. There was no surveillance camera operating in that room. Therefore, whatever transpired between the victim and her killer during the twenty five seconds or so that they were alone in that store room is not contained on the subject surveillance tape. (RA-X-621)

The fingerprints. The prosecution also relied on a set of fingerprints found on an ABC Liquors plastic bag (State's exhibit 52); (RA-X-678) in which sales receipts of the store were kept. The bag was found on the floor of the manager's office of the ABC Liquors by Jacksonville Sheriff's Office evidence technicians during their crime scene investigation. The State tried to establish that the customary business practice of ABC Liquors' was to utilize plastic bags of this type internally, and that neither the general public, nor anyone other than ABC Liquors' store managers would customarily have access to these plastic bags. (RA-IX-591-595) ABC Liquors employees testified that plastic bags like the one on which the fingerprints were found

were typically filled with daily receipts by the store managers, sealed, and placed inside a red ABC Liquors sack to be picked up by ABC Liquors truck drivers. (RA-IX-586); (RA-IX-591-595) The drivers would then transport the red sack containing the plastic bags with the receipts from the various ABC Liquors stores to the ABC Liquors home office. The plastic bags would then be re-used as before by the various ABC Liquors stores. (RA-IX-586);(RA-IX-591-595)

After laying this predicate, the prosecutor put on a "fingerprint expert," Richard Kocik, who testified that three latent prints found on one of these plastic bags discovered on the floor of the ABC Liquor manager's office after the crime, matched the rolled ink fingerprints of the Defendant. (RA-X-671-713)

The defense argued, and indeed moved pre-trial, that this testimony was unreliable and should not be admitted, because the State's expert could not say when the questioned fingerprints were placed on the bag. On cross examination, the fingerprint expert conceded that these prints could have been placed on the plastic bag days, weeks, or even months before the robbery. (RA-X-697-698)

Further, the defense pointed out that this plastic bag contained ABC Liquors' name and address, which belied the State's contention that these plastic bags never left the ABC Liquors internal system. (RA-X-636-637) The defense further brought out, on cross examination, that the ABC Liquors "policy" of keeping these plastic

bags in the manager's office for internal use was not written down as a "policy" anywhere (RA-X-631); that several of the ABC Liquors employees in the subject store were relatively new and were likely unfamiliar with this unwritten policy(RA-X-630-631); and that ABC Liquors employees had in the past been terminated for various incidents of non-compliance with ABC Liquors rules and procedures. (RA-X-638-640) Finally, the ABC Liquors District Manager acknowledged that this plastic bag looked liked hundreds, or even thousands, of similar plastic bags circulated throughout the ABC Liquors system (RA-X-629). She conceded that she could not say, under oath, that the subject plastic bag containing the fingerprints had never been on the counter of the ABC Liquor store–a counter to which store customers had access. (RA-X-629-630) Moreover, defense counsel called into question the issue of whether the fingerprint analysis itself was reliable, that it was more art than science, and that the fingerprint analyst based his conclusions on "partial latent prints" which consisted of only a portion of the inked prints which he used for comparison.[3] Mr. McCoy explained his prints on the plastic bag by testifying that he once picked up

[3]After cross examination of the State's fingerprint expert, the prosecutor was so concerned that his expert's testimony was dubious that he asked permission to supplement his witness list, and then bring into court, a second fingerprint expert to bolster the testimony of the first expert. The trial judge denied this request. (RA-XI-845-849)

an ABC Liquors plastic bag some months earlier in a parking lot adjacent to another ABC Liquors store, and that he mailed it back to ABC Liquors after he found it. (RA-XII-1026-1027) Mr. McCoy testified that if the prints on the plastic bag recovered at the crime scene were indeed his, that they were placed on the plastic bag when he was acting as a Good Samaritan months earlier, and not during the course of any robbery and murder. (RA-XII-1026-1027)

Zsa Zsa Marcel. However, it was not the fuzzy surveillance tape or the vigorously contested fingerprint analysis on which the State primarily relied. Rather, the foundation of the State's case rested on the testimony of Zsa Zsa Marcel, a married woman who was the Defendant's lover. (RA-X-743-744) Ms. Marcel testified that the Defendant had, the day after the robbery/murder, confessed to her that he had participated in committing the crimes. (RA-X-747-749)

Trial testimony revealed that six days after the robbery and murder, local Jacksonville news stations broadcast the fact that a ten thousand dollar ($10,000.00) reward would be offered for information leading to the arrest and conviction of the perpetrator of the ABC Liquors robbery/murder. (RA-X-626) Within an hour and one half of the first broadcast of the reward, the ABC Liquors' district manager, Teresa Johnson, received an E-mail from the ABC Liquors store manager that she had been contacted by a person named Zsa Zsa Marcel, who claimed to have

information about the case. (RA-X-623-626) The ABC Liquors district manager advised the ABC Liquors store manager to refer Ms. Marcel to the Jacksonville Sheriff's Office. (RA-X-625-626)

Zsa Zsa Marcel (a/k/a Zsa Zsa Savoy) (RA-X-776-777) was the State's star witness. (RA-X-742-800; RA-XI-801-837)[4] She admitted to an ongoing extra-marital adulterous relationship with Mr. McCoy. (RA-X-745-746) She was the mother of a young minor child who was living in someone else's care in another state. (RA-X-778-779) She had other children by a common law husband[5] with whom she lived in Jacksonville. (RA-X-833) She had a previous conviction for a crime involving dishonesty or false statement, and, at the time of her trial testimony, there were four outstanding warrants for her arrest from the State of Louisiana. (RA-X-743-744) She denied that she knew anything about the warrants.(RA-X-743-744); (RA-X-780) The defense brought into court a witness who himself was in prison in Louisiana, who testified that Ms. Marcel's reputation for truth and veracity in her home state of Louisiana was questionable at best. (RA-XI-983-988) Ms. Marcel admitted at trial to repeatedly lying both to her husband and to Mr. McCoy about numerous matters,

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[4]In addition to her trial testimony, Ms. Marcel's deposition (RA-III-556-605) through (RA-IV-606-690) and sworn statement (RA-III-514-527) are a part of the Record on Appeal)

[5]Common law as far as Ms. Marcel understood Louisiana law on the point.

including but not limited to her whereabouts during the time that she was secretly seeing Mr. McCoy, as well as to a scam which she successfully foisted on Mr. McCoy to get him to give her one hundred dollars ($100.00) for a U-Haul which she told him she needed to use to leave her husband. (RA-XI-808-811)

Ms. Marcel testified that Mr. McCoy told her about the robbery/murder the day after it happened, yet she continued to cheat on her husband and see Mr. McCoy, as lovers, on the sly, every day for a week after that. (RA-X-748-750) She claimed that she was moved to act, after a week after Mr. McCoy's alleged revelation, by what she termed was his "bad attitude." (RA-X-791); (RA-X-836) She testified that she was unaware of the reward when she called ABC Liquors, however she conceded that her call to ABC Liquors was coincidentally made one and one half hours after the first broadcast that a ten thousand dollar ($10,000.00) reward was offered for the arrest and conviction of the perpetrator of the ABC Liquors robbery/murder. She admittedly asked the lead Jacksonville Sheriff's office detective about the reward on three occasions, ABC Liquors District manager twice, and ABC Liquors security once. (RA-X-791); (RA-XI-836)

The account of the murder which Ms. Marcel claimed had been given to her by Mr. McCoy was grossly inconsistent with the other evidence in the case. First, Ms. Marcel claimed that Mr. McCoy told her that he and <u>another person</u> entered and

robbed the liquor store[6]; that he, Mr. McCoy, had utilized gloves (RA-X-788) and hence there would be no fingerprints; that there were seven shots fired by the "other perpetrator"[7]; and that Mr. McCoy only heard, but did not see, the shooting. She also claimed that Mr. McCoy told her that he had robbed over four thousand dollars ($4,000.00) in this escapade, when in fact the State's evidence was that slightly over four hundred dollars ($400.00) had been stolen. (RA-X-623) Despite these blatantly incorrect assertions, Jacksonville Sheriff's Office detectives decided to wire Ms. Marcel for sound and set up an audiotape recording whereby it was intended that she would pump Mr. McCoy for information in an effort to get him to confess to the robbery/murder.

On cross-examination of Ms. Marcel, the defense attempted to explore Ms. Marcel's true motives and biases in implicating Mr. McCoy. First, of course, her checkered past and pattern of consistent lying were explored.[8] (RA-X-744) Then the

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[6]Which is of course, belied by the surveillance tape which showed one, not two, perpetrators. (RA-X-614- 622); (State's exhibit 51)

[7]Forensics revealed only three shots had been fired. (RA-IX-523-540)

[8] Ms. Marcel admitted to cheating on her husband (RA-X-798); lying to Mr. McCoy about her intention of getting a divorce (RA-X-800); lying to Mr. McCoy about conversations with her husband (RA-XI-806) and that her divorce papers had already been served (RA-X-800); lying to Mr. McCoy about her close relationship with her sister; and lying that her sister was coming to get her children. (RA-XI-806)

defense explored the fact that she was financially impoverished and that the allure of the ten thousand dollar ($10,000.00) reward for the arrest and conviction of Mr. McCoy was too much for her to resist and made her testimony suspect. (RA-X-793-795) She claimed that she first learned about the reward from Ken Boston, an Assistant State Attorney assisting with the case.[9] (RA-X-774) She admitted to calling the lead Jacksonville Sheriff's Office detective in this case, Mr. Gilbreath, who told her that the reward was predicated on arrest and conviction. (RA-X-794) Beyond those factors, however, defense counsel tried to cross examine Ms. Marcel about a robbery of a Lee's Chicken restaurant in Jacksonville which had occurred some months earlier and to which she had confessed to Mr. McCoy that she, herself, was the perpetrator. (RA-X-816-830) After objection by the prosecutor, the defense was required to proffer this cross-examination out of the presence of the jury. (RA-X-818-830) The defense argued that this cross examination was designed to inquire as to whether Ms. Marcel was lying about Mr. McCoy and wanted to implicate him in the ABC Liquor robbery/murder for fear that Mr. McCoy would implicate her in the Lee's Chicken robbery. After hearing the proffer, the trial judge refused to allow

[9]Mr. Boston was the Assistant State Attorney who, on July 11, 2000, filed a two count Information in this case, charging Mr. McCoy with second degree murder and armed robbery, offense which the Information alleged occurred on June 12, 2000, as opposed to the actual date the crime was committed, to wit, June 13, 2000.

defense counsel to question Ms. Marcel about the Lee's Chicken robbery, or her admission to Mr. McCoy about her participation in it, in the presence of the jury[10]. (RA-X-818-830) The issue was made even more complicated because the defense had subpoened the victims of the Lee's Chicken robbery to court. For it seems that the perpetrator of the Lee's Chicken robbery was an African American female with a grotesque scar on her neck. Ms. Marcel is an African American female with a grotesque scar on her neck. (RA-X-784) Again, quite coincidentally, on the day of her trial testimony, Ms. Marcel wore a turtleneck top to court which covered her scar. (RA-X-784) The trial judge, after hearing the proffer, not only refused to allow defense counsel to question Ms. Marcel about the Lee's Chicken robbery, he also refused to allow an in-court identification interaction between the Lee's Chicken victims and Ms. Marcel. (RA-XI-841-844)

The audiotape. However poor the quality of the videotape, the audiotape quality was considerably worse.[11] (RA-X-757); (State's exhibit 58) It was of very

[10]In the same vein, the trial judge refused to allow witnesses to the Lee's Chicken robbery to make an identification of Ms. Marcel, who deftly concealed a distinguishing scar on her neck with a turtleneck sweater.

[11]We have filed, in this appeal, a motion to have this Honorable Court listen to the audiotape, without the benefit of Ms. Marcel's transcript, on the same audio equipment, and preferably, in the same courtroom as did the judge and the jury in this case. This Honorable court has indicated that it has taken this motion under advisement pending a review of the briefs.

poor quality. (RA-I-47-49); (RA-II-242-266) The prosecutor admitted that "the first part is hard to hear." (RA-V-870). Even Ms. Marcel admitted that portions of the tape are inaudible, especially the first part which was recorded while Mr. McCoy was driving. The court reporter who attempted to transcribe its contents during the pre-trial motion hearing without the benefit of a transcript could could discern virtually nothing. (RA-V-875-889); (AP-IV). The same thing occurred when another court reporter listened to the audiotape on the same audio equipment in the same courtroom– but this time at the trial. The trial transcript which the court reporter typed was replete with the word, "inaudible." (RA-X-758-766)(AP-V)

Prior to trial, defense counsel filed a motions to have the audiotape declared inadmissible, because it was largely inaudible. (RA-I-47-49); (RA-II-242-266); (RA-V-866-867) The motions were renewed during the trial[12]. (RA-X-741) Defense counsel also objected to the use of a typewritten transcript, prepared by the prosecutor, because it omitted portions of the conversation, deemed portions of the conversation to be inaudible, and because it "misinterprets or speculates about words spoken in other parts of the tape." (RA-V-866); (RA-V-871) The typed transcript was never authenticated by either Ms. Marcel, nor anyone who listened to the taped

[12] At the pre-trial hearing on the Defendant's motion, the trial judge refused to listen to the audiotape until he had the benefit of a typewritten transcript. (RA-V-867)

conversation as it was being made. No attempt was ever made by the trial judge to obtain a stipulation as to the accuracy of the typed transcript, or to obtain testimony from anyone as to its accuracy or authenticity. (RA-V-866-899) After listening to the audiotape, with the benefit of the unauthenticated transcript prepared by the prosecutor, the trial judge denied defense counsel's motion, and deemed the tape sufficiently audible for presentation to the jury. (RA-V-898-899).[13]

The judge allowed the jury to hear the twenty minute audiotape, and permitted the jury to utilize the typewritten transcript (RA-II-244-266); (Court's exhibit I); (AP-VI), prepared by unknown persons at the State Attorney's Office (RA-X-756-757). The judge gave the jury a cautionary instruction about the use of the transcript, telling the jury that the transcript "represents in part the state attorney's efforts to transcribe it" (RA-X-757-758)[14] No witness authenticated the typed transcript as being a fair and/or accurate written version of what was on the audiotape. At trial, the jury not only listened to the garbled audiotape, but they were permitted by the trial judge to do so while utilizing the unauthenticated written transcript of its contents prepared by

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[13]The judge also denied the Defendant's request to delete from the audio tape æstatement attributed to the Defendant to the effect that "if I keep spending money like I'm spending I will have to get some more money." (RA-V-901). The judge found this statement to be relevant and denied the defense's request to omit it. (RA-V-905).

[14]It–meaning the audiotape. Emphasis supplied.

the prosecutor. The transcript contained supposed admissions by the Defendant including a statement that he had been in the store at the time of the crime; that he didn't think the police had anything on him because he was on probation at the time and that the police knew where to find him; and that there was no statute of limitations on murder. (RA-II-244-266) Whether the audiotape actually contained these statements at all, and whether the judge or the jury would have discerned the transcribed statements as audible statements without the benefit of the transcript, as well as the absence of an audible context in which these alleged statements were made, will be discussed during the argument portion of the brief.

The defense case. The one aspect of the State's case that was clear was the time of the commission of the crime. It occurred between 8:13 a.m. and 8:35 a.m. The defense presented alibi testimony from disinterested persons that Mr. McCoy was somewhere else during the time that this crime was committed. Indeed, the next door neighbor of a friend of Mr. McCoy, a lady named Sherry Cross, testified that while she did not know Mr. McCoy prior to this incident[15], she specifically recalled seeing him and speaking with him for around five minutes between 8:00 a.m. and 8:30 a.m. on June 13, 2000.(RA-XI-913-921). The defense was able to authenticate the

[15]The fact that Ms. Cross did not know Mr. McCoy prior to June 13, 2000 was itself corroborated by Dorothy Small who was Mr. McCoy's friend and Sherry Cross' neighbor. (RA-XI-964)

whereabouts of Ms. Cross, a long distance trucker, through testimony of William A. Weise, Sr., the Director of Safety for Ms. Cross' employer, Raven Transport. The defense, through Mr. Weise, was able to establish that Ms. Cross' truck was in Jacksonville on the morning of June 13, 2000, by virtue of a "satellite positioning system" on the truck which she drove for her employer, Raven Transport. (RA-XI-932-941). Ms. Cross specifically recalled speaking with Mr. McCoy at the day and time in question, and did not deviate from her testimony on cross-examination. (RA-XI-921-929)

Mr. McCoy's whereabouts during the time frame that the crime was committed was also established by the manager of a Krystal Restaurant, John Bailey, III. Mr. Bailey testified that Mr. McCoy was a regular customer at Krystal, and that he ate breakfast there nearly every day. (RA-XI-967) Mr. Bailey testified that he was working at Krystal the morning of June 13, 2000 and that two weeks after the robbery/murder he recalled telling a Public Defender's Office investigator that Mr. McCoy ate breakfast at that Krystal restaurant the morning of June 13, 2000.(RA-XI-970-971).

Mr. McCoy took the stand in his own defense. He testified that he spent the night at his girlfriend Dorothy Small's home and that he left there at a quarter to seven in the morning. (RA-XII-1005) He remembered that before she left for work, Ms.

Small asked him to take out the trash. Mr. McCoy testified that he initially forgot to do so and that he came back to her home at 8:00 a.m. for that purpose. (RA-XII-1005) He testified that shortly thereafter he encountered Sherry Cross, and spoke with her. (RA-XII-1006-1008) he then testified that around 8:12-8:13 a.m. he was hungry and went to the Krystal restaurant on Edgewood Avenue. (RA-XII-1005) He testified that he then went to a place called Job Connection and telephoned Ms. Small from there around 9:00 a.m. (RA-XII-10116-1012) He testified that on June 10, 2000, Ms. Marcel admitted robbing a Lee's Chicken restaurant and showed him the money which she got in the robbery as well as a .38 snub nose revolver which she used to commit the crime. (RA-XII-1013-1014) Mr. McCoy stated that he lied to Ms. Marcel during his conversation with her which was recorded on the audiotape. (RA-XII-1015-1016) He also said that a lot of what he said on the audiotape was taken out of context– ie. that Ms. Marcel had set him up and that he was merely giving conversational answers to general questions which she had about the crime.(RA-XII-1015)

He testified that he told her that he went into the ABC Liquors during that recorded conversation because he loved Ms. Marcel, knew that she was into that "kind of lifestyle' from her account of the Lee's Chicken robbery, and that he wanted to impress her. (RA-XII-1015-1016)

The Penalty Phase. The State presented its theory that the murder of Shervie Elliott was cold, calculated, and premeditated, an aggravating factor under 5(i) of Section 921.141. The defense argued that "cold, calculated, and premeditated" was not proven under the facts of the case, especially where there were no witnesses to the crime and there was no evidence of what interaction took place between the murderer and the victim during the time that the murderer was alone with the victim in the storeroom where the victim was murdered.[16] The trial judge ruled with the State that the murder was, in fact, "cold, calculated, and premeditated." (RA-III-488-496)

A related issue at sentencing was the finding of "witness elimination." The State did not present the issue to the jury, but rather presented it to the trial judge at the Spencer hearing. The defense argued that "witness elimination" was not proven on the facts of this case, and that if it was, it merged with the "cold, calculated and premeditated" factor, if the court in fact found the factor of "cold, calculated, and premeditated." Judge Dearing found both aggravating factors, but found that they merged. (RA-III-488-496) Since the jury vote was 7-5 in favor of the death penalty, it is clear that the finding of "cold, calculated, and premeditated" effected the jury recommendation. It certainly affected the trial judge, as demonstrated by the Court's

[16]The videotape surveillance camera did not record any activity in the storeroom, the place where the murder occurred.

comment at the bottom of page 7 of the sentencing order: "The Court does not find the imposition of the death penalty in the instant case to be disproportionate, particularly with the cold, calculated and premeditated aggravating factor proven as it was in this case." (RA-III-494)

SUMMARY OF ARGUMENT

All of the evidence against Mr. McCoy was circumstantial. All of the State's circumstantial evidence was compromised because it was of very poor quality. Both individually and collectively, it is simply insufficient to sustain a conviction on scrutiny by this Honorable Court on appeal.

First of all, the "surveillance video" proved little or nothing about the identity of the killer. Both the State and the defense conceded that the video did not reveal the face of the killer. The fingerprint evidence was likewise inconclusive at best. The State's expert conceded that the latent prints which he claimed belonged to the Defendant could have been placed on the ABC Liquors plastic bag days, weeks, or months before the subject crime was committed. ABC Liquors personnel conceded that this same plastic bag, bearing ABC Liquors name and mailing address, was circulated all over Florida by its truck drivers, and that any "policy" which ABC Liquors had about internal use of the plastic bags was unwritten and likely unknown by any number of its employees. No one could testify that this plastic bag had not

been previously placed in an area where it could have been handled by store customers.

All of this notwithstanding, the most glaring insufficiency in the State's proof was that the audiotape of the conversation between the Defendant and the State's paid informant, Ms. Marcel, was virtually inaudible. The jury should never have been allowed to hear it in the first place. Moreover, the impropriety of the use of the audiotape was made indisputably worse when it was tendered to the jury with a highly questionable typed transcript. Mr. McCoy was deprived of a fair trial the moment that the trial judge permitted the State to publish to the jury this unauthenticated, typed transcript of the virtually inaudible audiotape– a transcript prepared by unknown persons in the State Attorney's Office who neither participated in the conversation nor listened to it as it took place. No one testified at trial that the typed transcript accurately portrayed what was said on the audiotape. The trial judge completely disregarded the guidelines set forth in Martinez v. State, 761 So. 2d 1074 (Fla. 2000) by failing to even attempt to obtain a stipulation as to the contents of the typed transcript, and then ignored the dictates of the applicable case law by allowing the State to present to the jury a typed transcript which was authenticated as to content and accuracy by—no one. The judge made the situation worse by investing the typed transcript with a false badge of reliability by telling the jury that it was prepared by the

Office of the State Attorney.

The injustice of all of the above was compounded by the State's reliance on a convicted liar and fleeing felon, Zsa Zsa Marcel, to implicate Mr. McCoy. Ms. Marcel's checkered past would ordinarily have been enough to call her credibility into question. In this case, however, she "volunteered" her testimony one and one half hours after a $10,000.00 reward was aired on the six o'clock news. The Record on Appeal consistently shows that Ms. Marcel perceived that her testimony must result in not only the arrest of the Defendant, but also his conviction. The record also shows quite clearly that she perceived that this reward would come at the direction and discretion of State authorities. The trial judge erred in permitting Ms. Marcel to testify under such circumstances.

However, once the decision was made to allow Ms. Marcel to testify, the trial judge again made matters worse and even more unfair by severely limiting the defense in the scope of its cross examination of Ms. Marcel. The judge prohibited the defense from exploring actions on the part of the State's star witness to show her pre-existing animus against Mr. McCoy. Then, unbelievably, the trial judge refused to allow the defense to cross examine Ms. Marcel as to her motive in testifying against the Defendant.

The rulings of the trial court in this regard would probably be suspect if this

were a petit theft case; but rulings such as this in a death penalty case clearly warrant a new trial. For all of the reasons set forth above, the Defendant did not receive a fair trial, and this cause should be reversed and remanded for a new trial.

ARGUMENT

First Issue on Appeal: Whether the Trial Court Erred in Admitting The Audiotape Conversation Between the Defendant and Zsa Zsa Marcel.

The trial court was aware of this Honorable Court's decision in Martinez v. State, 761 So. 2d 1074 (Fla. 2000). After reviewing the audiotape with the benefit of a transcript, the trial court held that "the relevant portions of the tape are sufficiently audible... That they would be of benefit to the trier of fact. And that the inaudible portions do not make the tape fully useless or inadmissible or confusing." (RA-V-898-899). As the Martinez decision instructs[17], the trial judge is preliminarily charged with the duty to determine whether the unintelligible portions of the tape render the whole recording untrustworthy.

The conversation on the audiotape itself is far from distinct. It is clear from a reading of the record of the motion hearing and the trial that neither of the court

[17]Citing Odom v. State, 403 So 2d 936 (Fla. 1981); Henry v. State, 629 So. 2d 1058 (Fla 5th DCA 1993); and Harris v. State, 619 So. 2d 340 (Fla. 1st DCA 1993).

reporters[18] could glean much from the audiotape itself. (RA-V-875-889); (RA-X-758-773) (AP-IV; (AP-V) For example, one of the most critical admissions on the tape is surrounded by two inaudible words or phrases. It is inaudible before Mr. McCoy allegedly says, "I went inside the place. Right. The dude shot that woman." Then it is again inaudible. (RA-V-897-898)

Ms. Marcel, at trial, conceded that portions of the tape were completely inaudible, and that some parts are more difficult to hear than are others, because the Defendant allegedly was driving his vehicle as he was being recorded. (RA-X-756). The prosecutor, at the motion hearing, conceded difficulty in hearing what was said at all during the first part of the tape, and argues only that its audibility gets better in the latter part. (RA-V-870) The trial judge conceded that "There are a couple of points where I think that I am hearing something different from what your transcript says." (RA-V-895)

What we are dealing with in the case of Mr. McCoy is not merely a case of "partial inaudibility." Rather, the subject audiotape was almost totally inaudible. Where a tape is almost totally inaudible, our courts of appeal have held it to be inadmissible. See, for example, Carter v. State, 254 So. 2d 230 (Fla 1st DCA 1971);

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[18]Persons who, by training and education, earn their living by accurately transcribing the spoken words of a variety of people

and Springer v. State, 429 So. 2d 808 (Fla. 4th DCA 1983). In each of those cases the audiotape was almost totally inaudible, and it would have been improper speculation for the jury to deliberate over that which even the trained court reporters could not transcribe.

The only way for this Honorable Court to determine whether or not the trial judge was correct as to this audibility issue is to listen to the tape itself, utilizing the same audio equipment as did the trial judge. This review should be made without the benefit of a transcript. The reason I stress that this should be done without a transcript is that the transcript itself was disputed, and, most important, never authenticated by anyone as being accurate.

Indeed, if the audiotape is made to stand on its own, and reviewed for what it is, which is a largely unintelligible conversation, it is clear that it should never have been allowed in evidence. For the trial judge to have allowed this garbled conversation to come into evidence when so much of it is inaudible, and with the context of the audible portions completely indiscernible, constituted reversible error.

Second Issue on Appeal: Whether the Trial Court Erred in Permitting the Jury to View an Unauthenticated Transcript, Prepared by the State Attorney, of the Audiotape Conversation Between the Defendant and Zsa Zsa Marcel.

In Martinez v. State, 761 So. 2d 1074 (Fla. 2000), this Honorable Court addressed the procedures to be followed by trial courts involving the use of typewritten transcripts of an audiotape conversation of a defendant.

The Martinez decision set forth several guidelines to trial courts for the use of transcripts of an audiotape at trial. This Honorable Court set forth its suggested procedures in this regard in considerable detail and emphasized that "trial courts should exercise extreme caution before allowing transcripts of recordings to be viewed by the jury." Martinez, at 1086[19]. The procedures to be utilized as a predicate for the admission of typewritten transcripts to be given to a jury as summarized in Martinez are:

- There should be an attempt by the court to obtain a stipulation from the parties as to the accuracy of the transcript. Martinez, at 1086.
- There must be testimony from either of the actual participants to the conversation that the transcript was accurate; Martinez, at 1086, or
- That someone who listened to the conversation as it was taking place

[19]As will be seen from our discussion, the trial judge simply did not follow Martinez. In fact, his attitude toward Martinez seemed cavalier from the outset, despite this Honorable Court's admonition of "extreme caution." For example, in discussing the Martinez decision relative to the issue of the admissibility of the tape itself, the trial judge stated, "I would assume that logically. It's nice of the court to express the legal jargon of what most of us would assume ought to be the case." (RA-V-875)

can verify the accuracy of the transcript, so long as such persons can establish that the quality of the conversation that they overheard or listened to was better at the time they overheard it than the quality of the tape recording. Martinez, at 1086.

These standards for the admissibility of a transcript of an audiotape as set forth in the well-reasoned Martinez decision have a firm basis in the stare decisis of this state. See, for example, Gulf Life Insurance Company v. Stossel, 131 Fla. 127, 179 So. 163 (1938), requiring proper authentication as to accuracy of a motion picture film prior to its admissibility; Padgett v. State, 53 So 2d. 106 (Fla. 1951) requiring proper authentication of an audiotape itself as to accuracy as a predicate to its admissibility; and as to typed transcripts, Duggan v. State, 189 So. 2d 890 (Fla. 1st DCA 1966), and Golden v. State, 429 So 2d 45 (Fla. 1st DCA 1983), review denied, 431 So. 2d 988 (Fla. 1983) where the court of appeals held that before a typed transcript could be admitted, either, "(1) the person who prepared the transcript could testify that he witnessed the events recited in the transcript and thus had personal knowledge that the transcript was an accurate rendition of the tape recording; or (2) an expert witness professionally skilled in understanding inaudible taped conversations could testify that the transcript was an accurate rendition of the recording." Golden, at p. 52; and Harris v. State, 619 So 2d 340 (Fla. 1st DCA 1993), where the court of appeals held that

"...neither written nor oral interpretation of a tape recording is admissible unless such interpretation is properly authenticated by a person having personal knowledge of the contents of the tape recording, or by an expert witness skilled in interpreting inaudible tape recordings." Harris, at 342. (Emphasis supplied.)

The trial court in the case sub-judice completely disregarded each and all of the aforementioned guidelines for the admissibility of transcripts set forth by this Honorable Court in Martinez, as well as First District Court of Appeals authority cited above. The judge permitted a typewritten transcript of unknown origin, which was never authenticated as to its accuracy, to be given to the jury along with a virtually inaudible audiotape. Did the trial judge exercise "extreme caution' in admitting the transcript of the audiotape conversation? No. Did the trial court ignore Martinez and the other case decisions in this area? Definitely. Was Mr. McCoy prejudiced by this and denied a fair trial? Absolutely.

First, contrary to the guidelines of Martinez, it is clear that the trial court made no attempt whatsoever to obtain a stipulation from the parties as to the accuracy of the transcript. In fact, the Record on Appeal is completely devoid of any such discussion, either at the pre-trial motion hearing on the admissibility of the tape and the typewritten transcript, or at the trial.

Second, and most important, the trial court never took testimony from anyone

as to the accuracy of the transcript which was given to the jury, either before trial, or during the trial. This is absolutely astounding. The jury was given a transcript whose accuracy was never authenticated by anyone! The participants to the conversation recorded on audiotape were Mr. McCoy, who of course did not testify at the pre-trial motion hearing on the admissibility of the audiotape and the transcript, and Zsa Zsa Marcel, who didn't testify at the pre-trial motion hearing either. While Ms. Marcel testified at trial, and the audiotape and typewritten transcript was introduced during her testimony (RA-X-756-757), she never authenticated the accuracy of the typewritten transcript. The only question ever directed to her relative to the typewritten transcript by the prosecutor prior to the jury's viewing it was,

Q-"Did you later help prepare a transcript of the tape?

" A- "Yes, I did."

Ms. Marcel was never asked whether the transcript accurately reflects the conversations on the audiotape. In fact, for all we know from the record, the transcript could be somewhat accurate, partially accurate, or even mostly inaccurate. Ms. Marcel was never asked! She was also never asked the circumstances surrounding her helping to prepare the transcript. She was never asked who she was helping, what input she had, or whether or not she agreed with the contents of the typewritten transcript which was utilized by the jury . In fact, the transcript of the

audiotape was given to the jury without any attempt by the prosecutor to authenticate anything about it, much less the accuracy of its contents.

While the foregoing is bad enough, (with the trial judge not only completely disregarding Martinez by giving the jury an unauthenticated typed transcript) he then made matters even worse. For the trial judge, in his cautionary instruction to the jury, indicated that "the transcript is a demonstrative aid and represents in part the state attorney's efforts to transcribe it..."[20] (RA-X-757) (emphasis supplied).

In other words, the trial judge effectively told the jury that the State Attorney's office created the transcript. This court instruction stamped the typed transcript with an aura of reliability far beyond what would have existed if Ms. Marcel testified as to its authenticity and accuracy[21]. This is of course, completely contradictory to the procedures outlined in Martinez whereby the transcript, if not stipulated to as to its accuracy, must preliminarily be authenticated by one of the people speaking on the audiotape or by someone who was listening to the audiotape conversation as it was

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[20]The trial judge presumably made this assumption from information given to him at the motion hearing on the admissibility of the tape and transcript–see (RA-V-867)

[21]Which of course, again contrary to Martinez, she didn't.

made.[22] The total effect of this was unbelievably prejudicial to the defense.

Thus, this unauthenticated transcript of the audiotape, never admitted in evidence yet improperly stamped with a badge of reliability of the Office of the State Attorney by the judge in his "cautionary instruction," resulted in the trial court effectively allowing the typed transcript to "become the evidence that the jury relies upon rather than the tape itself..." U.S. v. Holton, 325 U.S. App. D.C. 360, 116 F 3d 1536, 1540 (D.C. Cir. 1997), cert. denied, 522 U.S. 1067, 139 L. Ed 3d 673, 118 S. Ct. 736 (1998).

Thus, what is before this Honorable Court for review is a conviction based in large part on an unauthenticated, typewritten transcript of a virtually inaudible tape recording. Compounding this error is the fact that this unauthenticated transcript was ordained with a misleading badge of reliability in the trial court's misguided cautionary instruction. Completely ignoring the guidelines set forth in Martinez, the judge allowed the jury to utilize a typewritten transcript prepared by unknown persons who never, ever, testified as to its accuracy. Such a conviction, especially in a death penalty case, simply cannot stand.

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[22] Whoever may have been listening to the conversation between Mr. McCoy and Ms. Marcel as it was made didn't testify as to the authenticity of the typed transcript. Moreover, as Martinez pointed out, the authenticity of a typed transcript can be verified by an expert witness. Sub-judice, the State didn't elect to call such an expert.

Third Issue on Appeal: Whether the Trial Court Erred in Denying the Defendant's Motion for Judgment of Acquittal Made at the Close of the State's Case and Renewed after the Close of the Evidence in that the Evidence against the Defendant was Insufficient to Sustain a Conviction.

Mr. McCoy was convicted entirely on circumstantial evidence. The only evidence against him was (1) latent fingerprints; (2) a videotape surveillance film of the robbery where the perpetrator's features were indistinguishable; (3) a virtually inaudible audiotape wherein, allegedly, inculpatory statements were made; and (4) testimony of a convicted liar who, motivated by the promise of a reward, gave a testimonial account of alleged admissions of guilt on the part of the Defendant which was inconsistent with the forensic evidence in this case.

The rule is well established in Florida that in criminal prosecutions where circumstantial evidence is relied upon for proof of guilt, such evidence "must not only be consistent with defendant's guilt, but it must also be inconsistent with any reasonable hypothesis of innocence." Driggers v. State, 164 So. 2d 200 (Fla. 1964); Wilson v. State, 493 So 2d 1019 (Fla. 1986); Bedford v. State, 589 So 2d 245 (Fla. 1991), cert. denied, 503 U.S. 1009, 118 L. Ed 2d 432, 112 S. Ct. 1773 (1992); Orme v. State, 677 so. 2d 258, 262 (Fla. 1996). Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a

conviction. Scott v. State, 581 So. 2d 887 (Fla. 1991); Williams v. State, 143 So 2d 484 (Fla. 1962).

In the case before this Honorable Court for review, each and all of the foregoing elements of the State's proof were circumstantial, created only suspicion, and were either incompetent or not worthy of belief by a rational juror.

(A) The fingerprint evidence was highly suspect and, in and of itself, was insufficient to support a conviction.

The defense moved in limine to prohibit the introduction of the Defendant's fingerprints. (RA-II-312-313) The trial Court denied the motion in an Order dated May 14, 2001, and stated that the fingerprint issue is "one of the weight to be given to the evidence, not to its admissibility." (RA-II-314)

The fingerprints in question were found on an ABC Liquors plastic bag in the manager's office of the store which was robbed. The bag was found on the floor of the office of the subject ABC Liquors by Jacksonville Sheriff's Office evidence technicians after the robbery and murder. The State tried to prove that ABC Liquors' customary business practice was to utilize these plastic bags internally. The State tried to show that neither the general public, nor anyone other than ABC Liquors' store managers would customarily have access to these plastic bags. However, the State's strategy of exclusivity of internal use was belied by the evidence. In fact, the plastic

bag on which the questioned fingerprints were found contained, as did all of such plastic bags utilized by ABC, ABC Liquors' name and address. This fact alone certainly contradicted the State's theory that these plastic bags never left the ABC Liquors internal system. It was further revealed, that this so-called ABC Liquors "policy" of keeping these plastic bags in the manager's office for internal use was not written down as a "policy" anywhere. It was also brought out that these plastic bags were not only handled by store managers, but also were transported by ABC Liquors truck drivers to ABC Liquor stores all over the State of Florida; that several of the ABC Liquors employees in the subject store were relatively new and, in fact, one such employee had her first day on the job the day before the robbery and was certainly unfamiliar with this unwritten "policy." The testimony was also elicited that ABC Liquors employees may well have been unfamiliar with this unwritten policy, and that ABC Liquors employees had in the past been terminated for various incidents of non-compliance with ABC Liquors' rules and procedures.

The State's fingerprint expert, Richard Kocik, testified that three latent prints found on one of these plastic bags discovered on the floor of the store manager's office after the crime, matched the rolled ink fingerprints of the Defendant. However, the State's expert could not say when the fingerprints were placed on the bag. In fact, when on cross examination, the State's fingerprint expert conceded that these prints

could have been placed on the plastic bag days, weeks, or even months before the robbery. Mr. McCoy rebutted the State's theory by testifying to once picking up an ABC Liquors plastic bag some months earlier in a parking lot adjacent to another ABC Liquors store, and that he mailed it back to ABC Liquors after he found it. Mr. McCoy testified that if the prints on the plastic bag recovered at the crime scene were indeed his, that they were placed on the plastic bag when he picked it up in the parking lot.

It is well settled that where fingerprint evidence found at the scene of a crime is relied upon to establish identity, the evidence must be such that the print could have been made only when the crime was committed. Tirko v. State, 138 So. 2d 388, 389 (Fla 4th DCA), cert. denied, 303 so. 2d 29 (Fla. 1974); A.V. P. v. State, 307 so. 2d 468 (Fla. 1st DCA 1975); see also Williams v. State, 247 So. 2d 425, 426 (Fla. 1971) where the fingerprint evidence showed only that the defendant had been at the crime scene, not when he was there.

This Honorable Court so held in Jaramillo v. State, 417 So 2d 257 (Fla 1982), where the defendant was convicted of first degree murder in a double homicide which took place in a private residence. The State relied on the fact that the defendant's fingerprints were found on items recovered from the scene of the crime. However, as in the case of Mr. McCoy, the fingerprint technician testified that he had no way to

determine when the fingerprints were placed on the crime scene evidence. The defendant, as did Mr. McCoy, offered a reasonable explanation as to how his fingerprints were on crime scene evidence. This Honorable Court, in finding the fingerprint evidence to be insufficient in and of itself, overturned the defendant's conviction and held that a special standard of review of the sufficiency of the evidence applies where a conviction is based entirely on circumstantial evidence, to wit, the evidence must be inconsistent with any reasonable hypothesis of innocence.

In Shores v. State, 756 so 2d 114 (Fla. 4th DCA 2000), the Court of Appeals considered a case in which there had been a burglary of a private residence. A box of ammunition, (purchased approximately two months earlier) in one of the ransacked drawers of the home, contained the defendant's fingerprint. This was the only evidence connecting the defendant to the burglary. As in Mr. McCoy's case, there was no evidence as to the freshness of the fingerprint. The Court of Appeals held that because fingerprints were the only evidence linking the defendant to the crime, and because they were found on an object that was accessible to the public, they were insufficient to sustain a conviction.

In Leonard v. State, 731 So. 2d 712, (Fla. 2d DCA), rev. denied, 735 So. 2d 1286 (Fla. 1999), the defendant's fingerprints were found on a candy bar wrapper in the burglary victim's bedroom. Other candy bars of the same type were contained in

a box in the victim's refrigerator. The defendant's girlfriend testified that she and the defendant had often shopped at the same supermarket used by the victim, and that the defendant would often pick up candy boxes, intending to purchase them for her children, but would sometimes return them to the shelves if he didn't have enough money to pay for them. Although there was other evidence connecting the defendant to the burglary, and his conviction was affirmed, the Court of Appeals made it clear that the fingerprint evidence alone would have been insufficient for a conviction.

Similarly, in Mutcherson v. State, 696 So 2d 420, (Fla. 2d DCA 1997) the defendant's fingerprint was found on a gumball machine which had been broken into inside a store which had been burglarized. The court observed that, without more, the fingerprint evidence would have been insufficient to sustain a conviction.

In C.E. v. State, 665 So 2d 1097 (Fla. 4th DCA 1996), fingerprints belonging to a juvenile defendant were found on the broken window of a police crime scene van which had been burglarized. This police van had been parked in a place accessible to the public and was dispatched throughout the county on a daily basis. The defendant in C.E. v. State, id. as did Mr. McCoy sub judice, offered a theory of innocence as to how his fingerprints were at the crime scene. The C.E. defendant testified that he could have innocently leaned against the van on another occasion when the vehicle was out and about. Indeed, as in the case of Mr. McCoy, the State could not prove

when the questioned fingerprints were made, and the Court of appeals ruled that a judgment of acquittal should have been entered.

In Rhoden, et. al. v. State, 227 So 2d 349 (Fla. 1st DCA 1969), the First District Court of Appeals reversed the convictions of three co-defendants who were convicted of grand larceny. The evidence at trial consisted primarily of fingerprint evidence taken from furniture which had been stolen from the crime scene and from an automobile and trailer used to transport the furniture. The Court of Appeals held that the jury could not reasonably have concluded that the defendants' fingerprints were made at the time that the charged crimes were committed, and therefore the circumstantial evidence was not inconsistent with any reasonable hypothesis of the defendants' innocence.

Where fingerprints are critical evidence, the state often argues that they should be admitted because they are corroborated by other evidence in the case. In the criminal prosecution of Mr. McCoy, there was no such sufficient corroborating evidence. For as we have seen, the audiotape, standing alone, without the unauthenticated typed transcript, was little more than confused and distorted conversation which could easily be taken out of context. Similarly, the videotape did not reveal the identity of the murderer. Indeed, if the jury received only the videotape, the audiotape (without the transcript), and the fingerprint evidence, a judgment of

acquittal after the close of the State's case-in-chief would (or should) have been a virtual certainty.

The State may argue that while the videotape, audiotape without the transcript, and fingerprint evidence may not have been sufficient to sustain a conviction, they were sufficient when combined with the testimony of Ms. Marcel. It is our position, however, that the testimony of Ms. Marcel was not consistent with the other evidence which the State put forth, and in fact should never have been allowed before the jury in the first place. Remember, Ms. Marcel claimed that Mr. McCoy told her that he and another person entered and robbed the liquor store; that he, Mr. McCoy, had utilized gloves and hence there would be no fingerprints; that there were seven shots fired by the "other perpetrator"; and that Mr. McCoy only heard, but did not see, the shooting. She also claimed that Mr. McCoy told her that he had robbed over four thousand dollars ($4,000.00) from the liquor store, when in fact the State's evidence was that four hundred fifteen dollars ($415.00) had been stolen. In fact, Ms. Marcel's testimony did not corroborate the fingerprint evidence– it was in direct contradiction to it. It thus becomes clear that the only evidence which the State brought before the jury which was inculpatory of Mr. McCoy was the fingerprint evidence. However, as we have seen, the State's fingerprint expert could not say how or when Mr. McCoy's latent fingerprints were left on the plastic bag, a bag which was circulated in ABC

Liquor stores all over the State of Florida. Despite the State's attempts to show that the plastic bag could be touched only by store managers, it was clear from the cross examination of the State's witnesses that literally anyone, including Mr. McCoy, could have come in contact with this plastic bag as it circulated amongst the hundreds of ABC Liquor stores throughout the State of Florida.

The evidence in this case was completely circumstantial, and even the circumstantial evidence was as fuzzy as the videotape and as garbled as the audiotape. The foundation of this circumstantial house of cards rested on the very questionable testimony of a paid witness, whose own testimony was contrary to the forensics in this case. The sum total of this evidence is that it is grossly insufficient on which to base a guilty verdict, especially when viewing it in the light of strict scrutiny required in this death penalty appeal.

Fourth Issue on Appeal: Whether the Trial Court Erred in Allowing State Witness Zsa Zsa Marcel to Testify Since Her Testimony Was Tainted by Virtue of Being Motivated Not Only By A Promise of a Financial Reward, But Also By A Promise To Shield Her From Prosecution For An Unrelated Felony.

This entire prosecution was flawed by virtue of improper promises and rewards from the State to the most important witness for the prosecution, Zsa Zsa Marcel.

From the inception of this case, Ms. Marcel's assistance and testimony were

brought about by a promise of a financial reward in exchange for her pre-trial assistance and trial testimony. The reward, at least based upon what is in the Record on Appeal, was perceived by Ms. Marcel to have been offered by the State of Florida, or, at least, within the discretion and control of the State as to whether or not she would receive it.

Second, the State compounded this improper conduct by shielding Ms. Marcel from herself being prosecuted by the State Attorney's office for an unrelated, but very serious, felony offense. The facts surrounding this bizarre scenario are set forth in the defense motion entitled "Motion To Compel Investigation By the State or, In the alternative, To Dismiss the Indictment or Prohibit the Testimony of Zsa Zsa Marcel." (RA-II-347-350)[23]

The reward offered to the State's primary witness, Zsa Zsa Marcel, wherein she would receive the sum of ten thousand dollars ($10,000.00) upon the arrest and conviction of the Defendant, and the actions of the State in shielding Ms. Marcel from felony prosecution for another offense, both constitute gratuities offered in exchange

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[23]The trial judge denied this motion. (RA-II-351) The defense also filed a related motion based on similar grounds entitled, "Motion To Recuse The Office of the State Attorney From Prosecuting This Case and to Continue Trial For Appointment of Special Prosecutor." (RA-II-343-345). The trial judge denied this motion as well. (RA-II-346)

for testimony in violation of 18 U.S.C. § 201(c)(2). Further, these two good and valuable rewards constitute inducements to testify in violation of the Florida Rules of Professional Conduct[24]. The trial Judge should have ensured the integrity of the trial by suppressing Ms. Marcel's rewarded, inconsistent, and hence inherently unreliable, testimony.

This type of unreliable, compensated, testimony has had a very damaging effect on the integrity of the criminal justice system as a whole. Indeed, the impact of compensated witnesses on criminal trials is often significant and sometimes critical. It has resulted in dramatic miscarriages of justice. In their book, "Actual Innocence: Five Days to Execution and Other Dispatches From The Wrongfully Convicted,[25]" authors Dwyer, Neufeld, and Scheck tell the story of Ron Williamson who was convicted of murder but eventually freed by conclusively exonerating DNA evidence. Williamson spent twelve years in prison before being freed. At one point, he was on death row only five days from execution. The testimony of a "jailhouse snitch" who claimed to have heard Williamson confess to the murder, was critical to Williamson's conviction. In return for her testimony, the Williamson snitch received lenient

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[24]Florida Rule of Professional Responsibility 4-3.4(b).

[25]"Actual Innocence: Five Days to Execution and Other Dispatches From The Wrongfully Convicted," Dwyer, Neufeld, and Scheck, Doubleday Press, February, 2000.

treatment on a bad check charge despite two previous felony convictions. The authors, in an appendix to their book, tell us that of the sixty-four cases of DNA exoneration analyzed by them, "compensated snitch" testimony was a factor in 21% of the convictions[26].

The federal Tenth Circuit Court of Appeals reversed a defendant's conviction because the prosecutors obtained testimony in exchange for "(1) the promise not to prosecute [the witness] for certain offenses, (2) the promise to inform Mississippi authorities of his cooperation, and (3) the promise to inform the district court of his cooperation." United States v. Singleton, 144 F.3d 1343, 1348 (10th Cir. 1998).[27] Several federal district courts have considered so-called Singleton motions since.[28]

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[26] Id. Appendix, chart 2.

[27] The original Singleton decision was, of course, vacated en banc nine days after it was originally entered, 165 F. 3d 1297 (10th Cir. 1999).

[28] Two followed Singleton and suppressed testimony procured by plea agreement: United States v. Fraguela, 1998 WL 560352 (E.D. La. Aug. 27, 1998); United States v. Lowery, 15 F.Supp.2d 1348 (S.D. Fla. 1998). The others are: United States v. Szur, 1998 WL 661484 (S.D.N.Y. Sept. 24, 1998); United States v. Polidoro, 1998 WL 634921 (E.D. Pa. Sept. 16, 1998); United States v. Durham, 1998 WL 684241 (D. Kan. Sept. 11, 1998); United States v. Juncal, 1998 WL 525800 (S.D.N.Y.Aug. 20, 1998); United States v. McGuire, --- F.Supp.2d ---, 1998 WL 564234 (D. Kan. Aug. 19, 1998); United States v. Gabourel, 9 F.Supp.2d 1246 (D. Col. 1998); United States v. Dunlap, 17 F.Supp.2d 1183, (D. Col. 1998); United States v. Guillaume, 13 F.Supp.2d 1331, (S.D. Fla. 1998); United States v. Eisenhardt, 10 F.Supp.2d 521 (D. Md. 1998); United States v. Reid, 19 F.Supp.2d 534, 1998 (E.D. Va. 1998); United States v. Arana, 18 F.Supp.2d 715, (E.D. Mich.

The facts in the present case are more compelling than that approved originally in Singleton because the case at bar concerns not only a promise to forego prosecution, but also an actual financial reward to the State's star witness which was withheld until the Defendant was convicted. The Singleton court did not consider this extreme situation as we have sub-judice. See Singleton, at 144 F.3d at 1348.

Section 201(c)(2) bars giving or promising anything of value in exchange for sworn testimony.[29] In this case, Ms. Marcel contacted the Jacksonville Sheriff's Office detectives, and even one of the prosecuting attorneys, to determine the status of her reward, and what she would have to do to obtain it. Courts agree that the phrase "anything of value" as used in federal statutes outlawing bribery is to be interpreted in its broadest sense, encompassing both tangible and intangible benefits. United States v. Marmolejo, 89 F.3d 1185, 1192 (5th Cir. 1996), aff'd sub nom.

1998); United States v. Duncan, 1998 WL 419503 (E.D. La. July 15, 1998).

[29] The statute States:

> Whoever ... directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom ... shall be fined under this title or imprisoned for not more than two years or both.

Salinas v. United States, 118 S.Ct. 469 (1997), (holding that conjugal visits are things of value under 18 U.S.C. § 666(a)(1)(B) and collecting cases);(holding that witness' testimony is thing of value under 18 U.S.C. § 876); United States v. Gorman, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (holding promise of future employment is thing of value under 18 U.S.C. § 201(c)(1)(B)); United States v. Sun-Diamond Growers of Calif., 941 F.Supp. 1262, 1269 (D.D.C. 1996) (holding that "companionship" is thing of value under 18 U.S.C. § 201(c)(1)(A)). See also United States v. Williams, 705 F.2d 603, 622-23 (2d Cir. 1983) (holding that bribe recipient's subjective estimation of value and not actual value of stock controls under 18 U.S.C. § 201(c)).

Needless to say, Zsa Zsa Marcel faced an enormous temptation to slant what she had to say so that those offering the ten thousand dollar ($10,000.00) reward could obtain the desired conviction. In this case, a conviction of Mr. McCoy directly resulted in a large financial reward for Ms. Marcel.

Moreover, by participating in the reward process, the State also violated Florida Rule of Professional Conduct 4-3.4(b). That Rule provides:

> [A lawyer shall not] fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for the professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for attending, or testifying at proceedings. (Emphasis

supplied)

An "inducement to a witness" is anything given to the witness for his testimony. See Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F.Supp. 1516, 1524-25 (S.D. Fla. 1994), aff'd 117 F.3d at 1335 n.2.

This Rule ensures a level playing field in our adversary system, which "contemplates that the evidence in a case is to be marshaled competitively by the contending parties." Comment to Rule 4-3.4. Without it, the more powerful, influential, or wealthy lawyer in a case would have an insuperable advantage. Jailhouse snitches would proliferate. Convicted liars such as Ms. Marcel, in desperate financial condition, might well slant the truth to obtain a conviction and thus receive a reward. In this case, the prosecutors assisted ABC Liquors and the Jacksonville Sheriff's Office to exact Ms. Marcel's favorable (albeit inconsistent with the forensic evidence) testimony in violation of the Rule. This poses a grave threat to the integrity of these proceedings:

> The very heart of the judicial system lies in the integrity of the participants. Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice.

The Florida Bar v. Jackson, 490 So.2d 935, 936 (Fla. 1986).

In Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine

Ass'n, 865 F.Supp. 1516, 1524-25 (S.D. Fla. 1994), aff'd 117 F.3d at 1328 (11th Cir. 1997) the Plaintiff sought to recover insurance proceeds in connection with the theft of over nine million dollars from a warehouse. The defendant's insurer, Lloyds, undertook an investigation in cooperation with law enforcement officers to help solve the robbery. Lloyds paid over $750,000.00 to informants, witnesses, and intermediaries. Of that sum, $120,000.00 was paid to two fact witnesses for their testimony at depositions. When opposing parties filed a motion for sanctions based on the payments, Lloyds defended on the grounds that it sought truthful testimony, that its payments were made with the knowledge and cooperation of law enforcement, and that the testimony led to the apprehension and conviction of the wrongdoers. The district court excluded the testimony of the fact witnesses, relying in part on Rule 4-3.5(b) of the Florida rules of professional Conduct. The Court noted that whether this paid for testimony was truthful or not, it violated the integrity of the justice system.

Despite the federal and state prosecutors' on-going campaigns to exempt its lawyers from otherwise generally applicable professional rules of ethics, there is no question that the prosecutors in this case are subject to the Florida Rules of Professional Responsibility. As members of the Florida Bar, the prosecutors are subject to the Bar's rules. Suppression is appropriate for violation of Florida Rule of Professional Responsibility 4-3.4(b). The district court in Golden Door did just that

and was affirmed on appeal. 17 F.3d at 1335 n.2.

Sub-judice, Ms. Marcel's testimony was the only "fact witness" against Mr. McCoy which was offered to the jury. However, was she a reliable witness on which a conviction could be based? Not at all. She was a convicted liar, with four outstanding arrest warrants; she admitted that she lied to Mr. McCoy before, during, and after making the audiotape; that she was suspected of committing an unrelated robbery which she confessed to Mr. McCoy; and, perhaps most important, the State Attorney's Office advised her of the reward for her testimony leading to the arrest and conviction of Mr. McCoy[30]. One of her two motives to implicate the defendant, besides her own culpability in the Lee's Chicken robbery, was the money which she perceived was offered by the State for the Defendant, Mr. McCoy's conviction. A conviction of murder and a sentence of death should not stand on such a flimsy foundation.

Fifth Issue on Appeal: Whether the Trial Court Erred in Restricting Defense Counsel's Cross Examination of the State's Chief Witness, Zsa Zsa Marcel.

[30] We do not contend that the State of Florida put up the reward money. It is clear that ABC Liquors did so. However, that fact, at least on the record, was not clear to Ms. Marcel, who testified that she first heard about the reward from an Assistant State Attorney, and that she inquired of the Jacksonville Sheriff's Office's lead detective on this case repeatedly during the pendency of these proceedings as to when she would receive her reward.

Assuming that Ms. Marcel should have been allowed to testify at all, her testimony was given undue credence because the jury was not allowed to hear about her bias against the Defendant, or what the defense contended was her true motive in testifying.

The trial Court took the unusual position of limiting the Defendant's ability to reasonably and thoroughly cross-examine the State's most important witness. This improper limitation on the Defendant's constitutional right to confront and cross-examine the witnesses against him began during pre-trial proceedings relative to restricting the defense from inquiring into previous acts of animus on the part of Ms. Marcel to the Defendant's family, (RA-V-980-988) and continued into the trial itself wherein the Judge refused to allow defense counsel to cross-examine Ms. Marcel as to her motive in testifying against the Defendant.

On May 18, 2001, the State filed a "Fourth Motion in Limine" (RA-II-340-341), requesting the entry of an order prohibiting the defense from cross-examining Ms. Marcel about the fact that she, out of malice to the defendant and his family, made hundreds of dollars of unauthorized charges to the telephone account of the Defendant's father[31]. Defense counsel opposed the motion, stating that he intended to show that Ms. Marcel was testifying "against" the Defendant because of malice or

[31]With whom the Defendant lived and contributed to the household expenses.

animus which she had against the Defendant and his family. The defense wanted to show that not only did Ms. Marcel run up hundreds of dollars of unauthorized telephone charges on the Defendant's father account because of malice, but also to show that during the time frame of the Defendant's alleged admissions to her, that Ms. Marcel was committing deceitful and dishonest acts which hurt the Defendant and his family for her own pecuniary gain. (RA-V-980-988) The trial Judge, after hearing argument, granted the State's motion and entered an Order (RA-II-342) which prohibited the defense from exploring this area of inquiry on cross-examination.

Unfortunately, this pre-trial limitation on the Defendant's right to cross examine the most important witness against him, was carried over into an even more critical area of inquiry both during pretrial motion practice and during the course of the trial itself. For the defense wanted to bring out the fact that the State's star witness, Zsa Zsa Marcel, had admitted to Mr. McCoy that she had robbed a Lee's Chicken restaurant. The defense wanted to bring this out not only to show that Ms. Marcel had committed a bad act, but also to show her state of mind and her motive in testifying against Mr. McCoy.

Pre-trial, the defense proffered that it was Ms. Marcel's own fear that Mr. McCoy would turn her in for this Lee's Chicken crime which was the motivating factor in her implicating Mr. McCoy in the ABC Liquors robbery/murder. (RA-V-

985-996) This request was denied by the trial judge. (RA-V-1003-1005) The defense again attempted to bring up Ms. Marcel's involvement in the Lee's Chicken robbery during the cross-examination of Ms. Marcel at trial, but the trial judge repeatedly limited the defense in its attempt to impeach Ms. Marcel with evidence of animus against the Defendant, as well as her fear of being incriminated in a related crime. The defense argued that this cross examination was designed to inquire as to whether Ms. Marcel was lying about Mr. McCoy and wanted to implicate him in the ABC Liquor robbery/murder for fear that Mr. McCoy would implicate her in the Lee's Chicken robbery. The trial judge refused to allow defense counsel to question Ms. Marcel about the Lee's Chicken robbery, or her admission to Mr. McCoy about her participation in it, in the presence of the jury. (RA-X-818-830) The trial judge, after hearing the defense proffer, not only refused to allow defense counsel to question Ms. Marcel about the Lee's Chicken robbery, he also refused to allow an in-court identification interaction between the Lee's Chicken victims and Ms. Marcel. (RA-XI-841-844) .

It is well settled that the credibility and reliability of the witnesses who testify in a case is a matter for consideration and determination of the jury. Slavin v. Kay, 108 So 2d 462 (Fla. 1958). It is the function of the jury to give such weight to the testimony of each witness as in their judgment the conditions warrant. Florida Trust

& Banking Co. V. Consolidated Title Co. 86 Fla. 317, 98 So 915 (1923). This principle extends to the credibility of either party in the case, as well as to that of all other witnesses, including expert witnesses. Behm v. Division of Administration, State Dept of Transportation, 336 So 2d 579 (Fla. 1976); State Dept. Of Transportation v. Myers, 237 So 2d 257 (Fla 1st DCA 1970).

The admission or rejection of impeaching testimony is within the sound discretion of the trial court. See Winner v. Sharp, 43 So 2d 634 (Fla. 1949). However, where evidence tends in any way, even indirectly, to establish reasonable doubt of a defendant's guilt, it is error to deny its admission. Fla. Stat. Section 90.404 (2)(a). Decisions of trial courts limiting relevant testimony have been overturned by virtue of the trial court abusing its discretion in refusing to allow the admission of relevant inquiry and evidence. State v. Johnson, 284 So 2d 198 (Fla. 1973). Appellate courts have held that for the purposes of discrediting a witness, a wide range of cross-examination is permitted as a matter of right in regard to the witness' motives, interest, or animus as connected with the cause . Hicks v. Daymude, 190 So 2d 6 (Fla 1st DCA 1966); Payne v. State, 541 So 2d 669 (Fla 1st DCA 1989).

In Lutherman v. State, 348 So. 2d. 624 (Fla. 3d. DCA 1977), the Defendant appealed a conviction for aggravated assault and resisting an officer without violence. On cross-examination, defense counsel asked the arresting officers if they were under

investigation for police brutality as a result of this case. The trial judge refused to allow defense counsel to proceed with this line of questioning. The Defendant appealed, contending that the trial court erred in refusing to permit defense counsel to question the State's police witnesses concerning this police brutality investigation arising out of the Defendant's arrest. Defense counsel urged that this information was relevant to show bias or prejudice on the part of the police witnesses. The Court of appeals reversed and stated:

> "The credibility, bias, or prejudice of a prosecution witness should be of paramount concern to a jury in the exercise of its fact-finding function."
>
> Lutherman v. State, at 625.

In Henry v. State, 688 So 2d 963 (Fla 1st DCA 1997), the First District Court of Appeals reversed and remanded the defendant's conviction for attempted murder of a law enforcement officer and related charges. The appellant raised the defense at trial that the arresting officer shot twice at him, and that he, the appellant, had not shot at the officer. The appellant argued that the trial court erred in ruling inadmissible certain evidence that the officer in question had been involved in two prior police shooting incidents. Citing Landry v. State, 620 So. 2d 1099 (Fla 4th DCA 1993), and Mendez v. State, 412 So. 2d 965 (Fla. 2d DCA 1982), the First District Court of

Appeals held that where there is an issue of whether or not excessive force was used by a police officer, prior investigations into the officer's use of excessive force in other cases are relevant. The court held that it was reversible error to exclude evidence bearing on the credibility and bias of the arresting officer.

The trial judge erred when he precluded defense counsel from cross-examining Ms. Marcel regarding the conversation which she had with the Defendant about the Lee's Chicken robbery. The judge tied the defense's hands when liberal cross examination of Ms. Marcel's motives in testifying was so critical. In denying the Defendant his constitutional right to cross-examine and thus confront his accuser, the trial judge committed still another serious, and reversible, error.

Sixth Issue on Appeal: Whether the Trial Court Erred in Basing the Defendant's Death Sentence on the Aggravating Factor of Cold, Calculated, and Premeditated.

A. Whether the Trial Court Erred in Finding That the Murder was Committed in a Cold, Calculated, and Premeditated Manner

The robbery/murder in this case was thirteen minutes in duration. (RA-III-490) The victim was alone with her assailant for a very brief period of time. No one knows what occurred inside the storeroom where the victim was murdered because the video surveillance camera was not operating in that storeroom. Moreover, the only two

witnesses were the murderer and the victim. No one can say whether the murderer panicked. No one can say whether the victim fought back, made verbal remarks which angered or frightened the murderer, or even if the victim attempted to disarm the murderer. All the evidence shows is that the victim was murdered by three gunshots. No one can say whether the murderer was "cold," or "calculated," or "premeditated" in the act of killing. Certainly, if the killing was premeditated, the killer would have worn gloves. The trial judge engaged in pure speculation as to what transpired in the storeroom where the victim was murdered. Therefore, his finding of cold, calculated, and premeditated is not supported by the evidence in this case.

In order to justify a finding of "cold, calculated, and premeditated," "the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill." Bell v. State, 699 So. 2d 674, 677 (Fla. 1997). The trial judge's ruling must be supported by competent substantial evidence in the record. Almeida v. State, 748 So. 2d 922, 932 (Fla. 1999).

In the case before this Honorable Court, the proof cited in the trial judge's sentencing order was completely circumstantial. This circumstantial proof did not eliminate the reasonable hypothesis that the killing was not planned or that it occurred on the spur of the moment. The fact that the first shot was fired at the victim from the front suggests that it was not fired as part of a preplanned killing.

B. Whether 921.141 (5)(i) is Unconstitutional because it is Overbroad and vague.

Defendant filed a motion that the trial court not instruct the jury on aggravating factor 5(i) of Section 921.141, Florida Statutes. (RA-1-73-74) The trial Court denied the motion. (RA-1-75) In doing so, the trial court erred. This aggravating factor is impermissibly vague and overbroad on its face and as applied. It does not genuinely narrow the class of persons eligible for the death sentence and does not guide the discretion of the trial judge to prevent the arbitrary and capricious imposition of the death penalty, contrary to cases such as Zant v. Stephens, 103 S. Ct. 2733 (1983), Godfrey v.Georgia, 100 S. Ct. 1759 (1980), as well as the Eighth and Fifth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution. Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face and as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, and 16, of the Florida Constitution. This aggravating factor is to be applied when:

> "The capital felony was a homicide and was committed to a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

Section 921.141(5)(i), Florida Statutes

This aggravating circumstance was added to the Statute subsequent to the United States Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976). This aggravating circumstance has never been reviewed; either on its face, or as applied, by the United States Supreme Court or the Eleventh Circuit Court of Appeals.

The function of an aggravating circumstance has been delineated by the United States Supreme Court:

> "Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of person eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 879, 103 S. Ct. 2733, 2743 (1983).

The Court in Zant went on to state that:

> "An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty."

Id. at 2742-2743. Thus, it is clear that an aggravating circumstance can be so broad as to fail to satisfy Eighth and Fourteenth Amendment requirements and that even if it is narrow, on its face, it can be so arbitrarily applied, as to be unconstitutional.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Capital sentencing discretion should be uniform and limited. Gregg v. Georgia, 428 U.S. 153, 188-189 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

The manner by which Florida has attempted to guide sentencing discretion is through the propounding of aggravating circumstances. The United States Supreme Court held that the aggravating circumstances must channel sentencing discretion by clear and objective standards. See Godfrey v. Georgia, 446 U.S. 420. 428 (1980).

Section 921.141 (5)(i), has failed to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance has been applied, by the Florida Supreme Court to virtually every type of first degree murder.

This aggravating circumstance has become a "catch-all" aggravating circumstance. Secondly, even where the Florida Supreme Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever.

Section 921.l4l(5)(i) is unconstitutionally vague on its face. The words of the aggravating circumstance themselves give no real indication as to when it should be applied. It is well established that a statute, especially a criminal statute, must be definite to be valid. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

The requirement of commission in a "cold, calculated, and premeditated manner" gives little guidance as to when this factor should be found. While the word "premeditated" may be meaningful, the adjectives "cold" and "calculated" are vague,

subjective terms directed to the emotions. The finding of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated." The terms cold and calculated are unduly vague and subjective. This is especially true when considered in the context of the special need for reliability in capital sentencing.

This Honorable Court has attempted to limit the application of this circumstance. Jent v.State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981).

In Jent, supra, the Court stated:

> "the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated ... and without any pretense of moral or legal justification.

408 So. 2d at 1032. The Court in McCray stated:

> "That aggravating circumstance {(5)(i)} ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive."

416 So. 2d at 807. Thus, this Honorable Court has attempted to require more in this aggravating circumstance than simple premeditation. However, the Court has never explicitly defined what this circumstance requires. This circumstance has subsequently been applied in an arbitrary and capricious manner.

The facts of this case, as a matter of law, do not make the killing one committed in a cold, calculated or premeditated manner as that phrase has been interpreted by this Honorable Court.

Seventh Issue on Appeal: Whether the Trial Court Erred in Sentencing the Defendant to Death Inasmuch as Florida's Death Penalty Statute is Unconstitutional

a. The Death Penalty Statute has not been Interpreted Proportionately.

The United States Supreme Court upheld the facial constitutionality of Florida's capital punishment statute in Proffitt v. Florida, 428 U.S. 242 (1976). The Supreme Court, in upholding the statute, relied primarily on two Florida Supreme Court cases: State v. Dixon, 283 So. 2d I (Fla. 1973), and Tedder v. State, 322 So. 2d 908 (Fla. 1975).

The sentencing process in Florida is far from "informed, focused, guided, and objective" and the court's review process, in the years since Proffitt has not assured "consistency, fairness, and rationality in the evenhanded operation of the state law."

The lack of objectivity and consistency in the interpretation of Florida's capital sentencing law has resulted in an arbitrary and capricious application of the statute, thus rendering it unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments

to the United States Constitution and Article I, Sections 2, 9, 16 and 17, of the Florida Constitution.

b. The Trial Court Erred in Denying Defendant's Motion to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional because of Treatment of Mitigating Circumstances

The Defendant filed a Motion to Dismiss the Indictment filed in the on the grounds that Sections 782.04 and 921.141, Florida Statutes, are unconstitutional.(RA-I-79-81) The trial Court denied the motion. (RA-I-82)

The circumstances to be considered in mitigation under Section 921.141 are insufficient, in violation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the Constitution of the State of Florida. Section 921.141 also provides for cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17, of the Florida State Constitution. Florida Statute Section 921.141 is unconstitutional, on its face, in that the mitigating circumstances contain language which is unnecessarily restrictive, and the enumerated mitigating circumstances are restrictive in scope and unconstitutionally restrictive in their language. The statutory mitigating circumstances in Section 921.141 are inadequate, in that, they unduly emphasize certain mitigating circumstances to the jury, to the exclusion of other mitigating circumstances,

on which the Defendant may introduce evidence. Because the statute singles out certain mitigating circumstances and raises them to the dignity of a legally stated instruction, it diminishes the forcefulness and effect of other mitigating circumstances which are not dignified by statutory language and judicial instruction.

c. **The Indictment Did Not Properly Charge a Capital Offense because the Statutory Aggravating Circumstances the State Relied on to Obtain the Death Penalty are not Alleged in the Indictment, in violation of Article I, Sections 15 and 16, Florida Constitution, and the Fourteenth Amendment to the United States Constitution.**

The Defendant had the fundamental constitutional right to notice of the charges against him, including the aggravating circumstances to be considered by the jury in the second phase of the trial. Cole v. Arkansas, 333 U.S. 196 (1948). Presnell v. Georgia, 439 U.S. 14 (1978), held that the right to notice applies to the penalty phase of a capital case just as it applies to the guilt phase of any criminal trial. In failing to charge the Defendant with the specific aggravating factors which the state relied upon to obtain the death penalty, Mr. McCoy's constitutional rights were violated.

d**. Sections 782.04, 775.082, and 921.141, Florida Statutes, Provide for the Arbitrary Infliction of Punishment so as to deprive the Defendant of Life**

and Liberty without Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution.

The above-mentioned Sections are so vague, ambiguous and indefinite so as to deprive the Defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide, and to be able to prepare a defense accordingly, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 16, of the Florida Constitution.

e. **Section 921.141 placed upon the Defendant the Burden of Proving Mitigating Circumstances in Violation of his Rights Against Self-Incrimination as provided in the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2 and 9, of the Florida Constitution.**

The presumption in favor of death created by the establishment of a single aggravating circumstance has the result of imposing upon the Defendant the burden of establishing why he should live. This impermissible shift in the burden of proof and persuasion contravenes every fundamental principle underlying our system of criminal justice, in violation of Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975); Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979).

Section 92 1.141 does not require the State to prove beyond a reasonable doubt that the statutory aggravating factors in subsection (5) outweigh the mitigating circumstances listed in subsection (6) in each particular capital case. It thus violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution.

The standard of proof beyond and to the exclusion of every reasonable doubt is fundamental to our legal system and applicable to state criminal prosecutions. In re Winship, 397 U.S. 358 (1970). In phase two of a capital trial, the jury is instructed to find the existence of an aggravating circumstance beyond a reasonable doubt. However, in the jury's ultimate decision as to whether to recommend a life or death sentence, the jury is instructed pursuant to Section 921.141(3), to recommend death unless the mitigating circumstances "outweigh" the aggravating circumstances. The instruction to the jury to weigh the aggravating and mitigating circumstances in arriving at their recommendation to the court gives the jury inadequate guidance. The defendant's right to the reasonable doubt standard applies equally to the ultimate determination of whether he lives or dies as to the determination of his guilt or

innocence.

f. The Florida Death Penalty Statute is Unconstitutional as Applied.

This Honorable Court has the obligation to review death sentences and assure that they are being imposed in a uniform and reasonable fashion. However, death sentence appellate opinions have been unconstitutionally inconsistent in dealing with the weighing of the aggravating and mitigating circumstances.

g. The Florida Death Penalty Statute is Unconstitutional on its Face because it Creates a Presumption in Favor of Death for Those Convicted under the Felony-Murder Rule.

Mr. McCoy was convicted of both first degree pre-meditated murder and felony-murder. Under Section 921.141 (5)(d), Florida Statutes, the perpetration of a homicide during the commission of a designated felony constitutes an aggravating circumstance When one or more statutory aggravating circumstances are proved beyond a reasonable doubt, a presumption arises that death is the appropriate penalty. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Therefore, anyone convicted of first degree murder under the felony-murder doctrine is presumptively destined for death, regardless of other facts. There is no such aggravating circumstance applicable in the case of every premeditated murder, since Section 921.141 (5)(i), Florida Statutes, utilizes qualifying language to make only certain premeditated acts an aggravating

circumstance. The statute, therefore, makes possible a higher frequency of death sentences for those convicted of felony murder than those convicted of premeditated murder. There is no rational basis for this disproportionate sentencing, since in felony-murder the liability can be for aiding and abetting a felony that resulted in death, while in a premeditated murder the defendant can be the actual perpetrator who intended death to result. The Florida death penalty statute therefore violates the defendant's right to equal protection and due process of law, and the right to be free from an arbitrary and capricious sentencing process, as guaranteed by Article I, Sections 2, 9, 16, and 17, of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368,73 L. Ed. 2d 1140 (1982); Tison v Arizona, 481 U.S. 137, 107 S. Ct. 1676 (1987).

A defendant who is convicted of felony murder can be twice penalized for a singe aspect of his crime, because the same felony that caused his conviction can be used as an aggravating factor in the penalty phase to make him eligible for the death penalty. To punish a defendant in the penalty phase for the same element of the crime which was necessary to prove a conviction in the guilt phase is to violate the double jeopardy and collateral estoppel concepts of Article I, Section 9, of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States

Constitution. See State v. Hegstrom, 401 So. 2d 1343 (Fla. 1981); Provence v. State, 337 So. 2d 783 (Fla. 1976); State v. Cherry, 298 N. C. 86, 257 S. E. 2d 551 (1979).

h. The Death Penalty in Florida is Unconstitutional Because, Upon Conviction of the Defendant, the Jury is not Required to List the Specific Aggravating Circumstances They Have Found Beyond a Reasonable Doubt when They Recommend the Death Penalty.

In that situation the trial judge is deprived of the opportunity to know what aggravating circumstances the jury did and did not find. This permits the trial judge to consider and find aggravating circumstances that the jury did not. This results in disproportionate and unreliable imposition of the death penalty, in violation of Article I, Sections 9 and 17, of the Florida Constitution.

i. Sections 921.141, 922.10 and 922.105 of the Current Florida Statutes unconstitutional.

Death sentences in Florida are carried out pursuant to the provisions of Florida Statutes Section 922.10. Prior to January 14, 2000, death sentences in Florida had been carried out exclusively by electrocution for many decades. However, pursuant to an Amendment that went into effect on January 14, 2000, Florida Statutes Section 922.10 was changed to read "a death sentence shall be executed by electrocution or

lethal injection in accordance with Section 922.105".

Death by electrocution and death by lethal injection are cruel and unusual punishments in light of evolving standards of decency and the availability of less cruel, but equally effective, methods of execution. Thus, it is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the Florida Constitution to employ those methods of execution.

j. The Florida Death Penalty Statute is Unconstitutional Because the Decision as to "Life" or "Death" is made by a Judge, Rather than a Jury.

The decision as to whether a person can be put to death in Florida is made by a judge, not a jury of the defendant's peers. Such a sentencing scheme is, on its face, unconstitutional in that it violates a defendant's Sixth Amendment right to a trial by jury which is applicable to the states through the due process clause of the Fourteenth Amendment. A similar state sentencing procedure is currently under review by the United States Supreme Court in the case of Ring v. Arizona. See also, Bottoson v. Florida, where the United States Supreme Court is reviewing whether Walton v. Arizona, 479 U.S. 639 (1990), Hildwin v. Florida, 490 U.S. 638 (1989), and Spaziana v. Florida 468 U.S. 447 (1984) were overruled by Apprendi v. New Jersey, 530 U.S. 466 (2000).

CONCLUSION

Mr. McCoy did not receive a fair trial. Virtually all of the circumstantial evidence against him was so suspect, and of such poor quality, that it is grossly insufficient on which to base a conviction. The trial judge committed grievous errors in permitting the jury to view, and rely upon, an unauthenticated, typed transcript of a virtually inaudible conversation between the Defendant and the State's paid informant–herself a convicted liar and fleeing felon. This transcript was never validated as accurate by anyone, yet the trial judge misled the jury into thinking that it was a reliable depiction of a conversation which they really couldn't hear by telling the jury that it was prepared by the Office of the State Attorney.

By allowing the State to present such unreliable evidence, the judge violated all applicable case precedent. By allowing the State to foist the testimony of a disreputable, paid informant on the jury, and then to tie defense counsel's hands by restricting his cross examination of this witness as to her animus against the Defendant and her motive in testifying against him, the trial judge compounded his other errors. The Defendant has been sentenced to the most severe penalty allowable under our laws. Equity and justice cry out for a new trial.

Dated this _____ day of April, 2002, at Jacksonville, Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief of Appellant, been furnished to Harry L. Shorstein, Esquire, State Attorney for the Fourth Judicial Circuit of the State of Florida, Room 600 Duval County Courthouse, Jacksonville, Florida 32202, and to Robert A. Butterworth, Attorney General of the State of Florida, The Capitol, PL-01, Tallahassee, Florida 32399-1050, by United States Mail, first class, postage prepaid, this _____ day of April, 2002.

_____

A T T O R N E Y

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS OF FLORIDA APPELLATE RULE 9.210

The undersigned attorney for the Appellant, Richard McCoy, hereby certifies

that the above and foregoing is a computer generated brief which has been prepared and is submitted in Times New Roman 14-point font in compliance with the above stated Florida Appellate Rule.

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