IN THE SUPREME COURT OF FLORIDA

FRANKLIN DELANO FLOYD,	:	
Appellant,	:	
vs.	:	Case No.SC03-35
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
Assistant Public Defender
FLORIDA BAR NUMBER 0350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of the original record containing 22 volumes, two separate addendums, a supplemental record containing 25 volumes, and a supplemental addendum transcript. References to the original record will be designated by volume number, followed by “R” and the appropriate page number. References to the addendum will be designated “AD”, followed by “R” and the appropriate page number. References to the Second Addendum will be designated “AD2” and the volume number (I or II), followed by “R” and the appropriate page number. References to the supplemental record will be designated “S” and the volume number, followed by either “R” or “T” and the appropriate page number. References to the Supplemental Addendum Transcript will be designated “SAD”, followed by “T” and the appropriate page number.

The prefix “T” indicates transcript from the trial itself. The prefix “R” indicates documents filed with the clerk, transcript of pretrial hearings and transcript of the sentencing hearings.

STATEMENT OF THE CASE

A Pinellas County grand jury returned an indictment on November 12, 1997, charging Franklin Delano Floyd, Appellant, with committing the first-degree murder of Cheryl Commesso between the dates of March 13 and June 16, 1989 (I, R1-2). A capias was issued on the same date (I, R10). Appellant requested disposition of this charge pursuant to the Interstate Agreement on Detainers Act on July 28, 1999 (XII, R2161-2). He was transported to the Pinellas County Jail from federal prison in Georgia on October 5, 1999 (I, R13).

At his first appearance, held October 6, 1999, Appellant declined the offer of counsel and agreed to represent himself (XIX, R3471). The next day, Floyd announced that he had "no choice" but to request appointment of the Public Defender as he would be unable to get access to discovery otherwise (XIX, R3474). The court appointed the Public Defender to represent Floyd (XIX, R3475).

Subsequently, on November 18, 1999, Appellant's counsel waived speedy trial (I, R37). Floyd filed a *pro se* "Motion for Faretta Hearing", which was later withdrawn (I, R45-6, 49-51, 60). However, on June 29, 2000, Floyd's frustration at the length of

time it was taking to get to trial was put on the record (I, R150-2). Counsel stated that when Floyd was returned to Florida, he had expected that his right to a speedy trial under the Interstate Agreement on Detainers would be honored (I, R150). Floyd reluctantly agreed to waive speedy trial "in order to have adequate representation" by counsel (I, R151). However, he objected to being forced to give up the important right to a speedy trial in order to secure the "equally important right to effective assistance of counsel" (I, R151-2). The State then offered to move up the trial date to October 2000 (I, R152-3). The judge required Appellant to answer on the record whether he wanted to go to trial on October 23, 2000 or whether the trial should remain scheduled for March 2001 (I, R163-4). Floyd replied that he had to accept the March date because his lawyers said they couldn't be prepared by October (I, R164).

On November 2, 2000, a hearing was held regarding Appellant's *pro se* "Motion for Faretta Hearing" and his letter to Judge Ley, both filed November 1 (IV, R734-47). Counsel for Appellant suggested that Floyd was suffering from mental illness and requested that the court conduct a competency evaluation (IV, R751-2). The judge ruled that a motion for evaluating competency would be heard before she conducted a Faretta inquiry (IV, R766,

771). Appellant then filed a *pro se* "Motion and Demand for a Speedy Trial" on November 13, 2000 (IV, R780-1). Floyd's counsel filed a "Motion for Examination to Determine Competency to Proceed" in response (IV, R793).

At the next hearing, which took place November 16, 2000, defense counsel declined to adopt any of Appellant's *pro se* motions (V, R799). She urged the court to rule whether or not doctors would be appointed to determine Floyd's competency to proceed (V, R801). Both defense counsel and the prosecutor agreed that Floyd's *pro se* demand for a speedy trial should be considered a "nullity" (V, R797, 800). The judge then ruled that it was (V, R805, 807). The judge granted the motion to determine competency over the State's objection (V, R807-8). However, she requested that counsel submit proposals for what should be included in the order that the competency doctors would receive (V, R824, 829, 834-5).

At the December 20, 2000 hearing, counsel argued over the wording of the competency order (XXII, R3899-3913). The court entered an "Order Appointing Experts for Competency Evaluation" which required the reports from the doctors to be filed by February 9, 2001 (VI, R1097-9; XXII, R3918). On January 31, 2001, defense counsel noted that two of the three court-appointed

doctors gave opinions that Appellant was incompetent to proceed (S3, R4759). At a hearing held February 15, 2001, the prosecutor and defense counsel agreed to let the judge decide competency based upon the reports submitted by the three doctors without conducting adversarial hearings (XXII, R3953-4, 3959). The court requested proposed orders in case she found Appellant incompetent to proceed and stated that she would review the doctors' reports (XXII, R3962).

The court declared at the hearing held March 1, 2001 that she had studied the doctors' reports and found that Floyd was incompetent to proceed (S1, R4453). After considering input from both counsel, the judge entered her "Order Adjudging Defendant Incompetent to Proceed and Commitment to Department of Children and Families" on March 6, 2001 (VII, R1252-7).

Floyd was transported to the North Florida Evaluation and Treatment Center where he remained until his discharge on June 26, 2001 (S6, R5210). At a hearing held July 5, 2001, defense counsel requested that the same three doctors be appointed to reevaluate Floyd's competency (XX, R3661-2). Counsel also stated that Floyd still wanted to discharge counsel and represent himself (XX, R3662). The doctors were reappointed (VII, R1323-31; XX, R3668-9).

Subsequently, the doctors filed reports reaffirming their original determinations. Both doctors who had previously found Floyd incompetent to proceed said that he was even more incompetent (S8, R5605, 5614-5). Before competency hearings could be held, the court found on September 26, 2001 that a conflict existed between Floyd and the Public Defender (X, R1850, 1866). Appellant, upon examination by the court, declared that he would waive any conflict (X, R1868). He challenged the judge to find him competent and stated that he would request to discharge counsel and represent himself once he was found competent (X, R1877). The court found that it was appropriate to discharge the Public Defender and appoint private counsel to represent Appellant (X, R1878, 1886). Co-counsel was later appointed on October 18, 2001 (X, R1901-4; XIX, R3570-3).

Evidentiary hearings on Floyd's competency were eventually held on November 16, 2001 (XXI, R3730-862); February 15, 2002 (S5 and 6, R5063-296); March 8, 2002 (S7, R5297-428); April 12, 2002 (XIX, R3477-565); and May 3, 2002 (S1, R4503-40). Witnesses from the North Florida Evaluation and Treatment Center included a registered nurse and a social services counselor (XXI, R3761-98, 3801-39; S5, R5071-157), as well as Dr. Bilak, a clinical psychologist (S5&6, R5158-244), and Dr. Hernandez, a staff

psychiatrist (S6, R5246-93; XIX, R3479-554). The two doctors agreed that Floyd was competent to stand trial (XIX, R3491-501, 3530-2; S6, R5203-14). Dr. Bilak diagnosed Floyd as having an "adjustment disorder with mixed emotional features", but he never observed any psychotic or hypomanic behavior (S5, R5175; S6, R5197-9). Although Dr. Hernandez stated that she thought that Floyd's mental condition would benefit from anti-anxiety medication, Appellant chose to refuse it (XIX, R3538-9, 3543-4).

The two court-appointed doctors who had found Floyd incompetent to proceed also testified (S7, R5302-425; S1, R4518-26). Both changed their opinions after hearing testimony from the staff at North Florida Evaluation and Treatment Center and observing Appellant during the hearings (S5407-9, 5414-7, 5420-4; S1, R4520-6). The third court-appointed doctor reaffirmed her original opinions that Floyd was competent to proceed (S1, R4527-31). Defense counsel submitted an additional report from a forensic psychologist who had recently examined Floyd and found him incompetent to proceed (S1, R4536-7; S3, R4789-90).

After hearing argument from counsel regarding the competency issue on June 14, 2002, (S3, R4843-60), Judge Ley entered an order on July 30, 2002 ruling that Appellant was now competent to stand trial (XII, R2195-2211; AD, R3979-80). Floyd then filed a motion

requesting that he be appointed as co-counsel (XII, R2234). He also moved the court for a Faretta hearing (XII, R2237-8). At a hearing held August 8, 2002, the court granted Appellant's motion for co-counsel status (S4, R4934). The motion for a Faretta inquiry was later withdrawn (S4, R4975-7).

When accepting a trial date of September 18, 2002, defense counsel put on the record that he was not waiving his previous motion for discharge on speedy trial grounds (AD, R3997). The speedy trial issue arose when Appellant filed a pro se "Notice of Expiration of Speedy Trial Time" on May 30, 2002 (XI, R2041-6). At a hearing held June 6, 2002, defense counsel adopted the pro se motion and argued that speedy trial time had run (S4, T4955-63). Further argument was considered on June 14, 2002, where defense counsel clarified that he was arguing that Floyd's rights under the Interstate Detainer Act were violated as well as the state procedural right to a speedy trial (S3, T4774-8, 4797-4804). The State filed a motion to strike the Notice of Expiration (XI, R2077-8) and argued that Appellant originally waived speedy trial on November 18, 1999 and had not subsequently filed a valid demand for speedy trial (S3, T4807-24). The court took the issue under advisement (S3, T4830-1, 4860) and filed an order June 20, 2002 (XII, R2180-5; AD2I, R4006-8) finding that because Appellant had

been adjudicated incompetent, he was unavailable for trial. The State's "Motion to Strike Notice of Expiration of Speedy Trial Time" was granted (XII, R2180-5).

Appellant then petitioned the Second District Court of Appeal for a writ of prohibition, which was denied without a written opinion. Floyd v. State, 829 So. 2d 212 (Fla. 2d DCA September 13, 2002). Immediately prior to trial, defense counsel renewed the motion for discharge and the court adhered to its prior ruling (S11, T49).

Several defense motions in limine (XIII, R2285-95; XIV, R2478-9, 2542-4) were heard on August 29, 2002 (AD2I and II, R4027-4349). The "Motion in Limine to Exclude Profiler Testimony" (XIII, R2291) concerned a retired FBI agent Kenneth Lanning, a purported expert in criminal behavior profiling who "deals mostly with child molestation" (AD2I, R4049-78). The prosecutor wanted to educate the jury by allowing Lanning to testify about the significance of the group of photographs allegedly collected by Appellant (AD2I, R4079-4106). The court reserved ruling until September 5,2002 when an order was issued granting the motion to exclude profiler testimony (AD2I, R4105-6; XIV, R2585-8; S9, R5634).

Also heard at the August 29 hearing was the defense "Motion in Limine to Suppress Photographs Taken at Pinellas County Jail" (XIV, R2544; AD2I, R4124-68). Defense counsel argued that the photographs taken of Floyd's thumbs at the Pinellas County Jail pursuant to a search warrant issued October 6, 1999 should be suppressed because the affidavit in support of issuing the warrant did not disclose that the state already possessed photographs depicting Floyd's thumbs taken by court order at earlier dates (AD2I, R4124-8). Detective Robert Shock testified that he was the lead investigator on this homicide (AD2I, R4131-7). He was shown photographs taken by court order in Oklahoma of Floyd's hand (AD2I, R4138). FBI examiner Musheno told the detective that the photographs were unsuitable for a comparison analysis and directed the Oklahoma authorities to take another set at the proper angle (AD2I, R4139, 4146-7). When these photographs were also of low quality, Detective Shock decided that FBI examiner Musheno should photograph Floyd's hands himself (AD2I, R4139-40).

Shock prepared an affidavit for a search warrant on October 6, 1999, but failed to disclose in it that photographs had previously been taken in Oklahoma (AD2I, R4142, 4148). The warrant was signed by a judge and photographs of Floyd's thumb were taken pursuant to it in the Pinellas County Jail (AD2I,

R4142-5). After deleting a paragraph which the affiant was "not comfortable with", an affidavit executed by Musheno was also considered by the trial court (AD2I, R4149-57). The judge denied Appellant's motion to suppress the photographs, ruling that there would still be probable cause for issuing the warrant even if the omitted information had been included (AD2I, R4157-68).

Appellant, acting in his capacity of co-counsel, argued the "Motion in Limine to Exclude Photographs Purportedly Found in an Abandoned Ford Pickup Truck" (XIII, R2292-4; XIV, R2478-9; AD2I and II, R4168-4347). Appellant argued that the photographs found in Kansas had been altered and tampered with to the extent that they should not be admissible in evidence (AD2II, R4222-96). The prosecutor agreed that the tiny irregularly-shaped photos found in Kansas had been enlarged and cropped because "whoever was copying them was more concerned with contents than the configuration" (AD2II, R4327). Defense counsel reiterated that Appellant's burden was to show probable tampering sufficient to require the State to establish the chain of custody (AD2II, R4333-7). The court ruled in a subsequent hearing that the burden had not shifted to the State, but stated that testimony about how the photographs were obtained should be presented before the photos could be admitted (S9, R5656-63).

After the jury had been selected, four witnesses (John Magenheimer, a retiree from Polaroid Corporation, Luther Masterson, the owner of the body shop where the photographs were discovered, Gary Hines, a Mission, Kansas police detective, and James Scott, an employee of Masterson Auto Body) testified regarding the alleged tampering with the photographs (S14, T437-507). The court ordered the State to produce another set of the photographs which defense counsel had just become aware of before ruling on the motion (S14, T514-5). The next morning, after hearing argument and viewing the photographs, the judge ruled that there was no proof of tampering; therefore, the State did not have to prove the chain of custody (S14, T556-72).

The State filed a "Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Committed by the Defendant" at the close of the August 29, 2002 hearing and it was set for argument along with the defense Williams Rule motion on September 5, 2002 (XIV, R2518-39; AD2II, R4348-9). At the September 5 hearing, the State produced letters written by Floyd to State witnesses James Davis and Helen Hill-Kellar and contended that they amounted to tampering with these witnesses (S9, R5672). The court reviewed the letters and ruled that the State could introduce them as evidence of consciousness of guilt (S9, R5676-9).

Appellant's "Motion in Limine to Exclude the Defendant's Prior Criminal Record and Prior Bad Acts" (XIII, R2287-8) was next heard by the court (S9, R5679-5707). The prosecutor contended that a carjacking and two kidnappings committed by Floyd in 1994 were inextricably intertwined with the case at bar because it placed Appellant in possession of the truck where the photographs purportedly linking him to this homicide were later found (S9, R5684-7). Defense counsel argued that the facts of the incident which involved kidnapping an elementary school principal at gunpoint, taking custody of a first-grade child, and stealing the principal's truck after handcuffing him to a tree in the woods were so prejudicial as to outweigh the probative value of the evidence (S9, R5687-90). Defense counsel also stated that the testimony could be limited to allowing the principal to testify that Floyd had possession of the principal's truck from September 12, 1994 until it was recovered on October 22, 1994 (S9, R5691-3). The prosecutor suggested that the judge could give a standard William's Rule instruction to clarify to the jury that Appellant was not on trial for the other crimes (S9, R5704-5).

The hearing was continued until September 9, 2002, when the judge stated that she wasn't certain that the facts of the incident were inextricably intertwined (XV, R2635). Defense

counsel reiterated, “The fact that Mr. Floyd with a handgun went into an elementary school in 1994 and kidnapped his son and the principal and handcuffed the principal to a tree is not relevant to any of the issues that are before this Court” (XV, R2669). All that was relevant was after the principal met Floyd, Floyd had exclusive possession of the principal’s truck and the principal had not placed any photographs under the carriage of the vehicle (XV, R2672-3, 2682-3, 2693). The prosecutor claimed that the “events of Mr. Floyd’s life became a collection of photographs coupled with what is also loosely called the child pornography”; therefore the significance of the photographs to Floyd and Floyd alone was the material issue (XV, R2674-80). The court directed the prosecutor to file a Williams Rule notice in case the carjacking and kidnapping evidence was determined to be similar crime evidence rather than inextricably intertwined (XV, R2680).

After taking the motion under advisement (XV, R2700), the judge issued a written order on September 11, 2002, limiting the evidence which the State could adduce at trial regarding the kidnappings and carjacking (XV, R2763-8; S10, R5812-21).

Trial commenced on September 19, 2002 before Circuit Judge Nancy Moate Ley (S11, T54). A jury was selected (S11-3, T54-422). The State’s motion in limine to exclude defense use of a report by

Dr. Maples, now deceased, was heard and denied with the proviso that defense counsel was not permitted to mention it in opening argument (XV, R2821-2; S14, T516-48). The court stated that the photos would be reviewed individually under the balancing test of section 403 of the Florida Evidence Code and set forth some guidelines for admissibility (S14, T573-4). When photographs were about to be proffered by the State, defense counsel objected to all 97 and particularly to allowing any which contained nudity (S15, T716-22). The prosecutor asked witness Luther Masterson about the contents of the photographs he found and defense counsel objected to the leading questions and prejudicial characterizations (S15, T741-2). The objection was sustained; but the court allowed the prosecutor to produce the photos "the way you want to do" while giving defense counsel "a continuing objection to all of these photos, any of these photos, anything" (S15, T743, 746, 783).

The prosecutor later stated that the "child porn aspect" of the photographs had already been revealed to the jury and argued that its significance was "why a person would keep those photographs" (S16, T820-1). The judge proceeded to examine the photos one-by-one, stating, "I plan to let in some things that would otherwise be described as pornography", "because they are

relevant to the kind of collection they found here" (S16, T823-4, 827). Defense counsel reiterated that he wanted to exclude photographs of children (S16, T826). Seven of the photographs were not allowed into evidence by the court (S16, T830-1).

Appellant preserved his objection to allowing the nude photographs of Sharon Marshall into evidence (S18, T1095, 1097-9). He offered to stipulate that He knew Helen Hill-Kellar and her children and had taken photographs of them (S18, T1109-13). The State declined the stipulation and argued that the photographs of the children were "not pornography" but simply "sexually suggestive" (S18, T1115). Further objection to the relevance of the photographs of Helen Hill-Kellar's children was made before they were admitted into evidence (S18, T1157-62). Defense counsel's further motion for a mistrial was denied (S18, T1162).

Prior to the prosecutor's opening argument, defense counsel had renewed his objection to the collateral crime evidence and was granted a continuing objection to its use in the prosecutor's opening argument (S14, T574-6). The prosecutor then asked the court for guidance as to which specific acts would be admissible under the order (S15, T805-11). Defense counsel agreed not to object if the prosecutor asked leading questions of the witness James Davis in order to keep his testimony within the parameters

of the court's order (S15, T806-7). The judge stated that the subjects to avoid were the gun, death threats and the duct tape (S15, T811). The judge ruled that the kidnapping, carjacking and photos went "to the Defendant's state of mind when committing a crime" (S16, T839).

During the testimony of FBI Special Agent Joseph Fitzpatrick, defense counsel objected and moved for a mistrial when the prosecutor elicited testimony that Floyd had used the vehicle where the photographs were found during a kidnapping of Davis (S17, T967-8). The court ruled that Appellant had opened the door and denied the motion for mistrial (S17, T968-9). The court's offer to give the jury a limiting instruction was accepted (S17, T969-71). Before the witness James Davis testified, the court summarized for the jury the testimony that Davis would give; and instructed them both before and after Davis' testimony on the limited purpose for which they were to consider the collateral crime evidence (S17, T986-7, 1006). Defense counsel was allowed a continuing objection to Davis' testimony (S17, T984).

Appellant revisited the court's ruling allowing the State to present the letter written by Floyd to Davis while he was awaiting trial (S17, T972-85). Defense counsel argued that the letter from Floyd was not threatening, but simply called Davis a liar and

expressed his belief that God would punish Davis for his lies (S17, T972-4). The court adhered to the prior ruling (S17, T975). The prosecutor requested that the judge instruct the jury that the letter was being admitted as evidence of "consciousness of guilt of a crime that he is actually charged with" (S17, T980). The "consciousness of guilt" language was included in the limiting instruction given to the jury (S17, T998, 1004). After Davis actually read the letter in front of the jury, Appellant's motion for a mistrial was denied (S17, T1004). The court acknowledged that use of a gun in the kidnapping of Davis was mentioned in the letter written by Floyd to Davis (S17, T1011).

Defense counsel also reiterated his objection to admitting the letter written by Floyd to Helen Hill-Kellar (S18, T1117-8, 1166). As with the witness James Davis, the judge gave the jury a limiting instruction before testimony about the letter was presented (S18, T1127, 1167-8).

Before FBI examiner Thomas Musheno testified, defense counsel moved to exclude him from giving opinions as to whether items in evidence were consistent with items depicted in the photographs of the victim (SAD, T2200-2). The State contended that Musheno was qualified by training to distinguish minute details in a side-by-side comparison that the average juror would overlook (SAD, T2202-

4, 2209). Defense counsel argued that no scientific tests or principles were involved; Musheno's opinions were merely lay opinions on an ultimate issue of fact and would invade the province of the jury (SAD, T2206-7).

The proposed testimony of Musheno was proffered (S20, T1300-10). The witness outlined his training with the FBI in side-by-side analysis (S20, T1301-2, 1304). He stated that he was not going to make any positive identification in the case at bar; he would just state whether the items in evidence should be included or excluded with respect to the items depicted in the photographs (S20, T1303-4, 1318). Summing up, Musheno stated, "If I were to look at a thumb and a car, hopefully, I would be able to tell the difference between them (S20, T1310).

Although defense counsel argued that the jurors had the same ability as Musheno (S20, T1311-2), the judge ruled that Musheno was qualified to give an opinion and that it would aid the jury (S20, T1314-7). Defense counsel further objected and moved for a mistrial after the witness gave his opinion that he could not exclude the thumb of Floyd from being the thumb appearing in one photograph of the victim (S20, T1318-9, T1351-2). The motion for mistrial was denied (S20, T1352). Appellant, acting in his capacity as co-counsel, then addressed the court and showed the

differences between his thumb and the thumb in the photograph (S20, T1360). However, this distinction was never presented to the jury because the judge ruled that Appellant would have to give up the right to final argument if he wanted to introduce this evidence (S20, T1365-8).

During the charge conference, the prosecution and defense agreed upon a special instruction relating to the photographs (S22, T1505-6). Appellant was placed under oath and he stated that he had decided not to testify (S22, T1512-4). Defense counsel's request for a jury instruction on circumstantial evidence was considered and denied (S22, T1524-8, 1563-5, 1570). However, the prosecutor later announced that he would not oppose a circumstantial evidence instruction and the court agreed to give one (S23, T1624).

Defense counsel objected to allowing the jury to consider any lesser-included offenses and refused to waive the statute of limitations (S22, T1529-30, 1535-6). Appellant was addressed by the judge and personally waived instruction on the lesser offense of second-degree murder (S22, T1554-6).

The defense moved for judgment of acquittal based upon the fact that the State could not prove this circumstantial evidence case without pyramiding inferences (S22, T1574-1603). The court

denied the motion for judgment of acquittal (S23, T1618-20). The defense rested without presenting any evidence (S22, 1613).

During the prosecutor's closing argument, he told the jury to "take a look at some of the arson photographs later on" (S23, T1672). Defense counsel moved for a mistrial because there had been no evidence of any arson presented and mentioning it was a violation of an agreement on a motion in limine (S23, T1672-3). Although the judge denied the motion for mistrial, she instructed the jury to disregard "any suggestion that the trailer burned as a result of arson" (S23, T1673-5).

Defense counsel again moved for mistrial when the prosecutor stated that Cheryl Commesso had told witness Diana Rife that Appellant had hit her before the parking lot incident (S23, T1685). This was another example of facts not in evidence (S23, T1685-6). The judge denied the motion for mistrial, but instructed the jurors to rely upon their own recollection (S23, T1686-7).

The jury returned a verdict of guilty as charged of first-degree murder (XVI, R2879; S23, T1747).

Prior to trial, Appellant had filed a "Motion to Bar Imposition of Death Sentence on the Basis that Florida's Capital Sentencing Procedure is Unconstitutional under *Ring v. Arizona*"

XIII, R2276-81), which had been denied (XV, R2830). In the ensuing penalty phase, defense counsel renewed his argument that the jury instructions for penalty phase were unconstitutional because of Ring and Apprendi v. New Jersey (S24, T1758-9). Defense counsel also contended that the judge did not have the power to modify the jury instructions because the death penalty statute would have to be changed by the legislature first (S24, T1760-1; S25, T1892-3). The judge's proposed amended penalty jury instructions, drafted with assistance from Judge Schaeffer and intended to anticipate any change in the law which Ring might require, were objected to by both the state and defense (S24, T1803-16, 1820-59). In the end, the court agreed to the prosecutor's request that the jury instructions follow the 1989 version with the addition of a penalty verdict where the jury would record its vote on each aggravating circumstance (S24, T1869-73, S25, T1880).

During the charge conference, the prosecutor first requested that the judge allow evidence of a 1962 conviction in Georgia for child molestation as a prior violent felony and then withdrew the request when Appellant disputed his guilt of that crime (S24, T1782-8). The court ruled that the incident would "not be mentioned to the jury in the penalty phase" (S24, T1800).

Nonetheless, when Floyd testified during the penalty trial, the prosecutor asked him on cross-examination about the child molestation conviction (S25, T1995). The defense motion for mistrial was denied; but the judge instructed the jury to "disregard the last question and the last answer" (S25, T1995-7).

Appellant stated that he didn't want defense psychiatrist Dr. Maher to testify during the penalty trial (S25, T1959-64). Defense counsel proffered a summary of the testimony that Dr. Maher would give in order to establish the mitigating circumstances of emotional or mental disturbance and lack of capacity to conform his conduct to the requirements of law (S25, T1971-3). Appellant also declined to allow defense counsel to put his sister, Dorothy Leonard, on the witness stand to testify about family background (S25, T1973-4; 2006-8). Franklin Floyd, testifying in his own defense, was the sole defense witness during the penalty phase (S25, T1981-2006).

The jury returned findings that all three proposed aggravating factors were proved by a unanimous verdict (XVII, R3073; S25, T2046). The jury also returned a unanimous recommendation that Floyd be sentenced to death (XVII, R3074; S25, T2046-7). The judge scheduled a Spencer hearing and ordered a presentence investigation (S25, T2055-9).

On October 18, 2002, the Spencer hearing began (S8, R5429-598). Dr. Maher was in attendance as a possible defense witness in mitigation, but Appellant insisted that he not be cross-examined (S8, R5434-6). Defense counsel stated that Dr. Maher would testify relating to the mitigating factors of "low emotional age" and family background (S8, R5440). Counsel also stated that Dr. Maher could testify with respect to the statutory mitigating circumstances of emotional disturbance and impaired capacity, but Appellant would not allow this to be presented (S8, R5440). The judge conducted a sworn personal inquiry of Floyd before accepting his waiver (S8, R5440-51; 5455-61).

Appellant, as allocution, spoke at length about his life experiences and observations (S8, R5493-596). Floyd continued to profess his innocence of the Commesso homicide (S8, R5493-596). The court put on the record that the (mostly) monolog lasted three hours (S8, R5596).

A continuation of the Spencer hearing was held November 7, 2002 (S2, R4699-4730). Appellant requested that the court simply seal the presentence investigation and not consider it in any way (S2, R4703-4, 4709-20). However, based upon a letter which Appellant later wrote directly to the judge, the court ruled on November 20, 2002 that she would not accept a waiver and would

consider the presentence investigation for possible mitigation (XX, R3694-703).

A "Motion to Return the Defendant to Federal Custody" was also presented at the hearing of November 7, 2002 and set for later argument (XVII, R3087-8; S2, R4721-6). When argued on November 19, 2002, (S2, R4666-95), the judge questioned whether she had jurisdiction of the subject matter (S2, R4672); and she ultimately dismissed the motion (XVII, R3155-6).

On November 14, 2002, Appellant's motion for new trial was heard (XVII, R3076-8, 3122-5; S4, R5038-57). The judge entered an order November 19, 2002, denying it (XVII, R3151). Appellant, acting in his role of co-counsel, argued his "Motion to Bar Imposition of the Death Penalty on the Basis that Innocent People are Executed" (S2, R4657-65). He referred to several cases where people were convicted and sent to death row, only to have their innocence later proven (S2, R4657-65). The judge denied the motion (XVII, R3157; S2, R4666).

The sentencing hearing was held November 22, 2002 (S9, R5722-68). The victim's father, John Commesso, made a brief statement expressing the family's sense of loss (S9, R5723-4). Floyd also spoke and insisted that he was innocent and would be wrongfully sentenced to death (S9, R5725-32, 5737-9). He also gave reasons

why a death sentence should never be imposed because the justice system cannot reliably determine guilt or innocence in some cases (S9, R5732-7). The judge then read her previously prepared sentencing order (S9, R5739-66).

In the sentencing order, the court found that three aggravating circumstances were proved: a) committed by a person under sentence of imprisonment [s. 921.141(5)(a)]; b) previous conviction of a violent felony [s. 921.141(5)(b); and c) committed during the course of a kidnapping [s. 921.141(5)(d)] (XVII, R3168-71). In mitigation, the court found that the only statutory mitigating circumstance proven was age of the defendant [s. 921.141(6)(g)], which was given "some weight" (XVII, R3172). The court considered the statutory mitigating circumstances of extreme mental or emotional disturbance [s. 921.141(6)(b)] and substantially impaired capacity [s. 921.141(6)(f)], but found that they did not exist (XVII, R3172-3). However, the court did give some weight to each as nonstatutory mitigating factors (XVII, R3173, 3176).

Other nonstatutory mitigating circumstances weighed by the court were abusive childhood, federal and state prison sentences which would ensure that Floyd would never be released, and ill health (XVII, R3174-7). Giving each of the aggravating

circumstances “great weight”, the court concluded that they outweighed the mitigating factors (XVII, R3177-8). The judge termed the jury’s death recommendation “not surprising” and she sentenced Appellant to death (XVII, R3178).

The Public Defender was appointed to represent Appellant on appeal (XVII, R3183). Jurisdiction lies in this Court pursuant to Article V, section 3(b)(1) of the Florida Constitution and Fla. R. App. P. 9.030(a)(1)(A)(i).

STATEMENT OF THE FACTS

On March 29, 1995, a worker from a landscaping crew found a human skull in a swampy area between the Toy Town landfill and Interstate 275 in Pinellas County (S15, T623-6, 646-7, 656, 661-2). Two silicone breast implants were located in the same area (S15, T626, 630-2, 639). Police technicians also recovered some items of clothing, jewelry, artificial fingernails and a clump of hair-like fibers (S15, T668-75, 679-83, 686-7, 694-714; S16, T868; SAD, T2169).

A bikini-type bathing suit top was found in two separate pieces (S15, T669-72, 712). A pair of pants had been cut into pieces which were tied together (S15, T694-8). An FDLE crime lab analyst gave his opinion that the items had been separated by use of a double-bladed implement (SAD, T2167-8).

Forensic unit supervisor, Sergeant Earl Rutland, testified that he took the skull home with him for the night and kept it on the kitchen table (S16, T865-6, 870). The next day he turned it over to the Medical Examiner's Office (S16, T866). At the Medical Examiner's Office, the skull was photographed and x-rayed (S16, T880-2, 889-91). Lead fragments were recovered from inside the

skull (S16, T894). An FDLE crime laboratory analyst stated that he found the lead fragments to be consistent with two .22 caliber long rifle bullets (S17, T909-10). They could have been fired from either a rifle, a revolver, or a semi-automatic (S17, T910-11). Based solely upon the photographs and x-rays of the skull, Dr. Thogmartin of the Medical Examiner's Office testified that the cause of death was two gunshot wounds to the head (S19, T1261-2).

Rutland also testified that a root was found growing through the right leg of the skeletal remains (SAD, T2176). A forensic botanist, David Hall, analyzed the root and gave his opinion that part of the root was four years old (SAD, T2185). This was consistent with the skeletal remains being at the location for six years or more (SAD, T2189-93). By stipulation between the prosecution and defense, the judge told the jury that the skeletal remains were identified as being those of Cheryl Commesso, the victim in this case (S16, T898).

Records from the Humana Hospital in Brandon showed that Cheryl Commesso was treated in the emergency room on March 30 and 31, 1989 (SAD, T2129-30). Commesso's brother, Joseph Commesso, said that he last saw his sister alive in the middle of the first week of April, 1989 (S18, T1052-3). Upon leaving, she had told him that she would see him again the next week (S18, T1053).

Victoria Zucker, a friend, had been to the beach with Cheryl Commesso during spring break in 1989 and spoke with her on the telephone the following Tuesday (S19, T1235). That was her last contact with her (S19, T1235). Commesso's father, John Commesso, testified that Cheryl was living at home at the time of her disappearance in early April 1989 (S19, T1241). Other times when she had gone away, she would telephone to let the family know where she was (S19, T1241).

Cheryl Commesso was the owner of a 1985 red Corvette (S17, T911-2; S18, T1053-4). This vehicle was found abandoned at the St. Petersburg-Clearwater Airport parking lot and impounded on May 15, 1989 (S17, T920). Airport police records showed that the Corvette had been there since at least April 7, 1989 (S17, T912, 920).

Coincidentally, two days after Cheryl Commesso's skull was discovered, the owner of Masterson's Auto Body in Mission, Kansas, was wiring a pickup truck for trailer lights (S15, T736-7). Underneath the truck, Luther Masterson discovered an envelope sealed with masking tape lying on top of the gas tank (S15, T737-9). He took the envelope into the body shop office, opened it, and discovered photographs cut into bits and pieces (S15, T741, 751, 760). Because of the subject matter, which included women

and children in provocative poses, the witness telephoned the local police department (S15, T741, 748-9, 763).

Detective Gary Hines of the Mission, Kansas police department took possession of the 97 photographs (S15, T765, 768-9, 772). Copies were made and all of them were eventually sent to the Oklahoma State Bureau of Investigation (S15, T773, 775-6, 781-2, 785-7). On July 12, 1995, Agent Jordan of the Oklahoma State Bureau of Investigation authorized release of the photographs to the FBI (S15, T789). Former FBI special agent Joseph Fitzpatrick noted several photographs depicting a woman who was bound and who appeared to have been beaten (S17, T952-3). Because this woman had tan lines indicating that she might be from a warm climate, Agent Fitzpatrick sent the photos to the FBI office in Tampa (S17, T953). Later he was contacted by the St. Petersburg Police Department and by early 1998 all of the photos were turned over to them (S17, T953-5).

At trial, state witnesses Diana Rife, Michelle Sturgis, Victoria Zucker, and John Commesso identified the woman in these photographs as Cheryl Commesso (S18, T1071-3, 1090; S19, T1197, 1237-42). Dr. Thomas Boland compared the photographs with x-rays and photographs of Commesso’s skull (S18, T1133-9). He testified that there was a fracture to the skull in the area of the right

cheek (S18, T1135-6). This corresponded to the injuries visible in the photograph of the bound and blindfolded woman (S18, T1136-7, 1146-7). Based upon the swelling and redness evident in the photograph, Dr. Boland gave his opinion that the injuries were recent (S18, T1136). He further stated that the fracture in the skull had not begun to heal, indicating that the woman had died shortly after the facial injury was inflicted (S18, T1137, 1145). The facial injury was caused by blunt trauma, possibly by a closed fist (S18, T1138).

To bolster the State's theory that the photographs of the bound and beaten woman depicted Cheryl Commesso shortly before she was shot twice in the head, the prosecution was allowed over defense objection to present testimony by FBI examiner, Thomas Musheno, who held himself out to be an expert in side-by-side comparison analysis (S20, T1314-22, 1325-6). He testified that he compared the clothing, jewelry and artificial fingernails found with Commesso's skeletal remains to the clothing, jewelry and artificial fingernails worn by the bound and beaten woman in the photographs (S20, T1327-37). He stated that the pattern of the shirt found with the remains was consistent with the pattern of the shirt worn by the woman in the photographs (S20, T1337-8). It was not possible for him to make a positive identification,

but he found no inconsistencies between the two (S20, T1338-9). He reached the same conclusion when he compared all of the other items submitted with what was depicted in the photographs (S20, T1339-45).

Links Between Appellant and the Commesso Homicide Evidence

The State's case depended upon linking Franklin Floyd to the photographs which purportedly were taken in the final hours (if not minutes) before Commesso was killed. First, the prosecution tried to link Floyd to the truck where the envelope containing the 97 photos was found. This truck, a 1994 Ford F150 pickup with a camper shell, had been found abandoned in a parking lot belonging to the Wonder Bread Company in Dallas, Texas on October 22, 1994 (S15, T723-7; S17, T1005-6). The police determined that it had been reported stolen in Oklahoma (S15, T724). The State Farm Insurance office in Oklahoma City later offered this vehicle for sale as a theft return and Luther Masterson purchased it (S15, T734). His father, James Masterson, went to Norman, Oklahoma and drove the truck to Mission, Kansas in mid-March 1995 (S15, T735; S16, T852-4). Luther Masterson drove the truck for a couple of weeks before he went underneath it at his auto body

shop (and discovered the package of photos) on March 31 (S15, T736-9).

The person who had previously owned the truck, James Davis, a retired elementary school principal, testified that on September 12, 1994, he was on duty at the Indian Meridian Elementary School in Choctaw, Oklahoma (S17, T987-8). On that day, Appellant came to his office and asked him to call Michael Hughes out of his classroom (S17, T989). Floyd had been the child's stepfather; but a court in Oklahoma severed Floyd's visitation rights because he was not the natural father (S20, T1395). Floyd coerced Davis to drive Hughes and him in Davis's pickup truck away from the school (S17, T989-90).

Appellant directed Davis to a nearby wooded area and told him to stop (S17, T990-1). Davis noticed some bales of hay and what appeared to be an unzipped sleeping bag where the truck stopped (S17, T991-2). Floyd ordered Davis to exit the vehicle and directed him into the woods about 75 yards while Michael remained in the truck (S17, T991-3). Floyd then handcuffed the principal to a tree and walked away in the direction of the truck (S17, T992-3). Appellant returned twice; once to ask the principal how to open the camper shell of the pickup truck and then to ask how to shift into gear (S17, T993-4). Davis heard

the back of his camper shell being opened and a noise which sounded like something being thrown inside (S17, T994-5). Then the truck started up (S17, T995).

Davis yelled for help, and was finally rescued about 4½ hours later (S17, T995). Davis denied that the package of photos later found at the body shop in Kansas belonged to him (S17, T1005).

The State then presented witnesses who identified various photos in the package as being of persons who Appellant had associated with. Jennifer McElhannon identified Appellant in court as a person she knew by the alias Warren Marshall (S18, T1093). During high school, she was close friends with Sharon Marshall and met Appellant, who she thought was Sharon's father (S18, T1091-2). When Sharon graduated from high school, she and Appellant moved away (S18, T1093). McElhannon identified several of the photographs in evidence as being of Sharon Marshall (S18, T1094-5).

Helen Hill Keller, a resident of Oklahoma, testified that in 1993, Appellant (known to her as Franklin Floyd) resided in garage of her residence (S18, T1151-2). Appellant took some photographs of her children during that period and gave them to her (S18, T1156). The prosecutor showed the witness a series of

photographs which were among the 97 found in the package under the pickup truck (S18, T1153-4). Keller stated that the photos were of her daughter Brittany, who was eight years old at the time (S18, T1154-6). Several of them had been taken inside residences recognized by the witness as Appellant's apartment and the duplex to which he later moved (S18, T1155-6).

Diana Rife testified about her contact with Appellant and Commesso during the time period of January through March 1989 (S18, T1060-90). She, Sharon Marshall and Cheryl Commesso were all employed as dancers at the Mons Venus club in Tampa (S18, T1061-2). Rife met Appellant, known to her only as Warren, through Sharon Marshall (S18, T1062, 1076). She frequently saw him in the parking lot of the club because he would drive Sharon to the Mons Venus and wait for her until she had finished her shift (S18, T1062, 1076-7).

The witness became close friends with Cheryl Commesso and they lived together for a few weeks in January and February (S18, T1063, 1079-80). Shortly after St. Patrick's Day, Rife received a telephone call from Appellant asking for Cheryl's last name and her parents' address (S18, T1065-6). Appellant was very angry with Commesso because he believed that she had reported Sharon's work to HRS and was responsible for Sharon losing Medicaid

coverage for the baby (S18, T1066-7). Appellant threatened "to get her" for hurting his family (S18, T1066-7).

Sometime after the phone call, the witness observed a heated argument in the Mons Venus parking lot between Commesso and Appellant (S18, T1067-8). She couldn't understand what was being said, but they "were screaming at each other" (S18, T1067). Rife ran over to Appellant's car and started "yelling" at him (S18, T1068). Appellant yelled back and revved the engine of his car (S18, T1068). Frightened, the witness exaggerated the incident to the club bouncer and asked him to bar Appellant from the parking lot (S18, T1068-9, 1087-8). That was the last time that she had any contact with Cheryl Commesso (S18, T1074, 1080).

The prosecution's most damaging testimony came from Michelle Sturgis, who had been employed by the Pinellas County Sheriff's Office as a detention deputy (S19, T1202-3). When she was fifteen years old in 1989, Appellant, known to her as Warren Marshall, was a neighbor of hers in the Golden Manor Mobile Home Park (S18, T1027-9; S19, 1184-5). She babysat Sharon Marshall's baby Michael (who she believed to be Appellant's grandson) on several occasions (S19, T1185-7).

The witness identified several of the photographs from the package found in Kansas as depicting Appellant's boat (S19,

T1188-91). There were some of Sturgis and her girlfriend Camille when they had accompanied Appellant on a boat ride (S19, T1189-90).

Sturgis also linked Appellant to the homicide victim, Cheryl Commesso. She said that she once saw “a fancy sports car” parked outside Appellant’s trailer and a young girl standing by it (S19, T1191). When she commented on the car, Appellant and Sharon Marshall introduced the owner to her as “Cheryl” (S19, T1191). The witness said that she later saw Cheryl visiting at Appellant’s residence “two or three, maybe four times” (S19, T1192).

The prosecutor showed Sturgis the photographs depicting the woman on a couch who was bound and had been beaten (S19, T1193-7). The witness said that the person “looks like Cheryl, beaten up” (S19, T1197). Sturgis identified the couch in the photographs as being the one that was in the living room of Appellant’s trailer (S19, T1194-6). She further stated that the window in the door of the trailer was visible in one of the photos (S19, T1196-7).

On crossexamination, the witness said that when the police contacted her in March 1997, they asked if she would be able to identify the furniture that Appellant had had in his trailer

(S19, T1203-4). She admitted that during her deposition, she had said that she had never seen the mattress in Appellant's couch/hide-a-bed (S19, T1216-9). Sturgis also admitted that during her deposition, she said that there were no identifying stripes in the fabric covering the couch (S19, T1226-31). However, she maintained that the pattern of the couch in the photograph was the same as Appellant's (S19, T1232-3).

The State's case also depended upon another opinion given by the FBI examiner who had been qualified as an expert in side-by-side analysis. Musheno testified that on October 6, 1999, he photographed Floyd's thumb pursuant to a search warrant (S20, T1334-5, 1347). He compared the photograph of Floyd's thumb side-by-side to the thumb that was visible in one of the photographs allegedly depicting Cheryl Commesso when she was bound and beaten (S20, T1348-51). He concluded that there were several consistencies between the two thumbs and that he could not exclude Appellant's thumb from being the thumb visible in the photograph of Commesso (S20, T1348-51).

PENALTY PHASE

By stipulation, the State and defense agreed that Floyd had previous federal convictions for bank robbery in 1963 and for the carjacking and kidnapping in 1995 which involved James Davis and Michael Hughes (S25, T1917). He also had Oklahoma state convictions for the kidnapping of Davis and Hughes, as well as burglary with intent to commit assault and assault with a dangerous weapon involving the victim Carrie Box (S25, T1917-8). By further stipulation, it was agreed that the "under sentence of imprisonment" aggravating circumstance applied because Appellant had absconded from his parole on the federal bank robbery conviction when the homicide of Commesso took place (S25, T1918).

Carrie Howell (formerly Box) testified that in July 1994, she resided in an apartment complex in Oklahoma City (S25, T1919-20). As she was opening the door to her apartment around 3:30 a.m. on July 4th, a man jumped from the bushes and pushed her inside (S25, T1921-5). She was thrown on the floor and the man straddled her while she was lying on her stomach (S25, T1926). She realized that the man had cut her with a knife as he brought her wrists behind her back and held her in that position (S25, T1927-8).

When her boyfriend came to the front door, the intruder got up, dropped his knife and ran out the door (S25, T1930-1). The boyfriend pursued the intruder, tackled him and held him until the police arrived (S25, T178). Over defense objection, the witness was allowed to testify that the police discovered a pair of her panties in the intruder's pocket (S25, T1933-5). The witness identified Floyd as the intruder and said that he had pled guilty to the offenses (S25, T1935-8).

James Davis was recalled in the penalty phase of the trial to further dramatize the kidnapping and carjacking incident which had been presented to the jury in a limited fashion during the guilt or innocence phase (S25, T1939-58). He stated that when Floyd came into his office, Floyd started talking about an incident which had taken place at a nearby post office where someone shot about 15 people (S25, T1941-2). Floyd then told the principal that he had a gun in his pocket and pulled it out enough to reveal the handle (S25, T1943). Floyd said that he was prepared to die and that Davis wouldn't survive unless he helped him (S25, T1943).

Appellant directed Davis to get Michael Hughes out of his first grade class and to drive them away from the school, promising to release Davis if he complied (S25, T1943-5). When

they arrived at the rural location, Floyd directed Davis into a wooded area and displayed a small semi-automatic pistol (S25, T1946-8). Davis's hands were handcuffed behind him to a tree and duct tape was placed over his mouth (S25, T1948-9). Davis testified in detail about his fears for his safety and the four-hour ordeal before he was rescued (S25, T1949-55).

Davis admitted that after Floyd was convicted in federal court on charges arising from this incident, Floyd apologized for involving him in his quest to gain custody of Michael Hughes (S25, T1957-8). Appellant received sentences of 52 years, 3 months in the federal proceedings; and subsequently pled guilty to state charges which resulted in 9 life sentences (S25, T1957).

The defense case in mitigation consisted solely of Appellant's own testimony. Floyd told the jury that he was born to alcoholic parents in 1943 and that his father died before his earliest recollection (S25, T1982). He was placed in an orphanage where he was abused both physically and sexually from the time he was five (S25, T1983-5). After many abortive efforts to run away, Floyd succeeded at age 15 (S25, T1984-5). After living homeless for about a year, Floyd enlisted in the Army (S25, T1985-6). However, when the Army found out that he was underage, they discharged him (S25, T1986-7).

Soon afterwards, Appellant went to prison for the first time. Other state and federal convictions followed (S25, T1987). Prison life was nightmarish for him because he “still looked like a young boy” and was relentlessly victimized by other inmates (S25, T1987-9). Floyd suffered sexual abuse at both federal and state prisons as well as at the orphanage (S25, T1989).

Defense counsel asked Appellant how many times he had been convicted for felonies and he answered nineteen (S25, T1993). On cross-examination, the prosecutor asked Floyd if he remembered all of the felony convictions, and Floyd replied that he didn’t (S25, T1993). Appellant then responded that he had not committed all of the crimes for which he was convicted (S25, T1994). The prosecutor then went through a list of the offenses and asked Floyd whether he had committed each crime (S25, T1994-5). When the prosecutor mentioned the child molestation conviction in 1963, defense counsel moved for a mistrial (S25, T1995). Floyd then refused to answer further questions from the prosecutor, even when the judge instructed him to answer (S1997-8).

The jury was taken out while Floyd and his counsel discussed the improper questioning by the prosecutor (S25, T1998-2000). The court permitted Floyd to give his account of the circumstances surrounding his wrongful conviction for child

molestation in front of the jury (S25, T2000-4). The prosecutor resumed cross-examination and obliged Appellant to agree that he had chosen to lead the life of a criminal (S25, T2005).

During the Spencer hearing, defense counsel proffered facts in mitigation to which Dr. Michael Maher, a psychiatrist, would have testified if permitted to do so (S8, R5461-4). These included Appellant's inability to make connections with others which resulted from lack of love and nurturing. It caused him to operate on the emotional level of a six-year-old (S8, R5461). A family history showed that Floyd's mother drank heavily throughout her pregnancy and Floyd's father died before Floyd was two years old (S8, R5462). The mother abandoned the children who were put into an orphanage in 1946 (S8, R5462). Floyd remained there until age 15 (S8, R5462). During this time, Floyd's mother only attempted to visit him once (S8, R5476). Because she had been drinking, the orphanage asked her to leave (S8, R5476).

Dr. Maher would have further testified that orphanages in those days were practically "mid evil" [sic] institutions (S8, R5463). Because Floyd had no loving relationships as a child, he didn't have a chance to form positive relationships and become a good citizen (S8, R5463). He developed a dependent personality disorder (S8, R5463).

Defense counsel also introduced some photographs depicting Floyd as a child, his grandparents and mother (S8, R5465-9). Pictures of Michael Hughes, who Floyd attempted to raise as a grandson, were also put into evidence to be considered as mitigation (S8, R5469-76). A statement which Floyd made at his trial for kidnapping Michael was read to the court (S8, R5477-9). He explained that he wanted to save Michael from the horrible abuse which he had suffered himself as a ward of the state (S8, 5477-9).

Defense counsel also introduced as an exhibit, a letter from the Sheriff of Pinellas County to the federal prison system where the Sheriff stated that he didn't request a detainer to be placed on Floyd because Pinellas County did not intend to extradite Floyd for trial on this homicide (S8, R5485). Defense counsel argued that this was relevant mitigation because it showed that Appellant's other sentences were sufficient to ensure that he would never be free again (S8, R5485-91).

SUMMARY OF THE ARGUMENT

The State's case against Franklin Floyd was entirely dependent upon circumstantial evidence. In particular, it was necessary to draw a series of inferences from a package of photographs found at an auto body repair shop in Kansas. When inferences must be pyramided in order to reach a verdict of guilt, the evidence of guilt cannot be deemed competent and

substantial. Floyd's conviction for first-degree murder should be reversed and the trial court directed to enter an order of acquittal.

Over five years after the Commesso homicide was allegedly committed, the incident at the elementary school in Oklahoma took place. The State wanted to use Floyd's commission of the carjacking and the two kidnappings as inextricably intertwined evidence. Defense counsel argued that the only relevant fact

from the incident was Floyd's gaining possession of the principal's truck. Although the judge limited the evidence slightly, the probative value of what was presented to the jury was greatly outweighed by the danger of unfair prejudice.

Appellant moved to exclude irrelevant and cumulative photos, particularly those depicting nudity, from evidence. The prosecution argued that it was important for the jury to realize that Floyd possessed child pornography to show his state of mind.

The judge excluded a few photographs, but allowed many irrelevant nude photos of unknown children and women into evidence. The court also allowed numerous erotic photographs of Sharon Marshall and Helen Hill Keller's eight-year-old child into evidence when a few would have been sufficient. The probative value of many of the photographs was greatly outweighed by the danger of unfair prejudice to Floyd.

The trial judge also abused her discretion by allowing an FBI examiner to give his opinion that the items found with Commesso's remains were consistent with the items Commesso was wearing in the photographs depicting her bound and beaten. The examiner also compared a photograph of Floyd's thumb to a thumb in one of the Commesso photos and gave his opinion that he could not distinguish between them. This opinion evidence should have been excluded because it was not helpful to the jury; it was

prejudicial to Floyd because the jury was encouraged to accept the FBI examiner as a “super juror” with greater ability than they to determine the most critical and contested issue in the case.

During closing, the prosecutor argued facts not in evidence, specifically a prior battery committed on Commesso by Floyd. Instead of rebuking the prosecutor, the judge merely instructed the jury to rely on their own recollection. This was

insufficient to cure the great prejudice to Floyd that the improper remarks caused.

When Appellant testified during penalty phase, he admitted the correct number of felony convictions on direct examination. The prosecutor crossexamined Floyd anyway about the nature of his prior convictions and ended up by mentioning a 1963 conviction for child molestation which the judge had previously ruled

inadmissible. The error completely destroyed any semblance of a fair penalty trial.

Appellant argued that Florida's capital sentencing procedure was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). Although the trial court created a special penalty verdict form which recorded the jurors' findings on aggravating circumstances, the federal constitutional error remained.

In his role as co-counsel, Floyd filed and argued a “Motion to Bar Imposition of the Death Penalty on the Basis that Innocent People are Executed”. The gist of his argument was that a higher standard than proof beyond a reasonable doubt was required by the Eighth Amendment in order to impose a death sentence. Evolving standards applicable to the Eighth Amendment’s requirement of reliability in capital sentencing suggest that the appropriate

standard of proof for the underlying homicide is proof to a virtual certainty before a death sentence may be imposed.

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT FOR FIRST-DEGREE MURDER.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT FOR FIRST-DEGREE MURDER. An integral part of this Court's review in all capital cases is a determination of whether the evidence is sufficient to convict the Appellant for first-degree murder. Mansfield v. State, 758 So. 2d 636 (Fla. 2000). The trial court's denial of a motion for judgment of acquittal is reviewed by a *de novo* standard. Pagan v. State, 830 So 2d 792 (Fla. 2002)

The case at bar is perhaps unique in that the evidence consists almost exclusively of a collection of photographs from which the State has drawn inferences to establish guilt. Indeed, the only testimony unrelated to the photographs is that which substantiated that Franklin Floyd knew the victim Cheryl Commesso in the months before her disappearance. Commesso had come to visit him at the trailer where he, Sharon Marshall and her baby

were living. A former dancer at *Mons Venus* testified that Floyd was angry at Commesso and that the two of them had a loud quarrel in the parking lot some weeks before Commesso's disappearance. Perhaps this would be enough evidence to lead the police to interview Floyd; it certainly would not be enough to charge him for homicide.

The State's case against Floyd depends upon inferences drawn from the group of photographs discovered under a pickup truck at a Kansas body shop nearly six years after Commesso disappeared. The first major inference necessary to the State's case is that all of the photos in the package found under the pickup truck owned by James Davis had belonged to Floyd. Supporting this inference is the unusual manner in which all the photos were cut to eliminate insignificant details. The State also proved that Floyd had temporary possession of the pickup truck for an unknown amount of time some six months prior to the date that the photos were discovered. He would have had an opportunity to place the package of photographs under the carriage and resting on top of the gas tank of the truck.

However, anyone could have placed this package there because the truck was not in a secured location except for the brief time when the police seized it before releasing it to the insurance

company. It is also questionable whether the police could have performed their routine examination of this stolen vehicle and not discovered the package of photographs had they been under the truck at that time. Even if some of the 97 photographs belonged to Floyd, others could have been added at some point with the intent to frame Floyd for the murder of Commesso.

The second major inference required by the State's case is that Floyd had taken all of the Polaroid photographs himself or, had at least been present when they were taken. If Floyd merely possessed the photos of Commesso depicting her bound, and had not taken the photos or been present when they were taken, he could not be implicated in her murder.

To support this inference, the prosecution introduced evidence that Floyd had taken photographs of Helen Hill Kellar's child Brittany, some of which were in the package under the pickup truck. Also in the package were photos of Sharon Marshall and Floyd's boat which could reasonably be linked to Floyd. Most critical for the State was one of the photos of Commesso in which a thumb appeared. FBI examiner Musheno testified that he couldn't exclude the possibility that Floyd's thumb was the one depicted in the photo. Finally, Michelle Sturgis stated that the

photos of Commesso appeared to have been taken on the couch that she remembered being in Floyd's trailer in 1989.

The third essential inference required by the State's evidence is that the photos of Commesso were taken immediately before she was shot in the head and her body left beside Interstate 275. If the photographs were taken and Commesso was then released and went on her way, Floyd could not be guilty of her murder.

To support this inference, the prosecution presented evidence that the clothing and jewelry found with Commesso's remains appeared to be items that she was wearing in the photos. Dr. Boland gave his opinion that Commesso died shortly after the facial injuries depicted in the photographs were inflicted because the fracture to the skull had not begun to heal. Accepting this as true does not rule out the possibility that Commesso left by herself after the photos were taken and was shot in the head by someone else in a separate incident.

In short, the State's proof depends upon combining all three of these inferences. As this Court said long ago in Gustine v. State, 86 Fla. 24, 97 So. 207, 208 (1923), "Only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessary for conviction be reached." Florida courts

have followed the precept that, "Where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction." Collins v. State, 438 So. 2d 1036, 1038 (Fla. 2d DCA 1983). See also, Brown v. State, 672 So. 2d 648 (Fla. 4th DCA 1996); I.Y.D. v. State, 711 So. 2d 202 (Fla. 2d DCA 1998).

This Court has stated that in cases where the evidence is totally circumstantial, the evidence must be inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187 (Fla. 1989). Moreover, "a jury's verdict on this issue must be reversed on appeal if the verdict is not supported by competent, substantial evidence. Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction." Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997). Because the State's case against Floyd depends upon a pyramiding of inferences about what the photographs can be linked to, there is not competent, substantial evidence of guilt, but only a strong suspicion. As in Cox v. State, 555 So. 2d 352 (Fla. 1989) and Scott v. State, 581 So. 2d 887 (Fla. 1991), Floyd's conviction for first-degree murder

should be reversed and the trial court directed to enter an order of acquittal.

ISSUE II

THE TRIAL JUDGE ERRED BY ALLOWING UNFAIRLY PREJUDICIAL COLLATERAL CRIME EVIDENCE WHICH WAS ONLY RELEVANT TO SHOW BAD CHARACTER.

Prior to trial, Appellant filed a "Motion in Limine to Exclude the Defendant's Prior Criminal Record and Prior Bad Acts" (XIII, R2287-8). The State responded with a "Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Committed by the Defendant" (XV, R2744-6). Specifically, the incident at issue took place in September 1994 and resulted in Floyd's conviction for carjacking and two counts of kidnapping.

At a hearing held September 5, 2002 (S9, R5632-5720), the prosecutor contended that evidence of this collateral crime was relevant because it established Floyd's possession of the pickup truck where the photographs were later found. He asserted that the facts of the carjacking/kidnapping were inextricably intertwined with the evidence of the Commesso homicide (S9, R5684-7, 5704-5). Defense counsel stated that the jury would be overwhelmingly prejudiced by hearing that Floyd had kidnapped a first-grade child and the principal of an elementary school at gunpoint, leaving the principal tied to a tree (S9, R5687-8). Counsel suggested that the evidence be limited to testimony from James Davis that Floyd took possession of his pickup truck on

September 12, 1994 and that it was not recovered until October 22, 1994 (S9, R5691-3).

In her "Order Determining Admissibility of Evidence Related to Bad Acts" (XV, R2763-8), the trial judge specified exactly what evidence of the incident would be admissible before the jury (XV, R2765-6). Basically, the only facts being deleted from the presentation were Floyd possession of a handgun during the kidnappings, the statements he made in the principal's office, and the duct tape placed over the principal's mouth after Floyd handcuffed him to a tree (XV, R2764).

The judge explained the reasoning she used to determine that evidence of the incident would be admissible (XV, R2766-8). She found that the collateral crime evidence was neither admissible under Williams Rule, nor was it inextricably intertwined. However, it was relevant to show Appellant's exclusive possession of the pickup truck and his state of mind with regard to the significance of the photographs. The court conducted a weighing under section 90.403 of the Florida Evidence Code and determined that the probative value of the collateral crime evidence outweighed its prejudicial content.

The applicable standard of review on appeal from a trial court's ruling on the balancing test in section 90.403 is abuse of

discretion. Ramirez v. State, 810 So. 2d 836, 843 (Fla. 2001); Mansfield v. State, 758 So. 2d 636 (Fla. 2000). At bar, the trial judge abused her discretion by weighing Appellant's state of mind regarding the photographs during the subsequent collateral crime as relevant evidence in the Commesso homicide for which he was on trial.

To begin with, this Court should recognize that the trial court's tailoring of the facts regarding the carjacking/kidnapping offenses did very little to mitigate the overwhelming prejudice the incident generated for the jury. Disallowing testimony about Floyd's possession of a handgun during the incident did not genuinely benefit Appellant because it is obvious that Floyd must possessed some kind of weapon or made a substantial threat in order to coerce the elementary school principal to follow Floyd's directions. No one readily submits to being handcuffed to a tree in the woods unless the alternative is death. Indeed, the jury may have believed that the facts were sanitized for them to hide an even greater horror, such as a bomb hidden in the school which would be detonated by Appellant if the principal resisted.

Furthermore, the judge emphasized the fact that Davis's testimony was being limited when she instructed the jury before Davis testified:

> Mr. James Davis will testify that the Defendant on September 12th of 1994, came to Indian Meridian Elementary School. Mr. Davis will tell you that the Defendant directed him and Michael Hughes away from the school in Mr. James Davis' Ford F150 pickup truck after which the Defendant instructed him to drive to a secluded wooded area.
>
> Mr. Davis testify [sic] that at the secluded wooded area, Mr. Floyd handcuffed him to a tree.
>
> Mr. Davis will testify that the circumstances at the time he committed them [sic], to include that the Defendant drove off with Michael Hughes in his Ford F150 pickup truck.
>
> Although the testimony of James Davis may establish the existence of other crimes, it is important to remember that the Defendant is only charged with the indictment of first-degree murder. The Defendant is not on trial for any other crimes. Therefore, the testimony of James Davis should only be considered by you to the extent it may place the Defendant in the possession of a Ford 150 pickup truck.

(S17, T986-7)

Two things are immediately apparent about this so-called instruction which the judge read to the jury. First, the judge, in summarizing the expected testimony of Davis, has in fact assumed the role of a prosecution witness rather than remaining an impartial arbiter. Second, the summary of Davis' expected testimony not only alerts the jury that they are not going to hear the full story, but it also emphasizes the importance of it. The court's instruction has the effect of making Davis' testimony a

feature of the case and compounding the prejudice to Floyd rather than mitigating it.

The court's so-called instruction also begs the question of why the evidence of carjacking and kidnapping is being admitted when the jury is instructed to consider it only "to the extent it may place the Defendant in the possession of a Ford 150 pickup truck". Presumably, this is because possession of Davis's Ford F150 pickup truck is the only relevant evidence contained in the entire collateral crime incident. One has to wonder why the judge didn't simply accept defense counsel's suggestion that the testimony be limited to that fact alone.

Nonetheless, the judge accepted the prosecutor's assertion that the entire incident should be presented because it demonstrated Floyd's state of mind with respect to possession of the group of 97 photographs. In her order, she cited to Vasquez v. State, 763 So. 2d 1161 (Fla. 2000) and Caruso v. State, 645 So. 2d 389 (Fla. 1994) for the proposition that collateral crime evidence may be admitted to show "the defendant's state of mind when he committed the crime" (XV, R2768). However, the defendant's state of mind is only relevant when it relates to the crime for which he is being tried as Caruso and Vasquez make clear. The evidence at bar was admitted to show Floyd's state of

mind at the time that he committed the collateral crimes of kidnapping and carjacking, well over five years after the Commesso homicide. It was not even suggested that Floyd's state of mind at the time he allegedly killed Commesso had anything to do with what crimes he would commit in the future.

In short, most of the collateral crime evidence admitted at Appellant's trial was relevant solely to show bad character and his propensity to commit desperate acts of violence. Section 90.404(2)(a) of the Florida Evidence Code specifically disallows evidence "relevant solely to prove bad character or propensity". In Bryan v. State, 533 So. 2d 744 (Fla. 1988), this Court noted that a photo of the homicide defendant holding a sawed-off shotgun in a previously committed bank robbery was relevant to show his prior possession of the murder weapon. However, it was held that the photo's probative value was substantially outweighed by the danger of unfair prejudice ensuing from evidence of the prior violent felony.

At bar, detailed testimony about Floyd's crimes of carjacking and the kidnappings of a first-grade student and his elementary school principal dwarf the prejudice ensuing from a routine bank robbery. Compared to Bryan, the probative value of the testimony at bar was not as great but the prejudice was greater.

Accordingly, the trial court abused its discretion and committed reversible error by allowing Davis to testify beyond what was necessary to show Floyd's possession of Davis' pickup truck. See also, Henry v. State, 574 So. 2d 73, 75 (Fla. 1991) ("Even if the State had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value".)

ISSUE III

THE TRIAL JUDGE ABUSED HER DISCRETION BY ALLOWING INTO EVIDENCE MARGINALLY RELEVANT PHOTOGRAPHS WHOSE PROBATIVE VALUE WAS OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

At the September 5, 2002 pretrial hearing, defense counsel stated that of the 97 photographs found under the pickup truck, only the sixteen photos depicting the victim, Cheryl Commesso, and the photo of Floyd's boat were truly relevant to the homicide for which Floyd was being tried (S9, R5664). He urged the judge to exclude the others because they were of other individuals and were mostly pornographic in nature. The judge agreed to remove the ones which clearly appeared to depict capital sexual battery on unknown children (S9, R5665-7). Regarding the others, she stated that she would "evaluate each photo individually" (S9, R5665).

At trial, prior to opening statement, the judge clarified that she would review the photographs under the weighing test of section 90.403 of the Florida Evidence Code (S14, T573). After the prosecutor was able to elicit testimony from Detective Hines that the photographs found under the pickup truck "appeared to be child pornography" (S15, T781), he told the judge, "The jury is going to know that there is child porn" (S16, T820). Having opened his own door, the prosecutor urged the judge to admit all

of the photographs because:

> Collectively, all of these show the significance of why he maintained the photos. He forgot to get them. But otherwise, he would keep them around and care for them. And if we start removing some of these, it diminishes on that quality of the situation. (S16, T820).

While the judge adhered to her decision to evaluate each photo, she also stated, “I plan to let in some things that would otherwise be described as pornography” (S16, T823). She stated:

> There are photos here that cause Hustler’s magazine to exist.
>
> Some of those I’m letting in because they are relevant to the kinds [sic] of collection they found here, and they are similar in kind to Cheryl Commesso.
>
> You can have a continuing objection, but – (S16, T827).

In the end, the court excluded only seven of the photographs from coming into evidence (S16, T830-1).

The problem with this ruling was (as defense counsel observed) that Floyd was not charged with maintaining a collection of child pornography; he was charged with the homicide of Cheryl Commesso (S16, T828). This evidence of a sick mind greatly outweighed in prejudice any probative value that maintaining a collection of pornography might have with respect to whether Appellant killed Commesso. Indeed, the prosecutor’s closing

argument contained references to “child porn” (S23, T1667) and “teenaged women in various positions unclothed” (S23, T1671).

Defense counsel specifically objected to two groups of identifiable photographs which the court allowed into evidence: the nude photos of Sharon Marshall and the numerous photos of Helen Hill Kellar’s children. He additionally objected to allowing photographs depicting the genitalia area of unidentified children and women into evidence. Each group will be analyzed separately, although this Court should consider the prejudice ensuing to Appellant cumulatively.

A. The Nude Photographs of Sharon Marshall.

During direct examination of state witness Jennifer McElhannon, the witness was shown several photographs of Sharon Marshall, which were among the 97 photos discovered under the pickup truck in Kansas. The witness had known Sharon Marshall when they were both teenagers and going to high school. McElhannon also knew Appellant under the alias of Warren Marshall, who was represented to be Sharon Marshall’s father (S18, T1092). The relevancy of McElhannon’s identification of the photographs of Sharon Marshall was to try to prove that the photographs in the collection had been taken by (or at least belonged to) Floyd.

However, a single photograph of Marshall would have been

sufficient for this purpose. Instead, the witness was shown numerous photos of the teen-aged Sharon Marshall "in various stages of clothes or unclothed" (S18, T1094-5). Over Appellant's objection, the prosecutor was permitted to publish all of these photographs of Sharon Marshall to the jury (S16, T828; S18, T1095-1100).

Given that the purpose of witness McElhannon's identification could have been accomplished by allowing one clothed photograph of Sharon Marshall into evidence, it was needlessly cumulative as well as unfairly prejudicial to Appellant to admit the nude photos. Indeed, during the prosecutor's closing argument, he highlighted the fact that the collection included pornographic "photographs of his own daughter" (S23, T1679).

B. <u>The Numerous Erotic Photographs of Helen Hill Kellar's Eight-Year-Old Daughter.</u>

Prior to witness Helen Hill Kellar's taking the stand, Appellant offered to stipulate that he knew her and her children during 1994 and had photographed them (S18, T1110-1). The State declined to accept the stipulation and the court allowed them to proceed with live testimony (S18, T1111). Defense counsel noted the enormous prejudice Appellant would suffer by presenting the

jury with numerous photographs that would be child pornography except that the child was clothed (S18, T1113). The prosecutor and judge agreed that the photos were not child pornography but "unusual" and "sexually suggestive" (S18, T1115).

When Kellar testified, she stated that she had known Floyd when her daughter Britney was eight years old (S18, T1151). She identified many photographs taken from the collection of 97 photos found under the pickup truck as depicting Britney (S18, T1154-6). She also showed some photos of Britney which Floyd had taken and given to her (S18, T1156).

Before the photographs were moved into evidence, defense counsel reiterated his objection that Floyd was being tried as a pornographer (S18, T1157-9). The court ruled that the prosecutor could not use the word "pornography" in describing the photos, but allowed them into evidence (S18, T1161-2). Appellant's subsequent motion for mistrial was denied (S18, T1162-3).

During the prosecutor's closing argument, he referred to these photographs of Helen Hill Kellar's children as "those little photographs that show them in sexually erotic positions" (S23, T1677). He continued:

> … you've got to ask yourself, what makes a person keep this particular collection of photographs? What is it? Well, obviously somebody has got a fetish for a particular

> area of the female genitalia. That is unquestionable from looking at all of the photographs. You cannot arrive at any other conclusion there.

(S23, T1677-8).

C. The Numerous Other Photographs Depicting the Genitalia of Unidentified Children and Women.

The court allowed into evidence other photographs of female genitalia which could not link Floyd to anyone; the usual reason being that the face of the child had been cropped from the photo. In closing argument, the prosecutor described these as part of Floyd's "little collection":

> And lastly, you have photographs of other unidentified women that depict only the genitalia area of the women. And you have a number of those particular photographs that you can't really relate to any particular person because there is no face or other identifying features attached to them.

(S23, T1679).

How could these possibly be relevant to whether Appellant killed Cheryl Commesso? Their only purpose was to assassinate the character of Franklin Floyd which was not properly in issue. The prosecution's strategy at trial was to show the jury that Franklin Floyd was a diabolical person; not only had he kidnapped an elementary school principal and a first-grade student, but he was

a child pornographer as well. Consequently, the jury should not be concerned about whether the State had proof beyond a reasonable doubt that Floyd killed Commesso because the jury could be sure that they would be convicting an evil person.

Most of this Court's decisions on photographic evidence have focused upon photographs of deceased homicide victims. This Court has said, "To be relevant, a photo of a deceased victim must be probative of an issue *that is in dispute*." Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999); Hertz v. State, 803 So. 2d 629, 642 (Fla. 2001). The same standard of relevance should apply to any photographs which are potentially inflammatory. Surely the nude and clothed photos of children in erotic positions admitted in Appellant's trial should be evaluated from this perspective.

The only issue in dispute was Floyd's connection to individuals depicted in the "collection", not the contents of the "collection". Admitting one clothed photo of Sharon Marshall and a few of the less sexually charged photos of Helen Hill Kellar's children would have accomplished the legitimate goal of the prosecution. Instead dozens of erotic photos whose relevance to the homicide of Commesso was almost nil were shown to the jury. The prejudice to Appellant was overwhelming and clearly outweighed any probative value. As in Henry v. State, 574 So. 2d 73 (Fla.

1991), this Court should recognize that these inflammatory photographs should not have been admitted under a proper section 90.403 analysis and the error unfairly deprived Floyd of a fair trial.

ISSUE IV

THE TRIAL JUDGE ERRED BY ALLOWING F.B.I. EXAMINER MUSHENO TO TESTIFY BECAUSE HIS OPINIONS IMPROPERLY BOLSTERED THE STATE'S CASE AND DISRESPECTED THE JURY'S ROLE AS FACTFINDER.

Appellant objected to allowing F.B.I. examiner Thomas Musheno to testify as an expert witness, stating: "This person's testimony is not scientific, not for any purpose, other than to bolster something. It invades the province of the jury". (SAD, T2201). The State asserted that Musheno was "trained to acutely identify minute detail. And it's that training and eye for a minute detail that places him and gives him that expertise beyond what the jurors are aware of. This is not testing." (SAD, T2206).

The witness was proffered by a colloquy outside the presence of the jury (S20, T1300-10). Musheno said that his duties as an F.B.I. examiner of questionable photographic evidence involved side-by-side comparison analysis (S20, T1300-01). He was trained for two years before being certified. The program included time spent where he "worked side by side with qualified examiners on evidence that was submitted to the laboratory for examination" (S20, T1301).

Regarding his proposed testimony in the case at bar, Musheno said that he would not give opinions about positive

identification. He would simply compare jewelry and clothing found with Commesso's remains to the photographs of Commesso in evidence to either include them or exclude them as being the same. Similarly, he would compare a photograph he had taken of Appellant's thumb with the thumb depicted in one of the Commesso photos to "include or exclude" (S20, T1303-4). He stated that he was "able to identify minute details that otherwise a lay person might miss or ignore" (S20, T1304).

Defense counsel argued, "[The jury has] the exact same ability that Mr. Musheno does. The fact that he does it more often than them does not make him an expert; it does not make his opinion to be anything more than opinion…" (S20. T1312). The court ruled that the witness would be testifying based upon his experience and "his experience could assist the jurors, perhaps, in finding any details in the pictures that might not be…" (S20, T1315). She allowed him to give opinion testimony based upon training and experience (S20, T1316-7).

In accord with this ruling, Musheno testified before the jury to his qualifications and the methodology he would be using (S20, T1321-7). He was shown the photographs of Cheryl Commesso, depicting her bound and beaten, and asked whether the clothing and jewelry items shown in the photos matched the items found with

Commesso's remains (S20, T1335-45). To each of the items, Musheno said that he could not make a positive identification, but could not exclude the item as being the one which appeared in the photographs (S20, T1338-9, 1341-5). Regarding the thumb, the witness stated that he did a side-by-side comparison of the photograph he took of Floyd's thumb with the thumb depicted in one of the photographs of Commesso (S20, T1348-50). He gave an opinion that he could not exclude Floyd from being the person whose thumb appeared in the Commesso photo (S20, T1351).

On crossexamination, Musheno represented that he "had a lot more training than the jury does in doing that [side-by-side comparison]". (S20, T1372). In short, he was presented to the jury as a sort-of "super juror" who could save them the trouble of doing their own side-by-side comparison between photos and tangible objects.

This Court wrote in Glendening v. State, 536 So. 2d 212, 220 (Fla. 1988), cert. den., 492 U.S. 907 (1988) that four requirements must be met before expert opinion is admissible:

> (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice.

Opinion testimony based upon an expert's training and experience does not have to meet the Frye[1] test for admissibility. Holy Cross Hospital v. Marrone, 816 So. 2d 1113 (Fla. 4th DCA 2001); Davis v. Caterpillar, Inc., 787 So. 2d 894 (Fla. 3d DCA 2001). Expert opinion is subject to the balancing test of section 90.403 of the Florida Evidence Code and the trial judge's ruling is reviewed on the abuse of discretion standard. Ramirez v. State, 810 So. 2d 836, 842-3 (Fla. 2001).

The first question is whether Musheno's testimony helped the jury. Clearly, if the results of his side-by-side comparison showed subtle differences between the photos and the tangible items in evidence which the jury might otherwise miss, his opinion would be invaluable. However, Musheno's opinion that he couldn't find any differences is not so helpful. Perhaps it might save the jury time in reaching a verdict of guilt if they just agreed to accept Musheno's opinion rather than examine the photos and evidence for differences themselves. While helpful for the prosecution, an opinion which only reduces the task of the jury is not what is meant by aiding the jury.

The fourth Glendening factor is also implicated; the probative value of the opinion must not be substantially

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

outweighed by the danger of unfair prejudice. The probative value of an opinion that merely cannot exclude items being identical is not very great. The prosecution made no showing that the jurors would have difficulty in determining that by themselves.

On the other hand, the danger of unfair prejudice was extremely high. Courts have always scrutinized situations where the jury was persuaded to accept an authority's view on how a case should be decided. For instance, judicial comments on the evidence have caused many reversals on appeal. In Brown v. State, 678 So. 2d 910 (Fla. 4th DCA 1996), the trial judge commented that there was no evidence that the prosecution witnesses were liars. In reversing, the Fourth District quoted from Raulerson v. State, 102 So. 2d 281, 285 (Fla. 1958):

> a trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.
>
> * * * *
>
> the facts are left to the independent and unbiased consideration of the jury and the judge should not enter their sphere of operation else the accused would be deprived of his right to trial by a jury. Because of the judge's exalted position his appraisal of testimony would likely give such emphasis to it as to influence the jury in their deliberation.

678 So. 2d at 911.

Other Florida decisions holding that a judge's remarks deprived the defendant of a fair trial include Acosta v. State, 711 So. 2d 225 (Fla. 3d DCA 1998); Lester v. State, 458 So. 2d 1194 (Fla. 1st DCA 1984); and Gans v. State, 134 So. 2d 257 (Fla. 3d DCA 1961).

Similarly, when the prosecutor uses his official position to vouch for the credibility of a witness or imply more knowledgeable people than the jurors have already determined the defendant's guilt, reversible error occurs. In Ruiz v. State, 743 So. 2d 1 (Fla. 1999), this Court considered a catalog of prosecutorial abuses. Quoting with approval from Hall v. United States, 419 F. 2d 582 (5th Cir. 1969), it summed up, "The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor sit as a thirteenth juror". 743 So. 2d at 5.

As applied to the case at bar, the danger of unfair prejudice arose because Musheno was paraded as an authority who was better equipped than the jury to decide the critical issue of whether the clothing and personal effects appearing in the photographs of Commesso were the same ones found with her remains. Had differences been found such as other clothing any link between Floyd and the homicide would have disintegrated because different

clothing would suggest separate incidents rather than photos taken by Floyd in close proximity to the victim's execution. This critical determination should have been made by the jury rather than made by Musheno.

By qualifying Musheno as a sort-of "super juror", the prosecutor was indirectly requesting that the jury accept Musheno as a thirteenth juror. Inherent in this was a message to the jury that the critical issue in the case had already been decided for them. Rather than do their own side-by-side comparisons, they should just take the F.B.I. examiner's word for it.

Accordingly, the trial judge abused her discretion when she allowed Musheno to testify without weighing the huge danger of unfair prejudice to Appellant against the slight probative value Musheno's opinion provided. As in Fassi v. State, 591 So. 2d 977 (Fla. 5th DCA 1991), admission of the examiner's testimony was not harmless error. Floyd's conviction for first-degree murder should be reversed and a new trial ordered.

ISSUE V

THE TRIAL JUDGE ERRED BY FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR ARGUED PREJUDICIAL FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.

During the prosecutor's summation to the jury, he commented about the testimony of witness Diana Rife:

> And she told you: Because I know that Cheryl Commesso has told me that he had hit her – hit Cheryl – "he", meaning Franklin Floyd, had hit Cheryl before, and that "she", Diana Rife had seen the bruise. He had hit her before and she seen [sic] the bruise. And that is why she was so concerned based on what she saw out in the parking lot sometime right in this time period.

(S23, T1685).

Defense counsel moved for a mistrial because Diana Rife had not been permitted to give this hearsay testimony before the jury. There was no evidence of any act of violence, only a loud argument between Appellant and Commesso in the parking lot of the Mons Venus (S23, T1685-6).

The prosecutor replied that he specifically remembered Rife testifying that she saw the bruise on Commesso's face and Commesso had told her that Appellant hit her (S23, T1686). The court denied the motion for mistrial and instructed the jury to rely upon their own recollection (S23, T1686-7).

The prosecutor's assertion about the testimony of Rife was

incorrect. During crossexamination of Rife, the following exchange occurred:

> Q. Stevie [Cheryl Commesso's stagename] was your good friend and you were not happy about the fact that she was not living with you anymore, not being a part of your life in March of 1989?
>
> A. No, I wasn't angry. I was worried because I saw a bruise on her face earlier that night. She said that Warren had --

(S18, T1088).

At this point, defense counsel objected. At the sidebar, defense counsel stated that Rife's answer was not responsive. The prosecutor suggested that defense counsel had opened the door. When the judge told counsel to move on, defense counsel asked no further questions (S18, T1089).

Had Rife completed the statement she was about to give, the situation would have been comparable to that in Czubak v. State, 570 So. 2d 925 (Fla. 1990). There, on crossexamination, a witness blurted out that the defendant was an escaped convict. This Court held that the comment was unresponsive to defense counsel's question and was so prejudicial that reversal for a new trial was mandated.

At bar, the prosecutor's completion of what the witness would have said if not interrupted was equally prejudicial. Certainly committing a prior battery on the homicide victim is

much more prejudicial than just having a loud argument with her. It was another example of Appellant's propensity for violent behavior which the prosecutor should not have been permitted to present to the jury.

Arguing facts not in evidence is one of the most extreme acts of misconduct which a prosecutor can commit in closing argument. In Caraballo v. State, 762 So. 2d 542 (Fla. 5th DCA 2000), the court found that arguing facts not in evidence plus other misconduct was so pernicious as to constitute fundamental error. Similarly, in McKenzie v. State, 830 So. 2d 234 (Fla. 4th DCA 2002), the Fourth District also held that unobjected-to comments by the prosecutor about facts not in evidence amounted to fundamental error.

At bar, defense counsel's motion for mistrial means that the error was preserved and doesn't even need to be fundamental in order to require reversal. Appellate review of a trial court's ruling on a motion for mistrial is by an abuse of discretion standard. Smith v. State, 29 Fla. L. Weekly S41 (Fla. January 29, 2004). Where the judge admonishes the prosecutor for arguing facts not in evidence or the prosecutor corrects his own misstatement, the error may be harmless. Cf., Parker v. State, 29 Fla. L. Weekly S27 (Fla. January 22, 2004). However, when the

trial court only instructs the jury to rely upon their own recollection (as at bar), the prejudice to the defendant has not been cured.

Accordingly, Floyd’s conviction for first-degree murder should be reversed and this case remanded to the circuit court for a new trial.

ISSUE VI

THE PROSECUTOR'S MENTION OF THE NATURE OF ONE OF APPELLANT'S PRIOR CONVICTIONS DURING THE PENALTY PHASE CROSSEXAMINATION WAS IMPROPER AND DENIED APPELLANT A FAIR PENALTY TRIAL.

During penalty phase, Appellant elected to testify in his own defense. On direct examination, defense counsel asked him how many prior felony convictions he had and Floyd replied, "19" (S25, T1993). On crossexamination, the prosecutor immediately repeated the question. Appellant responded, "I don't really know. I'm guessing 19" (S25, T1993). On a follow-up question, the prosecutor elicited Floyd's admission that he didn't remember all of his felony convictions but he thought that there were "exactly" 19 (S25, T1993).

The prosecutor proceeded:

> Q. You did all of these crimes; did you not?
>
> A. No.
>
> Q. You did not?
>
> A. No.
>
> Q. But you were convicted of them?
>
> A. Yes.
>
> Q. And you made a choice to do those crimes; did you not?

> A. I told you, I did not do all of them. The ones that I did, I made a choice to do, yes.

(S25, T1994).

At this point, the prosecutor began a listing of Floyd's prior convictions and asked him whether he had actually done each of them. This culminated when the prosecutor asked:

> Q. All right. We have a child molestation in 1963, do we not?
>
> A. I did not commit it either.

(S25, T1995).

Defense counsel belatedly objected to this line of crossexamination and moved for a mistrial (S25, T1995). The prosecutor responded that he had "an absolute right to go through them in crossexamination of prior convictions. I'm not arguing that these are aggravators, but the jury has the right to know exactly how many there are, and I have an absolute right to go through them" (S25, T1996). The judge stated that she was "very wary of getting in front of this jury anything that is a juvenile conviction and that's a little unclear" (S25, T1996). The motion for mistrial was denied, but the judge instructed the jury to "disregard the last question and the last answer" (S25, T1996-7).

Contrary to the prosecutor's belief in his "absolute right" to detail the nature of a defendant's prior convictions under the guise of impeachment is this Court's decision in Fulton v. State,

335 So. 2d 280 (Fla. 1976). The Fulton court wrote:

> It is also established that 'evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness'. When there has been a prior conviction, only the fact of the conviction can be brought out, unless the witness denies the conviction. If the witness denies ever having been convicted, or misstates the number of prior convictions, counsel may impeach the witness by producing a record of past convictions. Even if a witness denies a prior conviction, the specific offense is identified only incidentally when the record of the conviction is entered into evidence. If the witness admits the conviction, 'the inquiry by his adversary may not be pursued to the point of naming the crime for which he was convicted'. [citations omitted].

335 So. 2d at 284.

At bar, Floyd admitted to nineteen prior felony convictions. The State did not contest that this was the correct number. The prosecutor should not have even been permitted to repeat the question because it was "asked and answered". Certainly, Appellant's admission that he was "guessing" and didn't "remember all of them" did not open the door to further inquiry. In Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982), the court wrote:

> If the witness admits the number of his convictions, the prosecution may not ask further questions regarding prior convictions, and in particular the prosecution may not question the witness as to the nature of the crimes. The defendant may voluntarily reveal

> the nature of any crime, but the prosecution must not invite him to volunteer.

412 So. 2d at 438.

Accord, White v. Singletary, 717 So. 2d 1054 (Fla. 3d DCA 1998); Kyle v. State, 650 So. 2d 127 (Fla. 4th DCA 1995).

The State may argue that Appellant did not make a timely objection to the improper impeachment. In Rodriguez v. State, 761 So. 2d 381 (Fla. 2d DCA 2000), the Second District held that ineffective assistance of counsel on the face of the record was demonstrated by defense counsel's failure to object when the prosecutor crossexamined the defendant about the nature of his prior convictions.

In any case, Appellant could not have imagined that the prosecutor would question him about the disputed 1963 conviction for child molestation. This had already been the subject of discussion in the charge conference and the judge had ruled that it would "not be mentioned to the jury in the penalty phase" (S24, T1800). The prosecutor's disrespect for the court's ruling was likely intentional and "calculated to provoke Mr. Floyd into some sort of response", as defense counsel put it (S25, T1998-9).

Indeed, Floyd did respond to the prosecutor's baiting by compounding the already extreme prejudice which had been created by bringing up a nonstatutory aggravating circumstance (child

molestation conviction) which the jury could not disregard, even when instructed to do so. This was yet another example of the "egregious and inexcusable" prosecutorial misconduct which this Court found unacceptable in Ruiz v. State, 743 So. 2d 1 (Fla. 1999) and cases cited therein[2].

Appellant was denied a fair trial on penalty and his sentence of death should be vacated with remand to the circuit court for resentencing before a new jury.

[2] See, Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Garron v. State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Campbell v. State, 679 So. 2d 720 (Fla. 1996); King v. State, 623 So. 2d 486 (Fla. 1993) and Urbin v. State, 714 So. 2d 411 (Fla. 1998).

ISSUE VII

APPELLANT'S SENTENCE OF DEATH WAS UNCONSTITUIONALLY IMPOSED BECAUSE FLORIDA CAPITAL SENTENCING PROCEDURE VIOLATES RING V. ARIZONA, 536 U.S. 584 (2002).

Prior to trial, defense counsel filed a "Motion to Bar Imposition of Death Sentence on the Basis that Florida's Capital Sentencing Procedure is Unconstitutional under *Ring v. Arizona*" (XIII, R2276-81). The argument was renewed at the penalty phase charge conference. Although a majority of this Court has rejected many times the contention that the holding of Ring applies to the Florida capital sentencing scheme, Appellant maintains that it does.

One novel aspect of the case at bar, is that the trial judge tried to cure any possible Ring error by giving the jury a special verdict form listing the aggravating circumstances submitted to them and recording the vote on each aggravator (XVII, R3073). However, constitutional error cannot be cured by a trial judge's jerry-rigging of capital sentencing procedure. Either the statute is defective or it is not; a valid sentence of death cannot be imposed under a defective statute.

Appellant's sentence of death should be vacated.

ISSUE VIII

APPELLANT'S SENTENCE OF DEATH SHOULD BE VACATED BECAUSE THE EIGHTH AMENDMENT REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING MAKES ANY SENTENCE OF DEATH UNCONSTITUIONAL IF IMPOSED WITHOUT CERTAINTY THAT THE DEFENDANT IS NOT INNOCENT OF THE HOMICIDE.

In his role as co-counsel, Floyd filed and argued a "Motion to Bar Imposition of the Death Penalty on the Basis that Innocent People are Executed". While asserting his own innocence of the murder of Cheryl Commesso, Floyd detailed some of the factors which can produce wrongful convictions such as mistaken eyewitness identification and lying jailhouse informants. In particular, he referred to Florida inmate Frank Smith who spent fourteen years on death row before he died of natural causes (S2, R4658, 4661). It was not until posthumous DNA testing that it could be shown that Smith was not guilty of the homicide which put him on death row.

The constitutional basis for Appellant's motion was the Eighth Amendment's requirement of reliability in capital sentencing (S2, R4656). It calls into question this Court's repeated refusal to consider "lingering doubt" about guilt as a proper mitigating factor. See, e.g., Way v. State, 760 So. 2d 903 (Fla. 2000). Indeed, it elevates "lingering doubt" into such an important factor that a death sentence cannot be constitutionally

imposed unless the homicide has been proven to a virtual certainly.

Appellant urges this Court to reconsider prior decisions and to recognize that evolving standards suggest that the Eighth Amendment requirement of reliability in capital sentencing should be interpreted to mean that the underlying homicide must be proved to a standard of virtual certainty.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Franklin Delano Floyd, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issue I -- reversal of conviction with remand for entry of an order of acquittal.

As to Issues II, III, IV and V -– reversal of conviction and sentence with remand for a new trial.

As to Issues VI, VII and VIII – vacation of death sentence and remand for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of , .

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number O35O141
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

dsc