QUAWN M. FRANKLIN,	)	
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	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC04-1267
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ld Chief v. United States, 519 U.S. 172 (1997).

TABLE OF CITATIONS

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IN THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

The record on appeal comprises twelve, consecutively-numbered volumes. Volumes one through five contain 820 consecutively numbered pages beginning with page one. Volumes six through eleven contain 1162 consecutively numbered pages beginning with page one. Additionally, the most recent supplemental record is numbered as volume twelve with consecutively numbered pages numbers beginning with page 821. Finally, a one volume supplemental record was filed previously. This volume contains 71 pages consecutively numbered beginning with page one.

Counsel will refer to each volume using a Roman numeral referencing the appropriate volume followed by an Arabic number indicating the appropriate page. The supplemental record containing the evidence will be referred to as follows: (SR I) with the appropriate page number inside the parentheses.

STATEMENT OF THE CASE

On February 1, 2002, a grand jury indicted Quawn Franklin, the appellant, charging him with one count of principal to murder in the first degree and one count of attempted armed robbery. (I 8-9) Specifically, the state charged appellant with the December 29, 2001, attempted armed robbery and murder of Jerry Lawley in Lake County, Florida.

Appellant filed numerous pretrial motions. These included: (1) Two separate motions challenging the constitutionality and continued viability of Florida's death sentencing scheme in light of ***Ring v. Arizona***, 536 U.S. 584 (2002) (II 250-69, 270-78); (2) Motion for statement of particulars as to aggravating circumstances as well as the theory of prosecution (II 279-86); (3) A motion to require a unanimous jury verdict at the penalty phase (II 287-90); (4) A motion to declare Florida's death penalty statute unconstitutional based on the failure of the statutory aggravating factors to genuinely limit the class of persons subject to the ultimate sanction (II 291-343); (5) A motion challenging the constitutionality of Florida's death penalty based on a violation of his constitutional right to freedom of speech (II 344-51); (6) A motion seeking modification of Florida's standard jury instructions based on ***Ring v. Arizona***, 536 U.S. 584 (2002) and ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) (II 352-54); (7) A motion challenging the

constitutionality of Florida's statute which allows the use of hearsay evidence in the penalty phase (II 355-59); (8) A motion attacking the constitutionality relating to the felony-murder aggravating circumstance (II 360-67); (9) A motion challenging the "heightened premeditation" aggravating factor (II 367-404); (10) A motion challenging the statute based on the improper burdens of proof or persuasion as they relate to the consideration of mitigating evidence (III 405-12); (11) A motion attacking the constitutionality of the statute, both facially and as applied, with respect to the "prior violent felony" aggravating factor and the respective jury instructions (III 447-53); (12) A motion challenging constitutionality of the "pecuniary gain" aggravating circumstance and the corresponding jury instructions (III 454-59); (13) Several pretrial motions in an attempt to prevent prosecutorial argument and misconduct (III 473-95); (14) A motion attempting to prohibit the prosecution from challenging potential jurors who have reservations about capital punishment but could be objective during the guilt phase (III 516-20); (15) A motion attacking the constitutionality of allowing the introduction of "victim impact evidence"; (16) In the alternative, appellant requested a proffer of the evidence prior to its introduction (III 549-56); (17) Appellant also sought to limit the introduction of victim impact evidence to the trial court alone (III 574-81); (18) Appellant also sought to limit victim impact

evidence in other ways (III 582-86); (19) Appellant also sought to videotape victim impact testimony (III 587-88); and (20) A separate motion to exclude evidence or argument designed to create sympathy for the deceased (III 557-73).

Prior to trial, appellant filed a motion requesting a special verdict form indicating whether the jury found the appellant guilty of premeditated or felony murder. (IV 593-96)

During appellant's guilt phase, the trial court overruled appellant's objections and allowed into evidence portions of Franklin's interview with a newspaper reporter. Although portions of the interview were redacted pursuant to a pretrial hearing, objectionable portions remained. (IX 675-91; XII 826-36)

Also at the guilt phase, the trial court overruled appellant's objections and allowed a witness and a police officer to testify about statements made by the victim after he was shot, but before he died. (VIII 501-505, 512)

Prior to the commencement of the penalty phase evidence, defense counsel offered to stipulate to the aggravating circumstance relating to prior violent felony convictions. This offer was a failed attempt to prevent testimony regarding details of appellant's prior convictions. (X 891-93) Appellant repeatedly renewed his objection during the presentation of this portion of the evidence at the penalty phase. (X 912-13, 917-19, 922-25, 934-35, 944-45)

Appellant had additional objections to the testimony of a detective about Alice Johnson injuries. Alice Johnson was the victim of Quawn Franklin's armed burglary which was used as a prior violent felony in aggravation. Over a timely hearsay objection, a detective testified that he learned from a doctor at the hospital that pieces of Johnson's skull had been broken and had ended up inside her brain. (X 947-48) Appellant also unsuccessfully attempted to exclude victim impact evidence at his penalty phase. (III 549-88; X 969-86)

At the conclusion of the guilt phase, the jury returned verdicts finding appellant guilty as charged of first-degree murder and attempted armed robbery with a firearm. (IV 692-93)

At the conclusion of the penalty phase, the jury returned a unanimous recommendation that the trial court sentence Quawn Franklin to death. (IV 702) The jury indicated that they unanimously agreed that all four aggravating factors were present. (IV 701)

Appellant submitted a memorandum in support of a life sentence. (IV 733-48) The state submitted a memorandum urging death. (IV 749-56)

On June 3, 2004, the trial court sentenced Quawn Franklin to death. In doing so, the trial court entered written findings of fact regarding the aggravating and mitigating factors. In aggravation, the trial court found that: (1) the murder

was committed while Franklin was serving a prison sentence, specifically that he was on conditional release; (2) that Franklin had previously been convicted of several felonies involving the use or threat of violence to another, as well as one prior capital felony; (3) that the murder was motivated by pecuniary gain; (4) that the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (IV 760-65)

The trial court rejected appellant's age as a mitigating factor. (IV 765) The trial court did find numerous nonstatutory mitigating circumstances. Specifically, (1) Quawn Franklin suffered from deficiencies in his upbringing, especially those relating to the forced removal from the only mother and father he had known during his eight years on this earth [some weight] (IV 765-67); (2) at a very young age, Quawn Franklin was sentenced to an adult prison where he served more than eight years of a ten year sentence, a rather harsh sanction even considering his prior juvenile record [little weight](IV 767); (3) Quawn Franklin was cooperative with law enforcement after his arrest [some weight](IV 768); (4) Quawn took responsibility for his crimes and confessed to the police and to the newspaper [some weight](IV 768); (5) Franklin offered to plead guilty in return for a sentence of life in prison without the possibility of parole, consecutive to the life sentences he was already serving [little weight](IV 768); (6) Franklin apologized to the

victim's family, showed remorse, and confessed to other offenses used as aggravating circumstances [some weight]; (7) Franklin apologized and showed remorse for other crimes he committed [little weight]; (8) Franklin entered pleas in related cases and was sentenced to life in prison [some weight]; (9) the trial court also considered it pitiful and distressing that no one was available to testify on behalf of Quawn Franklin at his penalty phase [some weight]; and (10) Pamela McCoy, Franklin's co-defendant, received a thirty five-year prison sentence for her role in these crimes [little weight]. (IV 765-69) The trial court considered the four aggravating circumstances as well as a number of nonstatutory mitigators of which he was reasonably convinced, gave the jury's recommendation great weight, and concluded that Quawn Franklin should die for his crimes. (IV 770-71) The trial court also sentenced Franklin to a consecutive life sentence for the attempted armed robbery. (IV 779)

On June 18, 2004, appellant filed a notice of appeal. (IV 783) This brief follows.

STATEMENT OF THE FACTS

Guilt Phase

Near the end of December, 2001, Quawn Franklin, the appellant, Antwana Butler, her cousin, Adrian, and Pamela McCoy drove from Leesburg, their home, to St. Petersburg for a short stay. While there, the foursome visited various members of Franklin's family. (IX 642-645)

After a short stay[2] in St. Petersburg, Butler and Adrian asked Franklin to drive them back to Leesburg.[3] Every one of the group complained that they had no money.[4] Franklin had to borrow ten dollars from a relative to buy gas for the return trip.[5] (IX 651-52) It was after midnight when they left St. Petersburg. During the return trip, Franklin showed off a chrome revolver that he had obtained from a relative in St. Petersburg. (IX 649-51)

That same night, during the early morning hours of Saturday, December 29, 2001, Jerry Lawley was working his usual shift as a night watchman at the Elberta Crate and Box Factory in Leesburg. Lawley sat in his parked car, getting out to walk his rounds every hour. (VIII 495-500)

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utler could not remember if the group spent the night. (IX 645)
utler and Adrian complained that they had no money to buy food. (IX 646-47)
hey were broke and hungry.
ranklin was none too happy that he had to drive his friends all the way back to Leesburg.

At approximately 5:00 a.m., Franklin, McCoy, and the two Butlers arrived in Leesburg. Franklin, who was driving, stopped at the Elberta Crate and Box Factory and pulled up next to Jerry Lawley's car. (VIII 510-11, IX 651-56) Franklin asked Lawley for directions during a brief conversation. Franklin then drove to the McCove Apartments where he dropped off the two Butlers. (IX 656-57) According to Adrian Butler, Franklin announced that he intended to go back and "get" the security guard. (IX 657) The group was looking for somebody to rob when they happened upon Mr. Lawley.[6] Using his revolver, Franklin ordered Lawley out of the car. Lawley got out and laid down on the ground. Franklin went through Lawley's pockets but found nothing. Franklin then shot Lawley once because he, "wanted to." (VIII 579-81)

After Jerry Lawley, he sought help from a truck driver who had arrived and parked at the factory earlier that evening. Lawley told Ellis that he had been shot by a tall black guy wearing a hat. Lawley told Ellis that the man tried to rob him. (VIII 495-506) Ellis called 911 and Officer Iozzi responded to the scene. Lawley answered Iozzi's questions about his assailant. Lawley described the suspect as a thin, black male, slightly over six-feet tall, wearing a knit cap, and driving a newer-

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ranklin provided details of the crime to police following his subsequent arrest in St. Petersburg. (VIII 562, 589-91)

model, blue, four-door car. (VIII 507-17)

Jerry Lawley suffered a fatal gunshot wound. The bullet entered his left back and exited through the left upper aspect of his abdomen. (IX 695-700) The medical examiner opined that her autopsy findings were consistent with Lawley kneeling down facing towards a wall 116 inches in front of the victim. (IX 702-3) However, the medical examiner admitted that this was one of many possibilities. The variables relating to the victim's position, position of the shooter, and other factors would make a difference in determining exactly how the shooting occurred. (IX 703-6)

The police arrested Quawn Franklin in St. Petersburg the following day. Detective Gary Gibson and Detective Dente of the St. Petersburg police department conducted an interview. (VIII 562-65) After waiving his constitutional rights, Quawn Franklin told the detectives that the group was looking for someone to rob. (VIII 579) Franklin ordered Lawley out of his car at gunpoint. (VIII 580) Lawley got out and lay down on the ground. Franklin went through Lawley's pockets but found nothing. (VIII 580-81) Franklin then explained that he shot Lawley because, "I didn't have no other choice. ...What I did, I wanted to do it at the time. (VIII 581) Franklin and his three confederates also searched Lawley's car for anything of value but found nothing. They decided not to take Lawley's

automobile. (VIII 584-86)

Franklin told the St. Petersburg police that the other three people were with him in the car when he shot Lawley. (VIII 584-85) They planned to split the money four ways. (VIII 585) Franklin wore gloves to avoid leaving fingerprints. (VIII 583-84)

While he was incarcerated in the Lake County Jail, appellant called a newspaper reporter who subsequently came to the jail to interview Franklin. (IX 669-74) Mark Mathews, the newspaper reporter, recorded the interview with the appellant. (IX 673-75)

During the taped interview, Franklin explained that he was confessing to the murder of the security guard. "I'm tired of life, man. I'm tired of being treated like an animal." (IX 680) Franklin described how the four of them had been in St. Petersburg and were low on funds. Franklin obtained a handgun and an assault rifle from "a source." (IX 686-87) The group went back to Leesburg and parked next to the security guard who remained seated in his car. The pair engaged in a conversation before Franklin's group drove away. Franklin dropped off Adrian and Blue, but he and Pamela returned to rob the security guard. Pamela made the guard get out of his car at gunpoint. Franklin attempted to steal the guard's Toyota Camry. However, he had difficulty starting it and getting it in gear. The pair

subsequently left in their own car. (IX 680-90) Before they left, Franklin took the gun from Pamela and shot the security guard. (IX 689-90)

Penalty Phase

A. Evidence and Testimony Relating to Franklin's Prior Violent Felony Convictions.

(1) When He Was Sixteen, Franklin Tried to Rob a Man.

On July 7, 1993, Clarence Martin was working for the St. Petersburg Times. He delivered newspapers and serviced various accounts. He was working his usual shift of midnight to dawn that day. At approximately 1:00 a.m., Martin was in downtown St. Petersburg, filling newspaper vending boxes with the latest edition. (X 900-902) As he was going about his job, Martin noticed two boys, one black and one white, walking in his general direction on the other side of the street. A few minutes later, the young black male, a sixteen-year-old Quawn Franklin, lifted his shirt and pulled out what appeared to be a small caliber automatic handgun. (X 902) It was in fact a toy cap gun. (X 910) He instructed Martin to turn around and to give him the money.

Martin complained that he had not had a chance to collect any money yet. Franklin told Martin to give him what he had in his pocket. Martin had a fanny pack which contained quarters used to open the newspaper boxes. He took it off

and dumped the quarters inside all over the ground. Franklin removed Martin's wallet from Martin's back pocket. Franklin retrieved the cash in the wallet as the other boy picked up all of the coins from the ground. (X 903-904) Franklin then instructed Martin to get down on his knees. Before doing so, Martin retrieved the butterfly knife from the fannie pack. Martin then turned and stabbed Franklin in the stomach. Franklin went all the way down to the ground exclaiming his surprise and dismay. Martin jumped on top of Franklin. With the other boy's help, Franklin was able to escape Martin's grasp.

Martin's assailants ran down the street and out of view. (X 903-906) Martin hailed a police officer. Shortly thereafter, police found a severely wounded Franklin and arrested him. Martin identified Franklin at the scene. (X 906) Franklin subsequently pleaded guilty to robbery and was sentenced to ten years in prison. (X 907-8; SR I 53-58)

(2) The December, 2001, Armed Burglary of Alice Johnson's House.

Alice Johnson, a seventy-eight-year-old woman, testified from her wheelchair at the penalty phase. (X 925-26, 934) Johnson was a retired school teacher who had returned to her hometown of Leesburg following retirement. (X 926-27) In late December, 2001, Johnson was living in the Leesburg home that her family had built back in the 1930s. (X 926-27) On a Thursday night, Johnson was

watching a favorite television show, when Quawn Franklin and a young woman knocked on her door asking for directions. (X 927-28) Johnson explained that she could not give directions and the couple left. (X 928) A few minutes later, Franklin and the woman returned to Johnson's front door. Johnson answered the door and walked out on her porch. The couple asked for directions again. Johnson again explained that she could not give directions. (X 929) At that point, Franklin hit Johnson in the head with "a hammer or something." (X 929) Johnson believed that she might have been hit a second time. She walked back into her house. Franklin and the young woman followed. (X 929-30) From that point on, Johnson had no memory of that night's events. (X 930) Franklin and his companion stole Johnson's 2000 Toyota Camary that night. (X 931)

The blunt trauma that Mrs. Johnson sustained from the attack was severe. Her doctor's main concern was the fact that pieces of her skull had broken off and ended up inside her brain. (X 948) Prior to the home invasion, Johnson was quite active. She volunteered at the food bank, for the Hospice board for Lake and Sumter counties, and she was also on the planning and zoning board for the city of Leesburg. (X 930) Johnson also assisted in registering local African Americans to vote. (X 930-31) Johnson was unable to continue these activities after the attack. (X 931) She was also unable to remain living at the family home. (X 931)

Franklin ultimately pleaded guilty to burglary, robbery with a deadly weapon, and attempted felony murder. (SR I 38-52) After pleading guilty, the trial court sentenced Franklin to life imprisonment. Quawn Franklin told Alice Johnson that he regretted his crimes and apologized to her. Franklin recognized that no apology would be sufficient. He prayed that Alice Johnson's life would get better. (X 932-34)

(3) The December, 2001, Murder of John Horan.

In December, 2001, Papa Johns received an order for a pizza delivery. John Horan attempted to deliver the pizzas to the Carver Heights area. When he left his vehicle to deliver the pies, he was ambushed by Quawn Franklin. Franklin bound Horan with duct tape and placed him in the back of Horan's car. He was then driven a short way to Talley Box Road. Franklin removed Horan from the car. Horan attempted to run, but was shot in the back and killed. (X 942-43) Prior to being shot, Horan begged for his life. (X 943) Franklin pleaded guilty to first-degree murder, kidnapping, and armed robbery. The court sentenced him to three concurrent life sentences. (SR I 61-69)

B. Quawn Franklin was on Conditional Release at the Time of the Capital Murder.

On September 20, 1993, Quawn Franklin was barely sixteen years old when he was sentenced to a period of ten years of incarceration in an adult prison.

Franklin served eight years in prison before leaving prison on October 1, 2001 when he started his conditional release. (X 967-68)

Saundra Ware, a probation and parole employee with the Department of Corrections supervised appellant while he was on conditional release. She met with him on October 8, 2001. Ware verified appellant's residence in Leesburg, Florida. (X 964) Franklin reported to Ware's office on November 13, 2001. (X 964) After that appointment, Ware left the office on medical leave and another officer was responsible for supervising Franklin. (X 964-65) Franklin was scheduled to complete his conditional release on July 9, 2003. (X 965) On conditional release, his status was still considered to be under his prison sentence. (X 965) On conditional release, Franklin was expected to comply with certain conditions. One of the conditions required that he maintain employment. Franklin did in fact maintain a job at Kentucky Fried Chicken in Leesburg. (X 965-66)

Appellant's Co-Defendant's Penalty Phase Testimony.

Pamela McCoy, a five-time convicted felon, entered a plea pursuant to a bargain with the state. McCoy pleaded guilty to being a principal to second-degree murder in the death of Jerry Lawley. McCoy was sentenced to thirty-five years in

prison.[7] (X 950-51, 957-58) While she was in St. Petersburg with Franklin, Adrian, and Blue, the group went to the house of one of appellant's relatives where appellant picked up a silver-colored handgun. (X 950-53) Franklin later used that handgun to shoot Lawley. Prior to getting out of the car before the shooting, Franklin stated, "This is going to hurt for a minute and it's only going to take a second." (X 953-54) Franklin then told Lawley to get down on his knees and to place his hands behind his head. After doing so, Lawley said, "Please don't kill me. Please don't shoot me." (X 955-56) After the shooting, Franklin and McCoy went to his grandmother's place in Leesburg for a short stay.

Victim Impact Evidence

Jerry Lawley was the oldest male in a family of six siblings. The Lawleys' father died when Jerry was about eighteen. As the oldest son, Jerry became a father figure to his siblings. He went to work at a cotton mill and helped out his mother and the other children. (X 971-73) Jerry taught his youngest sister how to drive when she was only eleven. (X 974) Jerry also acted as the family disciplinarian when necessary. (X 974-75)

At the time of his death, Jerry remained close to his family. Two of his

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[7] Despite her guilty plea, McCoy claimed that she had no idea that Franklin intended to rob and kill Lawley. In fact, McCoy testified that she thought that they were picking up

younger sisters had come from Alabama and were living with Jerry at his residence in Leesburg. (X 976-77) Jerry was not comfortable working security. He planned to retire the following October and move back to his home state of Alabama to be close to his family. (X 977-78)

Linda Paulette, Jerry's youngest sister, described Jerry as a "jolly teddy bear." He had a heart of gold and loved everybody. Paulette described the impact of Jerry's death on her five grandchildren. It's tore (sic) the family apart. It's ripped us apart. I have, I have my grandkids that still walk around wondering why, how could somebody do that to him. I have a five-year-old that adored him, and he misses him. To this day he'll lay (sic) up and cry because he misses his Uncle Jerry. (X 979)

Lawley was also popular with his co-workers at Elberta Crate and Box. Over half of the 100 employees at the plant were "real friends". (X 981-82) One friend and co-worker described Jerry as "just an all-around good guy" who would help you out in any way he could. (X 982) Lawley's death clearly affected his coworkers in a major way. (X 982-83) He had no real enemies. (X 982)

Lawley eventually enlisted in the military and served two tours of duty in Vietnam. (X 975, 985) He stayed in the service twenty-five years. (X 975) Even

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job applications. (X 958)

when he was stationed overseas, Lawley sent money to his mother every week. (X 975) He also let his youngest sister use his car while he was away. (X 976)

Jerry Lawley was also an exceptional neighbor. He cut the lawn for neighbors and also did odd jobs. (X 985) He bought eyeglasses, shoes, and school supplies for the children in his neighborhood. (X 985-86) He had a close relationship with his nieces and nephews. One niece lamented the fact that her five-year-old would never get to know Uncle Jerry. (X 986) Lawley's death affected his sister, Carolyn. Without any income, Carolyn was literally thrown out on the streets after Jerry's murder. (X 986)

Mitigation at the Penalty Phase

Quawn Franklin was born in St. Petersburg, Florida. Quawn's biological parents abandoned him as an infant. When he was only six weeks old, his biological mother dropped him off at the home of Minnie and George Thomas in Leesburg, Florida. (XI 1046-57,1053) Minnie Thomas attempted to return the infant Quawn to his biological mother on three different occasions. After the biological mother repeatedly rejected Quawn, Minnie Thomas ultimately took him in as her own. Minnie thought that she was raising Quawn for good. (XI 1047) Quawn knew Minnie and George Thomas as his parents until he was eight years

old. During the first eight years of his life, Quawn knew of no other parents.[8] He received no letters, cards, or phone calls from his biological parents. (XI 1046-47, 1053-54)

When Quawn was eight years old, his biological mother resurfaced to claim her child. Minnie Thomas and Quawn resisted to no avail. Quawn's mother, arrived accompanied by a police officer. The officer explained that Thomas had no legal claims to Quawn. (XI 1047, 1054-55)

Quawn Franklin's Penalty Phase Testimony.

Quawn Franklin testified at his penalty phase wearing shackles and a suicide smock. (XI 1051-81) Quawn testified about his difficult early years when his biological parents rejected him. When he was eight years old, his biological mother came and forcibly removed Quawn from the only family he had ever known. (XI 1053-55) Quawn's juvenile crimes began shortly thereafter. He stole a bicycle and attempted to ride all of the way back to his real home in Leesburg. (XI 1055-56) Quawn attempted this trek several times. Most of the time he would be arrested before he made it back to Leesburg. (XI 1056-57)

As a result of his juvenile crimes, Quawn bounced around among various juvenile programs and facilities. (XI 1057-58) Being one of the smaller, weaker

ıdeed, Quawn was known as Quawn Thomas during his formative years. (XI 1053)

kids, Quawn was frequently the target of sexual abuse by the older boys at various detention centers. (XI 1058-63) When he was not in detention, Quawn continued to break the law in an attempt to return to his loving family. (XI 1063-64)

When he was fifteen, Quawn used a cap gun to commit a robbery. (XI 1064-65) Since he had a prior adjudication for grand-theft auto, Quawn was sentenced to an adult prison for a term of ten years. Quawn explained that prison was not the idyllic setting that many people think of when federal prisons are mentioned. A typical day of Quawn's incarceration included stabbings, fighting, and robbery in a confined facility with limited freedom of movement. (XI 1065-67) Much of his time was spent in a six-by-nine foot cell where he lived with another inmate. (XI 1067)

After Quawn was arrested for Lawley's murder, he willingly confessed to the police. He was tired of running, tired of his bad life, tired of everything. (XI 1068) He saw no sense in running anymore. He felt remorse. He did not mean for this to happen. "I just got up in the wrong situation." (XI 1068) He was tired of living and felt that if he confessed, he would die. He felt as if there was nothing worth living anymore. (XI 1068-69) On the stand, Quawn apologized to Jerry Lawley's family. (XI 1072-73)

SUMMARY OF THE ARGUMENT

The jury's recommendation that Quawn Franklin should die for his crime was tainted by blatant hearsay that was unfairly prejudicial. Specifically, the trial court allowed a detective to testify that a hospital doctor told the detective specifics about the head injury to Alice Johnson, a victim of one appellant's prior violent felonies. This evidence should have been excluded pursuant to ***Crawford v. Washington***, 541 U.S. 36 (2004). The introduction of this inadmissible hearsay violated appellant's right to confront witnesses guaranteed by the state and federal constitution.

Appellant also contends that he is entitled to a new trial based on the improper admission of irrelevant and unfairly prejudicial portions of his statement to a newspaper reporter. One portion of that statement could have been interpreted by the jury as admissions of collateral crimes. Other portions of it were irrelevant statements revealing appellant's depression, feelings of persecution by society, and his desire to end his life. These portions of the statement were irrelevant and should have been redacted. They were unfairly prejudicial because the jury that heard them was deciding whether Quawn Franklin should live or die.

Appellant also challenges the admissibility of the victim's statements to a friend and a police officer after the shooting, but before the victim died. These

statements were testimonial in nature and should have been excluded pursuant to ***Crawford v. Washington***, 541 U.S. 36 (2004). Florida law has recently applied the ***Crawford*** holding to excited utterances which is the only conceivable theory of admissibility in this case.

Appellant offered to stipulate to his prior violent felony convictions. In doing so, he hoped to preclude the victims of his prior crimes from testifying at his penalty phase. The trial court's rejection of appellant's stipulation resulted in the jury's consideration of unnecessarily inflammatory testimony that became a feature of the trial in violation of ***Old Chief v. United States***, 519 U.S. 172 (1997). The admission of this evidence was unfairly prejudicial. The jury's death recommendation was also tainted by highly inflammatory victim impact evidence which was unfairly prejudicial.

Appellant also challenges the trial court's findings of two of the four aggravating circumstances cited to justify the imposition of the death penalty. Jerry Lawley's murder was not integral to the attempted robbery. Appellant's own admission established that he shot Lawley because, "I wanted to." Similarly, the shooting was a spur of the moment decision that cannot support a finding that the murder was committed with heightened premeditation. Although the attempted robbery was clearly planned ahead of time, the murder was a spur of the moment

decision.

Finally, appellant challenges the continued validity of Florida's statute after ***Ring v. Arizona***, 536 U.S. 584 (2002).

ARGUMENTS

POINT I

AT THE PENALTY PHASE, THE TRIAL COURT ERRED IN ALLOWING BLATANT HEARSAY THAT UNFAIRLY PREJUDICED QUAWN FRANKLIN IN CONTRAVENTION OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS REGARDING CONFRONTATION OF WITNESSES.

Even though appellant offered to stipulate to his prior violent felony convictions, the state insisted on presenting details of the crimes, including testimony from the victims. This evidence became a feature of the penalty phase that unfairly prejudiced Quawn Franklin and led to a tainted recommendation to impose death. ***See Point IV***, ***infra.***

The state presented evidence regarding a home invasion where Alice Johnson, a frail, elderly woman was injured. The state presented blatant, inadmissible hearsay evidence of her injuries. Frank Hitchcock, a detective with the Leesburg Police Department, helped investigate the burglary. During the course of that testimony, the prosecutor asked the following:

MR. GROSS [Prosecutor]: While that's being accomplished, Sergeant Hitchcock, can you tell us a little bit about the extent of the injuries that Ms. Johnson suffered as a result of being struck repeatedly with this hammer?

MR. NACKE [Defense counsel]: Your Honor, I'm going to object. The detective

is not a doctor, a physician.

MR. GROSS [Prosecutor]: He certainly in a sentencing proceeding is entitled to tell us what the extent of the victim's injuries are.

THE COURT: Overruled, Mr. Nacke. Go ahead.

BY MR. GROSS[Prosecutor]:

Q. What was the extent of her injuries as a result of the blunt trauma to her head?

A. **In speaking with a doctor at the hospital, he told me that his main concern was the fact that pieces of her skull had been broken off and ended up down inside of her brain.**
(X 947-48) (Emphasis added.) Subsequently, the prosecutor used the objectionable testimony in his closing argument urging death for Quawn Franklin:

Ladies and gentlemen, **he jammed pieces of her skull down into her brain, that man right there,** so that he and his little friend and his other little friends would have a nice ride for a trip to St. Pete. (XI 1106) (Emphasis added.)

The admission or exclusion of evidence, as well as the qualification of the expert, are subject to an abuse of discretion standard of review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998); ***Brooks v. State***, 762 So.2d 879 (Fla. 2000). Appellant contends that the detective's testimony was erroneously admitted and denied appellant his constitutional right to confront witnesses against him. ***Amend. VI & XIV, U.S. Const.; Art. I, §§9 &16, Fla. Const.***

In deciding ***Crawford v. Washington***, 541 U.S. 36 (2004), the United States Supreme Court overruled ***Ohio v. Roberts***, 448 U.S. 56 (1980), which had dispensed with the need for face-two-face confrontation if the hearsay evidence bore "particularized guarantees of trustworthiness" or fell under a "firmly rooted hearsay exception." ***Crawford, 124 S.Ct. at 1369 (citing Roberts, 448 U.S. at 66).*** The Court determined that the test set forth in ***Roberts*** failed to satisfy the historical concerns of the Confrontation Clause, stating:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 1370

Although the ***Crawford*** Court declined to provide a complete definition of "testimonial" evidence, petitioner argues that its partial definition encompasses the

breath test affidavit. The Court explained that the Confrontation Clause:

[A]pplies to "witnesses" against the accused – in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with the specific type of out-of-court statement. Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent - - that is, material such as *affidavits*, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements ... contained in formalized testimonial materials, such as *affidavits*, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Id. at 1364*** (citations omitted)(emphasis added).

Prior to trial, appellant filed a motion challenging the admissibility of any

hearsay at the penalty phase. The trial court denied that motion. (VI 31-32) This is a capital case in which the prosecution successfully asked the trial court to impose the death penalty. Hence, heightened standards of due process apply. ***See Elledge v. State***, 346 So. 2d 998 (Fla. 1977) ("heightened" standard of review), ***Mills v. Maryland***, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), ***Proffitt v. Wainwright***, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions.") and ***Beck v. Alabama***, 447 U.S. 625, 638 (1988)(same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." ***Gregg v. Georgia***, 425 U.S. 153, 187 (1976)(plurality opinion)(citing cases).

Section 921.141(1), Florida Statutes, which governs capital sentencing hearings, states in pertinent part (emphasis added):

...In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems

to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. ...

The holding in ***Crawford v. Washington***, ***supra,*** has now called into question the constitutionality of Florida's statute relating to the admissibility of hearsay at the penalty phase.

Applying the testimony examples set forth in ***Crawford***, it is abundantly clear that Detective Hitchcock's testimony is inadmissibility. The detective was investigating a crime. He was gathering information from the victim's doctor. As such, he was clearly obtaining information and statements that could subsequently used in court. As such, the evidence was clearly testimonial in nature.

Recently, the First District Court of Appeal cited ***Crawford*** in holding that the trial court erred in admitting a breath test affidavit into evidence at a felony DUI trial. ***See Shiver v. State***, 30 Fla.L Weekly D653 (Fla. 1st DCA March 8, 2005) The First District determined that the portion of the affidavit pertaining to the breath testing machines' maintenance was testimonial. The court noted that the affidavit "contained statements one would reasonably expect to be used prosecutorially, and was made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial." ***Id. at***

D654. Therefore, the court concluded, ***Crawford*** precluded its admission, "because appellant was unable to challenge the accuracy of the instrument by the constitutionally mandated method of cross-examination of the person who performed the maintenance." ***Id.*** ***See also Belvin v. State***, 30 Fla. L. Weekly D1421 (Fla. 4th DCA June 8, 2005)

Similarly, the testifying detective was gathering information which subsequently could be used in appellant's prosecution. The admission of this blatant hearsay unfairly prejudiced Quawn Franklin. The resulting death sentence violates his constitutional right to confront witnesses. Additionally, the imposition of the death sentence under these circumstances constitutes cruel and unusual punishment. ***Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17, Fla. Const.***

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING THE INTRODUCTION OF IRRELEVANT AND UNFAIRLY PREJUDICIAL PORTIONS OF APPELLANT'S STATEMENT TO A NEWSPAPER REPORTER.

While awaiting trial in the Lake County Jail, Quawn Franklin contacted a newspaper reporter and gave an interview in which he incriminated himself. This was obviously done without the knowledge or consent of his defense lawyers. Although portions of the interview were redacted, appellant's objections to some of the interview were overruled by the trial court. (IX 675-79; XII 826-36) Appellant's objections were made at an informal hearing before the trial court prior to trial. The specific portions at issue included:

[Reporter]: Why have you decided to confess now?

[Appellant]: I'm tired of life, man. I'm tried of being - - I'm tired of being treated just like an animal. (XII 828)

[Reporter]: What else do you remember from that night?

[Appellant]: Uh, man, we just left, man. Just - - just left from there, you know? Saw a helicopter in the air looking - - looking for the car we was in, and we was hiding, and then we left. Uh - huh. We left [sic] St. Pete.

(XII 829-30) The final section at issue:

[Reporter]: I mean, you are back here. What's gonna happen?

[Appellant]: I don't know. I don't care. You know what I mean? Whatever happens, you know, happens. I'm just saying, you know, I did it. Ain't no sense in me holding that in. You know, I did it. You know, I did my part, you know? I ain't denying it no more, and that's it, and everybody out there want to look at me and find me guilty anyway. I did it, but, so what, you know? They the cause of that there. The people, the world, the world, life, life itself. It's - - I hate - I hate living. I just hate life. I mean, I'm tired of - - I'm tired of everything. I'm tired of people watching me, tired of people hating me, you know what I mean? I'm tired of people. You know what I mean? Things people do, you know? ... I'm tired of everything. (XII 831-32)

Defense counsel posed a relevance objection to the portions of the transcript dealing with what was in Mr. Franklin's heart and his motivation in confessing. (XII 833) Defense counsel also articulated an objection to the portion about hiding from the helicopter.

MR. NACKE[Defense Counsel]: Your Honor, ...number one, it was irrelevant,...however, this particular thing - see, they - at this point they were in Ms. Johnson's car, and I just was afraid that it looks like the jury would get an idea that possibly that this car had been stolen or they were looking for the car for some

other reason than the Lawley case.

MR. GROSS[Prosecutor]: And, of course, the defendant says we were in that car, we committed the crime involving the security guard, and then immediately afterwards we see the helicopter, and we knew they were looking for the car we was in. I don't think it's interpretable by the jury.

(XII 830) The trial court agreed with the prosecutor and the offending portions were played to the jury at trial. (IX 675-91)

The admission or exclusion of evidence is subject to an abuse of discretion standard for purposes of appellate review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998). The same standard applies to the admission of collateral crime evidence. ***Lamarca v. State***, 785 So.2d 1209 (Fla. 2001). The trial court's ruling allowed the introduction of irrelevant evidence that was unfairly prejudicial to appellant's case at the guilt phase. This is especially true regarding the evidence that implied that appellant had committed the collateral crime of grand theft auto.

All relevant evidence is admissible, except as provided by law. ***§ 90.402, Fla. Stat. (2004); Johnson v. State***, 595 So.2d 132, 134 (Fla. 1st DCA 1992). Relevant evidence is evidence tending to prove or disprove a material fact. ***§ 90.401, Fla. Stat. (2004); Gibbs v. State***, 394 So.2d 231, 232 (Fla. 1st DCA 1981).

The objectionable portions of Franklin's statement were not relevant to any

issue at trial. As such, they should have been excluded. The unfair prejudice is clear. The jury heard that Quawn Franklin was tired of living. He was tired of being persecuted. He was tired of running. These statements had no relevance to his guilt. The statements undoubtedly contributed to the jury's alienation from him as a human being, such that they were only too happy to oblige his wish to die. This ultimately culminated in a guilty verdict and a unanimous death recommendation.

Any slight relevance was certainly outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence. ***§90.403, Fla. Stat. (2004); State v. McClain***, 525 So.2d 420, 422 (Fla. 1988). The picture was further muddied when one considers the statement where Franklin feared being spotted by the police helicopter. This evidence could have been confused by the jury as an indication of the commission of other crimes. As defense counsel articulated in his objection. The prosecutor's conclusion to the contrary is not controlling. The objectionable evidence certainly contributed to the jury's verdicts at both phases of Franklin's trial. Reversal is required.

POINT III

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S HEARSAY OBJECTIONS AND ALLOWING TWO WITNESSES TO TESTIFY TO STATEMENTS MADE BY THE VICTIM AFTER HE WAS SHOT.

After Jerry Lawley got shot, he sought help from a truck driver who had arrived and parked at the factory earlier that evening. Edward Ellis was the state's first witness at the guilt phase. (VIII 495-506) At approximately 5:40 a.m. on December 29, 2001, Ellis woke up to the sound of Lawley banging on Ellis' truck cab. Defense counsel objected when Ellis began testifying that Lawley told Ellis that he had been shot. (VIII 501) The trial court overruled counsel's hearsay objection and denied counsel's request to approach the bench. (VIII 501) Mr. Ellis then proceeded to testify that Lawley told him that he had been shot. Ellis went on to testify:

I asked him, I said, "well, do you know who done it," and he said, "No, I never seen him before." He said, "He was just a tall black guy with a hat on his head." (VIII 504) Lawley also told Ellis that the culprit was driving a relatively new blue car similar to Lawley's. (VIII 505) Ellis also testified that Lawley told him that the man tried to rob him. (VIII 505)

The second witness called by the state was Joseph Iozzi, an officer with the Leesburg Police Department. (VIII 507-517) Iozzi had responded to Ellis' call to 911. When Iozzi arrived, he saw Jerry Lawley standing up outside of his car. Lawley appeared to be in a great deal of pain. (VIII 511) Iozzi immediately approached and asked Lawley what had occurred. Defense counsel again objected based on hearsay, but the trial court overruled appellant's objection stating:

THE COURT: Okay, for the record, this also goes as to the previous witness, the objection is overruled per 98.03[sic] (1),(2), or (3). (VIII 512)

Officer Iozzi then testified that he proceeded to ask Jerry Lawley questions. Iozzi explained that he was "trying to get the information, obviously, on the suspect so we could try to capture the suspect." (VIII 513) Iozzi then testified that Lawley told him that a black male had approached, ordered him out of his car at gunpoint, and told him to lie down on the ground. (VIII 513) As Lawley started to comply, the black male shot him in the back. Afterwards, his assailant rummaged through his car and ultimately left the vehicle that he had driven to the scene. (VIII 513-14) Iozzi also testified to the detailed description of the assailant as told to him by Jerry Lawley. Lawley described the suspect as a thin black male, slightly over six feet tall, wearing a knit cap, and driving a newer-model, blue, four-door car. (VIII 514-15)

Appellant submits that the statements of Jerry Lawley as testified to by the two state witnesses were improperly admitted. The admission or exclusion of evidence is subject to an abuse of discretion standard of review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998). The admission of this testimony violated appellant's constitutional right to confront witnesses guaranteed by the ***Sixth*** and ***Fourteenth*** Amendments of the United States Constitution and ***Article I, Section 9*** and ***16*** of the Florida Constitution. The admission of the objectionable testimony violates the holding in ***Crawford v. Washington***, 541 U.S. 36 (2004).

The recent decision by the Supreme Court of the United States in ***Crawford v. Washington***, 541 U.S. 36 (2004) has called into question the admissibility of any hearsay where the accused is not afforded the right to confront witnesses against him. The First District Court of Appeal articulated this change in law: The standard of determining whether the admission of a hearsay statement against a criminal defendant violates the rule of confrontation was recently modified in ***Crawford v. Washington***, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004). Before the ***Crawford*** decision, the issue was controlled by the holding in ***Ohio v. Roberts***, 448 U.S. 56, 66 100 S. Ct. 2531, 65 L. Ed 2d 597 (1980), that a hearsay statement could be admitted in a criminal trial without violating the right of confrontation if (1) it was shown that the declarant was unavailable, and (2) the

out-of-court statement bore adequate indicia of reliability. This test focused on the reliability of the statement. As the Court explained, a statement had adequate indicia of reliability if it either fell within a firmly rooted hearsay exception or if it bore "particularized guarantees of trustworthiness." Id. In ***Crawford***, the Supreme Court dispensed with the reliability analysis in ***Roberts*** and held the admission of a hearsay statement made by a declarant who does not testify at trial violated the Sixth Amendment if (1) the statement was testimonial, and (2) the declarant was unavailable and the defendant lacked a prior opportunity for cross-examination. The Court emphasized that if "testimonial" evidence is at issue, "The Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." ***Crawford*** 641 U.S. at _____, 124 S. Ct. at 1374. ***Lopez v. State***, 888 So.2d 697-98 (Fla. 1st DCA 2004).

The ***Crawford*** opinion identified three kinds of statements that could be properly regarded as testimonial statements: (1) "Ex parte in-court testimony or its functional equivalent - - that is, material such as affidavits, custodial examinations, prior testimony . . . or other pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "Extrajudicial statements contained in formalized testimonial material such as affidavits, depositions, prior testimony, or confessions"; and, (3) "Statements that were made under circumstances which

would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford***, 541 U.S. at ____, 124 S. Ct. at 1364. The ***Crawford*** court did not formally define the term "testimonial". Instead, the Court gave these three examples, each of which the Court said was an acceptable "formulation" of the concept. See ***Crawford***, 541 U.S. at _____,124 S. Ct. at 1364.

The trial court clearly admitted the objectionable testimony based on his finding that the testimony was either a spontaneous statement [***§90.803(1)***, Fla. Stat.]; an excited utterance [***§90.803(2)***, Fla. Stat.]; or a then-existing physical condition [***§90.803(3)***, Fla. Stat.]. (VIII 512) The trial court clearly recognized that the state had not laid a sufficient predicate for the admissibility of the statement as a dying declaration. Specifically, there was no evidence nor finding by the trial court that Jerry Lawley knew, at the time of his statement, that death was imminent and inevitable. ***§90.804(3)***, Fla. Stat. (2004); ***See generally Torres-Arboledo v. State,*** 524 So.2d 403, 407 (Fla. 1988).

The testimony at issue is clearly not admissible under Sec. 90.803(3)[then-existing mental, emotional, or physical condition.] The statement was not introduced to prove the declarant's state of mind, emotion, or physical sensation. The declarant's state of mind was not an issue in this lawsuit. Nor was the evidence introduced to prove or explain acts of subsequent conduct of the

declarant. The only theory of admissibility is that of an excited utterance or as a spontaneous statement. In the present case, a startling event clearly occurred (the declarant's shooting), therefore, the most logical theory of admissibility is that Lawley's statements were "excited utterances."

In this case, the victim's statements were testimonial in nature because Lawley made the statement for the purpose of identifying his assailants for apprehension and future prosecution. This is especially true where the two testifying witnesses, including a police officer investigating the crime, asked questions designed to elicit information. As such, the hearsay statements at issue in this case fall in the third category of testimonial statements given as examples in ***Crawford.***

Florida courts have recently applied the holding in ***Crawford v. Washington, supra*** to the admissibility of excited utterances. ***Howard v. State***, ____So.2d ___, 2005 WL 1248965 (Fla. 1st DCA May 27, 2005) reversed for a new trial because the trial court erred in admitting the hearsay testimony of a deputy sheriff to whom the victim, who was unavailable for trial, excitedly uttered her claims against appellant. The First District held that the circumstances under which the excited utterances were given met the third definition of testimonial hearsay as set forth in ***Crawford v. Washington***, 541 U.S. 36 (2004). Although the permissible evidence

of guilt was substantial, the First District could not say, beyond a reasonable doubt, that the impermissible evidence did not affect the jury's verdict. ***See State v. DiGuilio***, 491 So.2d 1129, 1136(Fla. 1986).

In ***Manuel v. State***, ___So.2d ____, 2005 WL 1130183 (Fla. 1st DCA May 16, 2005), the Court reversed and remanded for a new trial based on the erroneous admission of an excited utterance. The victim's statement was testimonial in nature, because it was made in response to the officer's direct questioning. The admission violated appellant's constitutional right to confront witness against him. The error was not harmless, for the victim's statement was the only direct eyewitness testimony that the victim was injured by the hatchet swung by Manuel.

Similarly, Jerry Lawley's statements were in direct response to police questioning. Lawley's statements, even though excited utterances, clearly violated the dictates of ***Crawford v. Washington, supra.*** They were testimonial in nature, since they were in direct response to questioning by a witness at the scene, as well as a police officer investigating the crime. The state cannot prove that this objectionable testimony did not contribute to the verdict. In fact, the prosecutor featured Lawley's statements in his closing argument at the guilt phase. (X 830-31, 835, 838-39) The state clearly thought this evidence was important. The jury did too.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO HIS PRIOR VIOLENT FELONY CONVICTIONS IN CONTRAVENTION OF ***OLD CHIEF V. UNITED STATES***[9] RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

Prior to the commencement of the penalty phase evidence, appellant's defense counsel offered to stipulate to the aggravating circumstance relating to prior violent felony convictions. Defense counsel objected to the introduction of evidence regarding the details of appellant's prior convictions.

MR. NACKE(Defense Counsel): It's my understanding that the State is going to proceed with bringing on evidence and witnesses and victims of prior crimes of Mr. Franklin.

We would stipulate to the prior violent felony aggravator and object to any of this coming in. Basically our reason is, we believe that it's going to be the focus of the entire penalty phase and that Mr. Franklin would be sentenced to death based on prior convictions instead of this particular conviction and this case today. I think that the feature will be the other offenses, and the jury will be sentencing him or recommending a sentence based on that instead of based on this particular offense.

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ld Chief v. United States, 519 U.S. 172 (1997).

(X 891-92) Appellant renewed his objection repeatedly throughout the penalty phase, when the state called the victims of Appellant's prior crimes. (X 912-13, 917-19, 922-25, 934-35, 944-45) The trial court overruled appellant's objections and allowed the testimony. (X 893)

The court allowed, over timely objection, the introduction of an inflammatory photograph of Alice Johnson, the victim of appellant's armed burglary. (X 922-25; State's #23) The trial court also allowed into evidence, over objection, photographs relating to the murder of John Horan, the Papa John's pizza delivery man. (X 922-25; State's #22) The trial court allowed the state, over defense objection, to present the testimony of the victims of appellant's prior armed robbery, armed burglary, and evidence of the first-degree murder of John Horan. In fact, the vast majority of evidence presented by the state during their penalty phase case-in-chief was the testimony and documentation detailing these horrific crimes. This was error and denied Mr. Franklin's rights guaranteed by ***Article I, Sections 2, 9, 16 and 22*** of the Florida Constitution and the ***Fifth***, ***Sixth***, ***Eighth*** and ***Fourteenth*** Amendments to the United States Constitution.[10]

This issue should be controlled by the United States Supreme Court opinion

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[10] The introduction of evidence is judged by an abuse of discretion standard. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

in ***Old Chief v. United States***, 519 U.S. 172 (1997). In ***Old Chief***, the defendant was charged with the offense of possession of a firearm by a convicted felon. At trial the defendant offered to stipulate that the government has proven one of the essential elements of the offense, i.e., the defendant's prior felony conviction. The United States Supreme Court held that the district court abused its discretion when it spurned the defendant's offer and allowed the admission of the full record of the prior judgment of conviction. The defendant's prior offense, assault causing serious bodily injury, was of such a nature that the probative value was substantially outweighed by the danger of unfair prejudice. Since the nature of the prior offense raised the risk of verdict tainted by improper considerations, the defendant was entitled to a new trial. The court grounded the holding, in part, on Federal Rule of Evidence 403 relating to probative value outweighing the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.

In ***Brown v. State***, 719 So.2d 882 (Fla. 1998), this Court applied ***Old Chief, supra***, pointing out that the holding was grounded on the Federal Rule of Evidence which is reflected by an almost identical provision in the Florida Evidence Code. ***§90.403, Fla. Stat. (2000)*** Although this Court has not yet applied ***Old Chief, supra***, to a situation such as this, the holding and the logic are clearly applicable.

Appellant recognizes that this Court has previously held that the prosecution can introduce evidence regarding a prior violent felony beyond the mere judgment itself. However, this rule has proven to be unworkable. It has spawned tremendous litigation over the extent, nature, and source of evidence concerning prior violent felonies. ***Trawick v. State***, 473 So. 2d 1235 (Fla. 1985); ***Stano v. State***, 473 So. 2d 1282 (Fla. 1985); ***Tompkins v. State***, 502 So. 2d 415 (Fla 1986); ***Rhodes v. State***, 547 So. 2d 1201 (Fla. 1989); ***Freeman v. State***, 563 So. 2d 73 (Fla. 1990); ***Duncan v. State***, 619 So. 2d 279 (Fla. 1993); ***Finney v. State***, 660 So. 2d 674 (Fla. 1995). In ***Trawick, supra***, this Court held it to be error to allow "such detailed testimony" about a prior attempted murder. 473 So. 2d at 1240. In ***Stano, supra***, this Court found the detailed testimony and argument about the prior violent felonies to be admissible. However, this Court also stated, "The State's argument about these other crimes approached the outermost limits of propriety." 473 So. 2d at 1289.

In ***Rhodes, supra***, this Court began to describe the limits of testimony concerning a prior violent felony. This Court held a taped statement of a victim of a prior violent felony to be inadmissible.
Although this Court has approved introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, ***Tompkins; Stano***, the line must be drawn when that testimony is not relevant,

gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant. ***Rhodes v. State***, 547 So. 2d at 1204-1205.

In ***Freeman, supra***, this Court held the testimony of the victim's widow of a prior first degree murder should not have been introduced.

We agree that Ms. Epps should not have been called to testify concerning her husband's death. While the details of a prior felony conviction are admissible to prove this aggravating factor, ***Perri v. State***, 441 So. 2d 606 (Fla. 1983), Ms. Epps was not present when her husband was killed and, therefore, her testimony was not essential to this proof. ***Freeman v. State***, 563 So. 2d at 76 (footnote omitted).

In ***Duncan, supra***, this Court held the admission of an autopsy photograph of the victim of a prior homicide was inadmissible.

> In ***Rhodes v. State***, 547 So. 2d 1201, 1204-05 (Fla. 1989), we noted that evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence is admissible during the penalty phase of a capital trial. However, we cautioned that there are limits on the admissibility of such evidence. We emphasized that "the line must be drawn when [evidence] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." *Id*. at 1205.

We agree with Duncan that the prejudicial effect of the gruesome photograph clearly outweighed the probative value. Section 90.403, Fla.Stat. (1991). The photograph did not directly relate to the murder of Deborah Bauer but rather depicted extensive injuries suffered by that victim of a totally unrelated crime. Moreover, the photograph was in no way necessary to support the aggravating factor of conviction of a prior violent felony. A certified copy of the judgment and sentence for second-degree murder indicating that Duncan pled guilty to and was convicted of a violent felony had been introduced.

Duncan v. State, 619 So. 2d at 282.

In ***Finney v. State, supra***, this Court discussed the limits of testimony concerning a prior violent felony:

> Although the testimony elicited here from the victim of the rape/robbery was not unduly prejudicial, we take this opportunity to point out that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. *Cf. Rhodes*, 547 so. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape violated

> defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true where there is a less prejudicial way to present the circumstances to the jury. *Cf. Freeman v. State*, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. *See e.g. Duncan*, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor); *Freeman*, 563 So. 2d at 75 (error to allow surviving spouse of victim of prior violent felony to testify concerning facts of prior offense where testimony was not essential to proof of prior felony conviction).

Finney v. State, 660 So. 2d at 683.

This Court's frequent discussions of this issue have left litigants with a case by case balancing test regarding the admissibility of evidence concerning a prior violent felony. This test involves the source of the testimony, the emotional nature of the testimony, the relevance of the testimony, the necessity of the testimony, and the prejudice to the defendant from the testimony. This sort of overall balancing

test gives little firm guidance to trial judges or litigants as to when this testimony is admissible.

A better rule is outlined by the Oklahoma Court of Criminal Appeals in ***Brewer v. State***, 650 P.2d 54 (Okl.Cr. 1982). The Court in ***Brewer*** dealt with the admissibility of evidence as to an identical aggravating circumstance. 650 P.2d at 63. The Court held that defendant must be given an opportunity to stipulate to the validity of his prior violent felony convictions. ***Id***. If the defendant stipulates to the validity of the prior convictions, then the prosecution is limited to the introduction of the judgment and sentence on the prior felonies. ***Id***. The Court in ***Brewer*** went on to place strict limits on the introduction of evidence concerning the prior felony even in cases where the defendant refuses to stipulate.

> If the defendant refuses to so stipulate, the State shall be permitted to produce evidence sufficient to prove that the prior felonies did involve the use or threat of violence to the person. We emphasize that prosecutors and trial courts should exercise informed discretion in permitting only the minimal amount of evidence to support the aggravating circumstances. We do not today authorize the State to re-try defendants for past crimes during the sentencing stage of capital cases.

Id.

The Oklahoma procedure is far preferable to the current ill-defined limits. It sets out a bright line rule for everyone to follow as opposed to the current

imprecise balancing test. This procedure also satisfies all of the concerns of the capital sentencing process. If a defendant stipulates to the prior convictions, then there is no need to prove this aggravating circumstance.

The current practice in capital sentencing of allowing evidence beyond the judgment has had several negative affects. It has resulted in persistent and increasing litigation over the precise limits of such testimony. The current procedure also increases the arbitrariness in capital sentencing. There will be extreme variation from case to case in the availability of witnesses from prior violent felonies, in the emotional nature of their testimony and in the extent to which prosecutors and judge observe the ill-defined limits on such testimony. There will inevitably be cases where the limits are exceeded. ***Trawick, supra***; ***Rhodes, supra***; ***Freeman, supra***; ***Duncan, supra***. There will be other cases in which the evidence is used for improper purposes. ***Finney, supra***. Finally, there will be cases in which evidence is taken to the "outermost limits of propriety." ***Stano, supra*** at p.1289. All of this will lead judges and juries to different results based on an identical prior record.

At appellant's penalty phase, the vast majority of evidence presented by the state during its case-in-chief concerned the details of the prior violent felonies to which Quawn Franklin agreed to stipulate. It was highly inflammatory and

involved the testimony of victims which is strictly scrutinized. ***See, e.g., Finney v. State***, 660 So.2d 674 (Fla. 1995). Quawn Franklin himself recognized the overwhelming prejudice of this evidence. During the testimony of Alice Johnson, the elderly armed burglary victim, Franklin created a disturbance in the courtroom by pointing out the hopelessness of his situation. (X 934-40) Franklin's lawyers were able to calm him and he remained in the courtroom as Alice Johnson completed her testimony from her wheelchair.

This Court has repeatedly held that the details of prior violent felonies must not be emphasized to the point where they become the feature of the penalty phase. ***Id.; Duncan v. State***, 619 So.2d 279, 282 (Fla. 1993) This is precisely what occurred in the present case. When the prosecution's evidence concerning prior violent felonies is more extensive than that concerning the offense itself, it can only be described as a feature of the case. ***See***, ***Long v. State***, 610 So.2d 1276, 1280-81 (Fla. 1993); ***Bell v. State***, 650 So.2d 1032, 1035 (Fla. 5th DCA 1995) Since the objectionable evidence subsequently became a feature[11] of the penalty phase, this Court should vacate appellant's death sentence and remand for a new

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t was the vast majority evidence presented by the State during its penalty phase case-in-chief. Additionally, the testimony was from the unfortunate victims of many particularly horrible crimes. There was testimony from an elderly, extremely vulnerable woman describing in graphic detail an especially horrible and brutal home

penalty phase.

POINT V

THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE.

Appellant repeatedly tried to preclude or limit in some way the victim impact evidence that is invariably introduced by the state at capital trial. Appellant filed several pretrial motions attacking the propriety of this type of evidence. Defense counsel also sought to limit the jury's exposure to the unfairly prejudicial testimony. (III 549-88) Prior to the testimony of the "victim impact" witnesses, appellant renewed his objections, but the trial court allowed the testimony. (X 969-70)

The jury heard from three witnesses, Linda Paulette, the victim's sister, Kay Lawley, the victim's sister-in-law, and Edward Ellis, a co-worker and good friend of Mr. Lawley. (X 971-86) These witnesses told the jury that Jerry Lawley was truly a wonderful human being. He was a devoted family man who loved everybody. He was popular with his co-workers and had no real enemies. He was a military veteran who served two tours of duty in Vietnam. He was a great

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invasion.

neighbor who went out of his way to help. Jerry's death affected his co-workers and had a dramatic impact on his family.

In contrast to Jerry Lawley's saintly image, the jury heard about Quawn Franklin's violent criminal past. During Franklin's brief time on this planet, he was either serving time in prison or committing heinous, extremely violent crimes against helpless, vulnerable victims. After the presentation of this ultimate dichotomy, the jury unanimously recommended that Quawn Franklin should die for killing Jerry Lawley. The improperly admitted victim impact evidence unfairly tipped the scales to death.

This is exactly the type of evidence[12] that prosecutors are presenting to juries throughout this state after this Court's holding in ***Windom v. State,*** 656 So.2d 432 (Fla. 1995) and the enactment of ***Section 921.141(7)***, Florida Statutes (1995). In ***Windom***, this Court concluded:

...We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators...or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a

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[12] The admission or exclusion of evidence is subject to an abuse of discretion standard of review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case....The evidence is not admitted as an aggravator but, instead,...allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

Windom, 656 So.2d at 438. Prior to ***Payne v. Tennessee***, 501 U.S. 808 (1991), the ***Eighth Amendment*** to the United States Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. ***Booth v. Maryland***, 482 U.S. 496 (1987). ***Booth*** correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on his family, factors which may be wholly unrelated to the blame-worthiness of a particular defendant. ***Booth*** pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, ***Payne*** overruled ***Booth***. This Court settled the question in this state by its holding in ***Windom***. Appellant respectfully submits that this Court's holding in ***Windom*** was erroneous and urges this Court to recede from ***Windom***.

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Introduction

In finding this particular aggravator the trial court wrote:

Quawn Franklin obtained the .357 magnum revolver used in this crime from a residence in St. Petersburg. He selected a vulnerable victim open to attack. Mr. Lawley was a 61 year old unarmed stroke victim who was alone in an isolated location. Quawn Franklin learned of the victim's vulnerability while he engaged Mr. Lawley in a conversation, during his first visit to the scene that night. As he was leaving the scene the first time, Quawn Franklin announced that he intended to return to "get" the victim. He later admitted that he wore gloves during this crime to avoid leaving prints. During both incidents, the victim had ample opportunity to see Mr. Franklin's face and the car he was driving and interestingly, Quawn Franklin didn't bother to cover his face, or to park the stolen car out of sight.

The testimony of the medical examiner indicated that both of Mr. Lawley's knees were scraped indicating he was on his knees or nearly so when he was shot. Mr. Lawley told the truck driver, Mr. Ellis, and the first officer on the scene, Joe

Iozzi, that he was ordered from the car, told to get on the ground, and as he was doing so and he was shot. Then the tall thin black male rummaged through his car and left.

The bloodstain on the ground at the scene is consistent with the victim lying face down over that spot long enough for the blood to seep through Mr. Lawley's sweatshirt and accumulate on the pavement. Pam McCoy recalls that while the deceased was in his car, Quawn Franklin said "This is gonna hurt, but only for a minute." With that, Quawn Franklin exited Ms. Alice Johnson's stolen blue Camry, pointed the revolver at Mr. Lawley, ordered him out of his car and onto his knees. While in that defenseless position, Mr. Lawley pleaded, "Please don't shoot me. Please don't kill me." and Quawn Franklin coldly shot him in the back anyway, he says "Because I wanted to."

This aggravator has been defined as a killing that "was the product of cool and calm reflection, not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditation), and that the defendant had no pretense of moral or legal justification." Jackson v. State, 648 So.2d 85 at 89 (Fla. 1994), Evans v. State, 800 So.2d 182 at 192 (Fla. 2001).

Premeditation can be established by examining the circumstances of the killing and the conduct of the accused. Florida Standard Jury Instructions in Criminal Cases, Instruction 7.2. Quawn Franklin anticipated he might leave prints at the scene, so he wore gloves. He didn't bother to prevent the victim from seeing him, or hearing him, or seeing his car, because clearly Quawn Franklin never intended for Mr. Lawley to survive. This is confirmed by the matter-of-course manner of Mr. Lawley's shooting, as he was doing exactly what Quawn Franklin told him to do.

The coldness of this crime is borne out by the image of Mr. Lawley, completely at Quawn Franklin's mercy, kneeling before him, begging for his life. What this Court finds most remarkable was there was no fit of rage, no emotional frenzy, no panic involved in this decision of Quawn Franklin's, any more than in his decision to put on the gloves. Each event was a solution to a problem; the problem of fingerprints was solved by putting on gloves; the problem of possibly being indentified would be solved by shooting the defenseless Mr. Lawley in the back and killing him.

No pretense of moral or legal justification for the murder has even been suggested by this defendant, must less proven and one must remember the defendant said that he shot him "Because I wanted to."

The CCP aggravation has been upheld in cases with facts similar to, but certainly less cold, than these. Wuornos v. State, 644 So.2d 1000 (Fla. 1994)(defendant armed herself in advance, lured victim to an isolated location, shot him to steal his valuables.); Thompson v. State, 648 So.2d 692 (Fla. 1994)(killer armed himself before meeting the victims, took them to an isolated spot, made them get on the ground, shot female victim without any struggle); ("The cold, calculated and premeditated murder...can also be indicated by such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a murder carried out as a matter of course."); Huff v. State, 495 So.2d 145 (Fla. 1986). (Killer armed himself ahead of time, selected a secluded location to commit the murders); Wickham v. State, 593 So.2d 191 (Fla. 1991) (Victim picked at random in an isolated location, shot while on ground begging for his life during a robbery attempt);

The Court gives this circumstance very great weight.

Standard of Review

At trial, the state had the burden of proving aggravating circumstances beyond reasonable doubt. ***Robertson v. State***, 611 So.2d 1228, 1232 (Fla. 1993). Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. ***Clark v.***

State, 443 So.2d 973, 976 (Fla. 1983). Most recently, this Court has stated that it will not reweigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." ***Willacy v. State***, 696 So.2d 693, 695 (Fla. 1997) (Footnote omitted). ***See also, Way v. State***, 760 So.2d 903, 918 (Fla. 2000).

Applicable Law

In ***Jackson v. State***, 648 So.2d 85, 89 (Fla. 1994), this Court held:

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

Jerry Lawley's murder was a lot of things, but it does not fit the legal definition of the heightened premeditation aggravating factor. The trial court exercises extraordinary literary license in concluding that Franklin's statement that

he was going back to "get" the security guard meant that he planned to kill him. In fact, the state's star witness, Pamela McCoy, testified that she believed that Franklin was going to ask the security guard for an employment application. (X 958) Robbery was the only thing on the minds of the small band of desperados. They needed money. No one mentioned murder and none was planned calculated prior to the shooting. As Franklin said in his statement, he shot the guard because, "I wanted to." That decision was an impulsive one when the guard, according to Franklin, "left him no other choice." This is not a "heightened premeditation" murder under the jurisprudence of this State. To allow the aggravator to stand under these facts renders the words of the statute meaningless and the constitutionality of the statute in doubt. ***Amends V, VI, VIII & XIV, U.S. Const.; Art. I, §§ 9,12,16, 17, Fla. Const.***

POINT VII

THE TRIAL COURT ERRED IN FINDING THAT LAWLEY'S MURDER WAS COMMITTED FOR PECUNIARY GAIN

In finding this particular aggravating factor [***Section 921.141(5)(f)***, Florida Statutes (2001)], the trial court wrote:

On the night of the murder, the defendant admitted that: (1) he had no money; (2) was driving a car stolen from Ms. Alice Johnson; (3) was running low on gas: (4) admitted he went through Mr. Lawley's pockets; (5) admitted he went through Mr. Lawley's car; (6)admitted to trying to steal Mr. Lawley's car. See ***Jones v. State***, 612 So.2d 1370 (Fla. 1996). The jury found by a vote of 12 to 0 that the State proved this aggravating circumstance beyond a reasonable doubt and the Court gives this factor moderate weight. (IV 762)

This aggravating circumstance can be found anytime the proof demonstrates that financial gain was the reason for the killing, although it need not be the sole or dominant motive for the murder. ***Card v. State***, 803 So.2d 613 (Fla. 2001). The murder must have been an "integral step in obtaining some sought-after specific gain." ***Hardwick v. State***, 521 So.2d 1071, 1076 (Fla. 1988). If the evidence shows that the taking of property occurred after the murder as an afterthought, the circumstance is not applicable. ***Bowles v. State***, 804 So.2d 1173 (Fla. 2001)

The trial court erred in finding the pecuniary gain aggravator. In order for

this aggravator to apply, the state must prove a pecuniary motivation for the murder **itself** - - not the entire criminal episode. ***Simmons v. State***, 419 So.2d 316, 318 (Fla. 1982); ***See also Clark v. State***, 609 So.2d 513, 515 (Fla. 1993); ***Hill v.State***, 549 So.2d 179,183 (Fla. 1989). The state must show the murder was "an integral in obtaining some sought - - after specific gain." ***Peterka v. State***, 640 So.2d 59, 71 (Fla. 1994).

Here, the only evidence of motive was appellant's statement that he shot Lawley because "I wanted to." This conclusively demonstrates that the taking of money or property was **not** the motive for the murder. The robbery attempt was over when the victim was shot.[13] The homicide was **not** committed "as a means of improving [the perpetrator's financial worth]." ***See Scull v. State***, 533 So.2d 1137, 1142 (Fla. 1988).

This case is the converse of ***Clark***. In ***Clark***, the evidence showed the defendant killed the victim to get his job, then went through his pockets. The court upheld the pecuniary gain aggravator based on the motive for the killing, but rejected the felony murder/robbery aggravator because the theft was not the motive for the murder but was merely an afterthought. Just as the theft was committed as

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Appellant concedes that the jury found Quawn Franklin guilty of attempted armed robbery. (IV 692)

an afterthought in ***Clark***, the murder was committed as an afterthought here. Accordingly, the trial judge should not have instructed the jury on the pecuniary gain aggravator nor found it himself. To the extent that ***Seallito v. State***, 701 So.2d 837 (Fla. 1997) holds otherwise, appellant contends that ***Seallito*** was decided in error or is simply an anomaly. ***Seallito*** shot his victim because the victim had no money. This Court held that ***Seallito*** initiated the criminal episode for pecuniary gain which was sufficient to justify the giving of the instruction and the finding of this factor. The facts at bar are distinguishable. The evidence reflects that Quawn Franklin shot Jerry Lawley because he wanted to, not because Lawley had no money nor anything of value that Franklin could take.

This error requires reversal. Absent the pecuniary gain aggravator, there were only three remaining aggravators, one of which appellant contends was inappropriately applied. ***See Point VI.*** The trial court gave only "light" consideration to one valid aggravator, the fact that Franklin was on conditional release at the time of the offense. (IV 760-61) With only one other valid aggravating factor (appellant's prior violent felony convictions), and the substantial mitigation presented and found by the trial court, this Court cannot say there is no possibility the instructional error, combined with the prosecutor's argument for these invalid aggravators, did not affect the jury's recommendation of

death. ***Straight v. State***, 397 So.2d 903, 910 (Fla. 1981); ***See also Hill v. State***, 549 So.2d 179, 183 (Fla. 1989)[“cannot tell with certainty result of weighing process would be same” where striking of invalid aggravator left two aggravating factors and one mitigating factor]. A new penalty proceeding is required.

POINT VIII

FLORIDA'S CAPITAL SENTENCING PROCESS IS UNCONSTITUTIONAL BECAUSE OF JUDGE RATHER THAN JURY DETERMINES THE SENTENCE.

During the course of the lower court proceedings, defense counsel attacked the constitutionality of Florida's Capital Sentencing Statutes under the holding of the United States Supreme Court in ***Ring v. Arizona***, 536 U.S. 584 (2002). (II 250-343, 352-54; VI 10-25) Statutory construction and the constitutionality of statutes are subject to *de novo* review, since they are decisions of law. ***City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000). Review of statutes that impair fundamental rights explicitly guaranteed by the federal or state constitutions is governed by a strict scrutiny standard on appeal. ***T.M. v. State***, 784 So.2d 442 (Fla. 2000). Given the current state of Florida law, appellant acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in ***Ring v. Arizona***, 536 U.S. 584 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 166 (2000) should give him sentencing relief.

Interestingly, the trial court did submit interrogatory verdicts as to each aggravating factor. However, the trial court specifically instructed the jury that they need not be unanimous. (XI 1131) The trial court denied Franklin's motion that would have required unanimity. (II 287-90, VI 24-25, 89)

Despite the United States Supreme Court's ruling in ***Ring v. Arizona***, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth Amendment to the United States Constitution. ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002); ***Kormondy v. State***, 845 So.2d 41 (Fla. Feb. 13, 2003). Franklin raises this issue, in hopes that this Court has now seen the error of its ways and to preserve this issue and avoid the trap of procedural bar. Because this issue involves a pure question of law, this Court can review it *de novo*. ***See, e.g., City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

At trial, the appellant also challenged the sufficiency of the indictment contending that it failed to charge capital murder where the aggravating factors were not included in the indictment. (II 250-86) The ***Ring*** decision essentially makes the existence of a death qualifying aggravating circumstance an element to be proved to make an ordinary murder case a capital murder case. The Court in ***Apprendi*** described its prior holding in ***Jones v. United States***, 526 U.S. 227 (1999). The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable is starkly presented. Our answer to that question was foreshadowed in ***Jones v. United States***, [citation omitted], construing a federal statute. We there noted that "under the Due Process

Clause of the Fifth Amendment and a notice of jury trial with guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." [citation omitted] The Fourteenth Amendment commands the same answer in this case involving a state statute. ***Apprendi***, 530 U.S. 466, 476. It is clear that in Florida as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty. With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them - facts in addition to those necessary to prove the commission of the crime - whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty. ***State v. Dixon***, 283 So.2d 1, 8 (Fla. 1973)

Because the Supreme Court applied the requirement that a jury find the aggravating sentencing factor beyond a reasonable doubt in capital cases, it would appear the Supreme Court ought to hold that the ***Apprendi*** requirement of alleging

the aggravating sentencing factor in the indictment also applies to capital cases once that issue is presented. Therefore, this Court should find that ***Section 921.141*** is unconstitutional on its face, because it does not require a death qualifying aggravating factor to be alleged in the indictment charging first-degree murder. In the absence of that allegation, an indictment does not charge a capital offense, and no death sentence can constitutionally be imposed for the charged murder.

The Trial Court's Modification of The Statute, Instructions, and Procedures Relating to Florida's Death Penalty Sentencing Scheme Violates the Separation of Powers Doctrine.

To the extent Florida's death penalty statute is substantive, it can be amended only by the legislature. ***See Morgan v. State***, 415 So.2d 6 (Fla. 1982)(rejecting argument that death penalty statute violates separation of powers because it is procedural). To the extent the statute is procedural, it has been adopted by this Court in ***Florida Rule of Criminal Procedure 3.780***. ***Id***. Trial courts cannot create new rules in criminal procedures; only this Court has the authority to promulgate rules of procedure.

Just two weeks before this Court decided ***Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002), this Court reiterated that a trial court may not modify the standard jury instructions on statutory mental mitigators to omit the adjectives "extreme" and "substantial" because, to do so would "in effect...rewrite the statutory description

of mental mitigators, which is a violation of the separation of powers doctrine, ***Art. II, §3***, Fla. Const." ***Barnhill v. State***, 834 So.2d 836, 849 (Fla. 2002); ***accord Johnson v. State***, 660 So.2d 637, 647 (Fla. 1995); ***see also, State v. Elder,*** 282 So.2d 687 (Fla. 1980)("the court is responsible to resolve all doubt as to the validity of a statute in favor of its constitutionality,...The court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms"). Florida constitutional principles of separation of powers and statutory construction thus precluded the trial court from ignoring the plain and unambiguous language of ***Section*** 921.141, Florida Statues. In others words, the intent of the Florida Legislature is clear from the statute, and the judiciary is not free to rewrite it.

As individual trial judges attempt to improvise their own remedies to the constitutional infirmities in the statute, capital defendants throughout the state are being sentenced to death under procedures that literally vary from judge to judge. This is the epitome of arbitrary and capricious imposition of the death penalty and a clear violation of the ***Eighth*** and ***Fourteenth*** Amendments to the United States Constitution as well as ***Article I, Sections 9 and 17*** of the Florida Constitution. ***See Furman v. Georgia***, 408 U.S. 238, 248-49 (1972)("A penalty...should be considered 'usually' imposed if it is administered arbitrarily...")(Douglas J.,

concurring)(citations omitted); ***accord Id.*** at 310 (Stewart, J. concurring). Only the Florida Legislature can mend the constitutional defects in the statute. Until it does so, there is no constitutionally valid means of imposing a death sentence in Florida. The Appellant, therefore, respectfully asks this Honorable Court to declare ***Section 921.141*** unconstitutional for any or all of the reasons presented here, and remand his case for imposition of a life sentence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to grant the following relief: Reverse appellant's convictions and sentences and remand for a new trial as to Points II and III; vacate appellant's death sentence and remand for a new penalty phase as to Points I, IV, and V; as to Points VI and VII, vacate appellant's death sentence and remand for the imposition of a life sentence; as to Point VIII, vacate appellant's death sentence and remand for imposition of a life sentence or, in the alternative, declare Florida's death sentencing scheme unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Stephen D. Ake, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Rd. Suite 200, Tampa, FL 33607 and mailed to Quawn Franklin, #268130, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 20th day of June, 2005.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

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CHRISTOPHER S. QUARLES
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