IN THE SUPREME COURT OF FORIDA

HAROLD BLAKE,

Appellant,

vs.

CASE NO. SC005-1302
Lower Ct. No. CF02-52030A-XX

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from the imposition of a sentence of death in the Tenth Judicial Circuit. The record on appeal consists of eleven volumes. Volumes I-III numbered pages 1 through 437 contain the documents supplied by the Clerk, the Spencer hearing, and Sentencing hearing. This portion of the record will be referenced by the volume number, the designation R, and the appropriate page number in the Initial Brief. Volume III-XI, numbered pages 1 through 1554 contain the trial transcripts and will be referenced by the volume number, the designation T, and the appropriate page number in the Initial Brief. The Supplemental Record on Appeal is one volume and will be referred to in the Initial Brief as "SR" followed by the page number.

The Appellant, Harold Blake, will be referred to by his Christian name. The Appellee, the State of Florida, will be referred to as the State.

STATEMENT OF THE CASE

On April 16, 2002, the Grand Jury for the Tenth Judicial Circuit, in and for Polk County, Florida, returned an Indictment against the Appellant, Harold Blake, for the

first-degree murder of Maheshkumar Patel by shooting him with a firearm on August 12, 2002, contrary to §782.04 and §775.087, Florida Statutes (2002).(I,R102) Mr. Blake was also charged with one count of Attempted Robbery, a second-degree felony contrary to §812.13(2)(a), §777.04, and §775.097, Florida Statutes, (2002) and one count of Grand Theft (Auto), a third-degree felony contrary to §812.014(2)(c), Florida Statutes (2002).(I,R103) The State's Notice of Intent to Seek the Death Penalty was filed on September 10, 2002. (I,R109)

The State filed a Notice of Intent to Rely upon Evidence of Similar Crimes, Wrongs, or Acts on October 17, 2003.(I,R149) The Notice referenced the shooting and killing of Kelvin Young on August 1, 2002, allegedly by Mr. Blake and the theft of a handgun from Jittendra Patel on August 11, 2002.(I,R149)

Mr. Blake filed a Motion to Dismiss Counsel on January 29, 2004. The motion alleged that trial counsel did not communicate with him, that counsel refused to pursue a motion to suppress, and that counsel had failed to interview alibi witnesses.(I,R156) The court held a hearing on the motion on January 30, 2004, at which time Mr. Blake withdrew his motion.(I,R158) A second Motion to

Dismiss Counsel was filed by Mr. Blake on October 20, 2004. This motion sought to dismiss trial counsel and to have new counsel appointed.(I,R175-178) The motion alleged that trial counsel ignored requests to interview defense witnesses, refused to discuss trial strategies and defenses, failed to fulfill his role in the adversarial process, and advised that Mr. Blake had no confidence in counsel.(I,R176-177) The trial court held a hearing on the Motion on November 23, 2004. The trial court determined that there were no indications that counsel was ineffective and denied the motion by written order. (I,R184-185)

A *pro se* Motion to Suppress was filed on May 2, 2003. (I,R148) A second Motion to Suppress was filed by trial counsel on February 9, 2004.(I,R159-161) The Motion argued that Mr. Blake's statements/admissions to police were not voluntary and had been obtained in violation of Miranda.(I,R160) An additional *pro se* Motion to Suppress was filed on December 27, 2004.(II,R186-188)

The trial court held a hearing on the various Motions to Suppress on February 10, 2005.(II,R195-132) Subsequent to the hearing, the trial court entered a written order denying the Motion to Suppress.(II,R313-314) The trial

court found that Mr. Blake was read Miranda, waived those rights, and the statements/admissions were voluntary. (II,R314) The trial court further found that Mr. Blake's refusal to consent to a taped recorded interview did not render the video of the interview involuntary, was not a revocation of consent, and created no constitutional infringement of Mr. Blake's Fifth Amendment rights. (II,R314)

Mr. Blake was tried by a jury with Roger Alcott, Circuit Judge presiding, on February 21-25, 2005.(III,T347-XI) The jury returned the following verdicts on February 25, 2005: guilty of first-degree murder; guilty of attempted robbery and in doing so the defendant personally discharged a firearm resulting in death; and guilty of grand theft auto.(II,R316-318)

Penalty phase was conducted on April 20, 2005.(XI) The jury returned a recommendation of death by a vote of 12-0.(II,R334)

The trial court conducted a *Spencer* hearing on April 29, 2005.(II,R337-377) The trial court took judicial notice of the pending violation of probation, the dates of the probationary offenses, and the dates of conviction. (II,R340) No additional evidence was presented in

aggravation or in mitigation.(II,R341)

Mr. Blake appeared for sentencing on May 13, 2005. (III) The trial court found three aggravating factors:

1. That Mr. Blake was previously convicted of a prior violent felony in the shooting death of Kelvin Young, and assigned this factor great weight; 2. That Mr. Blake was on felony probation at the time of the offense, and assigned this factor some weight; and 3. That the aggravators pecuniary gain/in the commission of an attempt to commit armed robbery aggravators were merged and this aggravator was assigned moderate weight.(III,R389-390)

The trial court found one statutory mitigating factor- Mr. Blake's age of 22 at the time of the offense and assigned this factor moderate weight.(III,R391) The trial court found the following non-statutory mitigating circumstances and assigned them the following weights: 1. Mr. Blake exhibited appropriate court room behavior, Mr. Blake was always respectful to the court, Mr. Blake had positive and appropriate interaction with his family during the judicial proceedings, these circumstances were given some weight; 2. Mr. Blake was never violent in the presence of his family and was a good son, this circumstance was given moderate weight; 3. Mr. Blake is remorseful for his

conduct, this circumstance was given some weight; 4. Mr. Blake co-operated with the police, this circumstance was given some weight; 5. the life sentence received by the co-defendant, Richard Green, this circumstance was given little weight; 6. no prior violent felonies save the capital felony conviction which occurred two weeks prior to the instant offense, this circumstance was given some or little weight; 7. Mr. Blake is capable of adjusting to institutional life, this circumstance was given some weight.(III,R391-394)

The trial court concurred in the recommendation of the jury and imposed a sentence of death.(III,R394;416) A written sentencing order was filed.(III,R401-407)

In addition to the sentence of death, the trial court imposed a sentence of fifteen years prison on Count II, attempted armed robbery, and five years prison on Count III, grand theft auto.(III,R388;417-418) All sentences were to run concurrent. Mr. Blake's probation on all outstanding cases was revoked and concurrent prison terms on each imposed.(III,R386-388) Subsequently, on May 20, 2005, the mandatory/minimum sentence on Count II, armed robbery, was set aside as being improper per statute.(III,R425)

A timely Notice of Appeal was filed on June 10, 2005. (III,R426)

STATEMENT OF THE FACTS

FIRST PHASE:

Trisha Alderman was up early on the morning of August 12, 2002, getting ready for work.(V,T434) Del's Go Mart is across the street from her house.(V,T434) Both are located on Coleman Road.(V,T434) Mrs. Alderman can see the store from her front window.(V,T434) Mr. Maheshkumar "Mike" Patel is the owner of Del's.(V,T457) At around six that morning Mrs. Alderman heard a gunshot.(V,T435)

Mrs. Alderman went to the window and observed a car backing up down Coleman Road. She saw two men running to get into another car. That car was parked in the very last parking spot in front of Del's.(V,T437) One of the men was waving a gun.(V,R435) The two men got in parked car. One man got in on the driver's side and the other man got into the passenger seat in the front.(V,T437) The man with the gun got into the passenger side.(V,T444) The car backed up and drove down Coleman Road towards the Winn Dixie grocery store.(V,T435)

Mrs. Alderman was able to see that the two men were black and appeared to be in their twenties.(V,T436) The man with the gun had very short black hair.(V,T445) Mrs. Alderman saw a total of four persons in the car as it drove away, but could not determine their gender.(V,T437) Mrs. Alderman described the car as light in color, beige or gray. It appeared to be an older model car, like a Cadillac.(V,T441)

Mrs. Alderman ran across the street and saw that the glass front door of the store had been shot out.(V,T438) She could not see Mr. Patel.(V,T438) Mrs. Alderman saw a man on the pay phone calling 911.(V,T439) Mrs. Alderman saw another man jump a fence that separated the store from some apartments. That man went into the store to help Mr. Patel.(V,T439) That gentleman came out of the store and said that “Mike was hurt pretty bad”.(V,T440) Mrs. Alderman heard a loud moan from the store.(V,T440) Within fifteen minutes law enforcement arrived.(V,T440)

Denard Keaton was on his way to work as a detention deputy around six in the morning.(V,T450) As he approached the intersection of Coleman Road he heard a pop. (V,T451) He thought it was a firecracker and looked around to see where the noise came from.(V,T451) Mr. Keaton stopped at

the intersection and heard a loud yell.(V,T452) The yell came from inside Del's.(V,T452) Mr. Keaton saw two cars in the store parking lot and saw one person near the car.(V,T453) When he heard the yell, Mr. Keaton backed his car up.(V,T454)

Mr. Keaton saw a light colored car backing up in the parking lot of Del's. He observed three, maybe four heads inside the car.(V,T454) The men in the car were black. (V,T455) Mr. Keaton saw a young black man outside the car. (V,T456) Mr. Keaton couldn't tell if the man outside had anything on his head because it was too dark.(V,T464) One of the men in the back of the car had an afro.(V,T464)

Mr. Keaton saw the car exit the parking lot and drive down Coleman Road.(V,T457) Mr. Keaton knew Mike, so instead of chasing the car, he stopped to help.(V,T457) Mr. Keaton immediately went to the outside pay phone and called 911.(V,T458) While he was on the phone another man jumped over the wooden fence next to the store and went into the store to help Mike.(V,T459) That man would give Mr. Keaton updates, which Mr. Keaton would then give to the 911 operator.(V,T459)

Steve Nasr lives around the corner from Coleman Road. (VI,T572) A wall surrounding Del's is next to his back

yard.(VI,T573) Just before six on the morning of August 12, Mrs. Nasr put their dog into the back yard.(VI,T574) The dog began barking and would not come back into the house.(VI,T576)

Donovan Steverson lived right next door to Del's in an apartment complex.(VI,T579) Mr. Steverson got up for work about 5:30 a.m. on August 12.(VI,T580) He was outside his apartment when he was a black man walking through the grass towards a car in the apartment parking lot.(VI,T580) The man had on baggy clothes and braids.(VI,T581) The car was an old, gold-colored Oldsmobile.(VI,T581) The black man got in the back of the car and the car headed toward the lake. (VI,T581) Mr. Steverson could tell that there were two other people in the front seat of the car. (VI,T582)

Just a few moments after the car left Mr. Steverson heard a disturbance coming from Del's.(VI,T583) Mr. Steverson heard a gunshot and screaming.(VI,T583) Mr. Steverson ran to a fence that separated the parking lot at Del's from the apartments and looked over it.(VI,T583)

Mr. Steverson testified that he saw the same black male that had been in the apartment complex run from the store and get into the back seat of the car. The car sped

away.(VI,T584) Mr. Steverson thought the man had some kind of bandana on his head and could see the man had some hair styled in braids or dreads.(VI,T585;588-589) The car was the same gold Oldsmobile that had been in the apartment complex.(VI,T585)

Mr. Steverson jumped over the fence and ran into Del's.(VI,T586) He found Mr. Patel on the floor bleeding and unable to speak.(VI,T586)

Deputy Laura McManus was dispatched to the scene at 6:04 a.m..(V,T470) Just after she arrived at the store another deputy, Scott Billo, arrived as well.(V,T471) Deputy Billo is a K-9 officer.(V,T472)

After securing the exterior, Deputy McManus entered the store and found Mr. Patel laying on the ground gasping for air.(V,T473) He did not speak.(V,T473) McManus went to her car to get a CPR mask, and when she returned Mr. Patel was not breathing.(V,T474)

An autopsy was performed on Mr. Patel. (VI,T522;VIII,T891-898) Mr. Patel had a gunshot wound to the outside of his left arm and a gunshot wound to his left armpit.(VIII,T901) A bullet jacketing was recovered from his left forearm.(VI,T554;VIII,T902-903,907) A bullet was located in Mr. Patel's right chest cavity.

(VI,T555:VIII,T904,908) Mr. Patel died within a very short period of time.(VIII,T905)

The store was processed by crime scene technicians. (VI,T519) The front glass door was damaged and the damage appeared to have come from the outside in.(VI,T519) A spent 9mm shell casing was found on the ground next to a milk crate outside the door.(VI,T520;569)

The video surveillance tape from Del's was collected. (VII,T826) The camera records images onto the hard drive of a computer.(VII,T827) A copy of the hard drive of the store computer was made on site.(VII,T828) A portion of the crime was captured on tape.(VII,T829) A copy of the video was admitted into evidence (Exhibit 56). (VII,T839;VIII,T910-911)

Detective Glenda Eichholtz arrived at the store within ten minutes and made at attempt to locate the vehicle that had left the parking lot.(V,T480) As she was heading to Coleman Road, she observed a light colored Oldsmobile parked on the side of the road just past Recker Highway. (V,T481) The car was running and the lights were on. (V,T482) No one was in the vehicle.(V,T482) Det. Eichholtz noted that a rear window had been broken and there appeared to be damage to the steering column. (V,T482) Det.

Exichholtz determined who owned the vehicle and requested a deputy respond to that address.(V,T483)

Deputy Billo arrived at Oldsmobile with his dog, Fules.(V,T483-485;Vi,T494-498) Deputy Billo took Fules to the car and allowed him to sniff the front seat.(VI,T499) Fules then tracked to the east on Lake Deer to 26th Street through a back yard, through a hole in the fence, and then to the Lake Deer apartments.(VI,T499) Fules went to Apartment 2633.(V,T502) A black woman was outside that building.(VI,T504)

SSO Lorrie Moyer went to the home of Wanda Petranick at 99 Alachua Drive in Winter Haven.(VI,T487) Mrs. Petranick was the owner of the Oldsmobile found along Coleman road.(VI,T487-486) Mrs. Petranick advised that her car should have been in the driveway.(VI,T488) The car was missing and some glass was in the driveway. (VI,T488) Mrs. Petranick did not give anyone permission to drive her car.(VI,T491-2)

The Oldsmobile was processed for fingerprints. (VI,T556) Latent prints (Exhibit 64) were found on the car.(VI,T557) One print was lifted from behind the left rear window, one from the right rear door, and the exterior right front window.(VI,T559) Latent print examiner Patty

Newton testified that she compared the prints lifted from the Olds and found that one print taken from the left rear window matched Richard Green.(VII,T814) Mr. Blake's prints were found on the right front window.(VII,T815) Demetrius Jones' prints were found on the right rear exterior door of the Olds.(VII,T821)

Ms. Teresa Jones was living at 2631 Avenue C in the Lake Deer Apartments in August 2002 with her children and her boyfriend, Richard Green.(VI,T593) Mr. Green had a sister named Marion Clay, who was also called "Lady". (VI,T594) Marion Clay had a boyfriend named Harold Blake, the appellant.(VI,T594)

On August 12 Green came to Ms. Jones's apartment about 7:00 in the morning.(VI,T595) Green had not spent the night.(VI,T595) Mr. Blake and another boy known as "Red Man" were with him.(VI,T595-6) Ms. Jones left with the three men in her car.(VI,T598) Ms. Jones took the three men to a car that was parked along the side of the road. (VI,T599) The car was running.(VI,T601) Ms. Jones testified she couldn't remember which of the men told her to go there, but acknowledged that she had previously said that Mr. Blake told her how to get to the car.(VI,T599-603) Ms. Jones didn't ask about the car because she didn't want

to know the answer.(VI,T601)

Ms. Jones testified at trial that one of the men got out and went to the car.(VI,T602) She couldn't remember which man got out.(VI,T602) Ms. Jones acknowledged that she had testified before the grand jury.(VI,T602) Ms. Jones acknowledged that she told the grand jury that Mr. Blake got out of the car.(VI,T602-4)

Ms. Jones testified that she could not remember who took something out of the car.(VI,T604) Ms. Jones admitted that she told the grand jury that she saw Mr. Blake take two guns out of the car and wrap then in a shirt or sweater.(VI,T604;608) Both guns looked the same.(VI,T605) Ms. Jones didn't think much about the guns, because everybody from where she was toted guns.(VI,T608)

Ms. Jones acknowledged that while they were driving to the car, Mr. Blake said something about shooting someone. (VI,T607)

Ms. Jones testified that she was no longer afraid of Mr. Blake or his family.(VI,T605) She had been a little afraid at one point when an unknown person had called her house repeatedly and called her a snitch.(VI,T605;615) Jones didn't think the police could protect her.(VI,T615)

Ms. Jones dropped Red Man off at a store and took Mr. Blake to a motel, the Scottish Inn. Mr. Blake was staying in the motel with Marion Clay and Marion's children. (VI,T598;608) Ms. Jones took Green back to her apartment. (VI,T609) Ms. Jones left Green at her apartment and took her kids to school.(VI,T610) When she returned home, police were in the area of her apartment.(VI,T610)

Ms. Jones did not go into her apartment and talk to Green.(VI,T612) She stayed outside and watched the police.(VI,T612) At one point, she spoke with one of the officers.(VI,T612) The officer said that someone had been killed.(VI,T613) Ms. Jones said that some men had come to her apartment that morning, Mr. Blake and another person, but she did not give them Richard Green's name.(VI,T613) Jones told Green that he needed to go to the police or she would tell the police that he had been at her house. (VI,T615)

Ms. Jones gave a taped statement later that day. Some of the statement was true and some was not.(VI,T614) Jones gave another taped statement two days later, on August 14.(VI,T613) On the 14th Jones told the police that Green was involved.(VI,T616)

Demetrius Jones testified that he knew Richard Green,

whose nickname is “Plump”.(VI,T629) Mr. Jones also knew Marion Clay because he used to live near her.(VI,T630) Mr. Jones met Mr. Blake through Richard Green.(VI,T631)

Mr. Jones testified that in the very early morning of August 12 he was his home on Third Street talking with Green, Mr. Blake and a third man named Kevin Key.(VI,T632) Kevin Key’s street name is “Red Man”.(VI,T632) Green, Key, and Mr. Blake had arrived between 3 and 4 o’clock in the morning in an older model, light colored car. The back window of the car was broken out.(VI,T636) Mr. Blake was driving, Green was seated in the front, and Key was in the back seat.(VI,T634-6) Mr. Jones saw two guns in the car- a .38 revolver and a 9mm.(VI,T637) Green had the revolver and the 9mm was on the front seat.(VI,T637) Green had the gun in the pocket of his hoodie sweater.(VI,T638) Mr. Jones had seen both Green and Mr. Blake with these guns previously.(VI,T638)

Mr. Jones testified that it had been planned that Green and Mr. Blake would pick him up and that they were going to go to Lakeland to rob people who sell drugs. (VI,T638-9) Mr. Jones had made plans earlier in the day to go robbing with Green and Key.(VII,T673) Green and Key were also trying to get Mr. Blake to go.(VI,T673) Mr. Blake

had declined, saying he didn't want to go.(VI,T683)

Mr. Jones was trying to decide whether or not to go. (VI,T639) Mr. Jones did not go, but may have touched the car while it was at his house.(VI,T640) Mr. Jones decided not to go along, so Green, Key and Mr. Blake left. Green was driving.(VI,T640) Mr. Blake was in the front passenger seat and Key was in the back.(VI,T640)

Later that same morning, around 7, Mr. Jones got into a fight with his girlfriend and the police were called. (VI,T641) While the deputy was at his house, Jones heard a broadcast over the police radio about something happening at Lake Deer Apartments.(VI,T642) The deputy left. (VI,T642) Mr. Jones knew that Green lived in Lake Deer and thought the broadcast might have something to do with him. (VI,T642)

Mr. Jones went over to Lake Deer Apartments around 9 a.m. to see what was going on.(VI,T643) The police had blocked access to the apartments.(VI,T643) Mr. Jones did not see Green, but he did see Teresa Jones talking to the police.(VI,T644)

Mr. Jones ran into Mr. Blake later in the day on August 12.(VI,T645) Mr. Jones thought Mr. Blake was acting nervous, like something had happened.(VI,T646) Mr. Blake

wouldn’t say where Green and Red Man were, but he did say that something had happened.(VI,T646) According to Mr. Jones, Mr. Blake told him that they were trying “to do” somebody and someone got shot. (VI,T647) Mr. Blake said they were trying to do a robbery.(VI,T647) Mr. Jones testified that Mr. Blake asked him to get rid of a gun. (VI,T647) Mr. Jones agreed to try to sell the gun to some Jamaican people.(VI,T648) Mr. Blake then left in his girlfriend’s car.(VI,T648)

Mr. Jones further testified that after he saw Mr. Blake he saw Green.(VI,T648) He saw Green in the “boggy”, which is an area known for drug sales.(VI,T649) Green was with Teresa Jones.(VI,T649) According to Mr. Jones, Green wanted to tell him what happened and gave him a gun, a chrome 9mm.(VI,T650) Mr. Jones and Green tried to sell the gun to some Jamaicans, but had no luck.(VI,T651) Mr. Jones gave the gun back to Green.(VI,T652)

Either later that night or the next day, Mr. Jones went with Green to a nearby lake.(VI,T653) Mr. Green drove to the lake, parked, got out, and threw a gun into the water.(VI,T654)

Mr. Jones admitted to pending charges and admitted that he was not to be sentenced until after his testimony.

(VI,T656) Although he had no guarantees, Mr. Jones was hoping that his testimony would result in lenient treatment.(VI,T656)

Mr. Jones acknowledged that he had outstanding warrants in August 2002, but he was not arrested on them due to his cooperation.(VI,T658) Mr. Jones was also released on a VOP.(VI,T660)

Mr. Jones testified that Mr. Blake was bald and had been bald in August 2002.(VI,T658) In August 2002 Kevin Key had dreads.(VII,T666) In August 2002 Richard Green had short dreads.(VII,T683)

Detective Richard Davis executed a search warrant at an apartment that Mr. Blake had stayed in located at 953 6th Street on August 14.(VII,T688) He secured a pair of red FUBU tennis shoes, size 9.5.(VII,T689) The shoes were found in the bedroom closet.(VII,T689) FDLE technologist Ted Berman examined the bottoms of the FUBU tennis shoes.(VII,T701) Berman found eight glass fragments in the treads of the tennis shoes that matched those found in the Oldsmobile. (VII,T703) Four additional glass fragments did not match the car window and did not match the broken glass from the door at Del's.(VII,T705-6) No glass matching that of Del's was found in the shoes.

Detective Kenneth Raczynski went with Demetrius Jones to Lake Conine on August 21, 2002.(VII,T692) A gun was recovered by a dive team from the lake.(VII,T692-694) The gun was a 9mm.(VII,T694) Technologist Edward Lenihan examined the 9mm and found it to be operable.(VII,T720) Lenihan opined that the copper jacket fragment collected at the autopsy of Mr. Patel was fired from the 9mm.(VII,T730) Lenihan also opined that the shell casing recovered from the crime scene was fired by the 9mm.(VII,T735) No fingerprints were found on the gun.(VII,T742-743)

Detective Louis Giampavolo and Detective Navarro interviewed Richard Green on August 14, 2002.(VII,T748) After that interview, Mr. Blake was arrested.(VII,T749-752) Mr. Blake was taken into custody, handcuffed, and placed in the front passenger seat of Giampavolo's car. (VII,T752) While driving to the police station located at a local air base, Giampavaolo testified that he advised Mr. Blake of his Miranda rights from a card he kept in the car. (VII,T753-755) Mr. Blake, according to Giampavolo, did not exercise those rights.(VII,T755)

Mr. Blake talked continuously during the ride to the Air Base.(VII,T755) Mr. Blake said that he was planning to turn himself in and that he had an eyewitness that would

place him somewhere else.(VII,T755) Mr. Blake was not questioned in the car, he just kept talking.(VII,T756)

Upon arriving at the air base, Giampavolo took Mr. Blake to an interview room equipped with audio and video equipment.(VII,T756) This equipment is hidden.(VII,T757)

Detectives Raczynski and Giampavolo began to question Mr. Blake about the stolen Oldsmobile.(VII,T758) Mr. Blake admitted that he stole the car and started it with a screwdriver.(VII,T758) A Jamaican man named Kay-Kay was with him.(VII,T759) After he stole the car, Mr. Blake met up with Richard Green and another man that he didn't know. (VII,T760) Mr. Blake admitted to driving the Oldsmobile. (VII,T760)

Mr. Blake claimed that he sold the car to someone named Red in the "Bottom".(VII,T760) The man who bought the car let Mr. Blake off by the Lake Deer apartments. (VII,T761)

When asked, Mr. Blake denied having anything to do with the shooting of Mr. Patel.(VII,T760)

Mr. Blake then made some comment about the death penalty and his whole demeanor changed.(VII,T761) Mr. Blake began crying and said that he was present when the man was shot.(VII,T761)

Mr. Blake said that Green, Red Man, and he were going to do a robbery. Mr. Blake said he had brought two guns- a .38 and a 9mm.(VII,T763) They pulled up along side a fence by a convenience store.(VII,T762) When they realized the store was open, they pulled to the front. (VII,T762) Mr. Blake said he was in the back seat of the car.(VII,T762) Mr. Blake said he had the 9mm.(VII,T763) Mr. Blake usually carried a gun with his finger on the trigger.(VII,T764) As he approached the door to Del's, the gun accidentally went off.(VII,T764) Mr. Blake said he fired the shot that struck Mr. Patel.(VII,T765) Mr. Blake would not tell who gave him the guns.(VII,T766)

After this statement, Mr. Blake was asked to give a recorded interview.(VII,T766) Mr. Blake said he did not want to be taped, but would go over things again. (VII,T767) Detectives Giampavolo and Raczynski ignored Mr. Blake's refusal and activated the videotape without telling Mr. Blake.(VII,T767) Both detectives went back into the room with Mr. Blake and had him go over everything again. (VII,T767)

Det. Giampavolo denied making any promises to Mr. Blake.(VII,T768) Giampavolo did acknowledge that he offered to help Mr. Blake get in touch with Marion Clay.(VII,T768)

The police reached her and Mr. Blake spoke with her by telephone after the taped recorded statement was finished. (VII,T768)

Det. Giampavolo denied coaching Mr. Blake or providing any information about the crime to him prior to the recorded statement. He also denied reading Richard Green's statement to Mr. Blake.(VII,T769;798) A copy of the videotaped statement of Mr. Blake was played to the jury (Exhibit 54).(VII,T770) The content of the tape is summarized as follows:

Mr. Blake admitted that he stole the Oldsmobile and started it with a screwdriver.(VII,T773) Mr. Blake picked up Richard Green and another boy from Lake Deer Apartments, and the three then went to Demetrius Jones' house to drop of some stolen items.(VII,T773-774) After leaving Jones, the three went to the store because Green and the boy said they had been watching the store and it would be easy. (VII,T775) Green drove the Olds to Del's.(VII,T775) Green pulled in behind a fence, but realized that some people had let a dog out. Because the dog was barking, they left and went to Lake Deer.(VII,T776) After a few minutes they returned to the store and parked in the parking lot.(VII,T777) According to Mr. Blake, he, Green, and the

other boy went up to the door.(VII,T777) Mr. Blake had the 9mm.(VII,T777)

When they got to the door Mr. Blake could see Mr. Patel inside. It looked like Mr. Patel had something in his hand and was coming toward the door.(VII,T778) Mr. Blake stated that Mr. Patel scared him and the gun he had went off.(VII,T777) Mr. Blake didn't mean to shoot anyone, it was an accident.(VII,T777) After the gunshot Mr. Blake didn't know what to do, so he ran.(VII,T780) As he ran for the car, Mr. Blake saw a blue car back up on Coleman road.(VII,T780)

Mr. Blake stated he didn't know where the 9mm was. (VII,T781) Mr. Blake burned the clothes he had been wearing.(VII,T783) Mr. Blake tried to run to Georgia at the urging of his brother, but couldn't bring himself to go.(VII,T787-88)

Mr. Blake stated on tape that he had been treated well by Det. Giampavolo. He had not been beaten or hit. (VII,T784) Mr. Blake acknowledged that Giampavolo had read him his rights in the car.(VII,T784)

Ms. Teresa Jones was recalled.(VIII,T859) Ms. Jones testified that she didn't know who took her to the light colored car- it could have been Green or Mr. Blake.

(VIII,T859)

Ms. Jones admitted that at the time she had cared for Mr. Green and that they had been together for awhile. (VIII,T860) Mr. Green had short dreads.(VIII,T861)

Ms. Jones knew Red Man.(VIII,T860) Red Man had dreads.(VIII,T861) Red Man was also with them when they went to the car.(VIII,T862)

Ms. Jones admitted that some of what she testified to was information she had been told, but had not seen. (VIII,T866) Ms. Jones continued to avow that her testimony before the grand jury had been truthful.(VIII,T873;888) Ms. Jones admitted to a prior felony conviction and two convictions for crimes of dishonesty.(VIII,T869)

Mr. Blake testified in his defense.(VIII,T926) Mr. Blake was 23 at the time of the crime and had nine prior felony convictions.(VIII,T995) Mr. Blake testified that on August 12, 2002 he had stolen some property, including radios and a pressure washer, to sell to a Jamaican man named “Kay-Kay”.(VIII,T927;996) He and Richard Green were stealing these items from a house near the Scottish Inn in Winter Haven.(VIII,T928) Mr. Blake was staying with Marion Clay at the Scottish Inn.(VIII,T928) Mr. Blake was from Lakeland, but was staying in Winter Haven because of an

outstanding warrant in Lakeland.(VIII,T929)

Mr. Blake and Green had been hanging out in the Boggy with Demetrius Jones and Red Man on the night of August 11. (VIII,T930) The Boggy is a hangout spot known for drugs. (VIII,T930) Mr. Blake had been using cocaine and weed. (VIII,T930) Mr. Blake left when Marion Clay came and got him.(VIII,T931)

Mr. Blake went back to the motel with Clay and went to bed.(VIII,T931) Around 3 o'clock in the morning on August 12 he received several pages on his pager from Richard Green.(VIII,T932) At the same time Green, Red Man, and a girl showed up at the motel.(VIII,T932) Mr. Blake and Green started smoking and talking about stealing things. (VIII,T933) The girl who came did not want her car to be used, so Mr. Blake left the motel and stole the Olds. (VIII,T935-936;999)

Mr. Blake testified that he broke the window on the car.(VIII,T936) He broke open the steering column, started the car with the screwdriver, and returned to the motel for Green and Red Man.(VIII,T936) Mr. Blake testified that he supported himself by stealing cars. (VIII,T936)

Mr. Blake, Green, and Red Man went to a house and stole some property off the porch.(VIII,T937,1002) They

went to drop the stuff off at Kay-Kay's house in the Boggy, but Green changed his mind and they went to Demetrius Jones's house instead.(VIII,T938) Jones came outside while the car was being unloaded.(VIII,T939)

Jones, Green, and Red Man started to talk about doing some robberies in Lakeland.(VIII,T939,1003) They were all smoking and doing cocaine.(VIII,T941) Mr. Blake stayed away from the conversation and cleaned out the car so they could get rid of it.(VIII,T939) Mr. Blake told the others that he didn't want to do the robberies.(VIII,T940-41) The others decided to keep the car and Mr. Blake asked them to take him back to the motel.(VIII,T942)

Green, Red Man, and Mr. Blake left in the Olds. (VIII,T943) Green sat in the back seat, Red Man was driving, and Mr. Blake sat in front.(VIII,T943) Mr. Blake remembered that two stops were made.(VIII,T943) Mr. Blake thought one stop was so that Green could buy some drugs. (VIII,T943) The next stop was at the store. (VIII,T946,1007)

Mr. Blake testified that he thought they stopped at the store to get some cigarettes since they had been getting high.(VIII,T946) Green got out and Mr. Blake heard two shots.(VIII,T946-48;1009) Green got in the car and

they immediately left.(VIII,T946-48,1010) Green was yelling to go to his house, so they went to Lake Deer Apartments.(VIII,T949)

Mr. Blake testified that he had no part of the shooting.(VIII,T950) He only got in the car because he was supposed to be dropped off.(VIII,T950) Mr. Blake testified that he would not have gotten in the car if he had known that they were going to rob Del's.(VIII,T951)

The car was abandoned by the side of the road. (VIII,T952) Mr. Blake followed Green on some little path to the Lake Deer Apartments.(VIII,T952) Mr. Blake was very angry and yelling at Green to take him to the motel. (VIII,T952) They went to the apartment belonging to Teresa Jones.

At Teresa Jones' apartment Red Man and Green kept talking about how it wasn't supposed to happen that way. (VIII,T953) Mr. Blake was scared.(VIII,T953) Green then went upstairs and got Teresa Jones.(VIII,T954) They all got in Teresa Jones' car and left.(VIII,T954,1016)

Mr. Blake testified that Green told Teresa Jones where to drive to reach the Olds.(VIII,T954) Green got out and wiped the car off.(VIII,T954,1017) Mr. Blake didn't see him get any guns.(VIII,T954) Green got back in the car and

they left.(VIII,T956) Mr. Blake was finally taken to the Scottish Inn.(VIII,T956)

Mr. Blake did not tell Marion Clay what happened. (VIII,T958) He only told her that he, Green, and Red Man had stolen some pressure washers.(VIII,T959) At 11 o'clock Mr. Blake, Clay, and her children checked out of the motel and went to the Boggy.(VIII,T959) Mr. Blake saw Demetrius Jones, who asked him what had happened. (VIII,T959)

Mr. Jones said that he had heard on the street that the police had got Green for a murder.(VIII,T960) Mr. Blake didn't say anything.(VIII,T960) Mr. Blake and Clay went to someone's house and called Green.(VIII,T961) Green said that everything was ok.(VIII,T961) Clay went out on the street for awhile, then came back and said that someone had been killed.(VIII,T961) That was when Mr. Blake learned that someone had really been shot. (VIII,T961)

Clay and Mr. Blake went to Vanbossel Preston's house in Lakeland.(VIII,T962) Preston lives just two doors away from Mr. Blake's brother.(VIII,T963) Preston and Mr. Blake had previously made fake checks together to get money. (VIII,T962) Mr. Blake was trying to get money to leave town.(VIII,T963) Mr. Blake saw that the police were at his brother's house, so he and Clay went somewhere else.

(VIII,T963) Two days later Mr. Blake was arrested. (VIII,T963)

Mr. Blake found out that the police were looking for him and that he was considered armed and dangerous. (VIII,T964) Mr. Blake was at a house getting high when he realized the house was surrounded by police.(VIII,T964) Mr. Blake cracked a window and talked to the police, ultimately giving himself up.(VIII,T965)

Mr. Blake was taken to a patrol car.(VIII,T967) Mr. Blake kept trying to explain to the police that he was innocent.(VIII,T967) A detective started driving and talking to Mr. Blake, asking him questions.(VIII,T967) The detective kept saying that they knew what Mr. Blake did because they had a video.(VIII,T967) Mr. Blake testified that he was never read his rights while in the patrol car. (VIII,T968)

They arrived at the police station about 20 minutes later. Mr. Blake was taken to a small room where Detectives Giampavolo and Raczysnki began talking to him. (VIII,T969)

The detectives kept telling Mr. Blake that they didn’t believe him and that he needed to come clean.(VIII,T970) They told Mr. Blake that he would get the death penalty.

(VIII,T971) Mr. Blake kept insisting that he hadn't done anything or shot any body.(VIII,T972)

The detectives told Mr. Blake a video tape clearly showed his face.(VIII,T972) After two hours a new detective, Navarro, came in.(VIII,T974) Navarro said that they had a tape with Mr. Blake on it and that he was facing the death penalty.(VIII,T974) Navarro said that it would be easier if it was an accident and they could help Mr. Blake if he said it was an accident.(VIII,T975) Mr. Blake kept saying he had done nothing until Navarro finally left. (VIII,T976)

Another officer with blond hair came in.(VIII,T976) He said Mr. Blake was hard to believe.(VIII,T976) Mr. Blake said that he was tired and wanted to go.(VIII,T976) After a few minutes that officer left and Giampavolo and Racznyski returned.

Mr. Blake testified that while he was being questioned the officers kept giving him little bits of information about what had happened, like that a dog had been barking. (VIII,T977;982) The officers kept telling him things that they claimed Green had said to them.(VIII,T977)

Mr. Blake testified that when Giampavolo returned he came with a small recorder.(VIII,T979) Giampavolo played

Green's statement to Mr. Blake.(VIII,T979) Mr. Blake got very upset because what Green said was a lie.(VIII,T979) Mr. Blake was then taken to a holding cell for about 20 minutes.(VIII,T980)

During this time Mr. Blake was in bad shape. (VIII,T980) He was coming down off his high, or "jonesing" real bad.(VIII,T980) Mr. Blake either needed to get high again or go to sleep.(VIII,T980) Mr. Blake became very agitated and started to bang on the cell door.(VIII,T980) Giampavolo came over and Mr. Blake begged to leave. Giampavolo said Mr. Blake could leave if he came clean. (VIII,T981) Mr. Blake and Giampavolo kept talking and made an arrangement.(VIII,T981) Mr. Blake would say anything for his freedom.(IX,T1059)

According to Mr. Blake, he wanted to leave so bad he would come "clean".(VIII,T981) Mr. Blake knew that Green and "Tee" had made statements and been allowed to leave, so he believed that he would be allowed to go if he made a statement.(VIII,T982) The terms of the agreement between Mr. Blake and Det. Giampavolo were that if Mr. Blake said he did it and that it was an accident the police would call Marion Clay and Mr. Blake could leave with her.(VIII,T982)

Mr. Blake knew what to say had happened because the police had been feeding him information.(VIII,T982) Det. Giampavolo told Mr. Blake what he wanted him to say- he read it off a paper.(VIII,T983) Mr. Blake rehearsed the statement several times.(VIII,T984) Mr. Blake thought he would go home, so he did what Giampavolo wanted and gave the statement.(VIII,T983) Giampavolo left the room, telling Mr. Blake he was going to call Clay.(VIII,T984) Det. Navarro came back in and told Mr. Blake that he did the right thing. (VIII,T984)

Mr. Blake was taken to a second room, where he gave the statement again.(VIII,T985) Mr. Blake did not know that this statement was videotaped.(VIII,T985) Up until Mr. Blake was taken to the jail he thought that he was going to leave with Clay.(VIII,T986)

Mr. Blake denied shooting Mr. Patel.(VIII,T987) He denied that he was planning to rob the store.(VIII,T987) Mr. Blake testified his statement was a lie, said only to give the police what they wanted.(VIII,T987)

The state recalled Det. Giampavolo.(IX,T1072) Det. Giampavolo denied making any promises to Mr. Blake in exchange for his statement.(IX,T1073) Mr. Blake did not ask to stop the interview or to be let go.(IX,T1075)

SECOND PHASE:

The following summarizes the testimony presented in the penalty phase of the trial:

STATE'S EVIDENCE:

Felicia Baldwin testified that she had been engaged to Kelvin Young.(X,T1328) In the early morning hours on August 1, 2002, she was outside with Mr. Young and several other people by her home in Lakeland.(X,T1329) A dark colored, older model car with dark tinted windows drove by, then turned around and came back to where the group was standing.(X,T1330) The car stopped and Mr. Young approached the car.(X,T1331) The car window was rolled down and a gun was stuck out the window.(X,T1331) A man inside the car with a bandana on his face demanded money.(X,T1331-2) Both the man with the bandana and the driver of the car were black.(X,T1332) Mr. Young yelled to Ms. Baldwin to run, so she turned and ran.(X,T1331) Ms. Baldwin heard a shot and saw Mr. Young fall in the yard.(X,T1333) Mr. Young died as a result of a gunshot wound to the back of his body.(XI,T1427-1435)

A bullet casing found near Mr. Young's body was fired by the same gun that killed Mr. Patel.(X,T1346-1350;XI,T1394-98)

Detective Bradley Grice interviewed Vanbossel Preston. (X,T1356) Preston told him that Mr. Blake had come to his home in the early hours of August 1 and told him that he had shot someone on Crinshaw Street that had "bucked a jack". (X,T1356) Preston said that Richard Green was with Mr. Blake at the time of the shooting.(X,T1356) Det. Grice also determined that a vehicle registered to Marion Clay was the car that approached Kelvin Young.(X,T1358)

Detective Grice interviewed Mr. Blake on August 15 about the Young homicide.(X,T1362) Mr. Blake denied any involvement.(X,T1362) Green was also interviewed.(X,T1364) Green stated that he and Mr. Blake went to Lakeland, with Mr. Blake driving. (X,T1364) Green claimed that Mr. Blake demanded money from some people at gun point and then fired the gun. (X,T1364)

Grice admitted that another person outside who witnessed the shooting described the shooter of Mr. Young as having braids.(X,T1367) Grice acknowledged that Mr. Blake did not have braids, but that Green did.(X,T1367)

At the time of this crime Mr. Blake was on probation for driving with a suspended license and grand theft of a motor vehicle.(X,T1371-2) None of those offenses involved violence.(X,T1373) An affidavit of violation of probation

had been signed in May 2002.(X,T1374)

Darshana Patel had been married to Mr. Patel for fifteen years.(X,T1376) She has two children. (X,T1376) She and Mr. Patel owned Del's Go Shop.(X,T1376) Since Mr. Patel's death it has been very difficult to run the business.(X,T1377-1379) The children miss their father. (X,T1379)

Mr. Mike Nichols, an employee of the Polk County Fire Department, met Mr. Patel when he purchased Del's. (X,T1382) Mr. Nichols was a regular customer at the store, as were other members of the fire station.(X,T1383) After Mr. Patel's death, the fire station organized a cook out/ benefit for the family to show their support.(X,T1383) The money raised from the benefit was given to Mrs. Patel. (X,T1384) Many members from the nearby Jan Phyll neighborhood came and many expressed their outrage over Mr. Patel's death.(X,T1384)

Ms. Angela Consentino has lived in the Jan Phyl area fore ten years.(XI,T1386) She is a customer of Del's and had come to know the Patel family.(XI,T1386) Ms. Consentino knew Mr. Patel, whom she described as a very nice man. (XI,T1386) Mr. Patel often allowed people who didn't have enough money to purchase things and come back later to pay

the bill.(XI,T1387)

DEFENSE EVIDENCE:

In the death of Kelvin Young, the jury made the specific finding that Mr. Blake did not discharge the gun- he was not the shooter of Kelvin Young. The jury made the finding that Mr. Blake possessed a gun.

Naomi Blake Butler testified that she is Mr. Blake's mother.(XI,T1478) She believed that Mr. Blake had a wonderful childhood because she was his mother.(XI,T1479) Mr. Blake was sometimes spanked and whipped for doing bad things, but he was a good boy.(XI,T1479) While Mr. Blake might get upset, he was never violent.(XI,T1479)

Mrs. Butler was out of town when Mr. Blake called to tell her that he was being charged with a murder in Winter Haven.(XI,T1483) He did not want her to learn of it on T.V., so he was waiting until she got home to turn himself in.(XI,T1483) Mrs. Blake had met Marion Clay and her opinion of her was that she was not a girl that you brought home to your mother.(XI,T1485)

Vontrice Brown testified that she is Mr. Blake's older sister.(XI,T1446) Vontrice looked after the children because their mother worked a lot.(XI,T1446) Vontrice remembered that Mr. Blake was always hungry.(XI,T1447)

Vontrice described Mr. Blake as the family's protector.(XI,T1447) Mr. Blake stayed with her and her children during her divorce.(XI,T1447) Mr. Blake helped her with her boys, watching them, disciplining them and getting them to do silly things.(XI,T1448) Mr. Blake is their favorite uncle.(XI,T1448) Once, when a boyfriend became violent and ruined her apartment, Mr. Blake had her stay in Orlando while he cleaned up the mess.(XI,T1449)

Vontrice testified that Mr. Blake was never mean or violent.(XI,T1447) He would never pick a fight.(XI,T1447) Mr. Blake was the jokester, always playing around. (XI,T1448)

Vontrice stated that Mr. Blake was called "Seven Seconds" on the street because he could steal a car in seven seconds, but that was all he did. (XI,T1451)

James "Kenny" Blake is Mr. Blake's younger brother by two years.(XI,T1458) When he and Mr. Blake were teenagers then left their mother's house and moved in with their dad. (XI,T1459) Their dad lived in the "Hood"- an area known for drug dealing.(XI,T1459) Kenny got pulled into drugs living in that area.(XI,T1459)

When Kenny and Vontrice became aware on August 14 or 15 that Mr. Blake was a suspect in a murder, they went to

Winter Haven to find him.(XI,T1460) Kenny found Mr. Blake at Vanbossel Preston's house.(XI,T1460) Kenny tried to convince Mr. Blake to leave, but he refused.(XI,T1460) Mr. Blake said that he hadn't killed anyone.(XI,T1460) Mr. Blake broke down and cried. (XI,T1461) Kenny believed that if Mr. Blake had committed the murder, he would have run when he had the chance. (XI,T1461)

Kenny had never known Mr. Blake to be violent, to get in fights, or attack anyone.(XI,T1461)

Kenny urged the jury not to recommend death. (XI,T1463) He wanted to be able to communicate with Mr. Blake and help him to know the Lord.(XI,T1463)

Faith Blake is Mr. Blake's youngest sister. (XI,T1464) Mr. Blake used to watch out for her- walking her to school and home.(XI,T1465) Faith testified that Mr. Blake was not a mean or violent person.(XI,T1466) He was a joker and teaser.(XI,T1466)

Decarlos Brown is Mr. Blake's older brother. (XI,T1472) He and Mr. Blake have the same mother, but different fathers.(XI,T1473) They grew up together. (XI,T1473) Growing up it was mostly their mom.

Decarlos testified that Mr. Blake was never violent. (XI,T1474) As a young child he did not want to fight kids

that bullied him.(XI,T1474)

Decarlos felt Mr. Blake was worth saving. He would stand by him no matter what.(XI,T1476)

Natasha Oner grew up with Mr. Blake.(XI,T1468) They were boyfriend-girlfriend in August of 2002.(XI,T1468) She was aware that Mr. Blake was also dating Marion Clay. (XI,T1471) Mr. Blake called her on August 12th or 13th and said that he was going to turn himself in.(XI,T1469)

Ms. Oner had never seen Mr. Blake be violent. (XI,T1469)

Mr. Reginald Jenkins had met Mr. Blake eight or so months previous.(XI,T1486) Mr. Jenkins had worked for DOC in programs, but was now a pharmacist and exchemist. (XI,T1487-88)

Mr. Jenkins, based upon his prior DOC experience, felt that he was a good judge of when a person was walking in the truth or untruth.(XI,T1487) Mr. Jenkins felt that Mr. Blake was capable of getting a hold of his life in jail. (XI,T1489) They have developed a close relationship. (XI,T1489)

Mr. Jenkins believed that Mr. Blake lived a much different world, one of violence and the “six or twelve”

rule.(XI,T1491) The “six or twelve” rule dealt with guns- would you rather be tried by a jury of twelve or carried out of church by your six closest friends.(XI,T1492)

Mr. Blake spoke on his own behalf.(XI,T1498) He told the jury that he respected their finding.(XI,T1498) He told Mr. Patel’s family that he was very sorry for what happened.(XI,T1498) Mr. Blake stated that he was not the person who shot Mr. Patel, but he was sorry for his role. (XI,T1498) Mr. Blake asked the jury to have mercy on him. (XI,T1498)

Mr. Blake told the jury that while in jail he had the opportunity to begin to know God.(XI,T1499) He is still taking steps and gaining his faith. (XI,T1499) He reads the Bible daily.(XI,T1499) Mr. Blake tries to talk to other young men in the jail and discourage them from ending up like him.(XI,T1500)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in denying Mr. Blake’s motion to suppress Mr. Blake’s statement where the statement was involuntary because it was the product of an improper inducement and promise by the police that they would not record the statement after Mr. Blake refused to

consent to having his statement recorded. The subsequent recording of the statement without Mr. Blake's knowledge renders that recording involuntary and inadmissible.

ISSUE II: The trial court erred in failing to advise Mr. Blake that he had the right of self-representation pursuant to Faretta. After Mr. Blake requested to have court-appointed counsel discharged and the court denied that request, the court failed to inform Mr. Blake that if he still wished to have appointed counsel removed, he would be able to represent himself. The failure of the court to comply with the requirements of Nelson was not harmless, as the failure deprived Mr. Blake of the ability to make an informed decision as to whether or not to exercise his constitutional right to self-representation.

ISSUE III: The sentence of death is not proportionate in this case. The three aggravating factors found by the trial court, in light of the underlying facts surrounding them, do not establish that this is one of the most aggravated of capital cases. The mitigation established in the record and found by the trial court does not establish that this is the least mitigated of cases. In accord with prior opinions of this Court, the sentence of death must be reversed.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE RECORDED STATEMENT OF MR. BLAKE WHERE THE RECORDED STATEMENT WAS TAKEN AS THE RESULT OF AN IMPLIED PROMISE TO MR. BLAKE THAT THE STATEMENT WOULD NOT BE RECORDED AFTER MR. BLAKE REFUSED TO CONSENT TO A RECORDED STATEMENT

Prior to trial, defense counsel filed a motion to suppress Mr. Blake's statements to law enforcement.(I,R159-161) Mr. Blake made two statements to law enforcement after his arrest, the second of which was video tape recorded. The motion alleged that Mr. Blake's statements were made in violation of Miranda and after Mr. Blake indicated a desire to terminate questioning.

A hearing was held on the motion on February 10, 2005. At that hearing defense counsel argued that Mr. Blake was not properly Mirandized, therefore both of his statements should be excluded. (II,R300) Defense counsel further argued that even if the court determined that Miranda was properly given, the videotaped statement should be excluded because it was done over the express objection of Mr. Blake. (II,R300-305) The parties agreed and court made the factual finding that the tape recording was done without the consent of Mr. Blake and without his knowledge.

(II,R305)

The trial court denied the motion.(II,R313-314) The trial court first concluded that Mr. Blake was properly advised of his Miranda rights and chose to waive them. The trial court further addressed the videotaped statement. The trial court found no due process violation for the recording of the conversation without Mr. Blake's permission.

The testimony at the suppression hearing held on February 10, 2005, is summarized as follows:

Det. Giampavolo testified that on August 14, 2002, he arrested Mr. Blake and placed him in his patrol car. (II,R201) While driving to the Bartow Air Base Substation, Det. Giampavolo claimed to have read Mr. Blake his Miranda rights from a card. He did this while driving with one hand and holding the card with the other. (II,R201-204) Det. Gaimpavolo asked Mr. Blake if he understood each subsection, to which Mr. Blake responded that he understood. (II,R202-203) According to Gimpavolo, Mr. Blake did not appear to be confused. (II,R203) Det. Raczynski was also present in the back seat of the patrol car and testified that he heard Miranda being read to Mr.

Blake. (II,R273-277)

Upon their arrival at the air base, Mr. Blake was taken to an interview room and an interrogation began immediately. (II,R204) Mr. Blake was not given Miranda again. (II,R204)

During the subsequent interrogation, Mr. Blake made incriminating statements, taking responsibility for the shooting of Mr. Patel. (II,R205) After giving a verbal statement, Mr. Blake was asked to give a recorded or videotaped statement. (II,R205) Mr. Blake refused to give a recorded statement, but did agree to give another verbal statement. (II,R207;265) Despite his refusal, a video recording was made of the subsequent questioning. (II,R206) According to Det. Navarro, no consent has to be obtained for recording done in the police facility. (II,R266) Asking for consent is “the nice thing to do.” (II,R266)

In the video recording Mr. Blake provided essentially the same factual recitation of the incident. Mr. Blake was also asked to demonstrate what happened and complied. Mr. Blake stated on the tape that he had not been threatened or hit and acknowledged receiving Miranda.

Det. Gaimpavolo acknowledged that he did not have Mr. Blake Complete a written waiver of Miranda. (II,R220)

Richard Green did execute a written waiver after receiving his Miranda rights. (II,R220)

Det. Giampavolo agreed that he had taken a taped statement from Richard Green before interrogating Mr. Blake. (II,R219) He did not recall playing this tape to Mr. Blake, but admitted that Mr. Blake was told what Green had said. (II,R219-220;287) Det. Navarro denied telling Mr. Blake anything that Green had said. (II,R248) Det. Giampavolo may have discussed the store video of the crime with Mr. Blake. (II,R223)

Det. Navarro testified that he confronted Mr. Blake with the contents of the video when Mr. Blake denied having been involved in the crime. (II,R241)

Det. Giampavolo denied telling Mr. Blake that if he didn't talk, Marion Clay would be charged. Mr. Blake was told that the detectives would try to get in touch with Clay and that they would get her for Mr. Blake. (II,R229-230)

Det. Giampavolo admitted to offering some comfort to Mr. Blake when he cried, to patting him and telling him it would be all right. (II,R227) Giampavolo shook Mr. Blake's hand at the end of the tape. (II,R232) Giampavolo didn't believe that these actions gave Mr. Blake a false sense of

security.

A trial court's ruling on a motion to suppress is clothed with a presumption of correctness and not subject to reversal on appeal absent an abuse of discretion by the trial court. San Martin v. State, 717 So.2d 462 (Fla. 1998). Appellate review of the trial court's ruling is plenary- the review of the law as applied to the facts is conducted under a *de novo* standard by the appellate court and the factual decisions by the trial court are reviewed with deference to the trial court commiserate with the superior vantage point afforded to the trial court in evaluating the witnesses and their testimony. Nelson v. State, 850 So.2d 514, 521 (Fla. 2003). The issue presented in this case is whether or not the recording of Mr. Blake's statement was subject to suppression. The critical facts of this issue are not in dispute. The parties agreed that Mr. Blake did not consent to being recorded and that his statement was recorded by the police without his knowledge. Thus, the applicable review standard is *de novo* as to the issue presented of whether or not the recorded statement was admissible.

In denying the motion, the trial court likened the involuntary recording to video surveillance and opined that

such recordings were permissible under Fla. St. §934, the interception of oral communications. It is submitted that §934 is not applicable to the instant case for two reasons. First, this section pertains to wire tapping or other surveillance, which is not the case here. Second, as the trial court stated in his order, §934 permits the recording of a conversation by law enforcement under this section only by consent of the parties. If consent is not obtained, a court order for recording is required. The trial court made the specific factual finding that Mr. Blake did not consent to the recording, thus recording was not authorized under §934.

The trial court acknowledged that it could find no case on point with the issue presented and undersigned counsel has had no further success. No case has addressed the specific question of whether or not a recorded statement taken without the consent of the defendant and taken despite a clear communication by the defendant that he would not consent to a recorded statement could thereafter be admitted into evidence. Absent any case law directly on point, the trial court concluded that Mr. Blake had a right to be silent under the Fifth Amendment, but no right to not be taped. Mr. Blake disagrees with the trial

court's conclusion.

The critical fact here is that the taping was done in contravention to a clear directive from Mr. Blake that Mr. Blake had a reasonable expectation would be honored. By asking Mr. Blake if would agree to be taped, the police clearly implied to Mr. Blake that his refusal would be honored. Once the police asked for permission to tape and that permission was clearly denied, the subsequent taping is tantamount to an involuntary statement as it was the product of an improper inducement or promise. Mr. Blake had a right to believe that the police would not tape his statement after he refused to consent to that procedure. The police's subsequent action in taping without telling Mr. Blake constituted an implied promise that the statement would not be recorded.

In order to be admissible into evidence, a statement must be voluntarily made. When a defendant challenges the voluntariness of his statement, the burden is on the state to establish by a preponderance of the evidence that the statement was freely and voluntarily made. Albritton v. State, 769 So.2d 438 (Fla. 2nd DCA 2000).

In Albritton, the defendant was questioned over the mutilation of a corpse. During the first interrogation,

the officer suggested to the defendant that if the mutilation occurred for religious reasons, it would not be a criminal matter and she would not be prosecuted. In the second interrogation, the defendant confessed to cutting off the hand of the corpse as well as some additional actions to the corpse as part of a religious voodoo ceremony. Prior to trial she moved to suppress her statements, claiming that they were induced by the promise that she would not be prosecuted if her actions were motivated by religious means. The motion was denied and both statements were introduced at trial. The defendant testified at trial and denied committing the offense. The Second District Court of Appeal reversed her conviction, holding that the inducements of the police resulted in an involuntary confession that should have been suppressed. The court noted, citing to Almedia v. State, 737 So. 2d 520 (Fla. 1999), that a promise does not need to be direct, it can also be implied. In Almedia, this Court explained that a promise is sufficient to render a confession involuntary if the attending circumstances are calculated to delude the suspect as to his true position.

The totality of the circumstances are to be considered in determining whether or not a confession is involuntary,

but a confession is not free an voluntary if elicited due to direct or implied promises, however slight. Walker v. State, 771 So.2d 573 (Fla. 1st DCA 2000); Brockelbank v. State, 407 So.2d 368 (Fla. 2nd DCA 1981).

In this case, when the detectives asked Mr. Blake if he would agree to be videotaped and he refused, the exchange was an implied guarantee or promise from law enforcement to Mr. Blake that they would honor his request and not record the interview. The exchange over the recording between Mr. Blake and police deluded Mr. Blake into believing that his statement would not be taped. Based upon his belief that the statement would not be recorded, Mr. Blake gave a second statement. Quite clearly, the police did not tell Mr. Blake about the taping of the second statement because they knew he had not agreed to it and feared that if he were told the statement would be taped without his consent, Mr. Blake would have refused to repeat his statement. Obviously the police recognized the superior evidentiary value of a recorded statement. So they proceeded to tape Mr. Blake, but intentionally misled him that they were not. Thus, the taped statement was the direct result of an implied promise by law enforcement that they would abide by Mr. Blake's refusal to be recorded.

Mr. Blake was deluded into believing that his statement would not be recorded. This belief was further fostered by the fact that the recording was accomplished without the visible presence of any recording equipment. Because the second recorded statement was the product of an implied promise, it was not voluntary. The trial court thus erred when it permitted the second, recorded statement to be introduced into evidence and played for the jury.

The error in the admission of the recorded statement was not harmless. Despite the admission of the non-recorded statement, the evidentiary impact of the video statement, which included a "re-enactment" by Mr. Blake, was cannot be overlooked. Certainly the state considered the recorded statement to be powerful and damaging evidence or they would have agreed to its exclusion. Because the effect of the recorded statement on the jury cannot be said to have not affected the verdict and death recommendation, reversal is required.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO ADVISE THE APPELLANT THAT HE COULD EXERCISE HIS RIGHT OF TO SELF-REPRESENTATION AFTER THE COURT DETERMINED THAT APPOINTED COUNSEL WOULD NOT BE REPLACED.

On two separate occasions Mr. Blake filed *pro se*

motions to dismiss court-appointed counsel. The first motion, filed on January 29, 2004, alleged that appointed counsel had only met with Mr. Blake three times since appointment in November 2002, that appointed counsel had refused to file a motion to suppress and had refused to interview alibi witnesses, and that appointed counsel had failed to meet with Mr. Blake to discuss discovery and trial strategy. (I,R155-157) The trial court held a hearing on the Motion to Dismiss Counsel on January 30, 2004. (SR1-9) During the hearing, Mr. Blake withdrew his request. (SR3) Mr. Blake told the court he had spoken with appointed counsel that morning and had no problems. (SR4) Appointed counsel advised the court that he and Mr. Blake disagreed on a motion to suppress, but counsel was working on that. (SR4) Appointed counsel also told the court that there were no alibi witnesses, a statement Mr. Blake concurred in. (SR5)

Mr. Blake filed a second Motion to Dismiss Counsel and Appoint New Counsel on October 20, 2004.(I,R175-177) The motion alleged four grounds and sought the appointment of different counsel.

The trial court conducted a hearing on the second Motion to Dismiss Counsel and Appoint New Counsel on

November 23, 2004. (SR10) Mr. Blake advised the court that he wished to pursue the motion. (SR14) The court told Mr. Blake that he was required to inquire as to each of the four allegations in order to determine if appointed counsel was effective. (SR14) As to the first allegation, a claim that counsel refused to interview witnesses, Mr. Blake explained that he had given counsel the names of witnesses, counsel interviewed them, but had failed to call them in his other case. (SR14) Mr. Blake told the court that he had an alibi witness for this case, but that counsel's office would not accept his collect calls. (SR15) Mr. Blake hadn't been able to give counsel the name of the witness because he couldn't talk to counsel. (SR15) Counsel Colon advised the court that he had not received the name of any witness. Colon told the court that his office policy was to decline collect calls from inmate clients if he is absent from the office. (SR16) Colon stated that he had seen Mr. Blake recently in court. (SR17) Colon said he would make an exception on the phone call policy for Mr. Blake. (SR17)

In his second allegation, Mr. Blake claimed that Colon had failed to file a motion to suppress, so he had filed his own. (SR18) The clerk told him the motion would not be

accepted because he had two lawyers. (SR18) Colon responded that one pre-trial motion to suppress had been filed and heard, but he and co-counsel had determined that other motions were not proper. Consequently, those motions were not filed. (SR19)

As to the third allegation, Mr. Blake claimed that counsel was unwilling to take an adversarial role, which Mr. Blake explained to the court meant that he was not getting any help. (SR19) Mr. Blake explained that Colon would not do anything he wanted him to do. (SR19) Mr. Blake reiterated that he was getting no help, but could not point to a specific incident at that time. (SR20) Ground four alleged that Mr. Blake had lost confidence in Colon. (SR20) Mr. Blake explained that he did not believe that Colon was working hard enough, he wasn't interviewing witnesses and filing pretrial motions.(SR20)

Colon responded that he had tried Mr. Blake's other case three times, with the third trial resulting in a conviction after a hung jury and another mistrial.(SR21) Colon felt that he had worked hard in that case for Mr. Blake. (SR21) Colon thought that Mr. Blake was unhappy with his recommendation in this case. (SR21)

Without further questioning, the trial court informed

the parties that a written order would follow. (SR21) On November 24, 2004, the trial court entered a written order finding that court-appointed counsel was not ineffective and denied the motion without prejudice for refiling. (I,R184-185)

At no point in the hearing on November 23 was Mr. Blake advised by the court that if the court denied his request, he would not be entitled to a second appointed lawyer. Mr. Blake was not advised by the trial court that if he still wished to discharge counsel he could choose to represent himself. The written order did not inform Mr. Blake of his right to represent himself if he wished to discharge Mr. Colon upon the denial of his request for new court-appointed counsel. The trial court's failure to advise Mr. Blake on the record, let alone in the written order, that he could still chose to proceed without Colon was error. This error requires that a new trial be granted.

When an indigent defendant expresses a desire to have appointed counsel removed and seeks to have new counsel appointed, the trial court is required to conduct a hearing pursuant to Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), adopted by, Hardwick v. State, 521 So. 2d 1071 (Fla.

1988). Nelson, requires the trial court to determine whether or not the defendant is entitled to a different attorney or will need to consider self-representation. Under Nelson the trial court must first ascertain whether or not the defendant has made an unequivocal request for new counsel. In this case the trial court correctly determined that this request was made, and further inquiry was required.

The next step pursuant to Nelson requires the trial court to conduct a sufficient inquiry into the allegations made by the defendant. If the allegations involve incompetence or ineffectiveness, the trial court must then conduct a further inquiry to determine whether or not there is a reasonable cause to believe that the attorney is rendering ineffective assistance of counsel. If the answer is yes, a new attorney is assigned. In this case the trial court did inquire as to the nature of the complaints and determined that counsel was not ineffective.

If the answer is no, as in this case, then the trial court is obligated to inform the defendant on the record of his determination that counsel will not be removed. Nelson requires that the trial court inform the defendant on the record that if the defendant still wishes to discharge

counsel, that the court has no obligation to appoint different counsel and that the defendant has the right to represent himself. Nelson, Id.; Weaver v. State, 894 So.2d 178 (Fla. 2004); Maxwell v. State, 892 So. 2d 1100 (Fla. 2nd DCA 2004); Jones v. State, 658 So.2d 122, 125 (Fla. 2nd DCA 1995); Jackson v. State, 572 so.2d 1000 (Fla. 1st DCA 1990); Taylor v. State, 557 So.2d 138, 143-44(Fla. 1st DCA 1990).

While the adequacy of the Nelson hearing is subject to appellate review under an abuse of discretion standard under Weaver, other cases have held that the trial court's failure to advise the defendant of the right of self-representation and the lack of an obligation to appoint different counsel is subject to a harmless error analysis. See, Sweat v. State, 895 So.2d 462 (Fla. 5th DCA 2005); Lewis v. State, 623 So.2d 1205, 1208 (Fla. 4th DCA 1997).

In this case the trial judged erred in two ways which require that this case be reversed. First, the trial judge erred in failing to make his findings on the record, thereby providing Mr. Blake with an opportunity to engage in a dialogue with the court as to whether or not he wished to represent himself. Second, the trial judge erred in failing to advise Mr. Blake either on the record or in his written order that if Mr. Blake still wanted to discharge

counsel, the court while the court was not obligated to appoint a second attorney, Mr. Blake could chose to represent himself rather than be forced to proceed with Colon.

In this case, the trial court deprived Mr. Blake of the necessary information required in order for him to make a reasonable and informed choice about how he wished to proceed. By failing to follow the procedure set forth in Nelson, the trial court's actions resulted in Mr. Blake believing his only option was to proceed to trial with Colon. Mr. Blake was not adequately informed of his options, including his right to self-representation as guaranteed under the Sixth Amendment and Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). See, Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984)(holding that the trial court's failure to advise the defendant of his right to self-representation impermissibly led the defendant to believe that proceeding with appointed counsel was his only avenue).

The Fifth District Court of Appeal, in Sweat v. State, 895 So. 2d 462, determined that the trial court's failure to inform the defendant of his right of self-representation was harmless error because the defendant proceeded to trial

with the same attorney. This decision overlooks the rationale of Chiles and what is obviously the underlying basis for the requirement that the defendant be informed of his choices on the record. If the trial court does not comply fully with Nelson and inform the defendant on the record of his ruling and advise him of his other options, there is no assurance that the defendant will understand that he has the constitutional right to self-representation and cannot be forced to trial with an attorney he does not want.

In this case the error was not harmless. While Mr. Blake did not again seek to remove Colon, his actions were certainly justifiable based upon the inaction of the trial court. Mr. Blake had been told by the trial court that Colon was experienced and would remain on the case. Under the trial court's order, Mr. Blake would have had a reasonable belief that any further attempt to remove Colon would have been futile. The trial court's failure to advise Mr. Blake that he had the right to obtain other counsel at his expense or to exercise his right to self-representation deprived Mr. Blake of the necessary knowledge to allow him the ability to make an informed and intelligent choice to exercise his constitutional rights.

The procedure utilized by the trial court in this case effectively cut off any possibility of dialogue with Mr. Blake that would have provided Mr. Blake with an opportunity to persist in his desire to have Colon removed.

The trial court's failure to comply with the requirements of Nelson by advising Mr. Blake on the record that the request to for different appointed counsel would be denied and in failing to then advise him that if he still wished to dismiss counsel, he would not be entitled to a second appointed attorney, but could represent himself or hire counsel resulted in reversible error. Remand for a new trial is the appropriate remedy.

ISSUE III

THE SENTENCE OF DEATH IS NOT PROPORTIONATE

This Court has consistently held that due to the uniqueness and finality of death, the propriety of all death sentences must be addressed through proportionality review. In conducting this review this Court considers the totality of the circumstances in the case before it is compared to other cases in which the death penalty has been imposed in order to insure uniformity in the application of

the death penalty. Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998).

In performing this analysis, the Court has declined to engage in the reweighing of the mitigating circumstances against the aggravating factors, instead delegating this decision to the trial court. Bates v. State, 750 So.2d 6,14-15 (Fla. 1999). Still, this Court has continued to determine that the death penalty is reserved for only the most aggravated and least mitigated of first-degree murders. That standard is not met in this case, requiring a reversal of the death sentence.

In sentencing Mr. Blake to death, the trial court found three aggravating factors: (1) that Mr. Blake was previously convicted of a violent felony in the death of Kelvin Young; (2) the capital felony was committed while on felony probation; and (3) a merger of the pecuniary gain/in the course of a robbery. (III,R390)

In mitigation the trial court found Mr. Blake's age of 22 as a statutory mitigating circumstance. (III,T390) As nonstatutory mitigation the trial court found (1) the defendant's positive court room behavior, positive behavior to the court and his family, and with counsel; (2) the defendant never displayed violence in the presence of his

family and was a good son;(3) the defendant is truly remorseful;(4) the defendant's cooperation with police; (5) participation of the co-defendant, Richard Green; (6)no prior violent history until just prior to this crime; and (7) that the defendant is capable of adjusting to institutional living. (III,R390-394) The facts and circumstances surrounding the instant offense and consideration of the facts which form the underlying basis for the aggravation and mitigation do not support the trial court's sentence of death. A sentence of death is disproportionate in this case.

Proportionality analysis first involves the examination of the aggravating factors. To sustain a death sentence, the case must be one of the "most aggravated". A numerical count of the aggravators is not sufficient. It is further necessary to examine the facts behind each aggravating factor. The three factors found by the trial court to exist do not support a finding that this case falls into the most aggravated of first-degree murders.

The first, and clearly the most serious, aggravating factor was the prior violent felony conviction arising from Mr. Blake's conviction for the murder of Kelvin Young on August 1, 2002. While this factor is serious, an

examination of the facts would show that this factor does not support a death sentence. It was established during penalty phase that Mr. Young was shot once in the early morning hours in Lakeland. The car used in the shooting belonged to Marion Clay. A description of the shooter did not match that of Mr. Blake, but instead described Richard Green. While the jury found Mr. Blake guilty, the jury also made the specific finding that Mr. Blake was not the shooter. It is reasonable to infer from the verdict that Richard Green wielded the gun and killed Kelvin Young. The state did not seek the death penalty in that case against either Mr. Blake or Green. While certainly a serious aggravating factor, the jury's conclusion that Mr. Blake was not the shooter makes this factor less significant than in those instances where the defendant has personally committed multiple murders.

The second aggravating factor relied upon by the trial court was that Mr. Blake was on probation at the time of the offenses. This fact is not disputed, but it is also important to note what offenses Mr. Blake was on probation for. Mr. Blake was on probation for driving with a suspended license and the theft of a car, both non-violent crimes. (X,T1372) Mr. Blake had no other previous

convictions for violent crimes. His probationary status for a non-violent crime and traffic offenses does not establish this one of the most aggravated cases. This case is certainly distinguishable from those defendants who are on supervision from prior prison sentences or for violent offenses against persons.

The third aggravating circumstance was a merger of the pecuniary gain/in the commission of a robbery aggravating factor. By the very nature of the offense, this aggravating circumstance will exist in every robbery case resulting in death. None of the facts of this crime show that this was a violent confrontation. In fact, the video from the scene shows that Mr. Blake did not enter the store. The shooting appears to have occurred when the gunman was startled.

The facts of this case differ significantly from the case of Taylor v. State, 855 So.2d 439 (Fla. 2003), in which the same three aggravating factors were present. Terry had abducted and stabbed to death a woman whom he knew to be carrying money. The trial court found three aggravating factors- prior violent felony, a merger of in the commission of a robbery/pecuniary gain, and that Taylor was under sentence of imprisonment. The mitigating

circumstances were that Taylor came from a dysfunctional family, dropped out of school and was a good worker. The trial court also rejected several mitigating circumstances offered by Taylor that the trial court specifically found in this case-notably that Taylor had a non-violent background, had good relationships with his family and friends, was a positive influence on others, and would perform well in a structured environment. This Court affirmed the sentence of death, noting the facts which underlay the aggravation. Taylor had 22 prior felony convictions, he had prior violent felony convictions for armed robbery and burglary, should have been serving a twenty year sentence for burglary at the time the murder was committed, and the particularly violent facts of this murder. Although the same named aggravators are present in this case, the facts differ significantly from those in Taylor as previously argued. In comparison to Taylor, this is not the most aggravated of cases.

Notably absent from this case are two of the most serious aggravating factors- HAC and CCP. See, Larkins v. State, 539 So.2d 90,95 (Fla. 1999).

The second step in proportionality analysis requires an examination of the mitigation. Again, in proportionality

analysis, a death sentence is only appropriate if a case falls into the "least mitigated" of cases. The evidence presented in Mr. Blake's case establishes that this is not the least mitigated of cases.

In this case one statutory mitigating circumstance was found by the trial court. The court determined that the age of Mr. Blake, who was 22 at the time of the murder, was a mitigating circumstance.

The remaining mitigating circumstances are culled from testimony from Mr. Blake's family, evidence of his character, and his reputation. While Mr. Blake's childhood was described as positive by his mother, Naomi Blake, his oldest sister and brother described an environment with no stable father figure and an absent mother. Mr. Blake's mother was often gone from the family while working. The children were fathered by several men. The oldest sibling, Vontrice Brown, was often left in charge. She remembered that Mr. Blake was often hungry. All the siblings agreed that Mr. Blake assumed the role of the protector in the family. Mr. Blake would watch and care for his younger siblings.

Mr. Blake's brother James "Kenny" Blake, noted that only paternal influence led both he and Mr. Blake into

drugs.

All those who knew Mr. Blake testified that he was not violent, never fought, and avoided confrontation.

In addition to the positive role that Mr. Blake played in his family, the trial court also considered Mr. Blake's attitude and demeanor with the court and judicial proceedings. Despite a protracted pre-trial process and several trials, the court noted that Mr. Blake was at all times respectful, cooperative, and exhibited appropriate behavior to all.

The trial court also found Mr. Blake's cooperation with the police to be mitigating. Mr. Blake was found to be capable of adjusting to institutional living. The trial court noted that throughout his pretrial incarceration, Mr. Blake had never been disruptive or troublesome and did not pose a danger to the community.

The trial court further found that Mr. Blake was very remorseful for his actions. When considered in the aggregate, this case is not among the least mitigated and is undeserving of the imposition of a death sentence.

The third step proportionality review compares this case to other capital cases. This case is similar to three other cases where the death penalty was stricken- Urbin v.

State, Id., at 714 So. 2d 411, Livingston v. State, 565 So. 2d 1288 (Fla. 1990), and Terry v. State, 668 So.2d 954 (Fla. 1996).

This Court found a death sentence to be disproportionate in Urbin, supra. At the age of 17 Urbin and two other co-defendants planned to commit a robbery that resulted in the death of a patron of a pool hall. One of Urbin's co-defendant's had chosen the pool hall as a place to rob, believing it to be easy. After a first failed attempt, the three left, then returned. Urbin went inside the building, then came out and got a gun from the co-defendant. The victim came out of the pool hall and Urbin followed him, ultimately shooting him to death after the man resisted. Several weeks later Urbin committed additional violent crimes, including armed robbery with a firearm, burglary with assault, and armed kidnapping. The trial court found three aggravating factors- prior violent felony conviction, a merger of in the commission of a robbery/pecuniary gain, and that the murder was committed to avoid arrest. In mitigation the court considered Urbin's age and his ability to appreciate the criminality of his conduct was substantially impaired, along with evidence of parental neglect and the absence of parental

influence in early adolescence. Urbin claimed to have been using cocaine and drinking on the night of the murder.

This Court struck the avoid arrest aggravator and reduced the death sentence premised on an 11-1 jury recommendation to a life sentence on proportionality grounds. A similar reduction of sentence is appropriate in this case.

Like Urbin, Mr. Blake testified that he was using cocaine and other drugs on the night of the murder. Like Urbin, Mr. Blake grew up with an absent mother, and negative paternal influence in early adolescence. Like Urbin, the statutory mitigator of age was found by the trial court. In addition, the trial court in this case found substantially more non-statutory mitigation than considered in Urbin.

The aggravation in the two cases is similar- Urbin committed other violent crimes around the time of the murder. The pecuniary gain/in the commission of a robbery aggravator was present in both. In Urbin the murder was characterized as a "robbery gone bad" and the same characterization applies to this case. In both cases a co-defendant who did not commit the murder played a substantial role in the planning and organization of the

crime. The same rationale used by this Court to conclude that Urbin did not deserve to be executed should be applied to Mr. Blake.

In Livingston the defendant was convicted of killing a convenience store clerk and shooting at another patron in the store. Livingston was also convicted of armed robbery, displaying a weapon during a robbery, burglary, and grand theft. On the morning of the murder Livingston burglarized a home, stealing the murder weapon and jewelry. Livingston went to the convenience store in the evening. He fired twice at the clerk and once at a customer in the store before taking the cash register. The trial court found three aggravators: prior violent felony, murder committed during an armed robbery, and murder committed to avoid arrest. In mitigation the trial court found age (Livingston was 17), and a non-statutory mitigation of his unfortunate home life and upbringing. Evidence indicated that Livingston was neglected by his mother, beaten by her boyfriend, and that he used cocaine and marijuana. This Court struck the avoid arrest aggravator, and remanded for the imposition of a life sentence.

The aggravation in Livingston is not markedly different from that present in this case. Livingston

personally killed the clerk, shooting her twice, and wounded a second person after he indicated that he was going to "get" the person in the back of the store. Without doubt Livingston intended to shoot and kill two people. In contrast, in this case the evidence captured on the video tape indicated that Mr. Blake fired from surprise without any confrontation with Mr. Patel. Mr. Blake did not harm a second individual in this case.

While Mr. Blake was convicted of the prior murder, he was also found to have not wielded the weapon in that case. In contrast, Livingston clearly shot and intended to kill a second person.

The mitigation in this case is similar to that in Livingston. In both cases there was evidence of drug abuse, as well as alcohol abuse in this case. In both cases, the mother was largely absent. In both cases age was determined to be a statutory mitigator. This case contains additional mitigation not present in Livingston- Mr. Blake's remorse, his strong positive ties to his family, his positive behavior, and his lack of dangerous to the institutional community. Thus, the imposition of a life sentence in Livingston supports the imposition of a life sentence in this case.

Finally, in Terry v. State, 668 So.2d at 954, the defendant was convicted of killing a female attendant of a gas station. Terry and his co-defendant Floyd had engaged in committing a series of armed robberies before the murder. Terry was overheard to say "Don't move or I will shoot" by the victim's husband just before the gun was fired. The trial court found two aggravating factors-prior felony conviction and a merger of the pecuniary gain/commission of a robbery. Terry waived the no significant prior criminal history mitigating circumstance and the trial court rejected Terry's age of 21 as mitigating. No statutory mitigation was found and the trial court rejected much of what was characterized a "minimal non-statutory mitigation".

This Court reversed, again referring to this crime as a "robbery gone bad". The opinion notes that although the mitigation was not extensive, it showed that Terry was a good family man, that he lived in poverty, and that there was some emotional/developmental deprivation in adolescence. Similarly, in this case it was established in mitigation that Mr. Blake lived in a low-income single parent home, that in adolescence he lived in a drug-infested area with his half-brother's father, and that he

was a good person within his family. In addition to the same mitigation as present in Terry, other mitigation was also present in Mr. Blake's case. Significantly, the age mitigator rejected in Terry was found in this case.

This Court further found the aggravation in Terry was not extensive- noting that the prior violent felony aggravator stemmed from Terry's conviction for offenses that Floyd had actually committed, just as in this case where the prior violent felony was actually committed by someone other than Mr. Blake. This Court took special note that this fact was in contrast to and justified a different result from those cases where the defendant actually committed the prior offenses, including a prior homicide. Under Terry, a life sentence is warranted in this case.

One additional aspect of this case that must be considered by this court is the sentence and relative culpability of the co-defendant, Richard Green. The relative culpability of a co-defendant is one factor a court must evaluate in deciding whether to impose a death sentence and whether that sentence is proportional if there are multiple perpetrators. Chamberlain v. State, 881 So.2d 1087 (Fla. 2004). Generally, the relative culpability of the parties is a consideration in sentencing, and the

disparate treatment of an equally culpable co-defendant may render a disproportionate sentence. Shere v. Moore, 830 So.2d 56, 60 (Fla. 2002). The trial judge's determination regarding a co-defendant is a finding of fact and must be supported by competent, substantial evidence. Brooks v. State, 918 So.2d 181 (Fla. 2005).

The trial judge's finding that Green's participation in this crime was deserving of little to no consideration and did not mitigate against the imposition of a death sentence is error. The sentencing order fails to provide competent, substantial evidence to support the finding and the facts at trial do not support disparate treatment between Green and Mr. Blake.

The evidence at trial established that Mr. Blake was from Lakeland and Green was from Winter Haven. Mr. Green and "Red Man" targeted Del's as a place to rob, believing it to be "easy". Green drove the three men to Del's. Descriptions of the man seen fleeing from Del's by Ms. Alderman and Donovan Steverson matched that of Green (who had dreads) and not Mr. Blake(who was bald). Green drove away from the crime scene. Green unequivocally disposed of the murder weapon. While the jury convicted Mr. Blake of being the shooter in this case, the facts also established

that Green was the planner and facilitator of this crime. While the jury concluded that Green was not the trigger man, he was clearly the planner and instigator of this crime. His dominant role in this crime justifies a life sentence for Mr. Blake as well. This is not the situation such as was present in Evans v. State, 808 So.2d 92 (Fla. 2001), where the death sentence was found to be proportional. In Evans the co-defendant received a life sentence and Evans received a death sentence. Evidence established that Evans was both the shooter and the planner of the offense. Thus, the disparate treatment of Green justifies a life sentence in this case.

Green's role in the death of Kelvin Young cannot be overlooked. The jury specifically found that Mr. Blake was not the shooter. Descriptions of the killer matched that of Green and his sister's car was identified at the scene. Green was the person who disposed of the gun used to kill both Kelvin Young and Mr. Patel. Under the totality of the circumstances, it is inappropriate for Green to receive a life sentence while Mr. Blake receives death.

CONCLUSION

Based upon the forgoing arguments, citations of law, and other authority, the Appellant, Harold Blake, respectfully requests that this Court reverse this case for a new trial. Alternatively, Mr. Blake requests that this Court reverse the sentence of death and direct that a sentence of life in prison be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail to the Office of the Attorney General, Assistant Attorney General Katherine Blanco, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 this _____ day of September, 2006.

_____
ROBERT A. NORGARD
Attorney at Law

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief was prepared in Courier New, 12 point font, in compliance with and pursuant to Fla. R. App. P. 9.210.

_____

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