IN THE SUPREME COURT OF FLORIDA

CHARLES C. PETERSON,

Appellant, Case No. SC06-252

vs. Lower Ct. NO. CRC00-05107-CFANO

STATE OF FLORIDA,

Appellee.

_____/

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

INITIAL BRIEF OF APPELLANT

ANDREA M. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NUMBER 661066

P.O. BOX 811
BARTOW, FL 33831
(863)533-8556

SPECIAL ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This appeal comes to this Court following the imposition of a sentence of death by the trial court. The record on appeal consists of 28 original volumes, 7 Addendum volumes, and 4 Supplemental volumes. Each volume will be referenced by its roman numeral; "A" or "S" will designate the addendum or supplemental volumes, "R" for those documents originating from the trial court clerk, "T" for transcripts, followed by the appropriate page number. The Appellant, Charles Peterson, will be referred to as Mr. Peterson and the State of Florida as the State.

STATEMENT OF THE CASE

On March 21, 2000, the Grand Jury for the Sixth Judicial Circuit, in and for Pinellas County, Florida, returned an Indictment against the Appellant, Charles Peterson, charging him with one count of First-Degree Murder in the shooting death of John Cardoso on December 24, 1997.(I,R1-2) The State filed a Notice of Intent to Seek the Death Penalty on February 8, 2001.(I,R41) A second Notice of Intent to Seek the Death Penalty was filed on May 2, 2001.(I,R51)

The State's first Notice of Intent to Use Evidence of Other Crimes or Acts committed by the Defendant was filed

on May 2, 2001 with a Notice of Intent to Use DNA Testimony.(I,R53-60) The Williams Rule notice identified the following other crimes, wrongs, or acts the State intended to rely upon at trial: (1) April 30, 1981 armed burglary, kidnapping, and robbery at Jim's Spur Station; (2) February 24, 1997 armed robbery, burglary and sexual battery at the Family Dollar Store; (3) May 11, 1997 armed robbery and burglary at Walgreen's; (4) August 5, 1997 armed robbery and burglary at the Big Lot Store; (5) May 12, 1998 armed robbery and burglary at the Phar-Mor Store; (6) August 26, 1998 armed robbery and burglary at Eckerd Drugs. (I,R54-59) The State argued the evidence was necessary to prove notice, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, and to rebut an innocent explanation for Mr. Peterson's behavior and possession of certain identified items.(I,R59)

The Defense responded to the Williams Rule Notice by requesting that the State be prohibited from introducing the evidence outlined in the Notice because it was not probative, was highly prejudicial, and was unduly prejudicial in the penalty phase as non-statutory aggravating circumstances.(IX,R1694)

A hearing was held on the defense motion in limine on

April 5, 2004.(XIV,R2376-2440) The judge ruled that the Williams rule evidence from the 1990's robberies was admissible to prove M.O/identity and intent/motive. (XIV,R2430-31) The court also ruled that the evidence of the 1981 robberies would be excluded.(XIV,R2437) The court further ruled that any evidence of the sexual battery in the Family Dollar case would not be admissible.(XIV,R2437-38) The State filed a Memorandum of Law in support of the admission of the Williams Rule evidence on April 8, 2004. (X,R1716-1814)

The parties entered into a stipulation regarding the DNA found at the Family Dollar store during a hearing on July 15, 2005. (XV,R2551)

The Office of the Public Defender moved to withdraw on March 14, 2002.(VIII,R1537) The motion was granted and private counsel was appointed on March 14, 2002. (VIII,R1538)

Objections to the death penalty under Ring were made by pre-trial motion.(IX,R1635-1650) The State's Response to the Defendant's Motion to Bar Imposition of the Death Penalty was filed on January 31, 2005.(XI,R1992-1999) The motion was denied on April 5, 2004 and again on January 28, 2005.(XIV,R240;2454) An oral motion was made to the court

on July 15, 2005 that the lack of unanimity in the penalty phase recommendation rendered the death penalty statute unconstitutional.(XV,R2584) The motion was denied. (XV,R2584)

On June 4 and 14, 2004, Defense counsel filed a Motion to Suppress Tangible Evidence from the residence at 3963 Burlington Ave. N.[the home of Mr. Peterson's father, Willie Peterson] and from the residence at 50th Ave. South [the home of Mr. Peterson's sister], arguing that the evidence at that location was improperly seized as it exceeded the scope of the search warrant and was not described with specificity in the search warrant.(X,R1817-1822) A hearing was held on the Motion on January 28, 2005.(XIV,R2455) The court took judicial notice of the search warrant and affidavits.(XIV,R2455-2457) Following testimony and argument, the court denied the motion.(XIV,R2522) The court found the warrant described items to be seized with sufficient particularity and was not overbroad.(XIV,R2522) The court further ruled that the seizure of times connected to the other robberies whose descriptions were on the list but not in the warrant did not exceed the scope of the warrant.(XIV,R2524)

The defense further moved to suppress the oral state-

ments of Mr. Peterson because he was not advised of his Miranda rights. (X,R1848-1849) The motion was withdrawn on January 28, 2005.(XIV,R2448-51)

Mr. Peterson was tried by a jury in Pinellas County form July 19, 2005 through July 27, 2005.(XII,R2075-2082) The jury returned a verdict of guilty as charged on July 27, 2005. (XII,R2082;2127;XXVII,T1787)

Penalty phase was conducted on July 29, 2005.(XII,R2128) It was stipulated that Mr. Peterson was previously convicted of 8 prior felonies.(XII,R2131-2132) It was stipulated that Mr. Peterson was on Life Parole at the time of the instant offense.(XII,R2134) Defense counsel orally objected to the penalty phase jury instructions because they impermissibly shifted the burden of proof.(XVI,R2770-72) The jury recommended death by a vote of 8-4.(XII,R2129)

Following the rendition of the jury recommendation, defense counsel sought to interview jurors based on comments appearing in the new media in which the jury foreman expressed her opinion that the recommendation might have been different if the Defendant had testified or taken the stand and said he was sorry.(XII,R2144-2156) The State objected to juror interviews.(XII,R2159-2163) The defense

filed further argument in response.(XII,R2166-2168) The trial court held a hearing on this issue on August 12, 2005.(XVI,R2830) Defense counsel argued that the comments of the foreperson as reported in the newspaper would substantiate a limited inquiry from the jurors as to whether or not a lack of remorse or the failure of Mr. Peterson to testify in penalty phase had influenced the recommendation.(XVI,R2833-5) A second basis for inquiry was the foreperson's statement during voir dire regarding her feelings on the failure of a defendant to testify juxtaposed with her media comments.(XVI,R2835) The court ruled there was no basis for a jury interview and denied the request.(XVI,R2845)

The defense filed a motion entitled Defense Motion Concerning Penalty Phase Proceedings on October 3, 2005.(XII,R2177-2180) The motion requested a new penalty phase proceeding due to an improper argument and emphasis placed by the State on a perceived lack of remorse by Mr. Peterson.(XII,R2177-2180) The State responded that any issues of this nature had not been preserved due to lack of objection and any references or comments were reasonable rebuttal to defense arguments.(XIII,R2181-2310) The defense motion was denied.

The Defense Memorandum in Support of a Life Sentence was filed on September 21, 2005 (XII,R2169-2176) and a Memorandum In Support of Jury Override Sentence was filed on December 27, 2005.(XIII,R2323-2331) The State's response, a Memorandum In Support of Imposition of Death Sentence was filed on November 21, 2005.(XIII,R2312-2322)

On January 6, 2006, the trial court imposed a sentence of death.(XIII,R2334-2350) The trial court found three aggravating factors: (1) The Defendant was under sentence of imprisonment at the time of the murder (great weight); (2) The Defendant has previous felony convictions (great weight); and (3) The Defendant committed the murder while in the commission of a robbery (significant, but not great weight).(XIII,R2337-2340;XVII,R2923-2930) The trial court found the following mitigating circumstances: (1) The Defendant's mental condition (little weight); (2) low IQ (little weight); (3) Family relationship (some weight); (4) Work history (some weight); (5) Exemplary discipline record in jail/prison (little weight).(XIII,R2340-2347;XVII,R2930-2944) The trial court rejected two proposed statutory mitigators: Ability to conform conduct to the requirements of the law and age.(XIII,R2341-2343;XVII,R2931-38) The court further found that the jury did not rely upon the

impermissible aggravating factors of lack of remorse and failure to testify.(XIII,R2347-2348;XVII,R2945-2949) The trial court again rejected the necessity of jury unanimity in the penalty phase recommendation.(XVII,R2921)

A timely Notice of Appeal was filed on January 25, 2006.(XIII,R2357)

STATEMENT OF THE FACTS

A. Motion to Suppress

Sgt. James Griffis of the St. Petersburg Police Department was in the robbery division from 1996-1998.(XIV,R2478) He was aware of an investigation into a series of robberies at discount stores.(XIV,R2479) Griffis had read all the police reports from these incidents.(XIV,R2479) Griffis felt that there were similarities between the robberies- for example, a nylon mask was used in all of them and gloves were worn; the physical description of the perpetrator was the same; a Ford Bronco was observed at several; and a similar firearm was used.(XIV,R2480) Mr. Peterson's saliva was compared to DNA recovered at one of the robberies in October 1998.(XIV,R2480)

A search warrant was obtained to search Mr. Peterson's father's residence at 3963 Burlington Ave. N. and his

sister's residence at 50th Ave. S. in St. Petersburg.(XIV,R2483) Sgt. Griffis authored one of the affidavits used to obtain the warrant.(XIV,R2483) When drafting the affidavit, Griffis had all of the 15 robberies in his mind.(XIV,R2484) Griffis believed that clothing or masks might be found.(XIV,R2485) Griffis compiled a list of items that might be found from all the cases.(XIV,R2485) This handwritten list was given out at a briefing to the officers conducting the searches.(XIV,R2487) The list, culled from police reports of the other incidents, was not used in securing the warrant.(XIV,R2491) Items appear on the list that are not mentioned in the affidavits. (XIV,R2491)

Retired officer Robert Mullin testified that he was a homicide detective in 1999.(XIV,R2496) He did not participate in the briefing prior to the search when the handwritten list was distributed.(XIV,R2497) He was the coordinator at each search site.(XIV,R2497) Mullin instructed the officers conducting the search on the protocol that would be used and on the scope of the search warrant.(XIV,R2498) The search period lasted several hours.(XIV,R2500)

Sgt. Kevin Smith assisted in the execution of the

warrant at Burlington Ave., including reading the warrant and affidavit to Mr. Willie Peterson.(XIV,R2505) Smith also participated in the search.(XIV,R2507) He recovered a McCrory's bag containing a black pistol and checks and receipts from the store in the garage.(XIV,R2507-08) The date on the receipts in the bag matched the date of the robbery of McCrory's listed in the affidavit.(XIV,R2509) The affidavit did not contain a specific description of any property taken from McCrory's.(XIV,R2511)

Officer Damien Schmidt assisted in the execution of the warrant at 50th Ave. South.(XIV,R2513) During a briefing before the search he was given information about 15 robberies and descriptions of clothing, weapons, and masks that were used in those robberies.(XIV,R2514) Schmidt received a handwritten list of items to look for.(XIV,R2515) Items were seized if they were described in the search warrant or on the list.(XIV,R2516;2519)

B. Trial Testimony: July 19-July 27, 2005

1. This offense

Karen Smith worked at Big Lots in St. Petersburg as an Assistant manager.(XXV,T1267) She was working on Christmas Eve, December 24, 1997.(XXV,T1267) One of her duties was to oversee the closing of the store.(XXV,T1268) Prior to

closing an announcement is made in order to clear customers from the store. (XXV,T1270) A store check is then done to make sure all customers have left.(XXV,T1270) After all customers are gone and the doors are locked, the register tills are removed, and the tills are brought to the cash office at the rear of the store for counting.(XXV,T1271)

Normally Big Lots records a surveillance tape. (XXV,T1267) Earlier in the day of the 24th, an employee was suspected of stealing and the tape was shut off and not reactivated.(XXV,T1268;1272-73) The store has non-public areas at the rear.(XXV,T1269) There is a stock room, break room, manager's office, and the cash office.(XXV,T1269) There are fire doors at the rear that can be opened from inside, but not from outside.(XXV,T1269)

The store closed at 6:00 p.m. on December 24th.(XXV,T1273;XXVI,T1343) Ms. Smith stood at the front doors to make sure all the customers left.(XXV,T1273) The store was checked and the doors were locked. (XXV,T1275;T1343). The employees in the store at this time were assistant manager Maria Soto, stocker Josh McBride, customer service person Wanda Church, cashier Shirley Bellamy, and stocker John Cardoso. (XXV,T1274;XXVI,T1341)

Ms. Smith and Ms. Soto were in the cash office when

they heard a ruckus outside.(XXV,T1278;XXVI,T1344) Ms. Soto heard a noise like banging furniture or firecrackers (XXVI,T1345) Ms. Smith went into the hall, where she was confronted by a man with a gun.(XXV,T1279;XXVI,T1348) The man had a small build and was about 5'6". (XXV,T1279;1281;XXVI,T1350) He had a small gun.(XXV,T1279) Ms. Soto thought the gun was black and could fit into the palm of a hand.(XXVI,T1349) Ms. Smith could not see the man's face well because he was wearing a nylon scarf as a mask.(XXV,T1280) Ms. Soto described the mask as a stocking.(XXVI,T1348) Ms. Smith could tell the man was African-American and had pudgy cheeks.(XXV,T1280) He was wearing latex gloves.(XXV,T1280;XVI,T1350)

The man was very demanding.(XXV,T1281) He used profanity and called the women "bitches". (XXV,T1281;XXVI,T1352) The man demanded all the money. (XXV,T1281) The man took Ms. Smith and Ms. Soto into the manager's office where Ms. Bellamy was located. (XXV,T1282;XXVI,T1369) Ms. Bellamy started to pray a lot.(XXV,T1283) The man first told the three women to get on the floor, then changed his mind and had them leave the office and go to the stockroom.(XXV,T1283) The three women went single file down the hallway to the stockroom.

(XXV,T1284;XXVI,T1351,T1369) The man kept a gun beside Ms. Smith's head and held her arm in a hard, forceful manner.(XXV,T1284) Ms. Soto testified that the gun was at her back.(XXVI,T1351)

When they reached the door of the breakroom, they could see Mr. Cardoso's body lying on the floor.(XXV,T1285) The women stepped over the body and went into the stockroom.(XXV,T1285;XXVI,T1351;T1369) Ms. Soto testified that the man was threatening continuously to kill them, to do what he had done to John.(XXVI,T1352) They were made to get on their hands and knees in a line.(XXV,T1286) At this time Josh McBride came around the corner and was also made to lie down.(XXV,T1286) Ms. Soto testified that the man kept telling them not to look at him and at one point he grabbed the collar of her shirt, put the gun against her temple, and said "Why are you looking at me. Don't look at me."(XXVI,T1353)

The man asked if there was anyone else in the store and Ms. Smith responded the cashier was up front.(XXV,T1288;XXVI,T1353) The man grabbed Ms. Smith, told the others to remain in the stockroom, and took her to get the cashier.(XXV,T1289)

Ms. Smith and the man went into the store and Ms.

Smith hollered for the cashier, Wanda.(XXV,T1290) The man held her arm and kept the gun pointed at her head.(XXV,T1291) Wanda came to the back area and the man took them both into the cash office.(XXV,T1293) The man had Wanda put the tills in the cash office.(XXV,T1294) The man then took Ms. Smith and Wanda back through the break room and into the stockroom to the others.(XXV,T1294) Ms. Smith was made to unlock the back door.(XXV,T1295)

After unlocking the door, the man took Ms. Smith back out to the break room, over Mr. Cardoso's body, and back into the cash office.(XXV,T1295) The cash office had better lighting and Ms. Smith was able to see the man's face a little better.(XXV,T1296) The man realized he had nothing to put the money in, so the two of them went into the store and got a book bag.(XXV,T1296) The man kept calling Ms. Smith a bitch and telling her not to look at him.(XXV,T1296) They returned to the cash office and Ms. Smith put the money from the tills into the book bag.(XXV,T1297) The man left Ms. Smith in the cash room and returned to the stockroom to check the others.(XXV,T1298)

The man took Ms. Smith back to the stockroom after the money was packed.(XXV,T1300) He then took everyone from

the stockroom into the break room. (XXV,T1300;XXVI,T1356) Ms. Bellamy's stipulation stated that her hands were bound with plastic straps.(XXVI,T1370) They were all told to lie on the floor and to not move.(XXV,T1300;XVI,T1356) Ms. Soto testified that they could hear noises by the back door.(XXVI,T1357 They stayed there fifteen or twenty minutes, then Ms. Soto and Wanda called the police.(XXV,T1301;XXVI,T1357)

Detective Richard McKee and Officer Dennis Porter arrived at Big Lots at 6:30 p.m.(XXIV,T1177) A male and female out front told them someone inside had been shot.(XXIV,T1178) McKee found John Cardoso lying face down in the employee break room at the rear of the store.(XXIV,T1179) There were burn marks on the back of his shirt and he had no pulse.(XXIV,T1180) Three other persons were also lying on the floor with their hands behind their heads.(XXIV,T1179) All appeared to be in shock.(XXIV,T1182) Det. McKee directed them to leave.(XXIV,T1182)

In October 1998 Ms. Smith was shown a photopak.(XXV,T1302) She selected a photograph from that photopak.(XXV,T1304) Ms. Smith admitted that prior to viewing the photopak, she saw Mr. Peterson's picture on

television.(XXV,T1307) Ms. Soto was shown a photopak, but could not identify anyone.(XXVI,T1358,1365) Ms. Soto believed if the circumstances were the same and the clothing was the same she would be able to make an identification. (XXVI,T1359) She believed that the person was the black male in court, the only black male seated at the table.(XXVI,T1359,1361) Ms. Soto noted that Mr. Peterson was wearing the same clothing in court that the robber wore-a white shirt and no tie.(XXVI,T1362) Ms. Soto's court identification was based on the clothing because she was never able to see the robber's face.(XXVI,T1362,1364) Ms. Bellamy was unable to make any identification.(XXVI,T1369)

A video of the crime scene, including photos of the body of Mr. Cardoso was shown to the jury.(XXIV,T1183-1201)

Dr. Noel Palma did not perform an autopsy on Mr. Cardoso, but testified to the conclusions from the autopsy that were reached by Dr. Nikolas Hartshorne.(XXVI,T1381-83) Mr. Cardoso was shot once in middle of the back.(XXVI,T1384) The bullet pierced the left back, fourth rib on the left, perforated the lower left lobe of the lung, perforated the thoracic aorta, perforated the lower lobe of the right lung, the right side of the diaphragm,

and lodged in the right lobe of the liver.(XXVI,T1384-85) The bullet traveled through the body from back to front, left to right, and downwards.(XXVI,T1388) Mr. Cardoso's shirt had soot or fouling on the back side consistent with gunpowder residue.(XXVI,T1385) This residue was consistent with the firing of a gun less than a foot away.(XXVI,T1386) Bruises and contusions were also observed on the upper right back, mid-lateral back, right flank, back of the right hand, and inner aspect of the right arm of the body.(XXVI,T1386-87) The bruising was consistent with occurring before death.(XXVI,T1387;1389) A bullet and Mr. Cardoso's shirt was collected from the autopsy.(XXIV,T1202-04)

Yolanda Soto, of FDLE, examined the bullet recovered at the autopsy.(XXVI,T1392) She determined it was a .25 caliber bullet.(XXVI,T1393) A bullet of this type can be fired from a semiautomatic pistol.(XXVI,T1393) She did not have a firearm to test.(XXVI,T1393)

Robert Davis testified that he was a customer in Big Lots on Christmas Eve just before closing.(XXVI,T1371) He was buying stocking stuffers for his daughter.(XXVI,T1371) Mr. Davis went into the back of the store to look around the tool department.(XXVI,T1372) He came into contact with

a black male in that area that he first believed to be an employee.(XXVI,T1372) The man was pacing back and forth in the aisle.(XXVI,T1372) Mr. Davis watched the man for about five minutes.(XXVI,T1373) Mr. Davis thought the man was between 5’9” and 5’10”, was of medium build, and had a thin mustache.(XXVI,T1373) Mr. Davis left the area when an announcement for last check-out was made.(XXVI,T1373) The man was still in the back of the store when Mr. Davis went to the front of the store.(XXVI,T1373)

Mr. Davis noticed some police and ambulance activity at the store later in the evening because he lives across the street from the store.(XXVI,T1374)

Mr. Davis was shown photopaks on several occasions.(XXVI,T1374-75) Mr. Davis was not able to make any identifications in April and July 1998.(XXVI,T1375) Mr. Davis was shown a photopak a third time and did select a photo as a match to the individual he saw in the tool section on December 24.(XXVI,T1376-1377) Mr. Davis initialed his selection.(XXVI,T1377) Mr. Davis could not make an in-court identification.(XXVI,T1378)

Det. Robert Moland was assigned to supervise the execution of a search warrant at 3963 Burlington Ave., the home of Mr. Peterson’s father, Willie Peterson.

(XXIV,T1108-1111) Willie Peterson consented to the search of his modest, two bedroom home.(XXIV,R1111) The camera being used to document the search on the October 20, 1998 malfunctioned, so Moland and CST Ron Anderson returned to the home on October 22 to retake photographs.(XXIV,R111-12)

Two items of nylon stocking material were found in a dresser located in the smaller bedroom.(XXIV,T1113-14) The first segment was a cut of leg from a pair of pantyhose and then the remainder of the nylon material was the rest of the pantyhose.(XXIV,T1114-19) Detective Moland acknowledged that these items could be left over if someone made a "wave cap".XXIV,T1120-1122) A wave cap is used to hold waves or a jerry curl in place.(XXIV,T1120)

CST William Champion and Officer Damien Schmidt assisted in the execution of a search warrant at 800 50th Ave. N, the home of Mr. Peterson's sister. (XXIV,T1125;1133) Three latex gloves were found in a kitchen drawer.(XXIV,T1128;1133-38) A piece of panty hose was found inside the seat compartment of a Kawasaki motorcycle that was parked outside. (XXIV,T1129;1139) Another pair of black pantyhose was found in the driver's side door pocket of a Geo Tracker.(XXIV,T1130;1143-152)

It was stipulated that Mr. Peterson was the registered

owner of a 1974 Kawasaki motorcycle and a 1989 Ford Bronco II, and a 1992 Geo Tracker.(XXIV,T1153-56)

2. William's Rule Testimony

Objections to the William's Rule testimony were made prior to the introduction of evidence and at the close of the State's case. (XXVII,T1617)

A. Family Dollar Store

Mary Palmisano was working as the assistant manager at Family Dollar store in Tampa on February 14, 1997.(XXIII,T964) Alice Rabideau was working that evening as a cashier.(XXIII,T965) The store has an area in the back with an office and stock room that are private and not open to the public.(XXIII,T964) There is a rear exit.(XXIII,T965) At closing the front doors are locked, the lights are dimmed, and the money is removed from the registers and taken to the office for counting.(XXIII,T965) The store is checked for customers before the doors are locked.(XXIII,T965) Numerous photos of the store were admitted into evidence over objection.(XXIII,T981)

After locking the front and back doors, Mrs. Palmisano and Ms. Rabideau went to the back office.(XXIII,T967) As they entered the office, Alice screamed, then pushed and jerked Mrs. Palmisano to the side.(XXIII,T967) A man with

a gun screamed at them to “Get down”.(XXIII,T967)

Mrs. Palmisano saw the man for only a split second.(XXIII,T967) The man was wearing a black mask, like spandex, with no cut outs.(XXIII,T968) It looked like a stocking, only much thicker.(XXIII,T968) He was black and about 5’6” tall.(XXIII,T972) Mrs. Palmisano could not identify him.(XXIII,T972) The gun was small and chrome colored.(XXIII,T968) Both women got on the floor. (XXIII,T969) The man tied them up.(XXIII,T973) Ms. Rabidue was tied with a phone or extension cord and Mrs. Palmisano was tied with a microphone cord.(XXXIII,T974)

The man kept screaming at the women to shut up and to not look at him.(XXIII,T969) He used profanity and called the women “bitches”.(XXIII,T969-70) He wanted money, but when Mrs. Palmisano said it was on the desk, he demanded the “big money”.(XXIII,T969) Eventually the man found a petty cash bag behind the door and accused Mrs. Palmisano of hiding it from him.(XXIII,T971)

Mrs. Palmisano’s husband called during the robbery.(XXIII,T977) The man held the gun to the back of her head while she talked to her husband.(XXIII,T977) Ms. Palmisano told the her husband that she’d be home soon, but he thought she sounded “distant”.(XXIII,T977)

The man had difficulty leaving because the back door was locked.(XXIII,T974) The man got the keys from Ms. Palmisano, unlocked the door, then dropped the keys by her face.(XXIII,T974) After hearing a car in the back lot, Ms. Palmisano got up and called 911.(XXIII,T976)

A stipulation was read to the jury that biological evidence collected from the robbery contained DNA that could have only been left by the perpetrator and this DNA was analyzed by FDLE.(XXIII,T991)

Tampa police officer Jerry Herren obtained a blood sample from Mr. Peterson and sent it to FDLE.(XXIII,T993-996) FDLE analyst Marcella Scott performed RFLP DNA testing on the biological sample from the robbery and Mr. Peterson's blood.(XXIII,T1016-1024) The two were compared and it was determined that the one sample matched at five areas and one sample at four out of five areas.(XXIII,T1025) The frequency of the five of five match was 1 out of 621 African-Americans.(XXIII,T1028) The match of the four out of five was 1 out of 3.85 million African-Americans.(XXIII,T1028) A DQ alpha or PCR DNA comparison was done by Tina DeLaroche on the same samples.(XXIII,T1064) A match at the six comparative sites was found.(XXIII,T1068) This resulted in a frequency of 1

in 741 in the African-American population.(XXIII,T1071)

B. Phar-Mor Drug Store

Glendene Day worked as a co-manager of Phar-Mor drug store in Pinellas county on May 12, 1988.(XXVI,T1426) She was familiar with the closing procedures of the store. A closing call to ensure that all customers exited the store was made, the doors were locked, and the verification and counting of monies in the store was done in a private office.(XXVI,T1427) On May 12, 1998, the store was locked at 10:00 p.m..(XXVI,T1427) The tills were removed from the registers and taken to a secure area to be counted and verified.(XXVI,T1429) In addition to Ms. Day, two other employees were in the store at closing- Stacy Patterson and Sirisone Visane.(XXVI,T1430)

After securing the store, Ms. Day was confronted by a man near the warehouse racks in an area of the store that is not accessible to the public.(XXVI,T1431) The area was fairly dark.(XXVI,T1432) The African-American man was about 5’6”, medium build, wore a black nylon coverall with no eye holes, dark clothing, latex gloves, and carried a black gun.(XXVI,T1432-34) He grabbed Ms. Day, turned her around, put the gun to her head, and asked her how many employees were in the store.(XXVI,T1435) The man was a

adamant that she not look at him.(XXVI,T1435)

The man had Ms. Day call the other employees to the back room where they were located.(XXVI,T1436) Sirisone Visane recalled hearing an call over the P.A. system asking her to come to the back warehouse.(XXVI,T1468) When the others came near, the man pointed the gun at them and made all three of the women get down on the ground.(XXVI,T1437,1469) Ms. Visane stated the man wore black clothes, black gloves, and a black ski mask with eye holes in it.(XXVI,T1469;T1475) The man seemed petite.(XXVI,T1472) Neither Ms. Day or Ms. Visane could not recall the man using profanity.(XXVI,T1472)

The man used black electrical tape he got from a desk and tried to tie up the three women.(XXVI,T1437) When he ran out of tape, the man got some plastic strapping and used that.(XXVI,T1438;T1471) Ms. Day was then made to go to the front of the store to where the money was kept.(XXVI,T1440)

Ms. Day used a code to enter the office area where the money was located.(XXVI,T1443) The man picked up a manila envelope and started stuffing money into it.(XXVI,T1444) The man took the money and Ms. Day back to the rear of the store where the others were at.(XXVI,T1448) A locked door

was opened and the man left.(XXVI,T1449) Before the man left he bound Ms. Day's hands with box strapping material.(XXVI,T145)

Shortly after the man left, Ms. Day easily freed her hands.(XXVI,T1450) She ran across the street to a gas station and called the police.(XXVI,T1450) A video of the Phar-Mor store was shown to the jury.(XXVI,T1453)

Ms. Day could not identify anyone because she could not see the man's face.(XXVI,T1456) Ms. Visane could not make an identification.(XXVI,T1474)

Bliss Hillman was a Phar-Mor employee at the time of the robbery.(XXVI,T1458,T1478) His mother is Ms. Gosha and Mr. Peterson was her boyfriend.(XXVI,T1477) Mr. Peterson would frequently take Mr. Hillman to work and then pick him up from work.(XXVI,T1479) Mr. Hillman testified that he worked on May 12, 1998. Mr. Peterson picked him up at 8:00 p.m. in the front parking lot.(XXVI,T1480) Mr. Peterson took Mr. Hillman home and then left.(XXVI,T1481) Ms. Day could not recall of Mr. Hillman worked the day of the robbery and if she had let him leave around nine or ten that night.(XXVI,T1458)

Det. Paul Martin investigated the Phar-Mor robbery.(XVI,T1412) He was present when a video tape was

removed from the store surveillance machine.(XVI,T1413) The store closed at 2200 hours and a deputy arrived at 2300 hours.(XVI,T1416) The plastic tie bindings and electrical tape bindings were collected and admitted into evidence.(XXVI,T1486-1490) A dark colored hair and peach colored fibers were removed from the electrical tape.(XXVI,T1491) It could not be determined how the hair got on the tape.(XXVI,T1492)

Latent shoe prints were obtained from two pieces of paper lying on the floor of the cash room.(XXVI,T1497) A shoe print was made from the papers.(XXVI,T1503) It could not be determined when or how the prints were left on the papers.(XXVI,T1505)

Det. Gary Gibson met with Mr. Peterson on October 28, 1998.(XVI,T1398) Det. Gibson obtained Mr. Peterson's consent to search his storage unit in Pinellas Park.(XVI,T1398-1400) Det. James Shakas found a black Hilfiger T-shirt and pair of Nike sneakers in the storage unit.(XVI,T1404-5)

Lynn Ernst, of FDLE, compared the shoe prints from Phar-Mor with the Nike shoes taken from Mr. Peterson's storage unit.(XXVI,T1514) The Nike shoes could have made the shoe prints from Phar-Mor and could not be excluded as

the source of the prints.(XXVI,T1515) Ms. Ernst did not compare the shoes worn by store employees with the shoe prints.(XXVI,T1517)

A stipulation was read to the jury that a Phar-Mor video surveillance tape from May 12, 1998 at 10:12 p.m.-11:36 p.m. was authenticated.(XXIII,T1236) The tape was removed as part of a robbery investigation.(XXIII,T1236)

Jane Gosha met Mr. Peterson in 1995.(XXV,T1240) They lived together until September 1998.(XXV,T1241) Mr. Peterson owned three vehicles- a Geo Tracker, a Kawasaki motor cycle, and a Ford Bronco. Ms. Gosha drove the Geo Tracker, but Mr. Peterson would occasionally drive it.(XXV,T1242) Ms. Gosha did not drive the motorcycle or the Bronco.(XXV,T1242) She never saw cut pantyhose or stockings in the Geo Tracker.(XXV,T1258)

Ms. Gosha viewed the Phar-Mor surveillance tape.(XXV,T1255) She was familiar with Mr. Peterson and how he walked.(XXV,T1255) She identified Mr. Peterson as being on the tape. He was wearing a Hilfiger t-shirt. (XXV,T1256) His face was not visible.(XXV,T1264)

Sometime between 1996 and 1998 Ms. Gosha found a large amount of cash underneath the sink.(XXV,T1243) Ms. Gosha never found any latex gloves, nor did she know Mr. Peterson

to have any gloves.(XXV,T1244)

Mr. Peterson and Ms. Gosha had a safe.(XXV,T1244) Once, when she opened the safe to put something in it, Ms. Gosha saw a large amount of money.(XXV,T1244) She didn't know how much was there.(XXV,T1247)

Ms. Gosha also found a small silver gun with a mother of pearl handle in a drawer in the bedroom.(XXV,T1245) The gun did not belong to either her or Bliss Hillman. (XXV,T1245)

At one point in time, Mr. Peterson had a black Hilfiger t-shirt that once belonged to Bliss.(XXV,T1249) Ms. Gosha gave it to Mr. Peterson to wear when he did small engine repairs.(XXV,T1250) Ms. Gosha identified some clothing belonging to Mr. Peterson that appeared in photographs taken from a bedroom in Willie Peterson's house.(XXV,T1254)

Ms. Gosha found out that Phar-Mor had been robbed from Bliss.(XXV,T1263) Mr. Peterson had picked Bliss up from work on the day of the robbery and had driven him to work the next day.(XXV,T1263)

Ron Hillman is Ms. Gosha's brother.(XVI,T1418) He knew Mr. Peterson and socialized with him occasionally. (XVI,T1419) Mr. Peterson worked as a cook at the Marriott

Hotel.(XVI,T1420) Mr. Hillman also viewed the Phar-Mor surveillance tape.(XVI,T1421) He identified Mr. Peterson on the tape.(XVI,T1422)

Ms. Scott of FDLE performed testing in this case.(XXIII,T1031) She performed STR DNA testing on a hair removed from the electrical tape.(XXIII,T1033) The sample was so small that only the gender could be determined.(XXIII,T10390) The gender was male. (XXIII,T1039) The hair and a stain card with Mr. Peterson's blood were sent to Mitotyping Technologies for mitochondrial DNA testing. (XXIII,T1041)

The video conference testimony of Dr. Terry Melton taken on June 24, 2005, was admitted and played to the jury. (XVVI,T1532) A transcript of the video is contained in the third volume of the Addendum, pp. 3386-3435. Dr. Melton is the CEO and laboratory director of Mitotyping Technologies in Pennsylvania. (Add.III,p.3392) She has been qualified as an expert between 40 and 60 times in the area of mitochondrial DNA testing and analysis.(Add. III,p.3393)

According to Dr. Melton, mitochondrial DNA can never be said to be unique to a single person.(Add.III,p.3396) Mitochondrial DNA is inherited from the mother, hence

siblings and all maternal relatives will share the same mtDNA.(Add.III,p.3407) Mitochondrial DNA can be analyzed in terms of frequency-what are the random chances that you could go out and pick someone with a particular type of mitochondrial DNA?(Add.III,p.3396) Mitochondrial DNA is analyzed using an FBI database of almost 5,000 human mitochondrial DNA sequences, although there are many, many, many thousands of mtDNA sequences.(Add.III,p.3396-97) Mitochondrial DNA testing is used when conventional STR testing is not possible, especially when a small quantity of DNA is present in samples such as hairs.(Add.III,p.3408)

Dr. Melton analyzed a 1½ cm dark hair that she received from FDLE in this case after a mtDNA profile was obtained from the hair.(Add.III,p.3415-20) She compared the mtDNA profile in the hair with a mtDNA profile from a blood sample from Mr. Peterson.(Add.III,p.3424-26) Dr. Melton opined that the mtDNA of the two samples, the hair and blood, were the same.(Add.III,p.3426) Mr. Peterson and his maternal relatives could not be eliminated as a source of the hair.(Add.III,p.3426) The FBI database was searched and the mtDNA profile of Mr. Peterson was found twice.(Add.III,p.3427) One-tenth of one percent of the population would be expected to have this mtDNA sequence

based on comparisons with the FBI sample base. (Add.III,p.3428) The population percentage of people who would not be expected to have this mtDNA type is 99.87.(Add.III,p.3428) If the mtDNA profiled of the hair is compared to only the African-American samples in the FBI pool, it is found in .49% of the samples, with a population percentage of 99.51.(Add.III,p.3433) The pool of people who could have this mtDNA is quite small.(Add.III,p.3428) Dr. Melton could not say for sure that the hair was from Mr. Peterson.(Add.III,p.3430)

C. McCrory's Drug Store

Ann Weber was a cashier/supervisor at McCrory's discount store in August 1998.(XXVII,T1569) The registers are located at the front of the store and a stockroom, break room, and office are located in the rear of the store.(XVII,T1569) The store normally closes at 6:00 p.m., but stays open until 8:00 p.m. on Saturday night.(XXVII,T1577)

Shortly before 6:00 p.m. on Saturday, Ms. Weber had instructed the store to be locked and had gone out to empty the trash.(XVII,T1570) When she reentered the store, Ms. Weber was confronted by a man with a woman's stocking over his face.(XXVII,T1571) The man had high, pudgy cheekbones,

was dressed in white, and had what appeared to be a reddish semi-automatic gun.(XXVII,T1571) The man told Ms. Weber not to look at him or he would kill her.(XXVII,T1572) He grabbed the back of her smock and made her go into the office.(XXVII,T1572) The man demanded money.(XXVII,T1572) Ms. Weber crawled up the steps to a file cabinet where the money was kept.(XXVII,T1573) She put the money bags on the floor and the man called her a “bitch”.(XXVII,T1573) The man asked if there was any other money and Ms. Weber told him the safe also contained money.(XXVII,T1574)

The man and Ms. Weber went to the safe.(XXVII,T1574) After several unsuccessful attempts, Ms. Weber was able to open the safe and remove the money.(XXVII,T1575) The money was in deposit bags that also contained checks, credit card slips, deposit slips, and a pick-up receipt.(XXVII,T1575)

During this period of time the cashier was ringing the bell for assistance.(XXVII,T1576) Ms. Weber told the man she needed to go up front, but the man put her in the bathroom instead.(XXVII,T1577) Ms. Weber was made to lie on the floor.(XXVII,T1578) Ms. Weber heard the man rummaging around, then she heard the back door open and close.(XXVII,T1578) When the cashier called her name, Ms. Weber believed it was safe to get up, so she ran to the

front of the store.(XXVII,T1579)

Sgt. William Kevin Smith was assisting in the execution of a search warrant at the home of Willie Peterson at 3963 Burlington Ave. on October 20, 1998.(XVII,T1557) Sgt. Smith searched behind a refrigerator in the garage.(XVII,T1557) He found a green bank bag with a zippered top.(XVII,T1558) The bag contained a pellet gun and a white plastic bag from McCrory's.(XXVII,T1558) Inside the white McCrory's bag were approximately 30 checks and store receipts, a bank deposit slip for Nations Bank, and a receipt dated August 29, 1998, and a $20 bill.(XVII,T1563-1566) Ms. Weber identified a green Nations bag, two red bags, and a check-out bag as being from McCrory's.(XXVII,T1582) Ms. Weber also identified a cash register receipt that might come from a refund and some credit card slips dated August 29, 1998 and numerous checks made out to McCrory's.(XXVII,T1584-87)

CST Melinda Clayton processed dozens of paper items recovered from behind the refrigerator at Willie Peterson's house for fingerprints.(XXVII,T1594;1600) She found prints on a cash register receipt and a check that were compared to the known prints of Mr. Peterson.(XXVII,T1596-97) Mr. Peterson's left middle fingerprint was on the receipt and

his right palm print was on the check.(XXVII,T1598) Ms. Clayton could not determine the circumstances under which the prints were left.(XXVII,T1600)

Sgt. James Griffis was investigating a robbery in October 1998. He obtained a photograph of Mr. Peterson and placed it in a photopak at position three in the top right corner.(XXIV,T1167-73) Sgt. Griffis showed the photopak to Ann Weber.(XXIV,T1170) Ms. Weber testified that it took a little bit, but she was able to make a selection.(XXVII,T1580) She initialed her selection on the top right and told the detective she was "90%" sure.(XXVII,T1580) Ms. Weber admitted it was dark at the time and she did not get a good look at the robber.(XXVII,T1589) She was not sure if he wore gloves.(XXVII,T1590)

Ms. Weber made an in-court identification of Mr. Peterson as the man who robbed her.(XXVII,T1588)

C. Penalty Phase Testimony

The defense entered into two stipulations which were published to the jury by the court: that Mr. Peterson was previously convicted of a violent felony and that at the time of the murder he was on life parole.(XVI,R2668-2673; 2677-2682) The State presented the following additional

testimony:

Dale Smithson testified that in April 1981 he was working at a Spur gas station in St. Petersburg.(XVI,R2684) Around midnight on April 30 Mr. Smithson was alone in the store and had just begun to close for the night.(XVI,R2688) Mr. Smithson had locked the front door and dimmed the lights.(XVI,R2689) He believed the store was empty. Mr. Smithson turned around and was confronted by a black man who pointed a gun in his face.(XVI,R2689) The man demanded money, so Mr. Smithson took the man to the cash register and showed him how to open it.(XVI,R2691) Mr. Smithson was then made to go to the back storage room and lay on the floor.(XVI,R2692) The man tied Mr. Smithson's hands behind his back with some rags.(XVI,R2692) The man left, then came back and pointed the gun at the back of Mr. Smithson's head and said there was not enough money.(XVI,R2693) The man took some money from Mr. Smithson's back pocket that belonged to the store and took Mr. Smithson's wallet.(XVI,R2694)

The Defense presented the following testimony:

Dr. Michael Maher, a psychiatrist, evaluated Mr. Peterson.(XVI,R2704) Dr. Maher opined that Mr. Peterson does have some capacity to conform his conduct to the

requirements of the law, but that capacity is substantially less than an average adult.(XVI,R2795) Dr. Maher testified that Mr. Peterson functions at the level of a 14 to 16 year old.(XVI,R2705) Mr. Peterson's inability to function as an adult is based on intellectual, academic, and psychological factors.(XVI,R2705) Dr. Maher noted that Mr. Peterson's school records first showed an indication of problems in academics and emotional/psychological development as early as second grade and those problems continued through school.(XVI,R2706) Mr. Peterson's employment history in low level, menial, highly structured jobs was consistent with the level of job a 14 to 16 year old could perform.(XVI,R2706-7) Mr. Peterson had a few minor disciplinary problems in jail, but he functions well in a highly structured, supervised, and controlled environment.(XVI,R2707) Mr. Peterson had served in the military, but did not do well.(XVI,R2711-12) Dr. Maher's opinion was based upon a mental status evaluation that did not include an IQ test.(XVI,R2709) Dr. Maher believed that Mr. Peterson suffered from antisocial personality disorder.(XVI,R2700)

Defense counsel objected to any cross-examination of Dr. Maher on the issue of whether or not Mr. Peterson

lacked remorse or had shown anything other than a "contemptuous" attitude toward the suffering of his victims.(XVI,R2713-2715;2725) The first objection was overruled, but a second sustained. (XVI,R2715;2725)

Dr. Linda McClain, a forensic psychologist, evaluated and tested Mr. Peterson.(XVI,R2741) She determined that he had a verbal IQ of 77, borderline range and performance IQ of 81, low-average range.(XVI,R2741) Mr. Peterson had tested into the low-average range at age 11 as well.(XVI,R 2743) Lowered IQ can create challenges to thinking and reasoning.(XVI,R1742) Mr. Peterson had a 2.0 grade point average when he finished high school.(XVI,R2752)

Linda Dyer is the classification supervisor for the Pinellas County Sheriff's Office.(XVI,R2753) Mr. Peterson had only one disciplinary report since the beginning of his incarceration on January 19, 2001.(XVI,R1754) This would be very unusual.(XVI,R2754) This is a good record.(XVI,R2755)

Annie Peterson is Mr. Peterson's mother.(XVI,R2758) Mr. Peterson grew up with she and her husband.(XVI,R2758) He attended school in Pinellas county.(XVI,R2758) Mr. Peterson had no problems in school.(XVI,R2759) After graduation he entered the military.(XVI,R2759) After two

years, he returned to Pinellas county and lived with her.(XVI,R2759) Mr. Peterson spent some time in prison, then returned home.(XVI,R2759) He then worked for Marriott Hotel.(XVI,R2759) Mr. Peterson worked at Marriott for 7 years.(XVI,R2760)

Laquanda Peterson is Mr. Peterson's niece.(XVI,R2764) They are very close, Mr. Peterson is more like a father to her.(XVI,R2765) Mr. Peterson would have birthday parties for her at the hotel and help her with her car.(XVI,R2765)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in admitting the extensive Williams Rule evidence in this case. The State introduced extensive and highly prejudicial of three other robberies. The collateral evidence was not sufficiently similar to be admissible to prove *modus operandi*/identity and not relevant or sufficiently similar to establish an intent to rob with a higher degree of violence than that inherent in most armed robberies. The volume, quality and nature of the collateral crime evidence became an impermissible feature of the trial that served only to establish the bad character of Mr. Peterson and propensity. The error was not harmless.

ISSUE II: Execution by lethal injection constitutes

cruel and unusual punishment under the Eighth Amendment to the United States Constitution under the current protocols established for execution in Florida and specifically through the use of the three drug chemical sequence utilized to bring death.

ISSUE III: The sentence of death is not proportionate in this case, as this is not the most aggravated or least mitigated of murders.

ISSUE IV: The trial court erred in failing to grant a mistrial or to grant a new penalty phase after the prosecutor presented inadmissible evidence of lack of remorse and then argued lack of remorse as a reason for the jury to recommend death. The error was not harmless as it clearly affected the recommendation of the jury.

ISSUE V: Florida's capital sentencing process is unconstitutional because judge rather than jury determines sentence. The Florida process is further flawed because the jury is not required to return a unanimous sentencing recommendation in order for a sentence of death to be imposed.

ISSUE VI: The existence of the prior violent felony aggravator does not circumvent the necessity of a jury finding as to each aggravating factor in capital proceed-

ings in order to satisfy constitutional requirements under Ring v. Arizona, 536 U.S. 584 (2002).

ISSUE VII: The standard penalty phase jury instructions are unconstitutional because they fail to give appropriate guidance to the jury's determination regarding the analysis of mitigation and impermissibly shift the burden of proof to the defendant to establish that a life sentence should be imposed by requiring him to prove that mitigation outweighs the aggravation.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN PERMITTING EXTENSIVE EVIDENCE OF THREE PRIOR CRIMES TO BE ADMITTED IN THIS CASE WHERE THE EVIDENCE DID NOT HAVE SUFFICIENT SIMILARITY TO PROVE IDENTITY, WHERE THE PREJUDICIAL IMPACT OF THIS EVIDENCE FAR OUTWEIGHED THE PROBATIVE VALUE AND IMPERMISSIBLY BECAME A FEATURE OF THIS TRIAL.

The jury impaneled in this case to decide whether or not Mr. Peterson was the person who killed John Cardoso in the Big Lots store on December 24, 1997. Over the objections of defense counsel, the State was permitted to introduce under the Williams Rule evidence of collateral offenses pursuant to Fla. Stat.§90.404(2) of three other

robberies alleged to involve Mr. Peterson. The introduction of the voluminous collateral crime evidence was error for three reasons: first, the evidence did not meet the similarity standards for admissibility to prove MO/identity; second, the collateral evidence was not relevant to establish increased violence and not sufficiently similar; and third, the probative value of the collateral crime evidence was far outweighed by its prejudicial impact causing it to become an impermissible feature of this trial.

While often characterized as a rule of exclusion, Williams v. State, 110 So.2d 654 (Fla. 1959), is a rule of admissibility which permits evidence to be admitted unless it is prohibited by a specific rule of exclusion, such as relevance. The relevancy of Williams Rule evidence, because it points to the commission of separate crimes, should be cautiously scrutinized before being held admissible. Zack v. State, 753 So.2d 9, 16 (Fla. 2000). Even relevant evidence is not automatically admissible- relevant evidence may be excluded under §90.403, Fla. Stat.(2006) if it's probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, or needless presentation of cumulative evidence. Taylor v. State, 855

So.2d 1, 21 (Fla. 2003), *cert denied*, 124 S.Ct. 1605 (2004); LaMarca v. State, 785 So.2d 1209, 1212 (Fla. 2001); Henry v. State, 574 So.2d 73, 75 (Fla. 1991). The collateral crime evidence may not become a feature of the trial. Whether or not the collateral evidence becomes a feature of the trial is not determined solely on the quantity of evidence, but also on the quality and nature of the collateral crimes evidence in relation to the issues to be proven. Conde v. State, 860 So. 2d 930 (Fla. 2003), *cert. denied*, 124 S.Ct. 1885 (2004). A similar offense becomes a feature of the trial instead of an incident when it can be said that the similar fact evidence has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes. Bush v. State, 690 So.2d 670, 673 (Fla. 1st DCA 1997).

The standard of review on appeal is whether or not the trial court abused her discretion in admitting the evidence related to the three other robberies and whether or not the error was harmless. Steverson v. State, 695 So.2d 687, 688-689 (Fla. 1997); Carillo v. State, 727 So.2d 1047 (Fla. 2nd DCA 1999).

The defense first sought to prohibit the State from

presenting evidence of collateral crimes by filing a Motion in Limine as to Williams Rule Evidence on January 13, 2004.(IX,R1694) The State filed a Memorandum of Law in response.(X,R1716-1814) In the Memorandum, the State identified seven prior offenses which included the three offenses ultimately used at trial.(X,R1718-1719) In the Memorandum, the State argued that the collateral evidence met the striking similarity requirement and was admissible to prove a common modus operandi(MO)and therefore, identity (X,R1724-1729), to corroborate the testimony of potential witness Darryl Sermons (X,R1729-1730), to prove intent(X,R1730-1731), and to disprove an alibi defense built around the testimony of Mr. Peterson's sister(X,R1733). The trial court held a hearing on the Williams Rule testimony on April 5, 2004.(XIV,T2375) The State advanced the identical arguments in favor of admissibility.(XIV,T2415,2418,2420) The defense argued that the similarities among the seven offenses were not sufficiently similar to meet admissibility standards to prove identity.(XIV,T2423) The trial court excluded the 1981 offense. The trial court ruled that the remaining six cases could be used as collateral crime evidence to prove MO(XIV,T2439), to prove intent/motive that the defendant

used a consistent threat of more violence over what was necessary to commit a robbery (XIV,T2440), and to corroborate witness Sermons(XIV,T2440). The trial court did not rule on the alibi question.

The State had argued to the trial court that the collateral evidence was necessary to corroborate the testimony of potential state witness Darryl Sermons, the alleged co-perpetrator and driver of the getaway vehicle. (X,R1729-1730) This basis for admissibility is moot, as Sermons was not called as a witness at trial. Also moot is the State's claim that the collateral evidence of the Family Dollar store was of enhanced necessity to defeat the alibi testimony of the Mr. Peterson's sister.(X,R1733) No alibi defense was presented at trial.

At trial the State ultimately presented evidence of three prior offenses: Family Dollar/Feb. 1997; PharMor/May 1998, and McCrory's/August 1998. The trial court erred in permitting the State to present extensive and exhaustive testimony of these collateral offenses. The three offenses did not meet the similarity required for admissibility as to MO, the prejudicial impact far outweighed the probative value of the evidence, and it impermissibly became a feature of the trial.

A. Insufficient Similarity to Prove Identity

The State's primary basis for the admissibility of the collateral crime evidence was to establish identity through *modus operandi*, or MO. The State's evidence in this case was relatively weak compared to evidence present in the collateral crime cases. In this case the State had no physical evidence to connect Mr. Peterson to the Big Lots store-no fingerprints, no DNA, no surveillance tape. Of the four witnesses who were in the store on the night of the robbery/homicide, two could not identify anyone. The two identifications, from Karen Smith and Robert Davis, were weak, at best. Karen Smith first failed to make any identification. Her subsequent identification came months later after viewing Mr. Peterson's picture on television. Robert Davis made three attempts at identification before selecting Mr. Peterson in a photopak, but could not identify Mr. Peterson in court despite him being the only African-American present at the defense table. No proceeds from the robbery were found in the possession of Mr. Peterson or in the search of his father's house or his sister's house. Thus, in an effort to strengthen a weak case, the State chose to use collateral crime evidence in other cases where Mr. Peterson was connected to the crime

with DNA or fingerprints by arguing that the fact patterns between those three cases and this case were strikingly similar.

In order to admit evidence of collateral crimes to prove identity/*modus operandi* [MO], the MO must be so unusual that it is reasonable to conclude that the same person committed both crimes. There must be a unique pattern that is strikingly similar. Gibson v. State, 661 So.2d 288, 292 (Fla. 1995); Peek v. State, 488 So.2d 52, 55 (Fla. 2nd DCA 1986). This Court has recognized that general similarity between the collateral offenses and the charged offense is not enough- there must be unique and special characteristics that inexplicably point to the defendant as being the same perpetrator. McClean v. State, 934 So.2d 1248 (Fla. 2006). The State's contrary argument to the trial court is not supported by the decisions of Florida's appellate courts.(X,R1722)

The factors identified by the State as being as sufficiently unique to justify admissibility of the collateral crime evidence present in all cases were: use of a weapon, use of a mask, and remaining in the store after closing. It should be noted that although a gun was alleged to have been used in each collateral case and the

instant case, the description of the gun varied from witness to witness and no gun was ever found linking Mr. Peterson to this offense. The State also argued that other factors present in some cases, but not all cases should be considered as well: occasional tying up of the victims [Family Dollar, Phar-Mor], occasional requiring victims to lie on floor [Family Dollar, Phar-Mor}, occasional use of profanity [Family Dollar, McCrory's], occasional directing the victims not to look at him, occasional use of gloves[Phar-Mor], occasional requirement that all employees be accounted for[Family Dollar, Phar-Mor].

The use of a gun and a mask are clearly not unique in robberies- they are indicative of a typical robbery. See, for example, Gray v. State, 873 So.2d 374, 377 (Fla. 2nd DCA 2004); Denson v. State, 745 So.2d 1093, 1094 (Fla. 4th DCA 1999); Chambers v. State, 692 So.2d 210, 211-212 (Fla. 5th DCA 1997).

The entry of a store just before closing or remaining in the store to accomplish a robbery is not unique. It appears to minimize the chance of detection. In both State v. Ackers, 599 So.2d 222 (Fla. 5th DCA 1992) and Black v. State, 630 So.2d 609 (Fla. 1st DCA 1993), the defendants either entered or remained in the store just after it

closed. The District Courts found the collateral crime evidence to be admission in both Ackers and Black, but that admissibility was premised upon significant factors not present in this case. For example, in Ackers the weapon of choice for both the defendants included a broomstick, hardly a common weapon, the firing of guns in both the collateral offense and charged offense, and the same getaway car present in both. Similarly, in Black, the defendant wore the identical clothes, gloves, and mask in each robbery and always disabled the telephone.

The three behaviors that occurred in the all the collateral crimes and this crime simply do not contain the strikingly similar features, special characteristics, or factors so unique to constitute the fingerprint similarity necessary for admission. See, Gray, 873 So.2d 377, supra.; Fitzsimmons v. State, 935 So.2d 125 (Fla. 2nd DCA 2006).

The remaining characteristics that were identified as being in present in some, but not all of the collateral offenses and this offense do not support admissibility either. They, as well, are not sufficiently unique and are not common to all the offenses.

Obviously, the use of profanity is hardly unique, but has become common parlance in our culture. Telling victims

to lie down or tying their hands is not unique. The use of gloves during a robbery is not unusual or unique. Thompson v. State, 615 So.2d 737, 744 (Fla. 1st DCA 1993).

What must also be considered in the dissimilarities between the each of the collateral crimes and the charged offense. In the Family Dollar offense, the two female victims were sexually assaulted. The female victims in this case were not sexually assaulted, nor were they in any other case. The clothing of the perpetrator was never the same. Again, the description of the gun varied from reddish [McCrory's] to black [Phar-Mor] to chrome [Family Dollar]. Profanity was not used in all cases. The victims were not bound in all cases.

The trial court's decision to admit the collateral crime evidence because it was relevant to prove identity was error, where the evidence failed to establish a sufficiently unique pattern that rises to the level of a fingerprint. The trial court's ruling that the collateral evidence met this standard was an abuse of discretion and is not supported by the evidence.

B. The collateral crime evidence was not sufficiently similar or relevant to establish intent or motive for additional violence.

The second basis for the trial court's decision to admit the collateral crime evidence was the State's position that it was relevant to prove intent or motive for violence beyond that necessary to accomplish a robbery.(X,R1730-1732) Case law suggests that the strict similarity standard applicable to identity applies to other uses as well. Edmond v. State, 521 So.2d 269 (Fla. 2nd DCA 1988).

The question of intent was not at issue in this case. Obviously, the evidence clearly established the intent of the perpetrator was to obtain money. The use of Williams rule evidence to establish intent is appropriate in cases wherein the defense is one where the defendant claims that the consequence of his behavior was not intended. For example, in Randall v. State, 760 So.2d 892 (Fla. 2000), the defendant was charged with the choking/strangulation deaths of two prostitutes. Two ex-wives were permitted to testify that the defendant had also choked them during sexual intercourse because the defendant apparently gained sexual gratification from choking. The evidence of choking was sufficiently similar for purposes of identity, but also was probative of motive [sexual gratification by choking] in a case where consensual or accidental death was at

issue. Similarly, in Heuring v. State, 513 So.2d 122 (Fla. 1987), the defendant had argued that the choking of the decedent was accidental. Evidence of the defendant's prior use of choking in sexual situations was admitted to show his intent and absence of mistake.

The issue of the level of violence utilized in the case to carry out a robbery is not so unusual as to require the use of extensive collateral crime evidence. To enter a place of business, demand money with a weapon, and order the occupants of the business to lie down or tie them up to prevent immediate detection is certainly not outside the norm. The fact pattern is strikingly similar to how most convenience store/discount store robberies occur. The trial court's determination that the level of violence in this case as directed to the other occupants of the store is not supported by the facts.

B. The probative value of the collateral crime was far outweighed by its prejudicial impact and the collateral crime evidence became an impermissible feature of the trial.

Even relevant evidence, and especially that which is collateral in nature, may be excluded from the jury's consideration under §90.403.1, Fla. Stat. (2007) if the

probative value is exceeded by the danger of prejudice or confusion to the jury inherent in the admission of the evidence. Coverdale v. State, 940 So.2d 558 (Fla. 2nd DCA 2006); Steverson v. State, 695 So.2d 687, 688-689 (Fla. 1997). All relevant evidence has obvious prejudice when admitted at trial- unfair prejudice arises when the evidence is so prejudicial that it should be deemed unlawful. Wournos v. State, 644 So.2d 1000, 1007 (Fla. 1994).

For example, in Devers-Lopez v. State, 710 So.2d 720 (Fla. 4th DCA 1998), the Fourth District Court of Appeal reversed the defendant's conviction for driving under the influence of alcohol or a prescription drug after the State improperly introduced evidence that illegal drugs were found in the blood stream of the defendant and an expert testified that those substances would have no effect of the defendant's driving.

This Court agreed in Taylor v. State, 855 So.2d 1 (Fla. 2003), that the trial court erred in permitting evidence that the defendant had falsified a credit application just before the homicide. The State contended that this evidence was relevant to establish that the unemployed defendant had a motive to kill because he would

need money to pay for the car he had purchased while unemployed. This Court determined the error was harmless, due to the relatively minor role the evidence played in the trial. In this case, the evidence of the three other robberies did not play a minor role in the case- it was the main attraction. Mr. Peterson was unduly harmed by the introduction of evidence whose greatest value was to persuade the jury that if he had committed three other robberies, he must have committed the present robbery that resulted in a death.

The collateral crime evidence was also inadmissible because it impermissibly became a feature of the trial. As previously noted, it is not only the quantity of evidence that is measured, but also the quality and nature of the evidence. Conde v. State, 860 So.2d at 930, supra. An analysis of the quantity, quality, and nature of the collateral crime evidence admitted in this case demonstrates that this trial was far more focused on the collateral crime evidence and it became a feature of the trial over that of the charged crime itself.

The sheer quantity of evidence introduced as collateral crime evidence is cause for reversal. In this case the State called 11 witnesses, which included one

stipulation and the testimony of the medical examiner. The State called an astounding 22 witnesses regarding the collateral crimes. The number of witnesses and the amount of time devoted to the collateral crimes impermissibly "consumed more trial time and space than the evidence of the actual crime charged." Sutherland v. State, 849 So.2d 1107, 1108 (Fla. 4th DCA 2003)[reversing defendant's conviction for family sexual battery on child under 12 due to voluminous evidence of similar sexual acts committed when the victim was in her late teens and adult years]; Sexton v. State, 697 So.2d 833 (Fla. 1997), *aff'd after remand on other grounds*, 775 So.2d 923 (Fla. 2000)[conviction for capital murder reversed after erroneous admission of copious evidence from five collateral crime witnesses]. This Court clearly considers the quantity of collateral crime evidence as one factor in determining whether or not it has become a feature of the trial. Wilson v. State, 330 So.2d 457 (Fla. 1976)[finding that 600 pages of collateral crime evidence pushed the outer boundaries of what is permissible before the prejudicial impact exceeds the probative value].

The quality and nature of the collateral crime evidence is also considered in the analysis of whether or

not it impermissibly becomes a feature of the trial. In the charged offense the State offered the testimony of two victims, the stipulation of a third, the medical examiner, and a projectile analyst from FDLE who identified only the caliber of the bullet, two officers who responded to the scene, the crime scene technician, and one detective. The State did not present any expert witnesses who testified regarding complicated scientific evidence or people familiar with Mr. Peterson who identified him from video evidence.

In contrast, the State presented significantly more damaging evidence of the collateral crimes. The State presented testimony of both PCR DNA and mtDNA testing from four witnesses, fingerprint identification and analysis, and shoe print analysis from several witnesses, and the testimony of three persons who knew Mr. Peterson and identified him as being visible on the security tape taken from Phar-Mor. All of the physical evidence presented in this case except the bullet recovered at the autopsy related to the collateral crime evidence- all the money, receipts, surveillance tapes, clothing, shoes, fingerprints, and shoeprints. The State clearly utilized the collateral crime evidence to establish bad character

and, more egregiously, propensity. The prejudicial impact of the voluminous collateral crime evidence far outweighed the probative value of this evidence. The conviction in this case was obtained by DNA evidence and identification testimony from other crimes, not from the evidence related solely to what occurred at Big Lots.

This Court has held that the admission of collateral crime evidence "is presumed harmful error because of the danger that the jury will take the bad character or propensity to commit crime thus demonstrated as evidence of guilt of the crime charged." Robertson v. State, 829 So.2d 901, 913-914, quoting, Castro v. State, 547 So.2d 111, 115 (Fla. 1989). The State, as the beneficiary of the error, bears the burden to establish that it did not affect the verdict. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The State cannot meet their burden in this case. As argued above, the collateral evidence was extensive, thoroughly permeated the entire trial, was far more persuasive than the evidence presented in the actual charged offense and heavily relied upon by the State in the closing argument.(XXVII,T1681-1691) The admission of the collateral crime evidence undoubtedly influenced the verdict in this case.

ISSUE II

DEATH BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Florida currently uses a system of lethal injection, whose protocols have been presented to this court by the States as an attachment to the pleadings in Rutherford v. Crist, 945 So. 2d 1113 (Fla. 2006) and previously published by this Court in Sims v. State, 754 So.2d 657 (Fla. 2000). Following a moratorium on executions by former Governor Jeb Bush, the current protocol for executions in Florida can be found in the Final Report of the Governor's Commission on Administration of Lethal Injection issued May 9, 2007. The combination of chemical agents as reported by these sources which are utilized in the lethal injection process by the State of Florida cause undue pain and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The lethal injection process is further flawed due to the failure of DOC to implement and use of an appropriate protocol and trained medical personnel further renders the Florida lethal injection system unconstitutional.

The Eighth Amendment prohibits the "unnecessary and

wanton infliction of pain". Gregg v. Georgia, 428 U.S. 153, 173 (1976), (citing Furman v. Georgia, 408 U.S. 238, 392 (1972)). The United States Supreme Court has long held that the protections of the Eighth Amendment protect prisoners from "the gratuitous infliction of suffering". Gregg, 428 U.S. at 183[citing Wilkerson v. Utah, 99 U.S. 130, 135-36(1878) and In Re: Kemmler, 136 U.S. 436, 437 (1980)]. In the capital punishment context, when the suffering inflicted in executing a condemned prisoner is caused by procedures involving something more "than the mere extinguishment of life", the Eighth Amendment's prohibition against cruel and unusual punishment is implicated. See, Furman v. Georgia, 408 U.S. 238, 265 (1972)[quoting Kemmler, 136 U.S. at 447].

The Florida method of execution as set forth in the Final Report of the Governor's Commission on Administration of Lethal Injection violates these constitutional principles. Florida's method of execution by lethal injection is exceedingly similar to procedures that have been found to violate the Eighth Amendment or have raised serious questions as to the three drug protocol in five other states- California, Missouri, Oklahoma, North Carolina and Tennessee. On September 19, 2007, Judge

Aleta A. Trauger of the United States District Court for the Middle District of Tennessee, Nashville Division, entered an order in the case of Harbison v. Little, Case No. 3:06-1206, which enjoined the State of Tennessee from carrying out the execution of Mr. Harbison scheduled for September 26, 2007, due to her finding that the Tennessee method of lethal injection constituted cruel and unusual punishment. Judge Trauger extensively outlined current research and evidence submitted by the Protocol Committee appointed by the governor of Tennessee to review the lethal injection protocol, including the drugs administered and the method of administration, the training and experience of the execution team, and testimony from the medical and scientific communities. Judge Trauger noted that evidence had been submitted to establish that the three drug protocol carried the risk of a most violent, terrifying, and excruciating form of death. See also, Morales v. Tilton, 465 F. Supp. 2d 972 (N.D.Cal.2006), 2006 WL 335437,(finding that the three chemical sequence raises "substantial questions" that the condemned would be subjected to "an undue risk of extreme pain"); Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 U.S. Dist LEXIS 42949 (W.D. Mo. June 26, 2006), *rev'd*, 487 F.3D 1072 (8th Cir.

2007), Brown v. Beck, No.5:06-CT-3018, 2006 U.S. Cist. LEXIS 60084 at *23 (E.D.N.C., April 7, 2006), *aff'd* 445 F.3d 752 (4th Cir. 2006)("serious questions have been raised by the evidence concerning the effect of the current execution protocol" and "if the alleged deficiencies do, in fact, result in inadequate anesthesia prior to execution, there is no dispute that the plaintiff will suffer excruciating pain") and Anderson v. Evans, No. Civ.05-8-0825-F, 2006 WL 38903,(W.D. Okla. January 11, 2006)(accepting in its entirety a Magistrate Judge's report holding that death sentenced inmates state a valid claim that Oklahoma's administration of the same three chemical sequence for lethal injection "creates an excessive risk of substantial injury and pain" under the Eighth Amendment).

The United States Supreme Court accepted jurisdiction on September 25, 2007, in Blaze, et.al v. Rees, et. al., No. 07-5439. Blaze arises from several Kentucky inmates' challenge to the three-drug protocol lethal injection process in Kentucky that is also similar to the Florida protocol. Briefs of the parties are presently due on December 28, 2007.

It is respectfully urged by the Appellant that this Court closely consider the findings of the U.S. District

Courts and also reject the lethal injection protocol currently utilized in Florida as a violation of the Eighth Amendment.

ISSUE III

THE SENTENCE OF DEATH IS DISPROPORTIONATE

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 conducted by this Court. Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998). This review is conducted by this Court considering the circumstances in the case before it as compared to other cases in which the death penalty has been imposed in order to ensure uniformity in the application of the death penalty. Urbin, Ibid.

In performing this analysis, this Court has declined to engage in the reweighing of the mitigating factors 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. This standard is not met in this case.

While three aggravators were found, proportionality

review is not simply a mathematical totaling of the number of aggravators against the number of mitigators. It is important to consider what aggravating factors are absent compared to other cases because death is reserved for only the most aggravated of cases. Mr. Peterson does not argue that his case is without aggravation. Mr. Peterson stipulated that he was on life parole at the time of the offense and that he had a significant prior record. The third aggravator, that this murder occurred in the commission of a felony is present in virtually all cases and does not serve to narrow the class of death penalty eligible defendants.

In analyzing the aggravation in this case this Court should focus on the aggravators that are absent. The death in this case occurred from a single gunshot wound to the back. There was no evidence presented about the circumstances surrounding the shooting, just speculation from the prosecutor. The medical examiner could not substantiate a struggle or the presence of defensive wounds. Notably absent in this case are the two aggravators most indicative of supporting a death sentence because of the brutality that must be necessary in order for them to exist- HAC and CCP. The absence of these most

offensive aggravators suggests that this is not among the most aggravated of first-degree murders. See, Larkins v. State, 539 So.2d 90, 95 (Fla. 1999).

The second part of the proportionality equation shifts focus to the mitigation present in a case. Mr. Peterson submits that his case is not among the least mitigated of first-degree murders. The focus on the mitigating aspects of a defendant is not intended to diminish the victim or the death. It is a tool that this Court has determined to be necessary in order to meet minimal constitutional standards for the use of capital punishment.

In mitigation the trial court rejected the defense argument that Mr. Peterson's ability to conform his conduct to the requirements of the law or to appreciate the criminality of his actions did not rise to the level of a statutory mitigator pursuant to §921.141(6)(f), Fla. Stat. 2005, but the trial court did consider the facts of Drs. Maher and McClain as non-statutory mitigation. (XII,R2341-2343)

The trial court found that Mr. Peterson's age when coupled with his emotional immaturity was entitled to be considered, but given little weight.(XIII,T2343)

The trial court considered Dr. Maher's testimony about

the challenges he faced stemming from a low IQ and racial inequality. The judge further considered the testimony of Mr. Peterson's mother that he was raised in a poor but non-abusive environment.(XIII,R2344-45) The trial court found that Mr. Peterson's upbringing was not mitigating, but that his limited mental impairments was entitled to little weight.

The trial court considered the fact that Mr. Peterson had been steadily employed with Marriott for seven years prior to the crime and accorded this factor some weight.

The court gave little weight to Mr. Peterson's ability to conform to a prison environment and remain there with relatively little incident.(XIII,R2345)

This Court routinely evaluates cases with far less mitigation than present here. For example, in Shellito v. State, 701 So.2d 837 (Fla. 1997) and Moore v. State, 701 So.2d 545 (Fla. 1997), the only significant mitigation was the defendant's age. In Melton v. State, 638 So.2d 927 (Fla. 1994), the mitigation established only that the defendant had good jail conduct and a difficult family background. Mr. Peterson's case presents more mitigation than Melton.

In Terry v. State, 668 So.2d 954 (Fla. 1996), this

Court reversed a sentence of death imposed where the defendant had shot the victim during a robbery of a gas station. Two aggravating factors-pecuniary gain and prior violent felony were present. The trial court rejected all mitigation, despite evidence of poverty/deprivation, positive family relationships, and proportionality. In reversing for a life sentence, this Court found the murder to be deplorable, but that it did not fall into the category of the most aggravated and least mitigated. Under Terry, this Court should find that death is not a proportional penalty in this case.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR MISTRIAL AND FOR A NEW PENALTY PHASE DUE TO THE IMPROPER PRESENTATION BY THE PROSECUTOR OF TESTIMONY AND ARGUMENT THAT THE DEFENDANT HAD NO REMORSE FOR THE VICTIMS OR THE CRIMES.

Defense counsel told the jury in his penalty phase opening statement that they would hear evidence from a psychologist and a psychiatrist who examined Mr. Peterson so they would have an idea of what he was like mentally and emotionally.(XVI,T2700) The defense presented the testimony of Dr. Maher, who opined that Mr. Peterson had some ability

to conform his conduct to the requirements of the law, but that capacity was less than an average adult and more like a teenager.(XVI,T2705) Dr. Maher was not asked by the defense to provide a diagnosis for Mr. Peterson and no questions were asked regarding his capacity to feel, empathize, or exhibit remorse during the entire direct examination.(XVI,T2701-2708)

On cross-examination the State questioned Dr. Maher about antisocial personality disorder and testing that he had performed on Mr. Peterson.(XVI,T2709) The State asked Dr. Maher if Mr. Peterson was a "sociopath".(XVI,T2710) After Dr. Maher answered yes, the State proceeded to elicit testimony that persons with antisocial personality disorder are characterized by a pervasive pattern of disregard for others from Dr. Maher.(XVI,T2712) The State elicited testimony that those persons are "callous or indifferent or even contemptuous of other people's feelings, rights, including the suffering of the victim's they commit crimes upon." (XVlT2712) Dr. Maher opined that Mr. Peterson was capable of some feelings for people in his life, but he exhibited a pattern consistent with the prosecutor's description.(XVI,T2713) The prosecutor next asked Dr. Maher if he saw "anything to indicate that he [Mr.

Peterson] wasn't completely contemptuous of the suffering inflicted on the victims."(XVI,T2713) Defense counsel objected, arguing the prosecutor was impermissibly presenting evidence of lack of remorse.(XVI,T2714) While acknowledging the prosecutor was getting into a "tricky area", the trial court assured the prosecutor that she did not think he would try to argue lack of remorse as an aggravator, but was "trying to show is not to be a mitigator". (XVI,T2714 ln.17-19) The court permitted the state to continue forward.(XVI,T2715) Dr. Maher was asked again if he saw any evidence that Mr. Peterson treated his victims in any way that would suggest he was not contemptuous of them. Dr. Maher responded yes, because Mr. Peterson had treated him with respect.(XVI,T2716) The prosecutor asked Dr. Maher if he asked Mr. Peterson how he felt about the victims of his crimes.(XVI,T2717) Dr. Maher responded that Mr. Peterson denied he was engaged in the crimes, but that he doesn't want to see anyone hurt- a response Dr. Maher put little weight on.(XVI,T2717)

The prosecutor then asked Dr. Maher if the primary characteristic of an antisocial personality disorder is "lack of conscience". (XVI,T2717) Dr. Maher responded that it was a little more complicated, but people with anti-

social personality disorder experience less guilt and regret about the things they do.(XVI,T2718) Dr. Maher also testified after continual questioning by the prosecutor about Mr. Peterson's ability to empathize with the suffering of his victims or whether he had any information if Mr. Peterson was contemptuous of the feeling of his victims that he could not say with absolute certainty whether or not Mr. Peterson felt anything or was able to appreciate the horror he inflicted or what his feelings for the victims were.(XVI,T2722-2723) Dr. Maher opined that Mr. Peterson had a very limited ability to function on the same level as a normal human being and have empathy for people involved in relationships with him on a limited basis.(XVI,T2725) Again defense counsel objected on the same basis and the objection was sustained.(XVI,T2725)

Prior to penalty phase closing arguments, the trial judge cautioned the prosecutor about arguing a lack of remorse to the jury.(XVI,T2777) The court noted that a lack of remorse would only be permissible argument if the defense had presented remorse as a mitigator.(XVI,T2778) The trial court stated that she had not heard remorse offered as a mitigator by the defense.(XVI,T2778) After response from the state, the court told the state they

would be able to argue that the defendant's lack of ability to empathize with the victims or to understand the suffering he inflicted on them would be permitted argument to rebut the mitigating factor that Mr. Peterson's ability to appreciate the criminality of his actions was somewhat impaired and the court said that argument would be permissible.(XVI,T2780)

The State argued that Mr. Peterson's intent was to terrorize his victims.(XVI,T2791) The State argued that Mr. Peterson's capacity to appreciate the criminality of his actions was not impaired as demonstrated by the level of planning he engaged in to carry out the robberies and murder, but "…His concern over the victims was."(XVI,T2794)[emphasis supplied] The State asked the jury what the mitigator substantially impaired really meant- "Does the fact that a person who has the capacity to care for other people, who can choose who to love and who to interact with, has no regard for his victims, has not empathy for his victims, does that mean he can't appreciate that it's criminal or that he can't conform his acts to the requirements of the law?" (XVI,T2794-2795) The State argued that Mr. Peterson had a high enough IQ and had been born with the capacity to be a good person and to not hurt

someone-values and morals were not indicative of IQ.(XVI,T2797) The State argued that “this was a man who doesn’t care. He doesn’t care about the victims. He doesn’t care about the suffering of the—or he doesn’t care about Mr. Cardoso.’(XVI,T2799)

After the conclusion of penalty phase and the rendition of the sentencing recommendation, an article appeared in the St. Petersburg Times.(XII,R2156-57) The article contained the comments of the foreperson, Necole Tunsil. The interview reads: ”Tunsil, the jury forewoman, said that Peterson’s past crimes played a part in the jury decision. She wondered if there would have been another result had Peterson taken the stand and said he was sorry. “I think he could have gotten up and said something.’”(XII,R2158) Defense counsel’s motion specifically referenced the arguments of the State identified in this Brief.(XII,R2154) The State’s response mirrored that made to the trial court and argued against a juror interview.(XII,TR159-2162)

The trial court conducted a hearing on the motion on August 12, 2005.(XVI,T2833) Defense counsel argued that the comments of the foreperson substantiated a limited interview of the jurors on a limited basis to determine if

there was an overt act by a juror/jurors to discuss whether or not Mr. Peterson should have testified and whether he should have expressed remorse.(XIV,R2834) The State argued that the foreperson's comments were just speculation that the jury would have weighed things differently if there was other evidence.(XVI,R2837) The trial court denied the request for interviews, but ordered transcripts to review the prosecutorial misconduct issue.

Mr. Peterson filed a Memorandum In Support of Imposition of Life Sentence on September 21, 2005 which objected to the prosecutor's impermissible use of remorse as an aggravator and improper influence on the jury recommendation.(XII,R2169-2176) The trial court addressed the issue at the September 23, 2005 Spencer hearing.(XVII,T2852) The court agreed to re-look at the issue after the State objected to the form of the defense memorandum.(XVII,R2856-59) The trial court further stated in the written sentencing order that she did not believe that the jury heard improper evidence or argument of lack of remorse.(XIII,R2347-2349)

The issue of prosecutorial misconduct on the issue of remorse was again addressed as having tainted the entire penalty phase proceeding in Mr. Peterson's Motion Regarding

Penalty Phase Proceedings filed on September 30, 2005.(XII,R2177-2180) The defense asserted that the prosecutorial misconduct in presenting evidence of lack of remorse and then arguing such to the jury vitiated the fairness of the penalty phase and sought either a new penalty phase or a life sentence.(XII,T2177)

Mr. Peterson again raised the error in his Memorandum of Law In Support of Imposition of Life Sentence. (XII,R2169) The trial court considered the issue on November 7, 2005.(XVII,T2870) Following argument, the court ruled in favor of the State.(XVII,T2882-2884)

The standard of appellate review is whether or not the trial court abused his discretion in permitting the State to introduce evidence of lack of remorse and that determination will not be disturbed on appeal absent a clear abuse of that discretion. Tanzi v. State, 32 Fla. Law Weekly S223 (Fla. May 10, 2007). If this Court determines that the trial court abused his discretion in the admission of the evidence of lack of remorse, it must then be determined whether or not the error was harmless. Wike v. State, 596 So.2d 1020 (Fla. 1992). Under the harmless error doctrine, the State as the beneficiary of the error must demonstrate that there is no reasonable possibility

that the error contributed to the verdict or recommendation. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986)

Precedent from this Court clearly establishes that the State may not rely upon the lack of a defendant's remorse as an aggravating factor. Tanzi v. State, 32 Fla. Law Weekly at S225; Walton v. State, 847 So.2d 438, 451 (Fla. 2003). In perhaps the seminal case on this issue, this Court ruled in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983) that a "lack of remorse is not an aggravating factor" and that "lack of remorse should have no place in the consideration of aggravating factors." The jury's consideration of an unauthorized aggravating factor violates a defendant's Eighth Amendment right under the United States Constitution. Sochor v. Florida, 504 U.S. 527, 523 (1992). Thus, if the State used remorse as an aggravating factor as Mr. Peterson argues, that use was clearly error.

This Court has recognized the lack of remorse can often be disguised as a wolf in sheep's clothing by the prosecutor's choice of words other than the word remorse. For example, in Sireci v. State, 587 So.2d 450 (Fla. 1991), the prosecutions use of testimony from a witness that the

defendant was “proud” of his crime was an improper evidence of lack of remorse. In Hill v. State, 549 So.2d 179 (Fla. 1989), the prosecutor’s phrase “lack of emotion” was synonymous for lack of remorse. It is Mr. Peterson’s position while the prosecutor did not use the word remorse, his use of the phrases “lack of empathy”, “contemptuous toward his victims”, and his queries and arguments centered on the premise that Mr. Peterson acted with gross callousness and indifferent feeling toward the victims is synonymous with the improper term remorse. This position is supported by the defense argument to the trial court that the definitions contained in Random House Webster’s Dictionary, Ballentine (1993) and Roget’s New Millennium Thesaurus, 1st ed., Lexico Publishing Group, 2005, define the words similarly and have the same meaning.(XII,R2171-2;2179). The State clearly advanced arguments that were designed to demonstrate Mr. Peterson’s lack of remorse.

The prosecutor’s argument to the trial court that he was permitted to engage in this forbidden argument in order to rebut the defense mental health mitigator of impaired ability to conform conduct to the requirements of the law and that the defense had suggested that Mr. Peterson had a low IQ and lacked the capacity to understand the degree of

suffering he inflicted on his victims is disingenuous and not supported by the record.

The trial court recognized and advised the parties that the only time the State would be permitted to argue a lack of remorse would be if remorse had been argued as a mitigator. This is a correct statement of the law. See, Tanzi v. State, 32 Fla. Law Weekly S223, supra. The trial court specifically stated on the record during the state's cross-examination of Dr. Maher that the defense had not offered any evidence of remorse or made any attempt to present remorse as a mitigating factor. (XVI,T2778)

An examination of the testimony of Dr. Maher cannot support any argument that the defense attempted to use remorse as a mitigator. In the eight page direct examination of Dr. Maher the defense established Dr. Maher's credentials (XVI,T2702-04). The defense then asked Dr. Maher if, after interviewing Mr. Peterson, he had formed an opinion "about his capacity to conform his conduct to the requirements of the law and could you comment on that if you have.?(XVI,T2704) Dr. Maher responded that he felt Mr. Peterson "does have some capacity to conform his behavior to the requirements of the law, but that capacity is less than an average adult."

(XVI,T2705) It was Dr. Maher's opinion that Mr. Peterson functioned at the level of a mid teenager, age 14-16. His inability was beyond his voluntary or willful control. Dr. Maher testified this first started showing up in school in about second grade.(XVI,T2705) Dr. Maher believed that Mr. Peterson could function at the level of a mid teen, including holding a menial job and behaving fairly well in a structured environment.(XVI,T2706-07) At no point did the defense present evidence of Mr. Peterson's emotional capacity or contempt for others.

This Court has permitted the State to delve into a lack of remorse only is those situations where the defense has opened the door by relying upon remorse as a mitigator or by opening the door to that line of questioning by defense mitigation witnesses. For example, in Tanzi, this court permitted the State to present evidence of lack of remorse only after the defendant's own mental health expert had explained on direct examination that Tanzi had anti-social personality disorder and that the disorder could develop from childhood abuse and that lack of remorse, particularly in childhood, is a symptom of anti-social personality disorder. The State pointed out childhood medical reports indicating a lack of remorse by Tanzi and

argued that the lack of remorse was a symptom according to Tanzi's own expert. The defense in this case did not open the door in any fashion. The defense did not ask Dr. Maher if lack of remorse was a component of the mental disorder he believed Mr. Peterson suffered from- only the prosecutor did that.

This Court has specifically restricted the State from delving into the lack of remorse even when the defendant presents evidence of anti-social personality disorder. In Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993), this Court found that the trial court erred when it permitted the State to ask the defense mental health expert if persons who had anti-social personality disorder showed remorse. The prosecutor's actions in this case are indistinguishable from what was done in Atwater. The prosecutor's cross-examination of Dr. Maher on the issue of the personality characteristics of anti-social personality disorder regarding remorse were clearly not permitted by this Court. The trial court abused her discretion in permitting the prosecutor to question Dr. Maher in that regard and to then argue to the jury that Mr. Peterson treated his victims with contempt, had no empathy for them but could show love and empathy to his family, and

characterized him as a man "who doesn't care about the victims. He doesn't care about the suffering of the—or he doesn't care about Mr. Cardoso".(XVI,T2799)[Excerpt of State's Penalty Phase Closing]. See also, Robinson v. State, 520 So.2d 1 (Fla. 1988)(improper to permit evidence that a hallmark of antisocial personality disorder is indifference to the hurt of others or that the defendant doesn't care who he hurts after testimony was presented that defendant had anti-social personality disorder).

Mr. Peterson has demonstrated that the prosecutor's questioning of Dr. Maher and his closing argument to the jury were wholly improper and should not have been permitted by the trial court over the objections of defense counsel. The State now has the burden to demonstrate that there is no reasonable possibility that these errors did not contribute to the jury recommendation. The State cannot meet that burden.

The most telling evidence of the level to which the prosecutor's impermissible conduct tainted the jury recommendation comes from the mouth of the forewoman of the jury, Necole Tunsil. Ms. Tunsil's comments to the St. Petersburg Times acknowledged her belief that the jury vote might have gone differently had Mr. Peterson taken the

stand and said he was sorry. While it is impossible to determine how many other jurors might have felt this way or changed their votes absent the inflammatory evidence and repeated improper argument from the prosecutor, that cannot be determined because the prosecutor objected to any interview of the jurors and the trial court did not permit interviews on this narrow issue to be conducted. The jury recommendation in this case was 8-4. It is certainly reasonable that the recommendation would have been in favor of a life sentence if the prosecutor had not been permitted to infect the penalty phase with prejudicial evidence and argument. The trial court erred when she denied Mr. Peterson's overruled Mr. Peterson's objections while the errors were occurring and when she denied his request for a new penalty phase. This Court is requested to correct the error below and reverse for a new penalty phase.

ISSUE V

FLORIDA'S CAPTIAL SENTENCING PROCESS IS UNCONSITUTIONAL BECAUSE A JUDGE RATHER THAN JURY DETERMINES SENTENCE AND THE JURY RECOMMENDATION NEED NOT BE UNANIMOUS IN ORDER TO IMPOSE A DEATH SENTENCE.

Defense counsel attacked the constitutionality of Florida's capital sentencing statutes under the holding of

the United State Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002) during the lower court proceedings.(IX,R1635-1650;XV,T2584). In Ring the United States Supreme Court struck the death penalty statute in Arizona because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed, overruling its prior decision in Walton v. Arizona, 497 U.S.639 (1990). The Court held that Arizona's enumerated aggravating factors operated as the "functional equivalent of an element of a greater offense" under Apprendi v. New Jersey, 530 U.S. 46 (2000). Absent the presence of aggravating factors, a defendant in Arizona would not be exposed to the death penalty. Subsequent non-capital cases have adhered to the principle that sentencing aggravators require a specific jury determination as opposed to one performed solely by the court. Cunningham v. California, 127 S.Ct. 2842(2007); Blakely v. Washington, 124 S.Ct. 2531 (2004).

Similar to Arizona, Florida is a "hybrid state" and the aggravating circumstances are matters of substantive law which actually "define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 146, 149 (Fla. 1982). See also, State

v. Dixon, 283 So.2d 1,9 (Fla. 1973). Under Florida's statute the jury submits a penalty recommendation, but is not required to make specific findings as to the aggravating or mitigating factors. Nor is jury unanimity required as to which aggravator or mitigator is found. Jury unanimity is not required in order for a death sentence to be imposed.

Ultimately in Florida it is the judge who determines which aggravators and mitigators apply. It is the judge who is required to independently weigh the aggravating factors against the mitigating factors and thereupon determine whether to sentence the defendant to death. See, King v. State, 623 So.2d 486, 489 (Fla. 1993). While the jury recommendation is to be given great weight, this Court has said "We are not persuaded that the weight given the jury's advisory recommendation is so heavy as to make it the *de facto* sentence…Not withstanding the jury recommendation, the judge is required to make an independent determination, based on the aggravating and mitigating factors." Grossman v. State, 525 So.2d 833, 840 (Fla. 1988)(emphasis added).

Since, just as in Arizona, it is the Florida trial judge who makes the crucial findings of fact necessary to

impose a death sentence, it logically flows that Ring should apply to Florida. Mr. Peterson recognizes that his position has not been accepted by the plurality of this Court, a majority vote has yet to determine that Ring and Article I, Section 22 of the Florida constitution should not require unanimous jury findings and recommendation. But see, Rogers v. State, 957 So.2d 538 (Fla. 2007); Coday v. State, 946 So.2d 988 (Fla. 2006).

This Court recognized in State v. Steele, 921 So.2d 538 (Fla. 2005), that Florida is now the only state in the nation to permit a death sentence to be imposed where the jury may determine by a majority vote whether or not to recommend death. Despite urgings from this Court, the Florida legislature has not addresses the infirmity of the Florida statute. Both Justices Pariente and Anstead recognized in their dissenting opinions in Butler v. State, 842 So.2d 817 (Fla. 2003), that a unanimous recommendation of death prior to the imposition of a death sentence is necessary in order to meet the constitutional requirements of Ring. The reasoning of the dissent is that "the right to a jury trial in Florida would be senselessly diminished if the jury is required to return a unanimous verdict of every fact necessary to render a defendant eligible for the

death penalty with the exception of the final and irrevocable sanction of death." Butler, at 824.

This Court has little choice but to ensure that constitutional rights are protected and to hold that the protections of Ring apply to Florida. The failure of the Florida capital sentencing scheme to require specific jury findings and a unanimous jury recommendation as a prerequisite to the imposition of a death sentence violate the constitutional guarantees under the Fourteenth Amendment to the United States Constitution, the corresponding provisions of the Florida Constitution, the Sixth Amendment to the United States Constitutions and the corresponding provisions under the Florida Constitution, and Article I, Section 22 of the Florida Constitution.

ISSUE VI

THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATOR SHOULD NOT BAR THE APPLICATION OF RING V. ARIZONA TO THIS CASE

This Court has frequently used the existence of the defendant's prior violent felony aggravator as an alternative basis for rejecting challenges under Ring v. Arizona, 536 U.S. 584 (2002). This Court has concluded in majority opinions since 2003 that the constitutional requirements of Ring and Apprendi v. New Jersey, 530 U.S.

466 (2000) are satisfied when one of the aggravating circumstances is a prior conviction of one or more violent felonies. No distinction is made as to whether the felony satisfying the aggravator was committed previously, contemporaneously, or subsequent to the charged offense. See, Floyd v. State, 913 So.2d 564 (Fla. 2005). In this case Mr. Peterson had numerous prior convictions.

The concept that recidivism findings might be exempt from otherwise applicable constitutional principles regarding the right to a trial by jury or the standard of proof required for conviction "represents at best and exceptional departure from historic practice." Apprendi v. New Jersey, supra., 530 U.S. at 487. The recidivism exception was recognized in the context of non-capital sentencing by a 5-4 vote of the United States Supreme Court in Alamendarez-Torres v. United State, 523 U.S. 224 (1988). In his dissenting opinion Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg asserted that "there is no rational basis for making recidivism an exception." 523 U.S. at 258. In Apprendi the majority opinion consisted of the four dissenting Justices from Alamendarez-Torres and the addition of Justice Thomas (who had been in the Alamendarez-Torres majority). In Apprendi, the Court

noted that it was arguable that Alamendarez-Torres had been wrongly decided and that the decision "given its unique facts, surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." 530 U.S. at 490. The overruling of Walton v. Arizona, 497 U.S. 639 (1990) and the implicit overruling of Hildwin v. Florida, 490 U.S. 638 (1990) upon which Alamendarez-Torres was based further undermine the continued viability of the "fact of a conviction" exception.

In his concurring opinion in Apprendi, Justice Scalia wrote "This authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon the finding of some sort of aggravating fact--- of whatever sort, including the fact of a prior conviction- the core crime and the aggravating factors together constitute the aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature has

provided for setting the punishment of a crime based on some fact-such as a fine that is proportional to the value of stolen goods- that fact is also an element… One need only look to the kind, degree, or range of punshment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element. 530 U.S. at 501. [emphasis added]

Alamendarez-Torres was predicated on unique facts, noted the Apprendi majority, because the defendant had admitted his three prior felony convictions in proceedings which had bee subject to their own substantial procedural safeguards. Unlike the non-capital sentencing enhancement provisions of Alamendarez-Torres, which authorized a longer sentence for a deported alien who returns to the United States without permission when the deportation was subsequent to a conviction for the commission of an aggravated felony, Florida's prior violent felony aggravator focuses on at least as much, if not more, the nature and details of the prior conviction than it does on the mere fact of conviction. An important consideration in Alamendarez-Torres was the desire to ensure the jury did not learn of the details and prior facts of the conviction.

In this case, and in Florida death penalty proceed-

ings, both the fact of the prior conviction and the details of the prior conviction are routinely entered into evidence through documentary evidence, testimony from victims, law enforcement, or other parties. Even if the defense offers to stipulate, as in this case, to the existence of the prior violent felony, the state is entitled to "decline the offer and present evidence concerning the prior felonies." Cox v. State, 819 So.2d 705, 715 (Fla. 2002).

When Cox argued before this Court that the presentation of this evidence was unduly prejudicial and contrary to the holding of Old Chief v. United States, 519 U.S. 172 (1997), this Court rejected the assertion. This Court determined that such evidence would aid the jury in evaluating the character of the accused and the circumstances of the crime so that the jury could make an informed recommendation as to the appropriate sentence. This Court rejected the holding of Old Chief in the capital sentencing proceeding where "the 'point at issue' is much more than just the defendant's 'legal status'." Cox, 819 So.2d at 716.

In this case the prosecutor called one witness from a 1981 robbery who testified to being robbed at a gas station and having his own money taken as well. The State further

argued to the jury the fact of sexual battery convictions and the fear and terror experienced by those victims that was not presented in guilt phase. The very same victim had testified as to the robbery portion of the prior offense in guilt phase as part of the Williams rule evidence, but the court had not permitted any testimony of the sexual battery. For the same reason that Old Chief is not analogous to the Florida capital sentencing scheme according to this Court, the Alamendarez-Torres exception should also be inapplicable. A capital jury is allowed to hear much more than the simple fact of conviction. If the jury is allowed to hear the details of the prior conviction, there is no rationale for carving out an exception to Ring's holding that the findings of the aggravating factor, including the prior violent felony, must be made by a jury. The existence of the prior violent felony aggravator does not relieve the need for a jury finding under Ring as to each aggravating factor in order to meet constitutional safeguards and ensure due process is protected.

ISSUE VII

THE PENALTY PHASE JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFT THE BURDEN

OF PROOF TO THE DEFENDANT TO ESTABLISH MITIGATING FACTORS AND TO SHOW THAT THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

The Florida death penalty sentencing scheme is constitutionally infirm because it permits a sentence of death to be predicated upon unconstitutional jury instructions which shift the burden of proof to the defendant to establish mitigating factors and to then establish that the mitigating factors outweigh the aggravating factors. This unconstitutional burden shifting was objected to below.(XVI,T2770-72)

Under Florida law a capital sentencing jury must be told that:

> "…the State must establish the existence of one or more aggravating circumstances before the death penalty could be imposed … [S]uch a sentence could be given if the State showed the aggravating circumstances Outweighed the mitigating circumstances."

State v. Dixon, 283 So.2d 1 (Fla. 1973), Mullaney v. Wilbur, 421 U.S. 684 (1975). This straight forward standard was never applied to the sentencing phase of Mr. Peterson's trial over the objections of defense counsel. The standard jury instructions given in this case over objection were inaccurate and provided misleading

information as to whether a death recommendation should be returned.

The standard jury instructions impermissibly shift the burden of proving whether he should live or die to Mr. Peterson by directing the jury that their duty was to render an opinion by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." Standard Jury Instructions In Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989), a capital post-conviction case, this Court addressed the question of whether the standard jury instructions shifted the burned to the defendant on the question of whether he should live or die. A reasonable construction of Hamblen suggests that this determination is made on a case by case basis.

The jury instructions in this case required that the jury impose death unless Mr. Peterson could both produce mitigation and then prove that the mitigation outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Peterson to death. This standard obviously shifted the burden to Mr. Peterson to establish that life was the appropriate sentence. The standard jury instructions further limited the jury by requiring that they limit their consideration

of mitigation evidence to only that evidence that Mr. Peterson proved was sufficient to overcome or outweigh aggravation. Because the standard jury instructions conflict with the standard established in Dixon and Mullaney, the violate Florida law.

The jury in this case was precluded from "fully considering" and "giving full effect to" mitigating evidence. Penty v. Lynaugh, 109 S.Ct. 2934, 2952 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that could be used to decline the imposition of the death penalty. McCoy v. North Carolina, 110 S.Ct. 1227, 1239 (1990)[Kennedy, J., concurring]. The effect of the Florida standard jury instructions is that the jury can conclude that they need not consider mitigating factors unless they are sufficient to outweigh aggravating factors and from evaluating the totality of the circumstances as required under Dixon. Mr. Peterson was required to prove to the jury that he should live instead of the State having to prove that he should die. This violated the Eighth Amendment under Mullaney.

The Florida standard jury instructions are further flawed because the jury is instructed that mitigating

evidence can be found only if the juror is "reasonably convinced" that the mitigating factor has been established. The "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence must be considered. Continued use of the standard penalty phase jury instructions violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

CONCLUSION

Based upon the forgoing arguments, citations of law, and other authorities, the Appellant, Charles Peterson, respectfully requests that the judgment and sentence below be reversed and the cause remanded for a new trial or, in the alternative, for a sentence of life.

Respectfully submitted,

_____

ANDREA M. NORGARD
Counsel for the Appellant
Special Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Katherine Blanco, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607, this ____ day of October, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the font used in this Initial Brief is 12-point Courier New in compliance with Fla. R. App. P. 9.210(a)(2).

_____

ANDREA M. NORGARD
Special Assistant Public Defender
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fax (863)533-1334

Fla. Bar No. 661066
Counsel for the Appellant