IN THE SUPREME COURT OF FLORIDA

GABBY TENNIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC06-730
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit,
In and For Broward County, Florida
[Criminal Division]

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The parties will be refferred to as they appear before this court:

"R" will denote the record on appeal which has 8 volumes and 1014 pages.

"T" will denote the transcript pages contained in 33 volumes with 1678 pages.

"SR" will denote the supplemental record which has 4 volumes and 435 pages.

STATEMENT OF THE CASE

On August 6, 2003, Appellant, Gabby Tennis, was charged by indictment for first degree felony murder with the underlying felonies of burglary, robbery, and aggravated abuse of an elderly person or disabled adult R10.

At the close of the state's case, Appellant moved for a judgement of acquittal T978-79, 984. The trial court granted the judgment of acquittal as to the elderly person or disabled adult charge T981. The trial court denied the other motions T984. Appellant was found guilty of felony murder R381, 387.

The jury's recommendation was 8-4 for the death penalty R438. On April 16, 2006, the trial court sentenced Appellant to death R523-531. A timely notice of appeal was filed R533. This appeal follows.

STATEMENT OF THE FACTS

The following are the facts relevant to this appeal.

On June 2, 2003, the body of Albert Vassella was found in his residence T505. The house appeared to have been ransacked T533. Vassella's head was adjacent to a bookcase T617. Blood was found around Vassella T551. There was blood spatter by the bookcase T600-601. The blood spatter indicated more than one blow T610. A denture was found near the body in the area of the bookcase T547. The phone on the desk was unplugged T539. There were no signs of forced entry T549. A gun was found in a drawer that was taken out from a hutch T581.

A black Mercury automobile belonging to Liza Boltos tested positive for blood T578. There was an indication of blood on Boltos steering wheel T583. Phone records showed that Boltos called Vassella five times on the day he died T920.

Possible shoeprints were found in the residence T609. One shoe print was on the thigh of Vassella T609. Patent shoeprints were found on papers in the living room T616.

One print of Sophia Adams was found in the northwest corner of the living room T63. Another print of Adams was found on the top left side drawer T635. Adams' print was also found on a dresser drawer in the southeast bedroom T635. Adams' print was found on the door jam of the southeast bedroom T635.

Twenty-one prints of value that did not match anyone were taken from the scene T646. 134 prints of no value were taken from the scene T646. Appellant's fingerprints were found on the phone on the desk and on a dresser east of the kitchen T632-33. Two

of Appellant's prints were found on a buffet drawer in the dining room T633. Three of Appellant's prints were found on the top filing cabinet in the southeast bedroom T633. Five of Appellant's prints were taken from a dresser drawer in the northeast bedroom T633. Two of Appellant's prints were taken from a filing cabinet in the southwest bedroom T633. Another print was taken from a desk drawer in the southwest bedroom T633. A total of seventeen prints of Appellant were in the house T635.

Liza Boltos testified Vassella was a friend and he would give her money for cleaning his house T649-50. Sophia Adams was Boltos' daughter T648. Boltos received $6,000 for Adams marrying at the age of 14 T651-3. However, Adams' husband cheated on her and beat her T654. Adams returned home T654. Boltos returned some of the money, but still owed some money T655. Sophia sold flowers on the street and Boltos supported herself by cleaning houses T656. Appellant and Adams slept in a truck which Appellant kept at the side of Boltos' house T660. The total courtship between Appellant and Adams lasted two weeks T683.

Boltos testified she had called Appellant's father and informed him that Appellant had eloped with Sophia Adams T663. It was part of their culture that someone had to pay for Adams T665. Boltos wanted 3 to 5 thousand dollars T666. Boltos told Appellant someone had to pay for Adams T666. Boltos asked Appellant to call his father T666. Appellant told his father he needed help to pay for Adams T667. Appellant's father would curse and hangup T667. Boltos did not tell Appellant he had to pay T695. Boltos has a history of problems with Appellant's family T689.

Boltos testified she might have called Albert Vassella a number of times on May 31, 2003 to tell him she was coming over T692, 694. Phone records introduced into evidence showed that Boltos called Vassella 8 times that day R568. Vassella had Boltos' phone number written near his telephone T692. Boltos testified Vassella did not have any money and she did not set him up T695. When Vassella gave Boltos money he retrieved it from his drawer near his phone T691.

Boltos testified she last saw Vassella days before his death T691. Appellant dropped Boltos at Vassella's house T663. Appellant did not go in the house T663. Boltos believed Vassella had money T663. Boltos never told Appellant this T663. Boltos went to Vassella's house for money T663. Appellant had dropped Boltos off 24 days before he left town T673. Boltos accused Appellant of kidnaping Adams to the media T676. Boltos knew Adams had run away and was not kidnaped T677. A couple of days after Adams had left with Appellant she asked for money T674-75. Boltos told Adams that police were questioning her T675. Boltos testified that they all wore sneakers T677. Boltos is under criminal charges of exploitation of the elderly T686.

Sophia Adams testified she had a relationship with Appellant 2 to 3 months before the death of Vassella T716. Adams was married to another T716. Adams' mother had arranged the marriage T716. Adams was really close to Appellant and stayed at Adams' house T717. Adams mother wanted to be paid T719. Appellant's family had to make the payment T717. Adams never heard Appellant ask his family for money T770. Appellant said he would get money by working roofing with his father T721.

Adams testified she went to Vassella's house one time with her mother T721. Adams helped her mother clean Vassella's house T721. Adams never went to Vassella's house to borrow money T722. Adams testified that she and Appellant never dropped Boltos off at Vassella's house T724.

Adams testified that she and Appellant got into an argument and took a walk T723. The day before Appellant mentioned he needed an alternator for his truck T723. Appellant said he had to stop at a friend's house to use a phone book to get an alternator for his truck T724. They stopped at Vassella's house T725. Appellant knocked and Vassella came to the door T725. They greeted one another as if they knew each other T725. Vassella told Appellant to come inside T727. Adams also came inside T722. Appellant looked through a phone book and Vassella sat next to him T727, 729. Appellant got up and punched Vassella in the forehead T729. The two men started tussling T729. Appellant picked Vassella up by the shoulders and threw him into a bookcase T729. Vassella said I let you into my house and I don't believe you did this to me T730. Appellant told Adams to shut up and to shut the door T730. Appellant wanted to know where the money was and threatened to kill if he wasn't told where it was located T730. Appellant told Adams to look for money T731.

Adams testified she went around the house looking for something to give Appellant T732. Appellant used the heel of his foot and stomped Vassella's head T732. Appellant did it once or twice to get Vassella from getting up T732. Vassella tried to "dodge the hits" from Appellant T732. Adams saw Appellant use his foot 7 or 8 times and Vassella

tried to avoid these blows T733. Appellant would hit Vassella with his foot and go around and look for money T734.

Adams testified she searched the house for 5 or 10 minutes T734. Adams looked through a cabinet and opened a door and found a gun T735. Adams thinks Appellant saw the gun T736. Three or four times Appellant went to other parts of the house and returned to threaten Vassella T736. Appellant took a little coin box from the dresser where the phone was located T737. Adams testified she did not do anything to help appellant T737.

Adams testified appellant said it was time to leave T738. Vassella was in a pool of blood T739. Adams could hear Vassella breathing T739. Appellant had blood on his sneakers and pants T739. Appellant was wearing Tommy Hilfiger Classics T740. Adams was wearing slippers T741. Adams and Appellant walked to Publix to get a taxi T741. They then went home T741.

Adams testified that she and Appellant sat in his truck a couple of hours and talked about what happened T742. Adams wanted to go the police T742. Appellant said Adams would go to jail for aggravated battery on an elderly person T742. Appellant threatened Adams and her family if she went to the police T742. Appellant said they would sell his truck and then leave T742. The night of the attack Adams and Appellant stayed at Adams' friend's house T748. The day after, Adams and Appellant were stopped in Georgia T744. They drove to Columbus, Ohio, where they stayed with Appellant's family T747. Appellant was given a pair of Nike Jordans and Adams thinks

he left his old sneakers there T749. They then went to Chicago where they would be arrested T757.

Adams testified her mother did not direct her and Appellant to Vassella T759. Adams was not present when her mother made numerous calls to Vassella on the day of the murder T760. The whole incident was a surprise T777. However, once it began happening Adams chose not to leave T777. Adams left with Appellant because she was afraid of him T779. Adams characterized it as a kidnaping by Appellant T780. Adams didn't feel calling the police was an option T750. Adams believed Appellant's family would hurt her family T750. Adams did not try to seek help even when she separated from Appellant T783. Appellant told her that she was incriminated by her prints on the gun T784. Adams testified she did not call her mother and ask for money T786. Adams testified they all wore Tommy Hilfiger Classics T784. Adams claims not to have worn them that day at Vassella's residence T784.

Officer Adam Storey of the Tifton Police Department testified he observed Appellant sleeping inside a Plymouth Acclaim at a Holiday Inn parking lot at 11:27 p.m. on June 1, 2003 T702-705. Appellant identified himself as Tony Adams but was unable to produce identification T705. Sophia Adams had a fake i.d. and did not complain she was the victim of a kidnaping T709.

Thomas Hill testified he is a forensic analyst for the Broward County Sheriff's Office T844. Over objection Hill was permitted to testify as an expert witness T851. Hill looked at shoe patterns recovered from the crime scene T854-55. A footwear

impression was found on Albert Vassella's thigh T855. Hill opined that the pattern corresponded to a Tommy Hilfiger shoe T855. Over objection, Hill testified that a Tommy Hilfiger representative told him the pattern was exclusive to Hilfiger and not used by other companies T870-71. Another shoe pattern was found on the floor that clearly was not from a Tommy Hilfiger shoe T872.

Joshua Perper, the chief medical examiner of Broward County, testified he arrived at the crime scene on June 2, 2003 T891-895. Albert Vassella's face was covered with blood T896. There was a bloody pattern of a shoe imprint on his thigh T897.

Perper testified he performed the autopsy on Vassella on June 3, 2003 T898. The right side of his face was covered in dried blood T898. There were multiple bruises and scratches on the right side of his face T898. There were lacerations to the right ear and to the left and top of head T898. There was no fracture of the skull but there was a very mild subdural hemorrhage T898. There was bruising to different areas of the head T901. There were internal injuries to the neck - multiple fractures between the vertebrae T903. Bone fractures more readily occur in older people T903. Perper could not say the injuries were consistent with stomping by a foot T901. The injuries to Vassella could be caused by a woman T916. There were multiple bruises and abrasions of extremities T908. Perper could not say whether Vassella had defensive wounds T911.

Perper testified there were no injuries to Vassella's mouth or teeth T913. Vassella's facial lacerations could occur as the result of his head hitting the bookcaseT916. Vassella was 5'7" and weighed 160 lbs T913. The cause of death was

blunt force trauma of the head and neck T913. In Perper's opinion the majority of Vassella's injuries came from an assault T916.

James Hertzel of the Hollywood Police Department testified on May 31, 2003 there were 4 or 5 phone calls between Liz Boltos' residence and Albert Vassella's residence on May 31, 2003 T920. The records were introduced into evidence and showed 8 answered calls between the residences as follows:

Subpoena #:68909 ----------BellSouth #: BST0306S8199 ---------- Page 32
06/10/03 17:48 CALL DETAILS FOR (954) 925-1741

Number	Date	Time	Calling No.	Called No.	Duration	Answered	Call Type
#1650	05/31/03	10:53	954-925-1741	954-922-6661	1	YES	001
#1651	05/31/03	10:55	954-925-1741	954-922-6661	1	YES	001
#1652	05/31/03	11:06	954-925-1741	954-922-6661	1	YES	001
#1653	05/31/03	11:30	954-925-1741	954-922-6661	1	YES	001
#1654	05/31/03	11:35	954-925-1741	954-922-6661	5	YES	001
#1655	05/31/03	11:58	954-925-1741	954-537-4748	1	YES	001
#1656	05/31/03	11:59	954-925-1741	954-537-4748	1	YES	001
#1657	05/31/03	12:07	954-925-1741	954-537-4748	1	YES	001
#1658	05/31/03	12:40	954-925-1741	954-537-4748	1	YES	001
#1659	05/31/03	12:41	954-367-0000	954-925-1741	2	YES	001
#1660	05/31/03	13:13	954-925-1741	954-537-4748	1	YES	001
#1661	05/31/03	13:14	954-925-1741	954-922-6661	1	YES	001
#1662	05/31/03	13:15	954-925-1741	954-922-6661	1	YES	001
#1663	05/31/03	14:08	954-925-1741	954-537-4748	1	YES	001
#1664	05/31/03	14:59	954-925-1741	954-922-6661	1	YES	001

R568. The last call was at 2:59 p.m. and the phone was answered T922.

Hertzel testified in a sworn taped statement to police Boltos never mentioned that her daughter had been kidnaped T928. Later in a television interview Boltos claimed her daughter had been kidnaped T929. Hertzel went back to talk to Boltos but she became uncooperative T929.

Leo Tennis testified Appellant never asked him for money to be with Sophia

Adams T957. Boltos asked for money for her daughter T960. Tennis refused T961. Later Tennis told Appellant that he was wanted for murder T961. Tennis told Appellant to stay in Chicago and he would surrender Appellant T963.

Appellant told Tennis that he had pushed Vassella because Vassella had a gun T969, 975-976. Appellant said that Sophia Adams hit Vassella T969. Appellant did not hit Vassella T975. Adams took $25 from the house T974.

DEFENSE CASE

Appellant testified they went to Albert Vassella's house to get money for Sophia T991-92. Appellant was to stay across the street as Liz Boltos and Sophia Adams talked to Vassella T992. They had talked to him earlier that day on the phone T992. The plan was for Boltos and Adams to take Vassella to a restaurant T992. They would leave the back door open when they left T992. Appellant was supposed to go in the house and take money from a drawer and then leave T992. However, Boltos exited the house and told Appellant to get the car because they had to go to Dunkin Donuts T992. Vassella wanted donuts T992.

Appellant and Boltos returned T993. Vassella let Appellant in the house T993. Sophia and Appellant looked for money while Boltos talked to Vassella T993. Vassella saw Adams looking through a drawer T995. Appellant heard Boltos talking loudly T993. Appellant went to the front to see what was happening T994. Vassella was pointing a gun at Boltos T994. Adams was also talking T994. Vassella then pointed the gun at appellant T994. Boltos then pushed Vassella to the floor T1019. Vassella's face was

bleeding T994. Vassella was dazed and did not know what was going on T1020. Boltos told Appellant to go back and to look for money T994.

Appellant testified he was scared and wanted to leave T994. Appellant told Adams he did not want to rob and wanted to leave T994. Adams agreed that it was getting out of hand T995. Adams and Appellant left Vassella's house T995. Appellant never intended any harm to Vassella T1015. Appellant did not kill Vassella T1015. Boltos killed him T1015. Adams and Appellant went to Adams' house and put their belongings in Appellant's truck T995. Boltos then arrived in her car T995. Appellant told her he refused to rob people and they were going to Chicago T995. Appellant testified he did not own Tommy Hilfiger sneakers T1011. Appellant did not tell Vassella that his car broke down T1010-11. Appellant admitted he was in the house do to a plan to steal money T1020. Even though Boltos told Appellant to search after Vassella was injured Appellant refused to do so because no one was supposed to get hurt T1021. Appellant did not know Vassella was hurt bad T1023.

Appellant acknowledged that he lied in statements he gave to police T1017.[1] Appellant testified he lied to police to protect Adams and her mother so he could be with Adams T1017.

[1] The trial court ruled Appellant's statements to police were not admissible as substantive evidence and were only to be referred to for impeachment. Thus, the substantive content of the statements to police are not being referred to for the facts of the case.

PENALTY PHASE

The following facts are relevant to the aggravating and mitigating circumstances.

Benativo Capobianco testified he is a private investigator T1168. Capobianco testified appellant's family did not cooperate in giving him information regarding Appellant and family history. Appellant's natural mother, Sylvia Christie, asked Capobianco why he was bothering and said he was wasting cell phone minutes when he tried to talk about Appellant's childhood T1172. Capobianco went to her house in Columbus, Ohio, but he was not able to contact her and she didn't return his messages T1173. Capobianco talked to Leo Tennis, but Mr. Tennis had less comprehension than a five year old - everything went in one ear and out the other T1174. Capobianco only got a single statement regarding Appellant's childhood T1175. The one childhood memory was whereAppellant's friend talked him into tying him to a tree upside down and setting the tree on fire T1175.

Capobianco testified Appellant had somewhere between 22 and 25 siblings T1176. Tennis could name approximately 12 of his children but it is hard to tell if he knew the rest T1176. Tennis was unable to come up with any documents etc. showing Appellant had a childhood T1176. Tennis described himself as a gypsy judge T1178. The Gypsy King from Chicago, who is like the President of the United States to the gypsies, was going to ask the prosecutor and trial judge to turn Appellant over to their jurisdiction so they could punish him T1178. The only person who tried to help with mitigation was

Appellant's stepmother and every time she tried to convey something she was always told to shut up T1180. Even after the guilty verdict Tennis asked if Appellant's sentence would break down to 15 years T1180.

Patsy Ceros-Livingston is a psychologist and was declared an expert in psychology T1206. Ceros-Livingston testified at the time of the offense, when Appellant was 19, he was age 12 intellectually T1242. Appellant was emotionally handicapped as well T1243. Ceros-Livingston reviewed numerous school records and prior psychological reports from various school systems T1209. The reports are as early as the 3rd grade T1211. Appellant had a WAIS III full scale IQ of 73 T1217. Appellant was within the range of low average to mentally handicapped of the borderline range T1218. An IQ test given when Appellant was 12 years and 11 months show at full scale IQ of 76 T1220-21. When Appellant was 8 years old he had a WAIS-R full scale IQ of 74 T1222. In 1992 a psychologist reported Appellant was a severely learning disabled young boy T1223. In New York a petition for child abuse and neglect was filed against Leo Tennis for failing to send Appellant to school T1225. Ceros-Livingston testified learning disabled children have behavior problems and are impulsive and act out T1226-27. School records reflect behavioral problems T1227. Children with learning disabilities also have trouble with changes T1228. At age 11 Appellant was in 5 schools in 4 neighborhoods T1229. Appellant's mother was a drug user T1234. Leo Tennis said she stole Appellant and his sister and took them to Chicago in 1986 T1234. Tennis retrieved the children and was arrested for kidnaping T1234-35. The children were placed in a foster home T1235.

There is no indication Leo Tennis is interested in Appellant's education or religion T1237.

SPENCER HEARING

Mona Tennis testified Appellant was in a coma due to a car accident when he was 12 years old SR430. Appellant would have problems growing up SR430. Appellant had mental problems and was sick SR430.

Cynthia Tennis testified Appellant was a good hearted person SR 420. However, he was hit by a car and went into a coma SR421. He survived SR421. A report by Dr. Janice Wilmoth was introduced R456-60.

SUMMARY OF THE ARGUMENT

1. Over Appellant's objection Thomas Hill was improperly allowed to testify as an expert. Over Appellant's objection, Hill also was improperly used as a conduit for hearsay from another expert. Also, there was no predicate laid that the hearsay statement came from a qualified person. The error was not harmless.

2. It was error to introduce the guilty plea of co-defendant Sophia Adamswithout a limiting instruction. More importantly the trial court erred in prohibiting Appellant from impeaching Sophia Adams with the factual basis of her guilty plea. The error was not harmless.

3. On the separate occasions Appellant requested he be allowed to represent himself. The trial court ignored his requests. This was reversible error.

4. The trial court refused to proceed with a negotiated plea to life in prison due to concerns over Appellant's competency. It was reversible error to go forward without holding a competency hearing.

5. The trial court erred in failing to instruct on the lesser included offense of murder in the third degree with grand theft as the lesser included offense.

6. Appellant was denied due process and a fair trial where the jury's general verdict may have been based on an illegally invalid theory.

7. Appellant was denied due process and a fair trial where his trial counsel refused to represent him when he took the witness stand.

8. The trial court erred in failing to do an adequate Nelson inquiry.

9. Appellant was denied due process and a fair trial by the prosecution taking inconsistent positions to obtain Appellant's conviction and sentence.

10. Appellant was denied due process, a fair trial and a fair penalty phase due to undue injection of ethnicity.

11. The death penalty is disproportionate in this case.

12. The aggravating circumstances of vulnerability due to age or disability was invalid where submitting it violated double jeopardy.

13. The trial court erred in giving great weight to the jury's death recommendation.

14. Where Appellant is an immature individual, the trial court erred in rejecting age (19 years) as a mitigating factor.

15. Appellant's right to a jury trial was violated. An 8-4 death recommendation and a conviction for felony murder does not cure the error.

16. This court should reverse the death sentence where it was imposed because Appellant was unable to exercise his right to plead guilty,

17. Florida Statute 921.141(d), the felony murder aggravator is unconstitutional on its face and as applied in this case.

18. The judge erred by not finding in writing sufficient aggravating circumstances to support a death sentence.

ARGUMENT

POINT I

THE TRIAL ERRED COURT ERRED IN ALLOWING WITNESS HILL TO IMPROPERLY TESTIFY AS AN EXPERT AND TO BE USED AS A CONDUIT FOR HEARSAY TESTIMONY.

Over Appellant's objections, Thomas Hill was permitted to improperly testify as an expert and be used as a conduit for inadmissible hearsay. This was reversible error.

STANDARD OF REVIEW

A trial court's decision as to whether a fact is the subject of expert opinion testimony is reviewed for an abuse of discretion. It is an abuse of discretion to have expert opinion testimony to a subject that is in the understanding of the jury without expert opinion.

Whether the rules of evidence allow an expert to testify to hearsay evidence of another expert is a matter of law and thus subject to de novo review.

Regardless of the standards, the trial court's decision to allow the expert opinion and then to further testify to hearsay was reversible error.

EXPERT OPINION TESTIMONY

Thomas Hill testified that a Tommy Hilfiger shoe pattern was consistent with the shoe print impression found on Albert Vassella's body. Specifically, Hill's testimony was that he could not say any particular Tommy Hilfiger shoe made the imprint but the general pattern matched the class of Tommy Hilfiger shoes. Hill explained that the prosecutor could make the comparison and could do the same thing Hill was doing and Appellant objected and the trial court ruled Hill could give the opinion as an expert:

A. But I will, but I will say the Tommy Hilfiger shoe that I have right there could have made that print because everything that I see there is in the shoe also

Q. And when you say could have, what makes you more qualified to say that than any of the rest of us viewing it?

A. More - - well...

Q. Is there anything, I mean, that made you - - -

A. Well, it is a matter of you look at the pattern and then you find it on the shoe.

Q. Right.

A. Overtime you could sit and do the same thing.

Q. Okay.

MR. RASTATTER: So, based upon that, Judge, I would object to him rendering any conclusionary opinion type thing other than he got the shoe and, and took the photograph or whatever he did and put that exhibit together.

THE COURT: Mr. Hill will be permitted to testify as an expert, give his opinion, the jurors can give it whatever weight they wish.

T850-51 (emphasis added).

It should be noted Hill's shoe comparison was to a general classification and not to a specific shoe making the imprint. Hill's testimony that the prosecutor, without any known expertise, could make the type of comparison being made by Hill signifies that Hill's comparison is something a layperson could do. As a matter of law, where a matter is within the understanding of an ordinary juror - an expert opinion on the matter is not admissible. See e.g. Jordan v. State, 694 So. 2d 708, 717 (Fla.1997) (matter that elderly

person would be terrified when approached by a man with a gun is not a proper subject of expert opinion as it is understood by laypeople); Seropian v. Forman, 652 So. 2d 490, 497 (Fla. 4th DCA 1995) (reversible error to admit expert testimony concerning the meaning of words in a letter - the meaning of the words was not "so beyond the ordinary understanding of the average juror"); Reinhart v. Seaboard Coast Line R.R. Co., 422 So. 2d 41, 44 (Fla. 2d DCA 1982) ("facts testified to were not of such a nature as to require any special knowledge or experience in order for the jury to form its conclusions").

As explained in Florida Power Corp. v. Barron, 481 So. 2d 1309, 1310 (Fla. 2d DCA 1986) allowing improper expert opinion creates the danger the jury will forego independent analysis of the evidence and instead rely on the expert opinion when it was not needed. It was reversible error to admit the expert opinion testimony.

In addition, because Hill gave improper expert opinion testimony, the prosection was able to misuse Hill as a conduit for hearsay rule.

USING THE EXPERT AS A CONDUIT FOR A HEARSAY OF ANOTHER EXPERT.

Even if Hill's expert opinion was admissible, it was still reversible error to allow Hill to be used as a conduit for a hearsay of another expert.

Over Appellant's hearsay objections T856-859, 869, Hill was permitted to testify

that a representative from Tommy Hilfiger told him in a phone conversation that the Tommy Hilfiger shoe pattern is not made or used by any other company nor does Tommy Hilfiger provide the pattern to others:

> Q Based on your research and examinations in this case are you, were you able to locate or find or find any information to indicate that any other shoe other than the Tommy Hilfiger had this type of pattern? I said shoe, any other sneaker other than the Tommy Hilfigers had that type pattern in existence?
>
> A. I didn't find any and I didn't look beyond these days that I did look based upon the representative telling me that they are the only ones that make them and that I should also mention that - -
>
> ******
>
> Q. What type of information, you indicated you asked Tommy Hilfiger if they supplied these soles to any other maker of shoes, correct?
>
> A. Yes, sir.
>
> ******
>
> Q. Based on your conversations with Tommy Hilfiger did you have any reason to look at any other manufacturers other than Tommy Hilfiger?
>
> A. No.

T868-871. (Emphasis added).

Experts can rely on facts or data which are not admissible in forming their opinion. However, an expert may not become a conduit for hearsay of other experts. See e.g. Linn v. Fossum, 946 So. 2d 1032 (Fla. 2006); Bunyak v. Clyde J. Yancy & Sons Dairy, Inc., 438 So. 2d 891, 893 (Fla. 2d DCA 1983) (one expert cannot testify to "opinion given to him by another expert" - "such testimony is inadmissible hearsay"); Schwartz v.

State, 695 So. 2d 452, 455 (Fla. 4th DCA 1997) (allowing expert to testify consulted with other experts also causes probative value to be substantially outweighed by undue prejudice); Gerber v. Iyengar, 725 So. 2d 1181, 1185 (Fla. 3d DCA 1998); Erwin v. Todd, 699 So. 2d 275, 277 (Fla. 5th DCA 1977); Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430, 432 (Fla. 2d DCA 1989).

In Linn this court recognized the problem of the lack of ability to cross examine the hearsay evidence:

> The opposing party is unable to cross-examine the non-testifying experts who participated in the consultation. Moreover, there is no way for the trial court to assess whether the consulting expert, upon whom the testifying expert relied in whole or in part, is herself qualified or had a proper foundation upon which to base an opinion. For example, did the testifying expert provide the expert or experts with all the pertinent facts and records? Also, there are no clear limits on how far consultations could extend. Would an expert be able to solicit opinions over the internet?

946 So. 2d at 1039. In this case there was no ability to cross-examine the unknown person Hill had spoken with over the phone. When Hill was asked how to evaluate the information from the unknown hearsay declarant he responded - "I can only assume they are going to tell me the truth" T864. This is the type of situation that begs for cross-examination to unearth the reliability of the information from the Hilfiger representative and not just Hill's assumption of reliability.

In addition, the hearsay was not utilized by Hill in forming his opinion that a Hilfiger shoe was consistent with the imprint. Hill had already opined that the imprint was consistent with the Hilfiger pattern and then called the Hilfiger representative. Thus,

Hill did not utilize the hearsay in forming his opinion. Instead, the hearsay was being used for a separate fact - no other company was utilizing the pattern in its shoes. It was reversible error to allow Hill to be used as a conduit for the hearsay testimony.

FAILURE TO SHOW HILFIGER REPRESENTATIVE WAS QUALIFIED TO GIVE OPINION.

Defense counsel also objected to the hearsay information because a proper predicate was not provided:

> MR. RASTATTER: I'm going to object to lack of predicate. There's been no testimony of who he spoke to, at what level, whether that person possessed the information.
>
> THE COURT: He's permitted to proceed with the foundation, the jurors will give it whatever weight they believe is appropriate. You may proceed.

T870.

In Linn v. Fossum, 946 So. 2d 1032 (Fla. 2006) this court noted that there should be a way to assess whether the other expert is qualified or had a proper foundation for her out-of-court opinion:

> ...there is no way for the trial court to assess whether the consulting expert, upon whom the testifying expert relied in whole or in part, is herself qualified or had a proper foundation upon which to base an opinion. For example, did the testifying expert provide the expert or experts with all the pertinent facts and records?

946 So. 2d at 1039. In this case it is only known that the person worked at Tommy Hilfiger. It is known in what capacity the person worked or whether he was qualified to give the opinion.

As beneficiary of error the Appellee has the burden of proving beyond a reasonable doubt the error could not have affected the jury. State v. DiGuilio, 429 So. 2d 1129, 1139 (Fla. 1984). The error cannot be deemed harmless in this case. The testimony by Hall was based on information received by an unknown Hilfiger worker. This testimony, about the shoeprint on the victim's body, was the sole objective physical evidence presented. If the shoeprint was not solely identified as a Hilfiger print, others than Appellant could have left the print. The print also bolstered Adams' testimony which was deeply in question. See Point II. The bottom line is that the error cannot be deemed harmless.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF SOPHIA ADAMS GUILTY PLEA WITHOUT A LIMITING INSTRUCTION AND IN PROHIBITING APPELLANT FROM INTRODUCING THE FACTUAL BASIS OF SOPHIA ADAMS' GUILTY PLEA TO THE MURDER OF ALBERT VASSELLA.

The State's theory was that Sophia Adams and Appellant acted in concert in the felony murder of Albert Vassella. The State's case was based on the testimony of Sophia Adams. The key to this case was the credibility of Sophia Adams.

Adams testified that Appellant walked to Vassella's door, engaged Vassella in

conversation, and was invited in the residence T725, 727. Appellant attempted to impeach Adams with a prior inconsistent statement - the factual basis of her guilty plea to the murder of Vassella T769-770. Appellant also sought to have the statement introduced as an admission T770, 852. Appellant proferred the statement:

> Sophia Adams approached the front door of the home during the midday hours and engaged Mr. Vassella in conversation and indicated that she had a car that was broken down and asked to use the phone. During the, during that deception Mr. Gabby Tennis, who was waiting to make an entry, entered into the home, surreptitiously entered into the home, began searching for valuables.

T 775. The prosecutor objected that Adams could not be impeached by the factual basis of her guilty plea T770. The trial court prohibited the impeachment.[2] T770, 853. This was reversible error.

This issue does not involve a factual matter. This issue involves a purely legal matter. Thus, the standard of review is de novo.[3]

Generally, evidence of a guilty plea of a co-defendant is not admissible when the defendant and co-defendant are alleged joint actors in the crime. See United States v. Morgan, 956 F.2d 279 (10th Cir. 1992) (reference to co-defendant's guilty plea

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[2] Appellant later personally sought to have the court reporter of the plea called as a witness to read the inconsistent statement T1030. The trial court again refused the impeachment T1030.

[3] The issue as to the legal import on the factual basis of a guilty plea is not something that should vary from case to case depending on the exercise of discretion. The trial court had no special vantage point over this issue. Rather, this is an issue which litigants should be able to prepare and rely on a uniform rule of law rather than discretionary personal judgments of different judges.

constituted reversible error despite the fact there was no contemporaneous objection). Also, it has been recognized as plain/fundamental error not to give a limiting instruction that the guilty plea was to be used only with regard to the co-defendant's credibility and not as substantive evidence United States v. Baez, 703 F. 2d 453, 455-456 (10th Cir. 1983). Such plain/fundamental error occurred here.

In this case the prosecutor elicited evidence of Sophia Adams' guilty plea and there was no companion limiting instruction that it could not be used as substantive evidence. More important, once the guilty plea was mentioned, Appellant should have been permitted to introduce the factual basis for the guilty plea as impeachment evidence.

IMPEACHMENT

The importance of impeachment by inconsistent statements does not rest on which statement is true but is to show the witness at different times "is blowing hot and cold and raises doubt as to the truthfulness as to both statements". Wingate v. New Deal Cab Co., 217 So. 2d 612, 614 (Fla. 1st DCA 1969). In this case Appellant wanted to show Sophia Adams was blowing hot (her trial testimony) and blowing cold (the factual basis for her plea) and thus lacked credibility and was not worthy of belief.

It is error not to allow impeachment of a co-defendant with inconsistent statements made during his separate trial. Garcia v. State, 816 So. 2d 554 (Fla. 2002). Likewise, statements of facts made during a plea or sentencing may be used to impeach. See Glynn v. State, 787 So. 2d 203, 204 (Fla 4th DCA 2001) (statement made during sentencing on

prior plea was admissible to impeach in subsequent unrelated trial); Groover v. State, 458 So. 2d 226, 228 (Fla. 1984) (statement made in fulfillment of negotiated plea bargain admissible).

In Parker v. State, 542 So. 2d 356 (Fla. 1989) this court addressed that fact the State was utilizing inconsistent positions and noted the defense was not precluded from presenting the inconsistences on cross-examination:

> Parker's third contention is that the State failed to inform the court and the jury of its inconsistent factual positions in the trials of the co-defendants. He argues that the state violated Parker's due process and eighth amendment rights by taking different positions concerning who fired the fatal shot. Parker asserts that the state was required to advise the court and the jury of this fact because this information would have indicated that the state itself had doubts as to whether Parker was the triggerman. We find that the state had no duty to present this information. It must be noted, however, that Parker was not precluded from presenting this matter to the jury by an appropriate witness, either during his case or on cross-examination. In this regard, the co-defendants' trials predated this trial and Parker knew the position of the state in those trials.

542 So. 2d at 357-358 (emphasis added).

The prosecutor's only argument below was that the factual basis for the guilty plea was the prosecutor's statement and not that of Sophia Adams. However, this was not a no contest plea where a defendant is not admitting guilt and only pleas because it is her best interest. A guilty plea is an admission of guilt the facts upon which the guilty plea is based.

If the factual basis for Adams' guilty plea had been inaccurate, Adams or her attorney would be expected to object to or correct any inaccuracy. However, Adams did

not claim the factual basis was inaccurate . Adams' silence constituted an adoptive admission. See Brennan v. State, 754 So. 2d 1, 5 (Fla. 1999) defendant's silence in face of co-defendant's statement regarding their involvement in murder was an adoptive admission). It was reversible error to prohibit impeachment by the prior inconsistent statement. In addition, in Fotapoulos v. State, 838 So. 2d 1122 (Fla. 2002) this court made it clear that the state presenting differing versions of facts is clearly admissible:

> In 1989, this court decided Parker v. State, 542 So. 2d 356 (Fla. 1989), wherein the defendant asserted the "the State violated Parker's due process and eighth amendment rights by taking different positions [in the trials of co-defendants] concerning who fired the fatal shot". *Id.* at 357. Although we did not address the substance and merits of Parker's contentions, we clearly stated that "Parker was not precluded from presenting this matter to the jury". *Id.* at 358; see also Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979)(United States Supreme Court held that barring the introduction of a witness's prior testimony at a co-defendant's trial which tended to refute the State's theory in a subsequent proceeding violated the Due Process Clause of the Fourteenth Amendment); United States v. Salerno, 937 F.2d 797, 812 (2nd Cir. 1991) (holding that previous theories of prosecution are admissible in later proceedings as admissions of the prosecuting authority). Thus, in Florida, evidence that the State has previously presented differing versions of the facts at issue in a criminal prosecution is clearly admissible.

838 So. 2d at 1138-39 (emphasis added); see also United States v. GAF Corp, 928 F.2d 1253, 1260 (2nd Cir. 1991) (confidence in justice system requires defense to disclose government's change of its version of the facts); Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000) due process violated where contradictory statements of witness used at separate trials); Stumpf v. Mitchell, 367 F. 3d 594, 611 (6th Cir. 2004) (presenting two

different versions of facts at separate trials of co-defendants violated due process because it rendered convictions unreliable).

The reason the trial court gave for not permitting the impeachment was because Adams did not remember the statement T773. The trial court was legally wrong . Adams remembered the event. It was not important that she did not remember the statement because she was being impeached on her memory of the event and not to whether she made a statement. See Calhoun v. State, 502 So. 2d 1364 (Fla. 2d DCA 1987) (if witness denied she was aggressive she could have been impeached with prior inconsistent statement that she was aggressive despite not remembering such a statement - unfortunately, the impeachment went to whether she had made statement).

THE ERROR WAS NOT HARMLESS

As beneficiary of the error, the state has the burden of proving the error was harmless. The state's case against Appellant hinged on the credibility of Adams. The error not permitting the impeachment was not harmless. The error would impact both the guilt and penalty phases.[4] It should be noted the prosecutor even criticized the credibility of Adams at her later sentencing:

> And I have great concern that Sofia Adams is not telling the truth about the role her mother played in this crime. And it wasn't just a coincidence. And this court has sat through the evidence and the case, generally. And Sofia Adams had an obligation to tell the truth. The whole truth. And some power over her is I believe preventing her from giving that full truth about who set this up and motivated these younger defendants to go and attack

[4] Adams' credibility would also be key to the penalty phase and not merely limited to the guilt phase.

> and kill - I'm not saying her mother wanted them to kill him, but certainly the evidence and everybody believes, I believe, that this defendant's mother was a great motivating factor in them going to this 91 year old man's house. And I think the court respectfully should consider that the lack of candidness on that factor is important.

T1645-46. Unfortunately, the jury in Appellant's trial was never aware of Adams' credibility problems. The error cannot be deemed harmless. The other evidence can be also looked at in determining harm. Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999). The introduction of the guilty plea without a limiting instruction has the impact of telling the jury there is a judicial stamp of approval of the co-defendant and her version of what happened. That version defines Appellant's guilt. Appellant needed to show the jury the factual basis for Adams' guilty plea was inconsistent with her trial testimony. Because Appellant was prohibited from doing so, Adams guilty plea worked against Appellant. This case bolied down to a swearing match between Sophia Adams and Appellant. Adams testified Appellant chose Vassella as a victim and got himself and Adams invited into the house T725. Adams denied that Liz Boltos had anything to do with Vassella's killing T759. Yet Boltos called Vassella 8 times before his killing R568. Blood was found in the car Boltos was driving T583. Boltos has discussed her testimony with Adams prior to Adams testifying T721, lines 9-16. Appellant testified Boltos got the threesome invited into the house and Vassella and Boltos got into a confrontation with Boltos pushing Vassella. At this point Appellant and Adams exited the house because there was not supposed to be any violence T1021, 1015. Adams' and Appellant's

testimony were at odds.[5] Adams' credibility was crucial. Adams was the sole witness claiming Appellant did the killing. The error not permitting Appellant to impeach Adams was not harmless. The error is independently prejudicial to the penalty phase. This cause must be reversed and remanded for a new trial and/or a new penalty phase.

POINT III

THE TRIAL COURT ERRED IN FAILING TO RESPOND TO APPELLANT'S REQUESTS TO REPRESENT HIMSELF TO AND IN NOT ALLOWING APPELLANT TO REPRESENT HIMSELF.

Prior to trial on July 7, 2005, Appellant filed a motion to exercise his constitutional right to represent himself. R274-275. The trial court ignored the motion. Again, prior to trial on July 28, 2005, Appellant filed another motion to exercise his right to represent himself R279-280. Again, the trial court ignored the motion.

Prior to the jury being sworn Appellant pro se complained about his attorney and made it clear he did not want the attorney and wanted to represent himself:

> I refuse to go to trial with him. **I would like to go pro se**, instead of having two prosecutors against me, **I'll do it myself**. Even though I don't know what I'm doing, I will have a better fighting chance.

SR 359 (emphasis added).

When Appellant tried to further explain the trial court told Appellant he could not

[5] Adams claim that Boltos had nothing to do with the killing was contradicted by the fact that Boltos was constantly calling him prior to his death T692, 694 R568, and the blood in Boltos' car T583. Also, the prosecutor outside the presence of the jury acknowledge that Adams was lying T1645-46.

talk and then stated that Appellant's counsel was not incompetent SR 359. The trial court erred in failing to respond to Appellant's requests to represent himself and in not allowing Appellant to represent himself.

STANDARD OF REVIEW

The right to self-representation is personal and is not subject to the discretion of the trial court. Hutches v. State, 730 So. 2d 825 (Fla. 2d DCA 1999). The trial court does have discretion in determining whether the waiver of counsel is voluntary, intelligent and knowingly after conducting a proper inquiry. However, in this case no such inquiry was held. Thus, the issue does not involve the exercise of discretion. Rather, this issue involves a purely legal matter. Review is de novo.

LAW

The sixth amendment to the United States Constitution guarantees criminal defendants the right to self-representation. State v. Bowen, 698 So. 2d 248, 250 (Fla. 1997) citing Faretta v. California, 422 U.S. 806 (1975)). The right to self-representation and a defendant's choice must be honored out of that respect for the individual which is the lifeblood of the law. Goldsmith v. State, 937 So. 2d 1253 (Fla. 2d DCA 2006) (citing Faretta).

A criminal defendant who is competent to choose self-representation may not be denied that choice - even though the decision will most certainly result in incompetent trial counsel. Eggleston v. State, 812 So. 2d 524, 525 (Fla. 2d DCA 2002); Wheeler v. State, 839 So. 2d 770 (Fla. 4th DCA 2003). In Bowen, Supra, this court held "that once a court

determines that a competent defendant of his or her own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented". Id. at 251. In Hill v. State, 688 So. 2d 901 (Fla. 1996), this court emphasized it is the competence to waive counsel and not the competence to act as counsel that is important:

> A defendant does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se. As the Supreme Court stated in Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 2686-87, 125 L.Ed.2d 321 (1993), "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.

688 So. 2d at 906; see also Kimble v. State, 429 So. 2d 1369, 1371 (Fla. 3d DCA 1983) (fact that defendant stated to the trial judge that he was unqualified in terms of legal knowledge did not provide basis for denying defendant right to self-representation; defendant's technical knowledge of law is not relevant to an assessment of his knowing exercise of right to defend himself).

APPLICATION OF THE LAW AND CONCLUSION

In this case, Appellant's requests for self-representation should have been addressed and granted unless Appellant was deemed incompetent to waive counsel. The fact that Appellant was represented by competent counsel does not negate that he had a right to self-representation:

> ....the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on the defendant can only lead him to believe that the law contrives against him . . . the right to defend is personal. The defendant, and not his lawyer or the state, will bear

> the personal consequences of a conviction . . . and although he may conduct his own defense ultimately to his detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law".

Faretta, 422 U.S. at 834, 95 S.Ct. at 2540-2541 (citations omitted) (emphasis added) cited in State v. Bowen, supra. At 250. The error denied Appellant's rights under the sixth amendment to the United States Constitution. Since errors concerning the improper denial of self-representation are not subject to harmless error analysis, McKaskel v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) cited in Ollman v. State, 696 So. 2d 409, 410 (Fla. 1st DCA 1997), this error entitles Appellant to reversal of his convictions and sentences with directions that he be granted a new trial.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO HOLD A COMPETENCY HEARING.

In this case the parties agreed Appellant would receive a sentence of life in prison in exchange for a plea to the crime charged R217-220. Appellant was pleading because it was in his best interest SR201, 207. The plea colloquy was almost complete when it was revealed Appellant was on a number of medications which were interfering with his ability to make decisions:

> THE DEFENDANT: They gave me Thorazine. They gave me Prozac. They gave me Dylantin. They gave me Visterol (phonetic). And Tylenol sometimes for my headache.

> THE COURT: What medication have you had in the last 24 hours?
>
> THE DEFENDANT: I've had Thorazine, Prozac, Dylantin, Visterol and I don't think I had any Tylenol.
>
> THE COURT: Are any of these medications that you've taken interfering with your ability to make this decision?
>
> THE DEFENDANT: I know a lot of people if they were looking at the death penalty and copping out they would think it's crazy, but it hasn't hit me yet. Maybe it's the medication. I don't know what it is, but like it's calm. I don't know.
>
> THE COURT: Let me ask you again. Are any of the medicines interfering with your ability to make the decision as to whether you want to got to trial or enter this plea in your best interest?
>
> THE DEFENDANT: A little bit.

R217 (emphasis added). The trial court stated it could not accept the plea, and Appellant would go to trial, because of Appellant's inability to understand and to reason:

> THE COURT: Well, if you feel that the medication is interfering with your ability to make this decision then we will go to trial, because I can't accept a plea from you unless I know that you are able to understand and that your reasoning is not-
>
> THE DEFENDANT: There is no way that I can stay off the medication for a couple of days?
>
> THE COURT: I'm ending it now. I can't take this plea. He's indicated that the medication is interfering with his judgment and I've asked him numerous times and he's not been able to respond, so I can not accept the plea. Be ready for trial.

SR217-218 (emphasis added). The trial court erred in ruling Appellant was not competent to plead and then proceeding to trial without holding a competency hearing.

STANDARD OF REVIEW

A trial court is required to hold a hearing on competence if reasonable grounds exist to believe the accused may not be competent to proceed. State v. Tait, 387So. 2d 338 (Fla. 1980). In Tait, supra, the Supreme Court specifically rejected the state's argument " that the absence of a request for a hearing on the respondent's competence to stand trial was a waiver" of the requirement that a hearing be held when reasonable grounds exist to believe the accused may not be competent to proceed. Id. at 340. This is because "it is the responsibility of the trail judge to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency". Scott v. State, 420 So. 2d 595 (Fla. 1982).

The question whether reasonable grounds exist to believe the defendant may not be competent to proceed is subject to the abuse of discretion standard of review. However, the trial court does not have discretion to forgo a competency hearing if reasonable grounds exist to believe the defendant may not be competent. Scott v. State, 420 So. 2d 595, 597 (Fla. 1982) ("The competency rule states that upon reasonable ground the court shall fix a time for a hearing") (court emphasis); Cochran v. State, 925 So. 2d 370, 372 (Fla. 5th DCA 2006).

THE MERITS

As noted in Gibson v. State, 474 So. 2d 1183, 1184 (Fla. 1985) it is well-settled that the trial court has the responsibility, sua sponte, to conduct an inquiry into the defendant's competency when it reasonably appears necessary - even when not

requested:

> This Court has consistently held that a "trial court has the responsibility to conduct a hearing for competency to stand trial whenever it reasonably appears necessary, whether requested or not." Christopher v. State, 416 So. 2d 450, 452 (Fla. 1982); State v. Green, 395 So. 2d 532 (Fla. 1981); Gentilli v. Wainwright, 157 So. 2d 419 (Fla. 1963).

474 So. 2d at 1184 (emphasis added); accord, Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966); Fla. R. Crim.P. 3.210(b).

In determining a defendant's competency to stand trial, the question before the court is whether there is reasonable ground to believe the defendant may be incompetent, not whether he is incompetent". Scott v. State, 420 So. 2d 595, 597 (Fla. 1982); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Tingle v. State, 536 So. 2d 202 (Fla. 1988).

In the present case there was a reasonable ground to believe Appellant was not competent. In fact, the trial court terminated the plea to life in this case due to Appellant's mental state R217-218. The trial court did not believe Appellant was "able to understand" and "reason" due to his mental state R217. The trial court refused to permit the plea proceeding to continue. This is a reasonable basis to believe Appellant may be incompetent. See Godinez v. Moran, 113 S.Ct. 2680 (1993) (competency standard to stand trial is same as competency standard to plead guilty). The trial court erred in proceeding to trial without holding a competency hearing.

CONCLUSION

The error requires is a denial of due process and requires a new trial. Eg, Tingle v.

State, 536 So. 2d 202 (Fla. 1988).

It should be noted that the trial court held a competency hearing after trial due to Appellant's erratic behavior during trial. This does not cure the error for several separate reasons. Foremost, there can be no retroactive determination that Appellant was competent during trial. Tingle v. State, 473 So. 2d 1253 (Fla. 1985). Moreover, assuming arguendo that retroactive determination of competency is permissible the competency hearing was fatally flawed for several reasons. The trial court never informed or noticed Appellant's attorney it had appointed an expert to examine Appellant or that a hearing would be held. T1297, 1301 line 2-3. Appellant's counsel only discovered the examination after the expert took the stand and explained his examination of Appellant. See Metzgar v. State, 741 So. 2d 1181, 1183 (Fla. 2d DCA 1999) (due process requires adequate notice); The trial court appointed only one expert T1297. This was error. Fla. R. Crim.P. 3.210 (b) (trial court shall order at least two experts); Graydon v. State, 502 So. 2d 25 (Fla. 4th DCA 1987). Finally, Appellant was not present for the competency hearing T1297- lines 9-10. This cause must be reversed and remanded for a new trial.

POINT V

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF MURDER IN THE THIRD DEGREE WITH GRAND THEFT AS THE UNDERLYING FELONY.

Appellant requested the jury be instructed on third degree felony murder with grand theft as the underlying felony as a lesser included offense T875.[6] The trial court denied the request ruling the evidence did not show Appellant took more than $300 T876. This was reversible error.

STANDARD OF REVIEW

A trial court's decision on whether to instruct the jury on a permissive lesser-included offense is reviewed by the de novo standard. Gresham v. State, 908 So. 2d 1114, 1115 (Fla. 1st DCA 2005). The trial court has no discretion to refuse to instruct the jury on a lesser included offense. See United States v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997) (standard of review "turns on the nature of the error alleged").

THE MERITS

The trial court was simply wrong in ruling the evidence could not support the requested instruction because there was no grand theft. Third degree murder with the underlying felony of grand theft does not require the completion of a grand theft. Rather it is third degree murder if the death occurred as a consequence of and while Appellant was attempting to commit grand theft.

The evidence in this case showed an attempt to commit grand theft. The stealing from Vassella was to get thousands of dollars. See T666. There was no evidence of a plan to get less than $300. Thus, there was an attempted (but unsuccessful) grand theft.

[6] The issue on the request for an instruction is thus preserved for appellate review. Eg., Toole v. State, 479 So. 2d 731, 733 (Fla. 1985); State v. Heathcoat, 442 So. 2d

The evidence was sufficient to support third degree murder with the underlying felony grand theft.

CONCLUSION

A new trial is required. The error was not harmless. The jury was not instructed on premeditated murder - it was only instructed on felony murder. Thus, second degree murder was not a valid or feasible lesser included offense. Third degree felony murder was the next legitimate lesser included offense. The error of failing to instruct on third degree felony murder grand theft would not be harmless.

The error is not made harmless due to the instruction on third degree felony murder with battery as the underlying felony. See Reddick v. State, 394 So. 2d 417 (Fla. 1981) (instruction on same degree of offense as refused instruction does not make error harmless); Hunter v. State, 389 So. 2d 661-662 (Fla. 4th DCA 1980) (fact that instruction on same degree offense as refused offense did not render error harmless); Marshall v. State, 529 So. 2d 797 (Fla. 3d DCA 1988). Moreover, the third degree felony murder based on aggravated battery as the underlying felony is an invalid theory. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

955, 956 (Fla. 1983); Henig v. State, 820 So. 2d 1037, 1039-40 (Fla. 4th DCA 2002).

POINT VI

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHERE THE JURY'S GENERAL VERDICT MAY HAVE BEEN BASED ON A LEGALLY INVALID THEORY.

Appellant was prosecuted, and the jury was instructed , on a theory of burglary for felony murder which is invalid. A general jury verdict which may be based on a legally invalid theory violates the right to due process and a fair trial.

STANDARD OF REVIEW

The present issue, whether a legally invalid theory was instructed on, is a legal matter. Thus, the standard of review is de novo.

THE MERITS

The trial court instructed the jury on felony murder with burglary and robbery as the underlying felonies. The instruction on burglary was as follows:

> Burglary means entering or remaining in a structure owned by or in the possession of another when the defendant did not have the permission or consent of that person or anyone authorized to act for that person to enter or remain in the structure at the time. And, at the time the defendant entered or remained in the structure the defendant had a fully formed conscience intent to commit the offense of the theft in that structure. Or, one, Gabby Tennis had permission or consent to enter a structure owned by or in the possession of Albert Vassella. And two, after entering the structure remained therein surreptitiously and with the fully formed conscience intent to commit the offense of theft. Or, after permission to remain had been withdrawn and with the fully formed conscience intent to commit the offense of theft, or attempt to commit the offense of robbery.

T1077-78 (emphasis added). The standard instruction on burglary is as follows:

13.1. BURGLARY
§ 810.02, Fla. Stat.

Give this statement of the elements if the charge is unlawful entry:
To prove the crime of Burglary, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **entered a [structure] [conveyance] owned by or in the possession of** (person alleged)**.**

2. (Defendant) **did not have the permission or consent of** (person alleged) **or anyone authorized to act for [him] [her] to enter the [structure] [conveyance] at that time.**

3. **At the time of entering the [structure] [conveyance]** (defendant) **had a fully-formed conscious intent to commit the offense of** (crime alleged) **in that [structure] [conveyance].**

Give this statement of the elements if the charge is unlawfully remaining:

To prove the charge of burglary, the state must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **had permission or consent to enter a [structure] [conveyance] owned by or in the possession of** (person alleged).

2. (Defendant) **after entering the [structure] [conveyance] remained therein**

Give a, b or c as applicable
a. surreptitiously and with the fully-formed conscious intent to commit the offense of (crime alleged**).**

As can be seen the instruction in this case is different than the standard instruction.

The instruction in this case permits the finding of burglary on an invalid theory.

Under §810.02 of the Florida Statutes as amended in 2001, one may be guilty of

burglary due to remaining in surreptiously or remaining in after permission is withdrawn.[7] However, the instruction in this case allows a burglary conviction where one is invited and remains in and then commits an offense even though permission to remain had not been withdrawn. Thus, the instruction allowed for conviction based on invalid theory.

In Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003), as in this case, the jury was instructed on two forms of felony murder - burglary and robbery. This court reversed and remanded for a new trail where an erroneaous definition of burglary was given to the jury:

> Evidence submitted at trial established that there was no forced entry into the victim's home, and that the perpetrator had stolen items from the residence. Law enforcement officials testified that the house was in disarray, that stereo equipment appeared to have been stolen, and that the victim's wallet was found laying next to his body on top of the pool of blood.
>
> ***

[7] For offenses committed after July 1, 2001, "burglary" means:

1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:

   a. Surreptitiously, with the intent to commit an offense therein;
   b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
   c. To commit or attempt to commit a forcible felony, as defined in s.776.08.

(emphasis added).

> The trial judge in the instant case instructed the jury on premeditated murder and felony murder with robbery and burglary as the underlying felonies. The jury returned a general verdict finding Fitzpatrick guilty of first-degree murder. Appellant argues that reversal of his conviction is warranted because the jury may have relied upon an erroneous definition of burglary as the basis for the felony murder conviction. We agree.
>
> ***
>
> Our decisions in Delgado and Mackerley stem from the decision in Yates v. United States, S354 U.S. 298, 77 S.Ct. 1064, 1 L. Ed.2d 1356 (1957), where the U.S. Supreme Court held that a general verdict is invalid when it rests on multiple bases, one of which is legally inadequate. See *id*. at 312-13, 77 S.Ct. 1064.
>
> ***
>
> The instant case presents a slight variation on the issueaddressed in Mackerley and Delgado. Here, the question is whether reversal is required where the jury was instructed on premeditated murder and felony murder, and where felony murder, in turn, was based on alternate underlying felonies, one of which is legally insufficient. We hold that the etra analytical step required in the instant case does not alter the impact of the Yates rule. We have before us a multi-part theory of prosecution, one part of which is legally inadequate, and a general jury verdict. From this information, we cannot possible discern whether the jury convicted Fitzpatrick based on the legally sufficient grounds of premeditated murder or felony murder based on robbery, or the inadequate charge of felony murder based on burglary. It is precisely this type of uncertainty that Yates rejects. We are therefore compelled to reverse Fitzpatrick's conviction, vacate his sentence, and remand the case for a new trial.

859 So. 2d at 490-491 (emphasis added) (footnotes omitted). Thus, a general verdict cannot stand when one of the theories of prosecution is inadequate. It constitutes fundamental error. Levan v. State, 759 So 2d 683 n.2 (Fla. 2000); Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995); Smith v. State, 687 So. 2d 308 (Fla. 1st DCA 1997).

See also State v. Weaver, 957 So. 2d 586 (Fla. 2007) (invalid charge not fundament where State did not argue charge). Here the State argued burglary.

Likewise, in this case reversal is required where the burglary instruction for felony murder was legally inadequate. This cause must be reversed and remanded for a new trial.

POINT VII

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHERE HIS COUNSEL REFUSED TO REPRESENT APPELLANT WHEN HE TOOK THE WITNESS STAND.

After the state rested its case the issue arose whether Appellant would testify. Appellant decided to testify. Appellant's counsel strenuously objected specifically arguing it was bad strategy as it allowed the state to utilize statements which had been previously suppressed:

> MR. RASTATTER: So, this record can reflect that this is, to use the word over strenuous advice would not be doing justice for him. To take the stand after I spent two years having his confessions excluded and for him now to subject himself to a position where the prosecutor is going to be able to at least use them for impeachment purposes is, is reckless on his part and I fear that he is going to put himself credibility wise in a position with these jurors that he, and I hasten to say this, he may not live to regret. This is a very, very poor choice on someone that is always used poor judgment in the past. I've told him that for the past several years, I told him that for the past several hours yesterday and I'm telling you again today, Gabby Tennis, you are making a monumental life-altering mistake. This prosecutor is going to chew you up and spit you out in front of this jury and they will not only not believe you, but they won't like it.
>
> THE DEFENDANT: Is that why you are not defending me, sir?

T985 (emphasis added). Appellant requested his attorney to still represent him while he

was on the stand but Appellant's counsel remained adamant he would not represent Appellant on the stand:

> THE DEFENDANT: Just for the record so the record reflects, I want my lawyer to examine me after cross examination.
>
> MR. RASTATTER: Judge, I'm not going to examine him I'm only going to ask him his name, let him give his narrative. I'm not going to participate with what he's doing, end of story.

T988-89 (emphasis added). Appellant was denied due process and a fair trial by his counsel not representing him when he took the witness stand.

STANDARD OF REVIEW

This issue involves the deprivation of counsel. The standard of review is de novo.

THE MERITS

A defendant has the right to be represented by counsel - even when he takes the stand.

In Jennings v. State, 413 So. 2d 24 (Fla. 1982) the defense attorney refused to participate in cross-examination of a state witness. The attorney claimed the reason he refused to participate in cross-examination was due to a conflict of interest. This court stated the reason for counsel not participating in cross-examination was not relevant. 413 So. 2d at 26. What was important was that counsel's refusal to participate in cross-examination deprived the defendant of a fair trial. Id. The fact that counsel refused to represent the defendant by refusing to participate in cross-examination required a new trial.

Likewise, Appellant's counsel's refusal to represent Appellant while he was on the stand deprived Appellant of a fair trial and requires reversal. In both Jennings and in this case counsel's refusals was tantamount to walking out of the courtroom while a witness testified. Nothing warrants such an action.

There was no waiver of the right to have counsel represent Appellant at this stage of trial. Even where defense counsel disagrees with the wisdom of Appellant testifying - defense counsel is still required to represent his client including examining him and objecting when appropriate.

An attorney cannot knowingly elicit perjured testimony, but otherwise he is required not to abandon his client on the stand. Even then, counsel is required to object to improper questioning by opposing counsel.

In this case, Appellant's counsel did not refuse to represent Appellant when he took the stand due to perjured testimony. Rather, he refused to represent Appellant because he disagreed with the strategy of taking the stand.[8] Again, Appellant was denied due process and a fair trial. Jennings. This cause must be reversed and remanded for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE NELSON INQUIRY.

[8] Unfortunately, trial counsel's abandoning Appellant would probably be viewed by the jury as believing perjured testimony was being presented.

On two occasions, Appellant moved to discharge his court appointed counsel T253-55, 267-270; SR356. The trial court did not hold an adequate inquiry into Appellant's motions. This is reversible error.

STANDARD OF REVIEW

A trial court 's decision not to hold a Nelson[9] inquiry is reviewed for abuse of discretion. However, once the trial court decides to inquire into a defendant's allegations, the trial court has no discretion to hold an inadequate inquiry. Thus, whether the trial court's inquiry was adequate must be reviewed de novo by the appellate court. Regardless of the standard of review, the trial court did not hold adequate inquiries in this case.

The Sixth Amendment to the United States Constitution guarantees indigent persons accused of a criminal offense court appointed counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). Although an indigent is not entitled to court appointed counsel of his own selection, he is entitled to effective representation by such counsel. Nelsonv. State, 274 So. 2d 256 (Fla. 4th DCA 1973), approved, Hardwick v. State, 521 So. 2d 1071 (Fla.), cert. denied, 488 U.S. 871 (1988); Graves v. State, 642 So. 2d 142 (Fla. 4th DCA 1994). Where a defendant makes it appear to the trial judge before trial that he desires to discharge his court-appointed counsel, the court is to inquire into the reason for the defendant's request and if such request is incompetency, the trial judge is to make a

[9] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973) approved, Hardwick v. State, 521 So. 2d 1071 (Fla.), cert. denied 488 U.S. 871 (1988).

sufficient inquiry to determine whether there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. Nelson, 274 So. 2d at 258; Graves, 642 So. 2d at 143. Further,

> If a reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the state may not thereafter be required to appoint him a substitute...

Id. at 258-259 (emphasis added).

During the hearing on June 10, 2005, the trial court asked Appellant about his allegations regarding his counsel and Appellant tried to explain but the trial court stated it would not listen to Appellant's complaints unless they involved in court behavior:

> THE COURT: Mr. Tennis, what is it you can show me that would support your allegations?
>
> THE DEFENDANT: I have allegations that the man that you appointed to me, Pat Rastatter, my father and my cousins have talked to him. There was verbal confrontations of I don't know, of cursing and this and that. It was very, very, a lot of things that is going on that's outside of the courtroom you're not seeing.
>
> THE COURT: There are many things I'm not supposed to see. I find nothing within the record of thi - -
>
> THE DEFENDANT: I - -
>
> REPORTER: Excuse me. Sir - -
>
> THE COURT: Sir, you cannot talk.
> Within any of the things you have said, you have complained before. As I said, I'm present. I'm familiar with Mr. Rastatter's communications to you.

> He has communicated to you in open court.
> And there is nothing about his representation of you that is incompetent or does not meet the highest standards - -
>
> THE DEFENDANT: Can I say something?
>
> THE COURT: - - of professional responsibility.
>
> THE DEFENDANT: So him indicating to me, saying I'm a murderer is not prejudiced because - -
>
> THE COURT: Sir, I tell you your motion is denied.

SR358-359 (emphasis added).

It was reversible error not to allow Appellant to explain his allegations regarding counsel's ineffectiveness even if it involves out-of-court ineffectiveness. Often times counsel's ineffectiveness is a product of his out-of-court failures - such as failure to investigate. The trial court erred in not allowing Appellant to speak.

During the hearing on April 15, 2005, Appellant moved to discharge counsel alleging his court-appointed counsel was not going to call an expert witness unless he was paid $10,000 by Appellant (or his family) T1565-66. The trial court did not inquire of Appellant's counsel but merely imagined medical experts would be unwilling to testify without such a fee T1569. The trial court's personal opinion was no substitute for inquiry of trial counsel regarding the allegation.

Appellant also alleged that his attorney was not investigating the mother's (Liz Boltos) participation in the killing T1566-67. Again, the trial court did not inquire of Appellant's counsel.

The trial court must specifically address the issue with both the defendant **and** his court appointed counsel on the record for the hearing to be legally sufficient. Jones v. State, 658 So. 2d 122, 125 (Fla. 2d DCA 1998); Jackson v. State, 30 Fla. Law Weekly D 2374 (Fla. 2d DCA October 7, 2005); Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991). The Second District in Jones explained:

> We conclude in this case that the trial court abused its discretion in failing to conduct an appropriate inquiry under Nelson. As the record reflects, it *never inquired of the Appellant* **and *his court-appointed couns****el as to whether there was reasonable cause to believe that counsel was being ineffective.* Perkins v. State, 585 So. 2d 390, 392 (Fla.1st DCA 1991)(Nelson requires trial court to examine both defendant and counsel). Nor did the trial court ever make any adequate findings on the record as to why it was summarily denying Appellant's request for discharge of counsel, except to note that if found the reasons set forth in the motion and the Bar complaint to be unpersuasive and that Appellant and his counsel appeared to relate well to each other during the first trial.

Id. at 125 (emphasis added).

Thus the trial court failed to hold an adequate inquiry. This cause must be reversed and remanded for a new trial. Nelson, Hargrove.

POINT IX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION TAKING INCONSISTENT POSITIONS TO OBTAIN APPELLANT'S CONVICTION AND SENTENCE.

In capital cases prosecutors "are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects". Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998); Berger v. United States, 295 U.S. 78, 88 (1935).

Due process is violated when the State knowingly presents false evidence or, although not soliciting false evidence, allows false evidence to go uncorrected. Giglio v. United States, 405 U.S. 150, 154 (U.S. 1972); Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996); Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976).

The government may not take inconsistent positions as to what occurred between one trial and another. United States v. Bakshinian, 65 F.Supp.2d 1104 (C.D. Cal. 1999).

Here, as discussed in Point II, the State took inconsistent positions at Sophia Adams' plea and in Appellants's trial.

In addition, the prosecutor relied on Sophia Adams' credibility to convict Appellant in this case. The same prosecutor then turned around at Adams' sentencing and cried about the lack of credibility of Adams' testimony in this case and that Boltos set up the incident:

> And I have great concern that Sofia Adams is not telling the truth about the role her mother played in this crime. And it wasn't just a coincidence. And this Court has sat through the evidence and the case, generally.
> And Sofia Adams had an obligation to tell the truth. The whole truth. And some power over her is I believe preventing her from giving that full truth about who set this up and motivated these younger defendants to go and attack and kill - - I'm not saying her mother wanted them to kill him, but certainly the evidence and everybody believes, I believe, that this defendant's mother was a great motivating factor in them going to this 91 year old man's house.

T1645-1646 (emphasis added). The prosecutor constantly argued to the jury in Appellant's case that this killing was extraordinary because Appellant, rather than Boltos, chose Vassella as the victim:

> This was not just another killing. Not just another death. He chose his target. He chose a weaker man.

T1320 (emphasis added).

The inconsistent positions of the prosecutor were harmful to Appellant; especially as to the responsibility and culpability and Appellant and Adams. The prosecution's inconsistent positions to obtain a conviction and death sentence, rather than justice, are contrary to due process and a fair trial. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT X

APPELLANT WAS DENIED DUE PROCESS, A FAIR TRIAL, AND A FAIR PENALTY PHASE DUE TO THE UNDUE INJECTION OF ETHNICITY.

Undue emphasis was given to the fact that Appellant is a gypsy and to the gypsy culture. For example, there were aspersions it is a common practice for Gypsies to steal from the elderly T965-66. Appellant objected to Gypsy references T119, 1140, 1158.

In Robinson v. State, 520 So. 2d 1 (1988) this court reversed due to the undue injection of race into a capital case. The term "Gypsy" is often used as a derogatory connotation for migratory lawbreakers and is exemplified by slang terms like "to gyp" (meaning to swindle). Autonomous lawmaking: The case of the "Gypsies", Weyrauch and Bell, 103 Yale (L.S.) 323, 334 (1993).

Gypsies have persistently ranked below any other ethnic group in the United States for social states. 51 Am. J. Comp. L. 679, 681 note 8, (2003), The Romans People: A

long surviving and distinguished culture at risk, Weyrauch (noting that 1989 & 1964 National opinion polls, Gypsies had the lowest social ranking of any ethnic minority (2.65) with African-American with the next lowest ranking (4.17). The polls were "primarily concerned with various aspects of prejudice").

Examples of bias and prejudice in the United States against gypsies is horrific. Until 1986 Pennsylvania required gypsies to retain licenses to live in a given county within the state 14 FLJIL 353, 369 the Roma and the Native Americans encapsulated (communities within ...(Spring 2002). See also 45AMJ. Comp. L. 393, 394, 401, Complexities of U.S. Law and Gypsy Identity (1997) (when gypsies migrated to U.S. "they were feared and despised and after arrested for purportedly stealing children (a myth that has amazing persistence)"...; some officers in the United States trained to regard gypsies as "poor man's mafia"); Rosenheim, 54 Cal. L. Rev 511, 516 (1966) (vagrancy laws in U.S. grew out of bias and prejudice against gypsies). The seeds of bias and prejudice against gypsies are unfortunately deeply engraved in history.[10]

[10] Prejudice and Racism against gypsies goes back at least to the middle ages. From the 14th Century to the mid 19th century specific legislation dictated that gypsies were slaves in certain sovereigns. In 1541 it was declared that killing of a gypsy would not be considered murder. David Crowe (2004): A history of the gypsies of Eastern Europe and Russia (Palgrave Macmillan) p.39. In 1710 an edict ordering that adult gypsy males were to be hanged without a trial and women and young males were to be flogged and banished forever. Crowe (2004) p 36-37. The peak of racism occurred by Nazi genocide of up to 1 ½ million gypsies in the Porajomos during the Holocaust. Reparations were never made for the genocide based on the belief that the gypsy victims deserved what they received.

In Cristin v. Brennan. 2000 WL 419977 (U.S. District Court E.D. Penn.) Cristin was awarded a new trial because of references emphasizing his gypsy ethnicity (stating the prosecutor was not the first, or worst, offender):

> Many additional references to ethnicity occurred in the presence of the jury, in the course of the trial. The prosecutor was not the first, or worst, offender in that regard. In the course of cross-examining a police witness, defense counsel (Mr. Campo) elicited testimony to the effect that the defendants were indeed Gypsies; that the police officer specialized in investigating Gypsy crimes; that Gypsies made a practice of preying on older persons; and that Gypsies, in general, had a reputation for being con artists and for conducting fraudulent schemes. The prosecutor then seized the opportunity to elaborate upon these assertions, in redirect examination and, to some extent, in closing argument.
>
> Thus, I am persuaded that petitioner's constitutional rights were infringed because, in being subjected to trial *in absentia,* he was treated differently than he would have been but for his ethnicity, and because the **trial itself was tainted with ethnic discrimination.** There may be little doubt that the petitioner was actually guilty of the crimes with which he was charged, but the Constitution entitles him to a fair trial on those charges.

2000 WL 419977 at 3 (emphasis added).

In Robinson v. State, 520 So. 2d 1 (Fla. 1988) this court sternly condemned anything that injected race or ethnicity into a trial:

> The prosecutor's comments and questions about the race of the victims of prior crimes committed by Appellant easily could have aroused bias and prejudice on the part of the jury. That such an appeal was improper cannot be questioned. The questioning and resultant testimony had no bearing on any aggravating or mitigating factors.
> Racial prejudice has no place in our system of justice and has long been condemned by this Court. E.g., Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); Huggins v. State, 129 Fla. 329, 176 So. 154 (1937). Nonetheless, race discrimination is an undeniable fact of this nation's history. As the United States Supreme Court recently noted, the risk that the factor of race may enter the criminal justice process has required its unceasing attention.

520 So.2d at 7, and held that injection of race or ethnicity provides an impermissible risk of latent bias which can impact a jury's decision making process:

> Due to the nature of the individualized judgment that the jury must make in a capital sentencing proceeding, there is a greater opportunity for latent racial bias to affect its judgment ...

520 So.2d at 8 (emphasis added).

In State v. Davis. 872 So. 2d 250 (Fla. 2004) this court condemned defense counsel's manner of attempting to diffuse racial prejudice particularly noting the need of valiance against racial [or ethic] prejudice. The necessity of vigilance against the influence of racial prejudice acute when the justice system serves as the mechanism by which a litigant is required to forfeit his or her very life. 872 So. 2d at 254.

Other courts have held the injection of race of ethnicity to be fundamental error. See Murphy v. International Robotic Systems, Inc. 766 So. 2d 1010, 1030 (Fla. 2000) "closing argument that appeals to racial, ethnic, or religious prejudices is the type of argument that traditionally fits within this narrow category of improper argument requiring a new trial even in the absence of an objection"); Reynolds v. State, 580 So. 2d 254, 256 (Fla. 1st DCA 1991) ("comments have been held to constitute fundamental error requiring automatic reversal where they so infected the trial with racial prejudice and unfairness as to deny the defendant due process of law"); Perez v. State, 689 So. 2d 306 (Fla. 2d DCA 1997).

PENALTY PHASE

POINT XI

THE DEATH PENALTY IS DISPROPORTIONATE THIS CASE.

Because death is a unique and final punishment, the death penalty is reserved for only the most aggravated and least mitigated. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005). In Almeida v. State, 748 So. 2d 922 (Fla. 1999), the Court explained proportionality review is a two-prong test-the crime must fall with the "category of *both* (1) the most aggravated and (2) the least mitigated of murders" 748 So. 2d at 933.

Proportionality review is not a comparison between the number of aggravating and mitigating circumstances, rather it involves a consideration of the totality of circumstances. Crook v. State, 908 So. 2d 350, 356 (Fla.2005); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). There must be a "discrete analysis of the facts" entailing a qualitatial analysis rather than a quanatative analysis. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Crook v. State, 908 So. 2d 350, 356 (Fla. 2005).

The present case involves unique circumstances. An analysis of those circumstances follows.

PLEA TO LIFE

Everyone believed the appropriate resolution for this case was Appellant received life in prison. In fact, a plea to life in prison was all set to occur until it was discovered Appellant was on medications and his competency was in question . But for the inability

to delay the proceedings for two days, the life sentence was not imposed SR218.

CO-DEFENDANT'S DISPARATE SENTENCE

Although the mitigator about an equally culpable co-defendant was rejected - the treatment of the co-defendant cannot be totally ignored when considering proportionality. In this case co-defendant Sophia Adams received an extremely desperate sentence - 10 years in prison. Usually the co-defendant receives life. Sophia Adams was even portrayed by the prosecutor as lying in her testimony at Appellant's trial. It must be acknowledge Adams was only 16 at the time of the capital offense while Appellant was 19. Also revealing is the prosecutor noting at Adam's sentencing the culpability of a third person who was never charged:

> And I have great concern that Sofia Adams is not telling the truth about the role her mother played in this crime. And it wasn't just a coincidence. And this court ha sat through the evidence and the case. Generally. And Sophia Adams had an obligation to tell the truth. The whole truth. And some power over her is I believe preventing her from giving that full truth about who set this up and motivated these younger defendant to go attack and kill– I'm not saying her mother wanted them to kill him, but certainly the evidence and everybody believes, I believe that this defendants mother was great motivating factor in them going to this 91 year old man's house. And I think the court respectfully should consider that the lack of candidness on that factor is important.

T1645-46. This admission is significant in that it shows Boltos' culpability, Adam's lack of truthfulness, and Appellant and Adams were drawn into the incident by Boltos.

In addition, Appellant comes close to 2 absolute bars to the imposition of the death sentence - age and mental retardation.

AGE

Appellant was 19 years 3 months old at the time of the offense.

The age of 18 or under at the time of the offense is an absolute bar to the death sentence. It was necessary to draw this bright line. However, it must be recognized that this line is arbitrary in the sense the qualities that distinguish a juvenile do not simply vanish when the individual turns 18 or 19. It would be arbitrary and capricious to select impose the death penalty to those who are 19 and suffer from immaturity, poor judgement, and impulsive behavior. In Urbin v. State, 714 So. 2d 411(Fla. 1998) this Court explained that the age mitigator is weighted the closer one comes to the constitutional bar:

> However, considering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age, *Livingston*, the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes.

714 So. 2d at 418.

In this case Dr. Ceros - Livingston testified Appellant tested at age 12 intellectually and was emotionally handicapped as well T1242-43. An IQ test when Appellant was 12 years old show an IQ of 76 T1220-21. When Appellant was 8 years old he had a WAIS-R full scale IQ of 74 T1222. In 1992 a psychologist reported Appellant was a severely disabled young boy T1223. Livingston tested Appellant's WAIS III full scale IQ at 73 T1217.

Dr. Wilmoth tested Appellant's IQ at 67 R458. Appellant's IQ scores were "lower than 99% of the population his age" R458. Appellant started using drugs at the age of 11

R452. Appellant suffered a serious head injury at the age of 10 when hit by a car and bled from his ears and was unconscious for several days R457. This may have impacted his ability to control his behavior and his ability to learn R457.

Appellant is functioning adaptively at an averaged of 10.9 years R459. Appellant's age under the circumstances was a strong mitigator.

MENTAL MITIGATION/LOW IQ/LEARNING DISABILITY

Mental problems impacts ones ability to reason clearly and evaluate ones options. People with mental problems also tend to be impulsive. They lack coping skills. Their emotional state is also impacted. Dr. Wilmoth's report certainly supports that Appellant had major mental problems including mental retardation:

> Results: Results indicate that Mr. Tennis is mentally retarded.
>
> *****
>
> Mr. Tennis reports that when he was about 10 years old, he was hit by a car while he was walking in the street. When he woke up he states he could not recognize anyone but his ability to know people did eventually return. His father reports that he was bleeding from his ears and was unconsciousness for several days. It is unclear that a neuropsychological evaluation was ever completed. This appears to have been a serious head injury and may have affected his ability to control his behaviors as well as his ability to learn. Mr. Tennis does report that he has heard "voices" since that time but he appears confused as to whether the voices are actually his own thoughts. He also has had seizures since the accident especially when he becomes overly excited.
>
> *****
>
> **Wechsler Adult Intelligence Scale (WAIS III)**
>
> Results from the WAIS III provide information regarding an individual's

neurocognitive functioning. Mr. Tennis obtained a Full Scale I.Q. score of 67indicating that he is functioning within the Intellectually Deficient Category. He obtained a Verbal I.Q. of 68 indicating the performance in the intellectually deficient range on measures of acquired knowledge, verbal reasoning, and attention to verbal materials.

*****

The scores obtained by Mr. Tennis on the Verbal I.Q. section placed him in the first percentile of scoring for full scale intelligence level. This means that he obtained scores lower than 99% of the population his age. These scores are considered to reflect his I.Q. at the time of the test within an .05 degree of certainty.

These scores are consistent with previous testing as there is a Standard Error of Measurement of +- 4.5. This means his score could range from 72to 63. The DSM-IV-TR recommends that Full Scale IQ scores of 72 or below be considered to fall within the Mildly Mentally Retarded Category because of the Standard Error of Measurement.

*****

The Broad Independence Scale indicates that Mr. Tennis is functioning adaptively at an average age of 10.9 years. While Mr. Tennis may display some "street smarts" further questioning indicates that his abilities are limited. He desperately does not want to be seen as "retarded" because of the way his brothers and school made fun of him. He also frequently says "let me ask you a question." These are all ways he has learned to take the focus off his abilities. This is common among many mentally retarded people who try to put up a front that allows them to look as normal as possible.

*****

<u>TOMM</u>

Mr. Tennis scored 49 on trial 1,50 on trial2 and 40 on the retention trial. These scores indicate that he was putting forth consistent effort and was not attempting to portray himself as more impaired that he actually is.

<u>Summary and Conclusion</u>

The most appropriate diagnoses for Mr. Tennis.

Axis I	R/O Cognitive Disorder secondary to head injury Cocaine Abuse Marijuana Abuse Learning Disability - by history
Axis II	Mild Mental Retardation
Axis III	Seizure Disorder likely secondary to a head injury
Axis IV	Alleged conflict with the legal system, problems with primary supporting group.
Axis V	AF 45

Mr. Tennis does meet the criteria to be deemed mentally retarded. He has been diagnosed with disabilities since his entrance into school and subsequent IQ testing has been within acceptable ranges to be deemed mentally retarded. His adaptive functioning is below average thus completing requirements for diagnosis of mild mental retardation.

R456-60. Dr. Wilmoth's report alone would bar imposition of the death penalty. Atkins v. Virginia, 122 S. Ct. 2242 (2002). It must be acknowledged that the trial court respected Ceros-Livingston's findings over the findings of Dr. Wilmoth. Part of this was not well-founded because Dr. Wilmoth based her conclusions on Dr. Ceros-Livingston's findings and other prior tests:

Test Administered

Forensic Interview
Clinical Interview
Wechsler Adult Intelligence Scale (WAIS-III)
Scale of Independent Behavior (SIB-R)
Washington Intake Questionnaire
Test of Memory Malingering (TOMM)
Interview with Parents
Review of Social Security Determination Letter dated 6/26/92
Review of Confidential Report by Dr. Patsy Ceros-Livingston dated 7/29/04

Review of letter from Elwood Union Free School District dated 4/15/97
Review of letter from Central Islip Union Free School-No Date
Review of letter from Western Suffolk Bxxx dated 8/96
Review of Notice to Parents of due process rights- No Date
Review of Addendum from Child Protective Services-dated 11/20/99
Review of Psychological Report from East Northport School District dated 2/25/97
Review of Report from Central Islip School District dated 11/11/92
Review Observation from Premm Learning Center dated 2/16/96
Review of IEP Proposal 1996-1997 Eastern Suffolk Bxxx dated 2/5/96
Letter from Elwood Public Schools dated 10/18/99
Letter from Western Suffolk Schools dated 4/14/99
Letter from Western Suffolk Schools dated 4/20/98
Letter from Western Suffolk Schools dated 10/22/99
Letter from Western Suffolk Schools dated 5/19/98
Student report Card-eastern Suffolk Boces- No date
School Card from Broward County 1004
Individualized Education Program-Manor Plains High School Dated 3/1/99
Counseling Report from Western Suffolk Boces dated 4/99
Report from Wilson Technological Center quarter report 1999

*****

These scores are consistent with previous testing as there is a standard error of measurement of 4.5. This means his score could range from 72-63.

R458, 460 (emphasis added). There was also a concern that Appellant's recent low test score was deliberate because he had practiced low scores. However, the recent tests showed no malingering:

TOMM

Mr. Tennis scored 49 on trial 1,50 on trial 2 and 40 on the retention trial. These scores indicate that he was putting forth consistent effort and was not attempting to portray himself as more impaired that he actually is.

R460. Also, Appellant hd an IQ of score of 74 when he was 8 years old T1222. In other words, there is a lifetime of severe mental problems rather than recent malingering.

The trial court also noted Appellant was manipulative and when he didn't get his way he would react with outbursts. This behavior is symptomatic of Appellant's immaturity and mental problems. Children manipulate to get their way and when unsuccessful they throw a temper tantrum. This is precisely what Appellant was doing. In addition the trial court noted throughout that Appellant exercised very poor judgment:

> He has, in the Court's opinion exercised poor judgment by relying on information and advice from fellow inmates.

R1527. Again, this reflects immaturity and lack of responsible judgment.

Even setting aside Dr. Wilmoth's findings, Ceros-Livingston's testimony provided substantial evidence of Appellant's mental health problems. Ceros-Livingston testified when Appellant was 19 he was age 12 intellectually T1242. Appellant was emotionally handicapped as well T1243. At age 8 Appellant had a WAIS-R full scale IQ of 74 T1222. At age 12 he had a full IQ of T1220-21. Appellant has a WAIS III full scale IQ of 73 T1217. Appellant was within the range of low average to mentally handicapped of the borderline range T1218.

THE KILLING WAS NOT INTENTIONAL

The prosecution relied on theory of felony murder. The prosecution did not alleged the killing was intentional. In fact, the undisputed testimony was that Adams and Appellant deliberately left knowing Vassella was alive and breathing. If they had intended to kill Vassella they would have killed him before leaving. Instead, it is an attempt to steal that went bad. Force was used in an attempt to get Vassella to reveal where

money was located. Vassella died. The killing was not intentional.

Felony-murder is a creation to provide a substitute for the mens rea of premeditation. It logically should not exceed the culpability of a premeditated killing. The lack of intent to killing this case should be particularly mitigating where the force used for the taking was the same force that ultimately resulted in the death. It should be considered strong mitigation that the death occurred without the intent to kill.

GYPSY CULTURE

Of course, being from a gypsy culture is not a defense to a violent crime. However, coming from a different culture with different values helps explain how Appellant was not equipped with the normal decision making tools.

As explained in Point X, the history of discrimination and persecution of gypsies cause them not to assimilate into the host country's society. See 103 Yale L.J., 323. 339, Autonomous Lawmaking: The case of the "Gypsies', Weyrauch Bell (November 1993). Gypsies see American values conflicting with their own values. For example, the gypsies have their own courts for marriages, divorces, and money exchange in the process:

> Probably the quintessential example of "gypsy culture" took place when, during the course of pretrial proceedings, the "king of gypsies", Judge Wanko traveled from Chicago to convince this court to transfer jurisdiction of Gabby's criminal prosecution to a gypsy tribunal. A monetary bribe to the prosecutor was Judge Wanko's backup plan.

R475;T1178. The different gypsy cultural values was the catalyst for this incident.

8-4 JURY RECOMMENDATION

Despite the fact Appellant asked the jury to recommend the death penalty, four jurors recommended a life sentence. There have been no other cases with combination of these strong mitigating circumstances. This case has unique substantial mitigating making the death penalty disproportionate. When only some of the mitigating factors here - plea to life, co - defendant's 10 years sentence, age and immaturity, mental mitigation, gypsy, killing was not intentional, 8-4 recommendation- death has been deemed disproportionate due to the mitigation see Cooper v. State, 739 So. 2d 82 (Fla. 1999) (mental health age, abusive childhood, and 8-4 jury vote made death disproportionately despite prior violent felony, CCP and felony-murder pecuniary gain); Hawk v. State, 718 So. 2d 159 (Fla. 1998) (death disproportionate for bludgeoning of elderly couple with prior violent felony and pecuniary gain where significant mental mitigation); Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (death disproportionate for EHAC multiple stabbing and defensive wounds where mental and emotionally disturbed and abusive childhood); Crook v. State, 908 So. 2d 350 (Fla. 2005) (death disproportionate where age (20) and mental defects not rising to level of retardation or insanity); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (bludgeoning with crescent wrench and stabbing 66 times death disproportionate where age and significant mental mitigation); Robertson v. State, 699 So. 2d 1343 (Fla. 1997) (disproportionate-HAC and other aggravation - age, childhood , abuse, mental mitigation); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (prior violent felony and during a robbery versus youth and immaturity and diminished intellectual functioning). Death is disproportionate in this case.

POINT XII

SUBMITTING THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS VULNERABLE DUE TO ADVANCED AGE OR DISABILITY VIOLATED DOUBLE JEOPARDY WHERE APPELLANT HAD BEEN ACQUITTED OF FELONY MURDER OF AN ELDERLY OR DISABLED PERSON.

At the close of the State's case the trial court granted Appellant's motion for judgment of acquittal for felony murder aggravated battery of an elderly or disabled person because the evidence was insufficient to prove Albert Vassella was an elderly or disabled person:

> THE COURT: . . . The court requires you to have evidence under Chapter 825 for the underlying felony charge. It defines again an elderly person suffering from infirmities to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired. Even should the State bring in a witness to testify that the gentleman received a disability income, I do not feel that would be sufficient to meet that definition.
> There's - - okay, as to the underlying charge of aggravated battery against an elderly person, under that, that will be granted and you may continue with any other arguments about any other underlying felonies.

T983-84. (emphasis added). Thus, it was invalid.

At the penalty phase, the trial court instructed the jury on the aggravating circumstance vulnerability due to advanced age or disability T1363. The trial court ultimately found this aggravator. Instructing on, and finding, this aggravator violates the Double Jeopardy Clauses of the United States Constitution where the trial court previously granted a judgment of acquittal due to insufficient proof regarding advanced age or disability impairing the person's ability to protect themself.

Double Jeopardy is fundamental error and may be raised for the first time on appeal. e.g., State v. Johnson, 483 So. 2d 420 (Fla. 1986); Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970). Double Jeopardy is a legal issue and is reviewed de novo. It is a violation of double jeopardy to submit the charge to a jury after a trial judge finds the evidence insufficient to support the charge Neal v. State, 910 So. 2d 929 (Fla. 1st DCA 2005); Smith v. Massachusetts, 125 S.Ct. 1129 (2005).

The trial court erred in using something for which Appellant had been acquitted to find an aggravator. Burr v. State, 550 So. 2d 444 (Fla. 1989).

In Smith the trial court found the evidence "insufficient" to support a firearm charge. However, before closing arguments the prosecutor urged the trial court to reverse its ruling. The trial court reversed its ruling. The trial court's actions were upheld by a Massachusetts appellate court. Ultimately, the United States Supreme Court held that the trial court's reversal of its ruling on sufficiency of the evidence, whether correct or not, violated the Double Jeopardy Clause. The Supreme Court ruled the "Massachusetts characterization" of the trial court's finding was not controlling an "what matters is that . . . the judge evaluated the [commonwealth's] evidence and determined that is was legally insufficient to sustain a conviction" 125 S. Ct. At 1135; see also Smalis v. Pennsylvania, 106 S. Ct. 1745 (1986) (holding that granting a motion for demurrer constitutes an acquittal for double jeopardy purposes because it was based on insufficiency of the evidence). The trial court's findings constituted an acquittal for double jeopardy purposes. See Delap v. Dugger, 890 F. 2d 285, 321 (11th Cir. 1989) (acquittal of Delap

resolved the factual elements of the felony murder charge); Delgado v. State , 776 So. 2d 233 (Fla. 2000). This court has recognized that giving an instruction on an aggravating circumstance which does not apply may taint a jury's recommendation. Omelus v. State, 584 So. 2d 563 (Fla. 1991). This cause must be reversed and remand for a new penalty phase.

POINT XIII

THE TRIAL COURT ERRED IN GIVING GREAT WEIGHT TO THE JURY'S DEATH RECOMMENDATION.

In front of the jury at the penalty phase Appellant requested the jury to impose the death penalty:

> I wanted to marry Sophia, her daughter. And they tricked me to go steal this man's money and things got out of hand and she knew it would come back on her that's why she killed the man. And the way she planned it, she planned it perfectly because she's getting away with it but me and Sophia are stuck to pay the price. I don't blame Sophia for what she did, she's saving her mother and I hope the Judge shows some mercy on her, Sophia Adams that is. You all give me the death penalty and let her [Adams] go . . .

T132-1313 (emphasis added).[11] Appellant also limited the amount of mitigating evidence presented to the jury T1153-54.

In sentencing Appellant to death, the judge made it clear that it would not only give great weight to the jury's recommendation but the jury determination "may be rejected by the Court only if the Court finds it to be without any reasonable factual basis" T1367

[11] Appellant's description of Boltos planning the incident was similar to the prosecutor stating Boltos had set up the incident T1645-46.

This violates Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) (error to apply **Tedder** Standard to death recommendation requires resentencing). Under this test a jury's vote for death would automatically affirmed as long as there was an aggravating circumstance. In other words, there is not true independent sentencing by the trial judge as required by law. The sentence in this case was imposed in violation of section 921.141, Florida Statutes, the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and Article I, Sections 2, 9, 16 and 17 of the state constitution.

The jury recommended death by an 8-4 vote. However, Appellant's request for death and limitation of mitigating evidence hindered the jury's ability to fulfill its sentencing role in a meaningful way.

In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), this court held that the trial court erred in giving great weight to the jury recommendations where the jury's ability to fulfill its sentencing role was hindered in a meaningful way:

> We do find, however, that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammed's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence. In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of the advisory jury. Pursuant to section 921.141 (2), Florida Statutes (1995), the jury's advisory sentence must be vased on "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)" and [w]hether sufficient mitigating circumstances found to exist." §921.141 (2) (a) - (b), Fla. Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." Herring v. State, 446 So. 2d 1049, 1056 (Fla. 1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role.

782 So. 2d at 361-62. This Court wrote further at page 362:

> It is certainly true that we have previously stated that the jury's recommendation should be given "great weight." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, this statement was made in the context of a jury's recommendation of a life sentence. This legal principle also contemplates a full adversarial hearing before the jury with the presentation of evidence of aggravating and mitigating circumstances. We have also made clear that "[n]otwighstanding the jury's recommendation, whether it be for life imprisonment or death, 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); see King v. State, 623 SO. 2d 486, 489 (Fla. 1993).

See also Ross v. State, 386 So. 2d 1191, 1197, (Fla. 1980) (ordering resentencing because the trial court gave undue weight to a death recommendation by applying Tedder Standard to death recommendation requires resentencing). The jury sentencing proceeding was not reliable due to Appellant requesting death and limiting mitigating evidence. The death sentence is unconstitutionally unreliable under the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

POINT XIV

THE TRIAL COURT ERRED IN REJECTING AGE AS A MITIGATING FACTOR.

Appellant was 19 years 3 months old at the time of the offense. The trial court rejected age as a mitigating circumstance because it was not convinced Appellant "was unable to take responsibility for and appreciate the consequence of his actions" R526. The trial court erred in rejecting age as a mitigating circumstance.

The trial court essentially rejected age as a mitigator because it found Appellant did not have the additional statutory mitigator §921.141(6)(f) of having ones' capacity to appreciate criminality of his conduct substantially impaired. While it is true that chronological age (other than under 18) is not mitigating in itself, young age combined with evidence of mental or emotional immaturity will render age a mitigating circumstance. See Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998) (error to reject age of 19 where there was evidence of lifelong mental and emotional problems); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (age 21 mitigating where expert testified emotional age was between 9 and 12); Campbell v. State, 679 So. 2d 720 (Fla. 1996) (age 21 combined with emotional immaturity would be mitigating). The closer the age to the constitutional bar of 18, the stronger the age mitigator becomes. See Urbin v. State, 714 So. 2d 411 (Fla. 1998).

In this case one expert testified Appellant tested age 12 intellectually and was emotionally handicapped as well T1242-43. The other expert's finding was that Appellant was functioning adaptively at an age of 10.9 years R459. Appellant's mental history is below 99% of the population. R458, T1220-23.

Clearly this case involves Appellant's young age and mental and emotional immaturity. See Point XI. The rejection of age as a mitigating circumstance denied Appellant due process and a fair reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XV

FLORIDA'S DEATH PENALTY WHICH DOES NOT REQUIRE: A UNANIMOUS JURY FINDING FOR DEATH; A UNANIMOUS JURY FINDING OF AGGRAVATING CIRCUMSTANCES; A FINDING BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This court has indicated it has not ruled on whether Ring v.Arizona, 122 S. Ct. 2428 (2002) applies in Florida. State v. Steele, 921 So. 2d 538, 540 (Fla. 2005) ("...this court has not yet forged a majority view about whether *Ring* applies in Florida'); but see Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006) (stating in Steele this court determined Ring did not apply in Florida). In Steele this court made it clear that in order "to obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating circumstances" 921 So. 2d at 543. In other words, the fact finder must find at least one aggravating circumstance - otherwise the maximum sentence that can be imposed is life in prison. In Cunningham v. California, 127 S. Ct. 856 (2007) the court emphasized the Federal Constitution right to a jury trial requires juries to find facts noting "the relevant 'statutory maximum' ... is not the maximum sentence a judge may impose after finding of

additional facts, but the maximum he may impose without any additional facts". Thus, aggravating circumstances must be found by the jury otherwise the maximum punishment is life in prison. Ring clearly applies to Florida's death penalty scheme.

Also, the Eighth Amendment requires "heightened reliability... in the determination whether the death penalty is appropriate..." Sumner v. Shuman, 483 U.S. 66, 72 107 S. Ct. 2716, 97 L.Ed. 2d 56 (1987).

1. Due process and the right to a jury trial were violated without the jury finding "sufficient aggravating circumstances" exist.

The Florida Legislature has not proclaimed the finding of one aggravating circumstance is sufficient to exceed a life sentence. Rather, the Legislature requires that "sufficient aggravating circumstances" exist. §921.141. A finding of one aggravating circumstance is not enough. There must be a finding of sufficient aggravating circumstances. Thus, the fact Appellant was found guilty of felony murder does not waive his rights to have the jury determine whether "sufficient" aggravators exist. The felony murder aggravator may not be "sufficient " to justify the death sentence. In fact, the death penalty has not been upheld in florida when felony-murder is the only aggravator. See Jones v. State, 705 So. 2d 1364 (Fla. 1998); Williams v. State, 707 So. 2d 683 (Fla. 1998). Moreover, in this case there is no finding of a unanimous.[12]

2. Due process and the right to a jury trial is violated where Florida allows a jury to decide aggravators exist and to recommend a death sentence by a

[12] Two types of felony-murder were before the jury - burglary and robbery.

mere majority vote.

As this court noted in Steele, Florida is the only state that allows a jury to decode aggravators exist and to recommend a sentence if death by a mere majority vote. 921 So. 2d at 548. This violates both Ring and the right to heightened reliability of the Eighth Amendment that other states require. In deciding cruel and unusual punishment claims, the practice of other states will be reviewed. See e.g., Solem v. Helm, 103 S. Ct. 3001 (1983); Thompson v. Oklahoma, 108 S. Ct. 2687 (1988)

This court explicitly recognized that the jury is free to mix and match aggravating circumstances without deciding unanimously, or even by a majority, the particular facts upon which it is choosing death:

> Under the law, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statue, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5_)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see §921.141(5)(f), because seven jurors believe that at least one aggravator applies.

921 So. 2d at 545. Again, this violates both Ring and the Eighth Amendment right to heightened reliability.

3. Due process is violated where the jury does not have to find aggravators outweigh mitigators beyond a reasonable doubt.

In State v. Wood, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 980 (1982),

the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh,: or are compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

648 P. 2d at 83-84.

In State v. Rizo, 833 A. 2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was appropriate for the weighing process:

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

833 A. 2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is paretically unreviewable on appeal:

> ....in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instruction, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certaininty in the ultimate decision-making process.

833. A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable

doubt:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in this case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and remand the case for a new penalty phase hearing.

833 A. 2d at 410-11. Likewise, the factfinder in this case must have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentence must be vacated.

POINT XVI

THIS COURT SHOULD REVERSE THE DEATH SENTENCE WHERE IT WAS IMPOSED BECAUSE APPELLANT WAS UNABLE TO EXERCISE HIS RIGHT TO PLEAD GUILTY.

The state offered Appellant a life sentence in exchange for a guilty plea. Appellant accepted the offer, but pre trial court was unable to take the plea: The state then successfully prosecuted him and obtained a death sentence.

The state's action of obtaining a death penalty because the plea temporarily could

not be taken renders his death sentence illegal and unconstitutional. The prosecution has a unique role in death penalty cases: a court may impose a death sentence only if the prosecution elects to seek such a sentence. Further, the death penalty itself is qualitatively unlike other punishments. Constitutional and policy considerations require extra safeguards to prevent its arbitrary or vindictive application.

A Florida judge cannot impose a death sentence unless the state first seeks a death sentence. Burk v. Washington, 713 So. 2d 988 (Fla. 1998).

It follows that a judge has no discretion to refuse the state's agreement to a life sentence in a capital case. Once the state decides not to seek a death sentence, the only possible sentence is life imprisonment under section 775.082(1), Florida Statutes. The state and federal constitutions forbid imposition of a harsher sentence, much less a death sentence, as a consequence of not pleading guilty. Exercise of a constitutional right should not be punishable by death. Yet at bar, the difference between a life sentence and a death sentence for first degree murder was a direct consequence of Appellant not pleading guilty.

United States v. Jackson, 390 U.S. 570 (1968) involved a statute providing that only a jury could impose a death sentence for kidnapping. One who entered a guilty plea or otherwise waived trial by jury could not be sentenced to death.

The Court wrote that, under the statute, a "defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him

guilty and does not wish to spare his life, he will die." Id. 581. "The inevitable effect," it wrote, was to discourage exercise of the rights to plead not guilty and be tried by a jury, adding: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." Id.

The Court wrote that the crucial question was not the statute's intent, but its effect: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear." Id. 582.

The Court wrote that it did not matter that judges have the power to reject involuntary guilty pleas and waivers of jury trial, adding (id.; footnote omitted):

> For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnaping Act.

A similar analysis applies at bar. Had Appellant abandoned his rights and plead guilty, he could not have been sentenced to death. The procedure at bar had no other purpose or effect than to penalize the exercise of his constitutional rights. Hence it was "patently unconstitutional."

The rule that Appellant proposes does not affect the prosecution's constitutional power to enter into charge-bargaining, nor does it affect its power to waive or seek a death sentence. Indeed, in many if not most capital prosecutions the state already elects not to seek a death sentence regardless of whether the defendant goes to trial. Appellant's rule affects a narrow range of cases in which the decision to seek the death penalty hinges on the defendant's exercise of his constitutional rights to plead not guilty and go to trial.

It is equally unconscionable to induce a person to plead guilty upon pain of death or to punish one with a death sentence for going to trial. As Justice Scalia has written for the Supreme Court in another context, "there is already no shortage of in terrorem tools at prosecutors' disposal." Blakely v. Washington, 542 U.S. 296, -, 124 S.Ct. 2531, 2542 (2004).

It may be said that a ruling in Appellant's favor will be harmful to capital defendants in general. Appellant, however, does not represent capital defendants in general. Further, it is not the business of the courts to make life easier or harder for capital defendants or for any other litigants. The courts must protect the constitutional rights of all litigants. The procedure at bar violated Appellant's constitutional rights.

If the state truly believes that a case is appropriate for capital punishment, there is no public policy favoring bargaining that away. If it does not believe that a case is appropriate for death, it would be unconscionable to seek it only as a bargaining chip. Public policy does not favor a contract entered into under threat of death.

Because Appellant was found guilty of first degree murder, he is condemned to spend the rest of his life in prison. Because he invoked his right to a jury trial, the term in prison is to end by lethal injection. This Court should not countenance a death sentence under the circumstances at bar. Appellant's sentence violated his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should vacate the death sentence.

POINT XVII

FLORIDA STATUTE 921.141 (d), THE FELONY MURDER AGGRAVATOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Appellant was found guilty of only felony murder and not premeditated murder. Florida Statute 921.141(5) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant filed a motion to declare this aggravator unconstitutional. The trial court denied the motion. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

Aggravating circumstnace (5) (d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual batter, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree statute. Fla. Stat. 784.04(1)(a)2.

The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutionals. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2743, 77 L. Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra, at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with " heightened premeditation". See Fla. Stat. 921.141(5)(I). Rogers v. State, 511 So. 2d 526

(Fla. 1987). It is completely irrational to make a person who does not kill and/or intent to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992); Tennessee v. Middlebrooks, 113 S. Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S. Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

In State of North Carolina v. Cherry, 257 S.E.2d 551, the Supreme Court of North Carolina held that when a defendant is convicted of First Degree Murder under the felony rule, the trial judge is not to submit to the jury at the penalty phase of the trial, the aggravating circumstance concerning the underlying felony. The Court in Cherry held that:

> We are of the opinion, that nothing else, appearing the possibility that the defendant convicted of felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to an "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the Statute we hold that when a defendant is convicted of First Degree Murder under the felony murder rule, the trial judge shall not submit

to the jury, at the sentencing phase of the trial, the aggravating circumstances concerning the underlying felony.

The North Carolina Supreme Court state in Cherry that once the underlying felony has been used to obtain a conviction of First Degree Murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution of Cherry. 257 S.E.2d at 567.

This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

POINT XVIII

THE JUDGE ERRED BY NOT FINDING IN WRITING SUFFICIENT AGGRAVATING CIRCUMSTANCES TO SUPPORT A DEATH SENTENCE.

The court must "set forth in writing" findings that "sufficient aggravating circumstances exist." §921.141(3), Fla. Stat. It shall impose a life sentence if it does not make " the findings requiring the death sentence within 30 days" after rendition. Id. Even if there is no mitigation, there must be sufficient aggravating circumstances to justify the sentence. Cf. Terry v. State. 668 So.2d 954 (Fla. 1996) (reducing sentence where there were two aggravators and judge did not find mitigation) and Rembert v. State, 445 So.2d 337 (Fla. 1989) (same , one aggravator). The trial court failed to make such findings in this case. Appellant's death sentence must be vacated and this cause remanded for imposition as a life sentence.

CONCLUSION

Based on the foregoing facts authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Initial Brief has been furnished to: LESLIE CAMPBELL, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of August, 2007.

_____
Attorney for Gabby Tennis

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this Brief has been prepared with 14 point Times New Roman type, in compliance with *Fla. R. App. P*. 9.210(a)(2), this ____ day of August, 2007.

_____
JEFFREY L. ANDERSON
Assistant Public Defender