IN THE SUPREME COURT OF FLORIDA

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

REPLY 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 referred 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.

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.

Appellee argues Thomas Hill was qualified to compare shoe patterns. This is not the issue. Hill's expertise was not challenged. It was the use of that expertise which was challenged.

The primary issue is whether Hill became a conduit for the hearsay information from the Tommy Hilfiger representative that the shoe pattern is not made or used by any company other than Hilfiger. Appellee claims the trial court had broad discretion to allow Hill to be a conduit for the hearsay information. However, because the issue is whether the rules of evidence permit Hill to testify to information received from the Hilfiger representative the standard of review is de novo. Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006).

In its brief Appellee essentially concedes that Hill was a conduit for the information from the Hilfiger representative:

> Clearly, the Tommy Hilfiger representative only acted as an agent when he **provided Hill with the information that no other shoe manufacturer used the same soles**.

Appellee's Brief at 18 (emphasis added). Thus, Hill was improperly acting as a conduit for the hearsay. See Linn.

Appellee claims the hearsay was admissible to show Hill's investigation.

However, it is well-settled that one cannot circumvent the hearsay rules by claiming one is merely testifying about the investigation (thus clothing hearsay under a non-hearsay label). Keen v. State, 775 So. 2d 263, 274 (Fla. 2000); Conley v. State, 620 So. 2d 180, 183 (Fla. 1993); State v. Baird, 572 So. 2d 904, 907 (Fla. 1990).

Appellee's claim would allow the prosecution to build its case by calling a single witness - an investigating police officer - who then could relay what others had told him during the course of his investigation. Of course, that would in essence eliminate the hearsay rule.

Appellee claims there was no error based on the Linn v. Fossum, 946 So. 2d 1032 (Fla. 2006) line of cases because the Tommy Hilfiger representative was not an expert witness. Thus, Appellee advocates that experts can be used as a conduit for other hearsay but not from other experts. This makes no sense. The problem in Linn was the lack of ability to cross-examine the non-testifying source as to whether he is qualified or whether he has the proper foundation upon which to give the information:

> 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. That same problem is present in this case regardless of whether the Tommy Hilfiger representative was an expert or not. Appellant could not cross-examine the Hilfiger representative as to his qualifications or whether he had a foundation for his

claim.

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.

Finally, Appellee claims the error was harmless because there was "overwhelming" evidence Appellant was inside the residence. Appellee's Brief at 19. However, the harmless error test focuses on the impact of the evidence test.[1] More importantly, being inside the residence does not make Appellant guilty of first degree murder. Appellee even acknowledges the importance of identifying foot print on the victim's body by stating "the evidence linking Tennis to the foot print on the victim's body" makes the error harmless. Appellee's Brief at 20. The only objective evidence allegedly linking the footprint to Appellant is the identification of the print as coming from a Tommy Hilfiger shoe to the exclusion of any other type of shoe - thus eliminating Liz Boltos (the person Appellant's testimony linked to the murder).

Appellee claims Sophia Adams' testimony that she saw Appellant kick the victim

[1] As this court has pointed out the harmless error test is not a sufficient or overwhelming evidence test. Rather, the test is whether the beneficiary of the error can prove that the error did not contribute to the verdict of the jury. State v. Lee, 531 So. 2d 133, 136-137 (Fla. 1988).

makes the error harmless. However, this makes the error more prejudicial because the print being a Hilfiger print, and no other type of print, bolsters Adams' testimony which is severely in question. There was very little other objective evidence in this case, but it was contrary to Adams' testimony. Adams claimed Boltos had nothing to do with the killing. Yet phone records showed Boltos called the victim 8 times prior to the killing R568, T692, and blood was found in the car Boltos was driving T583. Adams was trying to protect Boltos (her mother).[2]

This case boiled down to a swearing match between Adams and Appellant. Under such circumstances errors which aid one side are not harmless E.g., Carlyle v. State, 945 So. 2d 540 (Fla. 2d DCA 2006) (where a swearing match between a witnesses's version of events and defendant's version error cannot be considered harmless); McCoy v. State, 928 So. 2d 503 (Fla. 4th DCA 2006); Chadwick v. State, 680 So. 2d 567 (Fla. 1st DCA 1996); Jorlett v. State, 766 So. 2d 1226 (Fla. 5th DCA 2000). Appellant's testimony was contrary to the prosecutor's theory of felony murder based on burglary and robbery. Appellant testified that Boltos got the threesome invited into Vassella's house. Thus under Appellant's testimony there was no felony murders based on burglary.[3] Appellant

[2] There was more evidence Boltos and Adams were dishonest. Adams claimed to have been kidnapped by Appellant. However, Adams had ample opportunity to get away while being with police in Georgia as Appellant was sleeping in the car T702-705. Boltos initially bolstered the story by telling the media Appellant had kidnapped Adams T676. However, Boltos knew Adams had run away and was not kidnapped T677.

[3] Having been invited Appellant would not be guilty of burglary unless he remained 1) after the invitation had been withdrawn or 2) surreptitiously or 3) with the intent to commit a forcible felony. §810.02(1)(b)2, Fla. Stat. Appellant's testimony did not show

testified he did not rob Vassella and left the house because there was not supposed to be any violence T1021, 1015. Appellant's testimony was contrary to being involved in any actual or attempted robbery of Vassella. Thus, Appellant's testimony provides that he was not involved in felony murder based on robbery.

Appellant's testimony pointed at Boltos (the person who called Vassella 8 times the day of his murder and was driving a car with unexplained blood on the steering wheel). Admittedly, this was inconsistent with Adams' testimony that Boltos was not involved in any way and Appellant killed Vassella,. The bottomline is that the error impacts the evaluation of one of the few objective pieces of evidence in this case. The error was not harmless. Appellant relies on his initial Brief for further argument on this Point.

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.

Appellee combines Points II and IX in its answer brief. Appellant will address Point II in this point and will address Point IX later. By combining the issues Appellee has created confusion. Although Appellee argues Point IX extensively in pages 20, 24-29 of its Answer Brief, it almost ignores the issue in Point II. As explained on pages 28 of

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the invitation had been withdrawn or that he remained surreptitiously. Appellant also testified he left the house because there was not supposed to be any violence T1021,

Appellant's Initial Brief the present issue is whether Appellant could impeach Sophia Adams with a prior inconsistent statement – the factual basis for her guilty plea. This issue was preserved for Appellate review. T769-70, 775, 852-53.

Appellee claims the instant issue is reviewed for abuse of discretion. However, whether one can be impeached by the factual basis of one's guilty plea is purely a legal question and thus the standard of review is de novo. See State v. Glatzenmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001) (legal rulings are reviewed de novo). Regardless of the standard, the trial court's decision to prohibit impeachment of the key state witness was reversible error.

Appellee does not dispute that a defendant is entitled to impeach a co-defendent with the factual basis for her plea. Instead, Appellee claims the factual basis must physically come from the mouth of the witness in order to be used for impeachment. This is an interesting legal question and the crux of this issue.

Appellant argued below that the factual basis for Adams' guilty plea constituted an admission T770, 858. Appellee acknowledges that "Adams agreed to the proffer [i.e. factual basis]". Appellee's Brief at 22. Although Adams' may not have physically spoken the words, she did not refute or deny the factual basis thus it became her statement as an admission. See Brennan v. State, 754 So. 2d 1, 5 (Fla. 1999) (defendant's silence in face of statement regarding his involvement in murder was an

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1015. Thus, his testimony was contrary to any intent to commit a forcible felony. Appellant's testimony was contrary to felony murder based on burglary.

adoptive admission); Nelson v. State, 748 So. 2d 237, 242-43 (Fla. 1999) (defendant's silence in presence of accomplice stating defendant involved in murder was an adoptive admission because if untrue would call for denial rather than adoptive silence); Globe v. State, 877 So. 2d 663, 672-73 (Fla. 2004) (defendant's acquiescence to co-defendant's statements made during joint confession was admissible as adoptive admission); Privett v. State, 417 So. 2d 805, 806-807 (Fla. 5th DCA 1982) (statements made in defendant's presence concerning his participation in robbery were adoptive admissions - it would be expected that defendant would protest if statements were not true).

The above applies with even more force to a factual basis for a guilty plea. One would deny, rather than admit to, activities which she did not do. See e.g. Bell v. State, 589 So. 2d 1374, 1375 (Fla. 1st DCA 1991) ("factual basis for a guilty plea is intended to preclude an unwitting admission of guilt for a crime the defendant did not in fact commit").

Adams did not plead no contest based on the plea being in her best interest. This was a guilty plea which was an admission of guilt. If there is ever a situation for an adoptive admission it is where the defendant pleads guilty with a recitation of a factual basis for the plea. If Adams was not adopting the factual basis she would object or deny it. Appellee concedes that "Adams agreed to the proffer [factual basis] to secure the agreed upon plea agreement" Appellee's Brief at 22.

Adams' reason for agreeing to, or not rejecting or denying, the stated factual basis is immaterial. By not rejecting the factual basis Adams adopted as an admission. See

Brennan; Nelson, Globe; Privett. Thus, Adams could be impeached with the factual basis of her plea which she had adopted.

Appellee claims the error in not permitting impeachment was harmless. However, the state's case relied on Adams' credibility. See Initial Brief at 31-33, Reply Brief at 4. Thus, the error of not permitting impeachment evidence cannot be deemed harmless. See e.g., Chawick v. State, 680 So. 2d 567 (Fla. 1st DCA 1996) (error of excluding impeachment evidence was not harmless).

In addition, Appellee does not dispute that due process would require Appellant be allowed to cross- examine Adams on the inconsistent factual basis based on Parker v. State, 542 So. 2d 356, 357-58 (Fla. 1989) ("Parker was not precluded from presenting this matter [inconsistence factual position at another proceeding] to the jury by an appropriate witness, either during his case or on cross - examination") See pages 29-30 of Initial Brief. Instead, Appellee claims the State's position never changed as to whether Appellant committed the murder. The problem is that the prosecution used Sophia Adams' testimony that Appellant walked to Vassella's door, engaged him in conversation, and was then invited into the house T725,727. This was materially inconsistent with the factual basis of Adams's plea that Adams approached Vassella and got invited into the home and Appellant later surreptitiously entered the home T775. The point is not to show which statement is true but to show Adams (and the state's position) should not be trusted because Adams is blowing hot and cold and thus lacked credibility. See Initial Brief at 28. Where the state is changing its version of what happened the jury should

know. See page 30 of the Initial Brief.

Finally, Appellant must acknowledge that evidence of the guilty plea of Adams - as a testifying witness - is permissible because it goes for and against her credibility. However, the factual basis for the guilty likewise is important to Adams' credibility. Appellant still maintains that a limiting instruction should have been given ensuring that the plea could not have been used as substantive evidence. See United States v. Baez, 703 F. 2d 453, 455-56 (10th Cir. 1983) (plain error not to give instruction limiting plea evidence to credibility). Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee combines Points III and VIII into this single point. However, the issues are separate and Appellant will reply to Point III in this point and Point VIII later on.

Appellee claims that Appellant never made an unequivocal request to represent himself. This is not true. Twice, Appellant filed motions to represent himself R274-275,279-280. These motions were unequivocal requests for self-representation:

> COMES NOW, Gabby Tennis, the Defendant, pro se, pursuant to Florida Constitution Article 1, Section 16, and the United States Constitution Amendment 6 and 14, who voluntarily, intelligently, and respectfully moves this Honorable Court for leave **to proceed as Self Counsel**...
> IN SUPPORT, Thereof, the Defendant avers the following:
> 1.) The Defendant has a constitutional right **to represent himself** in his pending criminal; cases. Faretta vs. California, 422 U.S. 806, 456 L. Ed.

> 2d 562, 95 S Ct. 2525...
> WHEREFORE, the Defendant respectfully request that this honorable Court hold an expeditious hearing with careful consideration of this matter and thereafter **grant this motion for leave to proceed as Self Counsel**.

R274-275, 279-280. (emphasis added) Twice the trial court ignored these motions. Finally, Appellant moved to represent himself prior to the swearing of the jury:

> 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). Nothing could be more unequivocal than - "I would like to go pro se" - "I'll do it myself" after filing two motions to represent himself.

Appellee also attempts to justify the failure to hold a Faretta inquiry because Appellant was disruptive and the trial court "was losing patience" with Appellant. Appellee's Brief at 33. Assuming that Appellant was disruptive[4] and the trial court lost patience, this would not justify ignoring his requests to represent himself. Appellant was not being denied his right to represent himself based on a finding he couldn't because he was disruptive. Certainly, a trial court's subjective loss of patience is not a valid reason to deny a Faretta inquiry. The trial court erred in failing to conduct a Faretta inquiry. Appellant relies on his Initial Brief for further argument on this point.

[4] Appellant did not physically disrupt or delay any proceedings. If he had he would have been expelled from the proceedings. The only way Appellant could be said to be

POINT IV

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

Appellee claims there were no reasonable grounds to believe Appellant may not be competent and the trial court merely terminated the plea proceedings because he was disruptive. However, the trial court never found that Appellant was disruptive.[5] Rather, the trial courts specifically indicated it was terminating the plea because medication may be impacting his ability to understand, reason, and respond:

> 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). Obviously, if the trial court believed Appellant was not capable of going forward with the plea he would not be competent for trial See Godinez

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disruptive would be his requests to testify, his moving to discharge counsel, and his moving to represent himself.

[5] The disruptive label is Appellee's creation based on Appellant's trouble in responding to the trial court's questions. The trial court did not find Appellant was disruptive but mentioned the medications impact on Appellant's ability to understand and respond SR 217-18.

v. Moran, 113 S.Ct. 2680 (1993) (competency standard to stand trial is same competency standard to plead guilty).

Even if the trial was not finding Appellant incompetent there was at minimum a reasonable basis to believe that a competency inquiry was necessary. If Appellant's problems stem from his taking medications it needs to be resolved whether they impact his ability to understand and communicate. It needs to be resolved whether Appellant is worse off without the medications - after all they were being administered for some purpose.[6] The bottom line is that a competency inquiry was required under the circumstances in this case. Appellant relies on his Initial Brief for further argument on this point

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.

Contrary to Appellee's claim, there are firm rules in place whether to give an instruction on a lesser included offense. It is not a matter left to a trial court's discretion. The legal issue involving instructing on lesser included offenses is reviewed de novo. Gresham v. State, 908 So. 2d 1114, 1115 (Fla. 1st DCA 2006).

[6] The trial court would later be notified by a nurse that Appellant was having seizures possibly related to medications or the lack of medications T36-38. There was also evidence of Appellant being unable to control his emotions by crying or sobbing during jury selection T176-77.

Appellee also does not dispute that there was an attempt to commit a grand theft where the intent was to get thousands of dollars T666. However, Appellee claims there must be an actual taking of over $300 for third degree felony murder via grand theft. Appellee is wrong.

It is third degree murder if the death occurred as a consequence of and while the defendant "was engaged in the perpetration of, **or in the attempt to perpetrate**, any felony [i.e. grand theft]...." Section 782.04(4), Florida Statutes (emphasis added). Thus, there need not be an actual taking. There only needs to be an attempted grand theft. Therefore, there was evidence to support the requested instruction. It was error to deny the requested instruction.

Finally, Appellee claims the error was harmless because the jury found felony murder with aggravated battery as the underlying felony. First, the jury made no such finding. Second, the jury found first degree felony murder -- which finding does not make the error of failing to instruct on a lesser included offense harmless. The error is not 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 instruction did not render error harmless); Marshall v. State, 529 So. 2d 797 (Fla. 3d DCA 1988). Moreover, felony murder based on aggravated battery as the underlying felony, where there is only the single act of kicking, is an invalid theory. See Brooks v.

State, 918 So. 2d 181 (Fla. 2005) (where aggravated battery causes the homicide it cannot be used as the underlying felony for felony murder).Appellant's conviction and sentence must be reversed and this cause remanded for a new trial. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee does not dispute that it is a denial of due process to have a general verdict based on multiple bases where the jury is instructed on a legally invalid theory. However, Appellee claims that due to the 2004 amended Section 810.015, the jury was never instructed on an invalid theory of burglary for felony murder. Appellee is incorrect for two reasons.

First, the date of the offense was June of 2003, before any 2004 amendment. Thus, the amendment was not in effect at the time of the offense and does not impact Appellant's case.[7]

Second, even if the amendment was in effect, the jury was still instructed on a legally invalid theory. In this case the jury was instructed that if Appellant remained in

[7] In addition, under the Florida and Federal Constitutions, the legislature cannot use the 2004 amendment on conduct that has already occurred. State v. Robinson, 936 So. 2d 1198 (Fla. 1st DCA 2006).

the structure and had the intent to commit theft he was guilty of burglary. T1077-1078. The instruction made no distinction between entering or remaining in. However, the burglary statute, even after the amendment, makes a distinction. If not invited, entry with intent to commit any offense constitutes burglary. However, if invited (as in this case) one who remains in is guilty of burglary only if 1) the **invitation is withdrawn** or 2) one remains **surreptitiously** or 3) has the intent to commit **a forcible felony**. §810.02(1)(b)2, Fla. Stat. The instruction in this case did not have any of these requirements -- it merely required remaining with the intent to commit **a non-forcible** misdemeanor theft T1077. Thus, the jury was instructed on a legally invalid theory. Appellant relies on his Initial Brief for further argument on this point.

POINT VII

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

Appellee claims this is merely an ineffective assistance of counsel claim. However, Appellant is not challenging counsel's decision or strategy not to have Appellant testify. Rather, counsel totally abandoned Appellant when he took the stand. This was no strategy or a tactical decision. Appellant had no counsel at this point. It was as if counsel had left the room. Appellant was denied due process and the right to counsel and not merely the right to **effective** counsel.

Appellee claims trial counsel did not represent Appellant because Appellant would commit perjury. This is not true. Trial counsel explained Appellant should not testify

because it was extremely bad strategy rather than perjury T985. Furthermore, trial counsel did not participate by objecting to the prosecutor's questions on cross-examination. Such participation would not be dependent on whether there was perjury. Trial counsel's expressed reason of bad strategy, along with not participating with objections during the state's cross-examination, fails to prove that trial counsel failed to participate due to perjury as Appellee claims.[8] Trial counsel abandoned Appellant because he disagreed with Appellant's strategy of taking the stand. This denied Appellant due process and a fair trial. Appellant relies on his Initial Brief for further argument on this point.

POINT VIII

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

Appellee claims the trial court gave Appellant an opportunity to explain his allegations regarding his counsel. This is not true. Appellant tried to explain his allegations but the trial court stated it would not listen to Appellant's complaints unless they involved

[8] Also, it should be noted that the objective physical evidence supported Appellant's testimony rather than Sophia Adams' testimony. Phone records showed that Boltos called the victim 8 times on the day of the killing and blood was found in the car Boltos was driving. This verifies Appellant's testimony and rebuts the testimony of

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). Also, explained on page 54 of the Initial brief, Appellant tried to explain other allegations but the trial court **refused to inquire of counsel**. Appellee does not address this failure to inquire. Appellant relies on his Initial Brief for

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Adams that Boltos was not involved. It was a concern regarding strategy, not perjury,

further argument on this point.

POINT IX

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

Appellee argues the prosecution did not change its position because in Appellant's trial the prosecution asked if Adams was protecting her mother (Boltos). Adams indicated that she was not protecting her mother and her mother was not involved in the incident. The prosecution then utilized Adams' testimony that Appellant targeted and arranged the entry into Vassella's house which contradicted Appellant's version that Boltos targeted and arranged the entry. 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. 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 he 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

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that caused trial counsel's actions.

was a great motivating factor in them going to this 91 year old man's house. T1645-1646 (emphasis added).

It cannot be said that the prosecutor did not change positions. Appellant relies on his Initial Brief for further argument on this point.

POINT X

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

Appellee does not dispute that undue emphasis on ethnicity or race is fundamental error. However, Appellee claims that the emphasis of "Gypsy" ethnicity was unavoidable and was only used to establish motive. This is incorrect.

The emphasis of ethnicity was not merely done to establish motive. For example, there were aspersions it is common practice of Gypsies to steal from the elderly T965-966. The term "Gypsy" is derogatory itself and can evoke negative feelings toward the members of that group. To use the justice system to endorse the use of that term that the stereotypes should be condemned.

Appellee's claim that "ethnicity was a material element in this case." AB at 53 does not ring true. Contrary to Appellee's claim, emphasis of the Gypsy ethnicity was not necessary to present the state's theory of motive. This should have been done by referring to the individual actions taken (money to pay the mother) rather than emphasizing ethnicity. Appellant was not on trial for being a Gypsy. The case could have been tried without injecting ethnicity. The injection of ethnicity evokes ethnic

prejudice. The danger is that the jury could take out its prejudice on the person on trial -- Appellant. This prejudice is also present, if not more so, in the penalty phase. Appellant relies on his Initial Brief for further argument on this point.

PENALTY PHASE

POINT XI

THE DEATH PENALTY IS DISPROPORTIONATE THIS CASE.

Appellee essentially claims that proportionality review is a determination whether the trial court abused its discretion in imposing the death sentence. Proportionality review is a device to compare cases to ensure that the death penalty is imposed evenhandedly. A trial court's discretion as to sentencing and weighing in a Florida capital case is extremely limited otherwise Florida's death penalty would be arbitrary and capricious (thus unconstitutional). Proffitt v. Florida, 428 U.S. 242, 258 (1976) (although factors cannot be given "numerical weights" Furman requires that sentencing authority's weighing discretion is "guided and channeled"). Proportionality review "requires a discrete analysis of the facts" and entails a "qualitative review" by this Court. Bell v. State, 841 So. 2d 329, 337 (Fla. 2002). In other words, this Court's proportionality review does not take back seat to an individual trial judges so-called unbridled discretion as essentially advocated by Appellee.

Appellee claims that the mitigating circumstances of a plea to life, co-defendant disparate sentence, age of 19, mental mitigation (low I.Q./learning disability), the killing was not intentional, Gypsy culture, 8-4 jury recommendation as discussed on pages 62-71

of the Initial Brief does not take this case out of the "least mitigated murders" for which the death penalty is reserved. See Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (to be proportional crime must be both most aggravated and least mitigated). However, the instant case is closer to the cases where death was found to be disproportionate:

> Cooper v. State, 739 So. 2d 82 (Fla. 1999) mental health, age, abusive childhood, 8-4 death recommendation
>
> Crook v. State, 908 So. 2d 350 (Fla. 2005) age (20), mental defects not rising to level of retardation or insanity
>
> Hawk v. State, 718 So. 2d 159 (Fla. 1988) bludgeoning elderly couple with prior violent felony and pecuniary gain where mental mitigation
>
> Nibert v. State, 574 So. 2d 1059 (Fla. 1990) EHAC multiple stabbings where mental and emotionally disturbed and abusive childhood

than the cases cited by Appellee for proportionality:

> Jones v. State, 652 So. 2d 346 (Fla. 1995) no mitigation found, 2 murders of elderly and 4 aggravators including prior violent felony and under sentence of imprisonment at time of murders.
>
> Douglas v. State, 878 So. 2d 1246 (Fla. 2004) 11-1 death recommendation of EHAC murder of 18 year old during a sexual battery, prior convictions of drug activity rendered no significant history of criminal activity of little weight -- no mitigation relating to time of offense such as age, mental mitigation, killing not being intentional, co-defendant involvement
>
> Chandler v. State, 534 So. 2d 701 (Fla. 1988) 12-0 death recommendation, 7 aggravators (including PVF, CCP, under sentence of imprisonment for killing of elderly couple) and no mitigation

Finally, the prosecutor below admitted that Sophia Adams probably was not telling the truth - especially about Liz Boltos's involvement T1645-46. It was conceded and Boltos may have set up and motivated the killings T1645-46. Of course, this impacts the

view of the culpability of Appellant, Adams, and Boltos. The bottom line is that the facts of the case are uncertain. When there is uncertainty to the facts a comparison of the case to other cases to determine similarity for a proper proportionality review cannot be done and the death penalty must be vacated. Tillman v. State, 591 So. 2d 167 (Fla. 1991). Appellant relies on his Initial brief for further argument on this Point.

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.

Appellee claims that double jeopardy does not apply to an aggravating circumstance. This is incorrect. Burr v. State, 550 So. 2d 444 (Fla. 1989).

Appellant argues that the trial court erred in granting the judgment of acquittal on aggravated battery of an elderly or disabled person. However, the state never cross-appealed the trial court's ruling. Moreover, even if the trial court was mistaken in its ruling, the double jeopardy clause was violated. Smith v. Massachusetts, 125 S.Ct. 1129, 1135 (2005) (trial court's ruling on sufficiency of evidence, whether correct or not, was controlling for double jeopardy).

Finally, Appellee claims the error was harmless because the trial court found other aggravating circumstances. However, that does not cure the error of instructing the jury . This Court has recognized that having an instruction on an aggravating circumstance

which does not apply may taint a jury's recommendation. Omelus v. State, 584 So. 2d 536 (Fla. 1991). Appellant relies on his Initial Brief for further argument on this Point.

POINT XIII

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

Appellee argues that a trial court may properly give great weight to a jury's recommendation of death. This is not true. See Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) (error to apply Tedder standard to death recommendation requires resentencing); Muhammad v. State, 782 So. 2d 345, 362 (Fla. 2001).

Appellee further claims the trial court can give great weight to a recommendation of death if the defendant is allowed to present mitigation. Appellee presents no caselaw or logic to support such a claim. This is especially true in a case like this where the jury recommendation was not reliable where Appellant requested the jury sentence him to death and he limited the mitigation presented. T1312-1313,1153-1154. Appellant relies on his Initial Brief for further argument on this point.

POINT XIV

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

Appellee argues the trial court properly exercised its discretion in rejecting Appellant's age (19) as a mitigating factor. However, the trial court made a legal error in

rejecting age. The trial court rejected age as a mitigating factor because it did not find §921.141(E)(f) -- capacity to appreciate criminal conduct. However, a statutory mental mitigator is not required to find age as a mitigator. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (error to reject age 21 as mitigating factor expert testified emotion age between 9 and 12).

Dr. Ceros-Livingston's testimony, which the trial court found credible, provided substantial evidence of Appellant's mental health problems.[9] 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 73 T1222. At age 12 he had a full IQ of 76 T1220-1221. 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. Thus, there was an undisputed combination of chronological age and mental or emotional immaturity. Appellant relies on his Initial Brief for further argument on this Point.

POINT XVII

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

Appellee has argued in its brief "it is settled Florida law that the death penalty attaches at the time of conviction." Appellee's Brief at 64. Since Appellant's conviction

[9] The trial court found Ceros-Livingston to be credible but had problems with Dr. Wilmoth's findings.

is solely based on felony murder, Appellee has in essence conceded that the later felony murder aggravator does not genuinely narrow the class of persons elilgible for the death penalty. Thus, as explained in the Initial Brief, the felony murder aggravator is unconstitutional. Appellant relies on his Initial Brief for further argument on this Point.

CONCLUSION

Based on the foregoing facts authorities and arguments, Appellant respectfully requests this Court vacate his conviction and sentence or to reverse and remand with appropriate directions..

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Initial Brief has been furnished to: LISA MARIE LERNER, 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 January, 2008.

_____
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 January, 2008.

_____
JEFFREY L. ANDERSON
Assistant Public Defender