IN THE SUPREME COURT OF FLORIDA

HERMAN LINDSEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-1167
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

INITIAL BRIEF OF APPELLANT

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

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

Jeffrey L. Anderson
Assistant Public Defender
Florida Bar No. 374407
Criminal Justice Building
421 3RD Street/6TH Floor
West Palm Beach, Florida 33401
(561) 355-7600

appeals@pd15.state.fl.us

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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.

In the brief, the parties will be referred to as they appear before this Court.

"R" will denote the Record on Appeal which is contained in volumes 1 through 3 and contains 457 pages - the pages numbered consecutively 1-457.

"T" will denote the transcript pages contained in volumes 1-31 and contains 2541 pages- the pages are numbered 1-2541.

"SR" will denote the supplemental records which has 10 volumes of transcript with 218 pages - the pages are numbered consecutively 1-218.

STATEMENT OF THE CASE

On March 8, 2006, Appellant was charged with murder in the first degree and robbery R2-4. The offenses were alleged to have occurred on April 19, 1994 R2. Appellant moved to dismiss the charges on the basis the delayed charges violated due process R195-196. Appellant's motion was denied R208.

A jury trial commenced on September 19, 2006 R227 . At the close of the state's case, and at the close of evidence, Appellant moved for judgment of acquittal T1708-09, 1740-41. The motions were denied T1725, 1743. The robbery charge (count II) was nol prossed T1973.

Appellant was found guilty of murder in the first degree T1953, R374. The jury recommended death by an 8-4 vote T2145. Appellant moved for new trial R345-49, T. The motion was denied R362-67.

On June 19, 2007, the trial court sentenced Appellant to death R380-395. A notice of appeal was filed R369. This appeal follows.

STATEMENT OF THE FACTS

Dr. Joshua Perper testified he is the chief medical examiner for Broward County T1162. Dr. Perper reviewed the autopsy records of Joanne Mazollo T1163, 1166. The autopsy was performed on April 20, 1994 T1166. The case was very straightforward and clear cut T1165. The cause of death was a gunshot wound to the head T1166. Nothing else could contribute to the death T1167. There was soot around the edges of the wound T1172. The soot indicates that the bullet was fired at a range of less than 6 inches T1172. Death was instantaneous T1173.

Officer Kermit Bougher of the Ft. Lauderdale police department testified that at 11:20 a.m. on April 19, 1994, he was dispatched to the scene of a shooting T1175-76. The scene was a pawn shop which had a set of double doors T1177. Behind the counter was an expired female T1179. The area was in disarray with pawn slips all over the floor T1179. Things were out of the shelves and the cash register was opened T1179.

Gerald Singer testified he owned two pawn shops in 1994 T1181. They were both on 17th West Sunrise Boulevard T1181. They were named "Big Dollar Pawn" and "Mo Money" T1181. Joanne Mazollo worked at Big Dollar Pawn T11872. On April 19, 1994, Singer called Big Dollar pawn but there was no answer T1185. Singer went to Big Dollar Pawn T1185. The front door, as always, was locked T1185, Singer unlocked the door and went inside T1185.

Singer testified he saw merchandise on the floor and noticed the cash drawer was empty T1185-1186. Singer went to the back room where he found Mazollo T1186. Mazollo was sitting in a lounge chair tilted over to the side T1186. She had been shot to the head and her eye was hanging out of her head T1186. She was dead T1186.

Singer testified he kept jewelry and guns in a display case T1190. Five to seven firearms were stolen from the storeT1192. There was a safe in the back of the store T1193. The safe contained less than 50 envelopes of gold coins T1195. There was also a blue velvet bag with gold draw strings that was marked Crown Royale T1195. The bag contained jewelry T1195-1196. Singer has a description of the jewelry on pawn slips T1205. Singer did not tell police about the velvet bag T1206. Months before the shooting Singer had fired another employee, Dave Taylor, who indicated he would not stay if Mazolla stayed T1202.

Alfonzer Harrold testified in 1994 he was 15 years old T1211. Harrold's friend Nikki was married to Appellant T1211. Harold went to the Big Dollar Pawn Shop with Appellant and Ronnie LoRay T1213, 1215. The pawn shop was off Sunrise and 13th Avenue T1213. They went to the pawn shop to get rid of something and to buy something T1215. There was an older lady in the store T1215. Appellant and Loray looked around to buy something T1216. A man came from the back T1216. Five or ten minutes later Appellant, LoRay, and Harrold left T1216. Harrold testified that

Ronnie LoRay came to his house the next night T1216. Harrold thought Appellant was in the car but was not sure T1217. Harrold did not speak with Appellant T1217. Harrold acknowledged that in 1995 he told police that he spoke with Appellant T1217-19. When Harrold spoke with LoRay, Appellant was not present T1219. LoRay had a circular bracelet with a marijuana leaf on it T1219. Later Harrold called police because a $1000 reward was being offered T1220.

Demeatrous Gause, a.k.a. Nikki, was previously married to Appellant and they lived in an apartment together T1226-27.[1] Nikki testified that in 1994 she went to the Big Dollar pawn shop with Ronnie Loray and Appellant T1228. They had previously been to another pawn shop but it did not have what they were looking for T1228. They were looking for stereo equipment T1228. Nikki was busy looking at jewelry T1229. The lady at the store appeared to know Appellant T1230. Days later Nikki was watching the noon news with Appellant T1232. Appellant asked Nikki to turn up the volume T1232. The lady had been killed T12361. When Nikki had woken up earlier that day she did not see Appellant in the house but he could have been downstairs T1232, 1248. Nikki would some point later find a Crown Royale bag with jewelry in the closet T1235. Nikki admits making different prior statements about the

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[1] Because Gause is more commonly known as Nikki, Appellant will refer to her as Nikki throughout this brief.

bag of jewelry T1236, 1244-45.[2] Nikki eventually called crime stoppers because she needed money and thought she could get $1000 T1243. Nikki testified the first time she mentioned a Crown Royale bag was in 2005 T1259. Nikki called crime stoppers because she needed money and thought she could get $1000 T1243.

Crime scene investigator, Carol Coval, testified that 45 prints were taken from the crime scene T 1336. One print was taken off a stun gun box T1339.

Alice Benitez, of the latent print unit, testified that she was given 41 latents of value T1349. Benitez compared the prints to Donald Byrd, Mark Dormius, Jamie Roman, Ronnie Loray, and Appellant T1350. Another examiner may have compared them to Mark Simms T1351. LoRay was identified to the latent from a stun gun box T1352. No prints belonged to Appellant T1352, 1357. No prints belonged to Mark Simms T1352-53. A print on a pawn slip belonged to Appellant T1358. Benitez does not know where the pawn slip came from T1359.

Mark Simms testified he has been in federal custody for 12 years T1385. Simms was arrested on May 20, 1994 T1387. Simms met Appellant in a holding cell

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[2] Nikki's prior statements were that she saw Appellant and LoRay with jewelry and the jewelry was later sold at a flea market T1236, 1244-45. The prosecutor questioned Nikki about the prior statement for purposes of impeachment T 1559-62.

T1388. Appellant struck up a conversation with Appellant T1388. Appellant told Simms not to worry about his charges T1389.

Simms testified he saw Appellant a few days later - this time in the Pompano Detention Center T1389. Simms talked with Appellant because it was a "macho thing" and he needed someone to talk to T1392. Simms talked about a robbery he committed with Walter Eady in which someone got shot T1391. Simms was annoyed because the people he robbed saw his face T1393. Appellant said Simms should have killed them T1393. Appellant said he would have killed the person that got shot in Simms' case T1393-94. Appellant then said, "I had to kill someone" T1394. Simms had no idea what Appellant was talking about T1394.

Simms testified he later found out Appellant had used information that Simms had given him T1395. Seven months after the conversation with Appellant Simms was placed in custody with Ronnie LoRay T1397. LoRay told Simms that police were implicating Simms and LoRay in a murder T1403. Simms told LoRay to straighten it out because he had nothing to do with the murder T1403. LoRay did not indicate he was going to take care of it T1403. Simms called his lawyer T1404. Simms testified he was going to use the information he obtained from Appellant to help him with his sentence T1407.Simms motive for testifying was the hope the prosecutor would help him T1408-09.

Jack King testified he used to work for the Ft. Lauderdale Police Department T1433. King interviewed Gerald Singer as to what things had been stolen from the pawn shop T1475. This included a 10 page statement T1475. Singer never mentioned a Crown Royale bag T1475. King interviewed Appellant at least 18 months after the crime T1435. The tape of that interview was played to the jury T1444-1470.

In the statement Appellant indicated that one day in April after 2:00 Ronnie LoRay came to Appellant's house and was very upset T1451. LoRay said he was involved in a robbery and he heard a shot but didn't know if the person was dead T1451. LoRay said they didn't have to shoot the woman T1452. LoRay did not say who shot the woman T1453. LoRay said he touched items T1454. LoRay had jewelry and a couple hundred dollars T1458.

Appellant's statement indicated he had been in the store before and had pawned a sega under the name David Ashley T1454. Appellant had signed a pawn slip T1455.

Appellant was not surprised LoRay did the robbery because LoRay was have known to do robberies T1466. Appellant stated he did not do robberies and he did not carry weapons T1460. Appellant stated that he didn't do robberies with LoRay T1457. Appellant might help him find a place to go with the stuff T1457.

A number of phone calls of Appellant from jail were recorded and played to the jury. In the phone conversation Appellant indicated a detective talked to him and said they had Ronnie's fingerprints and Ronnie was trying to work out a deal with the state

against Appellant T1669, 1671. Appellant didn't know anything T1672. Appellant was worried Ronnie was thinking Appellant would betray him T1672. Appellant said people kept coming to him and Appellant would tell them he had nothing to do with it T1673. Appellant said they didn't have a case on him but were trying to get Appellant to help with Ronnie T16765. Appellant indicated he was not going to do that T1676. Appellant indicated that he didn't do it and he wasn't there T1677. Appellant stated that they were playing games on him T1680. Appellant didn't know Ronnie's position and needed to find out T1680. Appellant said they wanted Ronnie to say Appellant was with him and they wanted Appellant to say Ronnie did it T1682. Appellant indicated that he could not say these things because he was not there T1682. Appellant was concerned that they were threatening people to say things T1683.

Appellant indicated that someone [police] came to see him but he was not worried because he did not do it T1626. Appellant indicated that he was supposed to be released shortly but they say Nikki was trying to testify on something Appellant had nothing to do with and they might lock him up for that T1630. Appellant said that he and Nikki were home and had nothing to do with it T1633-34. Appellant thinks that Nikki is lying on him and that is why police want to lock him up T1635. Police told Appellant that they had talked with Nikki T1635. Appellant said that police were trying to get Nikki to lie T1636-37. Appellant said that there was a detainer on him and he would be picked up by someone from Broward County T1648. Appellant was

not worried because he didn't do anything T1648. Also, what Nikki says can't be used against Appellant anyway because of the marital privilege rule T1649. Appellant said they were trying to use Nikki against him but he doesn't think Nikki is going against him T1658. They used Nikki to get a warrant against him T1658-59. Alfonzo is also lying T1659. Appellant wants to find out what is up with Nikki T1658-59. Appellant wants Nikki on a vacation so he doesn't have to worry about her T1660. Appellant thought Nikki had said things against Appellant because she was mad at him T1691.

PENALTY PHASE

Stephen Cadore testified that in 1988 he worked at a Circle K store T2119. Two men entered the store T2119. One pointed an antique gun at Cadore and asked for money T2119. Cadore gave him money but the second man wanted more T2119. The second man started struggling with the first and the gun went off T2119. Cadore could not identify anyone T2119.

Dr. Micahel Brannon, a licensed psychologist, testified Appellant's parents were divorced when Appellant was 5 T2143. There was a lot of domestic violence between Appellant's parents T2143. Appellant saw his father burn his mother with hot grease T2143. Appellant remained with his mother T2143. Appellant suffered physical abuse from his mother and grandfather T2143. Appellant's father is in prison T2149. Appellant never had a good relationship with his father T2149. Appellant came from a dysfunctional family and had to do everything to take care of himself T2150.

Appellant is not a psychopath T2152. Appellant had no negative disciplinary reports T2153. Appellant received a high school equivalency diploma while in prison T2270. Appellant also received merit time for quickly reporting another's seizure T2270.

Dr. Lynne Rich is a licensed psychologist and a clinical neuropsychologist T2279. Rich conducted a neuropsychological evaluation of Appellant t2282. Testing showed Appellant had a subnormal use of hands and had some kind of problem in his brain T2284. There were also problems with speech production on demand T2286. Appellant had below a 6th grade achievement level T2286. There was evidence of problems with visual awareness and visual memory T2287. There is a breakdown of comprehension when Appellant takes in a lot of things or things that get complicated T2288. Three times in Appellant's life he suffered loss of consciousness T2290. The loss of memory at ages 9, 15 and 17 was very likely due to brain injuries from beatings as a child T2290. Rich wondered if Appellant was exposed to cocaine while in his mother's womb T2290. Appellant's father tried to get him to use cocaine at the age of 12 T2290. Cross-testing showed no signs that Appellant was malingering T2289.

Appellant's grand aunt, Dorothy Thompson, testified Appellant was a very kind, generous young man who would come by and check on her T2160. Appellant was very nurturing and protective T2160.

Ronald Durham testified that Appellant is his stepson T2162. Appellant had to leave school when his child was born because he felt an obligation to take care of the child T2163.

Helena Thornton testified she had a child with Appellant - S.L.- who is now 17 years old T2172. Appellant is a good person and had a good relationship with his daughter T2173. Appellant still contacts her and she writes him T2174. Appellant's father abused drugs T2172.

S.L. testified that Appellant is her father T2176. Appellant is good to her T2176. They write to each other T2176-77. Appellant had matured and focuses more on his children T2177.

Mecka Ervin testified she met Appellant in 1992 and lived with him for 6 months T2179. Appellant treated her very well T2180. Appellant and Ervin had a child - M.L. T2181. M.L. is 11years old T2181. M.L. and Appellant write to each other T2181. Appellant is a good father T2181.

M.L. testified he is 11 years old and Appellant is his father T2182-83. M.L. visits Appellant and wants to continue to visit him T2183. They also write to each other T2183.

Francis McLamore testified Appellant is her grandson T2185. Appellant is good to her and would do things for her T2186. Appellant would correct the children if they did something wrong T2186.

Joyce Hamilton, Appellant's aunt, testified Appellant had always been loving and respectful T2188.

Camela Lindsey testified that Appellant is her big brother T2190. Appellant was a good brother who made sure she did not get into any trouble T2191. Among things Appellant did was to take care of a handicapped child T2191-92.

Appellant's great aunt, Audrey Canion, testified Appellant is a loving person who would be there if she or her husband needed him T2193-94. Appellant was also excellent to the kids T2194.

Curtis Fox testified that on September 27, 2006, he was in a holding cell with Appellant and Mark Simms T2198. As Simms was called to court he said to Appellant, "Do you remember me? I got you. Yeah, you remember me" and walked out T2199. After Appellant left the cell, Simms came back T2199. Others accused Simms of informing on Appellant T2199. Simms replied, "Fuck that nigger, you got to do what you got to do to free yourself" T2199. It was like Simms had something against Appellant T2202.

Eddie Carter testified that he was in the Broward County jail in 1994 T2206. Carter does not remember giving a statement to detective King T2206. Appellant and the prosecution stipulated that King took a statement from Carter on July 14, 1994, and the statement contained the following information T2217, 2223. Carter was under oath and said 3 months earlier he had a conversation with Reggie Mackey, Holsten,

and a tall guy T2219. Carter would later identify the tall guy as Mark Simms T2227. The men were talking about how they steal guns T2220. Simms said he went into a pawn shop and a lady got in the way so he shot her T2221. Simms mentioned Ronnie's name T2221. Mackey said Ronnie got a lot of money T2221.

Carl Thompson testified he was in the holding cell with Appellant on September 27, 2006 T2272-74. As a man was exiting the cell he said to Appellant, "You don't remember me, do you? I remember you" T2274. The man later returned to the cell and said, "Fuck that nigger, it's all about me. I don't give a damn about that nigger right there" T2274. Thompson later found out that the man had been a state witness T2276.

Robert Garcia testified that he is presently in the county jail T2312. In February- March of 2005, Garcia was housed with Mark Simms T2312. As a jail trustee, Garcia had heard that Simms snitched on someone in jail T2313. Garcia was concerned that Simms would become a witness against him so he confronted and pressured Simms T2314-15. Simms said he was mad that he got so much time and he was going to testify because he wanted to go home to be with his family T2316. Simms also wanted revenge T2316. He found out this person was Appellant T2317. Garcia later testified he was later in the same holding cell as Appellant T2318. The two men talked T2318. Appellant was upset about Simms testifying against him

T2318. Garcia testified that Simms knew details of the crime that no one else would know T2319. Garcia told Appellant what Simms told him T2319.

Rosalind Durham testified she is Appellant's mother T2327. She was fourteen years old when she became pregnant with Appellant T2328. Durham and Appellant's father would fight T2329. Appellant's father was addicted to crack and would beat her T2329. Durham would have six more children T2330-31. One child, Joby, has Angelman Syndrome T2332. Joby is missing a chromosome and doesn't talk, wears diapers, and everything has to be done for him T2332. Appellant had a lot of responsibility for taking care of the children T1224. Durham would go to work and Appellant would bath the children and clean the house T2335.

Durham testified she sent Appellant to be with her father when he was five T2336. Appellant called and said he had been beaten T2337. Even after Appellant had grown he was close to his brothers and sisters T2337. He still tries to help them T2337. He is also good with his children T2337.

Appellant testified he did not know his father while growing up T2350. Appellant does remember his father burning his mother with grease and beating her under the table T1251. This image stuck with him for years T2351. Around the age of six Appellant was sent to his grandfather T2351. His grandfather would get drunk and beat Appellant with a belt dipped in hot water T2351. The beatings would go on for 30 minutes T2351. Appellant was returned to Florida T2351. Appellant took care

of Joby and took care of the other children T2353. Appellant testified he had conversations with Mark Simms about Simms's and LoRay's past activities T1250. Appellant denies telling Simms you have to kill someone because they see your face.

Appellant never told Simms about anything he had done T2360. Appellant admits to the prior felony in 1988 T1251. Appellant testified that he and two others went to the circle K T2361. Appellant went to the counter T2361. The two others entered T2361. One had a gun and requested money T2361. Cadore gave Appellant the money T2361. Appellant passed the money to Rosemont who then turned around and wrestled with Charles about the gun and wanting more money T2361. The gun went off T2361. Appellant ran away T2361. Appellant was 15 at the time and did not threaten anyone T2361.

SPENCER HEARING/MOTION FOR A NEW TRIAL

Appellant testified that he didn't commit the crime and never hurt anyone in his life SR206. Appellant explained that while he has been in prison he has talked to his kids on the phone and tried to help them better themselves SR206. Appellant has talked to young people encouraging them not to mess up their lives. SR206. Appellant feels he can be very helpful to people in prison SR206. Appellant has helped people in prison - including keeping peace between people who were fighting SR207.

At the new trial portion of the hearing Deputy Arthur Reeves testified he works as a housing deputy at the main jail T2437. Deputy Reeves maintains order in the housing unit and makes sure the inmates are feed T2437. Appellant was assigned the duty or assisting Deputy Reeves T2439. Approximately a month and a half earlier Reeves saw a confrontation in the hall T2114. Deputy Reeves heard Appellant ask Mark Simms (A.K.A. Mark Swan) why he testified on the stand and made 'false allegations" against Appellant T2442. Simms responded it was not personal it was payback T2442.

SUMMARY OF THE ARGUMENT

1. The prosecution introduced prejudicial evidence that it failed to link to the charged crime. Without the linkage the evidence was inadmissible. The error cannot be deemed harmless.

2. The prosecution's case was circumstantial. There was no objective evidence, physical or testimonial, to place Appellant at the crime scene at the time of the shooting. Instead, this case involves the stacking and pyramiding of inferences. As such, the evidence is insufficient for conviction.

3. It was error to permit a prosecution witness to give a raw conclusion or opinion that Appellant knew Joanne Mazollo. There was no foundation or basis given for this conclusion. The error was prejudicial where the prosecution wanted the jury to believe Appellant killed Mazollo because she knew him.

4. The prosecution introduced a statement of Appellant discussing robberies involving Ronnie LoRay. Over objection, the prosecution was permitted to redact a portion of the statement it didn't like. This was reversible error.

5. The trial court erred in overruling Appellant's objections to the prosecution presenting evidence that Appellant had been in jail or prison.

6. The trial court erred in denying Appellant's motion to dismiss where there was an unjustified delay of 11 years in indicting Appellant. During this time period evidence disintegrated that would have implicated a key prosecution witness - Mark Simms. The unjustified delayed denied Appellant due process.

7. Inflammatory photographs were introduced into evidence over Appellant's objection. The photos were not relevant to any fact in issue. The photos were inflammatory and prejudicial.

8. It was error to send evidence to the jury during its deliberations that the jury had not requested. This unauthorized action unduly emphasized prejudicial evidence. The error was not harmless.

9. The trial court erred in denying Appellant's motion for new trial.

10. The trial court erred by improperly imposing the avoid arrest circumstance.

11. The jury was not properly instructed on the well-established law on the avoid arrest aggravating circumstance. The error was not harmless.

12. The trial court erred in finding and instructing on the prior violent felony aggravating circumstance.

13. The death penalty is not proportionally warranted in this case.

14. The trial court erred in allowing the prosecutor to question Appellant about the guilt phase where direct examination related solely to penalty phase information regarding Appellant's background. The error was harmful.

15. The trial court erred in permitting the prosecutor to improperly impeach a defense penalty phase witness.

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

17. Florida's death penalty which does not require: the findings under Ring v. Arizona, 122 S. Ct. 2428 (2002); the jury to be properly advised of their responsibility; 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.

18. Florida Statute 921.141(5)(d), the felony murder aggravator, is unconstitutional on its face and as applied in this case.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO EVIDENCE WHICH WAS NOT LINKED TO THE CRIME CHARGED.

Mark Simms took the witness stand and testified he and Appellant were involved in a "macho" conversation on May 20, 1994. T1392. During the conversation Simms stated he committed a robbery which got out of hand and someone was shot T1392. Simms indicated he could have handled it better T1392. Appellant said Simms should have killed the person T1393. Appellant said he would have killed the person T1393. Appellant said he had killed a person T1394. Appellant did not explain who, what, where, when or how he killed a person. There was no context as to the killing. Simms indicated that he and Appellant were involved in "macho" talk T1392. Simms testified that he had no idea what Appellant was referring to T1394.

Appellant moved to strike the evidence of Appellant's statement that he killed a person as not being linked to the crime for which he was on trial T1409-1411. The trial court denied the motion T1412. This was reversible error.

STANDARD OF REVIEW

The standard of review depends on the nature of the evidentiary issue under review. U.S. v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997). Linn v. Fossum, 946 So.

2d 1032, 1036 (Fla. 2006). If the issue is based on the superior vantage point of the trial court, the appellate court will give deference to the personal judgment (discretion) of the trial court, If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgment is deferred to.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to the conclusion of law. Legal rulings are reviewed de novo. State v. Glatzmayer, 789 So. 2d 297. 301 n. 7 (Fla. 2001). Although some evidentiary rulings are reviewed for abuse of discretion, any discretion is controlled and limited by rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003). Under any standard of review it was error to admit the evidence.

ANALYSIS

If evidence is not linked to the charged crime it is not admissible. See Huhn v. State, 511 So. 2d 583, 589 (Fla. 4th DCA 1987) ("because the particular gun was not linked to the offense charged, it served the purpose only of conveying to the jury that Huhn's having guns tended to support the testimony he had a gun when engaged in the charged crimes"). O'Connor v. State, 835 So 2d 1226, 1230 (Fla. 1st DCA 2001) ("without some link to the charges being tried, a general threat is not admissible"); Ford v. State, 801 So. 2d 318, 320 (Fla. 1st DCA 2001) ("without some link to the charges being tried, a general threat is not admissible"); Mariano v. State, 933 So. 2d

111, 115 (Fla. 4th DCA 2006) (defendant's statement not linked to charged offense thus inadmissible).

One does not speculate that a defendant's statement that he killed someone is relevant-the statement must be that he killed the victim in the case. See Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997) ("Long made vague statements he killed others"... "no statements were introduced in which Long stated that he killed the victim in this case").

The fact that Appellant stated that he killed someone does not make the statement admissible without linking it to the charged crime.

In Green v. State, 190 So. 2d 42 (Fla. 2nd DCA 1966) there was a robbery of a 7-11store in which money was taken. Green was arrested for the robbery. Allie Smith visited Green in jail. Green informed Smith that he had robbed a 7-11 store and had taken money. The appellate court held the trial court should have stricken Green's statement regarding a 7-11 robbery because the prosecution failed to link it to the 7-11 robbery for which Green was on trial:

> ... her conversation with Green at the jail related to a robbery. It is equally obvious, however, that **the robbery was never identified as this particular robbery for which Green was on trial.**
>
> ***
>
> From all the foregoing, it is clearly evident from the record before us that the evidence of Allie Mae Smith detailing her conversation with defendant Green with reference to the robbery of a Seven Eleven Food Store **or the robbery involved in the case on trial, was not otherwise**

> **identified being the store or relevant** to prove any fact or facts in issue before the jury, and its sole purpose and effect could only have been to show the bad character of the defendant when he had not put his character into evidence, and his propensity for committing the robbery in question.

190 So. 2d at 44,47 (emphasis added).

Likewise, in the present case there was even less of a connection or linkage between Appellant's vague statement that he killed someone and the crime charged. There were no identifying facts contained in Appellant's alleged statement to Simms. The statement did not identify who was killed. The statement did not identify when the killing occurred. The statement did not identify where the killing took place.[3] The statement did not identify how the killing occurred. It was merely a statement that Appellant killed someone in the past. The statement was not properly linked to the crime charged.

In Delgado v. State, 573 So. 2d 83 (Fla. 2nd DCA 1990) the defendant boasted that he had killed 10 men. The statement was held not to be relevant to whether he had deliberately killed the victim in the case for which he was on trial.

In Jackson v. State, 451 So. 2d 458 (Fla. 1984) this Court reversed due to introduction of a statement that Jackson made to another which may have proven that Jackson killed in the past but was not relevant to show he killed in the charged case:

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[3] At least in Green there was an identification of the location of the crime.

> The testimony showed Jackson may have committed an assault on Dumas, but that crime was irrelevant to the case sub judice. Likewise the "thoroughbred killer" statement may have suggested that **Jackson had killed in the past, but the boast neither proved the fact, nor was that fact relevant to the case sub judice.**

451 So. 2d at 461 (emphasis added).

In Armstrong v. State, 931 So. 2d 187 (Fla. 2nd DCA 2006) the court held the statement to be irrelevant where "Armstrong was not talking about a specific crime" but was giving "a general idea of his character and what he would do and not do" 931 So. 2d at 192.

In Smith v. State, 866 So. 2d 51, 58 (Fla. 2004) **during** the episode of the charged crime the defendant stated "that was the 13th or 14th people that had been - that he had shot." The state successfully distinguished Jackson, supra, because the statements in Jackson "were not made during the charged crime and did not involve an affirmation of guilt regarding the charged crime" 866 So. 2d at 58. This court agreed and affirmed. The present case is like Jackson - the statement **was not made during the charged crime and did not involve an affirmation of guilt regarding the charged crime**. The statement should have been stricken and is prejudicial.

The statement that Appellant killed a person was not linked to the crime for which he was on trial. It was error to deny Appellant's motion to strike the irrelevant evidence. Appellant was denied due process and a fair trial. 5th, 6th, 14th Amendments

to U.S. Constit.; Art. I §§9, 16, 17 Fla. Constit. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND FAILED TO PROVE IDENTITY.

Appellant moved for judgment of acquittal on the ground that the state had failed to prove that Appellant had killed Joanne Mazollo T1709, Lines 18-22. The standard of review for the denial of a judgment of acquittal is de novo. Jones v. State, 791 So. 2d 1194, 1196 (Fla. 1st DCA 2001).

The Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. Cox v. State, 555 So. 2d 352 (Fla. 1989). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925). .Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. Williams v. State, 143 So. 2d 484 (Fla. 1962); Davis v. State, 90 So. 2d 629 (Fla. 1956); Mayo v. State, 71 So. 2d 899 (Fla. 1954).

Stacking or pyramiding inferences to speculate that a defendant is guilty is not permissible. See Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000) ("the circumstantial evidence test guards against basing a conclusion on impermissibly stacked inferences"); Gustine v. State, 86 Fla. 24, 28, 97 So. 207, 208 (Fla. 1923) (conviction reversed because "only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessarily for conviction be reached"); Brown v. State, 672 So. 2d 648, 650 (Fla. 4th DCA 1996) ("circumstantial evidence is insufficient when it requires pyramiding of assumptions or inferences in order to arrive at the conclusion of guilt") Collins v. State, 438 So. 2d 1036 (Fla. 2nd DCA 1983) (pyramiding of inferences lacks the conclusive nature to support conviction); Chaudoin v. State, 362 So.2d 398, 402 (Fla. 2nd DCA 1978). Also, when the State relies upon purely circumstantial evidence to convict an accused, the courts have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

In this case the state's evidence failed to link Appellant to the murder of Joanne Mazollo. There was no objective evidence, such as fingerprints or DNA, to place Appellant at the scene at the time of the shooting. There was no eyewitness testimony. Instead, this case involves the stacking of inference upon inference.

The ultimate inference the state hoped to prove is that it was Appellant who shot Joanne Mazollo. To reach this inference one had to make two other inferences - Appellant was at the pawn shop at the time of the shooting and Appellant possessed the gun to do the shooting. In turn these inferences are based on stacking other inferences.

For the inference that Appellant was present in the pawn shop at the time of the shooting the prosecution relied on a number of inferences regarding a Crown Royale bag. The first inference is that the Crown Royale bag was taken from the pawn shop. This is a very questionable inference and requires further inferences. An inference has to be made that the Crown Royale bag was taken during the robbery. There is no direct evidence it was taken. The pawn shop manager, Gerald Singer testified that firearms and money were missing from the store T1191-92. Singer never testified the Crown Royale bag was missing.[4] Next one must infer that the Crown Royale bag

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[4] Singer testified the Crown Royale bag was kept in the safe. However, Singer never testified the bag was missing from the safe. Singer was the first to arrive at the scene and could have removed the bag from the safe. The prosecutor presented a later photo of the safe which showed some items in the safe. It is possible the Crown Royale bag was behind the items or had been removed prior to the taking of the photo. The bottom line is that there was no testimony that the Crown Royale bag was taken in the robbery.

from the pawn shop was observed by Nikki (Appellant's wife). Singer described the bag as "blue velvet" with "gold draw strings" T1195. Nikki did not give any description of the bag.[5] Under these circumstances the prosecution did not show the bag observed by Nikki was the same bag observed by Singer. See DRH v. State, 761 So. 2d 379, 380 (Fla. 2nd DCA 2000) (failure to prove car belonging to victim was the same car burglarized); Coyle v. State, 493 So. 2d 550 (Fla. 4th DCA 1986) (failure to show property was the same property that was stolen).

Assuming that one can infer the bag Nikki observed was the bag that Singer described and assuming that bag was stolen during the robbery still more inferences must be made. Nikki testified she saw the bag in the closet of her residence. However, Nikki could not say when she observed the bag T1235. The prosecutor tried to get Nikki to testify that she saw the bag on the day of the robbery or shortly afterward. She refused to do so T1235. Without testimony as to when she saw the bag, an inference from the bag cannot be made.

Assuming one could infer the bag was seen shortly after the robbery, one must still infer that Appellant possessed the bag. Nikki did not see Appellant with bag.

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[5] Nikki only alleged seeing a bag some 11 years after the robbery after talking with police and in the hope of obtaining a reward. She was apparently unable to describe the bag.

Thus, one can only infer Appellant had possession through constructive possession. However to prove constructive possession one must show control over the object and knowledge of the presence of the object. E.g., Person v. State, 950 So. 2d 1270 (Fla. 2nd DCA 2007). Here, the evidence did not show how many people had access to the closet. The testimony did not limit access to Appellant and Nikki. In fact, there was testimony about Ronnie Loray being at the residence. It is not even a legitimate inference that Appellant had dominion and control over the bag so as to possess it. See Lopez v. State, 711 So. 2d 563 (Fla. 2nd DCA 1997) (no constructive possession of contraband found jointly in a shared closet). Nor was any evidence presented that he had knowledge of the presence o f the bag. See Diaz v. State, 884 So. 2d 387, 389 (Fla. 2nd DCA 2004) (no constructive possession of item in shoe box that was accessible to other people where state failed to present independent proof of knowledge).

Assuming one infers possession still more inferences are required. So far, to have the Crown Royale bag stolen from the robbery and in Appellant's possession there must be a stacking of 4 inferences:

1. The Crown Royale bag was stolen.
2. Nikki saw the stolen bag.

3. The sighting was done shortly after the robbery.
4. Appellant possessed the bag.

One still then has to make the assumption or inference that Appellant obtained

the bag because he robbed the pawn shop as opposed to being given the bag later. The prosecution introduced Appellant's statement that he did not do robberies T1457, 1460. The prosecution introduced Appellant's statement that after Ronnie LoRay did a robbery Appellant had helped LoRay find a place to dispose of the proceeds T1457. If Appellant possessed the bag, the evidence or an inference was he helped **after** the robbery but not that he was involved in the robbery itself.

The prosecution also inferred, after all the above inferences, that Appellant shot Mazollo. However, there was no physical or objective evidence Appellant shot Mazollo. Appellant's "macho" conversation that he had once killed someone was not linked to the shooting of Mazollo at the pawn shop. There is only another inference or assumption.

The other evidence presented by the prosecution did not aid in a theory of Appellant being guilty.

The prosecution presented Appellant's statement to Jack King. In the statement Appellant denied doing robberies and said nothing that implicated him in the robbery and murder of Mazollo T1457, 1460. Appellant stated he had been in the pawn shop before. Appellant stated he had pawned a watch under the name of David Ashley T1454-55. Appellant did not hide these facts. Nor do these facts implicate him in any way in the robbery/murder.

The prosecution presented evidence of phone calls Appellant made from jail. In

the phone calls Appellant stated he was not guilty T1626, 1648, 1630, 1633-34. Appellant wanted to find out if Nikki and Ronnie Loray were going to testify. Appellant did not want either one to testify. Appellant wondered about Nikki and the marital privilege rule. Appellant believed police were trying to get Nikki to lie against him T1635.1636-37. Appellant also believed police were also pressuring LoRay to falsely testify against him T1671, 1682, 1683. The bottom line is that Appellant believed that Nikki and LoRay would give false testimony incriminating him in the crime. Having such a belief does not incriminate Appellant. An innocent person would be concerned about people falsely implicating him in a crime.

The prosecution presented testimony that Appellant had previously visited the Big Dollar and other pawn shops. Appellant never tried to hide being in the pawn shop previously. He told the police he had pawned a watch there under the name David Ashley T1454. The prosecution never claimed that transaction was related to the robbery/murder. Witnesses testified Appellant also went to the pawn shop, and other pawn shops, to attempt to buy stereo equipment T1228. This is not unusual. It certainly is not proof of guilt of robbery/murder.

The prosecution also introduced evidence that Ronnie LoRay's print was found on a stun gun box in the pawn shop. One cannot infer Appellant's guilt based upon a

fingerprint of Loray.[6] Appellant acknowledged that LoRay was known to have committed robberies but Appellant was not involved in those robberies T1457, 1460.

Again, when the State relies upon purely circumstantial evidence to convict an accused, this Court has always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

There was no evidence, physical or testimonial, that Appellant killed Mazollo. It is pure speculation that Appellant killed and robbed Mazollo. A conviction may not be based on guesswork, no matter how educated the guess or how strong the suspicion may be. See e.g. Frank v. State, 163 So. 223, 121 Fla. 53, 55-56 (Fla. 1935). Appellant's conviction and sentence must be reversed.

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[6] It should be noted that the print evidence does not even implicate LoRay let alone Appellant. There was no testimony as to when the print was left on the gun box. There was no testimony that the gun box was never located where the public could touch it or that it had not been displayed to the public. There was testimony that guns were displayed for the public T1190. Finally, no one testified where the gun box was eventually found. The bottom line is there was not enough evidence produced to show LoRay could only touch the box during the robbery.

POINT III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO TESTIMONY THAT JOANNE MAZOLLO KNEW APPELLANT.

The prosecution wanted the jury to believe Appellant killed Joanne Mazollo during a robbery because Mazollo knew Appellant. A key component to the prosecution's hypothesis was proving Mazollo knew Appellant. The prosecution offered Nikki's testimony that Mazollo knew Appellant (T1230- "she knew Herman"). Nikki never gave a basis for reaching such a conclusion. Appellant had objected to the conclusion T1230. The trial court overruled the objection and allowed Nikki to testify that Mazollo knew Appellant T1230. This was reversible error.

STANDARD OF REVIEW

The standard of review depends on the nature of the evidentiary issue under review. U.S. v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997). Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006). If the issue is based on the superior vantage point of the trial court, the appellate court will give deference to the personal judgment (discretion) of the trial court, If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgment is deferred to.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to the conclusion of law. Legal rulings are reviewed de novo. State v. Glatzmayer, 789 So. 2d 297. 301 n. 7 (Fla. 2001). Although some evidentiary rulings

are reviewed for abuse of discretion, any discretion is controlled and limited by rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003). Under any standard of review it was error to admit the evidence.

ANALYSIS

It is well-settled that a lay witness may not testify as to her opinion or conclusion. Section 90.701, Florida Statutes. It is the function of the jury, rather than the witness, to draw conclusions from the witness perceptions. Thorp v. State, 777 So. 2d 385, 395 (Fla. 2000) (witness may testify as to what defendant said, but witness could not draw conclusion as to what was meant ... such inference "were matters for the jury to consider").

Only if it is shown the witness cannot accurately testify to what she perceived without giving a conclusion or opinion is that conclusion admissible. §90.701. However, the proponent of the evidence must first lay the foundation that the witness is unable to describe what they perceived without giving a conclusion or opinion. Beck v. Gross, 499 So. 2d 886, 889 (Fla. 2nd DCA 1986) ("The opinion of a lay witness can only be given after he has testified as to facts or perceptions underlying his opinion"); Fino v. Nodine, 646 So 2d 746, 749 (Fla. 4th DCA 1994) ("... a predicate must be laid in which the witness testifies as to the facts or perceptions upon which the opinion is based"); Alexander v. State, 627 So. 2d 35, 42 (Fla. 1st DCA 1993)

(counsel sought to call witness to testify shooting appeared to be accidental - foundational requirements of 90.701 were not shown).

In Kight v. State, 512 So. 2d 922, 929 (Fla. 1987) this Court held that a witness's testimony that the codefendant "was encouraging" Kight was inadmissible under 90.701 where it was not established that the witness could not have communicated his perceptions without giving his conclusion.

Likewise, in this case there is no foundation as to why Nikki concluded Mazollo knew Appellant. Mazollo may have said or done something which could be interpreted to conclude Mazollo knew Appellant. Maybe the conclusion was wholly unfounded. The point is it is for the jury, and not witnesses, to draw conclusions from the evidence. It was error to admit the conclusion over Appellant's objection.

In addition, it generally is improper for witnesses to give conclusions as to what another appears to know or appears to be thinking. See Lee v. State, 729 So. 2d 975-80 (Fla. 1st DCA 1999) (error to permit witness to testify defendant "appeared to have something on his mind that he appeared to want to talk to somebody...").

The beneficiary of the error has the burden of proving the error was harmless. State v DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case it cannot be said the error was harmless. This was, best, a very close case based on a series of inferences. See Point II. One inference the prosecution relied heavily on was the claim Mazollo knew Appellant and Appellant killed her in fear of her identifying him. This cause must be

reversed and remanded for a new trial. The error was also prejudicial as to the penalty phase.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO REDACT A PORTION OF APPELLANT'S STATEMENT OVER APPELLANT'S OBJECTION.

The prosecution introduced the recorded statement of Appellant and Detective King. Over Appellant's objections (T 1277, 1302) the prosecution was permitted to redact a portion of the statement it did not wish the jury to hear T 1283 – 84, 1306, 1444 – 70. This was error.

When a recorded statement is introduced by a party, "an adverse party may require him or her at that time to introduce any other part" of the statement. Section 90.108(1) Fla. Stat.; Mason v. State, 719 So. 2d 304, 305 (Fla. 4th DCA 1998).

In this case prosecution introduced Appellant's statement including the portion regarding robberies committed by Ronnie Loray whom the prosecution hypothesized did robberies (including the one charged) with Appellant T1465 – 1470.

Over Appellant's objections, the prosecution excluded the following portion of the statement about Loray's robberies indicating that Mark Simms and Loray did the robberies together:

> Question: Well, you knew Ronnie was doing robberies?
> Answer: Yeah.
> Question: In fact, you helped Favarulo on a couple of them; right?
> Answer: Yeah.
> Question: In fact, one where Simms was involved in there was a shooting, right?
> Answer: (Unintelligible).

Question: **Didn't they shoot the gun on there, on that robbery where Simms and Ronnie LoRay?**
Answer: **I think so**, I'm not sure I – – I can't quite remember that-
Question: Well, there were quite a few robberies--
Answer: Yeah.
Question: I mean, we're not talking about just one; right?
Answer: No.

T1283 – 84(emphasis added).

In all fairness, when the prosecution introduced portions of Appellant's statements talking about knowing about LoRay doing robberies, including one with the shootingT 1451, 1466, it can not excise the portion about Mark Simms and LoRay's robberies.

By introducing **only** the portion showing that Appellant knew of LoRay's robberies the prosecution created the misimpression that the **statement shows that only Appellant knew** about LoRay doing the robberies.[7] This is not true. The complete statement showed that Simms and LoRay were doing robberies[8]together.

Obviously, the prosecution would want the jury to have the impression that LoRoy worked only with Appellant on these robberies. Thus, the prosecution did **not**

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[7] From this it could be inferred that Appellant, and no one else, had been partners with Loray.

[8] It should be pointed out that Appellant denied doing robberies with LoRay T1460.

want the jury to hear the parts of the statement indicating others did robberies with LoRay – especially one of its witnesses-Mark Simms. Also, the fact of Simms and LoRay doing a robbery in which there was a shooting would have been even more disturbing to the prosecutor – it strikes too close to the possible facts of this case.

Aside from preventing the jury from being misled, as defense counsel explained T 1277, the redaction also showed the basis for Simms motive for wanting revenge on Appellant – Appellant had helped police (Favarulo) regarding robberies Simms was involved in T1283.

It was reversible error to redact this statement to give the jury a one-sided version. Appellant's conviction and sentence must be reversed in this cause remanded for new trial.

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTION PRESENTING EVIDENCE THAT APPELLANT HAD BEEN IN JAIL OR PRISON.

Appellant objected to the prosecution presenting evidence that in May of 1994 and in 2006 Appellant was in jail or prison on the grounds that such evidence was irrelevant as to whether Appellant was guilty of murder and alternatively that any relevance was outweighed by unfair prejudice T1055, 1060, 1071, 1270, 1429, 1615.

The trial court overruled Appellant's objections and permitted the prosecution to introduce that Appellant was in jail or prison T1086-87, 1271, 1619-20. The jury was repeatedly inundated with information that Appellant was in jail or prison T1117, 1118, 1387, 1388, 1389, 1445, etc. This was reversible error.

STANDARD OF REVIEW

The standard of review depends on the nature of the evidentiary issue under review. U.S. v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997). Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006). If the issue is based on the superior vantage point of the trial court, the appellate court will give deference to the personal judgment (discretion) of the trial court, If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgment is deferred to.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to the conclusion of law. Legal rulings are reviewed de novo. State v. Glatzmayer, 789 So. 2d 297. 301 n. 7 (Fla. 2001). Although some evidentiary rulings are reviewed for abuse of discretion, any discretion is controlled and limited by rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003). Under any standard of review it was error to admit the evidence.

ANALYSIS

Testimony, such as that here, that a defendant is in jail, prison or on probation is irrelevant and therefore inadmissible. Adan v. State, 453 So. 2d 1195 (Fla. 3rd DCA 1984); Singletary v. State, 483 So. 2d 8, 9 (Fla. 2nd DCA 1985); See also Bates v. State, 422 So 2d 1033 (Fla. 3rd DCA 1982); Thomas v. State, 701 So. 2d 891 (Fla. 1st DCA 1997); Jackson v. State, 598 So. 2d 303 (Fla. 3rd DCA 1992) (reversible error to admit evidence that defendant had been released from prison); Rimes v. State, 645 So. 2d 1080 (Fla. 2nd DCA 1994) (reversible error for officer to testify he obtained defendant's photo from police files); Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1997) (reversible error for officer to state he knew defendant from prior investigation).

The jury's knowledge that Appellant was incarcerated seriously eroded the presumption of innocence. See Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 2d 126 (1976). A criminal past is a logical inference which the jury would have drawn from evidence of incarceration.

The testimony was improper evidence a bad character and bad acts which 90.404(1), Fla. Stat. (2002), seeks to exclude. Thomas v. State, supra; Bozeman v. State, 698 So. 2d 629 (Fla. 4th DCA 1997).

The prosecutor argued the evidence was relevant to show the locations where conversations occurred. However, Appellant was not on trial for being in jail or prison. The fact that the conversations occurred in jail was not an issue and does not prove Appellant killed Mazollo. It was the **content**, rather than the locations, of the conversations that the prosecution should have been interested in.[9] The evidence Appellant was in jail did not prove any material fact in issue.

In addition, assuming arguendo that Appellant being in jail had some relevance such relevance would be outweighed by unfair prejudice is extremely prejudicial.

The courts have consistently held that references to prior criminal justice contacts are so prejudicial that they require a mistrial. Ward v. State, 559 So. 2d 450 (Fla. 1st DCA 1990); Harris v. State, 427 So. 2d 234 (Fla. 3d DCA 1983); Smart v. State, 596 So. 2d 786 (Fla. 3d DCA 1992); Williams v. State, 715 So. 2d 1152 (Fla. 3d DCA 1998); Cuthbertson v. State, 623 So. 2d 778 (Fla. 4th DCA 1993); Ford v. State,

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[9] However, as pointed out in Point I the conversation with Simms was not shown to be linked with the instant crime and phone conversations where Appellant denied guilt did not show Appellant did the killing.

702 So. 2d 279 (Fla. 4th DCA 1997); White v. State, 734 So. 2d 484 (Fla. 4th DCA 1999); Jackson v. State, 627 So. 2d 70 (Fla. 5th DCA 1993). The court in Harris pointed out that the erroneous admission testimony concerning prior criminal justice contacts "has generally been considered classic grounds for a mistrial given its usual devastating impact upon a jury." 427 So. 2d at 235. In Smart a police officer testified as to unspecified prior "contacts" with the defendant. 596 So. 2d at 786. The Court held that the trial judge erred in denying the motion for mistrial, reversed for a new trial, and emphasized that a curative instruction could not have eliminated the prejudice:

> We find that a curative instruction would not have been sufficient to dissipate the prejudicial effects of this error. Post v. State, 315 So. 2d 230 (Fla. 2d DCA 1975). As stated in Post, "[t]he die was cast – the damage was done." Post, 315 So. 2d at 232.

Id. At 786.

In this case the trial court instructed the jury not to speculate as to the crimes for which Appellant was in jail and prison. This does not cure the prejudice.

The jury knew Appellant was in jail in 1994 and 2006 for something bad and it doesn't matter that they don't know the specific offenses. The prejudice is exacerbated by the jury hearing that Appellant was incarcerated twice - or on one long continuous occasion.

The error is especially prejudicial where the prosecutions case was built on numerous inferences. It cannot be said beyond a reasonable doubt that the error did not influence the jury. The error denied Appellant due process and a fair trial. 5th, 6th, 14th Amendments U.S. Constit., Art, I §3,9, 16, 17, Fla. Constit.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS.

Appellant moved to dismiss on the ground that an unjustified delay of 11 years in indicting him violated his right to due process under the Fourteenth Amendment to the United States Constitution R195-196.

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), this Court held that a defendant bears the initial burden of showing actual prejudice when alleging a due process violation due to pre-indictment delay. If the initial burden is met, the court must then balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and Fourteenth Amendment. Id. at 531.

In Scott v. State, 581 So. 2d 887, 892-893 (Fla. 1991), this Court held that an unjustified delay of seven years in seeking an indictment, which resulted in the loss of evidence, violated the defendant's due process rights As in Scott, Appellant argued he was prejudiced in the State's delay in arresting and indicting him. Because of the unjustified delay in this case, Appellant was prejudiced due to the disintrigation of evidence which would have implicated Mark Simms as the true killer of Joann Mazollo. In 1994 lead detective Jack King interviewed Eddie Carter who implicated

Mark Simms as the killer of Mazollo T118, 2219-2221, 2222. However, by the time Appellant was arrested and indicted 11 years later, Carter had no memory of such details or even being interviewed by King T75. Appellant had suffered actual prejudice.

The state then had the burden of demonstrating the reasonableness of the delay Scott; Rogers. The justification of the 11 year delay was to perform additional investigation. Detective King testified that in 1994 Appellant was a suspect. In 1994 the evidence was gathered. In 1994 Appellant, his wife Nikki, Eddie Carter, and other potential witnesses were interviewed. Yet the police did not bring charges. It was not until 11 years later that police reinterviewed witnesses. The investigative delay was not reasonable.

The justification for an investigative delay was severely outweighed by the actual prejudice to Appellant. "It is clear that the delay in this instance provided the prosecution with a tactical advantage." Scott, 581 So. 2d at 893. "[D]ue process will require dismissal of an indictment where it is 'shown that the preindictment delay caused substantial prejudice to (an accused's) right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." United States v. Townley, 655 F. 1d 579 (5th Cir. 1982) citing United States v. Marion, 404 U.S. 307, 324, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Dismissal was warranted in this case.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL PHOTOS INTO EVIDENCE OVER APPELLANT'S OBJECTION.

Over Appellant's objection (T.1149, 1157, 1159, 1168), the prosecutor was permitted to introduce state's exhibit 1 into evidence T1160, 1167, 1168. The photograph was a closeup of the victim's head. The photo had no relevance to any material fact in issue. The photo was not relevant and if it had any relevance that relevance was substantially outweighed by unfair prejudice.

It is true that photographic evidence, if relevant, is generally held admissible regardless of its character as gruesome or gory. Allen v. State, 340 So. 2d 536 (Fla. 3rd DCA 1976). However, if such photograph's primary effect is to inflame the passions of the jury, its introduction will result in a reversal of the conviction. Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

It could be claimed that the photo was relevant for use of the medical examiner. Such a claim would be frivolous. The medical examiner hypothesized that the gun shot came from close range based on soot remnants that were found during an examination of Mazollo T1172. However, the medical examiner testified the soot remnants are not visible in the photo T1172. In other words, the photo was not used by the medical examiner in relating his findings to the jury. The fact that the victim was shot was not in dispute. Similarly, in Almeida v. State, 748 So. 2d 922 (Fla.

1999) this Court held it was error to introduce inflammatory photographs to show things that were not in dispute and the introduction of such photos was gratuitous:

> The state introduced the Exhibit No. 10 an autopsy photo of the victim that depicted the gutted body cavity. Almeida claims that this was error. We agree. Although this Court has stated that "[t]he test for admissibility of photographic evidence is relevancy rather than necessity," Pope v. State, 679 So. 2d 710, 713 (Fla. 1996), this standard by **no means constitutes a carte blanch** for the admission of gruesome photos. To be relevant, a photo of a deceased victim **must be probative of an issue that is in dispute**. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. **Neither of these points, however, was in dispute.** Admission of the inflammatory photo thus was gratuitous.

748 So. 2d at 929-930(emphasis added). Here, the fact the victim was shot to the head was undisputed. The introduction of the gruesome photos was gratuitous and served only to inflame the jurors.

In Hoeffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990) the court reversed when although the photo had some relevance it was minimal when compared to the dangers of unfair prejudice to the defendant:

> Finally, Appellant contends the trial court erred when it permitted the introduction of an autopsy photograph of the victim's head. The photograph depicted the internal portion of the victim's head after an incision had been made behind the ears to the top of the head, with the scalp rolled away revealing the flesh behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair overlies the skull. The state argues that it introduced the photograph to show that in addition to the other injuries sustained by the victim, he had suffered a separate blow to the left side of his head, and that he received the worst fight of the fight. The record contains other evidence which showed that the victim had broken fingers, bruises above the nose

> and lacerations on the back of the head. The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muscle **without reference to the photograph**. The danger of unfair prejudice to Appellant **far outweighed the probative value of the photograph** and the state has failed to show the necessity for its admission. In retrial, the photograph should be excluded. Accordingly, we reverse and remand this case for a new trial.

559 So. 2d at 1249 (emphasis added). The inflammatory evidence should not have been admitted in this case. The evidence denied Appellant due process and a fair trial. 5th, 6th, 14th Amendments to U.S. Constit.; Art. I, §§9, 16, 17,Fla. Constit.

POINT VIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO SENDING THE JURY EVIDENCE IT HAD NOT REQUESTED DURING DELIBERATION.

Over Appellant's objection T1922, the trial court sent the jury evidence (photos of the victim's wound) that was not requested by the jury (it was only requested by the prosecutor) T1922-23. This was reversible error.

STANDARD OF REVIEW

The standard of review depends on the nature of the issue under review. U.S. v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997). If the issue is based on the superior vantage point of the trial court, the appellate court will give deference to the personal judgment (discretion) of the trial court, If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgment is deferred to.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to the conclusion of law. Legal rulings are reviewed de novo. State v. Glatzmayer, 789 So. 2d 297. 301 n. 7 (Fla. 2001). Under any standard of review it was error to admit the evidence.

The authorization for the jury having evidence during deliberations comes from Florida Rule of Criminal Procedure 3.400. Rule 3.400 reads in relevant part:

Rule 3.400. Materials to the jury Room

> **(a) Discretionary Materials.** The court may **permit the jury** upon retiring for deliberation, to take the jury room:
>
> ***
>
> (4) all things received in evidence other than depositions.

(emphasis added).

As can be seen by Rule 3.400 the **jury** may be permitted to take evidence in the jury room. Thus, it is the **jury's** choice to request certain evidence and not the trial court's choice to foist certain evidence upon the jury. The trial court's discretion comes into play **after** the jury has made their request - "permit **the jury** ... **to take** to the jury room".

Evidence is generally not neutral. There is a compelling reason for only allowing evidence to the jury room where the jury has requested it.

Allowing the trial court to send back evidence not requested by the jury places undue emphasis on that evidence. Appellant pointed this fact out to the trial court T1922. The jury would believe that the trial court must believe the evidence to be important where it selectively sends back the evidence without the jury even making a request for such evidence. The evidence receives more consideration based on (1) it is sent by the trial court and (2) it was chosen over the other evidence that was not sent back.

This court has noted the evil of emphasizing certain material to the jury during deliberations. In Barnes v. State, 970 So. 2d 332 (Fla. 2007) this Court held that a

defendant's prior written testimony could not be given to the jury because the undue emphasis over other forms of testimony:

> For example, In Young, this Court held that videotaped statements by child victims of alleged sexual abuse could not be taken into the jury room during deliberations. See 645 So. 2d at 967. We explained:
>
> ***
>
> ... [A]llowing a jury to have access to videotaped witness statements during deliberations has much the same prejudicial effect as submitting depositions to the jury during deliberations. By permitting the jurors to see the interview once again in the jury room, **there is a real danger that the child's statements will be unfairly given more emphasis than other testimony**.
>
> ***
>
> . . . writings which are merely testimony in a different form should not, by being allowed to the jury, be unduly emphasized over the other purely oral testimony in the case." 2 McCormick on Evidence § 217 at 30 (John William Strong, ed., 5th ed. 1999)(emphasis added). A clear distinction is drawn between admitting previous testimony (from a transcript) as evidence, and providing the transcript to the jury:
>
> > [W]ritten testimony is not to be ready by the jury in the jury room but is to be read to them in open court, subject to all objections to be made, the same as if the witness were present and testifying. The written record thereof should not be taken to the jury room where the jury might read it. A written instrument, made an exhibit in the cause but not consisting of testimony of a diagrams, and other exhibits. But the testimony of a witness is in a discussed while the oral evidence contra has in a measure faded from the memory of the jurors, it is **obvious that the side sustained by written evidence is given an undue advantage.**

970 So. 2d at 336-338 (emphasis added).

Appellant is not requesting reversal based on Barnes as controlling authority.

Barnes is factually different. However, Barnes demonstrates an important principle- that evidence should not be unduly emphasized to the jury during deliberations. No type of evidence (regardless of form) should be unduly emphasized to the jury. Rule 3.400 should not be interpreted to permit a trail court to emphasize certain evidence to the jury where the jury has not requested such evidence.

Here sending the jury certain evidence unduly emphasized the evidence over other evidence. It is a different situation when the jury requests certain evidence - they are emphasizing what the need or want to see. However, the trial court giving unrequested evidence unduly emphasizes the evidence over the other evidence in the case. It was error to deny Appellant's objection.

The error cannot be deemed harmless. The prosecutor specifically requested the two gruesome photos of the victim to be sent back to the jury. No other evidence was sent back to the jury. Why did the prosecutor want to emphasize this evidence to the jury? The fact that the victim was shot in the head was not in dispute. The photos would only inflame the jury and sending them back to the jury during deliberations emphasizes the gruesome nature of the crime. Emphasis of this evidence by sending it back without request was prejudicial. As noted before, this was an extremely close case built on a series of inferences. It cannot be said beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

POINT IX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant argued ore tenus T2443, and filed a motion for a new trial based on Deputy Arthur Reeves testimony of March 14, 2007 R345.[10] The trial court denied Appellant's motion R362. This was error.

The parties and the trial court believed Appellant's motion untimely. However, they were not aware that effective January 1, 2007, Florida rule of criminal Procedure 3.590(b) allowed the motion to be filed within 10 days of the judgment and sentence. Thus, the motion was timely.

The newly discovered evidence came from the testimony of Deputy Arthur Reeves. Subsequent to Appellant's trial, Deputy Reeves heard Appellant ask Mark Simms (A.K.A. Mark Swan) why he testified falsely against him T2442. Simms replied that it was "payback" T2442.

Because Mark Simms was the prosecution key witness in this case (See Point I) Deputy Reeves testimony probably would have changed the verdict. Thus, the motion for new trial should have been granted. Clugston v. State, 765 So. 2d 816 (Fla. 4th

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[10] It was agreed in the court below that the motion should be considered as a motion for post conviction relief- thus the motion

DCA 2000).

The importance of Deputy Reeves testimony is illustrated in two ways. First, the trial court rejected the testimony of several inmates' who witnessed Simms tell Appellant he was paying back Appellant, on the basis there was no indication that Simms had given **false testimony**. Unlike the inmates' testimony, Reeve's testimony shows Simms was confronted as to false testimony. Simms response did not deny the allegation which one would expect if the accusation was not true. Instead, Simms explained why he gave false testimony - it was payback. Second, the testimony from Deputy Reeves was from a disinterested police officer. The trial court should have granted the motion for a new trial.

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was titled that way. But, as explained, the motion was timely as to its subject - motion for a new trial. Fla. R. Crim. P 3.590(b).

POINT X

THE TRIAL COURT ERRED BY IMPROPERLY IMPOSING THE AVOID ARREST AGGRAVATING CIRCUMSTANCE.

In Willacy v. State, 696 So 2d 693, 695 (Fla. 1997) this Court stated the standard of review regarding aggravating circumstances:

> ... our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so whether competent substantial evidence supports its findings.

In this case the trial court did not correctly apply the rule of law regarding the avoid arrest aggravator and there was not competent substantial evident to support it.

This Court first extended this aggravator to non - law enforcement personnel in Riley v. State, 366 So. 2d 19 (Fla. 1978). In so doing, however the Court cautioned "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. **Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.**" Id.at 22 (emphasis added).

The degree of proof that is required to prove this aggravator was explained in Urbin v. State, 714 So. 2d 411, 415 (Fla. 1998) where this Court held that "[a]n intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it **is clearly shown that the dominant or only motive** for the murder was the elimination of witnesses," (emphasis added). See also Jones v. State, 963 So. 2d 180 (Fla. 2007) (proof must be very strong when victim not police officer). The Urbin

court then defined "[t]he overarching rule from our earliest cases onward discussing this aggravator: the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination." Id.

The mere fact that the victim knows the defendant and could identify the defendant, without more, is insufficient to prove this aggravator. Hurst v State, 819 So. 2d 689, 696 (Fla. 2002).

Mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996). Moreover, even the trial court may not draw logical inferences to support a finding of a particular aggravating circumstance when the State has not met its burden. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993).

Where it is plausible there are motives or reasons other than avoiding arrest for the killing, the evidence is not sufficient for the avoid arrest aggravator. Bell v. State, 841 So. 2d 329 (Fla. 2002) (where it was possible killing was done out of anger evidence was not sufficient); Green v. State, 975 So. 2d 1081 (Fla. 2008) (where other possible motives error to find avoid arrest).

The trial court relied on the statement to Mark Simms (A.K.A.Swan). The trial court **paraphrased** this statement as Appellant saying "he had killed someone for that reason" R382. "**For that reason**", meaning that one cannot leave witnesses.

However, according to Simms, Appellant's statement was that he killed someone. Appellant did not say **"for that reason**." Appellant did not place a context on why, who, where, how, or when he had killed. In fact, Simms specifically testified he had no idea what Appellant was talking about T1394.

Also, Simms' statement was not evidence that Appellant had killed Mazollo, let alone evidence that he killed her to eliminate her as a witness. The statement was never connected to the killing of Mazollo. See Point I.

In addition, the statement at best was a generalized statement relating to bad character. It does not prove the person acted during a specific situation in conformity with that character evidence. Especially where the statement was part of a "macho" conversation between Appellant and Simms T1392. For example, in Hardy v. State, 716 So. 2d 761 (Fla. 1998) the defendant made a statement that if ever confronted with police in a Rodney King situation he would kill. This Court would not use this statement as proof of specific conduct and held the statement did not prove avoid arrest.[11] Similarly, Appellant's vague and general statement does not prove the sole or dominant motive was to avoid arrest.

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[11] This is in contrast to Derrick v. State, 641 So. 2d 378, 380 (Fla. 1994), relied on by the trial court, in which the defendant made a specific, rather than general and vague, statement that he had killed **the victim in his case** to shut him up.

This was a robbery. There is no evidence as to what was happening other than a robbery and shooting. The evidence of a gunshot to the head is consistent with various actions and is too speculative to prove avoid arrest. See Foster v. State, 436 So. 2d 56 (Fla. 1983) (both victims shot from behind as they sat in front seat did not prove avoid arrest because "we do not know what events preceded the actual killing"); Menendez v. State, 368 So 2d 1278 (Fla. 1979) (use of **silencer** on gun to kill only person in store during robbery was not sufficient where it was not shown what events lead up to actual killing).

The trial court hypothesized that Mazollo was shot as she passively sat in a chair. This is at best speculation. The prosecution did not present any forensic evidence supporting such a hypothesis. Mazollo could have been seated and just beginning to move with the intent to resist the robbery when the shooting occurred. She could have risen and fallen back in the chair after the shot. Forensic evidence did not refute these scenarios. The fact the shot was at close range does not negate this possibility. The bottom line there is a lack of evidence as to what was occurring when the shot was fired. One cannot create facts from inferences from the lack of evidence. See Robertson v. State, 611 So. 2d 1228 (Fla. 1993) (can't even draw "logical inferences" to support this aggravator where state has not fully met its burden of proof). There are different possibilities for the reason for the shooting. See Green v.

State, 975 So. 2d 1081 (Fla. 2008) (where there are other possible motives it was error to find the avoid arrest aggravator); Bell v. State, 841 So. 2d 329 (Fla. 2002).

Finally, the trial court's conclusion is based on Mazollo knowing Appellant. But see Point III. However, it is not known if the robbers were disguised during the robbery. It is mere conjecture that Mazollo could identify the person, or persons, who robbed the pawn shop. Moreover, avoid arrest is not established by the fact that the victim knows the assailant ("even for a number of years"). Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985). It was error to find the avoid arrest aggravator. This cause must be reversed for a new penalty phase.

POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST THAT THE JURY BE PROPERLY INSTRUCTED ON THE AVOID ARREST AGGRAVATING CIRCUMSTANCE.

In this case the victim was not a law enforcement officer. It is well- settled that when the victim is not a law enforcement officer the facts must established that the sole or dominate motive for the killing was to eliminate a witness. E.g., Riley v. State, 366 So. 2d 19 (Fla. 1978); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Bell v. State, 841 So. 2d 329, 336 (Fla. 2002); Connor v. State, 803 So. 2d 598 (Fla. 2001); Green v. State, 975 So. 2d 1081 (Fla. 2008); Jones v. State, 963 So. 2d 180, 186 (Fla. 2007) (court explains that previous case law explains "avoid arrest is not present unless it is demonstrated beyond a reasonable doubt that the dominant or only motive for the murder was the elimination of witnesses").

Appellant requested the jury be properly instructed that the sole on dominant motive was witness elimination T2250-52. The prosecutor responded, "Now he probably is entitled to the language as it relates to the murder where it says for elimination of witness, where it says must show beyond a reasonable doubt the sole

dominant motive for the murder" T2254.[12] The trial court denied Appellant's request T2401. This was reversible error.

The instant issue involves a purely legal matter thus the standard of review is de novo. Regardless of the standard of review it was reversible error to fail to give the jury a complete and accurate instruction on the law as requested by Appellant.

The trial court instructed the jury on the avoid arrest aggravator as follows:

> Three. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

T2396.

As stated earlier the law is clear to find the avoid arrest aggravating circumstance where the victim is not a law enforcement officer it must be found that the sole or dominant motive for the killing must be to eliminate the witness. E.g. Jones; Bell; Green. Yet the jury was never instructed of this requirement as requested by Appellant.

A defendant is entitled to have the jury given a special instruction if (1) the evidence supports it, (2) the standard instruction does not adequately cover the issue, and (3) the special instruction correctly states the law and is not misleading or confusing. See Stephens v. State, 787 So. 2d 747, 756-57 (Fla. 2001). Appellant's request to have the jury instructed on sole or dominant motive meets these criteria.

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[12] The prosecutor objected to a different instruction T2255.

Here, the evidence supported the instruction. It is undisputed that the victim was not a law enforcement officer. The given instruction did not inform the way to find the sole or dominant motive for the killing must be to eliminate a witness. As noted above, the law is clear and unequivocal that the sole or dominant motive must be to eliminate a witness. In fact, the jury is given an incomplete and misleading instruction when they are not informed that the sole and dominate motive for the killing of a person is not a law enforcement officer must be to eliminate a witness for the avoid arrest aggravation to apply. This requirement should not be kept a secret from the jury. It was reversible error to deny Appellant's request. This cause must be reversed and remanded for a new penalty phase. See Espinosa v. Florida, 112 S. Ct. 2926 (1992) (accurate jury instructions constitutionally required in Florida where trial court relies on jury's recommendation). The denial deprived Appellant due process of law and subjected him to cruel and/or unusual punishment in violation of the 5th, 6th, 8th and 14th Amendments to the U.S. Constitution and Article I Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XII

THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY ON THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

Not all prior robberies constitute a prior violent felony. Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998) (prior robbery did not qualify as prior violent felony as facts did not show a life - threatening crime). In order for a robbery to qualify as a prior violent felony the perpetrator must have been involved in a "life-threatening crime in which the perpetrator comes in direct contact with a human victim." Id.

It is well-settled that an aggravating circumstance cannot be applied to a defendant vicariously through the actions of another. See Williams v. State, 622 So. 2d 456, 463-64 (Fla. 1993) (..."the trial court erred in applying this aggravating circumstance vicariously"). Whether a crime qualifies as a prior violent felony is determined by the specific facts and circumstances of the prior crime. Rose v. State, 787 So. 2d 786, 800 (Fla. 2001).

In the present case the specific facts of prior crime show that Appellant did not engage in any life-threatening conduct and this aggravator should not be applied vicariously to Appellant. Appellant was convicted for his involvement in a 1988

robbery of a Circle K store. He was 15 years old at the time.[13] The eyewitness to the crime, Stephen Cadore, testified it was two men that produced an antique gun and asked for money T2119. Cadore did not identify Appellant as one of the men - Appellant obviously was not of the men as he was only 15 at the time. Appellant admitted he was involved with the two men (Rosemant and Charles) but he did not threaten anyone T2361. The two men had the gun T2361. There simply is no evidence that Appellant engaged in life-threatening conduct. The conduct of the two men cannot be vicariously applied to utilize this aggravating circumstance. Appellant sentence must be vacated and this cause remanded.

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[13] Prior crimes committed by juveniles do not qualify as prior violent felonies. See Henyard v. State, 689 So. 2d 239, 251-52 (Fla. 1997). Appellant was charged as an adult - probably based on being with the adults involved in the robbery. It is an odd decision to charge a juvenile as an adult where the juvenile is under the influence, or domination, of an adult as opposed to doing the crime on his own. It falls on prosecutorial discretion. But for the unusual decision to prosecute as an adult the robbery would not qualify as a prior violent felony.

POINT XIII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionally of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). This court summarized proportionally review as a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996).

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), it was made clear that similar results would be reached for similar circumstances and results would not vary based on discretion:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing process becomes a **matter of reasoned judgement rather than an exercise in discretion at all.**

283 So. 2d at 10 (Emphasis added). See also Proffitt v. Florida, 428 U.S. 242, 250 and 252-53 (1976). In other words, proportionality is not left to the individual tastes

of the judges but this Court reviews each case to ensure that similar individuals are treated similarly.

Under this Court's proportionality analysis, the death penalty is reserved for the "most aggravated" and "least mitigated" of murders. Cooper v. State , 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State 748 So. 2d 922, 933 (Fla. 1999):

> [O]ur inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

Almeida, at 933 (emphasis added) (footnote omitted); Cooper v. State, 739 So. 2d at 85; see also, e.g., Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995) ("Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders.") (quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)).

In the present case there was a robbery but how it occurred is totally unknown. No one described how it happened. There were no eyewitnesses. There was no forensic or expert testimony to explain what had happened. It is only known the victim was shot once in the head. It is not known what occurred at the time of the shot. See Thompson v. State, 647 So. 2d 824 (Fla. 1994) (witness elimination aggravator stricken and death ruled disproportionate where it was not known what happened during shooting); Terry v. State, 668 So. 2d 954 (Fla. 1996) (death

disproportionate where although clear murder took place during robbery - the circumstances of the actual shooting were unclear).

The trial court found three aggravators. However, as discussed in Point X, the avoid arrest aggravator does not apply in this case. Also, as discussed in Point XII the prior violent felony aggravator does not apply in this case. Even if it did apply, at the very least it would be far less weighty than in other cases. Appellant was a juvenile (15 years old), presumably controlled by 2 adults, and he did not threaten the victim and but for pure fortuity the robbery would not have qualified as a prior violent felony. See Point XII. Thus, this aggravator would not be as substantial as in other cases. See Johnson v. State, 720 So. 2d 232 (Fla.1998) (while it was proper to find prior violent felony aggravator it was not as strong as in other cases when its facts were considered).

This case had significant mitigation found by the trial court including: Capacity for rehabilitation; difficult tumultuous childhood; lack of role model when growing up; physical abuse as a child; good prisoner while incarcerated; obtained GED and other certificates while incarcerated; increased maturity since time of offense; good and loving father; compassion and generosity to others; deficits indicative of organic brain damage. These mitigating circumstances were substantial.

(1) Capacity for rehabilitation

The trial court found Appellant "can be rehabilitated" R391, specifically noting

Appellant did not suffer from a major mental disorder and he "did not meet the criteria of a psychopath, defined as an individual who engages in cold-hearted acts of violence without purpose and with no remorse" R392. Appellant's increased maturity and good adjustment to prison do not detract from this mitigator.

This Court has recognized since its very first review of the death penalty that a death sentence is premised on the lack of possibility of rehabilitation by stating in State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) "because death is a unique punishment in its finality and total rejection of the possibility of rehabilitation, it is proper that the legislature has "chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." This Court has continued to hold firm to this principle. Kramer v. State, 619 So. 2d 274 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989).

"Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Also, in Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for rehabilitation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relating to the possibility of rehabilitation is deemed so important that exclusion of such evidence requires a new sentencing hearing. Simmons v. State,

419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

(2) Difficult tumultuous childhood

The trial court recognized Appellant had a tumultuous childhood with his parents fighting in front of Appellant during his years and his father being addicted to crack and stealing money T387. The parents would divorce. Having a difficulty, tumultuous childhood is significant mitigation. See Hegwood v. State, 575 So. 2d 170, 173 (Fla. 1991) (Hegwood's "ill-fated life appears too be attributable to his mother").

(3) Lack of role model when growing up.

The trial court recognized Appellant's father left when Appellant was five and "he felt isolated and that he had a "disruptive, distant, sometimes abusive relationship within his family, with very few opportunities to connect with those parenting figures" R387. This Court has recognized this as significant mitigation. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

(4) Appellant suffered physical abuse as a child.

The trial court found this mitigating circumstance T380. No detailed explanation of the impact physical abuse has on a child during his developmental years is needed.

(5) Appellant has been a good prisoner while incarcerated.

The trial court found this as a mitigating circumstance R390. This has been recognized as important mitigation in that it shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986).

(6) Appellant obtained GED several certificates while incarcerated.

The trial court found this mitigation stating Appellant had:

> . . . earned his GED and Certificates, Life Skills, Vocational, trade, Data Entry, General Office Clerk, Cabinet Making, Welding, Data Processing, Data Technician, and tier II Drug Program.

R390. See Johnson v. State, 720 So. 2d 232 (Fla. 1998) (gaining GED was mitigating circumstance-death disproportionate).

(7) Appellant has matured and become more responsible since the date of the offense.

The trial court found this mitigation R391. The offense occurred in 1994. This mitigation is significant in that show a positive change for the better.

(8) Appellant is a good and loving father.

The trial court recognized Appellant "did not complete high school because he had a child who he felt obligated to support" R388.

(9) Appellant had shown compassion and generosity to his family, friends, and neighbors.

The trial court found this mitigating evidence R389.

(10) Appellant has deficits indicative of organic brain damage.

The trial court noted deficits indicative of organic brain damage:

> Dr. Lynn Rich, a clinical neuropsychologist, testified that she conducted a neuropsychological evaluation of the Defendant. Dr. Rich testified that the Defendant showed some minor deficits in the areas of manual agility, speech production on demand, and auditory and visual memory. She further testified that the Defendant did not show any signs of malingering. Dr. Rich, concluded that the Defendant;'s error were consistent with organic brain damage, most likely as a result of the three minimal concussions the Defendant has sustained over the course of his life.
>
> This mitigating factor has been established and it is afforded some weight.

R392. Proportionality review is not merely counting the qualitity of circumstance but involves a qualitative analysis of comparable situations. In other comparable cases, with even less mitigation, the death sentence has been held to be disproportionate.

In Johnson v. State, 720 So. 2d 232, 238 (Fla. 1998) death was disproportionate where Calvin Johnson was convicted of first degree murder, attempted first degree murder, robbery, attempted robbery and burglary and received a 9-3 death recommendation. Two aggravating circumstances were present - 4 prior violent felonies and during the course of a felony. The evidence showed that Calvin Johnson shot the victim 3 times in the house then moved the victim to the porch and, without provocation, stood over him and shot him 5-6 more times. 720 So. 2d at 236. The accumulative effect of the wounds would cause death. Id. The circumstances in this case were less egregious that in Johnson.

Furthermore, although Johnson had similar mitigation it was less substantial than in this case. Johnson's mitigation was "he was 22 years old [Appellant was 21], troubled childhood; had young daughter, was respectful to parents and neighbors; obtained a GED, was previously employed, voluntarily surrendered to police." In Johnson death was deemed disproportionate. Likewise, death is disproportionate here. To hold other wise would violate this Court's proportionality analysis.

In Terry v. State, 668 So. 2d 954 (Fla. 1996). Terry and Floyd were looking for a place to rob. They came to a gas station where the Francos worked. Floyd held Mr. Franco at gunpoint while Terry dealt with Mrs. Franco in a different room. Terry shot and killed Mrs. Franco. Aggravating circumstances included prior violent felony, during the course of a felony, and pecuniary gain (merged). The mitigation was minimal compared to the instant case - good family man, poverty, emotional and developmental deprivation in childhood. This Court held that death was disproportionate. This Court emphasized that to find death proportionate there must be a "discrete analysis of the facts" 668 So. 2d at 965. This is consistent with this Court's view that the death penalty must be based on known facts and not speculation as to what occurred - otherwise Florida's utilization of the death penalty would risk being unreliable and arbitrary. Even though there was some eyewitness testimony and Floyd's confession it could not be determined what transpired immediately prior to Mrs. Franco being shot by Terry. Id.

"It is clear that the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting are unclear." Id. In this case the facts of the shooting are even less illuminated as there were no eyewitness or co-defendant confessions. In this case there was substantially more mitigation than in Terry. As in Terry, death is disproportionate in this case.

In Thompson v. State, 647 So. 2d 824 (Fla. 1994) the defendant was convicted of killing a subway sandwich shop owner, by a single shot to the head, during a robbery. The recommendation was 9-3 for death. The trial court found three aggravators-during the courses of a robbery; witness elimination; and CCP. The avoid arrest aggravator was reversed because it was not known what occurred during the shooting. Death was found disproportionate with mitigation showing Thompson was a good parent, was honorably discharged from the Navy, was a good prisoner, had artistic skills, and had been employed. The instant case has much more mitigation.[14] Death is disproportionate. Appellant's death sentence should be vacated and

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[14] The mitigation in this case is similar, although more extensive, than in Williams v. State, 707 So. 2d 683 (Fla. 1998) - good behavior awaiting trial, GED while in jail, capacity for rehabilitation, found religion in jail and involved in ministry capacity to work hard, 18 years old. Williams was another case where a shooting occurring during a robbery and death was deemed disproportionate.

remanded for imposition of a life sentence.

POINT XIV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO QUESTION APPELLANT ABOUT THE GUILT PHASE WHERE DIRECT EXAMINATION RELATED SOLELY TO PENALTY PHASE INFORMATION REGARDING APPELLANT BACKGROUND.

At the penalty phase, Appellant took the witness stand and testified about his family and children T2349-54. Appellant did not testify about any facts relating to the guilt phase T2349-54. Over Appellant's objections T2355-56, 2358, the prosecutor was permitted to question Appellant about the guilt phase T2356-2361. This was error.

Section 90.612(2) clearly limits cross-examinations of a witness to the subject matter of the direct examination:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

§90.612(2); see also Green v. State, 688 So. 2d 301, 305 (Fla. 1996) (direct examination that witness did not drink on the night of the murder did not permit cross-examination regarding use of alcohol at other times as it was impermissible as it was not within the scope of direct examination); compare Geralds v. State, 674 So. 2d 96, 100 (Fla. 1996) (where defendant denied the killing during penalty phase testimony he could be cross-examined about the killing as it would be within the scope of direct examination).

In the present case Appellant did not mention anything regarding guilt phase evidence - including whether he was involved in the killing. The prosecutor's questions were clearly outside the scope of direct.

The prosecution claimed that door to cross-examine Appellant beyond the scope of direct examination was open because Appellant had attacked the credibility of Mark Simms through other witnesses. However, Appellant never testified regarding any guilt phase evidence - including Mark Simms T2349-54. The prosecution was free to cross-examine the other witnesses regarding Mark Simms if they testified about Mark Simms. However, it is specious to claim it was within the scope of cross-examination to question Appellant about Mark Simms, or the guilt phase evidence, when Appellant had not been questioned about such matters on direct examination. Clear error occurred.

The error was not harmless. The prosecutor used the error to harass Appellant in front of the jury. For example, the prosecutor forced Appellant to criticize the jury in its presence:

BY MR. DAVID FANKEL:

Q. Why did you put a gun to her head and pull the trigger?
A. I didn't.
MR. CHRISTOPHER POLE: Objection, Your Honor, goes to
MR. DAVID FRANKEL: Goes to why he did it.
MR. CHRISTOPHER POLE: (continuing) – what we said at sidebar.
THE COURT (JUDGE E. O'CONNOR): Overruled.

BY MR DAVID FRANKEL:

Q. Why did you do that?
A. I didn't --
Q. **So the jury is wrong?**
A. **I think the jury is mistaken**.

T2358-59 (emphasis added). Obviously, Appellant maintained his innocence. Forcing him to criticize the jury is prejudicial. This cause must be reversed and remanded for a new penalty phase proceeding.

POINT XV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPROPERLY IMPEACH CURTIS FOX OVER APPELLANT'S OBJECTIONS.

During the penalty phase Curtis Fox testified for the defense as to conversations Fox had with Mark Simms implying that Simms was testifying against Appellant to advance his own interests. On cross-examination, over Appellant's objections T2200, the prosecutor questioned Fox on his pending charges and about being a violent career criminal T2200. This was error.

The general rule for impeachment by prior convictions, as codified in Section 90.610, Florida Statutes is that it is restricted to determining whether the witness has previously been convicted of a crime and if so, how many times. Fotopoulos v. State, 608 So. 2d 784, 791 (Fla. 1992); Fulton v. State, 335 So. 2d 280, 284 (Fla. 1976). A prosecutor is not allowed to delve into the nature of the prior convictions or the circumstances surrounding them. Ross v. State, 913 So. 2d 1184 (Fla. 4th DCA 2005). An exception exists, however, when the person attempts to mislead the jury about the prior convictions by, for example, trying to minimize them. In such a case, the state is entitled to inquire further regarding the convictions to dispel any false impression given. Fotopoulos, 608 So. 2d at 791. In Lawhorne v. State, 500 So. 2d 519 (Fla. 1986), this Court explained:

> [W]hile the impeaching party may only inquire as to the existence of convictions and their numbers (or, if the matter be denied, may show the convictions by documentary evidence)the party presenting the testimony of the witness may delve into the nature or circumstances of the convictions for the purpose of rehabilitating the witness by attempting to diminish the effect of the disclosures.

Id. at 522. See also Jackson v. State, 947 So. 2d 480 (Fla. 3rd DCA 2006).

The prosecutor's inquisition into pending charges and being a violent career criminal was far outside the bounds of proper impeachment. A **defendant** may ask a witness about pending charges as it is relevant toward whether the witness has a motive, or bias, to please the state which controls the pending charges. The prosecutor cannot properly impeach a witness on pending charges to imply bias toward the defense - the bias is only toward the one who controls pending charges, the prosecution. Thus, the sole purpose of the prosecutor questioning on pending charges is to show bad character.

In addition, questioning a witness about being a violent career criminal does not fall within parameters of asking if one has ever been convicted of a crime and how many times. The prosecutor's impeachment was improper.

The error was not harmless. The prosecutor emphasized Mark Simms' testimony for support of the avoid arrest aggravator. Appellant properly examined Curtis Fox to discredit Simms' testimony. The prosecutor improperly attacked Fox. Thus, Appellee cannot prove beyond a reasonable doubt that the error did not

contribute to the jury's evaluation in the penalty phase. Appellant's sentence must be vacated and this cause remanded for a new penalty phase proceeding.

POINT XVI

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

In sentencing Appellant to death, the judge made it clear that it "has given great weight to the sentencing recommendation provided by the jury. See Tedder v. State, 322 So. 2d 908 (Fla. 1975)" R380. 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 a true independent sentencing by the trial juidge 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.

POINT XVII

FLORIDA'S DEATH PENALTY WHICH DOES NOT REQUIRE: THE FINDINGS UNDER RING V. ARIZONA, 122 S. CT. 2428 (2002); THE JURY TO BE PROPERLY ADVISED OF THEIR RESPONSIBILITY; 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 circumstance." 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 was violated where the jury was not properly advised of their responsibility.

In this case the jury was constantly told its decision was "advisory" and the trial court would be making the sentencing decision. It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. See Caldwell v.Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) (wherein the Court stated that the jury must be fully advised in the importance of its role and neither comments not instructions may minimize the jury's sense of responsibility for determining the appropriateness of death).

The comments and instructions which would leave the jury to believe that their decision is advisory violates Appellant's right to receive due process of law and a fair proceeding under the Fifth, Sixth, and Fourteenth Amendments to the united States Constitution and Article I Sections 8, 16 and 17 of the Florida Constitution.

2. 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).

3. 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 mere majority vote.

As this court noted in Steele, Florida is the only state that allows a jury to decide 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.

4. 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 certainty 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 XVIII

FLORIDA STATUTE 921.141(5)(d), THE FELONY MURDER AGGRAVATOR, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida Statute 921.141(5)(d) 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.

The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

Aggravating circumstance (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 real narrowing function. Every person convicted of felony-murder for robbery 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.

CONCLUSION

Based on the foregoing facts authorities and argument and authorities cited therein, Appellant respectfully submits this Court should vacate the convictions and sentence, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida

_____

JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407
421 3RD Street/6TH Floor
West Palm Beach, Florida 33401
(561) 355-7600; 624-6560

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant'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 U.S. Mail this _____ day of August, 2008.

_____
Counsel for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Appellant's Initial Brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of August, 2008.

_____
JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407