IN THE SUPREME COURT OF FLORIDA

HERMAN LINDSEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-1176
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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POINT I

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

Appellee claims the conversation where Appellant stated he had killed a person was relevant to prove he shot Joanne Mazollo because it was an admission. However, the fact that Appellant stated he killed someone, unless linked to Mazollo, does not make the statement relevant to prove the crime charged-the shooting of Mazollo.

Appellee does not dispute that the statement or evidence must be linked to the crime charged for it to be relevant. However, Appellant does not provide any explanation showing linkage. In the lower court the prosecutor claimed the statement was relevant because killing someone is uncommon and thus constituted a confession that Appellant shot Mazollo T1410. However, statements that someone has killed before without any context disclosing person, place, or circumstances, simply doesn't help prove that a specific murder was done by the defendant. See e.g. Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990) (defendant's statement about killing men was held irrelevant in his murder trial as it had not be linked up to murder for which he was on trial); Jackson v. State, 451 So. 458 (Fla. 1984); (error to introduce defendant's irrelevant statement that he was a thoroughbred killer which suggested he had killed in past but was not relevant to prove that he was guilty of the killing for

which he was on trial). Mark Simms testified that he had no idea what Appellant was referring to T1394. If Simms had no idea-how can it be said that the statement was relevant. Moreover, Simms testified he **and Appellant** were involved in "Macho" talk T1392.

Instead of explaining how Appellant's statement helped prove Appellant killed Mazollo, Appellee relies on Swafford v. State, 533 So. 2d 270 (Fla. 1988). In Swafford, the defendant's statement was specific about getting a girl, doing anything he "wants to do with her", and "I'll shoot her in the head twice" to make sure she is dead. 533 So. 2d at 273. Swafford was on trial for abducting a girl, sexually abusing her and then murdering her which included shooting her in the head twice. This court held that Swafford's statement under these circumstances was relevant to prove he had committed the crime for which he was on trial. The circumstances in Swafford are different than in this case where the statement that Appellant had once killed someone does not have the specificity so as to connect it to the shooting at the pawn shop.[1]

[1] Appellee also claims that Pace v. State, 596 So. 2d 1034 (Fla. 1994) and Wyatt v. State, 641 So. 2d 1336 (Fla. 1994) support its claim. However, neither case is similar to the instant case. In Pace this court found it "unnecessary to recite the facts linking Pace to this killing" 596 So. 2d at 1035. This court held that Pace's statements "when taken together with the other facts" were admissible, 596 So. 2d 1034 (emphasis added). The "other facts" made the statements relevant. Moreover, in Pace the statements in question were specifically made the day before the murder - unlike in this case where the statement was months after the murder.

Appellee relies on Hoefert v. State, 617 So. 2d 1046 (Fla. 1993) to argue that Appellant's statement is relevant to show intent and motive. Hoefert made a statement showing his intent to do the crime charge. Here, Appellee claims Appellant's statements were relevant "since they indicate that he had killed **a person during a robbery**" Appellee's Brief at 16. First, Appellant never stated that he had killed anyone during a robbery. Appellant said he had once killed someone but never supplied any context, time, place, location, etc., to the killing. The statement in this case was never linked up to the pawn shop. Second, the prosecutor in this case never argued that the statement was admissible to show motive or intent. The prosecutor argued the statements were an admission or confession to the pawn shop killing T1853. Assuming **arguendo** the prosecutor had claimed a limited relevancy to intent or motive, Appellant could have requested an instruction limiting the use of evidence. By not making the argument to the trial judge the prosecutor waived the claim of a more limited relevancy as it deprived Appellant the opportunity to seek a limiting instruction. Also, unlike in Hoefert, the fact that Appellant stated he had killed someone in the past does not tend to prove he had a motive or intent to kill Mazollo at

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In Wyatt this court held that the admissibility of the statement was not preserved for appellate review. Thus, Wyatt does not help Appellee. This court noted in dicta that the statement would qualify as an exception to the hearsay rule - an admission. Relevancy was not addressed. Furthermore, a statement regarding killing three people when on trial for killing three people is different than the situation at bar.

the pawnshop.

To take the comment that Appellant had once killed someone to claim it tends to prove that he killed Mazollo at the pawn shop is rank **speculation**. Appellee's view of relevancy eliminates the need to show a link between the evidence and the criminal charge. Under such a view guns would be automatically admitted. The possession of a gun - even where it is not shown to be linked to the crime charged - would be admissible based on the fact the charged crime involved a gun. There would be no limit to all the types of evidence that would be admitted without such a requirement. Fortunately, Florida courts require that there be sufficient linkage between the evidence and crime charged. E.g., 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 charge 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). Likewise, a statement about having once killed, without who, where, how, when, or if killing was illegal, self defense etc., will not have sufficient linkage to a shooting of Mazollo at a pawn

shop.

Appellee claims none of the cases cited in the Initial Brief, to show there must be a nexus between the crime, apply in this case. Appellee claims Jackson v. State, 451 So. 2d 458 (Fla. 1984) and Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990) do not involve admissions. Appellee is wrong. Those cases, as does this case, involve statements by the defendant but the statements are not confessions and are not relevant because they are not linked to the charged crime.

Appellee claims Green v. State, 190 So. 2d 42 (Fla. 2d DCA 1966) does not apply because the statements were not clear and Green denied guilt. However, in this case Appellant denied guilt and the statement in Green was much more detailed than Appellant's statement.

Appellee claims it is permissible to speculate about **general statements**. However, this is not true. 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 victims in this crime"). Logically, such statements will not be either relevant or sufficient without linkage to the crime charged.

Appellee does not dispute that under the rational of Armstrong v. State, 931 So. 2d 187 (Fla. 2d DCA 2006) the statement was of general character evidence and irrelevant. See Page 24 of Initial Brief.

Appellee claims this issue was not preserved. However, once Simms testified

to the conversation Appellant specifically objected that the statement about killing was not linked to the crime charged and its prejudice outweighed its probative value T1410. Thus, the issue was preserved.[2]

As noted earlier Appellant also objected on the ground the unfair prejudice outweighed the probative value T1410. Appellee does not challenge that there was error on this ground. As pointed out in the Initial Brief, the statement about having killed once before was not properly linked to the pawn shop shooting. It is clear that where there is an insufficient predicate linking the statement to the crime charge it will be extremely prejudicial. By its very nature a statement about the killing which is not properly linked to the crime charged shows, or at least implies, a collateral killing - as pointed out in the cases cited in the Initial brief - Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990); Jackson v. State, 451 So. 2d 458 (Fla. 1984). Thus, the prejudice will substantially outweigh any probative value of the evidence.

Finally, Appellee claims the trial court has essentially unbridled discretion on

[2] To the extent that Appellee complains that Appellant's motion was not made prior to Simms testimony - it is without merit. Until Simms had completed his testimony one could not object Appellant was not aware that Simms would not connect the conversation to the pawn shop murder. In fact, prior to Simms' testimony the prosecutor consistently represented that Appellant had confessed to the pawn shop shooting to Simms because the lady had seen his face T119. It was only after Simms testified differently at trial that it became known Appellant did not confess to the crime charged.

evidentiary rulings. Discretion involves the personal judgment of a trial judge.[3] Discretion was developed in trial cases because originally there were little or no rules, or case law, and trial judges would have to rely on their personal judgment. Deferring to the personal judgment of a trial judge results in a lack of uniformity of decisions. One goal of appellate courts has been to provide uniformity by deferring to the rule of law rather than the judgment of the trial court. Over time case law has resolved many issues that in the past would be determined by a judge's personal judgment. The creation of rules have further limited, or even eliminated, the practice of deferring to the personal judgment of a judge. Thus, with regard to evidentiary issues, if the trial court has discretion - it is very limited by the rules of evidence and case law rather than broad discretion of an individual judge. See Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003). Appellant relies on his Initial Brief for further argument on this Point.

[3] "Discretion" is defined as the power of a trial court to determine questions to which no rule of law is applicable and are controlled by the personal judgement of the court. BOUVIER'S LAW DICTIONARY, 804 (8th ed. 1914)

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.

In its brief Appellee does not dispute that the evidence is insufficient where one stacks inference upon inference to prove guilt. See page 26 of Initial Brief. However, Appellee stacks inference upon inference to claim there is sufficient evidence. The stacking of these inferences is explained on pages 27-32 of Appellant's Initial Brief. Appellant will rely on his Initial Brief, but will briefly respond to some specific inferences upon which Appellee relies which are either not true or only supported by stacking a number of other inferences.

Since there was no forensic or eyewitness evidence to support it's case, Appellee relies heavily on a Crown Royal bag. However, there was no testimony that the bag was stolen. The owner of the pawn shop (Gerald Singer) testified the bag was kept in the safe, but did not testify it was not in the safe when he arrived after the robbery. Singer could have removed the bag from the safe (or it could be behind other items in the safe). The bottom line is that there is no testimony that the Crown Royal bag is missing. One could infer that it was missing and then also infer it was missing due to the result of the robbery. This only begins the stacking of inferences required to infer guilt.

Appellee makes the inference that the bag Nikki saw in the closet was the same bag as owned by Gerald Singer. However, Nikki was unable to describe the bag while Singer gave a detailed description of the bag T1195. Appellee argues that the jewelry from the bag was sold on the night at the robbery. The description of the jewelry sold at that time was a circular bracelet with a marijuana leaf on it T1219.[4] However, Singer never claimed that such a piece of jewelry was in the Crown Royal or even that such jewelry was ever taken from the pawn shop. Singer only testified that firearms and money were missing from the store T1191-92. Appellant was never shown to be in possession of guns or money.

Even if one assume a Crown Royal bag was taken from the pawn shop and then assumes the same bag was in the closet - one must still infer Appellant possessed the bag. However, Appellee even acknowledges there is no evidence as to who placed the bag in the closet:

> She did not know who put the jewelry in the closet. Since she did not live there all the time and a number of people lived in the apartment.

AB at 21. Also, Nikki testified she could not say how long the bag had been in the

[4] Appellee claims Appellant "personally sold the jewelry" that was in the bag. AB at 22 referring at 1245-1246. However, this portion of Nikki's testimony was only good for impeachment – not substantive evidence. The questioning was in reference to facts of a prior statement which Nikki testified was not true T1236. In the prior statement it was alleged that Appellant walked in with bags of jewelry and later sold them at a flea market T1243-46. Nikki testified at trial that she saw the bag in the closet but did not testify the content of that bag were sold.

closet T1235. Appellee also infers Appellant was not at home when Nikki awoke. However, taken in context Nikki testified she did not know that Appellant was not in the downstairs part of the residence:

> Q. All right. How long had Herman – was Herman there when you woke up in the morning?
> A. I cant' say he was.
> Q. What do you mean you can't say he was?
> A. Meaning I don't know – he wasn't in the house**. I don't know if he was downstairs**, but he wasn't in the house when he woke up.
>
> *****
>
> Q. You told us that you slept until 10:30 - 11:00 o'clock in the morning.
> A. Yes
> Q. And as far as you know, Herman Lindsey could have been **downstairs**?
> A. **He could have been**.

T1232, 1248 (emphasis added). Thus, at best there is yet another inference to stack. Moreover, even if true, the fact that Nikki did not awake to see Appellant does not mean he was busy killing someone.

Even after stacking all these inferences still more inferences must be stacked. None of the evidence places Appellant in the pawnshop at the time of the robbery/killing. The prosecution presented Appellant's statement that he does not do robberies T1457, 60. Appellee also claims that Appellant confessed to Mark Simms by noting Appellant advocated killing a witness and then stating "he had done that himself" AB at 21. This is incorrect. Appellant never told Simms he had killed

someone during a robbery. The killing was never placed in context. Simms testified that Appellant asked why he hadn't killed the person and that Appellant would have killed the person T1393-37. Simms then testified that Appellant had to do "that" - meaning kill a person and quoted the words Appellant spoke, "I had to kill someone" T1394. Simms testified he did not pursue what Appellant meant by that. T1394. There was no context. **Simms testified he did not have any idea what Appellant was talking about**.

Appellee states that Nikki testified that Appellant and LoRay came into the house together shortly after the robbery/murder. Nikki did **not** so testify. Nikki admitted she gave a prior untrue statement under coercion, but in her testimony she **denied** the two men walked in the house together - "They didn't walk in the house with bags in their hands" T1236. As noted before, Nikki did not know whether Appellant was in the house when she awoke. The prosecutor tried to get Nikki to say she saw Appellant enter the house but she wouldn't. The sequence of testimony shows that Nikki was at home watching TV in the **livingroom** T1231, line 18. Appellant came in the livingroom to watching the news with Nikki T1234, line 6-8. The prosecutor then asked what time he came in and the answer was it was before the news. T1234. The prosecution then asked when he came in was he with anyone and the answer was him and Ronnie T1234. The questioning was compound and ambiguous - but appears to involve what time Appellant came into the **livingroom**.

Assuming **arguendo** one infers the men entered the house together, there was no evidence as to when this occurred other than sometime before the TV news. Thus, Appellee is stacking inferences 1) the two men entered the house together and 2) the entry occurred shortly after the robbery. These stacked inferences do not prove Appellant was guilty of robbery/murder. In fact, Nikki did not observe Appellant with any proceeds from a robbery, any guns, etc. - nor did he appear nervous, anxious or show any type of demeanor consistent with a robbery/murder. Appellant could have been doing anything that day. At best, Appellee has two more inferences to be stacked on the other inferences.

The other inferences Appellee relies on are: LoRay's print on a stun gun box; phone calls; Appellant's statement to Jack King the fact that Appellant tried to buy stereo equipment at various pawnshops etc. Appellant has explained this evidence on pages 30-32 at the Initial Brief. Appellee has not disputed Appellant's evaluation of this evidence and inferences on pages 30-32 of the Initial Brief. However, despite the well-settled law that a conviction cannot be obtained by stacking inference upon inference, Appellee proceeds to stack inferences- including some that does not support it's case. For example, the prosecution's evidence of Appellant's statement to Detective King denying involvement in the killing/robbery refutes rather than proves Appellant's guilt.

The bottom line is there was no evidence, physical or testimonial that Appellant killed Mazollo. At best, the prosecution had a pyramid of stacked inferences which created a suspicion of guilt. A conviction may not be based on suspicion - no matter how strong it may be. See e.g., Frank v. State, 163 So. 223, 121 Fla. 53, 55-56 (Fla. 1935). Appellant relies on his Initial Brief for further argument on this point.

POINT III

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

Appellee correctly states that a lay witness may testify to perceptions and may testify in the form of opinion if she cannot adequately describe her perceptions. However, that principle does not apply in this case. Nikki did not give any indication she could not testify to her perceptions without giving her opinion/conclusion.[5] Appellee states that Nikki testified to "facial and physical reactions Mazollo expressed when Lindsey walked in " AB at 25. This is not true. Nikki never described such. In addition, giving lay opinion as to what someone else knows or is thinking is not permitted.

Appellee proposes to admit a lay conclusion as to what another person knows or is thinking without laying a predicate as to what the conclusion was based on. In Hudson v. State, 992 So. 2d 96 (Fla. 2008) a witness testified what another person was thinking. This Court held testimony as to what another person knows or is thinking was not permissible:

[5] Beck v. Gross, 499 So. 2d 886, 889 (Fla. 2d 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").

> Because Fizzuoglio's testimony went beyond simply describing her observations of Peller to speculate on what Peller was thinking or what he knew at that time, the trial court erred in allowing Fizzuoglio to testify that Peller knew he was going to die.

992 So. 2d at 114. Testifying as to one's interpretation of the knowledge of another is not the same as interpretation the emotions of another (such as anger). Thus, the cases cited by Appellee do not involve this issue. As explained in the Initial Brief it was error to allow the conclusion of Nikki.

The error was not harmless. The prosecution relied heavily on the claim Mazollo knew Appellant and thus Appellant killed her. There was no other evidence presented that Appellant knew Mazollo. This cause must be reversed and remanded for a new trial. Appellant relies on his Initial Brief for further argument on this Point.

POINT IV

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

Appellee does not dispute the rule of completeness or that one can't redact portions of statements just because one doesn't want the jury to hear something. Appellee claims the prosecutor was justified in redacting the portion of Appellant's statement that LoRay and Mark Simms were involved in a robbery/shooting on the ground that it was the detective who made that statement and Appellant never adopted the statement. Appellee is not correct - Appellant did adopt the statement. By stating "I think so" in response to whether Loray and Simms were involved in a robbery/shooting, Appellant was saying he thought they were involved in a robbery/shooting. Absolute certainty is not required. If absolute certainty was required then very few statements/evidence would ever be admitted. In addition, any ambiguities in a defendant's statement are to be resolved in favor of the defendant. Fiske v. State, 366 So. 2d 423, 424 (Fla. 1978).

The prosecution created a false impression that only Appellant knew of Loray doing robberies by introducing only a portion of the taped statement. Without the redacted portion, it could be possibly inferred that Appellant had been partners with Loray and no one else knew of Loray's robberies or was partners with Loray.

Appellee has not disputed this. The complete statement shows that Simms and LoRay were doing robberies.[6]

Finally, Appellee does not address nor dispute Appellant's other basis for not redacting the statement as presented on Page 39 of the Initial brief. Appellant relies on his Initial Brief for further argument on this Point.

[6] Appellant did deny that he personally did robberies with Loray T1418

POINT V

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

Appellee claims there was no prejudice because the jury did not what Appellant was in prison in 1994. Contrary, to Appellee's implied assertion - people don't go to prison for good behavior. Jurors think that bad people get probation and really bad people go to prison. It does not matter that they don't know the specifics of the offenses that result in prison. Human nature is to speculate the worst.

Appellee also claims the prison and jail settings were admissible because they were inextricably intertwined [i.e. the content of the conversations could not have been conveyed without the prison setting]. However, the content of the conversations could have been conveyed without mentioning Appellant was in prison. In fact, Appellee does not explain how the content involved prison - it did not. Appellee does claim that being in prison shows a motive for the two men to speak. The motive for the conversations was not a material issue to Appellant's murder trial.[7] Furthermore,

[7] Obviously the prosecution was not offering evidence of prison to claim that Simms was lying. The true impact of the evidence would be to inflame the jury. Appellee does not dispute that any relevance of evidence of being in prison was outweighed by unfair prejudice of such evidence.

It is the motive for the testimony and not the motive for a conversation that is relevant.

Appellee states that Appellant being in prison with Simms "could be used to show Simm's motive to lie and to testify against Lindsey" AB at 32. Obviously the prosecution was not offering evidence of prison to claim that **Simms** was lying. The true impact of the evidence would be to inflame the jury.

Appellee does not dispute that any relevance of evidence of being in prison was outweighed by unfair prejudice of such evidence Finally, Appellee also claims the error was cured by a curative instruction. However, as fully explained on page 43 of Appellant's Initial Brief a curative instruction is not sufficient to cure the error. Appellant relies on his Initial Brief for further argument on this Point.

POINT VI

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

Appellee claims the 11 year delay was reasonable to conduct further investigation. The problem is the police did not conduct any investigation for 11 years. They interviewed the witness in 1994 and re-interviewed them 11 years later. The investigative delay was not reasonable.

Appellee also claims there was no prejudice to Appellant because he could have called Eddie Carter as a witness or used Carter's prior statement. Carter could not help Appellant as live witness - he no longer remembered what he once knew and Carter's prior statement would not be admissible. More importantly, a transcript of an 11 year old statement is not a substitute for a live witness. Appellant was prejudiced by the delay. Appellant relies on his Initial Brief for further argument on this Point.

POINT VII

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

On page 41 of its Answer Brief, Appellee claims the medical examiner used the inflammatory photos to explain the shot came from close range. However, the medical examiner testified the soot remains were not visible in the photo T1172. Nor were the photos used to explain his other observations - the examiner made his observations without using the photos. Appellant relies on his initial Brief for further argument on this Point.

POINT VIII

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

Appellee has not addressed the analysis presented at pages 51-53 of the Initial Brief. Appellant will rely on his Initial Brief for argument on this Point.

POINT IX

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

Appellee claims the newly discovered evidence was merely cumulative to the impeachment testimony of the inmates. However, as explained on Page 56 of the initial brief, Deputy Reeves was the only one to testify that Simms was confronted as to **false testimony**. Also, Reeves was a disinterested police officer. Thus, Appellee's claim is without merit. Appellant relies on his Initial Brief for further argument on this Point.

POINT X

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

On pages 52-53 Appellee states because Appellant could be recognized by Mazollo the evidence was sufficient for the avoid arrest aggravator. However, assuming **arguendo** that the perpetrator was not disguised and could be identified, the fact he could be identified is not sufficient. E.g., Hurst v. State, 819 So. 2d 689, 696 (Fla. 2002).

Appellee makes the bold statement, without analysis, that Appellant admitted he killed a witness in a robbery. However, as fully explained on pages 58-59 of the Initial Brief there was no such admission. Appellee does not dispute this analysis.

Appellee states there could be no possible explanation other than avoid arrest. Appellee claims there was no struggle. Such a claim is pure 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 did not refute these scenarios. The fact the shot was close range does not negate this possibility. The bottom line there is lack of evidence as to what was occurring when the shots was fired. One cannot create facts from inferences from the lack of evidence.

Appellee relies on a number of cases to claim avoid arrest. However, in all these cases there was a specific statement to eliminate the murder victim (Derrick v. State, 641 So. 2d 378 (Fla. 1994) or the specific circumstances and details of the murder were known and showed witness elimination (Thompson v. State, 781 So. 2d 144 (Fla. 1998) [it was known that Jennings did not wear a mask]; Farina v. State, 801 So. 2d 44 (Fla. 2001)). Whereas in this case there was a **general statement** rather than a specific statement. Appellee does not dispute Appellant's analysis on page 59 of the Initial Brief and Hardy v. State, 716 So. 2d 761 (Fla. 1988) that a general statement showing bad character does not prove specific conduct and avoid arrest. Also, in this case the facts as to what occurred at the time of the robbery/shooting are unknown. There is only conjecture and speculation as to what occurred at this time. Where the victim is not a police officer the proof of witness elimination must be very strong. See initial Brief at 57-58. Appellant relies on his Initial Brief for further argument on this Point.

POINT XI

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

Appellee does not dispute the well-settled law that when the victim is not a law enforcement officer the facts must establish that the sole or dominant motive for the killing was to eliminate a witness.

Appellee does not dispute that the jury was **not instructed** on the well-established law that when the victim is not a law enforcement officer the facts must establish that the sole or dominant motive for the killing was to eliminate a witness.

However, Appellee claims that the jury does not need to be instructed on this well-established law pertaining to what is required for finding this aggravator. There is no logic nor reason that justifies Appellee's position. Why hide from the jury what their factual decision-making must encompass? There is no valid reason. This precise issue has never been fully explored and examined by this Court. Appellant relies on his Initial brief for the argument on this Point.

POINT XII

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

Appellee claims even though Appellant did not engage in life-threatening conduct the prior violent felony aggravator applied vicariously through the actions of the two men who had the weapon. However, it is well-settled that an aggravating circumstance cannot be applied to a defendant through the actions of another. See Williams v. State, 622 So. 2d 456, 463-64 (Fla. 1993).

Appellee relies on Williams v. State, 967 So. 2d 735 (Fla. 2007) to support its claim that the prior violent felony aggravator should apply even where a defendant's actions are not life-threatening. However, in Williams the defendant forced a girl into a room, threatened to kill her, and penetrated her so as to cause bleeding. This was considered life-threatening. Williams contradicts Appellee's position. In Williams the prior indecent assault was not inherently life-threatening but this Court went behind the label of the crime and looked at the defendant's specific actions to determine if the aggravator applied.[8] Here Appellant's actions did not involve life-threatening conduct. Again, the aggravator cannot be applied vicariously to a 15 year

[8] Also in Mahn v. State, 714 So. 2d 391 (Fla. 1998) the defendant (Mahn) and accomplice both agreed to rob the victim. However, Mahn was the getaway driver and did not engage in life-threatening conduct. Thus, the prior violent felony aggravator did not apply.

old through the actions of the two men with the weapon. Appellant relies on his initial brief for further argument on this Point.

POINT XIII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee essentially claims that proportionality review is a determination whether the trial court abused its discretion in imposing the death sentence. Proportionality review is a device to compare cases to ensure that the death penalty is imposed evenhandedly. A trial court's discretion as to sentencing and weighing in a Florida capital case is extremely limited otherwise Florida's death penalty would be arbitrary and capricious (thus unconstitutional). Proffitt v. Florida, 428 U.S. 242, 258 (1976) (although factors cannot be given "numerical weights" Furman requires that sentencing authority's weighing discretion is "guided and channeled"). Proportionality review "requires a discrete analysis of the facts" and entails a "qualitative review" by this Court. Bell v. State, 841 So. 2d 329, 331 (Fla. 2002.). In other words, this Court's proportionality review does not take back seat to an individual trial judge's so-called unbridled discretion as essentially advocated by Appellee.

Appellee does not try to analyze proportionality under the test that the death penalty is reserved only for the "most aggravated" and "least mitigated" of murders. E.g., Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

Appellee claims that **capacity for rehabilitation** is being argued as an absolute

bar to the death penalty. This is false. However, as pointed out at page 70 of the Initial Brief capacity for rehabilitation is very significant and under State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) the "death penalty is a unique punishment in its finality and total rejection of the possibility for rehabilitation". It is only in rare circumstances that a death sentence will be upheld where there is a capacity for rehabilitation.

Appellee claims that cases cited by Appellant in pages 72-75 of the Initial Brief are not comparable to the prior violent felonies that are not as egregious as the average prior violent felony. However, in the present case the prior violent felony was also less egregious than in the normal case. Appellant was 15 years old, made no threats, and had no weapon. Also, Appellee does not dispute that the mitigation in the present case was much more significant than in Johnson v. State, 720 So. 2d 232 (Fla. 1998); Thompson v. State, 647 So. 2d 824 (Fla. 1994); or Terry v. State, 668 So. 2d 954 (Fla. 1996).

Appellee does not dispute Appellant's analysis at page 74-75 of the Initial brief of Terry v. State, 668 So. 2d 954 (Fla. 1996) explaining that the death penalty must be based on known facts and not speculation as to what occurred. In this case the facts as to what occurred during the shooting are even less clear than in Terry. Also, the mitigation was much more extensive than in Terry. As in Terry, the death penalty is disproportionate in this case.

This Court has recognized that proportionality analysis does not involve a mere

counting of aggravating circumstances it involves a qualitative analysis of similar type cases. Appellee claims that the instant case is similar to a number of cases involving prior violent felonies where a death sentence was deemed proportionate. However, all the cases involve a much more egregious prior violent felony and/or less mitigation and the facts of the killing were known.

In Shellito v. State, 701 So. 2d 837, 845 (Fla. 1997) the defendant committed the prior violent felonies as an adult - not as a 15 year old like Appellant. Shellito committed **three robberies** and an **aggravated assault on a police officer**. 701 So 2d at 1845. Shellito's prior violent felonies were not comparable to Appellant's situation. Also, the mitigation in Shellito was much weaker.

Again, in Mendoza v. State, 700 So. 2d 670 (Fla. 1997), the prior violent felonies were much more egregious than in the present case - robbery with a firearm and aggravated battery including beating the victim during the robbery. Also, there was virtually nothing in mitigation.

In Melton v. State, 638 So. 2d 927 (Fla. 1994) the prior violent felony was a **murder** committed by Melton and there was virtually no mitigation. Pope v. State, 679 So. 2d 710 (Fla. 1996) is a totally different type of case involving a different analysis. In Pope, the defendant decided to kill Alice Mahaffey for her car and money. Pope killed Alice in front of his niece Marsha Pope. Pope forced Marsha to watch him beat, kick, and stab Alice. This Court described Pope's actions as follows:

> Later, Pope summoned Marsha and forced her to watch him beat, kick, and stab Alice. Marsha witnessed Pope beat Alice's head against the sink and wall while Alice was sitting on the toilet and stomped on her head and back with his boots. While Alice was lying face down on the floor, Pope straddled and stabbed her. When Marsha tried to escape, Pope threatened to kill her if she attempted to leave. Pope then left Alice lying on the bathroom floor and went to the kitchen to wash his hands.... He said calmly, "I hope I killed the bitch" and, as the officers were discussing Alice's condition, Pope said loudly, "I hope I didn't go through all that for nothing. I hope she's dead as a doornail."

679 So. 2d at 712. Pope did not challenge proportionality on the basis that it was not the "most aggravated" and/or was not the "least mitigated" crime. Instead, Pope argued that his case fell within a heat of passion domestic dispute exception, but this Court rejected his claim. The bottom line is Pope is not comparable to the instant case to use it for a proportionality analysis.

Finally, Lowe v. State, 650 So. 2d 969 (Fla. 1994) does not give any information as to the prior violent felony aggravator. Certainly it was more weighty than in this case. Lowe's mitigation was much weaker than in this case. In fact, Lowe's appellate attorney did not even bother raising proportionality as an issue. The issue raised on appeal was whether the trial court analyzed the mitigating circumstances. Thus, Lowe is not useful in performing a proportionality analysis in this case.

Comparison to the most comparable cases shows that death is not proportionate in this case. Moreover, the facts of the case are uncertain. When there is uncertainty

to the facts a comparison of the case to other cases to determine similarity for a proper proportionality review cannot be done and the death penalty must be vacated. Tillman v. State, 591 So. 2d 167 (Fla. 1991). Appellant relies on his Initial Brief for further argument on this Point.

POINT 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.

Appellee claims the prosecutor could go outside § 90.612(2) in cross-examining Appellant in order to prove the avoid arrest aggravating circumstance. However, Appellee cites no authority that says § 90.612(2) can be ignored.

Appellee also claims that the prosecutor was merely attacking Appellant's credibility. Such a claim is specious. Appellant's testimony was about his family. The prosecution never claimed he was lying about his family. The prosecution never attacked Appellant's credibility. Appellee misrepresents what occurred.

Finally, Appellee claims there was no prejudice. However, as explained on pages 77-78 of the Initial Brief forcing Appellant into a position of criticizing the jury by improper questioning was very prejudicial. Appellant relies on his Initial Brief for further argument on this Point.

CONCLUSION

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

Respectfully submitted,

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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 January, 2009.

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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 January, 2009.

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