IN THE SUPREME COURT OF FLORIDA

VAHTIECE A. KIRKMAN,)
)
Appellant,)
)
vs.) CASE NO. SC16-808
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
burden.george@pd7.org

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The original record on appeal is comprised of five digital records. One digital record is the record on appeal and will be noted with the letter "R." One digital record is a transcript of the trial and penalty phase and will be noted with the letter "T." There is a digital supplement of the record which will be noted with the letters "SR." There is a digital supplement of the transcript of pretrial hearings and that will be noted with the letters "ST." There is a second digital supplement of the transcript of trial and that will be noted with "ST2."

STATEMENT OF THE CASE

Vahtiece A. Kirkman, hereinafter referred to as appellant, was indicted by Grand Jury for the First Degree Murder of Darice Knowles on January 23, 2012.

(R 126) The appellant was found to be indigent and Frank Bankowitz was appointed as conflict attorney. (R 155) The state filed a Notice of Intent to Seek the Death Penalty on March 28, 2012. (R 159) The trial judge signed an Order appointing J. Edwin Mills as second chair counsel in this case. (R 188) The appellant's defense team sought the assistance of a mitigation specialist and a psychologist which was approved by the trial judge the following year. (R 198) The trial judge also approved a confidential Neuro-Psychological Evaluation. (R 200)

The appellant filed a Motion for Hearing requesting that new counsel be appointed on the grounds that Attorney Bankowitz failed to respond to letters from the appellant dated June 9, 2013, June 28, 2013 and that a letter dated September 2, 2013 was returned as undeliverable. (R 216) The trial judge held a Nelson Hearing. (SI 199) At the hearing Attorney Bankowitz explained that he did not received the appellant's mail because the appellant had an incorrect address. (ST 200) When asked, the appellant stated that he was satisfied with the services of his attorneys. (ST 201)

The appellant filed twenty-one pre-trial motions on June 16, 2014.[1] Most of

[1] Motion for Additional Peremptory Challenges (R 233); Motion for Daily Transcripts (R 241); Proposed Penalty Phase Jury Instructions re: Victim Impact Evidence (R 245, 251); Motion for Disclosure of Penalty Phase Evidence (R 253);

the motions were denied or taken under advisement.[2] The appellant again filed a Motion for Hearing requesting that new counsel be appointed on the grounds that: 1) The appellant had previously requested new counsel but was persuaded by Attorney Mills and Attorney Bankowitz to withdraw the request, and (2) Attorney Bankowitz failed to respond to letters from the appellant dated April 19, 2014 and May 25, 2014. (R 331)

Motion to Elect and Justify Aggravating Circumstances (R 256); Motion to Preclude Death as a Possible Punishment (R 258); Motion for Disclosure of Impeaching Information (R 262); Motion for Individual Voir Dire (R 265); Motion for Findings of Fact by Jury (R 268); Motion to Declare Florida Death Penalty Unconstitutional (R 272); Motion for Juror Questionnaire (R 282); Motion in Limine Re: Penalty Phase (R 284); Motion In Limine Re: Jury Selection (R 286); Motion to Limit Victim Impact Evidence to One Witness (R 291) Motion to Limit Victim Impact Evidence (R 296); Motion for Pre-Trial Determination of Admissibility of Photographs (R 301); Motion to Dismiss Indictment (R 304); Motion for List of Jurors (R 307); Motion to Dismiss Indictment (Ring) (R 309); Motion to Allow Victim Impact Evidence Before the Judge Alone (R 322); Motion to Videotape Victim Impact Evidence (R 329)

[2] 913.08 unconstitutional denied. (S 265); Victim Impact Motions held in abeyance because state will not present victim impact evidence. (S 271) Motion to Elect and Justify Aggravating Circumstances; and Motion to Preclude Death as a Possible Punishment denied (state provided aggravating circumstances orally hearing). (S 276, 305) Motion for Disclosure of Impeaching Information granted. (S 278) Motion for Individual Voir Dire taken under advisement. (S 287) Motion for Findings of Fact by Jury and Motion to Declare Florida Death Penalty Unconstitutional denied. (S 288, 289) Motion for Juror Questionnaire reserved ruling. (S 290) Motion in Limine Re: Penalty Phase granted in part and denied in part. (S 293) Motion In Limine Re: Jury Selection granted in part and denied in part. (S 297) Motion to Dismiss Indictment; and Motion to Dismiss Indictment (Ring) denied. (S 301)

The appellant filed a Statement of Particulars as to Aggravating Circumstances. (R 369) The appellant made a Demand for Speedy Trial on February 16, 2016. (R 472) The trial judge held a hearing on the Motion for Speedy Trial on February 23, 2016 and ordered trial to commence on March 28, 2016. (R 474) The state filed a Notice of Intent to Offer Evidence of Other Criminal Offenses on March 2, 2016. (R 475) After hearing, the trial judge took the matter under advisement. (ST2 162)

On March 9, 2016 pursuant to Florida Statute 784.04(1)(b) the state filed an Amended Notice of Intent to Seek the Death Penalty and listed the six aggravating factors the state believed that they could prove beyond a reasonable doubt. (R 494) The state filed a Second Amended Notice of Intent to Seek the Death Penalty on March 18, 2016. (R 499) The appellant filed a Motion to Strike the State's Death Notice. (SII 120) The appellant argued that the Florida Legislature passed a new death penalty statute that requires the State of Florida to file a notice of intent to seek the death penalty and list the aggravating factors that make the appellant death eligible. (ST2 120) The State of Florida did not file a timely notice, and the Florida Legislature did not include language that would preclude this requirement for this case. (ST2 121) The state argued that they had already complied with the new statute before the legislation changed, and the statute allows a good cause

exception. (ST2 124) The trial judge denied the motion. (ST2 125)

The appellant also filed a motion to declare portion of the new Florida death penalty statute unconstitutional. (ST2 125) The appellant's argument was two-fold: first, the Florida Rule 3.440 Rendition of Verdict requires that "No verdict maybe rendered unless all of the trial jurors concur in it." This Rule is violated where the jury can issue a verdict on sentence and it does not need to be unanimous; second, the lack of an unanimous verdict under the new Florida statute is contrary of the United States decisions of Ring v. Arizona, and Hurst v. Florida. (ST2 126) The trial judge denied the motion. (ST2 131)

The case proceeded to trial. (T 114) The trial judge issued an order during jury selection concerning Williams Rule evidence. (T 841) The trial judge ruled that the murder of Willie Parker is not necessarily inextricable intertwined with the murder of Darice Knowles. (T 843) However, the motive of the Knowles' murder was the that the victim may give information to the police of the appellant's involvement in the Parker murder. (T 844) Moreover, the Court requested that the state proffer testimony of Christopher Pratt regarding why he feared the appellant. (T 858) Finally, the trial judge found that the subsequent burning of the van is relevant and inextricable intertwined with this case. (T 859) Through the testimony of Christopher Pratt, the state informed the jury that the appellant was

indicted for the murder of Willie Parker on two occasions. (T 1,588; 1,609) The appellant did not object to this testimony. (T 1,588; 1,609)

The state rests. (T 2,177) The appellant made a Motion for Judgment of Acquittal on the grounds that the state's entire case was built around the testimony of Christopher Pratt. (T 2,178) There is no forensic evidence that links Vahtiece Kirkman to the death of Ms. Darice Knowles. (T 2,178) The trial court denied the appellant's Motions for Judgment of Acquittal. (T 2,182)

The appellant rests. (T 2,204) The jury returned a verdict of guilty as charged. (T 2,296; R 625)

PENALTY PHASE

The appellant reiterated his motion challenging the constitutionality of the new death penalty statute. (T 2,411) Moreover, the appellant further argued that the appellant was indicted under an unconstitutional statute, and to proceed to sentencing under a new statute would be an improper ex-post facto application of the new statute to the appellant. (T 2,411) The appellant objected to the state presenting evidence relating to the "prior crime" aggravating factors based upon relevance and that the probative value of the evidence was outweighed by its prejudice. (T 2,509) The trial judge ruled that he wished the state to make a proffer of evidence of prior violent felonies before he made a ruling. (T 2,512) The state

explained the evidence they intend to introduce, and then the trial judge ruled that based upon the case law he reviewed, the state could go forward with detailed evidence of appellant's prior violent felonies. (T 2,515)

The state sought instruction on six aggravating factors: Kirkman was previously convicted of a felony and under sentence of imprisonment; Kirkman was previously convicted of a capital crime; Kirkman committed a kidnaping during the course of the murder; witness elimination; HAC; and CCP. (T 2,438-2,450) The jury returned an advisory sentence of death by a vote of 10-2. (T 2,687; R 965) The jury found that the witness elimination aggravating factor did not apply. (R 963)

The trial court issued a Sentencing Order and found that there were five (5) aggravating factors.[3] (R 1,014-1,022) The trial court rejected the appellant's mitigating factor that the defendant was an accomplice to the capital felony committed by another person and his or her participation was relatively minor; and the trial judge rejected the proportionality of sentences between the appellant and Christopher Pratt as a mitigating factor. (R 1,024; 1,025) The trial court found

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[3] Defendant was previously convicted of another capital felony or a felony involving violence; The defendant was previously convicted of another capital felony; The capital felony occurred during the course of a kidnaping; The capital felony was heinous, atrocious or cruel; The capital felony was committed in a cold, calculated and premeditated manner.

some non-statutory mitigation, and gave it moderate weight. (R 1,025) The trial court found that the aggravating factors outweigh the mitigating circumstances. (R 1,026) The trial court sentenced the appellant to death. (R 1,027) The Office of the Public Defender was appointed. (R 1,038) This appeal follows.

STATEMENT OF THE FACTS

Christopher Pratt came to the United States from the Bahamas in November 2005. (T 1,544) In February 2006, Pratt's girlfriend Darice Knowles came to visit from the Bahamas and they both moved into the apartment of Deondra Williams. (T 1,546, 2,156) In the middle of March 2006 Pratt and Knowles moved with the appellant into the appellant's girlfriend Tamiko Smith's residence. (T 1,548)

On March 16, 2006 Christopher Pratt and Darice Knowles were staying at the Dixie Motel in Cocoa Beach. (T 1,552) At this time Pratt and Knowles were just friends, but did have a sexual relationship. (T 1,558) That evening Cocoa Beach Police Officer Jovonnie Freeman was on patrol and received a disorderly conduct call to Norman's, a local bar and grill. (T 1,652) Upon arrival, the bar manager informed him that a African-American lady (Darice Knowles) was being disorderly and the manager wanted her to leave. (T 1,652) Officer Freeman spoke with the suspect, and she stated her name was Tamiko Smith.[4] (T 1,652) Officer Freeman issued a trespass warning. (T 1,653) Officer Freeman, after obtaining permission from his supervisor, gave Darice Knowles a ride to the Dixie Motel. (T 1,657) During the ride the two exchanged contact information. (T 1,657)

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[4] It was later determined that Officer Freeman gave the trespass warning to Darice Knowles, and that she had given Officer Freeman the false name of Tamiko Smith. (T 1,661)

After Officer Freeman got off work and changed into civilian clothes, he called Darice Knowles and asked whether she wanted to get together. (T 1,658) Knowles agreed, and Officer Freeman came to the Dixie Motel in his civilian vehicle to pickup Darice Knowles. (T 1,658) Knowles came out of her room, and as she got into Officer Freeman's vehicle, Christopher Pratt approached and asked Knowles "what's going on." (T 1,553) Pratt observed that a Cocoa Beach police officer was driving the vehicle. (T 1,553) Knowles responded that nothing was going on; and that Officer Freeman asked Pratt to get away from the car. (T 1,555) Pratt was upset when he saw the police officer with Knowles. (T 1,556) Pratt departed the Dixie Motel and drove to Merritt Island to find another place to stay because he was locked out of his room. (T 1,556, 1,559) Pratt called the appellant from Merritt Island and explained to him what happened. (T 1,557)

Pratt thereafter joined the appellant at Tamiko Smith's house. (T 1,557) The appellant questioned Pratt to determine the name of the Cocoa Police Officer with Darice Knowles. (T 1,557) Pratt did not know the police officer's name. (T 1,557) Pratt returned to the Dixie Motel, found the room door ajar and empty, and went inside to rest. (T 1,559) Meanwhile, Knowles joined Officer Freeman at a bar and grill in Cocoa Beach to talk. (T 1,660) Two hours later Knowles came to Officer Freeman's "place" and stayed the night and had sexual relations. (T 1,661)

Pratt awoke when the sun came out and observed that Knowles had returned to the Motel parking lot with Officer Freeman. (T 1,560) After Pratt made eye contact with Knowles, Knowles left the motel with the police officer. (T 1,561) Pratt called Knowles and asked her whether she was coming back to the Dixie Motel. (T 1,561) Knowles stated that she would be back. (T 1,561) Knowles returned to the Dixie Motel and explained that nothing was going on with the police officer and that she just went out to have a little fun and party. (T 1,562) Pratt did not feel safe at the Dixie Motel, so he and Knowles packed their things and they went to Tamiko Smith's house. (T 1,563)

Pratt pulled up to Smith's house and the appellant got in. (T 1,566) Pratt was planning to take Knowles to the airport, but the appellant directed Pratt to meet up with "Los"(Carlos Buckner). (T 1,566, 1,718) Pratt arrived at Shalonda Tillman's house and the appellant got out of the vehicle and met with Carlos Buckner and Tony Rogers. (T 1,569) The appellant told Pratt that he was not believing Knowles explanation of her relationship with the police officer. (T 1,570) The appellant told Pratt to wait, and the appellant left with Buckner and Rogers. (T 1,571) Pratt was upset with Knowles and he struck her in the face a couple of times while they waited for the appellant's return. (T 1,572)

The appellant went to the Home Depot in Merritt Island and purchased an

eighty pound bag of concrete, a shovel and a roll of duct tape. (T 1,706) The appellant returned to Pratt and Knowles with the shovel, bag of concrete and duct tape. (T 1,573) Appellant gave Pratt an ultimatum: it is either Knowles or both of you. (T 1,578) Pratt was afraid of the appellant. (T 1,579) Appellant then told Pratt to tie up Knowles, and Pratt complied and used duct tape to tape her hands in front of her. (T 1,575) The appellant put the items from Home Depot in the van, got the keys from Pratt and drove thirty minutes to a "dirt road off of 524." (T 1,574) Once the group arrived at the destination, the appellant told Pratt to tie up Darice Knowles, and Pratt used duct tape to tie up her feet and placed duct tape over her mouth. (T 1,576) Once restrained, Pratt picked up Knowles over his shoulder and carried her towards the woods at the appellant's direction. (T 1,579) When Pratt put Knowles down you could see that she was terrified. (T 1,580)

The appellant ordered Pratt to start digging. (T 1,580) Pratt was fearful that the appellant was going to kill him and Knowles. (T 1,581) Once the appellant was satisfied with the hole, he ordered Pratt to prepare the cement. (T 1,581) After Pratt threw some of the mixed cement in the hole, the appellant ordered Pratt to throw Darice Knowles into the hole. (T 1,583) Pratt picked up Knowles and threw her in the hole, and Knowles fell sideways and turned on her back. (T 1,583) Knowles was alive and terrified while Pratt threw cement mix on top of her at the

appellant's direction. (T 1,584) Pratt then refilled the hole with dirt and then Pratt and the appellant left the scene. (T 1,585) Pratt and the appellant returned to Tamiko Smith's house and returned the shovel and duct tape. (T 1,586) The two then discarded Darice Knowles' clothes at different garbage disposal areas. (T 1,586)

Pratt was questioned by Cocoa Police about Darice Knowles and he lied about her whereabouts claiming that he had driven her to Orlando Airport. (T 1,588) Pratt was indicted for the first degree murder of Willie Parker along with the appellant and Jonathan Page. (T 1,588) While the Parker murder charge was pending in July of 2010 Pratt spoke to law enforcement and the state attorney about Darice Knowles. (T 1, 588) Pratt entered into a plea agreement where he would reveal the location of Darice Knowles' body, and Pratt would be charged with Second Degree murder; sentenced to 10 year in the DOC and 10 years probation; and provide truthful testimony against the appellant. (T 1,589) Pratt subsequently accompanied law enforcement to the murder scene. (T 1,891) After several days of searching, bodily remains were discovered in the area identified by Christopher Pratt. (T 1,898) The bodily remains were excavated and transported to the Medical Examiners Office. (T 1,912) The bodily remains were of a female of West African origin between the age of 18-25. (T 1,979) There were no signs

of recent injury on the bodily remains. (T 1,985)

Pratt admitted that he was involved in the murder of Willie Parker and murdered Darice Knowles (at the appellant's order). (T 1,609) For his testimony he was offered twenty years for both murders. (T 1,610) Through the testimony of Christopher Pratt, the state informed the jury that the appellant was indicted for the murder of Willie Parker on two occasions. (T 1,588; 1,609)

Tamiko Smith had telephone calls with the appellant in jail after he was arrested in South Carolina. (T 1,734) The appellant instructed Smith to remove all his clothes from her place and bring the clothes to his grandmother's house. (T 1,734) In the next telephone call the appellant instructed Smith to have no visitors and to just go to work. (T 1,749) He also instructed Smith to torch the van. (T 1,757) Smith was later charged with arson to the van, and plead guilty. (1,758)

Medical Examiner

Dr. Qaiser Sajid was the Medical Examiner that examined the remains of Darice Knowles. (T 2,009) Dr. Sajid found no sign of any injury of any kind. (T 2,009) The remains were consistent with someone being placed in a hole, having cement poured over them and being buried. (T 2,013) The likely cause of death was a homicide; Dr. Sajid could not confirm whether the victim was alive when she was buried. (T 2,014, 2,012)

The victim's father and mother provided DNA samples to investigators. (T 2,157, 2,165) A DNA profile was developed from the DNA samples from the victim's parents. (T 2,195) A DNA profile was developed from the molars removed from the bodily remains found in this case. (T 2,198) The DNA profiles were compared, and found that it was 1.35 trillion times more likely that Mario and Princess Knowles were the parents of the sample of bodily remains tested. (T 2,200)

Vahtiece Kirkman's Statement

Kirkman admitted to buying a shovel. (T 2,088) He explained that he purchased the shovel for his job at Rainbow Concrete. (T 2,089) The owner of Rainbow Concrete stated that Kirkman never worked for him. (T 2,281) The owner of Rainbow Concrete stated that he never asked Kirkman to purchase any item for his company. (T 2,281) Kirkman further admitted to giving the order to torch the van because it was stolen. (T 2,099, 2,091) The interview terminated when Kirkman requested a lawyer. (T 2,136)

Penalty Phase

State's Case

The appellant was on a probationary sentence with the Florida Department of Corrections at the time of the murder. (T 2,487) The appellant had a prior first

degree murder conviction in case number 2006-CF-014913-C for the murder of Willie Parker and received a life sentence. (T 2,494)

Dr. Sajid Qaiser reviewed the death investigation of Willie Parker. (T 2,530) Parker suffered from four gunshot wounds. (T 2,530) One gunshot was to the left upper arm, and then entered the victim's back. (T 2,531) One gunshot was to the chest, and collapsed the victim's lung. (T 2,531) One gunshot was to the upper thigh; and the final shot was to the buttock. (T 2,534)

The victim Darice Knowles' skeleton was in a propped position, and her hands were above the skull in flexed position. (T 2,535) It appeared that Knowles was in a struggle to try to escape the situation. (T 2,535) Knowles would have lost consciousness with 20 seconds, and died within four to six minutes. (T 2,537)

When the appellant was seventeen years old he was involved in the burglary of a home in Rockledge, Florida. (T 2,552) Marvis Christian was present during the shooting of Willie Parker. (T 2,558) Christian was sitting in a car with Willie Parker in the dark. (T 2,558) Two guns came through the back passenger window. (T 2,558) Christian was ordered out of the car and ordered to the ground. (T 2,559) Christian was ordered to empty his pockets. (T 2,559) Then gunshots went off and Christian fled. (T 2,559) While Christian ran he was shot in the leg and

went down. (T 2,559) An individual came and touched Christian's pockets and ran off. (T 2,560)

The robbery of Willie Parker and Marvis Christian was planned by Carlos Buckner and the appellant. (T 2,564) The appellant, Jonathan Page and Christopher Pratt participated in the robbery and murder. (T 2,564) Christopher Pratt observed the appellant fire two shots into Willie Parker's vehicle. (T 2,569) Darice Knowles had no knowledge of the Parker murder, but she did know about Christopher Pratt's drug dealing. (T 2,570)

Vahtiece Kirkman's Mitigation

Risha Ford knew Kirkman as a child and Kirkman was her god-brother. (T 2,598) Kirkman was a perfect brother, and Ford is the woman she is today because of Kirkman. (T 2,598) Kirkman would be sure that Ford did her homework, and made sure that she did what she was supposed to do. (T 2,598) Even when incarcerated, Kirkman would write and call Ford. (T 2,599) Kirkman was there for Ford at the hospital when her child was born in September 2004. (T 2,602)

SUMMARY OF ARGUMENT

Issue I: The Supreme Court of the United States held that Florida's capital sentencing scheme violates the Sixth Amendment to the United States Constitution. Hurst v. Florida, 136 S. Ct. 616 (2016) Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is unconstitutional. Hurst at 619, 624 In reaction to the Hurst decision, the Florida Legislature amended the death penalty statute. The appellant responded by filing a Motion to Declare Florida Statute 921.141(2)(C) Unconstitutional. This Court agreed that the current Florida death penalty statute was unconstitutional in Perry v. State, 2016 WL6036982 (Fla. October 14, 2016). Since the appellant was sentenced under an unconstitutional statute, this Court should reverse and remand his death sentence and order a new penalty phase hearing. See Franklin v. State, SC13-1632 (Fla. November 23, 2016)

The appellant also contends that the current Florida death penalty is unconstitutional because it fails to adequately narrow the class of cases eligible for the death penalty. The expansion of the number of aggravating factors by the Florida Legislature has created a statutory scheme where the class of cases eligible for the death penalty includes every first degree murder.

Issue II: The state sought to introduce evidence that the appellant was

involved in the prior murder of Willie Parker on the grounds that the evidence was inextricably intertwined with the homicide of Darice Knowles. The state claimed that their star witness and co-defendant Christopher Pratt would testify that he was directed/ordered to assist the appellant in murdering Darice Knowles because the appellant thought that Darice Knowles was providing information to the Cocoa Police Department about his involvement in the murder and robbery of Willie Parker.

The trial judge found that informing the jury that the appellant and co-defendant where indicted for the previous unrelated murder of Willie Parker was relevant to bolster the state's claim that the appellant believed that the murder victim Darice Knowles knew about the appellant's involvement in drug trafficking and the murder of Willie Parker. The appellant further believed that Darice Knowles was providing information to the Cocoa Police Department about the appellant's involvement in these criminal activities. The trial judge ruled that this highly prejudicial evidence of unrelated criminal activity was relevant to prove appellant's motive to murder Darice Knowles (witness elimination). This was error.

Issue III: It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be

proportional to the culpability of the defendant. Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). The appellant's co-defendant Christopher Pratt testified that he murdered his girlfriend Darice Knowles on the orders of the appellant. The state argued that the sole motive of her murder was witness elimination.

The penalty phase verdicts make it clear that the jury was not comfortable with Pratt's testimony and uncertain as to what actually occurred in that killing field. Had the jury fully believed the testimony of Christopher Pratt they would have unanimously found the witness elimination aggravating factor. There was no other reason given by the state to explain the motive of the murder of Knowles. On the other hand the jury found the CCP aggravating factor for the appellant which would suggest that the jury believed that the appellant was culpable for the murder of Knowles. Where the culpability of co-defendant's is similar, this Court has long recognized "that the less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable, triggerman defendant receives" a lesser sentence. Therefore, in this case the imposition of the death penalty is disproportionate in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

ISSUE I

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION.

On January 12, 2016, the Supreme Court of the United States held that Florida's capital sentencing scheme violates the Sixth Amendment to the United States Constitution. Hurst v. Florida, 136 S. Ct. 616 (2016). In Hurst the Court stated:

> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional. Hurst at 619, 624 In reaction to the Hurst decision, the Florida Legislature amended the death penalty statute. The appellant responded by filing a Motion to Declare Florida Statute 921.141(2)(C) Unconstitutional. After hearing, the trial judge denied the Motion. This was error. Since the trial judge's ruling in the instant case, this Court found that the current Florida death penalty statute was unconstitutional in Perry v. State, 2016 WL6036982 (Fla. October 14, 2016):

> In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in Hurst. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. Hurst, SC12–1947, slip op. at 4. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. Id. at 23–24, 36.

Since the appellant was sentenced under an unconstitutional statute, this Court should reverse and remand his death sentence and order a new penalty phase hearing. See Franklin v. State, SC13-1632 (Fla. November 23, 2016)

The appellant also contends that the current Florida death penalty is unconstitutional because it fails to adequately narrow the class of cases eligible for the death penalty.

Failure to Narrow the Class of Cases Eligible for the Death Penalty

Florida's current death penalty statute is also unconstitutional because the aggravating factors listed therein fails to narrow the class of cases that are eligible for the death penalty and, in fact, it expands the class of cases eligible for the

death penalty to include every first degree murder. The post-Furman death penalty statute listed eight aggravating factors. Since its enactment, the aggravating factors listed in the statute have expanded to a total of sixteen. The expansion has occurred over the years as follows:

A. Victim a law enforcement officer was added in 1987.
B. Victim an elected official was added in 1988.
C. Victim Impact was added in 1990. (Not called an aggravating circumstance)
D. Defendant on probation or community control was added in 1991.
E. Victim under 12 years of age was added 1995
F. Victim elderly or vulnerable was added in 1996.
G. Defendant a member of a street gang was added in 1996.
H. Sexual predator was added in 2005.
I. Violation of an injunction for protection was added in 2010.

In addition, (1) the legislature has added aggravated child abuse to the list of felonies that trigger the felony murder rule; (2) the legislature has significantly expanded the common law definitions of robbery and burglary to include relatively minor criminal activity which would formerly have been petit theft or trespass; and (3) the distinction between principles in the first and second degree has been abolished. The effect of this legislation has been to widen the net, thereby ensnaring more defendants into the crime of first degree murder. The conduct of these defendants generally involves a lower level of culpability than previously required for a capital crime.

The sixteen aggravating circumstances and the other legislative changes are so all encompassing as to include every conceivable fact situation that would support a conviction for first degree murder. The aggravating circumstances listed in the statute currently include the following:

> (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) The defendant knowingly created a great risk of death to many persons.
>
> (d) 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 battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnaping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> (f) The capital felony was committed for pecuniary gain.
>
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
>
> (h) The capital felony was especially heinous, atrocious, or cruel.
>
> (I) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal

justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

Each of the aggravating factors listed, taken separately, narrow the class of cases eligible for the death penalty. However, when the legislature added additional aggravating circumstances to the list over the years, it expanded the number of cases eligible for the death penalty and narrowed the number of cases which are

ineligible. Only a severely mathematically challenged individual would conclude that these additions and expansions truly narrow the class of cases eligible for the death penalty.

One of the aggravating factors the Florida Supreme Court has held to narrow the class of cases eligible for the death penalty is the felony murder aggravating circumstance. The Court justified this "automatic aggravator" by comparing the list of felonies in the felony murder statute to the list of felonies that can be used for the felony murder aggravator and noting the felony murder statute has a longer list. Blanco v. State, 706 So.2d 7, 17-18 (Fla. 1998). The Court reasoned that since the felony murder statute has a longer list of felonies, the shorter list in the felony murder aggravating circumstance narrows the class of cases eligible for the death penalty in felony murder cases. That analysis is correct as far as it goes. However, each of the felonies contained in the felony murder statute, and missing from the list of felonies in the felony murder aggravating circumstance always provides one or more separate aggravating circumstances. For example, carjacking always includes the pecuniary gain aggravator for the auto theft. And every felony included within the list of felonies that qualify as an aggravating circumstance in the felony murder aggravating circumstance includes at least one aggravating circumstance that "doubles" with the felony murder

aggravating circumstance. For example, burglary always includes the pecuniary gain if the motive is theft, and cold, calculated, and premeditated or heinous, atrocious, and cruel if the motive is sexual battery or harm to another. Thus, every felony murder conviction in Florida contains at least one, if not more, aggravating circumstances. Since a high percentage of first degree murders in Florida are felony murders, the felony murder aggravating circumstance actually increases, rather than decreases, the number of murders eligible for the death penalty.

The complete list of felonies contained in the current felony murder statute (Fla. Statute 782.04(1)(a)) that are missing from the felony murder aggravating circumstance, are listed below with the their included " aggravating circumstance(s):

Missing Felonies	**Corresponding Aggravating circumstance**
Trafficking offense (893.135(1)).	Pecuniary gain
Carjacking[5]	Pecuniary gain
Home invasion robbery	Pecuniary gain
Aggravated Stalking	Cold, Calculated and Premeditated
Murder of another human being	Prior violent felony (second victim)
Resisting an officer with violence	Victim a law enforcement

[5]The charging document charging carjacking or home invasion robbery must allege the elements of robbery. Fla. Standard Jury Instructions (Criminal) 15.2 and 15.3.

	officer
Aggravated fleeing and eluding	Avoid arrest
Act of terrorism	Danger to many persons, prior violent felony, heinous, atrocious, or cruel; cold, calculated, and premeditated

The list of felonies included in the felony murder statute, and included among the felonies listed in the felony murder aggravating factor, together with their included "doubling" aggravating circumstance are listed as follows:

Included Felonies	**Other aggravation Circumstance**
Robbery	Pecuniary gain
Sexual battery	Heinous, atrocious, or cruel; cold, calculated and premeditated
Aggravated child abuse	Victim under 12 years of age
Abuse of elderly person etc.	Vulnerable victim due to age etc.
Arson	Cold, calculated and premeditated; heinous, atrocious, or cruel
Burglary	Pecuniary gain; cold, calculated, or premeditated; heinous, atrocious, or cruel
Kidnaping	Cold, calculated and premeditated; heinous, atrocious, and cruel
Aircraft piracy	Danger to many persons; cold, calculated and premeditated
Throwing destructive device	Danger to many persons, cold, calculated, and premeditated; heinous, atrocious, or cruel

A capital punishment scheme must genuinely narrow the category of cases subject to the death penalty. Furman v. Georgia, 408 U.S 236 (1972);

Zant v. Stephens, 462 U.S. 862 (1983). The Florida death penalty scheme fails to comply with this constitutional requirement. Every conceivable fact situation that could support a charge of first degree murder includes at least one of Florida's aggravating factors. The legislature could have simply combined the sixteen the aggravating factors listed above into one aggravating factor, which could be stated as follows: "Any person convicted of first degree murder in Florida is eligible for the death penalty unless the jury finds there is sufficient mitigation to justify the imposition of a life sentence." The sixteen aggravating circumstances listed in the current statute must be construed together and, when combined, fail to narrow the class of cases of first degree murder that are eligible for the death penalty.

The appellant urges this Court to declare Florida Statute 921.141 unconstitutional because it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to sufficiently narrow the class of cases that are eligible for the death penalty.

ISSUE II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE WHERE THE PROBATIVE VALUE WAS OUTWEIGHED BY THE PREJUDICE TO THE APPELLANT.

Standard of Review

A trial court has wide discretion concerning the admissibility of evidence, and a ruling on admissibility will not be disturbed unless there has been an abuse of discretion." Huhn v. State, 511 So. 2d 583, 588 (Fla. 4th DCA 1987) The abuse of discretion standard of review also applies to rulings on admitting evidence of other crimes. LaMarca v. State, 785 So. 2d 1209, 1212 (Fla. 2001)

On the eve of trial the state filed a Notice of Intent to Offer Evidence of Other Criminal Offenses. The state sought to introduce evidence that the appellant was involved in the prior murder of Willie Parker on the grounds that the evidence was inextricably intertwined with the homicide of Darice Knowles. The state claimed that their star witness and co-defendant Christopher Pratt would testify that he was directed/ordered to assist the appellant in murdering Darice Knowles because the appellant thought that Darice Knowles was providing information to the Cocoa Police Department about his involvement in the murder and robbery of Willie Parker. After hearing, the trial judge took the matter under advisement.

During jury selection the trial judge revisited the state's Notice of Intent to Offer Evidence of Other Criminal Offenses motion. The judge found the following:

> The fact that Willie Parker was murdered doesn't necessarily get me there. It is a bad act but that doesn't qualify for making it inextricably intertwined with this case. And it also doesn't necessarily provide any relevance unless there's more to it. (T 843)

The trial judge found that the "more to it" relevance is the state's claim that Christopher Platt would testify that the appellant believed that Darice Knowles knew about the appellant's involvement in drug trafficking and the murder of Willie Parker. The appellant further believed that Darice Knowles was providing information to the Cocoa Police Department about the appellant's involvement in these criminal activities. The trial judge ruled that witness elimination would be relevant to prove appellant's motive to murder Darice Knowles:

> He will testify that he was directed and ordered to assist in murdering Ms. Knowles, and his statement that because of the belief that she was providing information to Cocoa Police Department about his involvement in the murder of Willie Parker. Now the Court would tell you, is going to tell you, that that goes to the motive issue. And as it goes to the motive issue, that particular fact should be allowed. I don't see in anything that I've been provided in this case, any other real way to get the issue of her being a victim in this case without getting into the idea that she was going to the police about something. But to go far beyond just that

> simple involvement, in other words, saying, well, let's talk about the murder of Willie Parker, it's going to be very troublesome, other than his involvement in the murder of Willie Parker and were you involved in that murder, yeah, I was. And was Mr. Kirkman, yeah, he was. I can see that kind of testimony. But I don't, unless you're going to provide testimony that directly relates to Ms. Knowles' knowledge about it, and Ms. Knowles, or their knowledge or belief, knowledge about or basis, foundation, for their belief that, or his belief, that she was going to the police. Beyond that, I can't see it, the relevance. I can allow it up to that point. But beyond that, I have a tough time seeing it.

(T 845) In this context, the trial judge ruled that the jury could hear evidence that the appellant was involved in the murder of Willie Parker only. If the state could show that the murder victim Darice Knowles had knowledge about the murder particulars, the trial judge would permit the state to go beyond just letting the state inform the jury that the appellant was involved in Willie Parker's murder.

The trial court erred in admitting evidence of the appellant's involvement in the murder of Willie Parker through the testimony of co-defendant and star witness Christopher Pratt. This evidence was far too prejudicial to admit before the jury on the issue of motive in this case.

The motive of the murder of Darice Knowles was provided through the testimony of Christopher Pratt. For his testimony Pratt was spared the full punishment of the law. By his own admission, Pratt committed the grisly murder

of Darice Knowles, admittedly on the orders of appellant. Also, Pratt was facing a first degree murder charge as a principal in the murder of Willie Parker. Pratt received a 20 year sentence for both murders. This reduced sentence was in exchange for his testimony that put the appellant solely responsible for both murders. The motive of the murder of Darice Knowles could just as easily have been Pratt's desire to seek revenge for the hurt of his lover spending the night with a police officer that had issued Pratt a ticket for a traffic infraction earlier that day.

The victim Knowles came to Florida in February 2006 to be with her boyfriend Christopher Pratt. Less than 6 weeks later she has sexual relations with a Cocoa Beach Police Officer. By Pratt's own admission he was very angry with Knowles for being with the police officer and struck her several times in the van prior to her murder. The jury, by its rejection of the witness elimination aggravating factor, was skeptical of Pratt's testimony concerning motive.

At trial, the first mention of the appellant's involvement in the murder of Willie Parker was in the context of Pratt coming forward to cooperate with law enforcement:

> STATE: All right. Now at one point in June of 2006, do you recall the Cocoa police coming up to speak to you?
> PRATT: Yes, sir.
> STATE: And while you were in custody there, did they speak to you about Darice Knowles and a Willie Parker?

PRATT: Yes, they did, sir.
STATE: All right. And were they asking you, to the best of your recollection, about where Darice Knowles was?
PRATT: Yes, sir, they did.
STATE: What did you tell them in June of 2006?
PRATT: I told them I took her to the airport, Orlando
STATE: Is that the truth?
PRATT: No.
STATE: Why did you lie to the police in June of 2006?
PRATT: I know if I told them that, I would end up, probably with a life sentence.
STATE: Now at that time, after June of 2006, and the Cocoa police were talking to you asking you about her whereabouts, shortly thereafter you were indicted on a murder charge for Willie Parker; is that correct?
PRATT: Yes, sir.
STATE: **Along with a Vahtiece Kirkman and Jonathan Page?**
PRATT: Yes, sir.
STATE: And that case was pending through 2006 up until 20l0?
PRATT: Yes, sir.
STATE: Did there come a time in July of 20l0 that you spoke to law enforcement and the State Attorney's Office?
PRATT: Yes, sir. (T 1587-89)

The jury was reminded of the appellant's involvement in the murder of Willie Parker at the conclusion of Christopher Pratt's direct examination:

STATE: Mr. Pratt, when we were talking about your plea agreement, the date of the homicide of Willie Parker that you pled to when you were under indictment with Mr. Kirkman, that was February 28th of 2006?
PRATT: Yes, sir.

The admission of testimony that the appellant was indicted for another murder served only to prove the appellant's criminal propensity for murder and was

presumptively harmful, requiring reversal for a new trial.

Section 90.404(2)(a), Florida Statutes, codified the rule in Williams v. State, 110 So. 2d 654 (Fla. 1959) that relevant evidence is not excluded merely because it related to similar facts which pointed to the commission of a separate crime:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. § 90.404(2)(a), Fla. Stat. (2009)

In Heuring v. State, 513 So. 2d 122 (Fla. 1987), the Florida Supreme Court stated that, because similar fact evidence was inherently prejudicial, the evidence had to meet a strict standard of relevance:

> To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offense.... In addition to the above requirements, the evidence must be relevant to a material fact in issue such as identity, intent, motive, opportunity, plan, knowledge, or absence of mistake or accident.

Heuring at 124. As the statutory codification of the Williams Rule in section 90.404(2) makes clear, the first requirement for the admission of collateral crimes evidence is similarity of facts. The courts do not require that the collateral crime

be completely identical to the charged crime. Chandler v. State, 702 So. 2d 186, 194 (Fla. 1997) However, "similar crime evidence cannot be admitted when its sole purpose is to prove bad character or propensity...[a]nd, the similarities must be so unusual or so special that they point to the defendant." Gadson v. State, 941 So. 2d 573, 575 (Fla. 4th DCA 2006) (citations omitted). "It is not enough that there is greater similarity than dissimilarity between the crimes, but rather there must 'be something so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged."' Miller v. State, 791 So. 2d 1165, 1170 (Fla. 4th DCA 2001) (emphasis in original), quoting Sias v. State, 416 So. 2d 1213, 1215 (Fla. 3d DCA) *rev. denied*, 424 So. 2d 763 (Fla. 1982).

In this case the trial judge found that the murder of Darice Knowles and the previous murder of Willie Parker were not similar. Moreover, the trial judge found that the two murders were not inextricably intertwined. The appellant agrees with these rulings by the trial judge. However, the trial judge ruled that the Willie Parker murder may be relevant to prove appellant's motive for the murder of Darice Knowles:

Now the Court would tell you, is going to tell you, that that

> goes to the motive issue. And as it goes to the motive issue, that particular fact should be allowed. I don't see in anything that I've been provided in this case, any other real way to get the issue of her being a victim in this case without getting into the idea that she was going to the police about something. (T845)

The trial judge was correct in ruling that the murder of Willie Parker did not meet the traditional Williams Rule criteria. Where evidence does not meet Williams Rule criteria, the evidence should be examined under the Section 90.402 of the Florida Evidence Code Admissibility of Relevant Evidence. See McCray v. State, 71 So.3rd 848 (Fla. 2011)

The Prejudice of the Parker Murder Outweighed its Probative Value

Admittedly, the jury should hear the state's theory of the case. The jury should hear evidence that the appellant ordered the murder of Darice Knowles because he believed that Knowles was cooperating with police related to appellant's criminal activity. In the context of this case, informing the jury that the appellant and Mr. Pratt were both indicted for a previous murder was extremely prejudicial. It is generally harmful error "to admit evidence of other or collateral crimes independent of and unconnected with the crime for which the defendant is on trial." Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925). As stated above, the reason for this rule, establishing the harmfulness of the error

in admitting a certain class of irrelevant evidence, is:

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

Id. at 685, 106 So. at 488. The admission of the appellant and Pratt's indictment for the Willie Parker murder most certainly created an improper predisposition in the minds of the jury that the appellant was guilty of the murder of Darice Knowles. It was much easier for the jury to accept that the appellant was involved in the murder of Darice Knowles with Christopher Pratt if the appellant was already indicted for a prior murder with Christopher Pratt.

The evidence to convict the appellant was the direct evidence testimony of Christopher Pratt; the circumstantial evidence that the appellant purchased items at the Home Depot used in the murder of Darice Knowles; the appellant's direction to firebomb the van used to transport the victim; and the fact that the appellant terminated police interrogation and requested an attorney. The introduction of the appellant's statement to police that he wished to invoke his rights to an attorney and stopped questioning was a serious constitutional error:

Q. Are you willing to take a polygraph?

A. Yeah, because I don't –

Q. Are you going to pass?

A. Uh—huh.

Q. What if you don't pass?

A. I'm going to pass.

Q. But what if you don't? I'm asking, what if you don't?

A. Well, it's got to be wrong.

Q. (Laughter.)

A. It's got (unintelligible) for real. I'm just guaranteeing you for real, if you want to dig a lawyer.

Q. I think we probably will. We'll see if we can dig you one up.

A. Okay.

Q. We'll ask them if they will give you one.

A. When I can have a lawyer, a lawyer with me, then I think --

Q. You know, if you want one.

A. I want one.

Q. I mean they're going to ask you questions. But the thing is with a polygraph, you have to answer all of the questions they ask you.

(More than one speaker, unintelligible.)

Q. Are you all ready? That concludes this interview. The time is ten forty—three a.m.

(T 2,135, 2,136) The trial attorney's did not raise a contemporaneous objection to the state introducing this harmful evidence of the appellant invoking his right to remain silent and have an attorney. This Court in Clark v. State, 363 So.2d 331 (Fla. 1978) held that to preserve this constitutional error for appellate review defense counsel must raise an objection. Besides the jury learning that the appellant ended police interrogation for the Knowles murder and requested an attorney, the other damning evidence of the state's case was the eyewitness testimony of Christopher Pratt.

In order for the jury to convict the appellant the jury must believe the testimony of Pratt. They must believe Pratt's testimony that he no intention of harming Knowles, even though by his own admission Pratt was angry at Knowles for having sexual relations with a Cocoa Beach police officer. To accept the state's theory of the case, the jury had to accept the following Pratt claims:

1) Pratt would not harm Darice Knowles because they were no longer boyfriend/girlfriend;

2) Pratt was the non-violent "good guy" and simply wanted to send Darice Knowles home despite the fact he was involved in the murder of a drug dealer two weeks before;

3) Pratt's claim that he didn't mind that Darice Knowles slept with a police officer despite Pratt's own admission that he and Knowles were living together and still maintaining a sexual relationship;

4) Have the jury ignore Pratt's own admission that he physically assaulted Knowles several times before the murder because she had slept with the police officer.

5) In addition to Knowles infidelity towards Pratt, Pratt was not fearful that Knowles also had knowledge of Pratt's criminal history.

Finally, there was a very telling moment in Pratt's testimony at trial that went unexplored by defense counsel. When Cocoa Beach Police Officer Freeman dropped Darice Knowles back to the Dixie Motel the day of the murder Christopher Pratt was waiting for her. Pratt then abruptly checked out of the Dixie Motel with Knowles to join the appellant (and meet her death). Pratt explained to Knowles that he checked out of the Dixie Motel because he did not feel safe anymore. Pratt was not feeling safe, and then what did Pratt do...he left the safety of the Dixie Motel and take Knowles to the appellant...the man he claimed he feared the most!! What was Pratt fearful of at the Dixie Motel ??? Officer Freeman??? Knowles cooperating with Freeman against Pratt?? We simply do not know for sure, but it was likely that Pratt himself was fearful that Knowles was cooperating with police and already had made a plan to murder Knowles for her infidelity and being a possible snitch. Finally, for Pratt's testimony he received a 20 year concurrent sentence for two murders.

Based upon the foregoing, it is indisputable that Pratt had a more

compelling motive to murder Knowles than did the appellant. The jury recognized this when they disregarded the witness elimination aggravating factor. Other than Pratt's testimony, there is no other evidence that the appellant was with Pratt at the time of the murder. What made some of Pratt's testimony believable for the jury is when they learned that Pratt and the appellant where indicted together for the previous murder of Willie Parker weeks before the Knowles murder. Also, the jury was negatively impacted when they watched the appellant invoke his right to counsel and request a lawyer during police interrogation.

The appellant concedes that appellant waived the constitutional error by not making a contemporaneous objection when the state showed the appellant invoking his constitutional rights. The appellant also concedes that the state should be permitted to introduce evidence that the appellant and Pratt were involved in some sort of criminal enterprise and the appellant ordered the murder of Knowles to end her suspected cooperation with police.[6] Motive is very relevant in this particular case. Relevancy is not the only test for admissibility. In every case, the trial court must also balance whether the probative value of the relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion

[6] Christopher Pratt testified in the penalty phase that Darice Knowles had no knowledge of the murder of Willie Parker prior to her death.

of issues, misleading the jury, or needless presentation of cumulative evidence. See § 90.403, Fla. Stat. (2012).

As a practical matter, any evidence introduced by the State during a criminal prosecution is prejudicial to a defendant. See Sexton v. State, 697 So.2d at 837 (citing Amoros v. State, 531 So.2d 1256, 1258 (Fla.1988)) "[A] trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded." Unfair prejudice is defined in McDuffie v. State, 970 So.2d 312, 327 (Fla. 2007):

> "Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Brown v. State, 719 So.2d 882, 885 (Fla.1998) (quoting Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). This rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." Steverson v. State, 695 So.2d 687, 688–89 (Fla. 1997). In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider the need for the evidence, the tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference from the evidence necessary to establish the material fact, and the effectiveness of a limiting instruction. Taylor v. State, 855 So.2d 1, 22 (Fla. 2003). The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt.

McDuffie at 327. The appellant argues that evidence of a prior murder indictment in this case created unfair prejudice. The relevant fact is what would motivate the appellant to order the murder of Darice Knowles. The fact is that Knowles was in contact with a police officer and according to Pratt the appellant believed it was possible that she was cooperating with police in relation to the criminal activities of Pratt and the appellant. It was very likely that Darice Knowles had direct knowledge of various criminal activity involving the appellant's drug trafficking. According to Pratt's testimony in the penalty phase, Knowles had no knowledge of Pratt or the appellant's involvement in Willie Parker's murder. The trial judge should have limited Pratt's testimony concerning the specific criminal activity that the appellant might have feared being communicated by Knowles to the police. The fact that the appellant and Pratt were engaged in an ongoing criminal enterprise at the time of Knowles murder was relevant and probative.

The specific crime of murder was unduly prejudicial and its relative probative value was negligible. The unfair prejudice to the appellant created a situation where it is likely that the juries' verdict in this trial was based upon reasons other than evidence of his guilt. The appellant's judgement and sentence should be reversed and the appellant given a new trial without evidence of appellant's indictment for the murder of Willie Parker being presented to the jury.

ISSUE III

THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED BY ENMUND/TISON AND OTHER LEGAL AUTHORITY.

Standard of Review

A trial court's finding that a defendant satisfies the requirements of Enmund/Tison is reviewed by this Court to determine whether competent substantial evidence supports the lower court's ruling. Benedeth v. State, 717 So. 2d 472, 477 (Fla. 1998).

This Court ordered trial judges to instruct juries that, in order to recommend death, they must make findings satisfying Enmund/Tison, and the trial courts shall include in their sentencing orders findings supporting the Enmund/Tison culpability requirement. See footnote 2 in Diaz v. State, 513 So.2d 1045 (Fla. 1987) In the present case the trial judge neglected to instruct the jury to make findings satisfying Enmund/Tison. However, the trial judge did include in his sentencing order findings supporting the Enmund/Tison requirement:

> Further, where the conviction is based upon a felony murder theory, the Court must make the necessary finding of culpability before the defendant is death eligible. The general rule is that a trial court may not impose a sentence of death on a defendant who aids and abets a felony during which a murder is committed but who does not himself kill, attempt to kill, or intend to kill. The exception to this

> general rule is that the culpability requirement may be met when the defendant is a major participant in the underlying felony which resulted in a murder even if the defendant is not the killer; and the defendant demonstrates a reckless indifference to human life.

(R 1,024)

It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant. Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, the United States Supreme Court, "citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder" under the circumstances of that case. Tison, 481 U.S. at 147; cf. Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty disproportional to the crime of rape). Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison, 481 U.S. at 156 Hence, if the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment. See generally Id.; Enmund, 458 U.S. at 782.

In Enmund and Tison, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison, 481 U.S. at 151; Jackson v. State, 575 So. 2d 181, 191 (Fla. 1991) As this Court held, in Stephens v. State, 787 So. 2d 747, 759 (Fla. 2001):

> [I]n Enmund the Court indicated that in the felony murder context a sentence of death was not permissible if the defendant only aids and abets a felony during the course of which a murder is committed by another and defendant himself did not kill, attempt to kill, or intend that a killing take place or that lethal force be used. (emphasis added).

However, the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life. As the Court said, "we simply hold that major participation in the felony committed,

combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison, 481 U.S. at 158. Courts may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However, such participation alone may not be enough to establish the requisite culpable state of mind. Id., 481 U.S. at 158 n. 12.

This Court has questioned whether the Enmund/Tison culpability requirement can be met in an armed robbery committed by two or more co-defendants, where there were no eyewitnesses, circumstantial evidence, and the killer is not clearly identified. Jackson v. State, 575 So. 2d 181, 192-193 (Fla. 1991). In Jackson, the defendant and co-defendant robbed a hardware store in St. Petersburg, Florida, and during the robbery, the clerk was killed. Id. at 184-185. Although there was evidence that the defendant was a major participant in the crime, this Court held that there was insufficient evidence that the defendant acted with reckless disregard for human life where there was no proof that the defendant shot the victim, that he intended to harm anyone when he entered the store, or that he expected violence to occur. Id. at 191-192. See also Benedeth v. State, 717 So. 2d 472 (Fla. 1998).

In the instant case, the jury was instructed both on capital first degree murder and capital felony murder. The verdict form did not have the jury

determine which murder theory was accepted by the jury. Finally, the trial judge neglected to instruct the jury or have a special verdict on the issue of relative culpability between the two co-defendant's. The state's theory of the case, which was supported by the testimony of co-defendant Pratt was that the appellant planned and ordered the murder of Darice Knowles because of his belief that she was cooperating with police, or witness elimination. Pratt testified that he had no intention of harming his former girlfriend Knowles, but was compelled to murder Knowles due to the threats of the appellant.

The defense theory of the case was that Pratt was not truthful, and that he was the mastermind of the murder either as a scorned boyfriend or also fearing that Knowles was cooperating with the police against him too. Whatever Darice Knowles knew about the appellant's criminal activity equally applied to Christopher Pratt. The argument of defense counsel was that Pratt was given a sweetheart deal to testify and save his own skin by testifying the appellant planned and ordered the murder of Knowles:

> Did (Pratt) he have an interest in how the case should be decided? That kind of goes hand in hand with whether he was offered or received anything or preferred treatment to get him to testify. Well, he told you he wouldn't testify when they offered him thirty—five years for two murders. But once he got down to twenty and some probation, he was jumping at it. Twenty years for killing two people.

> That's an abomination. Twenty years. Ten years for killing this young lady. Again, in his testimony he admitted he was the murderer.....
>
> How do you know that Christopher Pratt wasn't giving the instructions out there? He's the one that took the lead. He's the one that dug the hole. He's the one that tied her up. He admitted all that. He did it all. And the bottom line, he admitted that he murdered Darice Knowles. And for doing that he got ten years on a second degree murder for it. And while I'm not conceding or giving up anything as to guilt or innocence, should my client be held to a higher standard than second degree murder?

(T 2,355) It should be noted that Pratt was in jail for four years awaiting trial on the Parker murder before coming forward to cooperate on both the Parker murder and Knowles murder. Pratt had four years to prepare his story. He only cooperated and gave "his side of the story" after being offered 10 years for the murder of Knowles. He made it clear that he initially lied about the unsolved murder of his girlfriend to avoid going to prison for life. He just as easily could lie to get a combined 20 years (where had already served 10 years).

The closing argument of defense counsel also had to have an impact on the jury concerning relative culpability. The penalty phase verdicts make it clear that the jury was not comfortable with Pratt's testimony and uncertain as to what actually occurred in that killing field. Had the jury fully believed the testimony of Christopher Pratt they would have unanimously found the witness elimination

aggravating factor. There was no other reason given by the state to explain the motive of the murder of Knowles. On the other hand the jury found the CCP aggravating factor for the appellant which would suggest that the jury believed that the appellant was culpable for the murder of Knowles.

In the case at bar, other than the self-serving testimony of Mr. Pratt to obtain a 20 year sentence for two murders, there was no evidence presented that either Pratt or appellant where more culpable for the murder of Darice Knowles. There is no evidence whatsoever that corroborates Pratt's version of events. In fact, by Pratt's own admission he committed the murder of Knowles. And to be sure, Pratt had the same motive to murder Knowles as the appellant, and the additional motive of being a scorned boyfriend. The independent evidence equally supports the theory that Pratt was the leader and mastermind of the murder of Darice Knowles. As such, the Enmund/Tison culpability requirements were not met.

Proportionality Grounds

This Court recently issued an opinion receding from the blanket rule that relative culpability of co-defendants is triggered only when the co-defendant's are found guilty of the same degree of murder. In McCloud v. State, 2016WL 6804875 (Fla. November 17, 2016) this Court expressly found that the holding in Shere v. Moore, 830 So.2d 56, 62 (Fla.2002) is no longer good law finding that

"because we do not see the utility in a blanket rule prohibiting a relative culpability analysis when a co-defendant is convicted or pleads guilty to a different degree of murder than the primary defendant." This Court endorsed the writings of Justice Anstead that the blanket rule could lead to injustice and that the Court had a duty to provide uniformity in the application of the death penalty:

> As a corollary to this analysis of comparing the circumstances of a case in which death had been imposed to others with a similar sentence, the Court also performs an additional analysis of relative culpability in cases where more than one defendant was involved in the commission of the killing.

McCloud quoting Shere, 830 So.2d at 64 (Anstead, J., concurring in part and dissenting in part).

In this case, the jury explicitly determined that this was not a witness elimination murder. Therefore, they were uncertain of the motive for the murder in this case. Moreover, eyewitness co-defendant Christopher Pratt confessed to committing the grisly murder of Darice Knowles. This Court has long recognized "that the less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable, triggerman defendant receives" a lesser sentence. Hazen v. State, 700 So.2d 1207, 1214 (Fla.1997) (citing Slater v. State, 316 So.2d 539, 542 (Fla.1975)). Therefore, the imposition of the death penalty is disproportionate

in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death and remand with directions that the appellant receive a new penalty phase trial or life sentence as to Issue I; the appellant received a new trial as to Issue II; and vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Issue III.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ George D.E. Burden
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd. Suite 210
Daytona Beach, FL 32118
(386) 254-3758
burden.george@pd7.org

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered by email to the Office of the Attorney General, Daytona Beach, Florida, capapp@myfloridalegal.com and mailed to Vahtiece Kirkman, #165328, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32083, on this day of December, 2016.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

/s/ George D.E. Burden
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER