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IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE,

Appellant,

vs. Case No. 75,985

STATE OF FLORIDA,

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

A Hillsborough County grand jury indicted Terence Valentine, Appellant, on September 21, 1988 for armed burglary, two counts of kidnapping, grand theft second degree motor vehicle, first degree murder and attempted first degree murder (R1413-6). Prior to trial, Appellant moved to suppress tape recordings of telephone conversations between him and his wife (R1459). At a hearing held on this motion, January 18, 1990, the State relied upon section 934.03(2)(c), Florida Statutes (1989) as authorization for the intercepted telephone conversations (R1620-1). No warrant had been issued for the interception (R1635). Defense counsel specifically objected to admission of Appellant's conversation with his ten-year-old daughter Giovanna, because Giovanna did not give consent to the recording (R1624-7). The prosecutor said, "Maybe I will stipulate to Mr. Meyers, if he has no objection, one or two of the tapes as long as I keep Giovanna out of it" (R1629). Defense counsel also argued that the recording violated the Fourth and Fourteenth Amendments, United States Constitution, and Article I, section 12 of the Florida Constitution (R1636-7). The court denied the motion to suppress (R1459, 1644).

A trial was held on January 22-25, 1990 before Circuit Judge Graybill and a jury (R1-591). The jury was unable to reach a unanimous verdict and the court declared a mistrial (R567,589).

Valentine was retried on March 26-30, 1990 before Circuit Judge Graybill and a jury (R596-1368). During the jury selec-

tion, defense counsel objected to the prosecutor's use of peremptory strikes to excuse two African-American prospective jurors (R755-7). The court ruled that the defense had not shown that the peremptory strikes were based "solely on group bias" (R759).

The prosecutor asked the Court to allow him to play the entire fifteen minute telephone conversation between Valentine and his wife and daughter rather than the four minute excerpt admitted in the mistrial (R780). Defense counsel objected that many parts were irrelevant and involved other wrongful acts (R780-1,783-6). A written ''Supplement to Motion to Suppress Taperecordings of Telephone Calls from Defendant to Victim"' specified each of the objectionable statements (R1466-9). The judge ruled that the entire tape would be admissible (R807-9, 1466).

Appellant's motion for judgment of acquittal was denied (R1076). The court also denied Valentine's renewed motion for judgment of acquittal (R1152). The jury retired for deliberations and sent a note asking to hear the taps again or to be provided with a transcript (R1265). In accord with defense counsel's request, the court instructed the jury to rely on its recollection (R1267). The jury later returned verdicts of guilty as charged on all counts (R1273,1507-9).

After return of the verdicts, Appellant requested that he be allowed to represent himself during the penalty phase (R1282). The court asked Valentine some questions and eventually ruled that he could represent himself (R1307). In his penalty argument

to the jury, Valentine argued that he had not committed the crimes, but that the jury should recommend a death sentence if they truly believed that he had (R1348-55). The jury returned a recommendation of death (R1362,1510).

On April 12, 1990, a sentencing proceeding was held before Judge Graybill (R1373-1404). Appellant's Motion for New Trial was also heard at this time and denied (R1374-88). The court sentenced Valentine to death on the capital felony (R1400). On the noncapital felony convictions, the court departed from the guidelines recommendation and imposed consecutive sentences of ninety-nine, ninety-nine, ninety-nine, five, and life (R1401-2). The Contemporaneous capital felony and the manner of its commission were given as reasons for the guidelines departure sentences (R1402,1532).

The court filed "Findings in Support of Death Sentence'' (R1534-6). As aggravating circumstances, the court found (1) prior violent felony (based on contemporaneous conviction for attempted first-degree murder), (2) while engaged in a kidnapping, and (3) cold, calculated and premeditated/heinous, atrocious or cruel (treated as a single aggravating factor) (R1534-5,1403). In mitigation, the court found (1) no significant history of prior criminal activity, (2) age of 41, (3) good provider and family man, nonviolent, well known basketball player and coach who benefitted his friends' children (treated as a single mitigating factor) (R1535). The judge wrote that he was "bound to follow the reasonably returned jury recommendation

under the same reasoning applied by the Florida Supreme Court in its *Tedder* decision'' (R1536)

Valentine filed a Notice of Appeal on May 2, 1990 (R1539). Pursuant to Article V, section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i), he invokes the jurisdiction of this Court to hear his appeal.

STATEMENT OF THE FACTS

On September 9, 1988, Ferdinand Porche was beaten and shot to death. Appellant's estranged wife, Livia Romero, witnessed the entire series of events and suffered two gunshot wounds herself. The central issue for the jury's determination was whether she was telling the truth when she accused Terence Valentine, Appellant, of being the one who committed these crimes.

A. Testimony of Livia Romero

Livia Romero testified that she married Terence Valentine in Costa Rica when she was nineteen years old (R827-8). They came to the United States in 1975, settling in New Orleans (R828). They adopted a child, Giovanna, while living in New Orleans (R829). Romero testified that in 1986, she tried to obtain a divorce from Valentine while keeping it a secret from him (R829-30).

Valentine's employment kept him away from the househald for periods of two or three months at a time (R835). In 1986, Romero started living with Ferdinand Porche and they married in December 1986 (R835). They moved to Tampa, bringing Giovanna with them (R836).

Romero testified that she and Ferdinand started receiving telephoned threats from Valentine while they were living in Tampa (R837-8). On September 9, 1988, she was in the family room of her home in Brandon around 2:30 p.m. when Appellant allegedly entered her back porch and kicked down the sliding glass door

leading to the house (R841-2). She was trying to dial 911 on the telephone when she was shot at (R842,844). The intruder took the telephone from her hand, pulled her hair and put the phone back on the hook (R844).

According to Livia Romero's testimony, Valentine pushed her down, hit her and abused the baby (R845-6). He then cut her clothes off with a knife and tied her up with wire (R847,852). He stuffed a diaper in her mouth (R846).

A man called John walked in the room to assist the intruder (R853). Over the defense abjection of hearsay, Romero was permitted to testify that John kept asking Appellant, "what do you want me to do with the Bronco?" (R854)

Romero was still tied up in the baby's room when she heard two gunshots which came from the kitchen (R855). She testified she heard Appellant saying, "Move your legs," and Ferdinand Porche replying, "I can't move my legs" (R855). Porche dragged himself into the bedroom with Appellant allegedly prodding him with his feet (R856). Porche was tied up with wire and hit several times in the jaw with the butt of a gun (R857).

About 3:30 p.m., Giovanna returned home from school (R856-7). According to Romero's testimony, Valentine told John to intercept Giovanna as she entered the house and take her to her mother's bedroom (R856-8). Then Appellant dragged Porche to the garage and put him in the back of the Chevy Blazer which Porche and Romere owned (R858-9). He returned and took her to the back

of the Blazer as well (R858-9). Two bedspreads were placed on top of them (R859).

Romero testified that Valentine drove the Blazer out of the garage and John occupied the passenger seat (R863). After a short ride, they stopped at a Circle K gas station where Appellant had the gas tank filled and purchased a six-pack of beer (R864,921-2). This took about ten minutes (R923). Although Romero said she and Porche were talking to each other, they did nat yell for help because she was afraid (R865,921).

The vehicle drove for another five minutes and then turned onto a bumpy road (R866). After a short time, it stopped and Appellant allegedly opened the back of the Blazer (R866). Romero testified that Valentine shot Porche twice in the face before he ran out of bullets (R867). John supplied some more bullets and Porche was shot again through the eye (R867).

According to Romero, Valentine asked her if she would return to him if he allowed her to live (R868). She said yes (R868). However, he reconsidered and shot her twice in the back of the head (R868). Romero never lost consciousness, but pretended to be dead (R868). Allegedly, Valentine examined her and said, "Two shots did it" (R868).

Romero testified that Valentine locked the doors ta the vehicle and left (R869). She managed to drag herself over the seats to the front door (R870). She unlocked the door and fell on the ground (R870).

A deputy sheriff heard her cries for help (R870). When he assisted her, she immediately accused Valentine of the ahootings (R870). Romero was transported to the hospital by helicopter (R870). She suffered damage to a vein from the gunshot wounds and was not released from the hospital until five days later (R871).

After Romero was released from the hospital, she was relocated to another house by the sheriff's department (R874). About three weeks later, she went to check her mailbox at the former address and found a Costa Rican banknotc in it (R875). Romero testified that she recognized the handwriting of Appellant on the note requesting her to connect the telephone (R876).

She advised the sheriff's office of this note (R876). The sheriff's office arranged for her old telephone number to be directed to the residence where Romero and her daughter were now living (R877). Romero agreed to allow the sheriff's office to tape her telephone conversations (R877). she then contacted people who she believed were in touch with Valentine to make them aware that her phone was reconnected (R877).

She began to receive telephone calls from Appellant (R878). She taped all of them (R878-9). On November 7, 1988, Romero received a call from Valentine (R879). Giovanna was also present and spoke with Appellant during this conversation (R879). Over Appellant's objections, the entire tape of this telephone conversation was played and translated for the jury (R881-2,888-907).

During the telephone conversation, Appellant said that he saw that Romero still had the furniture he bought when they were married, the same clothes and only one "half pint of booze" (R905-6). Romero testified after the taped conversation had been played that Valentine had never been in her Florida home except when this homicide occurred (R908). However, she acknowledged that when she found the Costa Rican banknote in her mailbox, her furniture and possessions were still in the house where the events took place (R926).

B. Corroboration of Livia Romero's Testimony

Nancy Cioll, a resident of New Orleans, testified that she had known Livia Romero and Terence Valentine since the time they had been married and living together in New Orleans (R956-7). She also knew the homicide victim, Ferdinand Porche (R958). She read about the killing in the local newspaper, the New Orleans Times-Picayune (R958). About two weeks after the killing, Valentine came into the travel agency which the witness and her mother operated (R959). He was driving a maroon, gray and black Ford Bronco (R960). Cioll testified that she and Appellant went to the restaurant next door where Valentine confessed to the shootings and demonstrated how he had shot Livia (R960-1). She said that Valentine told her that he made a mistake by leaving Livia alive (R961).

Louise Soab, the mother of Nancy Ciall, agreed that Valentine was in the travel agency two weeks after the homicide (R967-

8). She testified that Valentine and Cioll had a conversation that day, but she didn't hear what they were talking about (R969).

A neighbor who lived four houses away from the Porche residence testified that on September 9, 1988, he saw a Ford Bronco parked opposite his house between one and three o'clock (R974-6). He described the color as faded red and white or faded red and gray (R976). The neighbor testified that two men, wearing yellow hard hats, were in the vehicle (R976-7).

C. Impeachment of Livia Romero's Testimony

Livia Romero was extensively impeached with regard to her purported divorce from Valentine and subsequent marriage to Porchc. At her August 1989 deposition, Romero stated that she had appeared before a judge in New Orleans and received a divorce decree (R913-4). However, at trial she admitted that she had lied about appearing before a judge (R914). She still claimed to have a "divorce paper" and to have mailed a copy of it to the prosecutor which was returned to her because the address was an "old" one (R912-3). Although the prosecutor then requested that she mail it again or bring it with her to trial, she admitted that she never showed anyone any document purporting to be a divorce from a New Orleans court (R913). Her explanation was that her attorney in Costa Rica told her not to show the divorce

"paper" in court because it "wasn't going to do any good" (R911).

Romero was also questioned as to whether she married Ferdinand Porche to escape deportation (R911). She admitted that she had been sentenced to a year in prison for "impersonating a United States citizen," but denied that her marriage to Porche had anything to do with solving her immigration problems (R911).

Other parts of Romero's testimony which strained credibility included her claim that she made $70,000 over a period of eighteen months in New Orleans by selling houses (R928). She made this income although she wasn't licensed and used a fake social security number (R928-9). Romero also testified that after this incident, she sold both of Porche's cars for well below their book value to an individual named "John" (R927). She claimed not to know John's last name (R927).

The Hillsborough County Sheriff's Office was first alerted to the homicide site by a motorcyclist who was riding in a field near the Chevy Blazer (R948,1053). Detective Fernandez spoke with the motorcyclist at the scene (R1053). According to the police report, the motorcyclist approached the Blazer and saw a naked woman tied up on the ground, yelling for help (R1055). A

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[1] Romero's failure to obtain a divorce from Valentine provided the motive for her to falsely accuse Valentine of the shootings. Romero admitted to living in Costa Rica at the time of trial (R826). Allegedly, she was attempting to gain control of Valentine's assets in Costa Rica.

whits male of medium build [2] stood nearby (R1055). As the motorcyclist rode away, he heard a gunshot whistle by his head (R1055).

The physical evidence also contradicted Romero's account. She testified that she was lying on her side in the Chevy Blazer facing the front when she was shot in the back of the neck (R924). The bullets passed through her neck (R924). However, the crime scene investigators found no trace of any bullets in the vehicle (R1035, 1073).

Crime scene technicians also lifted latent fingerprints from areas where the perpetrator would have been likely to touch (R997-8). From the residence, they made six lifts of comparison value (R988). There were eight lifts of comparison value taken from the Chevy Blazer (R990). None of these matched the fingerprints of Appellant; neither did they match those of Livia Romero nor Ferdinand Porche (R991-2). 3

D. Defense Evidence

Appellant presented an alibi defense. When Valentine was first arrested, according to FBI Agent McGinty, he said he had been in jail at Port Limon, Costa Rica, when the homicide occur-

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Appellant is of African heritage and has a very tall muscular build (R1412). The companion, John, was described by Romero as not tall and extremely thin (R920). John was also of African heritage (R920).

Romero testified that John was wearing gloves but Appellant was not (R853).

red (R1026-7). At trial, however, the defense produced two witnesses who remembered seeing Valentine in San Jose, Costa Rica, on September 9, 1988 (R1080-92,1131-40).

Gonzalo Camacho-Miranda, a bar owner, testified that he had known Appellant for eight years (R1082). September 9th is an important holiday, Children's Day, in Costa Rica (R1082). The witness remembered seeing Valentine on the afternoon of September 9, 1988 in his bar because Valentine had dressed himself like a child in honor of the holiday (R1082-3). Later in the evening of that day, Valentine returned with several friends and ordered fried chicken for the whole group (R1084).

Carlos Nora, a manager with an export business, also testified that he saw Valentine in San Jose, Costa Rica, on September 9, 1988 (R1132-4). Governmental agencies in Costa Rica recognize Children's Day as a holiday (R1134). Mora attended a Children's Day party at the home of Lorenzo Delano Valentine, Appellant's brother (R1134). At the party, Appellant gave him a gift for his newborn son (R1134-6).

Giovanna Valentine, Appellant's twelve-year-old daughter, testified about her recollection of the events of September 9, 1988 (R1093-8). When she came home from school around 3:00 or 3:30, she was met at the kitchen door by a black man she had never seen before (R1095). The man said he was a policeman and he directed her to stay in her mother's bedroom (R1095-6). About twenty or thirty minutes later, she heard the car start up and she looked out the window (R1096-7). As the Blazer backed out of

the driveway, she saw the stranger sitting in the passenger seat but could not see the driver (R1097).

Giovanna also testified that her father had visited hex one time at the Tampa residence (R1098). He only stayed for five minutes (R1098). She never told her mother about his visit (R1098).

Over Appellant's objection, the prosecutor was permitted, as rebuttal, to read into the record Giovanna's prior sworn statement that her father had never been to the residence (R1150-1).

E. Penalty Phase

The State relied upon the evidence presented during the guilt or innocence phase.

Appellant, now representing himself, called the same three witnesses that had testified during the guilt or innocence phase (R1318-31). His daughter, Giovanna Valentine, testified that he had taught her to be a good person (R1318). He always provided for the family even when he was away from the home on wark assignments (R1319-20,1322). He never abused any of the family (R1319-20). He helped other people in the neighborhood and played with her and her friends (R1319-20).

Carlos Mora Diaz testified that he had known Valentine for eight to ten years (R1323). He said that Valentine was well known in Costa Rica as a basketball star (R1324). Valentine coached children in basketball as well (R1324). He had a reputa-

tion as a helpful and generous person (R1324-5). The: witness had never seen Valentine lose his temper (R1325).

Gonzalo Carnacho-Miranda testified that ha had known Valentine for eight years as a gaad friend (R1327). He said that Valentine was a family man (R1329). The witness had newer seen Valentine get into a fight (R1329).

The jury was read a stipulation that Valentine was 41 years old and had no significant prior history of criminal activity (R1339).

SUMMARY OF THE ARGUMENT

An important part af the State's evidence was the tape-recorded telephone conversation between Appellant on one end and Livia Rornero and Appellant's daughter Giovanna on the other. With regard to the conversation with Giovanna, it should have been suppressed because Giovanna did not give consent far its interception. The conversation with Giovanna was also irrelevant to any material fact in issue, but showed Valentine prejudiciously as an angry, hot-tempered individual.

With regard to the taperecorded conversation with Livia Romero, Appellant's motion to excise irrelevant but prejudicial statements during the conversation should have been granted. Threats made by criminal defendants to victims or witnesses are inadmissible when they only prove bad character. Also, Romero accused Appellant of collateral crimes which were not supported by the record.

Two African-American praspective jurors were excused by the prosecutor on peremptory strike. Although these prospective jurors said nothing which would indicate that they would be partial or unfair, the trial court did not require the prosecutor to give reasons for their excusal. Appellant made a sufficient showing of likely racial bias that it was error for the court to overrule his objection.

A hearsay statement allegedly made by an accomplice named "John" was erroneously admitted into evidence. The statement by John was essential to the prosecutor's inference that a Ford

Bronco vehicle driven by Valentine two weeks after these crimes had been used in their commission.

While testifying as a defense witness, Giovanna Valentine made a statement which was inconsistent with her testimony at Appellant's earlier trial (which ended in a mistrial). Defense counsel contended that the prosecutor had to confront the witness with her prior statement and give her the opportunity to explain it before the prior statement could be admitted. The court, however, overruled Appellant's objection and allowed the prosecutor to read the prior inconsistent testimony before the jury as rebuttal evidence.

In imposing the death sentence on Appellant for the murder of Ferdinand Porche, the sentencing judge reasoned that he was ""bound to follow" the Jury's death recommendation. He cited this Court's Tedder decision as authority. This was error because the court must conduct an independent weighing. Tedder applies only where a jury has recommended a life sentence. Defendants who commit crimes of passion stemming from a prior domestic relationship and who have no prior criminal record da not usually get sentenced to death. This Court should remand this case to the trial court for an independent weighing of aggravating and mitigating factors.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE TAPED TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND HIS DAUGHTER, GIOVANNA, BECAUSE SHE DID NOT CONSENT TO THE TAPING AND APPELLANT'S STATEMENTS WERE IRRELEVANT TO ANY FACT IN ISSUE.

At the January 18, 1990 hearing on Valentine's Notion to Suppress the telephone conversations, Detective Fernandez testified that no warrant was issued (R1635). For admissibility of the taped conversations, the State relied upon the exception to the general prohibition against interception contained in section 934.03(2)(c), Florida Statutes (1989), which provides:

> (c) It is lawful under ss. 934.03-934.09 for an investigative or law enforcement officer or person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

Fernandez testified that, pursuant to this subsection, he provided Livia Romero with a tape recorder and a telephone from the sheriff's office (R1622). She was instructed to turn on the tape recorder whenever she received a telephone call from Appellant (R1622). Detective Fernandez got verbal consent from Livia Romero for the interception (R1625). However, no one ever asked

Appellant's ten-year-old daughter, Giovanna, for her consent (R1627).

A. Prior Consent is Essential for a Lawful Interception

The Florida Legislature has specifically prohibited use of any intercepted wire communication as evidence if there is any violation of provisians pertaining to Chapter 934. § 934.06, Fla. Stat. (1989). Discussing Chapter 934, this Court wrote that it

> is a statutory exception to the constitutional (federal and state) right to privacy. Therefore, as an exception to a constitutional right it must be strictly construed.

In re Grand Jury Investigation, 287 So.2d 43 at 47 (Fla. 1973).

The Fourth District in Davis v. State, 529 So.2d 732 (Fla. 4th DCA 1988) held that a gaod faith exception could not be applied to the Chapter 934 mandated remedy of suppression. Upon the certified question, this Court agreed and adopted the district court's opinion. State v. Garcia, 547 So.2d 628 (Fla. 1989).

With regard to the prior consent requirement, the majority of this Court in State v. Welker, 536 So.2d 1017 (Fla. 1988) overruled precedent which required the party giving consent to the recording to testify in court. However, the Welker court did not relieve the State of its burden to prove prior consent; it merely allowed a deputy to testify that the absent party consented to the recording. At bar, the record shows that Giovanna did not consent to the recording of her conversations with

Appellant. Although Detective Fernandez testified that she "didn't seem to have any objection to talking to her father while the conversations were being taped" (R1625), this prove only acquiescence to authority, not consent. In State v. Jones, 562 So.2d 740 (Pla. 3d DCA 1990), a friend was pressured by the police into telephoning the defendant and taping the conversation. The appellate court agreed that knowing cooperation with a police-initiated telephone interception was not voluntary consent and suppressed the taped conversation.

It should be noted at bar that Livia Romero put Giovanna on the talephone for both conversations hoping to incite Valentine into making damaging statements. On the first occasion Romero had told Valentine that she and Giovanna were moving and he would never see them again (R892). The conversation proceeded:

> Now, do you want to talk to your daughter and see if she wants to go with you?
>
> Put her on.
>
> Okay, ga ahead. You'll hear her.
>
> Hello.
>
> Hey girl!
>
> Don't hey girl me!
>
> Ah?
>
> Don't hey girl me!
>
> Look, I'll hey girl you anytime I want, you hear?
>
> Dummy! (R893)

Appellant expressed anger about Giovanna's attitude in further conversation with Livia:

> Oh, so you are probably going to kill Giovanna too!
>
> It doesn't bother me.
>
> Okay, I know--we know that--
>
> She's going to be a bitch like you.
>
> You do--you want to--
>
> She better be dead, or--or probably be crippled. It doesn't bother me. (R899)

Livia then put Giovanna on the telephone again:

> You do want to kill me, huh?
>
> Girl, look, if you are going to be a bitch like your mama, I'd rather see you dead, akay. Because her mama is a bitch and her grandmother was a bitch, and if you want to be a bitch, no! Not named Valentine. Change your name, mother-fucker. Change. Wave any name you want to have, but not Valentine.
>
> I'm so glad!
>
> For Valentines are--are good people! Valentines are not bitches. (R899-900)

The court erred in denying Appellant's motion to suppress the telephone conversations with Giovanna which were taped by Livia Romero and the sheriff's office without Giovanna's independent consent.

B. The Taped Conversations with Giovanna Were Irrelevant and Prejudicial

When Appellant was first tried in January 1990, none of the conversation between Giovanna and him was played before the jury

(R429-30,1581-5). At the retrial, the State! decided to introduce the entire taped conversation rather than only the excerpt (R780). The court questioned the admissibility of the conversations between Valentine and Giovanna, but ruled that the entire tape could be played (R808-9). The prosecutor represented that Appellant made threats in his conversations with Giovanna which were relevant admissions (R809).

In fact, the prosecutor's assertions are not supported by the record. Valentine never said to Giovanna that "the next time, I'm not going to spare you either," as contended by the prosecutor (R809). Rather, this was part of Valentine's conversation with Livia Romero (R899).

The conversations with Giovanna had no relevance to the charged offenses and only tended to prove bad character on Valentine's part. For instance, jurors might well have been prejudiced by this exchange between a father and his ten-year-old adapted daughter:

> Anyway, you are not my father.
>
> Who the hell would want to be your father? You--your real father gave you away because you weren't worth shit.
>
> Uh.
>
> And I picked you up and tried to be a father for you, but your mama want you to be a whore, so grow up to be a whore.
>
> A whore?
>
> Yeah!
>
> A whore, okay.

> Yeah, do that.
>
> You--1 have something to tell you, what you are, but--
>
> And get this--get this straight. Get this damn straight.
>
> Uh-hum, I'm listening. Speak up. Hurry.
>
> Hurry? I'm paying for these calls. I can do any fucking thing I want. Get that bitch on the phone and you shut up because if not, I'm going to came up there and slag you all over! (R901-02)

The only purpose Appellant can discern for introducing the conversations with Giovanna is to depict Valentine as a hot-tempered individual who makes threats of violence. This is not relevant to any material fact in issue. See Fulton v. State, 523 So.2d 1197 (Fla. 2d DCA 1988); Castro v. State, 547 So.2d 111 (Fla. 1989). Indeed, the prosecutor commented on the tape for this reason in his closing argument:

> You heard that tape. Daes that sound like the voice of an angry man? Does that sound like a man who had the motive to kill?(R1163)

Even if some probative value could be found in the conversations with Giovanna, it would be substantially outweighed by the danger of unfair prejudice. § 90.403, Florida Evidence Code; State v. Vazquez, 419 So.2d 1088 (Fla. 1982). Accordingly, this Court should reverse Valentine's convictions and order a new trial from which the taped conversations with Giovanna are excluded.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCISE PREJUDICIAL PORTIONS OF THE TAPED TELEPHONE CONVERSATION BETWEEN LIVIA ROMERO AND APPELLANT.

When the prosecutor decided to introduce the entire taped telephone conversation into evidence in the retrial, Appellant objected on grounds of relevancy and prejudice ensuing from other wrongful acts contained within the telephone conversation (R783-4). The State contended that the tape was not offered to prove bad character but for the "strong inference" that Valentine did commit the charged crimes (R789). A written supplement to Appellant's motion to suppress was prepared, detailing each of the irrelevant and prejudicial statements (R802,807,1466-9). The trial judge ruled that the entire taped conversation would be played for the jury to show the entire context of the conversation (R807-8).

Most of the objectionable parts of the conversation concern threats by Valentine to harm Livia Romero or her family. When Romero told Valentine that she and Giovanna were moving and that he would never see either of them again, he responded by threatening to kill members of her family (R890-1). He threatened to make them "pay really ugly" and "to cut them open" (R891). After speaking with Giovanna on the phone and hearing her attitude towards him, Valentine said he would "leave her laying around, too" and "next time, I probably don't even want to spare her either" (R896,899). Appellant concluded:

So, you can hide, you can run, change your name twenty times--

Uh-huh.

--I'll get you--

Uh-huh.

--through your family, or through *you.*

Uh-huh.

Okay?

Okay, Tsrance.

So, as far as I'm concerned, next time I see you, duck!

Uh-huh. I don't think you are going to see me ever, so--

Don't worry about it. I'll see you when you come to bury your mama.

Okay.

Because I will kill that mother-fucker.

Okay, Who?

Your mama.

Oh, okay. So--

I will kill her, and I'm going to make damn well and sure she's missing enough so they get in contact with you--

Aha?

And you come down there, try to bury her--

Oh--

I'll sand a hand or something. (R904-5)

These threats were irrelevant to any material issue for the jury's consideration. Florida courts have agreed that threats by

criminal defendants to victims or witnesses are inadmissible because they only show bad character evidence. See Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA 1980) (threat to accomplice/ witness); Fulton v. State, 523 So.2d 1197 (Fla. 2d DCA 1988) (harassment of victim between arrest and trial); St. Louis v. State, Case No. 90-1868 (Fla. 4th DCA August 14, 1991)[16 FLW D2145] (threats to employee at Detention Center).

The other grossly prejudicial part of the conversation was Romero's accusing Valentine:

> Look, you are--you are--ah--ah--as low as law can be and I'm not going to give my daughter to a killer like you, to a somebody who doesn't even know how to make a living because the only thing you do is to, ah, go dealing with drugs, and that's the only thing--and not even that you can do right! (R898)

Calling Valentine a drug dealer is not supported in any way by the record and suggests a criminal propensity. Moreover, because Appellant insisted upon representing himself at the penalty trial, the jury never got to hear that Valentine was a nautical engineer and a "well-respected expert" in that field (R1308).

In State v. Lee, 531 So.2d 133 (Fla. 1988), this Court re-affirmed the principle that evidence of collateral crimes is inadmissible where the sole relevancy is showing bad character or criminal propensity. The Lee court further explained that erroneous admission of collateral crime evidence cannot be harmless error unless the State can prove no reasonable possibility that the error affected the jury verdict.

At bar, admission of Valentine's threats and Romero's accusation that he was a drug dealer cannot be found harmless error. The prosecutor relied extensively on the tapes to bolster Livia Romero's questionable credibility. During his closing argument, the prosecutor read from the transcript of the tapes, emphasizing Appellant's threats to Livia Romero and her family (R1177-80). After the jury had retired for deliberations, their sole request was, "Can we hear the tape again or read the transcript of the tape" (R1265).

The prosecutor stipulated that in the original trial, only the latter portions of the tapes (transcript pages 51-55) were introduced into evidence while the tapes used in the retrial covered pages 39 through 55 (R1177-8,1181,1581-5). The original trial jury was split nine to three in their deliberations, necessitating a mistrial (R1379-80). Clearly, the additional taped conversation introduced at the retrial could have contributed to the jury's verdict. Any error in admission of the entire taped telephone conversation cannot be harmless.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO FIND A LIKELIHOOD THAT THE PROSECUTOR EXCUSED TWO AFRICAN-AMERICAN PROSPECTIVE JURORS ON RACIAL GROUNDS.

During jury selection, defense counsel objected after the State had excused by peremptory strike, two African-American prospective jurors, Ann Glymph and Robert Aldridge (R755-6). The court agreed that the defendant, Valentine, is a black Latin-American (R757-8). However, the court ruled that the defense had not shown that the State exercised the two peremptories "solely on group bias" (R759). The trial judge went on to quarrel with current voir dire practice:

> I've just made my ruling. You made your objection, and I ruled. And I can see it coming. The State's going to claim that you exercised peremptory challenge just in order to get a Black person on the jury. I've already been on the record before. We ought to do away with peremptory challenges. We ought to take the first twelve jurors in a capital case and the first six jurors in a non-capital case and they become the jury unless you can show reasons why they should be excused for cause.
>
> And 1 don't mind telling the supreme court my own personal opinion. I think voir dire is a big waste of time except to show cause. (R759)

The issue, however, is not how voir dire should be conducted. The question is whether Appellant made a showing of possible racial bias in the exercise of peremptory strikes by the State sufficient to shift the burden of proof to the State to give racially neutral reasons for the strikes.

In State v. Slappy, 522 So.2d 18 (Fla.), cert.den., 487 U.S. 1219 (1988), this Court set forth at length the proper procedure which should be followed once a party has complained that peremptory strikes have been exercised in a racially discriminatory manner in violation of State v. Neil, 457 So.2d 481 (Fla. 1984). The Slappy court recognized:

> Unfortunately, deciding what constitutes a 'likelihood' under Neil does not lend itself to precise definition. 522 So.2d at 21.

Therefore, adhering to the "spirit and intent of Neil", the Court decided that there must be

> broad leeway in allowing parties to make a prima facie showing that a 'likelihood' of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question. 522 So.2d at 22.

The Slappy Court held that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." 522 So.2d at 22. See also, Tillman v. State, 522 So.2d 14 at 17 (Fla. 1988).

At bar, the trial judge should have found that Appellant met his initial burden.

A. Prospective Juror Aldridge

Prospective juror Robert Aldridge was the first African-American prospective juror struck by the State (R755). He was questioned by the State only in regard to his attitude toward the death penalty (R636). He indicated that he was not opposed to

the death penalty; and that under certain circumstances, he could recommend it (R636).

On defense questioning, Mr. Aldridge agreed to hold the State to its burden of proof (R677). He said that he didn't have any relation or friend employed in law enforcement (R696). He said that if he had to decide whether to impose a death sentence, he would want to give the defendant a fair trial and would consider all of the factors carefully (R742-3).

The record further reflects that prospective juror Aldridge was retired (R757).

B. Prospective Juror Glymph

Prospective juror Ann Glymph stated, in response to the prosecutor's asking if any of the prospective jurors were crime victims, that her home had been burglarized (R604). Although no arrest was made, she was satisfied with law enforcement efforts (R604). Her nephew worked far a sheriff's department in Sauth Carolina (R617). She was personally acquainted with two Hillsborough County judges (R617-8).

When asked by the prosecutor whether she could recommend the death penalty under appropriate circumstances, she replied that she could (R637). She did not believe that the death penalty should be imposed automatically, but would follow the court's instructions (R743).

The record further reflects that prospective juror Glymph belonged to the PTA and the Orchid club (R712). She was employed as the manager of a doctor's office (R757).

It is a matter of some curiosity that although the prospective juror identified herself as Ann Glymph (R604), bath the trial court and the prosecutor referred to her as Annie Glymph (R755-7).

C. Grounds of Defense Counsel's Objection

Defense counsel, when objecting to the State's peremptory excusal of these two prospective jurors, pointed out that there was nothing in the jurors' responses which indicated any kind of bias (R757). In fact, prospective juror Glymph had the type of background which a prosecutor would usually favor.

In Blackshear v. State, 521 So.2d 1083 (Fla. 1988), this Court observed "no indication that any of the excluded blacks would be unfair or partial.'' 521 So.2d at 1084. This was enough of a showing to shift the burden of proof to the State. Id. Accord, State v. Jones, 485 So.2d 1283 (Fla. 1986).

If there was any doubt in the judge's mind concerning the impartiality of the challenged jurors, that doubt should have been resolved in favor of Appellant. Slappy, supra. Because the prosecutor was not asked to disclose his reasons for striking prospective jurors Aldridge and Glymph, Appellant was convicted by a jury which may have been selected under the taint of racial bias. He was deprived of his rights under Article I, sections 2

and 16 of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment, United States Constitution. He should now be granted a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING LIVIA ROMERO TO TESTIFY TO STATEMENTS MADE BY "JOHN" BECAUSE THESE STATEMENTS WERE INADMISSIBLE HEARSAY.

During direct examination of Livia Romero, the prosecutor asked her:

> Q. Did you hear John say anything to Terance about any vehicles? (R854)

The trial judge overruled defense counsel's hearsay objection and Romero was permitted to answer:

> A. He asked him all through the time that they were there what will he do with the Bronco, and he'd say, "Man, what do you want me *to* do with the Bronco? What do you want me to do with the Bronco?" Terance never did answer. (R854)

"John," the declarant, was neither identified nor apprehended. Clearly, his alleged statements about the Bronco were admitted for the truth of the matter asserted. Mention of a Bronco was only relevant to create an inference that the "faded red or white or faded red and gray" Bronco seen by Romero's neighbor James Dillon on the day of the crime (R976) was the same vehicle as the "maroon. . . gray and . . . black" Bronco which witness Nancy Cioll said Valentine was driving in New Orleans two weeks later (R960).

In Wright v. State, Case No. 71,534 (Fla. August 29, 1991) [16 FLW S595], this Court found error where out-of-court statements made to a state witness were allowed into evidence under the theory that the statements only proved that "something was

said" to the witness. The Wright Court held that the statements were inadmissible hearsay because their only relevance would be to prove the truth of the matters asserted. The same is true of Romero's testimony to "John's" statements about the Bronco at bar.

In Asberry v. State, 568 So.2d 86 (Fla. 1st DCA 1990) the State offered hearsay statements from the investigating police officer under theories that they were either spontaneous statements or that they explained a logical series of events. The court reversed, holding that a statement which includes incriminating details cannot be rationalized as merely explaining presence or activity. The critical factor is that the defendant is denied his Sixth Amendment right to confront witnesses against him when the out-of-court statement is incriminating.

Finally, in Romani v. State, 542 So.2d 904 (F'la. 1989), this Court considered the parameters pertaining to admission of coconspirator hearsay statements. This Court declined to follow the federal approach to this exception to the Hearsay Rule and held that before coconspirator hearsay statements can be admitted into evidence, there must be independent evidence to prove a conspiracy and each member's participation in it. Thus, "John's" statements at bar could not have been admitted under this hearsay exception either even if the trial court had cansidered it.

Admission of the hearsay statements about a Bronco was not harmless error. The prosecutor repeatedly mentioned them during his closing arguments to the jury (R1166-7,1172-3,1224). Since

the trial was basically a credibility contest between Livia Romero and Valentine's alibi witnesses, the inference that the accomplices to the homicide used the same vehicle that Valentine was seen driving two weeks later may have convinced some jurors of Appellant's guilt.

Because admission of the hearsay statements violated Appellant's Sixth Amendment right to confrontation *of* witnesses against him as well as section *90.802* of the Florida Evidence Code, Valentine should now be granted a new trial.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE AS REBUTTAL EVIDENCE THE PRIOR INCONSISTENT STATEMENT OF GIOVANNA VALENTINE BECAUSE THE WITNESS WAS NOT GIVEN OPPORTUNITY TO EXPLAIN, ADMIT OR DENY THE PRIOR STATEMENT.

Giovanna Valentine, a defense witness, was asked by the prosecutor on cross-examination:

> Giovanna, you had never seen your father, Terence Valentine, at your house before where you lived with Ferdinand and your mother, did you? (R1098)

The witness replied that Appellant had visited once and had come inside the house for five minutes (R1098). The State did not ask Giavanna whether she had aver said on a prior occasion that her father had never been at the residence.

After the defense had rested, the prosecutor stated that he would like to read into the record, as rebuttal evidence, inconsistent testimony from Giovanna Valentine given at the prior trial on January 24, 1990 (R1141). The prosecutor argued that the inconsistent testimony should be admissible as substantive evidence under section 90.801(2)(a) of the Florida Evidence Code (R1141-2).

Defense counsel contended that the prosecutor had failed to lay the proper predicate for admission of Giovanna's inconsistent statement because she was never given an opportunity to explain the prior statement (R1143). Defense counsel cited section 90.614(2) of the Florida Evidence Code as authority that the witness must first be given this opportunity (R1143). Counsel

also pointed out that the Sponsers' Note to § 90.801 specifically refers to § 90.614 (R1144).

The trial judge examined Ehrhardt's Florida Evidence with regard to section 90.801(2)(a) of the Evidence Code (R1146). The court noted Ehrhardt's opinion that the predicate usually required for admissibility of prior inconsistent statement was unnecessary when the statements were offered as substantive evidence under section 90.801(2)(a) (R1146-7). The trial court ruled that Giovanna Valentine's testimany would be admissible as substantive evidence that Appellant had never been at the Porche residence prior to the day of the homicide (R1147-8).

Accordingly, as rebuttal evidence, the prosecutor was permitted to read before the jury:

> MR. BENITO: Your Honor, at this time, the State would offer into evidence the following sworn statement made by Witness Giovanna Valentine on January 24th, 1990, the question by Mr. Benito: "And the time that you lived in Brandon there at the house there with Ferd and your mother, your father, Terance, had never been to that house, had he? Answer by Giovanna: "No." (R1150-1)

A. Extrinsic Evidence of Prior Inconsistent Statements Is admissible Only After the Witness Has First Becn Confronted With the Prior Statement.

The Florida Evidence Code, section 90.614 governs the admissibility of prior statements of witnesses. Subsection (2) provides in part:

> (2) Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior

> statement and the opposing party is afforded an opportunity to interrogate him on it, or the interests of justice otherwise require.

This subsection has been interpreted by Florida courts to require, as a predicate far admitting the prior inconsistent statement, an opportunity for the witness to explain or deny the prior statement.

Thus, in Irons v. State, 498 So.2d 958 (Fla. 2d DCA 1986), the defendant argued that the court erred when the defense was not allowed to present several witnesses who would have testified that the key state witness had previously told them that the defendant had not been a participant in the charged robbery. The Second District held that there was no error because the State witness had not first been afforded an opportunity to explain or deny the prior statements to these witnesses.

Saucier v. State, 491 So.2d 1282 (Fla. 1st DCA 1986) presented a similar posture to the case at bar. The State, as rebuttal evidence, offered testimony from a deputy sheriff that the defendant's statements when taken into custody were inconsistent with his trial testimony. The Saucier court found error because the prosecutor had not inquired during the defendant's testimony about his conversation with the deputy. Since the defendant had not been given an opportunity to explain or deny his prior statement, no proper predicate was laid for the impeaching testimony. See also, Hoctor by and throush Hoctor v. Tucker, 432 So.2d 1352 (Fla. 5th DCA 1983).

Since the prosecutor at bar never inquired of Giovanna Valentine while she was on the witness stand about any prior statement, the qusstian presented is whether section 90.614(2) of the Florida Evidence Code applies as well when the prior inconsistent statements were taken under oath and are offered under section 90.801(2)(a), Florida Evidence Code as non-hearsay substantive evidence. The Sponsors' Note - 1979 provides persuasive evidence that it does. Under the heading "Paragraph (a)" of "Subsection (2)", the Note discusses the change from prior Florida law which did not accept a prior inconsistent statement as substantive evidence. The Sponsors's Note then states:

> In order for prior inconsistent statements to be introduced, Section 90.614 requires that generally the witness must be afforded an opportunity to explain or deny the statement before it is admissible.

Clearly, the committee which drafted the revised Florida Evidence Code had considered the question presented at bar and agreed that Section 90.614(2) applies no matter whether the prior inconsistent statement is offered as impeachment or substantive evidence.

Professor Ehrhardt's view, accepted by the trial judge at bar, is that the foundation required to offer a prior inconsistent statement as impeachment should not be required when the statement is offered under section 90.801(2)(a). Ehrhardt reasons that the

> prior statement is admissible regardless of whether the witness denies or admits making it. Since credibility is not in issue the same considerations of fairness are not applicable. Ehrhardt, Florida Evidence, § 801.7, p.449 (2d edition 1984).

Appellant disagrees with Ehrhardt's contention that "credibility is not in issue." Where two statements by a witness are truly inconsistent, it is vital for the trier of fact to determine which (if either) of the statements to believe. McCormick on Evidence explains the reason why prior inconsistent statements given by a declarant under oath at a prior proceeding are exempted from classification as hearsay:

> the witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.

E. Cleary, editor, McCormick on Evidence, § 251, p.746 (3d edition 1984).

At bar, because Giovanna Valentine's prior statement was only read into the record, the jury did not have the benefit of her explanation for it. The jury had no witness demeanor or other evidence to determine which of Giovanna's statements was reliable. Therefore, the Florida Evidence Code should be construed to require that a witness be confronted with the prior inconsistent statement pursuant to § 90.614(2) as a predicate to admissibility as substantive evidence under § 90.801(2)(a).

B. Harmless Error Analysis

Admission af Giavanna Valentine's prior testimony without the requisite predicate cannot be held harmless error. The key evidence for the State in corroboration of Livia Romero's testimony was the part of Appellant's taped telephone conversation where he referred to the furniture in the house where the crimes occurred, Romero's clothes, her jewelry and her "halfpint of booze" (R905-6). Rornero testified that Valentine had never been in the house prior to the date of the crimes (R908).

Based upon this, the prosecution argued that Valentine's taped statements were admissions against interest because he could only have known about Romero's possessions by being the perpetrator of the charged offenses (R1166,1223-4). Giovanna's trial testimony that Valentine had previously been in the house on one occasion for five minutes explains how Appellant could have known about Romero's possession without having been at the residence on the date of the crimes. Accordingly, admission of Giovanna's prior statement that Valentine had never been to the residence could certainly have contributed to the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE VI

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN INDEPENDENT WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES BEFORE IMPOSING THE DEATH PENALTY.

In the trial judge's "Findings in Support of Death Sentence"', he first lists the appropriate aggravating and mitigating circumstances (R1534-6, see Appendix). The court then notes that a majority of the jury recommended that the death penalty be imposed (R1536, see Appendix). The judge concluded his written findings as follows:

> D. The Court is bound to follow the reasonably returned jury recommendation under the same reasoning applied by the Florida Supreme Court in its Tedder decision (R1536, see Appendix).

This paragraph indicates that the sentencing judge applied the wrong standard in sentencing Appellant to death.

Florida's death penalty statute, section 921.141(3), Florida Statutes (1989), requires the sentencing judge to conduct an independent weighing of aggravating and mitigating circumstances:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.

This statutory language was interpreted by this Court in **State v. Dixon**, 283 So.2d 1 (Fla. 1973) to mean:

> the trial judge actually determines the sentence to be imposed - guided by, but not

> bound by, the findings of the jury. 283 So.2d at 8. (e.s.)

Thus, the sentencing judge was in error when he cancluded that he was "bound to follow the reasonably returned jury recommendation." (R1536, see Appendix). [4]

The sentencing judge further revealed his misunderstanding of the prior capital sentencing standards when he referred to this Court's decision in Tedder. (R1536, see Appendix). Tedder v. State, 322 So.2d 908 (Fla. 1975) stands far the proposition that

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. 322 So.2d at 910.

By its own terms, Tedder applies only where the advisory jury has recommended life imprisonment rather than the death penalty.

At bar, the court committed the same error as the sentencing judge in Ross v. State, 386 So.2d 1191 (Fla. 1980). The judge in Ross also cited this Court's Tedder decision and reasoned that he "was bound by the jury's recommendation of death." 386 So.2d at 1197. This Court reversed for resentencing because

> it appears that the trial court did not make an independent judgment whether the death sentence should be imposed. 386 So.2d at 1198.

---

[4] See also Spaziano v. Florida, 468 U.S. 447 at 466 (1984) ("Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence").

Appellant's death sentence should likewise be vacated, and resentencing ordered.

It is impartant to recognize that defendants who, like Appellant, are convicted of murders motivated by passion usually receive sentences of life imprisonment. In Farinas v. State, 569 So.2d 425 (Fla. 1990), the defendant kidnapped his ex-girlfriend. When she tried to escape, he shot her once, causing paralysis. He then stood over her by the side of the road and, '"after unjamming his gum three times, fired two shots into the back of her head." 569 So.2d at 427.

This Court found that two aggravating circumstances (during the course of the kidnapping and especially heinous, atrocious or cruel) were proved. Nonetheless, Farinas' sentence of death was reduced to life imprisonment because of the prior domestic relationship between the victim and her assailant. It should be noted that, compared to Farinas, Appellant has the additional statutory mitigating factor of no significant history of prior criminal activity.

Even more directly on point is Irizarry v. State, 496 So.2d 822 (Fla. 1986). Irizarry broke into the house shared by his former wife and her new lover in the middle of the night. He attacked both of them with a machete, killing his ex-wife and leaving her lover permanently disabled. The aggravating circumstances found in Irizarry were the same ones found at bar. The statutory mitigating circumstances found by the trial court were

also identical - (1) no significant history of prior criminal activity, and (2) age of early forties.

This Court reduced Irizarry's sentence of death to life imprisonment. While Irizarry's jury had recommended life, this Court did not rely solely an Tedder as a rationale for reversal. The Irizarry Court wrote:

> Furthermore, from evidence presented, the jury could have reasonably believed that appellant's crimes resulted from passionate obsession. In fact, the jury recommendation of life imprisonment is consistent with cases involving similar circumstances. 469 So.2d at 825.

Further support for the position that Irizarry is also a proportionality decision comes from its citation in Amoros v. State, 531 So.2d 1256 at 1261 (Fla. 1988) in support of the vacation of Amoros' death sentence.

There is a reasonable likelihood that the sentencing judge at bar might want to impose the same sentence as Irizarry ended up receiving [5], if he did not believe himself "bound" by the jury recommendation. Accordingly, this Court should vacate Valentine's sentence of death and remand this case to the trial court for an independent judgment of whether the death penalty should be imposed.

---

[5] The trial judge at bar, M. Wm. Graybill, was also the presiding judge in Irizarry's trial.

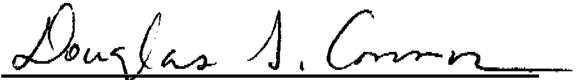
CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Terence Valentine, Appellant, respectfully requests this Court to grant him the following relief:

As to Issues I - V, reversal of convictions and remand far a new trial.

As to Issue VI, vacation af death sentence and remand for resentencing before the trial court.

Respectfully submitted,



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APPENDIX

1. Findings in Support of Death Sentence (R1534-6) A1-3