IN THE SUPREME COURT OF FLORIDA

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DARIUS M. KIMBROUGH,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

CASE NUMBER 84,989

APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

DARIUS M. KIMBROUGH, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NUMBER 84,989

STATEMENT OF THE CASE

On October 14, 1992 Darius M. Kimbrough, hereinafter referred to as appellant, was indicted by a Grand Jury with one count of Murder in the First Degree, one count of Burglary and one count of Sexual Battery. (PT254) The trial court found the appellant indigent, and the Office of Public Defender was appointed. (PT260) Appellant filed a Motion to Dismiss the Indictment on the grounds that the indictment failed to recite the aggravating circumstances that formed the basis of seeking the death penalty. (PT294) The trial court denied the motion. (PT377)

On July 26, 1993 appellant filed nineteen other (19) pretrial motions concerning challenges to the Florida Capital scheme; Motion to Determine Admissibility of Photographic Slides; Motion to Preclude Racially Discriminatory Excusal of Blacks from Jury Through Death Qualification. (PT294-351) After hearing, the trial court took the Motion to Preclude Racially Discriminatory Excusal of Blacks from Jury Through Death Qualification under

advisement. (TR25)

The Court granted defense Motion in Limine concerning statements made by the victim days before the murder to her apartment manager. (TR91) The defense filed a Notice of Intent to Use Similar Fact Evidence. (TR399) The Court granted the State Motion in Limine excluding similar fact evidence concerning the victim's prior boyfriend beating her in her apartment in Massachusetts one year before the murder. (TR91) On suggestion of the State, the Court reserved ruling on the State's Motion in Limine concerning "William's Rule Rape". (TR92) Defendant waived his presence for the passing out of the jury questionnaires prior to voir dire. (TR106)

The jury trial convened on June 27, 1994. (JT-1) At the beginning of jury selection the state read off the names of persons that were going to be called as witnesses including two employees of the Florida Department of Law Enforcement, Dave Baer and Charles Badger. (R19,21, 217) The trial court asked if anyone recognized the names and there was no reply. (R21, 229) The castings of the indentations found in the ground under the victim's balcony were introduced into evidence without objection as State Exhibit AAA and State Exhibit ZZ. (R487 and R488) Orange County Deputy Sheriff, Marcus McCloud photographed the scene and spent two days taking fingerprints and gathering other evidence. (R496-499) The State introduced 33 pictures of the crime scene that were taken by Deputy McCloud without objection. (R500) Deputy McCloud also successfully gathered latent

fingerprints from the scene and he turned them over to the Department of Law Enforcement or the Orange County Sheriff's Office for further analysis. (R518)

The defense objected to David Baer being declared an expert in the area of DNA testing on the grounds he had no background in population genetics. (R695) The Court overruled the objection and declared a Baer an expert in the area of DNA testing and in the interpretations of that testing. (R696) The defense objected to Baer's testimony of the probability of the different band matches on the autorad concerning the black population in central Florida. (R765) The objection was on the grounds that Baer was not an expert in population genetics. (R765) The trial Court overruled the defense objection. (R770)

The defense requested jury instruction for a murder in the third degree. (R701) The State objected to a jury instruction for murder in the third degree. (R702) The Court reserved ruling on the request for the instruction. (R702) Slide photographs of the autopsy pictures were submitted as evidence without objection. (R860) On redirect, Hughes identified photographs of the victim's apartment that were introduced into evidence. (R876)

The State rested. (R877) The defense moved for a Judgment of Acquittal on all three counts. (R877) The Court denied the defense Motion for Judgment for Acquittal. (R883)

During the close argument of the State, defense objected to the State argument that there was no fault found with

the way State expert David Baer did his case. (R922) The objection was on the grounds that it was burden shifting and the objection was sustained. (R922) The defense again objected during the closing argument of the State concerning argument shifting the burden of the evidence. (R933) The trial court sustained the objection and gave the jury a cautionary instruction. (R934) Again during the prosecutor's closing argument, defense counsel objected on the grounds that the prosecutor was making an improper burden shifting argument. The objection was sustained and the Court gave another cautionary instruction. (R940, 941) After closing arguments, the defense renewed all objections and renewed its Motion for Judgment of Acquittal. (R1004)

After jury deliberations, the jury returned a verdict of guilty of first degree murder, burglary, and sexual battery with great force. (R1007) The defense made a Motion for New Trial on the grounds of jury misconduct. (R153) Juror Julian, was the fiancee of an employee at the FDLE crime lab in Orlando, Florida where state witness, Dave Baer was also employed. (R153,155) During the trial Julian told other jurors during a break that his fiancee works at the FDLE lab and his fiancee told him that Baer would return to testify. (TR454) The Court denied the Motion for New Trial but granted the Motion to Voir Dire juror Julian. (R192) Juror Julian was questioned and he admitted being the fiancee of an FDLE employee, but denied knowing the FDLE witnesses or discussing the case with his fiancee. (TR161)

Before penalty phase began, the jurors were asked whether they read the newspaper after the guilty verdict. (R200) Three of the jurors read a newspaper article that suggested that the victim moved to her apartment to avoid a stalker. (R201) The defense then moved for a mistrial for the penalty phase. (R210) After questioning of the jurors, the trial court granted the Motion for Mistrial. (R210)

On November 7, 1994 a new jury was selected for the penalty phase. (PP1) During the penalty phase closing argument the defense objected to the state's arguments concerning non-statutory aggravation. (PP542, 546, 549) After jury deliberations the jury recommended a sentence of death by a vote of 11-1. (PP571) A pre-sentencing hearing was held on December 1, 1994. (R226)

The trial court found that aggravating circumstances outweighed the mitigating circumstances and sentenced appellant to death as to Count I; and life imprisonment as to Count II and Count III concurrent. The Office of Public Defender was appointed to perfect this appeal. This appeal follows.

STATEMENT OF THE FACTS

Denise Collins made arrangements to visit her friend Sandra Hughes on the evening of October 2, 1991. (R454,R456) Collins arrived at Hughes' house at 8:00 p.m. (R456) Hughes and Collins had dinner and were subsequently joined by other friends, Gary Boodhoo and Linda Hartman. (R457) Collins had recently returned from a short stay in Boston where she had a romantic relationship with Boodhoo, who also went to high school with Collins. (R455) Collins had been Gary Boodhoo's girlfriend for some time. (R460) When Collins returned from Boston, Boodhoo was no longer her boyfriend. (R461)

Boodhoo still pursued Collins to be his girlfriend, and had a key to her apartment. (R461) Boodhoo would spend the night at Collins' apartment three to four times a week. (R461) The group sat around in Hughes' apartment talking and listening to CDs. (R458) Collins left Hughes' apartment alone after 11:00 p.m. and before midnight. (R458) Hartman and Boodhoo left Hughes' apartment and went back to Hartman's house. (R597) After a period of time, Boodhoo left Hartman's house and reportedly returned home to Titusville that night. (R597)

Andre Lee, lived at the Carousel Club Apartments on Rio Grande in October, 1991. (R531) Lee left worked at 10:00 p.m. the evening of October 2, 1991 and went straight home after work. (R532) After entering his apartment, Lee adjusted the back blinds of his apartment and observed an individual down below loitering on the property. (R532) Lee went and took a shower

and after showering checked out the window again and the gentlemen was still there. (R533) Lee then got dressed, and went outside to observe the individual more closely. (R533) Lee then approached the individual walking within two feet of him. (R534) Lee also observed that there was an aluminum ladder up on the balcony of the second floor which would have been apartment 2211. (R534) The individual Lee observed was standing about three feet away from the ladder and was just looking around. (R534) Lee stated that he got a good look at the individual's face by the ladder and commented casually, "What's up?". (R535) Lee then returned to his apartment and went to bed. (R536)

At 4:00 a.m. on October 3, 1991, Orange County Deputy Sheriff Pelaez was dispatched to the Carousel Apartments, Apartment 2211. (R466,467) When Deputy Pelaez arrived at the apartment, Fire Rescue was there waiting at the door. (R467) The deputy found the door to the apartment slightly ajar. (R468) The deputy opened the door to the apartment and yelled out that an Orange County Sheriff's Office Deputy was at the door, was anyone there and there was no response. (R468) After a couple more yells the deputy began hearing some moaning sounds like someone was in pain. (R468)

The deputy then entered the apartment and in the bedroom observed a white female (DENISE COLLINS) lying nude on the floor in the bedroom. (R469) The woman was apparently injured with blood all over her body and was in a semi-conscious state like a coma. (R469) At one point the woman made some

grunting sounds and moved her head from side to side. (R469) Rescue personnel then began to give aid. (R470) The victim suddenly sprung up to a seated position and slumped forward and the deputy could observe trauma to the left side, and as rescue people brought her back to position she began to vomit and lose blood in gushes. (R471)

Deputy Sheriff Tittle also responded to the scene. (R457) Deputy Tittle inspected the apartment to find if there was anyone hiding inside. (R477) While inspecting the apartment, Deputy Tittle found that the sliding glass door off the living room was three quarters to completely open. (R477) Deputy Sheriff Knight also responded to the crime scene to process evidence. (R481) Deputy Knight was informed that there were some ladder mark impressions under the balcony of the crime scene. (R482) The Deputy then cast the indentations with dentstone material. (R484) Deputy Knight also examined the front door of the apartment and the sliding glass door from the living room to the balcony and observed no signs of forced entry on either door. (R491) Deputy McCloud also examined the entrance door and the sliding glass door and found no signs of forced entry. (R507) Deputy McCloud also removed the bottom and top black colored bedsheets from the bedroom of the victim for processing. (R508)

Collins languished for sometime in the hospital as a result of her injuries before she expired. (R561) During that time, Deputy Sheriff Gay requested that Dr. Blakely take semen

samples on the victim. (R561) Deputy Gay was present when Dr. Blakely took the semen samples from the victim on October 3, 1991. (R562) After the samples were taken, Deputy Gay sealed the samples in a bag and took those to a refrigeration unit at the sheriff's office pending transportation to the Florida Department of Law Enforcement Crime Lab for analysis. (R563)

The following day after the murder, Lee reported to the police that he had seen a gentlemen downstairs on the second floor and told them there was aluminum ladder up to the balcony. (R536) A week after the murder, Lee saw the individual that was by the ladder again in the apartment complex. (R536) Lee called Detective Gay who came over to the apartments to search for the individual. (R536) According to Lee, Lee and Deputy Gay were unsuccessful in finding the individual at that time. (R537) Later Deputy Gay showed Lee pictures and Lee told Deputy Gay which one of the pictures he thought was the person he saw. (R537) Lee then identified in court the defendant, as the person he saw by the ladder underneath the balcony the night of the murder. (R537)

Lee also testified that the Carousel Apartment Complex lacks security. (R538) He further testified that prior to the murder there was no bench in close proximity to the apartments. (R539) After the murder a bench did appear in close proximity to that area. (R539) On cross-examination, Lee admitted that he was old and having a hard time hearing. (R539) When Lee walked by the individual at the ladder he noticed that the individual

was the same height as Lee, which is 5′ 5" tall. (R543)

Deputy Gay came with a photo lineup to Lee's apartment two days after the murder. (R544) During the photo lineup session, Lee could not recall whether or not Deputy Gay was engaged in the homicide investigation. (R545) On October 5, 1991 Lee signed a sworn statement that the individual in photo one (1) was the person he saw by the ladder under the balcony of apartment 2211. (R547) On October 22, 1991, Lee called the police when he saw the individual again at the apartment complex and pointed him out to Deputy Gay at the scene that evening. (R549)

Gary Stone, a tile setter and drywall patcher, testified that in October, 1991 he did repairs at the Carousel Apartment Complex. (R551) After the murder, Stone made a statement to police in which he stated a black male watched him put the aluminum ladder away in the storage area. (R555) Stone identified that black male for police in a photo lineup. (R555) The same black male that Stone identified drove a two-door red Nissan. (R557) Stone also admitted that it was not usual to have black males hanging around passing the time of day all over the complex while they worked. (R557)

Deputy Gay was the lead investigator of the death of Denise Collins. (R560) While conducting the investigation at the victim's apartment, Deputy Gay observed Darius Kimbrough standing next to another male that had a rather large snake around his neck. (R566) The individual with the snake around

his neck's name was Alonzo Terrell. (R567) Based upon conversations during the investigation, Deputy Gay prepared a photographic lineup containing a photograph of Terrell. (R568) On October 5, 1991, the photographic lineup was shown to Andre Lee. (R569) Lee did not pick Terrell, which was photograph number four in the lineup page, but instead identified person number one as the person that he saw, however he could not be sure. (R570) The State then introduced a picture, state exhibit 42, that was a picture of the defendant in the general time period of October, 1991. (R571) The picture of the defendant as he appeared in October, 1991, and the picture of the person that Lee picked in the photo lineup passed out to the jury. (R573)

Subsequent to showing Lee the photo lineup, Deputy Gay received a call from Lee about having seen the individual again. (R571) After receiving the call he went back to the Carousel Apartments. (R572) Deputy Gay made contact with Lee and immediately Lee pointed to a black male individual who was watching the apartment complex. (R572) The person that Lee identified was the defendant. (R572) According to Deputy Gay, Detective Deridder showed the Terrell photo lineup to the maintenance man, Stone. (R572) Stone picked Terrell as the person that watched him put the ladder away around the time of the murder. (R573) According to Deputy Gay, ladder marks were found on the ground outside the victim's apartment before any witnesses came forward. (R574) Deputy Gay then questioned

complex management as to whether there were ladders in the complex. (R574) The management stated that there was an aluminum ladder in the third floor storage room. (R574) According to Deputy Gay, the ladder is distinctive in that it has a bent foot. (R574) This unique feature matches the impression in the ground found under the balcony of the victim's apartment. (R575)

During cross-examination of Deputy Gay, he learned in his investigation that the victim had an ex-boyfriend, Gary Boodhoo. (R584) Boodhoo stayed the night with the victim 3 to 4 nights a week leading up to her murder. (R584) Deputy Gay also spoke to Ms. Collins' mother, Diane Stewart, a couple of weeks after the murder. (R585) Stewart told Deputy Gay a couple of days before her daughter's murder she had been in Collins' apartment for the night. During that stay, she heard what sounded like Boodhoo's voice, which she knew, and a metal ladder outside. (R585) During the re-direct examination of Deputy Gay, the State attempted to have Deputy Gay testify to hearsay statements by the victim's mother. (R590) The trial Court ruled that the State could not go into other things the victim told her mother about an alleged black male in the neighborhood. (R596) The evening of the murder, Deputy Gay continued to call investigative leads to either include or exclude Boodhoo. (R598) This included a DNA test performed on Boodhoo. (R5980) Reportedly the DNA test excluded Boodhoo as being a possible suspect in the case. (R598)

Maryann Hildreth a microanalyst with the FDLE Orlando Regional Crime Laboratory testified. (R613) Hildreth compared pubic hairs on the victim's bedsheets with the pubic hair of the defendant, and concluded that three of the pubic hairs found at the crime scene were microscopically similar to the defendants. (R633) There was also a Negroid pubic hair that was found on the victim's bedsheets that was not similar to the defendant's. (R632) On cross-examination, Hildreth admitted that her tests could not determine the age of the hair or how long the hair had been at the crime scene. (R655) Hildreth further admitted that she could not positively identify the hairs as coming from the defendant and no one else. (R657)

The State called David Baer, Senior Crime Lab Analyst in the Florida Department of Law Enforcement Crime Laboratory in Orlando, Florida. (R687) Baer performed the extraction procedure for DNA testing on blood sample from the defendant, cuttings from the bedsheets, vaginal swabs and blood sample from the victim. (R725) Baer then performed DNA testing. (R747) Baer then developed x-ray films that showed the end results of the DNA testing process. (R744)

The x-ray film showed one lane which was the female fraction from the vaginal swabs which contained material from the vaginal fluids of the victim; the next lane is the male fraction of which contained sperm from the vaginal swab; the next lane was a blood sample taken from the victim; and the next lane is a blood sample taken from the defendant. (R746, 747) The male

fraction had very faint bands which appeared to be in the same location as the bands in the blood from the defendant. (R747)

An additional probe of the DNA was taken from the vaginal swab. (R749) This is the probe called TBQ, which looks for a sight on chromosome number four. (R749) The female fraction of the DNA from the vaginal swab matched the blood sample of the victim. (R750) The male fraction which was the DNA from the sperm was probably in the same location as the bands from the blood of the defendant. (R750) A third probe was done called PH39. (R751) Nothing of evidentiary value was obtained from the PH39 probe. (R751)

DNA comparison was also done from the cuttings of the sheets from the victim's bed. (R752) Baer was able to get information on five different probes of the material found on the sheets. (R752) The x-ray bands from the DNA testing of the defendant's blood appeared to be in the same location as the DNA testing results from the stains found on the victim's bedsheets. (R754) On the second probe of the DNA found on the victim's bedsheets, all three male fraction bands line up with the paternity blood from the defendant. (R757) In the third probe of the DNA samples from the stains found in the bedsheets, two bands were again the same place as the blood sample given by the defendant. (R758) In the fourth probe, there were two bands in the same relative position as the blood from the defendant. (R759) The x-ray or autorad bands of the fifth probe also had bands in the same relative position as the blood of the

defendant. (R760)

According to Baer, the results of the two probes that were used on the DNA found in the vaginal swab and the same two probes used on the sperm samples found on the bedsheets matched. (R761) Also according to Baer, after he confirmed a visual match on the autorad testing, he submitted the autorad to computer sizing. (R762) According to the computer sizing, the match of the bands were within a acceptable range of accuracy. (R762) According to Baer, the probability that someone other than the defendant matches the five probes from the evidence sample in the black population was one out of one hundred and forty million. (R775)

During cross-examination of Baer, counsel asked whether they were times that DNA testing did not work properly (R784) Baer testified that during testing of this case due to faulty autoradiography he was not able to get a couple of results. (R784) Baer also admitted that at times technicians used the wrong probes during testing. (R785) Baer also admitted that in DNA testing there is something called "band shifting" which occurs when the sample becomes contaminated by bacteria. (R790)

Dr. Martin Tracey, Jr., who has a doctorate degree in genetics, was declared an expert in genetics. (R804, 805) Dr. Tracey reviewed the DNA testing results, and his opinion the MS1 probe although a visual match on the autorad, was soiled and could not be considered a match and was not used. (R816) Based on the four band pattern match, one out of every thirty six

million blacks would have a four band match pattern of the type found in this case. (R817) Dr. Tracey further testified that using the most conservative NCRC principle in applying the band matches the chances that someone else had the same band match was one in a million. (R822) Dr. Tracey admitted in cross-examination that the DNA testing is subject to human error relating to the test process itself and the process of making estimations of probabilities. Therefore, it is not a certain test. (R831) Dr. Tracey also admitted that in the set of the three autorads prepared from the vaginal swab that he looked at there was nothing that matched the defendant. (R833)

Dr. Thomas Hegert, Orange County medical examiner performed an autopsy on the victim. (R855) The Court declared Dr. Hegert as a expert in forensic pathology. (R854) Dr. Hegert testified that the victim had a fractured jaw and an extensive fracturing on the left side of the head in the area of the temple. (R856) According to Dr. Hegert, the cause of death was hemorrhaging and injury to the brain including bleeding and swelling that resulted from blunt force injury to the face and to the head of the victim. (R857) Dr. Hegert also examined the vaginal area of the victim. (R858) There was an area of contusion or reddening on the right side of the inner lips of the genitalia, and there were two areas of superficial tear of the genitalia membrane. (R858) The injuries to the vaginal area were consistent with having been made by an erect male penis. (R858) The Doctor also testified that the victim's arms and forearms had

bruises that were consistent with someone grabbing and holding her down. (R859) The doctor concluded that there were at least three separate blows to the face and head of the victim. (R868) Also, the injury to the victim's vagina would have been painful to her. (R874)

EVIDENCE OF AGGRAVATION

Fire rescue and sheriff deputies responded to a call of a disturbance at the victim's apartment. (PP405) They heard a moaning noise and located a white female on the floor in front of the bed bleeding about the head and was incoherent. (PP406) The victim was rushed to the hospital were she expired 24 hours later. (PP 407) The state introduced photographs of the crime scene (state exhibit 3-36). (PP 407)

Law enforcement investigators found ladder prints on the ground below the victim's apartment balcony. (PP417) Lee told investigators that the evening of the murder he saw a ladder placed under the balcony of the victim's apartment. (PP417) Lee also observed a black male standing near the ladder who he later identified as the defendant. (R418) Law enforcement believed that the ladder was used to enter or exit the apartment of the victim since the balcony sliding glass door was found ajar. (PP417) The ladder imprint found below the victim's apartment matched a ladder found on the third floor maintenance shed located between the victim's apartment and the defendant's apartment on the third floor. (PP419) According to Deputy Gay, the investigation determined that the victim and the defendant

did not know each other. (PP420) Deputy Gay further testified that there was no evidence of forced entry to the apartment, nor was there any ripped panties or clothing found in the victim's bedroom. (PP423)

Heather Claypool was a subsequent victim of rape by the defendant. (PP429) According to Claypool, in the early morning hours of March 19, 1992 she was awakened by a man crouched at the end of her bed. (PP426) Claypool asked what the man was doing there, and he then stood up and told her he did not want to hurt her and put a pillow over her head. (PP426) The man then had forcible sex with Claypool. (PP427) Throughout this episode, the man told Claypool not to look at him and she complied. (PP427) Claypool offered no resistance. (PP427) The man then left and Claypool called police. (PP428) Claypool was present when the defendant pled guilty to burglary and sexual battery for these acts. (PP429) The state introduced certified copies of the Judgment and Sentence for burglary and sexual battery. (PP429)

Dr. Hegert, the medical examiner, testified that he performed an autopsy of the victim. (PP433) He found bruises on both arms and forearms. (PP433) The primary areas of injury was found in the area of her head and face. (PP433) There was a fracture to the lower jawbone and extensive fracturing of the skull on the left side. (PP434) Examination of the brain showed hemorrhaging and bruising in the area of the skull fracture. (PP434) There were also contusions on the head and face that were consistent with a blow of knuckles of a fist. (PP436) The

fracture to the skull was consistent with something striking the head rather than the moving head striking an object. (PP437) The injury to the head was a blunt force type of injury requiring a very forceful blow. (PP439) The bruises to arms were pressure markings consistent with someone holding down the arms of the victim. (PP441)

EVIDENCE OF MITIGATION

The defense called Kimbrough's aunt, Gayla May Elliott. According to Elliott, Kimbrough's mother Annie was impregnated by "Kenny Ray", however, for the longest time it was believed that Annie's boyfriend "Bud" was Kimbrough's father. (PP488) While Kimbrough was growing up he would say he had two fathers. (PP489) Moreover, Annie confided to Aunt Gayla that Bud had a drinking problem and Annie deserved a better man. (PP487) After Kimbrough was born, Annie lived with her sister, Gayla May, and would routinely leave Kimbrough and live at Bud's parents' house. (PP497)

Kimbrough's mother, Annie, testified that she believed Bud was Kimbrough's father, but at age six she told Kimbrough that Kenny Ray was his father. (PP495) Ms. Kimbrough subsequently lived a transient lifestyle living about nine years with Julius Mackintosh, while moving to California to live with a sister-in-law five or six times throughout that period. (PP496) Annie Kimbrough subsequently moved to the central Florida area. (PP496) At first, Kimbrough did not like central Florida, and moved back to live with Julius. (PP497)

Bud's sister, Cheryl Portch, testified that Kimbrough's mother moved around a lot sometimes leaving Kimbrough with relatives. When Kimbrough was eleven years old, she tried to have Kimbrough stay with her and her son permanently so that Kimbrough could have a stable homelife. (PP506)

Malcolm Walton, Kimbrough's cousin, went to school with Kimbrough and testified that they would both participate in talent shows where they would sing and play musical instruments. (PP509)

SUMMARY OF ARGUMENT

POINT I: The trial court erred when it failed to conduct a Frye hearing on the propriety of the DNA testing procedures and results in the instant case in accordance with Hayes v. State, infra. Taking all the evidence submitted by the State concerning hair fibers, proximity of Appellant to the murder scene, and the ladder impression, and putting it forward in a light most favorable to the State, the evidence is legally insufficient to support the guilty verdict.

POINT II: The trial court erred in excluding similar fact evidence that a prime suspect in the case, Gary Boodhoo, battered the victim while they lived together in Massachusetts a year before the murder.

POINT III: The trial court erred in not finding the statutory mitigating factor of age where at the time of the murder the Appellant was nineteen years old, showed no extraordinary maturity for his age, and had not completed high school.

POINT IV: The Appellant's death sentence is disproportional to other capital cases that this Court has reviewed where the record supports only one statutory aggravating factor of prior violent crime, weighed against the statutory mitigating circumstance of age.

POINT V: The trial court erred in instructing and finding that the statutory aggravating circumstance of especially heinous, atrocious or cruel where the evidence was legally

insufficient to support the finding.

POINT VI: The trial court erred in the penalty phase jury selection by excusing for cause one qualified juror over defense objection thereby violating the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 22 of the Florida Constitution.

POINT VII: The trial court erred in instructing and finding that the statutory aggravating circumstance of the crime committed during the course of a sexual battery where the evidence was legally insufficient to support the finding.

POINT VIII: Section 921.141, Florida Statutes is unconstitutional.

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The trial court denied the appellant's motion for judgment of acquittal on each count of the indictment. The trial judge erred by not granting an acquittal to the charges because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to exclude the reasonable possibility that someone other than Darius Kimbrough killed Denise Collins. The evidence of Kimbrough's guilt is entirely circumstantial, consisting of the reasonable inferences to be drawn from the facts established by competent testimony.

Those facts are not in dispute. Denise Collins made arrangements to visit her friend, Sandra Hughes and Collins arrived at Hughes' house at 8:00 p.m. (R456) Hughes and Collins had dinner and were subsequently joined by other friends, Gary Boodhoo and Linda Hartman. (R457) Collins and Boodhoo also went to high school together and had recently returned from Boston where they lived together and had a romantic relationship. Collins had been Gary Boodhoo's boyfriend for some time, however, when Collins returned back from Boston, Boodhoo was no longer her boyfriend. (R460,461) Boodhoo still pursued Collins to be his girlfriend, and had a key to her apartment. (R461) Boodhoo would spend the night at Collins' apartment three to four times a week (R461) The night of Collins' murder, the group sat around

in Hughes' apartment talking and listening to CDs. (R458) Collins left Hughes' apartment alone after 11:00 p.m. and before midnight. (R458) Hartman and Boodhoo left Hughes' apartment and went back to Hartman's house. (R597) After a period of time, Boodhoo left Hartman's house and reportedly returned home to Titusville that night. (R597)

Andre Lee, lived at the Carousel Club Apartments above Denise Collins' apartment in October, 1991. (R531) On that evening, Lee observed an individual down below loitering on the property. (R532) Lee went and took a shower and after showering checked out the window again and the gentlemen was still there. (R533) Lee then got dressed, and went outside to observe the individual more closely. (R533) Lee then approached the individual walking within two feet of him. (R534) Lee also observed that there was a aluminum ladder up on the balcony of the second floor which would have been apartment 2211. (R534) The individual Lee observed was standing about three feet away from the ladder and was just looking around. (R534)

At 4:00 a.m. on October 3, 1991, Orange County Deputies and fire rescue were dispatched to the victim's apartment. (R466) The door to the apartment was slightly ajar. (R468) The deputies opened the door to the apartment and in the bedroom observed the victim was lying on the floor in the bedroom. (R469) The victim was naked with blood all over her body and was in a semi-conscious state like a coma.

Subsequent inspection of the apartment found that the

sliding glass door off the living room was three quarters to completely open. (R477) The front door of the apartment and the sliding glass door from the living room to the balcony and observed no signs of forced entry. There were also ladder mark impressions under the balcony of the crime scene. (R482) The deputies cast the indentations with dentstone material. (R484) Deputy Sheriff McCloud also removed bottom and top black colored bedsheets from the bedroom of the victim for processing. (R508)

Vaginal swabs taken from the victim showed the presence of sperm. Sperm was also collected from the bed sheets. Hair fibers were also removed from the crime scene. The sperm found on the bed sheet was found to have similar DNA patterns as the blood sample of the Appellant. Some hairs found at the scene were consistent with appellant's hair, while another Negroid pubic hair was not consistent with appellant's hair.

Appellant was not permitted to introduce similar fact evidence that supported the hypothesis that the victim's ex-boyfriend was the likely perpetrator of this crime (See Point II). Nevertheless, this evidence is legally insufficient to establish that Darius Kimbrough, and no other person, killed Denise Collins. Accordingly, as a matter of law, Kimbrough is entitled to reversal of the murder conviction and discharge.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Kimbrough's conviction

violates the Due Process Clause and as a matter of law the judge erred in denying the motion for judgment of acquittal because the circumstantial evidence is legally insufficient to overcome the presumption of innocence.

> Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. (citation omitted). The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. (citation omitted). It would be impermissible to allow the state to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. (citations omitted).

Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981) ("Where the state fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kickasola v. State, 405 So.2d 200, 201 (Fla. 3d DCA 1981) ("[E]vidence which furnished nothing stronger than a suspicion, even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction.") (emphasis added).

It is well established in Florida that a case that

rests exclusively on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. <u>Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.</u>
>
> <u>Davis v. State</u>, 90 So.2d 629, 631-32 (Fla. 1956) (emphasis added).

The case against Kimbrough is entirely circumstantial. There is <u>NO</u> direct evidence of his guilt. There was no motive shown for Kimbrough to commit the crime, which is a valid consideration in circumstantial evidence cases. <u>See</u> <u>Daniels v. State</u>, 108 So.2d 755, 759 (Fla. 1959) ("Where proof of the crime is circumstantial motive may become both important and potential.")

The state was required to prove beyond a reasonable

doubt that:

1. DENISE COLLINS is dead.

2. The death was caused by the criminal act or agency of Darius Kimbrough.

3. There was a premeditated killing of Denise Collins.

Section 782.04(1)(a), Fla. Stat.; Fla. Std. Jury Ins. in Crim. Cases, p.63. The state proved and it is undisputed that Denise Collins is dead. It is expressly submitted, however, that the state failed as a matter of law to sufficiently prove either that Collins' death was caused by the criminal act or agency of Darius Kimbrough or that the killing was premeditated. Accordingly, as a matter of law, Kimbrough is entitled to reversal of his conviction and immediate discharge from custody in Florida.

THE STATE FAILED TO PROVE THAT COLLINS' DEATH WAS CAUSED BY THE CRIMINAL ACT OR AGENCY OF DARIUS KIMBROUGH.

What competent evidence exists that Kimbrough, and no other person, killed Collins? The state relied on the inferences to be drawn from four areas of proof:

1. Hair comparison evidence.

2. Ladder impression.

3. DNA evidence.

4. Proximity of Kimbrough to Collins' Apartment.

HAIR COMPARISON:

The hair comparison evidence established at most that hairs found in Collins' apartment are consistent with Kimbrough's pubic hair. A hair comparison analysis was conducted by an

expert hair analyst, and the results were either inconclusive or favorable to Kimbrough. The testimony of the expert establishes <u>at most</u> that Kimbrough's hair is <u>consistent</u> with some hairs found in Collins' bedroom, with one negroid pubic hair found in the victim's bed was not consistent with Kimbrough's hair. The expert testified:

> There were three negroid pubic hairs that were found to display the same microscopic characteristics as known pubic hair sample from Mr. Kimbrough. In addition, there's one negroid pubic hair obtained from debris in the fitted sheet which exhibits different characteristics from Mr. Kimbrough's known pubic hair sample and also two body hairs typical of negroid origin which are not suitable for examination and it does contain one male caucasian hair, pubic hair, from the fitted sheet. (TR630)

There was also hair found in a towel: one pubic hair consistent with Mr. Kimbrough's pubic hair; one negroid pubic hair fragment not consistent with Mr. Kimbrough's pubic hair; and other caucasian hairs. (TR632-33)

The expert testified that comparing hair is not like comparing fingerprints, in that hair comparison does not provide a positive means of identification:

> I can't say that that hair came from Mr. Kimbrough in this example to the exclusion of all others because hairs are not a means of positive identification. (TR634)

Florida appellate courts have not hesitated to reverse convictions that are founded upon such equivocal identification evidence. For example, in <u>Horstman v. State</u>, 530 So.2d 368 (Fla. 2d DCA 1988), the Second District Court of Appeal reversed a

second-degree murder conviction because the circumstantial evidence proving identification (hair and blood comparison testimony) was too equivocal to negate the possibility that someone other than the accused shot the victim.

> The strongest evidence implicating Horstman in Peterson's murder is the hair that was found on her body. Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent upon such evidence.

Horstman, 530 So.2d at 370. See Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987) (First-degree murder conviction reversed due to the legal insufficiency of identification of murderer based on bite-mark comparison, hair comparison, and statement of accused).

The hair found in the victim's bedroom was of negroid origin. The state's expert conceded that the characteristics are the most common for pubic hair. Even if the hair comparison evidence provided a positive means for identification, the state would be required to show that the hair could only have been left in the victim's bedroom during the commission of the crime to allow the trier of fact to legally infer that the identity of the murderer was Darius Kimbrough. See Jaramillo v. State, 417 So.2d 257 (Fla. 1982); Cox v. State, 555 So.2d 352 (Fla. 1989). The state did not prove that the hair could only have been placed in

the victim's bedroom at the time of the murder. There is no way of knowing how long the hair was present in the bedroom. This equivocal identification evidence, viewed in a light most favorable to the state, shows at most that at some point in time a person with hair consistent with Darius Kimbrough's hair might[1] have been in Collins' bedroom.

LADDER IMPRESSION EVIDENCE:

Below the victim's balcony were impressions in the earth. Andre Lee testified that a ladder was set up below the victim's balcony at 10:00 p.m., approximately 6 hours before the murder. The state introduced into evidence a ladder located in one of the apartment storage sheds and a casting of the impressions made in the ground below the victim's balcony. According to law enforcement, the impression was consistent with the ladder introduced into evidence. This testimony is absolutely useless! Law enforcement is saying that the ladder impressions were made by a ladder in the apartment storage shed. The state further put on evidence that an individual by the name of Alonzo Terrell would watch the workman put the ladder in the storage facility. This evidence had no relevance whatsoever to whether Kimbrough took out the ladder and placed it under the victim's balcony.[2] Indeed, the contention that these ladder

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[1] Significantly different than a fingerprint, a hair can originate with an individual and thereafter be transferred in his or her absence.

[2] It should be noted that the victim's mother told police after the murder that her daughter's ex-boyfriend, Gary Boodhoo, was heard outside the balcony with a metal ladder days before the

indentations originated from the ladder introduce in evidence is questionable because Andre Lee testified that the ladder he saw appeared different than the ladder introduced into evidence.

Viewed in a light most favorable to the state, it establishes that ladder indentations were left at some point in time below the balcony of the victim. This testimony, viewed in a light most favorable to the verdict and in conjunction with the hair comparison testimony, utterly fails as a matter of law to provide competent, substantial proof that Darius Kimbrough and no other person murdered Collins. Such equivocal proof fails to overcome the legal presumption of innocence.

<u>PROXIMITY OF KIMBROUGH TO COLLINS' APARTMENT</u>:

At the time of the murder, Kimbrough lived at the same apartment complex as Denise Collins. The night of the murder, Andre Lee testified that he saw Kimbrough loitering in the vicinity of the victim's balcony approximately six hours before the murder. Andre Lee's identification of Kimbrough was not convincing. Lee stated that the person he saw was the same height as Lee (5'5" tall). Lee had obvious memory lapses on the witness stand not recalling to whom he spoke during the investigation and freely admitted that he was old and had a hard time hearing.

Collins was last seen around 11 p.m. of October 2, 1991. The period of time wherein she could have been beaten was from near midnight to four o'clock in the morning on October 3,

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murder.

more than four hours. The "proximity" of Kimbrough to Collins' apartment before this time fails to prove beyond a reasonable doubt that Kimbrough, and no other person, murdered Collins. The state failed to present competent evidence that Kimbrough was any closer than in the vicinity of the victim's balcony five hours before her murder.

In circumstantial evidence cases, the consistently critical factor in determining the sufficiency of evidence to allow the question to go to the jury is the presence of direct evidence placing the defendant with the victim at or very near the time of death. Cf. Bundy v. State, 471 So.2d 9, 12 (Fla. 1985) (Two witnesses identified Bundy as the person at scene of abduction driving white van stained with victim's blood type); Heiney v. State, 447 So.2d 210, 211 (Fla. 1984) ("The victim's mother and his wife later positively identified Heiney as having been with the victim the day prior to his death. They both testified at trial."); Bundy v. State, 455 So.2d 330 (Fla. 1984) ("The principal items of evidence [include] the identification testimony of a resident of the Chi Omega sorority house who briefly saw Bundy in the house."); Peavey v. State, 442 So.2d 200, 201 (Fla. 1983) (unexplained presence of defendant's fingerprints on victim's cashbox); Williams v. State, 437 So.2d 133 (Fla. 1983) (Defendant called victim's sister from scene and reported finding victim murdered); Rose v. State, 425 So.2d 521, 522 (Fla. 1983) ("The evidence reveals that the defendant was the last person seen with [the victim] at the bowling alley on the

night she disappeared."); Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981) ("Welty's own statement to the authorities which was introduced into evidence placed him in [the victim's] bedroom at the exact time of the murder."); Clark v. State, 379 So.2d 97, 101 (Fla. 1980) ("There was no question as to the identification of Clark or the fact that Clark's Blazer was identified as being in the bank's parking lot at the precise time that the victim was abducted."); North v. State, 65 So.2d 77, 78 (Fla. 1952) ("Only the appellant and [the victim] were present at the time of her death."); Green v. State, 408 So.2d 1086, 1087 (Fla. 4th DCA 1982) ("Ms. Parillo testified that when she entered the lot, there was no one in the parking lot other than the appellant and the elderly man that was killed. Ms. Parillo positively identified the appellant, both at the lineup and in court[.]")

In each of the foregoing cases where the circumstantial evidence was found legally sufficient to support the verdict, the state was able to unequivocally establish through direct evidence (eyewitness, fingerprint, or admission) that the defendant was with the victim at or near the time of death. In cases where the circumstantial evidence was found to be legally insufficient for the case to have been submitted to the jury, the state was unable by direct evidence to unequivocally place the defendant in the presence of the victim at or near the time of death. Cf. Jaramillo v. State, 417 So.2d 257, 258 (Fla. 1982) (First-degree murder convictions reversed where state failed to prove that accused's fingerprints had been left at murder scene at time of

the crime and no other); Davis v. State, 90 So.2d 629, 630 (Fla. 1956) (Murder conviction reversed where "There is not one item of direct evidence that connects him with the crime for which he was convicted."); Head v. State, 62 So.2d 41, 42 (Fla. 1952). (Manslaughter conviction reversed where accused's automobile was seen being erratically driven at a high speed near the scene of a body, but "to conclude from the testimony in this record offered for the purpose of showing that the deceased was killed by being struck by an automobile, would be at best a haphazard guess.")

The evidence presented in the best light to the state in this case is that Kimbrough was seen six hours before the murder loitering on the apartment complex grounds. The probative force of such testimony does not amount to substantial, competent evidence upon which to rest a conviction for first-degree murder.

DNA COMPARISON TESTIMONY:

The testimony viewed in a light most favorable to the verdict establishes that DNA of a semen stain on the victim's bedsheet recovered eight months after the murder was found to have similar characteristics as a DNA sample from Kimbrough's blood. The reasonable inference to be drawn from this, viewed in a light most favorable to the verdict, is that a person with comparable DNA left a semen stain on the victim's bedsheet at an undetermined time before the sheet was recovered by the police. However, under this Court's recent decision in Hayes v. State, 20 FLW S296 (Fla. June 22, 1995) the DNA results should not be accepted as reliable as a matter of law because the trial court

did not perform the proper Frye[3] inquiry.

In Hayes, this Court addressed for the first time how deoxyribonucleic acid (DNA) test results may be admitted in the trial courts of this State. The record revealed that the murder victim's body was found on the floor of her room. An investigation of the homicide led to the arrest of Robert Hayes, an African-American co-worker of the victim. At Hayes' trial, a technician from Life Codes, a DNA testing company, testified that she performed DNA testing on samples taken from the victim, the defendant, the vaginal swab, and the victim's tank top. She explained that in doing her testing she worked without anyone watching her and that she also ran tests on another case at the same time. She stated that testing on the vaginal swab produced a seven-band DNA match with the blood sample taken from the defendant and that testing on the tank top sample produced a three-band match. On cross-examination, counsel for the appellant challenged the testing methods used by the technician. Defense counsel also presented expert testimony challenging the DNA test results.

The claim that the DNA test result were unreliable was an issue of first impression with this Court:

> While other Florida courts have recognized the admissibility of DNA evidence as a new but proper scientific procedure, see, e.g., Brim v. State, 654 So.2d 184 (Fla. 2d DCA 1995); Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994), review granted, No. 83,935

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[3] Frye vs. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

> (Fla. May 16, 1995) [FN1]; Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), review denied, 542 So.2d 1332 (Fla.1989), this Court has not yet addressed the issue. Hayes at S297.

Concerning the admissibility of new or novel scientific evidence such as DNA, this Court has endorsed the Frye test to determine the admissibility. Ramirez v. State, 651 So.2d 1164 (Fla.1995); see also Flanagan v. State, 625 So.2d 827 (Fla.1993); Stokes v. State, 548 So.2d 188 (Fla.1989). In Ramirez, this Court held that the admission into evidence of expert opinion testimony of a new scientific principle requires a four-step inquiry:

> The trial judge must determine whether: (1) expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; (2) the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs" under the Frye test; and (3) the particular expert witness is qualified to present opinion evidence on the subject in issue. If the answer to the first three questions is in the affirmative, the trial judge may proceed to step four and allow the expert to present an opinion to the jury.

Ramirez, 651 So.2d at 1166.

The admissibility of DNA evidence is a fairly new issue in the courts. To establish the standards for reliable and proper DNA testing the National Research Council of the National Academy of Sciences was called upon, in 1989, to establish recommended standards and methodology concerning DNA testing. According to this court's opinion in Hayes, The National Research Council published its report and recommendations in 1992:

> This report makes it clear that courts should take judicial notice of three scientific underpinnings of DNA typing. The National Research Council emphasized the importance of the scientific testing methods used in DNA typing and stated: Forensic DNA analysis should be governed by the highest standards of scientific rigor in analysis and interpretation. Such high standards are appropriate for two reasons: the probative power of DNA typing can be so great that it can outweigh all other evidence in a trial; and the procedures for DNA typing are complex, and judges and juries cannot properly weigh and evaluate conclusions based on different standards of rigor.

Furthermore, the National Research Council (NRC) report emphasizes the importance of the testing protocol used in DNA analysis and has a separate section that explains in detail how DNA evidence is appropriately admissible under the Frye test. In reversing judgement and sentence in Hayes, this court held that the admission of DNA evidence would be on a case by case basis with the trial court being required as a matter of law to do a Frye inquiry using the above NRC standards:

> We do not find that this DNA evidence should be excluded as a matter of law, but we also do not find that we should approve it for admission under the circumstances of the record in this case because we find that the Frye test was not properly applied, particularly as suggested in the National Research Council report. We do not fault the trial judge in this instance who did not have the benefit of the National Research Council report. DNA test results as evidence in criminal trials are not only new, but, as important, such results are based on technology that is still evolving and must be evaluated on a case by case basis. This evolving technology is constantly changing as evidenced by the fact that the National Research Council is presently revising its 1992 report. (Footnote omitted) Without

> question, DNA testing methodology, while an extremely important new identification technique, has not yet reached the level of stability of other forms of identification such as fingerprint comparisons. In the retrial of this defendant, the DNA evidence pertaining to the vaginal swab may be presented if the State can establish that the methodology utilized by the technician in performing the test meets the requirements of the Frye test.

Hayes at S298.

In the instant case, the trial court did not perform the proper Frye inquiry concerning the methodology and procedures used in the DNA testing by the FDLE. Therefore, the DNA testing results from the semen stain left on the victim's bedsheet and the vaginal swab are unreliable under the holding in Hayes. The presumed unreliable DNA test results introduced by the state do not prove that Darius Kimbrough and no else committed this murder.

THE BEDSHEET

The bedsheet was stored in an evidence locker from October 1991 until it was submitted to FDLE for testing in July 1992. (TR682) According to the state's DNA expert Dave Baer DNA samples can degrade over time, and DNA testing is subject to human error:

> Q. Samples can be degraded can they not?
>
> A. They can.
>
> Q. And they can be degraded due to exposure to light. Is that true?
>
> A. To sunlight, Yes.
>
> Q. And they also can be degraded due to exposure to moisture. Is that true?

A. That is correct.

Q. And it is true that they can be degraded by exposure to bacteria?

A. Yes.

Q. These items that you examine and analyze do you have any way of knowing how other s may have stored them?

A. No. I don't.

Q. Would it make a difference if they were stored somewhere where they got it wet?

A. It could.

Q. Is it fair to say that there are things that could possibly alter the mobility to a DNA pattern.

A. There are.

Q. During the time you have been with the FDLE lab there were times that DNA testing didn't work properly, true?

A. There were a period actually when I started working this case where we would due to faulty autoradiograph we were not able to get a couple of results.

Q. Were there times sizing turned out to be outside the range, Mr. Baer?

A. There are times when the sizing will be outside the range possibly due to the curvature of the range as far as match we cannot use the results.

Q. When you're talking about curvature of the gel the gel is actually something like jello. Is it not?

A. That is correct?

Q. And it can then get distorted. Is that true?

A. It can.

> Q. And I believe you testified earlier that there were times that technician have used a wrong probe. Is that true?
>
> A. On one occasion.
> (TR784,785)

Based upon the above testimony the test result could be flawed because of contamination of the DNA sample or due to human error. Where the testing results could be compromised, the DNA testing result should not be controlling in supporting a conviction for first degree murder. See Hayes, supra. Therefore, the evidence is simply legally insufficient to establish that the semen was positively left by Kimbrough.

THE VAGINAL SWAB

Two probes of the DNA were made from the vaginal swab. (R749) According to Dave Baer, the female fraction of the DNA from the vaginal swab matched the blood sample of the victim. (R750) The male fraction which was the DNA from the sperm "was probably" in the same location as the bands from the blood of the defendant. (R750) A third probe was done called PH39, and nothing of evidentiary value was obtained from the probe. (R751) Dr. Tracey, the genetics expert that reviewed the FDLE's testing procedures and results, testified that the set of the three autorads prepared from the vaginal swab that he reviewed showed no matches to Mr. Kimbrough. (R833) Therefore, the DNA evidence obtained from the vaginal swab should be discarded altogether.

CONCLUSION

In sum, the state's evidence is more consistent with the premise that Kimbrough did not murder Collins than that he

did. If it is assumed that the hair and semen in Collins' bedroom belonged to Kimbrough, where did the negroid pubic hair and white head hair that was not consistent with Kimbrough's hair come from? The assumption that Kimbrough is the murderer is also inconsistent with the defense theory that the victim's ex-boyfriend, Gary Boodhoo, committed the murder. There was testimony that there was no sign of forced entry, and there was testimony that Boodhoo had keys to Collins' apartment at the time of the murder.[4]

Pursuant to McArthur v. State, 351 So.2d 972 (Fla. 1977), as a matter of law the state's evidence is insufficient to support the verdict because it fails to exclude the possibility that some person other than Darius Kimbrough killed Denise Collins.

> A review of prior decisions of this Court in similar cases is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique.
>
> *   *   *
>
> In general, the jury received two categories of circumstantial evidence -- scientific and non-scientific. Our study of both types leads us to conclude that, on balance, neither is inconsistent with innocence.

McArthur, 351 So.2d at 976; see also Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986) ("Conviction returned by jury

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[4] The evidence that Boodhoo battered Collins before the murder while they lived together in Boston was excluded by the trial court.

could not be sustained by the court unless there was competent and substantial evidence inconsistent with any reasonable hypothesis of innocence.")

All of the state's competent evidence can be believed and still the proof is consistent with Kimbrough's innocence because there is no competent, substantial proof showing that Kimbrough entered Collins apartment at the time of the murder. Moreover, there was no forced entry into the victim's apartment and the victim's ex-boyfriend had keys to the victim's apartment. As a matter of law, pursuant to McArthur, supra, the evidence is insufficient to support the verdict. The conviction must be reversed, not only because the state failed to prove that Kimbrough was the murderer, but also because the state failed to prove a premeditated murder.

INSUFFICIENT EVIDENCE OF PREMEDITATION

For a killing to constitute premeditated murder in the first-degree the state must establish not only that the accused committed the act resulting in the death of another, but also that before committing the act he formed a definite purpose for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968). Premeditation is the one essential element distinguishing first-degree murder from second-degree murder. See Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986) ("Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill."); Owens v. State, 441 So.2d 1111 (Fla. 3d DCA

1983). More than an intent to kill must be shown to sustain a first-degree murder conviction. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983).

The state at trial argued that Collins was raped and savagely beaten. Assuming, arguendo, that Kimbrough was the assailant, can it reasonably be said beyond a reasonable doubt that the beating was first-degree premeditated murder? If Kimbrough was Collins' assailant, he may well have intended to inflict severe injury upon her for an unknown reason, but as a matter of law that provoked reaction does not equate with a deliberate, conscious purpose to effect the death of another. Though premeditation can be proved by circumstantial evidence, as a matter of law that evidence must be inconsistent with any premise other than that the person was killed by someone consciously intending to do so before it is sufficient to support a conviction for first-degree premeditated murder.

The evidence in this case is legally inadequate to support the conviction because the evidence fails to establish that Darius Kimbrough was Collins' murderer. There is no direct evidence that is inconsistent with the legal presumption that Kimbrough is innocent. Therefore, the state failed to adequately prove that the death of Denise Collins was caused by the criminal act or agency of Darius Kimbrough. Assuming that Kimbrough was Collins' assailant, the evidence is silent on the motive for the murder. It is equally likely that the blows were struck out of rage and pain, that is, as a totally non-premeditated reaction to

resistance by the victim. See Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) ("A rage is inconsistent with the premeditated intent to kill someone[.]") (emphasis added). The injuries that were inflicted on Collins, though severe, were not such that would allow the jury to conclude beyond a reasonable doubt that Collins' assailant deliberately and consciously intended that she be killed, especially where the testimony establishes that Collins lived for more than 24 hours after the injuries were inflicted. Had her assailant been intending that she be killed, ample opportunity was present whereby Collins could have been readily dispatched. In fact, assuming that Kimbrough was the assailant and a neighbor, it would seem that he would have hastened to kill Collins so that she could not identify him rather than have her linger for at least one day before dying.

As a matter of law, the evidence in this case is simply inadequate. The conviction rests on pure speculation. A first-degree murder conviction that rests on such equivocal evidence violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the conviction must be reversed and Kimbrough discharged from Florida custody.

POINT II

THE TRIAL COURT ERRED BY PROHIBITING THE DEFENSE TO INTRODUCE TESTIMONY ABOUT OTHER CRIMES, WRONGS OR BAD ACTS WHERE SAID TESTIMONY WAS RELEVANT TO A MATERIAL ISSUES AT TRIAL.

In Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), the Court declared that any fact relevant to prove a material issue is admissible into evidence even though it points to a separate crime, unless its admissibility is precluded by a specific rule of exclusion. Evidence of collateral offenses is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. Id. at 662. Evidence of other crimes or bad acts is admissible, however, where such evidence shows motive, intent, absence of mistake, common scheme, identity or a system or pattern of criminality. Id. The question of relevancy of this type of evidence should be cautiously scrutinized; but, relevancy is the test. Castro v. State, 547 So.2d 111, 114 (Fla. 1989).

Section 90.404(2)(a), Florida Statutes (1991) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact an 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.

This statute is a codification of the Florida law discussed above and the evidentiary rule is now commonly called the Williams Rule. The evidence frequently evaluated under this rule is

commonly referred to as similar fact evidence. However, evidence of collateral crimes is admissible under the Williams Rule not because it is similar to the crime at trial, but because it is relevant to prove a material fact or issue in the trial, other than the defendant's propensity or bad character. Castro v. State, 547 So.2d 111, 114-115 (Fla. 1989). Thus, it can be confusing to refer to this evidence as similar fact evidence because the similarity of the facts involved in the collateral crimes does not insure relevance or admissibility; likewise, evidence of collateral crimes may be relevant and admissible though not similar. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989). Similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible, unless specifically excluded by a rule of evidence; a similar fact crime or "fingerprint crime" is simply one way to show relevance, and this does not bar the introduction of evidence of other crimes which are factually dissimilar to the crime charged if the evidence of other crimes is otherwise relevant to a material issue. Id.

The criteria to use in conducting a Section 90.404(2) and Section 90.403 evaluation include: the strength of other evidence available to the defense to prove the material fact; whether the state is disputing the material fact and if so how vigorously; the emotional impact of the collateral crime evidence; the similarities between the collateral crime and the crime charge; the proportion of evidence of collateral crimes *vis*

a vis direct evidence of the crime charged; whether the state or the defense adduced the collateral evidence; the nature of the crime charged; and, whether there is a proper jury instruction pertaining to the collateral crime evidence. See Huddleston v. United States, 485 U.S. 681, 689 n.6 (1988); See also Ehrhardt, Florida Evidence, Section 404.9 (1993).

In the instant case, the state objected to testimony that showed that Denise Collins' ex-boyfriend, Gary Boodhoo, had beaten her when they lived together in Boston the year before. The State's objection to the above evidence was sustained.

Well before trial, the defense gave notice of its intent to use similar fact evidence. At trial, the defense argued that the collateral crime evidence was relevant and admissible, because it supported the defense theory that Boodhoo was the murderer. It was the defense contention that only Boodhoo had the motive and opportunity to commit the murder. Boodhoo was a spurned ex-boyfriend who wanted to be back together with Denise Collins. He was with Collins and other friends the night of the murder. He would stay with Collins four nights a week, however, on this particular night for some unexplained reason after 11:00 p.m. he drives back to Titusville instead of staying with Collins. He had a key to the apartment which would explain why there was no forced entry into the apartment. The victim's mother testified that she heard the noise of a metal ladder and Boodhoo's voice outside his daughter's apartment window days before the murder.

The murder of Denise Collins and the beating of Collins by Boodhoo were not so remote in time that the evidence was not probative or relevant to the defense's theory of the case. See Duckett vs. State, 568 So.2d 891 (Fla. 1990) (Testimony of petite 19 and 18-year-old women concerning police officer's "passes" at them made while he was in patrol car, on duty, and in uniform was admissible similar fact evidence in prosecution of officer for sexual battery and first-degree murder of 11-year-old girl, relevant to establishing officer's mode of operation, identity, and common plan). This is especially true where Boodhoo was a suspect because there was evidence that Boodhoo attempted the unique entry of Collins' apartment by a ladder to the balcony in the general time period of the murder and had keys to the apartment to explain that there was no forced entry. By improperly excluding this similar fact evidence, the trial court prevented the appellant from presenting his defense. Accordingly, the trial court's failure to exclude the similar fact evidence denied Appellant a fair trial.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT FINDING THE STATUTORY MITIGATOR OF AGE AT THE TIME OF THE OFFENSE.

In the sentencing order, the trial court did not find the statutory mitigation of the age of the appellant at the time of the offense.[5] The reasons for determining that this statutory mitigator was not present is twofold: the defense did not show that the appellant was "impaired" in any way; and the fact that appellant did not finish high school does not indicate a lack of maturity or appreciation of the crime. The appellant asserts that the trial court abused its discretion in failing to find the statutory mitigating factor of age.

IMPAIRMENT

The trial judge gave a lot of consideration to finding that the defense made no showing that the appellant was impaired and that the defense counsel did not share the results of the confidential psychiatric evaluation for "tactical reasons." This implies that had the defense been forthcoming with the psychiatric evaluation it would have been damning to the propriety of this mitigating factor. Appellant asserts that it is improper for the trial court to consider such factors in assessing the propriety of this mitigator.

APPELLANT HAD NOT COMPLETED HIGH SCHOOL

The trial judge determined that the appellant had not completed high school at the time of the offense. The trial

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[5] Florida Statute 921.141(6)(g).

court summarily reasoned that this fact does support the assertion that appellant's age is not mitigating. This finding is contrary to the evidence. The defense asserted that had the average maturity or below average maturity for his age as a result of being engaged in the school system with peers that are years younger. This is a logical inference from the fact that he had an academic peer group that was younger.

ARGUMENT

The appellant contends that when the accused is nineteen years old at the time of the offense there is a presumption the statutory mitigator should be given great weight because society has a responsibility in overseeing the welfare of the young. In Ellis v. State, 622 So.2d 991 (Fla. 1993) this Court stated that it was gravely concerned over the inconsistencies upon which this statutory mitigator was being weighed for minors. This Court concluded that for minors the "mitigating factor of age must be found and weighed, but the weight can be diminished by other evidence showing unusual maturity." Ellis at 1001. Concerning the instant case, there is no immediate change in maturity on the eighteenth or nineteenth birthday. Likewise, to say that since one year passed since the time Kimbrough was a minor and the instant offense this statutory mitigator should be considered any less is arbitrary and should be ignored. Appellant contends that under Ellis there is a strong presumption that the statutory mitigator is present and should be given weight. This mitigator should be given

little weight only if the state provided ample competent evidence that Kimbrough possessed unusual maturity at the time of the offense. A review of the trial judge's sentencing order above demonstrates that Kimbrough had an unstable childhood and did not finish high school, and that evidence of unusual maturity was absent. See Morgan v. State, 639 So.2d 6 (Fla. 1994) The trial judge improperly weighed the mitigating factor herein and resulted in an unreliable judgement and sentence, and this court should reverse the sentence of death and reduce the sentence of appellant to life.

POINT IV

KIMBROUGH'S DEATH SENTENCE IS DISPROPORTIONATE IN CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE TRIAL COURT IMPROPERLY WEIGHED THE MITIGATING CIRCUMSTANCES.

The trial court found three aggravating circumstance, i.e., felony murder, prior violent felony and heinous, atrocious and cruel. The Heinous, Atrocious and Cruel (HAC) aggravating circumstance and felony murder aggravating circumstance was improperly found (See Points Five and Seven). Therefore, the aggravating circumstance prior violent felony is not especially compelling. Unfortunately today it is in fact rather ordinary, found in a large number, if not most murders. Against the backdrop of this routine aggravator, this Court must consider Darius Kimbrough's youth, his lack of a significant past criminal history, and unstable childhood. Considering the spectrum of capital cases that this Court reviews, this case simply does not qualify as one warranting the imposition of the ultimate sanction.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973);

See also Coker v. Georgia, 433 U.S. 584 (1977)[6] This Court reviews "each sentence of death issued in the state, " Fitzpatrick v. State, 427 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Darius Kimbrough's case is neither "the most aggravated" nor "unmitigated."

Performing a proportionality review, this Court should strike Darius Kimbrough's death sentence. In Rembert v. State, 445 So.2d 337 (Fla. 1984) the Defendant was convicted of first-degree felony-murder and robbery. After drinking for part of the day and worrying about how to make his car payment, Rembert entered the victim's bait and tackle shop. He hit the elderly victim in the head once or twice with a club and took forty to sixty dollars from the victim's cash drawer. Shortly thereafter, a neighbor entered the shop and found the victim on the floor, bleeding from his head. He died several hours later of severe injury to the brain. Rembert was charged with first-degree felony murder and robbery. The jury convicted him of both counts as charged and recommended the death sentence. The trial court sentenced Rembert to death for the murder and to

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[6] The requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence.

life imprisonment for the robbery, but later deleted the sentence for robbery.

This Court found that one statutory aggravating factor had been established, i.e., during commission of a felony. Rembert introduced a considerable amount of nonstatutory mitigating evidence, but the trial court chose to find that no mitigating circumstances had been established. This Court held:

> Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here.{Footnote} Compare Swan v. State, 322 So.2d 485 (Fla.1975). We therefore vacate the death sentence and remand for the trial court to impose a sentence of life imprisonment with no possibility of parole for twenty-five years. Rembert's convictions are affirmed.
>
> {Footnote} At oral argument the state conceded that in similar circumstances many people receive a less severe sentence.

Rembert at 340,341.

In Caruthers v. State, 465 So.2d 496 (Fla. 1985), a clerk at a convenience store was found lying motionless behind the counter, with the cash register open. Approximately $55 was missing. A white car with a dark top had been observed accelerating rapidly out of the store parking lot. An automobile with a similar description had been reported stolen, and police investigation led to the stolen car, abandoned with the motor still running. Caruthers was subsequently arrested and confessed.

According to Caruthers, he had drunk a considerable amount of beer that day and after an outing with friends he

decided to steal a car and drove to a friend's home and got a gun. He stated that someone had wanted him to shoot a big dog that bothered the children. Unable to find the dog, he went to the convenience store. He decided to rob the store and drew the gun on the victim. Caruthers stated that he had not wanted to hurt her, but that she jumped and he just started firing, shooting her three times. He was charged with premeditated and felony murder in the first degree, robbery with a firearm, theft of the car, and theft of the gun.

The jury found him guilty as charged on all counts. At the sentencing phase, several members of his family testified regarding his devotion to his younger brother, kindness toward others, parental love, church activities, and favorable school record. Appellant, age twenty-two at the time of the murder, also testified. It was established that his only previous conviction was for the misdemeanor of stealing a bicycle about a year earlier.

The jury recommended the death penalty, and the trial court imposed sentence in accordance with the jury's recommendation. This Court concluded that there was one valid aggravating circumstance, that the murder was committed while the defendant was engaged in the commission of an armed robbery, and one statutory mitigating circumstance, no significant history of prior criminal activity, and several nonstatutory mitigating factors and held:

> Our review process in capital cases insures proportionality among death sentences, and it

> is an inherent part of our review, whether or not we mention the review process in our opinion or mention other capital cases. See Booker v. State, 441 So.2d 148 (Fla.1983); Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). We have conducted a proportionality comparison with other capital cases to determine whether death is the appropriate sentence in this case, and we find that it is not.

Caruthers at 498.

In Proffitt v. State, 510 So.2d 896 (Fla. 1987) defendant was initially tried and convicted for first-degree murder and originally sentenced to death. The evidence at trial revealed that Proffitt, while burglarizing a house, killed an occupant with one stab wound to the chest while the victim was lying in bed.

The trial court resentenced Proffitt to death, finding the following aggravating circumstances: (1) the murder occurred during the commission of a felony (burglary), and (2) the murder was committed in a cold, calculated, and premeditated manner. In mitigation, the trial court found that Proffitt had no significant history of criminal activity, and recognized nonstatutory mitigating evidence from Proffitt's family, former co-workers, religious advisers, and others.

Proffitt argued that the death sentence in his case was disproportionate. He claimed that this Court has never affirmed the death penalty for a homicide during a burglary unaccompanied by any additional acts of abuse or torture to the victim, where the defendant has no prior record of criminal or violent

behavior. Moreover, Proffitt argued that this Court had consistently reversed death sentences in these types of felony murder cases with or without jury recommendations of life relying on Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983); Menendez v. State, 368 So.2d 1278 (Fla. 1979).

In overturning Proffitt's death sentence this Court held:

> Here, not only is there no aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances. Co-workers described Proffitt as nonviolent and happily married. He was employed at the time of the offense and was described as a good worker and responsible employee. This testimony was unrefuted. The record also reflects that Proffitt had been drinking; he made no statements on the night of the crime regarding any criminal intentions; there is no record that he possessed a weapon when he entered the premises; and the victim was stabbed only once. Additionally, following the crime, Proffitt made no attempt to inflict mortal injuries on the victim's wife, but immediately fled the apartment, returned home, confessed to his wife, and voluntarily surrendered to authorities. To hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty. We hold that our decisions in Rembert and Menendez require this Court to reduce the sentence to life imprisonment without the opportunity for parole for twenty-five years.
> Proffitt at 898.

In Lloyd v. State, 524 So.2d 396 (Fla. 1988) the defendant appealed his conviction of first-degree murder and

sentence of death. In Lloyd, the victim was murdered in her home. The victim's five-year-old son, testified that he was in the garage when a man came to the door; that he went in the house and saw who was at the door and that the man had a beard and a mustache and was wearing driving glasses; that he was a guitar player and had a suitcase and a gun; that he told the child and his mother to go into the bathroom; that his mother got shot twice and that prior to her being shot the man told his mother to give him money; that his mother had her wallet out and tried to give the man money and a ring. The child stated that after the shots the man went outside.

During the penalty phase, appellant presented testimony from his wife, his nine-year-old daughter, and other family members that he was a good husband and father, and from an employer that he was a good, dependable worker. The trial court also found that Lloyd had no significant history of prior criminal activities. This Court concluded that the death sentence is supported by just one aggravating circumstance--that the murder was committed during the course of an attempted robbery--and one mitigating circumstance--that the appellant had no significant history of prior criminal activities, and held:

> A review of our prior decisions requires us to conclude that the imposition of the death penalty on this record is proportionately incorrect, and, consequently, the death penalty must be vacated and a life sentence imposed. See Rembert v. State, 445 So.2d 337 (Fla.1984); see also Proffitt v. State, 510 So.2d 896 (Fla.1987); Swan v. State, 322 So.2d 485 (Fla.1975).

Lloyd at 401.

MITIGATION

Appellant argues that the facts surrounding the murder in the instant case are no more aggravated than in the series of cases listed above. Appellant further contends that there is as much mitigation presented and found in the instant case than the series of cases listed above. For example, this Court should consider, unlike the trial court, the age of the Kimbrough. The murder occurred just past his nineteenth birthday. Kimbrough was also found to have an unstable childhood.

The trial court concluded that the record failed to disclose any impairment that would reduce Kimbrough's chronological age. Moreover, the Court totally ignored the unrefuted testimony that Kimbrough had not completed high school. The trial court failed to recognize that there is a presumption that of tender years when an individual is under twenty-one years of age, and unless there is evidence presented that demonstrates the defendant is exceptionally mature for his chronological age, then the statutory mitigating circumstance is proven.

Kimbrough presented evidence of six mitigating circumstances:

(1) The age of Kimbrough;

(2) Unstable childhood;

(3) Maternal deprivation;

(4) Father figure was an alcoholic;

(5) Dysfunctional family;

(6) Talent for singing.

Although the state argued and the court found that three aggravating circumstances were applicable, there is competent evidence of one statutory aggravating factor, that being a prior violent felony.

The trial court disagreed that the evidence supported age as a statutory mitigating circumstance and several non-mitigating circumstances. The court found that Kimbrough had:

(1) Unstable childhood;

(2) Father figure was an alcoholic;

(3) Dysfunctional family;

(R598, 599) However, the trial court found that these elements in mitigation were entitled to be given weight. (R600)

The Trial Court Improperly Rejected Unrefuted Statutory and Non-Statutory Mitigating Circumstances.[7]

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court enunciated a three part test:

> [T]he trial court's first task....is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the

[7] The discussion of the Statutory Mitigating Circumstances are presented in Points IV and V respectively.

> defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of the sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. Accord Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Hardwick, 521 So.2d at 1076.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court quoted prior federal and Florida decisions to remind trial courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) and Rogers v. State, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or nonstatutory), the trial judge must find that mitigating factor. Although the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight. Campbell, 571 So.2d at 419-20.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court held that, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert, 574 So.2d at 1066. A trial court may reject a mitigating circumstance as not proved, only where the record contains "competent substantial evidence to

support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1987); Cook v. State, 542 So.2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

In the instant case, the trial court improperly rejected Kimbrough's age as mitigating and that Kimbrough suffered from maternal deprivation.

Conclusion

To be sure, the instant case is not the most aggravated and least mitigated murder to come before this Court. On the contrary, this case is one of the least aggravated and most mitigated. The sentence of death in this case is disproportionate when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. When compelling mitigation exists such as that existing in this case, some of which was found by the trial judge, the death penalty is simply inappropriate under the standard previously set by this Court.

POINT V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

There was no direct evidence presented on how Denise Collins was murdered. The medical examiner testified that Collins received three distinct blows to the head. One blow to the head was so severe that in the opinion of the medical examiner the victim would have been rendered unconscious immediately. The trial court emphasized that there was sign of a struggle to support the fact that the victim was aware of the attack and suffered great fear and pain. This is pure speculation.

Appellant submits that there was no testimony that the victim was aware of her impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the blow to the head. It is fair to conclude due to the lack of evidence that Denise Collins lost consciousness immediately upon being attacked. Appellant contends that the HAC aggravating factor was not proven beyond a reasonable doubt.

"A homicide is especially heinous, atrocious or cruel when 'the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Boenoano v. State, 527 So.2d 194 (Fla. 1988), quoting State v. Dixon, 283 So.2d 1, 9

(Fla. 1973). "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to the question of whether the capital felony itself was especially heinous, atrocious, or cruel." Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); See Halliwell v. State, 323 So.2d 557 (Fla. 1975).

A judge may properly instruct on all of the statutory aggravating circumstances, notwithstanding evidentiary support. Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982); See also Jacobs v. Wainwright, 450 So.2d 200, 202 (Fla. 1984) (reading verbatim all statutory aggravating and mitigating). It is not improper for a judge to refuse to instruct the jury on mitigating circumstances that are not supported by the record. Roman v. State, 475 So.2d 1228, 1234 (Fla. 1984) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1984)("We find no error. The judge followed the standard instructions and specifically addressed all circumstances and gave instructions of those aggravating and mitigating circumstances for which evidence had been presented.") The note to the judge contained in the Standard Jury Instructions in Criminal Cases, 2d Ed. expressly states, "Give only those aggravating circumstances for which evidence has been presented", p. 80 (emphasis added).

In the instant case, the trial court did not instruct

on all the aggravating circumstances. The trial court elected to instruct on only those aggravating circumstances which he believed were supported by the evidence. Therefore, appellant contends that the trial court erred in instructing the jury on the aggravating circumstances of an especially heinous, atrocious or cruel murder where a timely objection was made and where there was no evidentiary support whatsoever for the instruction. It is expressly submitted that giving the unsupported instruction over objection violated the Eighth Amendment, in that the presence of that legally improper instruction was confusing and misleading to the jury concerning their recommendation of the appropriate sanction.

The presence of the instruction was prejudicial and confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if unobjected to, is apparently not reversible error. See Straight v. Wainwright, supra. The jury in this case received instructions on only three aggravating circumstances.

This particular aggravating circumstance, due to the subjectivity involved, violates the Eighth Amendment because it fails to adequately channel the discretion of the jury.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge of balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of

judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973)(emphasis added). See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. George, 446 U.S. 420 (1980).

The jury in this case where the defendant was a black man and the victim was a white woman ought not to have had before them the consideration that the murder was especially heinous, atrocious or cruel. In the instant case, the natural racial tension involved in such a crime makes such a vague instruction as HAC extremely prejudicial to a black defendant to the extent that the weighing of aggravating and mitigating factors is completely compromised.

The instruction also should have not been given because clearly as a matter of law there was not sufficient competent evidence to support the means and method of the victim's death. It was nothing more than speculation that the victim died as the state theorized. Moreover, the trial court should not have found this aggravating circumstance. In the trial court's sentencing order it stated:

> The last moments of Denise Collins life were a nightmare. First, she discovered a stranger in her bedroom, then she was raped by that stranger. After that she was beaten, and her head was banged against the wall. She had to be in unspeakable fear and pain. (R597)

Appellant submits that the trial court erred by finding beyond a reasonable doubt that the victim died as stated above. The state presented no evidence that the victim suffered any pain at all.

Appellant further submits that the trial court erred in detailing the events that led to Appellant's death (as if the trial court was there) where there was no evidence introduced to support these course of events. Again the state presented no evidence other than that the there was a single fatal blow to the head of the victim. The trial court's finding that Kimbrough raped the victim before she was beaten where it is unknown in what sequence of events the rape took place.

In anticipation of an argument by the State that the error is harmless, it is submitted that the erroneous presence of this particular instruction led the jurors to conclude, and reasonably so, that they were entitled to consider whether in their opinion these murders were especially heinous, or cruel and to base the death recommendation on this erroneous consideration. Furthermore, the trial court relied upon this aggravating factor in determining that death was the appropriate sentence in this case. The jury would not appreciate, in the absence of a separate instruction in that regard, that acts on an unconscious victim could not support the circumstance. See Halliwell supra. A lay person would inevitably conclude that these murders were especially heinous, atrocious or cruel. The State cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 531 So.2d 133 (Fla. 1988); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

The death sentence must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. These violations were caused by the presence of an improper instruction and finding by the trial court that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

POINT VI

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE ONE QUALIFIED JUROR OVER DEFENSE OBJECTION.

Introduction

The law is clear that prospective jurors may not be excluded for cause "simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Lockhart v. McCree, 476 U.S. 162, 176 (1986). This principle was reaffirmed by the United States Supreme Court in Gray v. Mississippi, 481 U.S. 648 (1987). There, the Court reiterated what the constitutional standard to be used to determine if a juror may be excluded for cause as being not whether the juror would have a difficult time imposing the death penalty; rather "the relevant inquiry is whether the jurors views would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." Gray v. Mississippi, 481 U.S. at 658, quoting Adams v. Texas, 448 U.S. 38, 45 (1982). See also Wainwright v. Witt, 469 U.S. 412, 424 (1985).

The constitutional basis of that standard was emphasized in Gray:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

Justice Rehnquist in writing for the Court,

> recently explained: "It is important to remember that all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases as long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interests in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 U.S. at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack(s) the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 U.S. at 523.

Gray v. Mississippi, 481 U.S. at 658, 659.

In Adams v. Texas, 448 U.S. at 49, the Court ruled that jurors could not be excluded if they stated they would be "affected" by the possibility of the death penalty since such indication could mean "only that the potentially lethal consequences or decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally."

> Neither nervousness, emotional involvement, nor inability to deny or confirm any affect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently

> insufficient under the Sixth and Fourteenth Amendments.

448 U.S. at 50. The standard for limiting the exclusion of jurors was specifically approved by the court in Wainwright v. Witt, 469 U.S. at 423-424, which also reiterated that the burden of demonstrating that the challenged juror would not follow the law in accordance with his oath and that the instruction of the court is on the party seeking exclusion of the juror, i.e., the State. Id. In the present case, it is clear that prosecution did not meet its burden to establish exclusion.

Juror Alexander

It is not clear whether Juror Alexander had strong feelings for or against capital punishment. From the jury questionnaire and subsequent questioning it was disclosed that Alexander had a friend that was on death row whom may have been subsequently executed. When asked the general question would it be difficult to sit on a death case, Alexander naturally replied "yes". When asked whether she could recommend the death penalty to someone else she replied: "It's hard to say really." (PP 97) However, when asked whether the death penalty was sometimes appropriate, Juror Alexander replied "Yes." Then the state asked whether Juror Alexander could be fair and impartial in judging issues of the death penalty having had a personal relationship with people involved in the process, wherein Juror Alexander replied "no."

At this point Juror Alexander had not been explained the role the juror plays in the capital punishment scheme in

Florida. In the rehabilitation of Juror Alexander, defense counsel explained the process the court will following in the proceeding and the role Juror Alexander would play. Then after the defense counsel instructed Juror Alexander on how the process works, Juror Alexander initially answered that "maybe" she could follow her oath as a juror in this case. The defense counsel then pressed Juror Alexander for a more definitive answer wherein Juror Alexander stated that she could follow the law and serve on the jury. (PP103)

It is clear from Juror Alexander's answers that, to the day of trial, she'd never considered the issue of capital punishment. She wrestled with the issue throughout voir dire. Her answers made it abundantly clear that he did not know the procedure of the law, but was willing to learn to apply the law in an appropriate case. As would any reasonable person who had a friendly relationship with a person executed in Florida, Juror Alexander recognized that passing judgment that a fellow human being should die is a momentous decision, not to be taken lightly. The State seemed to read juror Alexander's hesitancy to kill an individual as an inability to recommend death in the appropriate case. Alexander's answers revealed the contrary. Although a decision to impose the death penalty was a weighty one for Juror Alexander (as it should be) she never expressed an irrevocable commitment to vote for a life sentence regardless of the evidence. In fact, she stated that in some cases the death sentence was likely an appropriate sentence. And, when explained

how the process works, she concluded that she could follow the judge's instructions and could obviously consider a death recommendation if warranted by the evidence and the law.

Conclusion

The erroneous exclusion of even one juror in violation of the Adams-Witt-Gray standard is constitutional error which goes to the very integrity of the legal system and could never be written off as "harmless error". Gray v. Mississippi, supra; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So.2d 172 at 174-175. "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the constitution." Witherspoon, 391 U.S. 519-523.

The State is not permitted to so stack the deck against the defendant and thus deprive him of due process of law. Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for new trial before a fair and impartial jury.

POINT VII

> THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A SEXUAL BATTERY.

The trial judge found the existence of Section 921.141(5)(e) as follows:

> Denise Collins was brutally raped in her bed in the middle of the night by the Defendant. The DNA evidence matched that of the Defendant. The bruises on her arms are indicative of being held down. The evidence presented was that the victim and the defendant did not know each other and that the Defendant gained entry into her apartment through the sliding glass door of her second-story apartment balcony.

(R 596)

Section 921.141(5)(d), Fla.Stat. (1991) provides: "The capital felony was committed while the defendant was engaged in the commission of sexual battery." For this aggravating circumstance to stand the state must prove beyond a reasonable doubt that before the murder occurred the crime of sexual battery was complete and that sufficient penetration occurred. See Buford v. State, 403 So.2d 943 (Fla. 1981).

It appears that the trial judge found the existence of this aggravating circumstance because it accepted the state's speculative theory of the case without the sufficient evidence to prove the aggravating factor beyond a reasonable doubt. In Atkins vs. State, 452 So.2d 529 (Fla. 1984) defendant was convicted of first-degree murder and kidnapping, was sentenced to death, and defendant appealed. The trial court found that the murder was committed "while the defendant was engaged in the

commission of [or flight after committing] a Sexual Battery." Atkins at 945. Atkins was initially charged with murder, kidnapping, and sexual battery. At the close of the state's case, the court granted the defendant's motion for judgment of acquittal on the charge of sexual battery. The appellant's pre-trial statement, admitted into evidence at trial, indicated that sexual battery had occurred, but there was no physical evidence to so indicate. Therefore the court entered judgment of acquittal on the ground that there was no independent proof of the corpus delicti. However, the court later ruled that the confession was a sufficient basis to establish that sexual battery had occurred for purposes of finding that the murder was committed while engaged in or following a sexual battery, an aggravating circumstance under Section 921.141(5)(d), Florida Statutes (1981). This Court held that:

> In proceedings held under section 921.141 for determination of the appropriate sentence upon conviction of a capital felony, aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by judge or jury. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Williams v. State, 386 So.2d 538 (Fla.1980); State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Atkins at 946.

In the instant case, the testimony of the medical examiner was that the cause of death was severe blunt force trauma to the victim's head. The medical examiner further testified that the redness of the victim's vaginal area was

consistent with sexual battery. Two key areas of proof are missing: one, that the sexual activity, if any, was non-consensual; two, the sexual activity tied to appellant through the DNA testing occurred during the course of the fatal beating.

The lack of evidence on these two areas of proof demand the finding that this aggravating factor was not established beyond a reasonable doubt. Because the evidence in this case fails to show beyond a reasonable doubt that the murder occurred during the commission of a sexual battery, this aggravating circumstance must be stricken, the death sentence vacated, and the matter remanded for resentencing with a new penalty proceeding.

POINT VIII

SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL.

1. The Jury

a. Standard Jury Instructions

Appellant made numerous requested changes to the Florida Standard Jury Instructions. The trial court denied all requested changes. The Appellant submits that the jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T 882) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be

included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little discretion by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[8]

ii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it

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[8] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the holding in Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[9] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[10]

Florida's history of racially polarized voting, discrimination[11] and disenfranchisement,[12] and use of at-large

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[9] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[10] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[11] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[12] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Ninth Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial. These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially

discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

5. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive gambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is

rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[13] The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to

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[13] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

political assassinations or terrorist acts,[14] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[15] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989)

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[14] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

[15] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

(absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[16] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it

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[16] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavor mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[17] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[18] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due

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[17] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[18] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Park, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States

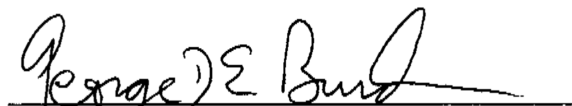
Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

Based upon the foregoing reasons, authorities and arguments, Appellant respectfully requests that this Honorable Court reverse his convictions, vacate his sentences and remand this cause to the trial court with directions that Appellant be released from custody.

Respectfully submitted,



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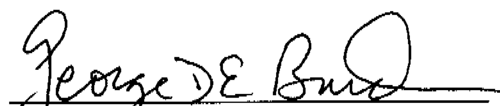
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal, and mailed to Mr. Darius M. Kimbrough, #374123 (42-1131-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 14th day of September, 1995.



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