October 12, 2010

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: George Wallace Brown vs. State
Appeal No. 78,007

Dear Mr. White:

Enclosed for filing in the above-styled cause are the original and seven (7) copies of the redraft of Initial Brief of the Appellant within 100 page limit per court's order. I sincerely hope this will be acceptable. The motion should be self-explanatory.

Sincerely,

RONALD E. SMITH
Attorney at Law

/pc

Enclosures: noted above

xc: Attorney General

Re: Your appeal 78,007

Dear Mr. Brown:

Enclosed is a copy of the redrafted brief that I filed in your case after the court belatedly denied my motion to extend page limits. After a great deal of sifting I managed to add issues, argument and case law while grammatically and stylistically limiting page numbers. The Attorney General's Office has 45 days to file their answer, unless they request and get an extension. If you have any questions about the brief, please let me know.

Sincerely,

Ronald E. Smith
Attorney at Law

/pc

Enclosures: noted above

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| GEORGE WALLACE BROWN, | : | |
| Appellant, | : | |
| vs. | : Case No. | 78,007 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| _____: | | |

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

# INITIAL BRIEF OF APPELLANT

RONALD E. SMITH
ATTORNEY AT LAW

FLORIDA BAR NO. 0349232
(678) 462-7777

ATTORNEY FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)



OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

## STATEMENT OF CASE

On July 12, 1990, a Polk County grand jury indicted Appellant, GEORGE WALLACE BROWN, for first-degree murder of Horace D. Brown between April 22 and May 2, 1990. (R. 1425-1428) Public defender filed a standard pre-printed motion for continuance of trial for one trial cycle[1] and someone marked a pre-printed box for defendant's waiver. (R. 1443) Motion was granted on September 27, 1990. (R. 1436-1440) On October 19, 1990 public defender filed a motion to withdraw as counsel due to conflict of interest. (R. 1463-1464) A private attorney was appointed on October 26, 1990. (R. 1467)

On January 7, 1991 defense attorney, notice court with copies to State Attorney and Trial Coordinator stating in part that "it would be unconscionable to require defendant to remain in jail for more than two additional months because of [prosecutor's] scheduling conflicts," and requested trial be set February 11, 1991, to avoid bringing defendant to trial for murder after "almost one year in jail before trial" (R. 1998, see also 2004) but

> "management of the docket must control....[t]he case will be scheduled to begin on February 11, 1991 for a ten-day trial. I would suggest that sufficient time exists for the State to assign a qualified prosecutor to the case and to have that person prepared to go to trial by that date."

(Court's response at R. 1999)

March 1, 1991, court denied motion to compel state to provide evidence regarding ongoing investigations of "serial killings," known as "Gainesville murders." (R. 1864-1942, 1943-1963) Defense counsel filed a second such motion on March 12, 1991 (R. 1965-1968), but the court denied that motion during jury selection (R. 523-528), by granting state's motion in limine opposing that discovery. (R. 2018-2019,

[1]"Trial cycle" is an undefined period of time in Tenth Judicial Circuit, which may last between five and seven weeks and discussed under the speedy trial issue to this brief.

2023)

March 15, 1991, appellant moved the court to discharge defendant on outstanding charges due to denial of speedy trial (R. 1973-1996). Appellant noticed hearing for April 5, 1991 on motion and a second motion for discharge on April 1, 1991. (R. 2000-2002) On April 5, 1991, the judge authorized another defense attorney to represent a key third party witness to aid in discovery of prime "serial killer" suspect, Danny Harold Rolling, regarding similar murder circumstances of this case. (R. 2008-2014, 2017)

April 5, 1991 the judge denied motion for discharge. (R. 2015, 2017) and April 16, 1991 state moved court to limit defense presentation of evidence and argument that: (1) defendant attempted discovery of relationships of this case to murders in Gainesville, Florida, in New Orleans, Louisiana, and Dothan, Alabama; (2) any evidence pointing to a particular person other than defendant as responsible for this murder; (3) innuendo that Gainesville murderers committed the murder. (R. 2018-2019)

## STATEMENT OF FACTS

### A. Guilt Phase

On May 1, 1990 at 6:45 p.m. Deputy Richard Lee Hess of the Arapahoe County, Colorado, Sheriff's Department, performed a book-in search of George Brown after Englewood Colorado City Police Department arrested him under a Florida warrant. (R. 626) Deputy Hess searched George Brown and found Horace D. Brown's credit cards with George. (R. 630, 646 L. 17)

After searching and finding credit cards with George's property and without ever advising him of Miranda rights, Hess "asked him about them." (R. 631, L. 11) Brown said "they were his father's and that his father knew all about them." (R. 631) Hess said he "was going to have to go ahead and take the credit cards." Brown said "I don't want to hurt that old man, he knows I've got them and it's OK." (R. 633) Hess asked

Brown how to contact Horace and whether he lived in that area. (R. 634) George said Horace lived in Florida and could only be contacted at work. (R. 634) Hess told Brown he "would have to go ahead and take the credit cards." (R. 634) Brown asked Hess to enter the holding cell, so he could tell him something. (R. 634-635) Hess entered and Brown said "Horace D. Brown is dead. He was murdered eight days ago." (R. 635) Hess looked at Brown in surprise and Brown said "No, no, I didn't do it, but I was the only one that was a witness to it." (R. 635) Hess asked Brown if Horace was his father and Brown said "no ... just a friend." (R. 635) Brown then requested a cigarette and an investigator. (R. 635) At 7:30 or 7:40 p.m. that evening Investigator Roland Lackey of the Arapahoe County Sheriff's Office questioned Brown in a lunchroom. (R. 636, 646) Brown said "I'm kind of involved. I found the body" (R. 647), whereupon Lackey stopped the interview and gave Brown Miranda warnings. (R. 648) Brown signed a waiver form and told Lackey this unrecorded account: (R. 649)

George went to Sam's bar and met a "casual friend" or "casual acquaintance," Horace Brown.[2] (R. 1413, 1415, 650) After drinking together, George asked Horace to take him to his Polk City girlfriend. (R. 654, 972, 1413, 1415) Horace drove his gray Honda to a Seven-Eleven near Highway 98 and 92 where they purchased more beer and Horace placed a ten minute telephone call.[3] (R. 654, 972-973, 1413) On their way to Polk City, Horace said he had to meet someone and drove to a dirt road near

[2]Detective Robert Ore's probable cause statement and trial testimony refers to George's reference to "casual friends" during Lackey and Ore interviews (R. 972, 1413, 1415) However, Lackey testified George said "casual acquaintance" (R. 650) and prosecutor "remembered" they were just "casual acquaintances" during closing arguments for penalty phase (R. 1169), so as to add to state's theory that George was just a casual hitchhiker whom Horace picked up with a car, which he never loaned to a friend. (R. 1159-1160, 1168-1169) Etherington heard George say he hitchhiked to Haines City before bringing "Bobby"'s car (Horace's Honda) to her house on the night of the murder. (R. 783-785)

[3]Prosecutor alone suggested George instead of Horace drove to the scene. (R. 1169) There is no apparent basis for misquoting Ore's and Lackey's testimony.

Interstate 4 and Highway 33. (R. 655, 1414, 973) Horace left his car and sat in a large white with blue or green Chrysler with a man named "Danny" at approximately 10:30 p.m. (R. 655, 1414, 1416, 974-975) After approximately 30 minutes George yelled to Horace he needed to go to Polk City and Horace came to George and told George to leave and return in an hour. (R. 656, 1414, 975) On the way to the girlfriend's house,[4] George bought more beer at a convenience store in Polk City.[5] (R. 654-655, 1416, 973-974) When George returned he could not find the other car, but found Horace Brown's wallet, a watch, papers and his body near a canal further down the dirt road. (R. 657, 1414, 975-978) He found blood on Horace, who was feet first in bushes lying on his stomach.[6] (R. 657, 1414, 1416, 977-978) George tried to find a pulse, got scared and drove to Haines City, where he called Judy Etherington. (R. 657-658, 1416, 1418, 977-978)

Judy Etherington said George lived with her for about three weeks prior to April 22,

---

[4]Etherington verified George had an "ex-girlfriend" in Polk City, but she was presumably the only one in Lakeland. (R. 798) State's theory was that George had only one girlfriend in Lakeland and Polk City destination was a ruse to get Horace into a secluded area carry out a premeditated murder. (R. 1169, 1178)

[5]Alcohol consumption was prevalent that night: George and Horace had a few beers together (R. 650, 971); they bought at least a six-pack of beer at a convenience store enroute to Polk City (R. 654-655, 972-973); George bought a beer entering Polk City (R. 975); George bought a six-pack of Hamms beer on sale at a convenience store after taking the Honda to Judy's house. (R. 787-788) Testimony regarding George's alcoholism and alcohol consumption prior to the murder (R. 1313-1314, 1318-1319, 1348, 1385-1386) were rejected in the findings of fact, "[t]here is not one shred of evidence to indicate Defendant was under influence of alcohol such that his faculties were impaired." (R. 2117)

[6]Detective Ore reported in his arrest warrant affidavit George said Horace was sitting up when George lit his lighter and found Horace's body. (R. 1416, paragraph 6) Neither Lackey nor Ore repeated this at trial, because of Ore's possible typographical error or name switch. Such error suggests continued inaccuracy of Ore's recollection of George Brown's statements.

1990 in her Lakeland home. (R. 774-775, 801) He left their home on foot[7] approximately 6:00 p.m. on April 22, 1990.[8] (R. 780) George called Judy around 9:45 or 10:00 p.m. from Haines City. (R. 781, 1418, 1416) He said he hitchhiked and borrowed a car from a friend "Bobby" so as to return home.[9] (R. 783-784) Judy said George arrived home at 11:00 p.m. driving what later identified as Horace Brown's Honda. (R. 784, 1416, 1419) George told Judy he had to return to Haines City to leave around 4:00 or 5:00 o'clock that morning for a one or two week trucking job. (R. 785) George showed her blood on his shirt sleeve and shirt tail and explained he had been in a bar fight that night in Haines City. (R. 786-787, 1416, 1419) George and Judy drove the Honda to a nearby convenience store and George bought a six-pack of beer.[10] (R. 787-788) He left again at 1:00 or 1:30 a.m. that night. (R. 788) Monday, April 23, 1990 Judy could not find her small half-inch blade pocket knife on her night table. (R. 795-797) George called Judy from Cullman, Alabama, Tuesday, April 24 and from Nashville, Tennessee, Wednesday, April 25, 1990.[11] (R. 791-793, 806-807, 809)

Lackey and Polk County Detective Robert Ore heard George say on Monday, April

---

[7]Judy said they did not have a car and instead used public transportation during a month together. (R. 776) Judy did not know George went to Polk City during this time. (R. 781)

[8]Judy testified they were worried about financial troubles. (R. 777-778) She told Ore they were depressed about not having a money and he, saying he needed to think and he might know where he could get a job. (R. 1418) Judy did not say this at trial.

[9]Bobby Dobbing from Haines City could not identify George in the courtroom (R. 832) after prosecutor attempted a "lineup with only one person in it." (R. 810)

[10]Since Judy was allergic to beer (R. 783) George drank alone. (R. 787-788) Judy never explained whether George drank any of the Hamms in her presence.

[11]George previously told Judy he was driving a truck for one to two weeks through New York and New Jersey, but explained to her during Tuesday and Wednesday collect calls he was giving "Bobby" his truck and George was pursuing his music career in Nashville. (R. 785, 793, 806) Neither state nor defense could find Bobby Ellison with whom George stayed in Nashville. (R. 808, 1418)

23, 1990, he found a checkbook and credit cards in the Honda.[12] He cashed one of Horace's checks for $650.00 to buy a 1980 or 1981 Dodge Colt, after which he drove to Nashville, Tennessee to pursue a music career.[13] Ore's investigation revealed owner of the Tennessee tag, with which Brown drove a '80 - '81 Dodge Colt to Nashville and obtained tag registration within "two days" (R. 1417) identified a man resembling George Brown, who was missing two fingers, but known for over a year only as "K.C. Cannon." (R. 1418) Judy Etherington verified that George used "K.C. Cannon" and "Carl" as stage names when writing and recording his songs. (R. 776) (R. 678-659, 982, 1416, 1417) Unable to get a job he stayed with friends in Nashville, but left for Denver, Colorado after two days.[14] (R. 659, 982, 1417) Brown allegedly told Lackey that when he "went to 4301 South Santa Fe Drive, which was the Mark Claim Motel... he was approached by Englewood officers and arrested on an outstanding Osceola County warrant for auto theft," at which time Lackey ended the interview.[15] (R. 659, 1414)

---

[12]During initial interviews on May 8, 1990 Ore asked Brown for location of Horace Brown's car, driver's license and other papers; George told Ore correct locations already verified by execution of search warrant on May 4, 1990. (R. 1042, 1417) Prosecutor during closing argument suggested George lied about the location of the car and papers so as to misdirect police investigations. (R. 1172) The record does not reflect this.

[13]Brown's accomplishments in country music were to be a highlight of the defense penalty phase. (R. 1295-1296) However, allusion to George's talents were "short changed" by timidity and probable inconsistency in presenting such non-statutory mitigation after counsel argued innocence during the penalty phase.

[14]Investigator Lackey testified George became somewhat leery that he was going to be caught because everybody "on the run"" gets caught in Nashville. (R. 659) However, George's statement to Ore revealed he went to Nashville for a career in music. (R. 1417)

[15]George's recital of an exact address where he was arrested by Englewood Police Department for an outstanding warrant on grand theft auto charges from Osceola County was repeated by Hess and Lackey during trial and prosecutor requested arrest warrant verification. Counsel objected to these statements. (R. 659-660)

Lackey called Polk County Sherrif's Sergeant Davis Edward Kite 11:30 p.m., they arrested Brown on an outstanding warrant for grand theft auto[16], and requested Kite check the crime site. (R. 711-712, 1414) Kite met Deputy Kenneth Powers at the dirt road near I-4 and State Road 33 intersection, smelled something dead and advanced on foot with flashlights. (R. 719, 1414)

Investigator Lackey briefed facts received from Brown to Polk County Sheriff's Detective Robert C. Ore by telephone shortly after midnight on May 2, 1991 while Ore was traveling to the crime scene. (R. 958-959) Ore arrived at the scene and noticed the body was lying in a ditch.[17] (R. 1415, 960-967) Ore noted position of Horace's body feet first into the ditch and lying on its stomach was just as George Brown had described it to Lackey on May 1, 1991 and to Ore on May 8, 1991. (R. 966-967, 1415) But, Ore could not view the body without entering the ditch with a special light. (R. 960, 965, 1415)

The court denied defense objection photographs and a videotape taken at crime scene by Crime Scene Technician Nancy Shipman, because parts were not in focus and parts were editorially focused on the dead body, thereby excluding a fair and accurate representation. (R. 861-864, 863-864)

Medical examiner, Dr. Alexander Melamud, testified the May 2, 1990, autopsy in Lakeland, Florida, revealed Horace's severely decomposed. (R. 593) Parties stipulated

---

[16]Again prosecutor unnecessarily suggests outlaw-ism.

[17]The state emphasised "covered with underbrush and large bushes" element of the area so as to prove a secluded environment where George looked for Horace - alive or dead. Heightened dramatic tension obtained by state's escalation from George's initial description of a "canal" where Horace's body was found - to a depredating "ditch", quoted by later-day officers. The "canal" would contain water and imply exculpating explanations for their presence, i.e. fishing, nature loving or homosexual love-making. "Ditch" implies a non-recreational environment where a robber or killer would plunder and lay waste. Such a change in description can only serve to distract jurors from viewing George as a nearest culpable observer of Horace's death.

to identity of Horace's before before trial. (R. 1787-1788) During autopsy large body parts were skeletonized where maggots, animals and flies had eaten part of the face; the middle portion of the chest, the middle portion of the neck and at least three holes as large as 10 inches in diameter in the torso were noted. (R. 602-603) Clothing including "a light green short sleeved shirt with linear defects on it." (R. 599) The "linear defects" corresponded to the three holes in the front aspect of the body.[18] (R. 599-601, 604-606, 615, 900-902) Decomposition and the hydration changes while left in a wooded area, suggested death eight or nine days prior.[19] (R. 622)

Melamud's examination revealed Horace suffered three wounds to the abdomen and right chest causing hemorrhage of the liver. (R. 604) Melamud requested a radiologist perform X-ray examination and testified the radiologist found "multiple small densities" in the body, ruling out metal bullet like pieces and suggesting stab holes to the torso.[20] (R. 603, 617-619) He could not determine whether Horace's body had been disturbed or even turned over after a significant time during decomposition. (R. 615-616) He could not determine whether Horace was conscious when he was stabbed, because he did not know when stabbings or hemorrhage occurred. (R. 608-609, 1301) He could not tell whether stab holes were more or less attributable to animal bites, maggot

[18]During the guilt phase, Dr. Melamud never referred to the "linear defects" as cuts, which would be clear evidence of a knife. One of them was described as a "tear which was along the seam beginning from the right arm pit down and extending to the back." (R. 600) During testimony from the medical examiner they were generally referred to as "linear defects" or "holes in the shirt." (R. 605) The State's murder theory centers on a stabbing occurring because of Dr. Melamud conclusion; but Dr. Melamud also conceded that the shirt could have prevented decomposition as compared to exposed areas [including the linear defects]. (R. 615, 617)

[19]This corroborates George Brown's statement originally made to Deputy Hess. (R. 635)

[20]Dr. Melamud first said that he performed X-rays looking for foreign objects. (R. 603) Upon cross-examination, he denied expertise of a radiologist and admitted he only quoted a licensed radiologist's test results. (R. 617-619)

burrowing and bug activity, because of marked decomposition.[21] (R. 605, 606, 608-609) He could not tell to what extent holes in the body were attributable to maggot and fly burrowing into Horace's body and how much was attributable to decomposition. (R. 615, 617) Melamud performed body fluid tests and discovered unusually high level of alcohol, .18 grams over decaliter, suggesting Horace consumed an some alcohol prior to death.[22] (R. 620-621)

Detective Joe R. Benavides of Polk County Sheriff's Office testified that on May 3, 1990 he was directed by Sergeant Putnel of the Sheriff's Office to travel to the front parking lot of an Eckerd's Drugstore on Orange Blossom Trail in Orlando, Florida. (R. 866-867) He found the gray Honda where George Brown told Lackey it would be. (R. 868, 1417)

On May 8, 1990 in Arapahoe County, Colorado, without Miranda warnings and again without taping the statements, George Brown told Detective Ore essentially the same facts that he had told Investigator Lackey on May 1, 1990.[23] (R. 969-970; see summary

[21]Condition of the autopsied body significantly distorted medical examiner's estimation of original height and weight and body position during decomposition. Melamud estimated height at 66 inches and weight at 170 pounds (R. 603), but Mrs. Brown said Horace was approximately 5 feet 9 inches (69 inches) tall and weighed about 155 pounds. (R. 842) He was also inconclusive as to whether the body had been turned over or whether the body remained face down during decomposition. (R. 615-617) He even conjectured the face might not have touched the ground (R. 617), contrary to the officers' description. (R. 1414, 657, see Kite & Ore testimony) Non-appearing radiologist's "multiple small densities in the soft tissue" would be testimony (R. 618) and Melamud's ignorance of actual physical properties or location of these "small densities" was defended by "It doesn't have--also I can tell you it doesn't have any diagnostic significance at all." (R. 618)

[22]Defense counsel attempted to proffer evidence that Dr. Melamud could compare Horace Brown's alcohol consumption to .10 Blood Alcohol level DUI standard, however the court sustained state's objection, because Melamud was allegedly unqualified to render such an opinion, and because the questioning was outside scope of direct examination. (R. 620-621)

[23]Ore's initial notes from which he recorded George's statement to him is found summarized in his probable cause statement. (R. 1415-1417)

below in order of trial testimony)

Horace Brown's wife, Jeanene Brown, testified they were married almost 37 years and Mr. Brown was 62 years old at the time of his death. (R. 835, 842) Her husband had retired but started working part-time at Scotty's in Bartow, Florida. (R. 836) Because Horace frequently drove to the beach and remained there all day, Mrs. Brown thought her husband went to the beach on April 22, 1990. (R. 837) She last saw her husband alive about 8:30 a.m. when she returned home from her night shift as a living skill's instructor for Peace River Mental Health Center in Bartow on April 22, 1990. (R. 834, 836-837)

Mrs. Brown never knew George Brown and could not recognize him at trial. (R. 844) She had never heard of a friend of her husband named "Danny" and she had never known her husband to lend his automobile to anyone except family members. (R. 844-845) However, she admitted her husband frequented bars and she did not know whether Horace met George Brown, because she never went with him to bars. (R. 849) Horace traveled frequently to the beach. She was unsure where in Florida that beach would be, but "assumed he meant the causeway between Tampa and St. Pete," because he explained that he went only to the beach along the causeway." (R. 837)

Polk County Sheriff's Detective Joe Benavides testified he saw the dead body at the crime scene and identified photographs. (R. 865-870)

Polk County Crime Scene Technician, Nancy Shipman testified she took extensive crime scene photographs identified Horace's eyeglasses (R. 887), checkbook, billfold (R. 897), beer cans (R. 898) shirt (R. 901), and the videotape of the scene (R. 903)

Emma West, an employee at Sam's Tavern in Lakeland, Florida, could not identify George or Horace's driver's license photograph. (R. 938-940)

Sam Turpin, owner of Sam's Tavern, said he never singled out Horace Brown from his innumerable elderly customers. (R. 940-943)

Bonita Brennan and Lee Ann Boughner, of Siesta Lounge in Lakeland, knew Horace as "peanut man," who regularly frequented their bar, but could not recall George. (R. 943-951 and 951-955) Lee Ann remembered Horace as a recent divorced person after 35 years of marriage. (R. 953, emphasis added)

Detective Robert Ore "did not" give Brown Miranda warnings before questioning him in the Colorado jail on May 8, 1991. (R. 969-70) Ore reasoned Brown had previously signed a Miranda waiver form to Lackey on another day, and Lackey told George he "did not have to speak with [Ore] at all." (R. 970) George told Ore he and Horace were "casual friends." (R. 972) Horace agreed to give George a ride to Polk City after they left the bar. (R. 972) They stopped at a convenience store on Highway 98 "Horace pulled off into the dirt road area which runs east off Highway 33 saying he had to meet someone by the name of Danny." (R. 973, 974) "Horace parked his car, exited and entered the Chrysler." (R. 974) Horace remained in Danny's car car for approximately 30 minutes, before George yelled to Horace that he needed to go to Polk City. (R. 975) Horace walked back to his car and said, "go ahead ... take my car, just come back in about an hour." (R. 975) George drove Horace's vehicle to Polk City, stopped at a convenience store, purchased a beer, drove to a girlfriend's residence who was not home and returned to the dirt road where he had left Horace. (R. 975) George exited the vehicle and walked in front of the car, and found Horace's wallet and papers lying in the dirt road. (R. 975-976) He reportedly called out for Horace and never got a response, then drove Horace's car further down the road, exited and found Horace's watch lying on the side of the road. (R. 976) He walked approximately 50 feet down the road, lit a cigarette and saw Horace's body. He reached down to feel whether Horace was breathing, got blood on his hands, became frightened, reentered Horace's car and left. (R. 977-978) He called Judy Etherington from a Haines City telephone and told her he would go to her home. (R. 978) Upon arrival, Judy noticed

George had blood on him and he said he was "in a fight." (R. 979) He told Judy he had found a job driving up the east coast and was leaving that morning. (R. 979) After taking a shower, washing and packing clothes, he reportedly left Judy Etherington's house and traveled to Orlando where he forged a $650 check and cashed it from Horace Brown's bank account. (R. 980-981) From that amount George purchased another car for $300 and drove to Nashville, Tennessee. (R. 982) Using Horace Brown's credit cards and cash, George stayed in Nashville for several days and drove to Denver, Colorado, because he had lived there several years before. (R. 983) Horacee's credit cards and bank transaction slips, about which Hess first asked George, were then identified and stipulated. (R.987-994) Ore admitted no one taped any interviews with George in Colorado, because George refused to be taped "at the end of the particular interview" Ore wanted to start interview again. (R. 1029-30) George had aa blood stained shirt, but blood type matched George, not Horace. (R. 1034-1035, 1050) There was no blood in Horace's car. (R. 1035) There was no sign or marking to suggest at the scene a struggle or dragging the resting place. (R. 1036) Ore could not explain how or why he believed Horace "got as far back in the bushes as he was and was stabbed in that location based on what [he] saw at the scene." (R. 1045) Ore said he thought the body looked like it had been moved "after it was dead," because of "the manner in which the pants, the way they were located on the body." (R. 1046) George did not resist extradition back to Florida. (R. 1036-1037) George consistently denied killing Horace Brown. (R. 1043-1044) Only upon recross-examination, did Ore agree the "Osceola County warrant" for grand theft auto, had been "dropped" before he sought to extradite George Brown only on new grand theft auto charges for stealing Horace Brown's car. (R. 1052)

Following closing arguments and jury instructions (R. 1225-1246, 1096),[24] the jury

[24] Prior to charge conference defense counsel renewed his motion for judgment of acquittal which was again denied. (R. 1058) Defense counsel waived the long form

found Appellant guilty as charged after an approximate two and one-half hour deliberation period. (R. 1257-1259, 2030)

**B. Penalty Phase**

Penalty phase of trial commenced the following day. (R. 1268-1410) Melamud, testified the stab wounds did not cause Horace's instant death, but the decomposition made it too difficult to determine how long it took him to bleed to death. (R. 1300-1304) There was no indication whether Horace was conscious during the stabbing or whether he felt pain. (R. 1301) Prosecutor published a Montana judgment and sentence indicating George assaulted his wife on February 4, 1977 by firing six 30.06 shells in his residence resulting in an aggravated assault conviction by plea. (R. 1304) The state rested. (R. 1304)

Dr. Henry L. Dee, a Lakeland clinical neuropsychologist, interviewed George regarding his personal history. (R. 1309-1314) Dee relied on objective testing, corroborating medical records and subjective personal history to conclude George had sustained a bullet shot as a teenager in the lower occipital region of the brain, and numerous other blows to the head including an automobile accident. George suffered from very impaired memory function, epilepsy, and organic brain damage. (R. 1315-1317, 2100) Dee provided unrebutted diagnostic opinion George suffered from organic brain syndrome manifested by significant memory impairment and organic personality syndrome. (R. 1317, 1321) Dee also concluded George is an alcoholic (R. 1313-1314, 1318) and subject to anxiety greater than 96% of the population. (R. 1320, 2100) Brown's organic mental condition and experiential background have also

---

expansion of the definition of excusable homicide (R. 1067), but the court agreed to reinstruct on excusable and justifiable after manslaughter instructions, anyway. (R. 1089) However, defense counsel requested several other instructions, in particular those dealing with the juries requested unanimous verdict as to whether they found felony murder or premeditated first degree murder as the basis for their verdict (R. 2084-2092) and the court denied his request. (R. 1089-1097)

made him subject to temporary psychotic thinking, to impulsive actions without heeding consequences to himself or others, and to uncontrollable rages. (R. 1318-13, 1321, 1327, 1329, 1331) Brown suffered from significant depression. (R. 1322) Dee ruled out possibility of malingering, based on administration of seventeen (17) neuropsychological tests. (R. 1332) Dee specifically opined during the murder George suffered from extreme mental or emotional disturbance, because of cognitive memory disturbance and emotional disturbances found in his Organic Personality Syndrome. (R. 1322) Organic Personality Syndrome greatly impaired Brown's conduct to conform to requirements of the law at the time of the murder. (R. 1322-1323)

Brown's mother, Juanita Lamey, also testified George suffered considerable physical and mental abuse during his childhood from his father, Willie Brown. (R. 1342-1345) She corroberated George's finding his wife with her lover in bed and grabbing a gun and shotting only into walls of his home and not at the people, but pleading guilty to a Montana aggravated assault charge. (R. 1345-1346, 1327) She verified George playing and writing music. (R. 1350-1351)

Nonstatutory mitigation included several considerations, which were supported by competent evidence during guilt phase by Judy Etherington and penalty phase by Dee and Juanita Lamey. George was apparently abandoned by his mother before age 3 (R. 1309, 1336, 1338-1339, 1343), but his mother suggested he and other children were involuntarily separated from her from George's third through fifteenth years, even though she had opportunities to find and reclaim them from Willie. (R. 1338-1340) George thought she was dead because his father told him so. (R. 1343) He felt branded as Willie Brown's bastard son, reflecting his feelings of resentment for both parents. (R. 1309) Willie brutally beat and shot George. (R. 1310, 1312-1313, 1340, 1342, 1349) Willie caused George great embarrassment by his lifestyle--including

stints in prison and jail. (R. 1337) Willie sexually abused George's sisters. (R. 1347-1348) Willie was married to one woman, Mary Lou Stabler, while keeping another woman, in the same house with her, George, and the rest of the kids. (R. 1342-1343) Willie fathered children indiscriminately. (R. 1312, 1342) He put them to work to make money for his alcohol consumption. (R. 1312-1313, 1341-1343) He also shuffled them off to foster homes and moved them around because of his, and their, work as migrant farm workers. (R. 1310, 1312-1313)

Brown also exhibited positive character traits. He was very protective of his sister, Anita. (R. 1348) He especially protected her from Willie, for which he earned more abuse. (R. 1348, 1313) She was the only person with whom he ever had a lasting relationship, while enduring five broken marriages. (R. 1311, 1313-1314) Anita is now dead and he has no effective relationships other than temporary entertainment situations described with Judy Etherington, her handicapped boarder, and her children and with his mother through his musical performances. (R. 801-805, 1350-1351)

The judge instructed jurors to consider three aggravating factors: (1) Appellant had previously been convicted of a felony involving use or threat of violence; (2) Appellant committed robbery in the course of murder; and (3) the crime was heinous, atrocious or cruel. (R. 1394-1396) He instructed them to consider in mitigation, if established by evidence: (1) crime was committed while Appellant was under influence of extreme mental or emotional disturbance; (2) Appellant's capacity to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired; (3) any other aspect of defendant's character, record and other circumstances.[25] (R. 1396-1397)

### C. Sentencing

On May 3, 1991, the judge sentenced Brown to death in accordance with jury

[25]HAC instructions were given over defense counsel's objections. (R. 1287)

recommendation. (R. 2108-2110, 2120-2125) He found three aggravating circumstances: (1) Appellant had a previous conviction of a felony involving use or threat of violence, to wit: Montana Aggravated Assault; (2) Appellant committed a felony, to wit: Robbery, while murdering victim in this case; and (3) commission of First Degree Murder of Horace D. Brown was especially heinous, atrocious, or cruel, because Horace D. Brown experienced conscious pain and suffering before death as a result of being stabbed three times by Defendant with a knife and because victim experienced apprehension of impending death even absent physical pain while bleeding to death after having been left to die by Defendant. (R. 2115-2116, 1301-1302)

The judge totally rejected statutory mitigation factors (1) that Defendant was under the influence of extreme mental or emotional disturbance, or by use of alcohol; (2) that Defendant's capacity to appreciate criminality of his conduct, or to conform his conduct to requirements of law was substantially impaired; any non-statutory factors. (R. 2116-2118) The judge also recited unfounded facts of premeditation, suggesting the judge imposed death because of another aggravating factor (cold, calculated, and premeditated) not submitted to the jury.

## SUMMARY OF ARGUMENT

I: State presented no evidence Horace D. Brown's murder was premeditated. State suggested murder was committed during a robbery, with or without premeditation, before or after defendant took victim's property. Evidence was consistent with at least one theory of innocence of first-degree murder. Accordingly, directed verdict as to first-degree murder must be granted.

II: Denial of defendant's motion to suppress video and photographic representations of decomposed body and scene was reversible error in violation of sixth amendment guarantees of fair and impartial jury.

III: Denial and procedural bar of defendant's motions to compel discovery and trial testimony of Gainesville task force officers regarding similar serial murders and suspects was reversible error. Court failed to acknowledge corroborative reports credibly manifesting other murders and suspects, which substantially resembled facts of this case. Defendant's constitutional right to present a defense was denied.

IV: Right to present a defense includes right of compulsory process which defendant tried to exercise by subpoenaing Gainesville investigators for trial. State's granted motion in limine denied appellant any enforceable discovery procedure violating his fourteenth amendment and Florida Declaration of Rights due process and sixth amendment compulsory process rights.

V: Law enforcement witnesses unresponsively answered prosecutor's questions and blurted out that Brown was arrested under an outstanding warrant for grand theft auto. The court denied defense objections because "it was part and parcel of the officers' statements." Officers' unresponsive testimony that Brown was arrested on an outstanding warrant was clearly not admissible. § 90.404(2), Fla. Stat. (1990). It was not "invited" and objection was timely, albeit delayed. Accordingly, Brown must be granted a new trial.

VI: The court denied counsel's motion in limine to suppress certain kinds of

prosecutor's death qualifying jury questions and objections and motion for mistrial during state's hypothetical questions on issues of felony murder, premeditation and reasonable doubt. Errors cumulatively compounded prejudicial effects of predisposing jurors to erroneous legal interpretations outside court's instructions and denied defendant's fundamental rights to fair trial, unprejudiced jury, and competent defense attorney under sixth amendment and Florida Declaration of Rights.

VII: Right to present a defense includes right of compulsory process, which defendant tried to exercise by moving to suppress law enforcement officers' testimony of defendant's admissions, because of initial Miranda violations. Subsequent statements from defendant must also be suppressed, because of the original violation, because of continued violation of due process and right to counsel, when interrogations continued without notifying defense counsel and allowing counsel to confer with client prior to any of the statements. The court erred in denying defense motion to suppress in violation of Brown's rights under fifth and sixth amendments and Florida Declaration of Rights. Defendant is therefore entitled to a new trial.

VIII: Approximately three months prior to a conservative calculation of speedy trial days, defendant began written and oral notices and motions, culminating with Petition for Writ of Prohibition to this Court, regarding state's failure to bring Appellant to trial before end of speedy trial period. The court attempted to require another prosecutor to try the case so as to stay within the time period, but denied motion for discharge when the state failed to cooperate. This Court denied writ of prohibition without explanation. 1980 comments to Rule 3.191 clearly reject the terms waiver, tolling or suspension and allows extensions for a specified period of time. Court denied motion for discharge, because "waiver was made accomplished a waiver of speedy trial for all procedural purposes." Court and state violated Brown's continued procedural and constitutional rights to speedy trial and due process. The state intentionally tried defendant past

speedy trial period so as to deny his right to speedy trial after his first requested continuance was granted. The judge foresaw appellate review and possible retroactive discharge of defendant based on this issue. Accordingly, Brown must be discharged.

IX: Although defense counsel did not file a pretrial motion requesting the judge appoint separate counsel to represent Brown for penalty phase, the court should have done so on its own motion. Court's failure appoint co-counsel for a first degree murder case where the state is seeking death penalty was inherently a failure to provide assistance of counsel. Because counsel's argument was Brown did not commit the murder, his credibility with the jury was foreseeably lost upon Brown being found guilty of first degree murder, forseeably reducing his effective representation during penalty phase. Death cases in this circuit are tried routinely with two defense attorneys. Defense counsel was forced to choose between continuing to profess that Brown was innocent and presenting extensive mitigation evidence. Because counsel's credibility was tainted by his defense that Brown was innocent, the jury probably gave little weight to his argument for a life sentence. Thus, Brown received ineffective assistance because of state and judicial interference with ability of counsel to render effective assistance in violation of the sixth amendment. State and court also violated his rights to equal protection under law as a member of the identifiable class of indigent "death case" clients who are not represented by public defender and rights of due process under the fourteenth amendment and the Florida Declaration of Rights.

X: Over defense objection, judge instructed jury on heinous, atrocious or cruel aggravating factor and failed to specify with logical consistency all plausible inferences of unwitnessed circumstances to murder. No evidence supported that instruction. Because some jurors may have based recommendation on this factor, advisory recommendation was unreliable, resulting in an eighth amendment violation. This aggravating factor is unconstitutional as applied, because it is so broad a juror might

believe all murderers are death worthy.

XI: The judge's written findings drew inference from the position of the body when found to suggest Horace experienced conscious pain and suffering before death and experienced apprehension of impending death even absent physical pain while bleeding to death after having been left to die by the Defendant, however equally plausible inferences to the contrary. Inferences of other aggravating circumstances are unmistakably broader than the evidence supports. Reciting unfounded facts of premeditation, suggests the judge imposed death sentence because of an aggravating factor (cold, calculated, and premeditated), not submitted to the jury.

XII: The judge failed to consider mitigation presented in determining sentence. He found no mitigation presented rose to the level of a mitigating circumstance to be weighed in his penalty decision. He should have instead weighed the mitigation against no more than two aggravating factors, since (1) prior aggravated assault was committed against Brown's wife and her lover, which would have been a mitigating domestic circumstance in sentencing of prior conviction, (2) robbery charge was the basis for the felony murder conviction in this case and (3) HAC aggrevator was inappropriate according to Issue IX. Thus, Brown's sentence of death was unconstitutionally imposed in violation of eighth and fourteenth amendments.

XIII: The death penalty was reserved by the legislature for only the most aggravated and unmitigated of first-degree murder cases. This involved a dispute between casual friends. One of the three aggravating factors were not related to the murder itself. There was no competent evidence to suggest how much or how long victim suffered before his dying. This stabbing was clearly not one of the most aggravated first-degree murder cases and the death penalty is not an appropriate penalty.

XIV: The judge must consider all relevant mitigating evidence before determining whether to impose a life or death sentence. Under no circumstances may the court

give a mitigating circumstance no weight by excluding the evidence from its consideration. The judge feigned to find statutory or nonstatutory mitigation while failing to find any real value to those circumstances and properly weigh all mitigating factors established in the record.

## ARGUMENT

### ISSUE I

**THE COURT ERRED DENYING DEFENSE MOTION FOR DIRECTED VERDICT REGARDING FIRST DEGREE MURDER BECAUSE OF INSUFFICIENT PREMEDITATION EVIDENCE.**

**" \I 2** The state presented no direct evidence that the murder of Horace Brown was premeditated. Premeditation, of course, may be shown by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Because Horace's body was badly decomposed, the medical examiner was only able to discern he died from three stab wounds. (R. 604, 608-609) The medical examiner explained there were at least three stab wounds and possibly more, but the markedly decomposed body made it impossible to establish. (R. 605) The question then is whether the fact of stab wounds was sufficient to prove premeditation.[26]

As in any criminal case where the State attempts to establish guilt by circumstantial evidence, the evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986); McArthur v. State, 351 So.2d 972 (Fla. 1977). The question is whether the evidence failed to exclude all reasonable hypotheses of innocence. Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied, 469 U.S. 930, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

This Court defined premeditation in the Sireci case as:

> a fully-formed conscious purpose to kill which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of

[26] At close of State's case, defense counsel moved for directed verdict, arguing the state failed to prove the element of premeditation. (R. 1058)

> killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

399 So.2d at 967 (citations omitted).

Although stabbing Horace Brown would support a hypothesis of premeditation or guilt, it would also support a reasonable hypothesis of lack of premeditation or innocence as to first-degree murder charge. His assailant may have intended to quiet him and to stop before causing death. His assailant may have stabbed him with a nearby pointed object without deliberation, if used as a tool previously or even carried by the victim prior to the stabbing. Horace's own weapon could have been used against him by defendant as determined in Taylor v. State, 156 Fla. 122, 22 So.2d 639 (Fla. 1945).

> In short, the state's contention is that appellant used an excess amount of self-defense; that he could have withdrawn from the field of combat without firing the fatal shot. These are factual questions for the jury to consider in the light of the relative position of the actors, together with their state of mind under the stress of excitement. In this case the deceased was a white man and appellant a colored man. As to the relative rights and duties, the law makes no distinction. When the two clash in combat it is usually violent. The method and degree of force employed in a self-defense is a question of fact, but like all other findings of fact they are subject to judicial review. If not supported by law, they must, necessarily, be set aside.
>
> In the light of the entire record we are driven to the conclusion that the essential element of premeditation was absent, hence there could be no finding of murder in the first degree. We are satisfied that the homicide was unlawful; that the evidence of murder in the second degree; therefore, pursuant to Sec. 924.34, F.S. '41, F.S.A., we reverse the judgment with directions to adjudge the appellant guilty of murder in the second degree and sentence him accordingly.

22 So.2d at 640-641.

Because Horace was 62 years old and abused alcohol, his liver could have been diseased and more easily injured. (See, Dr. Melamud testimony at R. 620-621) Thus,

death may have occurred almost instantly. Evidence establishing only a suspicion or probability of guilt is not sufficient. McArthur, 351 So.2d at 976 n.12.

In comparison the appellant offers the observation made by other courts in the cause and effect of death:

> In Demurjian v. State, 557 So.2d 642 (Fla. 4th DCA 1990), the victim had died from multiple stab wounds. She suffered four wounds to her left arm, lacerations to her face, contusions on her lips, her nose was fractured and had a laceration, and she had an area of hemorrhage the size of a fist present on her skull which was most likely caused by a flat surface, such as when a victim hits a wall or a floor. The medical examiner testified that all of these wounds occurred while she was still alive. He described that the four wounds on her left arm were defensive wounds which probably occurred as she attempted to grab the knife and in efforts to raise her arm and defend herself.
> The chest wounds, at least six in number, penetrated her lung and her liver. These were lined up as though the victim had been lying on her back when stabbed, although the medical examiner could not testify conclusively to that. Nevertheless, the fatal chest wounds were all consistent with the victim lying on the floor. Thus, the evidence the state presented was consistent with a hypothesis that the appellant attacked the victim with the knife which she attempted to ward off until she fell to the floor. The appellant then stabbed her six times causing death.

557 So.2d at 643.

In Miller v. State, 332 So.2d 65 (Fla. 1976), the defendant committed murder while robbing and raping the victim. The victim was stabbed nine times and yet the defendant's original death sentence was declared improper because the jury did not hear certain testimony as to mitigating circumstances.

In Jones v. State, 332 So.2d 615 (Fla. 1976)

> the State's medical examiner attributed death to 'blood loss from multiple stab wounds.' The pathologist stated that the 'majority of these wounds were quite superficial,' being generally 3/4 to 1/2 inch in depth with the deepest wound being 1 1/4 inches in depth. The pathologist counted 38 'significant' wounds as well as many other superficial scratches. The wounds' nature indicated to the pathologist 'some kind of a frenzied attack rather than a--coldly--calculated stabbing, homicide premeditated.'

332 So.2d 616

Similarly, in Austin v. State, 382 F.2d 129, 136 (D.C. Cir. 1967), "the crux of the issue of premeditation and deliberation is not the time involved but whether the defendant did engage in the process of reflection and meditation.... The 'appreciable time' element is subordinate, necessary for but not sufficient to establish deliberation." In Austin, defendant stabbed a woman whose nearly lifeless body was retrieved from a river mutilated and nude except for a piece of clothing around her neck. 382 F.2d 129, 132. Remanding the case for second degree murder sentencing, the court stated:

> The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximumdenunciation, to cry out murder "in the first degree." But it is the taskand conscience of a judge to transcend emotional momentum with reflective analysis. The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and that these are in law only murder in the second degree. The Government's evidence sufficed to establish an intentional and horrible murder -- the kind that could be committed in a frenzy or heat of passion. However, the core responsibility of the court requires it to reflect on the sufficiency of the Government's case. 382 F.2d 129, 138-39 (D.C. Cir. 1967).

The planned presence of a weapon has been held as adequate evidence to allow the issue of premeditation to go to the jury. State v. Bingham, 40 Wash. App. 553, 699 P.2d 262 (1985), aff'd, 105 Wash. 2d 820, 719 P.2d 109, 113 (1986); see also State v. Giffing, 45 Wash. App. 369, 725 P.2d 445 (Ct. App. Wash. 1986). In the instant case, a weapon was used, and Horace may have been intentionally stabbed with a knife without provocation; or he may have been stabbed with some other instrument with or without a struggle. (R.1161)

> In Jackson v. State, 575 So.2d 181 (Fla. 1991), this court noted:
> In Sireci, premeditation was proved with evidence that the defendant clubbed the victim over the head with a wrench, then stabbed and cut the victim fifty-five times in the chest, head, back, and extremities, and finally slit his throat. In Griffin, premeditation was supported by evidence that Griffin used a "particularly lethal gun"; the bullets were of a special type designed to have "a high penetrating ability"; there was no sudden provocation caused by the victim; and Griffin fired two shots into his victim at close range. Griffin, 474 So.2d at 780. Those facts are completely distinguishable from the instant case where there is no evidence to indicate an

> anticipated killing, and where all of the evidence is equally and reasonably consistent with the theory that Phillibert resisted the robbery, inducing the gunman to fire a single shot reflexively, not from close range, with an unidentified type of weapon and bullet. There is no evidence of a fully-formed conscious purpose to kill. Moreover, there is no evidence in this record that Jackson fired the shot that killed Phillibert.

575 So.2d at 186.

Brown's actions after the homicide do not necessarily evidence premeditation. Etherington's testimony of George's phone calls and waiting before driving to Colorado suggests he was confused, upset and did not know what to do or where to go. (R. 657-658, 781, 785, 786-787, 791-793, 806-807, 809, 1416, 1418) Although the state would argue otherwise, George did not attempt to hide the body. The unrebutted circumstances are he returned from authorized borrowing of victim's car, discovered victim's property and body, and anticipated probable blame for victim's death causing him to flee.

The evidence suggests in its worst case scenario a "heat of passion" killing rather than premeditated murder. See Forehand v. State, 126 Fla. 464, 171 So. 241 (Fla. 1936) ("heat of passion" killing is second degree murder). George made no prior threats and could also have been unarmed just prior to the stabbing, although the state would put Etherington's knife in his hand.

> But consciousness of the act is part of premeditation... you have to intend the killing, a fully formed conscious intent to kill at the time of the killing and time to reflect. But no definite time. The Judge will read you this instruction. There is no definite time involved in premeditation. Such that if I had decided not to throw a pencil but to kill the person in the back row of the jury box at that time, so long as you believed from whatever you saw of me that day, that is maybe I wasn't intoxicated and I looked like I knew what I was doing, whatever you could see convinced you that I had the opportunity to reflect on that decision once I made it, that's premeditation, and it doesn't have to take a day or an hour or a minute or 10 seconds. It just has to be the intent to kill... State can prove this case against George Brown is premeditated murder, that he intended to kill Horace Brown that night. The other, though, is felony murder, that he robbed him, and in the course of the robbery, during the taking killed him, either because he did it to get his property away from him or he did it so that

Horace Brown wouldn't turn him in once he stole all of his property.[27]

(R. 1150-1151)

He and Horace were "casual friends" or at least "casual acquaintances". The state theorized Horace was killed incident to George hitchhiking with Horace, after he drove George Brown, the alleged aggressor, to the secluded spot in the woods. (emphasis added) However, the prosecutor ignored the unrebutted evidence that George and Horace mutually searched for inebriation and Horace, not George, drove to the secluded area. (R. 654, 972-973, 1413) The prosecutor may have tried to avoid mentioning other "facts" not in evidence, but he misquoted evidence when he alleged George drove to the "secluded area." (R. 1152, 1169)

[27]Double theory of murder like felony murder and/or premeditated first degree murder creates a jury's dilemma by requiring circumstantial inference of intent to commit robbery with or without the intent to kill, compared with intent to kill with or without the intent to commit robbery. Any analysis less than this defies the reason why there are two separate legal theories of criminal liability and thereby creates a Hobson's choice dilemma to defend on one theory successfully while involuntarily waiving his constitutional right to defend on the other.

**ISSUE II**

**THE COURT ERRED DENYING DEFENSE MOTION TO SUPPRESS CERTAIN VIDEO AND PHOTOGRAPHS OF THE BODY AND CRIME SCENE.**

**" \I 2** Horace's body position may not have changed, even if small animals ate body parts. Doubtless, the body remained exposed to the elements and smaller animals for several days, thereby greatly reducing certainty as to cause of death and post-mortem changes. Speculation as to alternative body positions, distances of the property items from where the body was found, phases of the moon the night of the killing versus the night the body was found, and emotional responses to inflammatory photographs and video, only caused the jurors to speculate what could have happened and were not probative of what actually did happen to Horace Brown. Most importantly, no photographs or videotapes were probative of the main issue -- who killed Horace Brown. They only incited jurors to convict someone -- and George Brown was on trial.

In Gomaco Corporation v. Faith, 550 So.2d 1853, 14 F.L.W. 1853 (Fla. 2d DCA, 1989), the court remanded for new trial because of unnecessary introduction of gruesome, offensive and inflammatory photographs depicting defendant's severed foot prior to surgery. The court found, pictures might have been tangentially relevant, but they neither independently establish material parts of appellant's case nor necessarily corroborated factual issues. A new trial was mandated because the court could not say video and photographs did not permeate the trial and prejudice appellant. Id.

The case at hand is the same. Once jurors saw disgusting photographs of Horace Brown's badly decomposed and eaten body, it would have been difficult for them not to visualize them during trial, thus permeating trial with prejudice against Appellant. The photographs did not depict and extensive medical description of decomposition did not describe with certainty what the perpetrator did to Horace Brown, but what subsequent

decomposition, post-mortem abuse and time did to his body. Thus, they were not relevant and were extremely and unfairly prejudicial.

Defense counsel objected only to the videotape depicting the decomposed body and the area surrounding it. (R. 861, 863-864) He objected because the video was confusing, inaccurate and misrepresentative of the area where the body was found. (R. 863-864)

The prosecutor used these sensational and inflammatory photographs and distorted video to argue that the jury should convict the Appellant, after viewing the body and the location "closely," and comparing the height and size of defendant in the court room with Horace's decomposed body. (R. 1174-1176, 1184-1185) But, he first suggested that because George used the victim's property, this was sufficient to prove Brown either premeditatedly killed Horace or tried to rob the victim while killing him:

> The death occurred as a consequence of and while the defendant was engaged in the commission of or was attempting to commit a robbery. This is the felony murder portion of the instruction. And the defendant was the person that killed him. Those are the only three elements.
> On premeditated murder, the person alleged to have been killed is dead; the death was caused by the criminal act or agency of Mr. Brown; and he did it because he intended to do it. Premeditation.
> Only, only if you don't think that's what happened do you even get to second degree murder to even look at it. Only if you believed that the State didn't prove first or second would you ever get to third or manslaughter. So you're not going to have to worry about looking at all of those things so I'm not going to address them in any more depth. Just keep in mind you don't start at the bottom. Necessarily we've proved manslaughter and second, we're here on a first degree murder charge.
> The same with robbery with a deadly weapon is even easier to understand. Because robbery with a deadly weapon means you took property from the person or possession of some person, Horace Brown, and did so with the intent to keep it, and when you did it, you had a deadly weapon.
> Now if you do the same thing without the deadly weapon, that's a lesser crime. So the Judge will tell you, robbery with a deadly weapon is the charge. If you find that he carried a knife, and a knife is a deadly weapon, that is, it can cause great bodily harm or death, then you should find him guilty of robbery with a deadly weapon. If you think he committed robbery and he carried a weapon but it wasn't deadly, which is pretty inconsistent with this case since the man is dead, but that would be a lesser. If you find he took the stuff but he didn't use any weapon, then that would be robbery.

* * * *

> But here we're talking about circumstantial evidence. Are you convinced, do you have when you go back there an abiding conviction that this 62 year old man got murdered by George Brown and he stole his car and his property? You have to be convinced beyond a reasonable doubt. There is nothing else magic about circumstantial evidence. It's just the same evidence as any other evidence, you just have to be convinced by it beyond a reasonable doubt.

(R. 1153-1156)

Based on the prosecutor's announced enumeration of circumstances during closing argument the above statement would purportedly contain circumstance inferring guilt (1) "robbery". Subsequent numbered circumstances are as follows: (2) Brown's apparent lies to Judy Etherington regarding his claim of looking for a job and finding one (R. 1156); (3) Brown's "totally unreasonable" description that Horace went to Sam's tavern, when the victim's wife did not know the bars he frequented and Siesta bar employees knew Horace, but the owner of Sam's bar did not, somehow suggesting Horace only frequented the Siesta bar (R. 1157-1158); (4) Judy Etherington's contemporaneously missing knife and the knife that Dr. Melamud said could have caused the fatal wounds were "3/4s of an inch to an inch and a quarter" (R. 1158); (5) the victim's wife said he picked up hitchhikers and took them off his original travel agenda (R. 1159-1160)[28]; (6) if the victim had gone to the beach near Tampa[29], he could have driven near Brown's residence while returning from the beach on or about the time George told Judy he was

[28]Contrary to prosecutor's recollection that George told Judy "when he leaves that he's got a thumb and he'll use it" (R. 1160), Judy's only testified that George later called from Haines City and said he had hitchhiked there. (R. 784) Judy verified at the beginning of her testimony that she and George Brown had no "mode of transportation other than walking or taking public transportation." (R. 776)

[29]The victim's wife testified that Horace travelled frequently to the beach, however she only "assumed he meant the causeway between Tampa and St. Pete," because he said he went to the beach "along the causeway." (R. 837) The prosecutor recalled "his normal thing was to go to the beach....his wife didn't say he liked to go over to Cape Canaveral and watch the rockets take off. But that wouldn't have been true. So this path he would logically take just happens to cross the path of the defendant." (R. 1161)

taking a walk (R. 1160-1161); (7) Brown said he returned to where he had left Horace with "Danny" an hour earlier and stopped "miraculously" to find victim's wallet and watch in the dirt road, but the location of those items would suggest a struggle[30] (R. 1161-1162); (8) Brown said he discovered Horace's body while lighting a cigarette, although investigators testified they used highly powerful lights to discover the body 25 feet from the dirt road in bushes, and actually first knew the general location of the body by smelling its odor. (R. 1162-1163, 1174-1176); (9) Brown's inconsistent statement to his girlfriend that the blood on his shirt sleeve was from a fight and later to the officers that the blood was from reaching to feel Horace's body for life signs upon his post-mortem discovery, which suggested Brown could have gotten blood on the shirt while stabbing the victim.[31] (R. 1165-1167, 1184); (10) neither the particular group of three employees at Sam's and Siesta bars, nor victim's wife could identify the defendant, suggesting that George could not have had a "casual acquaintance" relationship with the Horace, because those people had not seen them together (R. 1167-1169) and victim's wife did not know anyone named "Danny" as befriending her husband. (R. 1169); (11) Brown first claimed victim's credit cards belonged to his father,

[30]The record is void of evidence to support the state's theory of a struggle and Detective Ore testified there was no sign or marking where the body was found to indicate that there had been a struggle or he was dragged to that place, (R. 1036). Ironically, the prosecutor's reference to a struggle at the crime scene is based on defendant's "miraculous" discovery of victim's wallet and watch at certain specific locations, the truthfulness of which he attempts to totally discredit. (R. 1161-1162)

[31]The evidence included only one shirt belonging to the defendant, which had his own blood on the sleeve. (R. 1034-1035, 1050) There was no blood found in Horace's car. (R. 1035) There was no sign or marking where the body was found to indicate that there had been a struggle or he was dragged to that place, (R. 1036). Investigator Ore could not explain how or why Horace "got as far back in the bushes as he was and was stabbed in that location based on what [he] saw at the scene." (R. 1045) Without supporting evidence the state's theory relied on Brown throwing away "one of his best shirts" with the missing knife, because the victim's blood would have been on those items. (R. 1184)

then he gave investigators a detailed description of the murder scene and position of the body before a murder they suspected, but he failed to tell them the location of the victim's abandoned vehicle until shortly after law enforcement independently found it.[32] (R. 1170-1173); (14) Brown's fraudulent use of victim's property after the murder, including driving victim's car to Orlando, purchasing another with victim's check book, and using victim's credit cards, but failure to take victim's license plate or to anonymously report the murder to police (R. 1173-1174, 1179-1182, 1182); (15) Brown's lack of recent social contact (a) with his unidentified Polk City girlfriend, to whom he told Horace he wanted to travel on the night of the murder and from whom his more recent girlfriend, Judy, admitted George's recent separation but for whom she denied George's subsequent affection, and (b) with his Haines City friend, Bobby Dobbins, for whom George falsely told Judy he was driving a truck out of Florida (R. 1178); (16) George Brown always sat alone in the Siesta Bar, sharing peanuts with other patrons. (R. 1185-1186)

The prosecutor apparently admitted a possible lack of premeditated motive to the murder/robbery:

> Why George Brown killed the man doesn't make much sense. I mean why the man is murdered is pretty dumb. He's 62 years old. George Brown, half his age and twice his size, he could have taken anything he wanted from Horace Brown. So he didn't need to kill him.
> But he takes off out of the state with all these different stories, even calls Judy Etherington and says if anybody is asking about me don't tell them where I'm at. What was he scared of; a grand theft warrant?[33] Not reasonable.[34]

---

[32]The prosecutor suggested that the substantially cooperative and corroborative statements made before and after finding the body, should be interpreted as "just trying to keep misleading the police." (R. 1172) However, he later acknowledged a contributing cause of incomplete initial information to Lackey was "Lackey didn't ask him all the questions, he didn't get the detail because he didn't know the scene, he didn't know the area." (R. 1183-1184)

[33]This erroneous admission and repeated reference to an unfounded prior criminal act of grand theft auto is more completely discussed under Issue III of this brief. (R. 626 et. seq.)

(R. 1164-1165)

Thus, the prosecutor himself presented more than one reasonable hypothesis that the stabbing was not premeditated, but was perpetrated in an attempt to flee the area, to elude a grand theft warrant, or a "pretty dumb" robbery. However, this court has repeated its finding in Harwick v. State, 461 So.2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985)

> The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue.

cited at Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992).

Defense counsel proposed a special jury instruction on circumstantial evidence, which the judge rejected on the basis of compromise with his rejection of the prosecutor's requested instruction on flight. (R. 1096-1997) Defense counsel's instructions selectively included: (1) "Mere presence at the scene of a crime is not alone sufficient grounds for conviction." (R. 2084); (2-A) and (2-B) Alternate instructions requiring the jury to be unanimous in choosing either first degree murder or felony murder as the basis for their possible guilty verdict; (3)

> In order for a killing to be premeditated; the premeditated design must exist an appreciable length of time before the killing so that the perpetrator of the act may know and be conscious of the nature and character of the act which he is about to commit and the probable result therefrom insofar as the life of the assaulted person is involved.
>
> The killer must have taken a distinct and definite purpose to take the life of another human being and deliberated or mediated upon such purpose for a sufficient length

---

[34]The prosecutor later suggests there was only one reasonable interpretation as to why the victim went to where he was eventually killed, excluding Brown's description of the liaison with "Danny": "This man didn't go out there except for one reason and that is George Brown had a knife on him and took him out there and murdered him and stole his property." (R. 1169)

of time to be conscious of a well defined purpose to kill another human being. Forehand v. State, 171 So. 241 (Fla. 1936). Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944). Purkhiser v. State, 210 So.2d 448, 449 (Fla. 1968). Douglas v. State, 152 Fla. 63, 10 So.2d 731 (1942). Hines v. State, 227 So.2d 234 (Fla. 1st DCA 1969).

(R. 2087); (4) the older and frequently discarded circumstantial evidence instruction[35] (R. 2088); (5) "A defendant's version of a homicide can not be ignored where there is absence of other evidence legally sufficient to contradict his explanation." Mayo v. State, 771 So.2d 899 (Fla. 1954)(R. 2089, (6) "When circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of his innocence," Id. (R. 2090), (7) "Evidence which leaves one with nothing stronger than a suspicion that the defendant committed the crime is not sufficient to sustain a conviction." Id. (R. 2091) and (8) "It is not robbery to take property from someone who is dead at the time of the taking." (R. 2092)

The court's rejection of appellant's jury instructions substantially disabled the jury from finding him not guilty as to premeditated murder and not guilty as to felony murder, because the circumstantial evidence presented at trial was unclear. Since the instructions were not given, the appellate court should consider these instructions. Where there is substantial, competent evidence to support a jury verdict of guilt as to the offense charged, the question of whether the evidence was inconsistent with any reasonable hypothesis of guilt becomes a jury question. Heiney, 447 So.2d 210; Rose, 425 So.2d 521. Nevertheless, when a criminal conviction is based solely on

[35]This instruction was probably rejected by the court because of notions that the instructions on burden of proof and reasonable doubt, negated the need for instruction on circumstantial evidence. See In the matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla.1981). Beatty v. State, 500 So.2d 173 (Fla. 1st DCA 1986).

circumstantial evidence, it is the appellate court's duty to reverse the conviction if evidence, even though strongly suggesting guilt, it fails to eliminate any reasonable hypothesis of innocence. Jackson v. State, 511 So.2d 1047, 1048 (Fla. 2nd DCA 1987); see also Horstman v. State, 530 So.2d 368 (Fla. 1988) (state failed to present substantial, competent evidence sufficient to enable jury to exclude every reasonable hypothesis of innocence).

The facts presented by the state in this case failed to show premeditation. The prosecutor's closing argument supported the theory that the murder was committed before taking the victim's property and the taking was an after thought. Thus, the circumstantial evidence was consistent with innocence as to first-degree murder. A motion for a judgment of acquittal as to premeditated first-degree murder must be granted. (R. 1058)

Although the photographs and videotape depicted Brown's body with holes, the largest of the holes and missing body parts were not caused by stabbing. (R. 605-617) If the killer did not intentionally remove parts of the body as "souvenirs" (as argued in Issue II), then animals in the woods could have tampered, carried away or even eaten portions of Brown's body. Even if George took the credit cards and wallet from Horace's body, the evidence showed that George did not have the emotional or mental capacity to report his death, because he was in serious financial trouble and there was an alleged outstanding warrant for his arrest. (R. 777-778, 626, see also prosecutor's closing argument at 1164-1165) Thus, the prosecutor's argument was not probative and was intended only to further inflame the jurors and divert their attention from the real issue -- who killed Horace Brown.

In Jackson v. State, 359 So.2d 1190, 1192-93 (Fla. 1979), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979), this Court cautioned "the prosecutors of this state that gory and gruesome photographs admitted primarily to inflame the jury will

result in a reversal of the conviction." Because Brown's trial was tainted by the prejudicial and inflammatory photographs and videotape, in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution and Article I, § 9 and § 16, of the Florida Constitution, Brown must be granted a new trial.

**ISSUE III**

**THE COURT ERRED FAILING TO GRANT DEFENSE MOTION TO COMPEL DISCOVERY AND TESTIMONY FROM GAINESVILLE TASK FORCE OFFICERS REGARDING SERIAL MURDERS AND PARTICULAR SUSPECTS.**

**" \I 2** The court denied defendant's motion to compel discovery and authority to take depositions of Gainesville task force officers regarding serial murders and suspect, Danny Rolling, manifesting similar circumstances to this case. (R. 1864-1942, 1945-1964, 2264-2275) Defendant filed a second motion to compel (R. 1965-1968), and argued it before the court (R. 2009-2016) which was effectively denied prior to opening statements to the jury by granting state's motion in limine prohibiting discovery from the subpoenaed Gainesville investigators. (R. 523-528) The court had previously granted motion to compel deposition of Glenn Hicks (R. 2017), but failed to acknowledge that witness' testimony credibly established Danny Rolling as a logical suspect of the murder in this case. (R. 2009-2016) Defendant has a constitutional right to present a defense. Danny Rolling was a suspect in Gainesville and there are at least a few similarities in those deaths and this one (R. 524-527, 1864-1942, 1945-1964, 2264-2275), therefore defendant has a constitutional right to present a defense under Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (State cannot make co-indictees or others incompetent as witnesses for defendant) and Cool v. U.S., 409 U.S. 100, 993 S.Ct. 354, 34 L.Ed.2d 335 (1972) (Instructions to disregard exculpatory testimony of accomplice unless jury finds it true beyond a reasonable doubt is error). The right to present a defense includes the right of compulsory process defendant tried to exercise by subpoenaing the Gainesville investigators. Id.

In Moreno v. State, 418 So.2d 1223, 1226 (Fla. 3rd DCA, 1982), the district court found supporting authority that certain proffered evidence should be admitted:

> where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. Holt v. U.S., 342 F.2d 163 (5th Cir. 1965); Commonwealth v. Keizer, 385 N.E.2d 1001 (Mass. 1979). Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979); Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978). In Commonwealth v. Keizer, supra, the court permitted defendant to show that crimes of a similar nature had been committed by some other person so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime. The evidence appellant sought to have admitted herein is of a crime alleged to have been subsequently committed by the State's key witnesses which is so similar, in its method and circumstances, to the events surrounding the defendant's alleged offense that it could, if heard by the jury, raise a reasonable doubt as to the defendant's guilt. Because the similar crime evidence is relevant, non-prejudicial, and not inadmissible by any rule of law, it should have been admitted. One accused of a crime may show his innocence by proof of the guilt of another. Lindsay v. State, 68 So. 932 (1915); see Barnes v. State, 415 So.2d 1280 (Fla. 2d DCA 1982); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982).

418 So.2d at 1225-1226

This court agreed with the district court in Rivera v. State, 561 So.2d 536, 539 (Fla. 1990), but pointed out admissibility of such "reverse William's Rule" evidence "must be gauged by the same principle of relevancy as any other evidence offered by the defendant." Id.

> In this case, Rivera sought to introduce evidence pertaining to the February 20 abduction and murder of Linda Kalitan, which occurred while Rivera was in custody. We find the dissimilarity of this crime to Staci Jazvac's murder sufficient to preclude its admissibility as relevant evidence. Linda Kalitan was twenty-nine years of age, whereas Staci was eleven. Her body was fully developed, whereas Staci's body was childlike. Linda's body was totally nude except for a pair of socks, whereas Staci was clothed. Linda's body was found in a canal and her clothing was weighted down by rocks. Although both bodies were found in the same general location, Staci was found in the vacant field. In Linda's case, there was evidence of anal sex prior to her death, unlike Staci's case. Staci was abducted in northern Broward County, and Linda was abducted in southwest Broward County. The only alleged similarities were that both Staci and Linda were riding bicycles when they were abducted; they were both asphyxiated; their bodies were found in the same general area; and pantyhose was discovered in the vicinity of their bodies. Under these circumstances, we find that the trial court did not abuse its discretion in excluding the proffered evidence.

561 So.2d at 540

**ISSUE IV**

**THE COURT ERRED GRANTING STATE'S MOTION IN LIMINE PROHIBITING DEFENDANT FROM COMPLETING COMPULSORY PROCESS OF SUBPOENAED OFFICERS IN TESTIFYING TO OTHER PROBABLE SUSPECTS AND SIMILAR MURDERS.**

**" \I 2** Prosecutor and judge prohibited Brown from discovering similarities, or even dissimilarities, between the "Gainesville serial murders" and circumstances of Horace's murder. Neither the judge nor this court can justifiably apply the relevancy test expressed in Rivera, unless appellant had a reasonable opportunity to prepare a defense for trial and use assistance of counsel to discover relevant evidence. To compromise Brown's fundamental rights of jury trial, compulsory process and assistance of counsel under the Sixth Amendment, with the pressing right of speedy and "fair" trial is to create a Hobson's choice.[36]

Prosecutor further abused defendant's inability to investigate the murders perpetrated by Danny Rolling, when referring to the alleged non-existence of a murder suspect named "Danny" during his guilt phase closing argument:

> Danny Lynnvillee went to the Siesta. I don't know what that's supposed to mean. When Detective Ore testified he couldn't find Danny, to just listen too a defendant say a guy named Danny was out there is a green Chrysler, use your common sense. What are you going to do? Where are you going to start? Danny, a nonexistent Danny, we're just going to find? How about a nonexistent Bob or nonexistent Jim; can you go find them? Go find Jim in a green Chrysler. Where would you walk to, where would you go, what would you do if you're a homicide detective to find a guy like that? I don't know.
>
> He did already find out from the barmaids that the guy didn't regularly have any friends in the Siesta, people that he sat with or hung around with. He sat by himself. He didn't find anybody that said they saw him leave in a green Chrysler or any guy named Danny with him. And he talked to his wife and he ain't got no friends named Danny. That's not police work? I mean you don't impute to the cop that he did his job by finding all those things out?
>
> If Mrs. Brown had got on the stand and said he's forever going up to I-4 and 33 meeting a guy named Danny and the cop didn't look up that, he didn't do his job. But when he got no leads too lead him to any Danny, I don't understand how he didn't do his job.

(R. 1186-1187)

---

[36]This term is adequately defined in Anderson v. Highlands Beach Development Corporation, 447 So.2d 1045, 1046 (Fla. 4th DCA 1984) as: "Hobson's choice -- An apparent freedom of choice with no real alternative. [After Thomas Hobson (died 1631), English liveryman, who required his customers to take the next available horse rather than give them a choice.]" (quoting the American Heritage Dictionary of the English Language at 626 (1979).

Based on the guilty verdict, the jury obviously believed there was no further investigation that could have been made. This is contrary to defendant's continued attempts to obtain information about Danny Rolling and his methods of murdering his victims. Understandably, at the time of this trial Danny Rolling was only one of at least 3 main murder suspects, but since then the murders have apparently still gone officially unsolved and without resulting prosecution.

In Trafficante v. State, 92 So.2d 811 (Fla. 1957) this court reviewed similar circumstances where the defendants had subpoenaed a court reporter and the Grand Jury transcripts of a state's witness, but the judge refused enforcement of the subpoena and denied defense counsel's preferred motion for production. As in our case defendants contended they were denied their rights under the Fourteenth Amendment and Section 11 of the Declaration of Rights of the Florida Constitution, "which provides that in all criminal prosecutions the accused 'shall * * * have compulsory process for the attendance of witnesses in his favor.'" 92 So.2d at 814 As in this case the State contended, that it was not compelled to provide the witness or subpoenaed documentation because, it "was not material to the issues in this case, and the grand jury presentment or findings had not been made public at the time of trial." 92 So.2d at 814-815 This court held:

> We cannot accept the contention of the State herein. Appellants' sworn application for the subpoena, as we have stated, sets up the materiality of the evidence sought to be reached by the subpoena and must be taken for the purpose of this appeal as proving materiality to the extent necessary to warrant examination of the transcript by the court with a view to making final determination of its materiality. See Vain v. State, supra, 85 So.2d 133, and Coco v. State, Fla., 62 So.2d 892. Moreover, the record abounds with evidence that the grand jury had returned its presentment and made its findings public prior to the trial of this cause.
>
> The right of an accused in a criminal case to compulsory process for attendance of witnesses on his behalf, as we have seen, stems from the express terms of our constitution. This provision was inserted because of the fundamental unfairness which results from placing a man on trial on a criminal charge and denying him the means to compel the attendance of witnesses, within the jurisdiction of the court, who are in possession of material facts which show or tend to show his innocence of the charge.

> In State ex rel. Brown v. Dewell, supra, 167 So. 687, we held that an accused on trial is entitled to the issuance of a subpoena duces tecum to reach the testimony of a State's witness given before a grand jury when it is shown that such testimony is or may be material to the issues in the trial. In that case, in seeking to be informed as to the application of the rule, we reached back to the celebrated Aaron Burr case wherein Chief Justice Marshall stated in part:
>
> > 'It is believed that such a subpoena, as is asked, ought to issue, if there exists any reason for supposing that the testimony may be material, and ought to be admitted.' 25 Fed.Cas. p. 38, No. 14,692d.
>
> Very recently, in Vann v. State, supra, 85 So.2d 133, we had occasion to consider a related problem, and we held that it is the duty of the trial judge, on proper application, to examine documents sought to be subpoenaed, and to apply tests of relevancy or privilege which we there stated, in order that an enlightened ruling might be made upon the application. Such procedure was not followed in the instant case.

92 So.2d at 815

The record does not reflect that the judge scrutinized the material, which defendant provided him prior to granting state's motion in limine and barring further compulsory process. In the middle of jury selection defense counsel explained to the court that Brown told investigators in Arapahoe County Sheriff's Office in Colorado and Detective Ore of the Polk County Sheriff's Office "long ago... a year ago almost, that when he last saw Horace Brown alive, Horace was with a person named Danny...and...the prime suspect in the Gainesville deaths has been--or has become a person named Danny." (R. 523-524) Counsel admitted he had never shown a picture of Danny Rolling to his client, probably because the state had not provided one under the unenforced subpoenas. (R. 524) Instead of requesting such identification as part of the court's inquiry, the judge merely commented "Well the only thing we have--there are lots of Dannys in the world." (R. 524) Whereupon counsel proffered the medical examiner's findings that the victim's organs and tongue were missing and it was not clear whether those body parts were removed by the murderer, as in some Gainesville murders (R. 1864-1942, 1945-1964, 2264-2275) or removed due to "deterioration and time." (R. 524-525) The judge suggested there were "sexual similarities," but erroneously ignored male victims, and Rolling's attempted patricide. The judge said "most of the

sexual suggestivity of the Gainesville business had to do with female victims, and there was maybe one male victim who just may have been on the scene or something like that." (R. 525, but see 1864-1942, 1945-1964, 2264-2275) Counsel pointed out "two fingers were missing" from victim's hands, evidencing disfigurement like Gainesville, Shreveport and Dothan killings. (R. 526)

The judge failed specifically to notice (1) that Danny Rolling was involved in numerous auto thefts and finally apprehended after a robbery (R. 1910), while this murder involved an otherwise indistinguishable Chrysler driven by "Danny"; (2) that Danny Rolling shot his father, who was his abusive authority figure (R. 1910, 1911), while this murder involved a killing of a man possibly the same approximate age as Danny's father, although this could not be verified because of the state's bar to further discovery; (3) that College students where found "stabbed and dismembered" (R. 1913, 1916), whereas Horace was found stabbed and dismembered as to fingers, certain organs and areas of the neck and throat; (4) that the fatal stabbings of five Gainesville victims was in the woods near the University of Florida near I-75 (R. 1914), and Horace was fatally stabbed in woods near I-4, which connects with I-74 and approximately 2 hours drive in a more direct route between both crime scenes; (5) that as late as January 28, 1991, Danny Rolling was reported to have been one of the active suspects in the "similar slayings" in Gainesville (R. 1915), but apparent overwhelming interest developed in Michael Bates of Lakeland, who was sentenced for an attempted stabbing of a burglary victim by the same Judge Tim Strickland on January 25, 1991 (R. 1912), and whose public defender withdrew from representing appellant in this case because of the resulting conflict during these Gainesville investigations; (6) that the Gainesville killer "struck at night," mutilated his victims to the point of decapitation, and left their bodies in sexually suggestive poses (R. 1916), and Horace's body was mutilated at night and left in a sexually suggestive pose (R. 524-525); (7) that two men where stabbed to death

where a woman was also murdered in Shreveport, Louisiana in connection with these murders (R. 1916), Rolling's father was almost killed by Rolling (R. 1913, 1916), a male roommate in Gainesville was also stabbed to death (R. 1916), while Horace was a male victim and the judge was clearly in error as to how many men were killed in the serial killings; (8) that Rolling had a reported "string of armed robbery convictions" (R. 1917), and Horace was robbed by someone, who apparently took the cash in his wallet and threw the wallet to the ground, leaving only "papers," subsequently found by George Brown upon his return (R. 975-976, 977-978); (9) that in the serial killings "little evidence was left behind because the killer was meticulous about cleaning up evidence" (R. 1919), and Detective Ore and Dr. Melamud noted that there was no evidence of a struggle (R. 1036) or of how or where Horace's body was lying at death was evident (R. 1046, 614-617)(compare specifics used in Miller, 557 So.2d at 643); (10) Rolling "had a long history of animal mutilations and hospital commitment for sexual and mental dysfunction" (R. 1924), and Horace's body evidenced mutilation and possible sexual abuse (R. 524-525, 1902-1908); (11) DNA tests were performed and returned as early as October, 1990 on Danny Rolling with comparisons made to evidence at the murder scenes (R. 1925, 1931), but no such comparison's were made on Horace's body to link George or Danny directly to this killing; (12) reports described Danny Rolling as "a divorced white man, 6 feet, 2 inches tall, about 180 pounds, with long, curly brown hair, hazel eyes and a thin mustache" (R. 1926), but the record does not reflect whether the state or the court confronted George with these facts for comparison with the other person George saw with Horace the night of the murder; (12) at least one victim in Gainesville was found "draped over the end of the bed with her feet on the floor" (R. 1928), and Horace's body was found draped over the edge of a ditch or canal (R. 960, 965, 1415); (13) police did not rule "out the possibility that two men were involved in the killings" (R. 1930, 1939), and this would have been an equally plausible theory to the

presence of "Danny" at the murder scene, but the state chose to proceed on a single perpetrator theory; (14) a "multiagency task force" was available to assist in verifying Danny Rolling's possible involvement in the Gainesville killings (R. 1931), but no such task force was used to dispel Rolling's involvement in this murder; (15) Rolling's father was blinded in one eye as a result of Danny's assault (R. 1933), and Horace's eye balls were missing when the body was found (R. 1903); (16) Danny was also musically gifted and played the guitar like George (R. 1933), evidencing a similar interest Horace may have found in both men; (17) Danny had a habit of roaming places at night in military fatigues, carrying a large hunting knife in his back pocket and surviving "in the woods on a knife and matches" (R. 1933), again suggesting a military style ambush in the woods with a knife, which the prosecutor ably suggested repeatedly during closing argument; (18) as many as "1,500 tips" existed by August 31, 1990 regarding involvement of others in those and similar murders, producing at least one other Bartow suspect, whose name was not revealed (R. 1936, 1937), but no such canvasing is apparent regarding a follow-up investigation by the authorities of the "Danny", of whom George consistently told investigators[37]; (19) two of the victim's nipples were reportedly cut off and taken as souvenirs by the murderer (R. 1937, 1939, 1942), and parts of Horace's body where also missing, including the hyoid bone, larynx, tongue, pharynx and upper esophagus. (R. 1904-1906); (20) the medical examiner to one of the murders verified "most of the mutilation occurred after death" (R. 1939), and Dr. Melamud could not verify whether most of the stabbings and mutilations took place before or after death (R.

[37]The materials also show, long before Danny became the chief Gainesville suspect, appellant told Investigator Lackey and then Detective Ore that he last saw Horace with a man named Danny; further, a jailhouse snitch, Glenn Hicks, gave Detective Ore a statement, in which he claimed the appellant described how Horace Brown died including a "Steve" with whom Hicks was familiar; another of the prime suspects in the Gainesville killings was a Steve, Stephen Bates (represented by the public defender thereby causing withdrawal from this case due to conflict.)

608-609, 1301); (21) there were specific similarities to the all mutilations, which the police would not disclose (R. 1940), the state's complete secrecy as to such particularities should have been compared by the judge in camera, but there is no record to suggest that was done; (22) psychologists who had studied serial killers and these facts suggested "the killer's crimes were probably acts of violence, rather than sexual passion" (R. 1942), which further removes the judge's rationale of exclusively heterosexual lust crime as a necessary modus operandi to the Gainesville killings and erroneously suggest a dissimilarity with this murder; (23) materials submitted by defense counsel (R. 1864-1942), photographs and video reveal (R. 605-617), Ore's testimony (R. 1046) show Horace Brown was found with his pants down and rear-end exposed in a manner which could have been intended as a "pose" by the killer, similar to posed positions some of the Gainesville and Shreveport victims were found in.

After counsel argued and cited Washington and Cool (R. 527), the judge granted state's motion in limine and advised defense counsel "that if there is a development in the case that would lead to relevant, admissible evidence on the theory that Counsel has, then it would be taken up. Now gentlemen, back to the question of 13 or 14 jurors." (R. 528)

The consequences of not being able to fully investigate and discover the existence of a probable suspect's involvement and even murder of Horace Brown are evident under State v. Law, 559 So.2d 187, 14 Fla. L. Week. 387, 15 Fla. L. Week. S241 (Fla. 1989)(reh. den. April 16, 1990), where defendant was convicted of second-degree murder, the district court at 502 So.2d 471 reversed and remanded with directions, and this court issued a partial reversal holding first that motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which jury can exclude every reasonable hypothesis except that of guilt, and secondly that the state in Law introduced sufficient evidence inconsistent with

defendant's reasonable hypotheses of innocence to justify submitting case to jury. Id.

**ISSUE V**

**THE COURT ERRED FAILING TO SUSTAIN DEFENSE OBJECTION AND CURE ERROR WHEN STATE WITNESSES SAID GEORGE BROWN WAS ARRESTED FOR AN UNRELATED WARRANT, IN VIOLATION OF §90.404, FLORIDA STATUTES.**

**" \I 2** During direct examination, key prosecution witnesses Deputy Richard Hess, Investigator Roland Lackey, Sergeant Davis Kite, and Detective Robert Ore continued to testify that Brown was arrested for an allegedly outstanding warrant regarding an unrelated crime. (R. 626, 659, 711; see also prosecutor's closing argument at 1164-1165) Defense counsel moved for a "cure" to the disclosure of unrelated criminal activity. The court denied his motion because the court agreed with the state, in that "it was part and parcel" of defendant's statement to the officers during interrogation. (R. 660) Relevant testimony was as follows:

> Q. (state on direct) How was it that you came into contact with Mr. Brown in your job at the receiving facility?
> A. (Deputy Hess) He was arrested by a city department, Englewood Police Department and brought to the detention facility on a warrant for ----
> Q. That's OK. What was your job with regard to him once he got there?
> A. As soon as he came in, I checked for the appropriate paperwork, which was a warrant, and then I received him into our facility.
> Q. OK. About what time of day was it in Colorado when you first saw Mr. Brown?
> A. Approximately 6:45 p.m.
> Q. Now what was your procedure, what did you do with him once you got him there? You made sure you had a warrant to hold him there, then what did you do?[38]

* * * *

(R. 626)

> Q. (State on direct) Did he tell you how he found the body; whether he was still in the car when he found the body or anything of that nature?
> A. (Investigator Lackey) He didn't specify to me.
> Q. He just said he drove down the canal and found the body?
> A. Found the body and the body was approximately 25 feet off the side of the road feet first in the weeds lying on its stomach. He said that at that point he saw blood on the body and that he approached the body to attempt to find a pulse and put his ear next to the torso. At that time he got scared and said he left in Horace Brown's car and said he did not notify authorities because he had warrants for his arrest and

[38] Had this testimony been elicited by Defense counsel, then Defense's objection and motion for mistrial would have to be made after one additional question and answer so as to be considered timely. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986) (objection and motion for mistrial after four additional questions asked and answered was timely); Jackson v. State, 451 So.2d 458, 461 (Fla. l984); Roban v. State, 384 So.2d 683, 685 (4th DCA), rev. denied, 392 So.2d 1379 (Fla. 1980) (motion for mistrial made after three more questions were asked was within time frame for contemporaneous objection). However, in this case the prosecutor elicited the testimony and emphasized it by repeating the fact of a warrant. (R. 626, 659, 711, 1164-1165)

he was, quote, afraid they were going to hit me with a murder rap, unquote.

He then stated that he was going to get rid of the car. And on April 23rd, which would be a Monday morning, he took one of Horace Brown's checks----

Q. Let me stop you again. He's now telling you that on April 23rd in the morning, that's a particular date he told you?

A. That's correct.

Q. In the conversation, had you learned then when this supposed activity with Danny and everything and finding the body took place?

A. That is correct.

Q. When?

A. It was a week ago Sunday from the day I interviewed him, which would be April 22nd.

Q. OK. So at some point in this conversation he had told you all this stuff happened a week ago Sunday?

A. That's correct.

Q. All right. And then he says then on April 23rd, which is going to be the next Monday morning----

A. Right, that he forged one of Horace Brown's checks in the amount of $650.00, cashed that check at the First Union Bank of Orlando, bought a, according to him, '80 or '81 Dodge Colt and decided to drive to Nashville, Tennessee. He said that once he got to Nashville he became somewhat leery that he was going to be caught because he told me that everybody that's on the run gets caught in Nashville. And he also told me he went to visit a friend there, however he did not provide me with that friend's identification.

He said then he decided to drive to Denver and went to 4301 South Santa Fe Drive, which was the Mark Claim Motel. At that point he advised me that he was approached by Englewood officers and arrested on an outstanding Osceola County warrant for auto theft. At that time the interview was completed.

MR. DOYEL: Your Honor, may we approach the bench?

THE COURT: Yes.

(The following occurred at the bench)

MR. DOYEL: I think that John has been trying to be careful not to ask the people about warrants and what they were for, and that's what this guy has just said. That's introduced another crime of auto theft which is not involved in this case, he said it was Osceola County. I don't know how to cure the problem, but that's another act that is not--another crime that is in no way involved in this case, the fact that was the reason they stopped him.

THE COURT: Well apparently the defendant allowed that he was on the run from a warrant. It would seem to me the defense would rather the jury know it's for auto theft than for another homicide or something like that.

MR. DOYEL: I believe actually it was for failure to appear for an auto theft, but--

MR. AGUERO: Judge, they both are not talking about proof of that crime. We're talking about some kind of statement by the defendant where he just says that. I'm not even offering it to prove it's true.

THE COURT: I can't clean up the defendant's statement.

MR. AGUERO: Yeah. I mean that was all part and parcel of the statement and the

defense has been aware we were going to introduce that.
THE COURT: I note the objection but it's overruled.

(R. 657-660)

Q. (State on direct) Did you have occasion on May the 1st of 1990 to become involved in an investigation into the death of Horace Brown?
A. (Sergeant Kite) Yes, I did.
Q. How did you first become involved in that situation, Sergeant Kite?
A. I was at my office in Lakeland reviewing reports and I received a telephone call from a Detective Lackey from the Denver, Colorado area. And he advised me that they had arrested a subject by the name of George Wallace Brown and that--for grand theft, auto, and that Mr. Brown had told them that he had knowledge of a homicide that had occurred approximately eight days prior. And he requested--he described the area to me and requested that I send somebody out to check it.
Q. All right. Now did you ever have any direct contact with this Mr. Brown on the phone or did you just speak to Detective Lackey?
A. Just Detective Lackey.

(R. 711-712)

Q. (State on direct) And what eventually did Detective Lackey tell you during that phone call?
A. Detective Lackey advised that Mr. George Brown had been arrested by another police agency and in turn was taken to his agency's detention facility. During the booking process, several items were found on--or in George's possession which belonged to Horace Brown.

In the course of finding out who this property actually belonged to, George advised that Horace Brown was dead. Eventually Detective Lackey interviewed Mr. Brown at his request and he gave the location of Horace Brown's body.

(R. 958-959)

Defense counsel argued only once against the mention of the warrant and the unrelated grand theft auto and requested a cure from the court, however the error required a mistrial at that point. (R. 659-660) Although the judge overruled the objection because "defendant allowed that he was on the run from a warrant," he also theorized "defense would rather the jury know it's for auto theft than for another homicide or something like that." (R. 660).

During guilt phase closing argument the prosecutor told the jury:

But he takes off out of the state with all these different stories, even calls Judy Etherington and says if anybody is asking about me don't tell them where I'm at.

What was he scared of; a grand theft warrant? Not reasonable.

(R. 1165)

The officers' unresponsive testimony and the prosecutor's unfair and prejudicial use of the evidence of unrelated criminal activity that Brown was arrested on an outstanding warrant for grand theft auto was clearly not admissible. § 90.404(2), Fla. Stat. (1990). Equally clearly, it was not "invited." See e.g., Simeon v. State, 520 So.2d 81 (Fla. 3d DCA 1988). Even the judge agreed it could not help to "clean up Defendant's case." (R. 660) This court recently stated

> Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly had the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992)

### A. The testimony was inadmissible.

If the prosecutor had attempted to prove Brown committed other unrelated crimes, such evidence would not have been admissible. There was no theory under which the evidence could have come in. Unless a defendant places his character in issue, it may not be attacked by the state. See Von Carter v. State, 468 So.2d 276, 278 (Fla. 1st DCA 1985).[39] References to a defendant's past contacts with law enforcement have been deemed error in numerous cases. See e.g., Henderson v. State, 463 So.2d 196 (Fla. 1985) (defendant wanted by other states); Loftin v. State, 273 So.2d 70 (Fla. 1973) (reference to mug shots); Periu v. State, 490 So.2d 1327 (Fla. 3d DCA 1986) (officer's testimony he recovered stolen vehicles from defendant's body shop before). The introduction of such evidence is precisely what the "Williams rule" is intended to prevent.

Williams rule evidence is a special application of the general rule that all relevant

[39] Although the prosecutor did not elicit the unwelcome testimony in this case, it was the state's key witness who blurted out the information.

evidence is admissible unless excluded by a rule of evidence.[40] Evidence of other crimes or misconduct perpetrated by the defendant may be admitted only if relevant to a material fact in issue. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988). Evidence of other crimes is not admissible if its sole purpose is to demonstrate the defendant's bad character or propensity to commit crimes. Castro v. State, 547 So.2d 111, 115 (Fla. 1989); Straight v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2), Fla. Stat. (1990).

In Jackson v. State, 451 So.2d 458 (Fla. l984), for example, the court admitted testimony from a state witness that at some prior time the defendant had pointed a gun at him and bragged he was a "thoroughbred killer." On appeal, this Court could "envision no circumstance" in which the testimony could be "relevant to a material fact in issue." 451 So.2d at 461. Although the testimony showed Jackson may have committed an assault and may have killed before, neither was relevant to the case. Quoting from Paul v. State, 340 So.2d 1249, 1250 (3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977), the Jackson court stated:

> There is no doubt that this admission would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

---

[40] The "Williams rule," codified in the Florida Evidence Code at {90.404(2)(a), Fla. Stat. (1987), was derived from Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959), in which this Court held that similar fact evidence of a prior criminal act is admissible if relevant except to prove bad character or criminal propensity. Section 90.404(2)(a) of the Florida Evidence Code provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, 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.

340 So.2d at 1250 (citation omitted).

Lackey conjectured George Brown "did not notify authorities because he had warrants for his arrest and he was, quote, afraid they were going to hit me with a murder rap, unquote," (R. 658) likewise established nothing more than criminal propensity. It revealed two crimes --the apparent murder and the offense for which Brown was to be arrested. Although the "murder rap" was the offense for which he was on trial, the arrest warrant for an unrelated crime was not related or similar to the one for which he was on trial. This resembles Hess' statement that Brown was arrested by city police and brought the detention facility on a warrant. (R. 626) Even after defense counsel's objection and the court's ruling during Lackey's testimony (R. 660), Sergeant Kite repeated unverified warrant for grand theft auto information told to him by Lackey (R. 712), Sergeant Ore quoted Lackey's initial contact with Brown under arrest circumstances (R. 959) and the prosecutor even used the warrant as circumstantial evidence to prove Brown's guilt. (R. 1165)

In Harmon v. State, 394 So.2d 121 ((Fla. 4th DCA 1980) the district court found prosecutor's cross-examination of defendant regarding her prior arrest reversible error:

> Appellant contends that references to the collateral crimes were prejudicial to the defendant. We find it unnecessary to determine whether defense counsel's single motion for mistrial was adequate to preserve the putative error for appeal. Compare, German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980), Opinion filed February 13, 1980 (1980 FLW 302), since the case must be remanded for a new trial based upon the errors previously discussed infra. However, for the guidance of the trial court upon retrial, it is well to point out that we view the aforementioned line of questioning by the prosecutor as highly improper. Arrest, without more, does not, in law any more than in reason, impeach the integrity of a witness. Michaelson v. United States, 335 U.S. 469, 482, 69 S.Ct. 213, 222, 93 L.Ed. 168 (1948). It is permissible to interrogate witnesses only as to previous convictions, not mere former arrests or accusations of a crime. Jordan v. State, 107 Fla. 333, 144 So. 669, 670 (1932).

394 So.2d at 125-126

Thus, the evidence of outstanding arrest warrants for unidentified crimes was not

relevant and was not harmless error. See Castro v. State, 547 So.2d 111 (Fla. 1989) It was inadmissible and harmful error.

**B. The Errors were Not Responsive, Relevant or Invited by Defendant.**

Prosecutor's questions prior to the witnesses inadmissible statements were (1) How Hess came into contact with George; (2) What Hess' job was with regard to George once he arrived in jail; (3) Whether Hess made sure he had a warrant to hold him there; (4) Whether George told Lackey George drove down the canal and found the body; (5) What George allegedly told Lackey happened on April 23rd, i.e. the next Monday morning after discovering Horace's dead body; (6) How Sergeant Kite first became involved in an investigation into the death of Horace Brown; and (7) Detective Ore's recital of what Lackey told him. Except for the third occasion when the prosecutor actually mentioned the warrant in his question, the line of questioning had nothing to do with George's past or prior record. Context of direct examination clearly shows prosecutor asked preliminary questions regarding officer's initial contact with George or with the dead body. The implication was that on the first three statements, Hess never suspected George killed Horace so he only testified in a vacuum about a warrant arrestee who only later said he found Horace's dead body. Lackey impliedly needed to talk about the arrest warrant for grand theft auto so as to bolster his credibility of the truthfulness of his recollection and attack on George's character. Ore's recital of Lackey's explanation of George's Osceola warrant for grand theft auto would also bolster the credibility of an effectively communicating network of law enforcement officers dealing with a known criminal. There was no way defense counsel could have anticipated each officer's unresponsive statement. Defense timely objected under the unexpected circumstances of unresponsive answer's to prosecutor's questions, but the overruled the objection anyway.

Most cases, where courts found error was invited, concern situations in which

defense counsel agreed to the procedure used by the court, intentionally solicited objectionable evidence, or failed to object or to move for a mistrial. See e.g., Pope v. State, 441 So.2d 1073 (Fla. 1983) (defense counsel invited error by stating he had no reason to doubt unavailability of a state witness, thus precluding further inquiry into his unavailability); Clark v. State, 363 So.2d 331, 334-35 (Fla. 1978) (defense counsel may not make improper comment or suggest friendly witness make "spontaneous" improper comment to gain mistrial; counsel must make contemporaneous objection); Meek v. State, 474 So.2d 340 (4th DCA), aff'd 487 So.2d 1058 (Fla. 1985) (objectionable response elicited by defense counsel who made no motion to strike nor motion for mistrial). In some cases, defense counsel also rejected the court's offer to give a curative instruction. See e.g., Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974); Hicks v. State, 362 So.2d 730 (Fla. 3rd DCA 1978).

Objectionable comments are "invited" only when, unlike the officers' comments in our case, they are responsive to the question asked by the defense counsel. In Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979), for example, the objectionable comment was elicited on cross-examination and was invited by defense counsel. Counsel kept asking the deputy sheriff why he questioned the defendant in a "question and answer form" and then stopped. 359 So.2d at 1193-94. The deputy eventually responded by reading a written report that defendant said he wanted a lawyer, thereby changing the dialogue from a question and answer format. Thus, officer's testimony was responsive to defense counsel's question. See also Copeland v. State, 457 So.2d 1012, 1018 (Fla. 1984) (defense counsel opened door because witness's answer was expressly responsive to question). When the testimony is not responsive and not elicited by defense counsel, as in our case, it is not invited. See Simeon v. State, 520 So.2d 81 (Fla. 3d DCA 1988).

The Second District reversed in Brown v. State, 472 So.2d 475 (Fla. 2d DCA 1985), finding the court was "clearly in error in affirming on a notion of invited error." Id. at 477. The court had ruled prior to trial the state could not elicit testimony that the defendant tried to reach in victim's pocket prior to the actual theft of his wallet. Finding the pretrial ruling correct, the Second District noted evidence of criminal activity not charged is inadmissible to show bad character or propensity to crime. Id. at 476-77. Defense counsel asked a state witness during cross-examination, if the only thing he saw defendant do was run. The witness responded he had "seen her try to get into Earl's wallet and he told her no." Brown, 472 So.2d at 476. This was precisely the evidence excluded prior to trial. The district court held "[t]he petitioner had every right to claim error in the unsolicited and previously prohibited testimony . . . ." 472 So.2d at 477-78.

The officers' comments that Brown was an wanted criminal was at least as egregious. As in Simeon and Brown, it was volunteered and unwelcome. As was true in Simeon, if our defense counsel had asked the original questions asked by the prosecutor, he would clearly have intended to elicit from the officers that each of them did not suspect that George Brown killed Horace Brown until Ore later suggested it. Again like Simeon, the question -- "What was your job with regard to him once he got there?" (directed to Hess) and "So at some point in this conversation he had told you all this stuff happened a week ago Sunday.... And then he says then on April 23rd, which is going to be the next Monday morning" required only responsive answers within the context of the questions. Id. Hess' and Lackey's answers were a verbatim and rehearsed hammering of the inadmissible outstanding warrant for grand theft auto. Even if the prosecutor's questions invited an explanation, it did not invite the response that defendant was brought to jail under a grand theft auto warrant.

During bench conference, defense counsel objected to evidence of another crime of

auto theft not involved in this case and he did not "know how to cure the problem." (R. 659-660) The judge held the comment was not error because "apparently the defendant allowed that he was on the run from a warrant." (R. 660) It "seem[ed] to [the judge] the defense would rather the jury know it's for auto theft than for another homicide or something like that." (R. 660) Thus, the jury was not even told to disregard the comments. See Finklea v. State, 471 So.2d 596, 597 (Fla. 1st DCA 1985) (testimony about defendant's prior criminal act, elicited by co-counsel, was too prejudicial for jury to disregard; thus, counsel's failure to request cautionary instruction did not preclude review). Our defense counsel was not in a position to request a curative instruction because the judge found the testimony was not error.

**C. A Case In Point.**

Robinson v. State, 520 So.2d 1 (Fla. 1988) is instructive because of its clearly distinguishable characteristics. Robinson's counsel and the prosecutor entered into pre-trial stipulation that Robinson fired the fatal shots and the prosecutor agreed not reveal Robinson had allegedly stolen the murder weapon in a prior burglary. The prosecutor proffered a gun resembling the one allegedly used to commit the murder, defense counsel objected and asked the witness, "Detective West, you don't know whether the weapon was exactly like this or a different length barrel, do you?" 520 So.2d at 4. The detective said he did because it was reported "on the stolen list, the burglary list." Defense counsel told the judge he did not invite the comment. The judge disagreed and found the remark had "gone right over the jury's head, had been invited by defense counsel, and was harmless." 520 So.2d at 4-5. This Court also found the remark harmless, because the evidence would have been admissible but for the stipulation, leaving only the stipulation violated; and because its nature and context further suggested the remark was harmless. Id.

Robinson is distinguishable from our case for three reasons. First, evidence that

Brown was a wanted criminal would not have been admissible under these circumstances. Second, unlike Robinson's attorney, who manifested his knowledge and control of the response his question might elicit based on his pretrial stipulation, our defense counsel had attempted to suppress all such references as part of his motion to suppress because of Miranda warning violations. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) Even after his motion to suppress was denied he could not reasonably anticipate that the prosecutor would elicit such unresponsive references to an unrelated crime and arrest warrant. Third, the nature, context, and repetitiveness of the comment did not render it harmless. In Robinson, the witness did not say that the defendant committed the robbery. He could have bought the gun from the robber. In our case, Hess and Lackey said specifically that Brown was arrested pursuant to a grand theft auto warrant. We know the comment did not go over the heads of all of the jurors because the prosecutor emphatically pointed out this unverified assumption during his guilt phase closing argument.[41] (R. 1164-1165) Accordingly, based upon this Court's reasoning in Robinson, the officers' and the prosecutor's comments were inadmissible, uninvited, and harmful.

**D. The Error was Not Harmless.**

Our criminal justice system requires the elements of a criminal offense be established beyond a reasonable doubt without resorting to the character of the defendant or propensity of defendant to commit crime. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Castro, 547 So.2d at 115; Peek v. State, 488 So.2d 52, 56 (Fla. 1986); Straight, 397 So.2d at 908. Evidence of arrests or pending charges are not only

[41]Prosecutor's intentions were contradicted when he responded to defense objection by stating, "I'm not even offering [evidence of the warrant] to prove it's true." (R. 660)

harmful error during guilt phase, but prejudice the juror to find non-statutory aggravating circumstances during the penalty phase of a death case. Provence v. State, 337 50.2d 783 (Fla. 1976)

Predisposing influences on the jury regarding the manner of how, when, where and who referred to such inadmissible evidence created harmful error, because of the obvious later effects during the penalty phase deliberations. Based on the arrest circumstances, during which George answered Hess and continued to talk to Lackey prior to Miranda warnings, George's suppressible statements could only be interpreted as manifestly lacking in remorse. It has been held as error to consider lack of remorse as an aggravating circumstance to a murder. Riley v. State, 366 50.2d 19 (Fla. 1978); Drake v. State, 441 So.2d 1079 (Fla. 1984); Hill v. State, 549 So.2d 179 (Fla. 1989).

The apparent means of disposing victim's body by stealing his car, just as he apparently did during another auto for which he was held, erroneously prejudiced the jury. Means of disposing of victim's body is an impermissible aggravating circumstance. Blair v. State, 406 50.2d 1103 (Fla. 1981).

Revelation of this inadmissible and unsubstantiated crime, could only be combined in the jurors' minds with the penalty phase evidence of George Brown's prior aggravated assault to create the appearance of a more substantial criminal history than he actually had at the time. Substantial criminal history, even if totally substantiated with competent evidence may not be used as non-statutory aggrevator in the penalty phase. Milkenas v. State, 367 50.2d 606 (Fla. 1978)

The erroneously admitted evidence of George's pending grand theft auto charge, which was never proved at a later stage in the trial created, overly stated, George's propensity to commit the same crime, for which he was charged at this trial. This also predisposed the jury to conclude George's propensity to commit the collateral crime of car theft, which the state argued was part of the robbery. Such evidence of

defendant's propensity to commit crime cannot be considered as an aggravating circumstance to the murder. Miller v. State, 373 So.2d 882 (Fla. 1979), but, see, Shriner v. State, 386 50.2d 525 (Fla. 1980)

In Castro, the state rebutted the presumption because the defendant confessed three times to the murder. 547 So.2d at 115. Brown's defense was he did not commit the crime. Defense counsel earnestly attempted to compel discovery from the state regarding the Gainesville murder investigation and suspects. Thus, the potential evidence was far from overwhelming.

Grand Theft auto was a particularly serious charge for the jury to hear about for three reasons. First, it may have engendered fear that George was predisposed to commit the auto theft again in this case, but with more serious consequences resulting in the death of the car owner. The jurors were not told defendant did not confront or threaten anyone during the grand theft auto charge, no one was injured, no violence occurred, and the charge upon which the warrant was based never lead to a conviction. (R. 660, 626, 659, 711-712) They may have imagined a daring and dangerous reckless driving and a high speed chase, involving weapons, hostages and injuries to automobile owners, pedestrians, and other near the public roads. Worse yet, they may have imagined another murder was committed during the other car theft, not yet discovered by the authorities or hidden from their hearing by the court's previous rulings during a suppression hearing. Hearing only that George Brown was an outlaw or "at large", was worse than hearing the whole story. Second, Hess', Lackey's and the prosecutor's remarks told the jurors Brown committed three crimes --the murder and robbery and the offense for which he was arrested when he fled to Colorado. They were not told the nature of the offense and may have suspected violence and even previous murders. Third, after having found Brown guilty of premeditated murder in the first degree, their recommendation of death was even more probable when combining the previously

disclosed grand theft auto and the newly discovered aggravated assault of George's wife, with the present case of George stealing the automobile after committing the more violent act of killing the auto owner.

The jury members were not polled as to how the arrest for grand theft auto affected their decision. Thus, the officer's remark clearly affected the verdict. See Castro, 547 So.2d at 115 (error harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error"); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986. A new trial is required.

**ISSUE VI**

**THE COURT ERRED FAILING TO GRANT DEFENSE MOTION IN LIMINE AND OBJECTIONS REGARDING PROSECUTOR'S DEATH QUALIFYING QUESTIONS.**

**" \l 2** Defense counsel's motion in limine to suppress certain kinds of death qualifying questions by the prosecutor during jury selection was heard and denied by the court. (R. 1682, 1723-1731) Also during jury voir dire at trial, defense counsel's timely objections and motion for mistrial regarding prosecutor's hypothetical questions regarding issues of felony murder, premeditation and reasonable doubt were denied. (47-48, 94-95, 128-129) The court committed reversible error, because the judge's overruling of objections and denial of mistrial motion (R. 128-130) cumulatively compounded each other and resulted in a denial of defendant's fundamental rights to a fair trial, an unprejudiced jury, and competent defense attorney under the sixth amendment of the United States Constitution and the Declaration of Rights in the Florida Constitution.

In Thomas v. Wainwright, 486 So.2d 574, 576, 11 Fla. L. Week. 154 (Fla. 1986) this court told that habeas corpus petitioner, that

> impropriety of the voir dire procedure used at trial[, which] was not raised and preserved by motion or objection at trial and argued on appeal thereafter, ... is foreclosed from consideration and is not properly before us. See, e.g., Steinhorst v. Wainwright, 477 So.2d 537 (Fla.1985)

The impropriety in the jury selection process, which was reviewed even though the above standard was not met, included prosecutor's

> practice of questioning prospective capital-case jurors about whether any of their attitudes or beliefs regarding capital punishment would prevent them from impartially considering the matters submitted to them under the instructions of the court.

486 So.2d at 575

This court further suggested

> even if petitioner's suggestion that jurors unalterably opposed to the death penalty should be allowed to sit on the guilt phase of capital trials should have legal merit, the correctness of the exclusion for cause of the venireman in question would not be affected. He was excused for cause on grounds so clearly shown by his answers that defense counsel abandoned his rehabilitative efforts and acquiesced in the court's ruling.

486 So.2d at 576 citing as authority Wainwright v. Witt, 391 U.S. 510, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Trial counsel cited the same United State Supreme Court cases at the beginning of

his motion in limine regarding death penalty qualification of the jury, prior to trial. (R. 1682) The standard "death qualifying" criteria authorizes the state's "for cause" removal of a jury member "whose opposition to the death penalty would prevent or substantially impair the performance of the juror's duties in accordance with the juror's oath and the court's instructions." (R. 1682) However, those cases, do not authorize extensive voir dire "in order to develop information about prospective jurors' views concerning the death penalty in order to enable the state to exercise peremptory challenges." (R. 1682) Nor do they authorize extensive questioning "for the purpose of conditioning jurors to be receptive to imposition of the death penalty." (R. 1682-1683) Our defense counsel requested the following limited instruction: "when asking voir dire questions about the death penalty," limit questions to (1) "who is opposed to the death penalty[?];" then "(A) Do you think that society should be able to impose the death penalty?; [and] (B) Do you personally favor or oppose the death penalty?;" (2) if anyone is opposed to the death penalty based on his or her answers to those questions, then a fourth and last question on the issue may be posed only to those opposing jurors, "despite that opposition, [will you perform your jury duties in accordance with your oath and] follow the court's instructions? (R. 1682-1684) Legal presumption would exist based on the court's objective requirement of a "yes or no answer," where upon the juror presumably could be discharged for cause if the answer is "no" or remain for possible peremptory challenges if the answer is "yes."

The judge denied the requested instructions, "[b]ecause the Court is of the persuasion that it serves both purpose of the State and the Defense to have a full voir dire..." (R. 1731) Defense counsel moved the court again at the beginning of jury selection to prohibit the prosecutor from telling "the jury bits and pieces of the law and then to use unrelated that are unrelated to this case [because this] is simply allowing the prosecutor to condition the jury to his point of view." (R. 15) The presiding judge during voir dire,

Robert Pyle,[42] deferred ruling by observing "it is not proper for ... the State or the defense to instruct the jury." (R. 15)

When first addressing the jury, the prosecutor, over defense counsel's specifically preemptory objections (R. 47-48, 94-95, 98, 99), asked the jury

> If Mr. Brown was here charged with drunk driving and killing somebody, DUI manslaughter, and suppose you, as you sit there today, had been in an accident with a drunk driver and been seriously injured or had some person close to you seriously injured or killed by a drunk driver. You may sit there and say, look, Judge, I could sit on any kind of case, murder, rape, anything, but not this one because of my background. These people had some person close to them killed or injured by a drunk driver, that may be a prejudice they just couldn't set aside."

(R. 47) and

> ... felony murder essentially is this. There are certain felonies that the law sets out in black and white, a laundry list sort of thing and says this. If Mr. Brown, in this case, is involved in one of those crimes and in the course of that crime somebody dies as a result of him, his actions, then whether it's premeditated or not, that's also called first degree murder.
>
> So premeditated murder can be first degree murder, felony murder could be first degree murder... Do you understand that in your job as a juror it makes no difference as regards the death penalty whether you may believe the State proves this case through the felony murder theory or through premeditation, if you as a juror are convinced beyond a reasonable doubt that Mr. Brown is guilty of first degree murder, then when we get to the second part of the trial, what theory you believed it was proven under oath doesn't matter? Did I make myself understood?

(R. 96-97)

> MR. AGUERO: OK. If somebody holds--well like this lady, she was robbed, somebody pointed a weapon at her, a gun or knife and robbed her. If she'd had got killed during that robbery, we'd be talking about this kind of thing, felony murder. Do you understand that?
> PROSPECTIVE JUROR NORMAN: Yes.
> MR. AGUERO: OK. Ms. Willis, do you think that it takes any particular amount of time to make a conscious decision to do something and then do it; so you thing that takes any particular amount of time, one minute, one day, one hour?

[42]Although appellant has not stated a formal issue for an appeal in this brief, by asserting a separate and fully argued position, regarding the legal impropriety of using a different judge for jury selection than the one presiding during trial, we object to this procedure as illegal as per this court's prospective order in State v. Singletary, 549 So.2d 996, 14 Fla. L. Week. 413 (Fla. 1989).

> PROSPECTIVE JUROR NANCY WILLIS: Yes, I think it takes time.
> MR. AGUERO: OK. Let me give you an example. Do you think it's possible that since I've been standing here for the last few minutes asking these questions that I consciously made up my mind to take this pen and throw it at Mr. Hutchinson -----

(R. 98) The very abuses foreseen did in fact occur. Defense counsel objected and cited Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986), where the district court held:

> Appellant alleges that the first error was committed during jury selection. The prosecutor attempted to elicit from the prospective jurors whether they had any preconceived notions as to premeditation and the time required to form the design to kill. The prosecutor defined premeditation as "killing after consciously deciding to do so" and "operation of the mind." The definition failed to include reflection, the integral second requirement for premeditation. Sireci v. State, 399 So.2d 964 (Fla.1981), cert. den. 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The trial court erred by allowing the prosecutor to follow this line of questioning over defense counsel's objection and permitted an improper definition of premeditation to form in the jury's mind.

Id. at 615.

The self-same prejudicial and erroneous comments, legal instructions and hypotheticals, which defense counsel had peremptorily objected to, did in fact occur during voir dire. However, the judge said "I think it's distinguishable, so I'll overrule the objection." (R. 99) Similar prejudicial statements were used in voir dire, followed by objections and adverse court rulings. (R. 128-130, 217-218, 431-435, 443-444, 479-481, ) Defense counsel moved for mistrial based on these continued prejudicial and erroneous statements of the law and the court denied the motion. (R. 128-130)

The Thomas court said if it had reached the legal merit, it would have denied petitioner's claim because the claim incorrectly represented the record, ie. only one of the prospective jurors was excused for cause due to death penalty attitudes and the others were removed by peremptory challenge, but defense counsel made no motion or objection on the ground of improper use of peremptory challenges. 486 So.2d 576 "Therefore, any reliance on such use as a point of law was waived and is foreclosed

from consideration." Id. Defense counsel made timely objections and motion for mistrial at close of jury selection due to the improper dismissals and challenges.

Thomas also argued the process of explaining the two phases of a capital trial to prospective jurors and establishing their qualifications improperly prejudiced them in favor of the state on both guilt or innocence and on the sentencing question. 486 So.2d 576 This argument predictably ignores the defense-oriented portion of the voir dire procedure, in which defense counsel is permitted to inquire into jurors' understanding and acceptance of (and thereby to educate them about) such concepts as the presumption of innocence, the state's burden of proof, and so forth. The question of the legal propriety of the procedure used is, again, not cognizable in this habeas corpus proceeding and is not properly before us.

**ISSUE VII**

**THE COURT ERRED FAILING TO GRANT DEFENSE MOTION TO SUPPRESS DEFENDANT'S PRE-MIRANDA STATEMENTS TO OFFICERS AND SUBSEQUENT TAINTED STATEMENTS TO OTHER OFFICERS AFTER MIRANDA WARNING.**

**" \I 2** Prior to trial defense counsel moved the court to suppress defendant's statements made to Colorado and Florida authorities, based on initial Miranda violations. (R. 1682, 1723-1731) Subsequent statements from the defendant must also be suppressed, because of the original violation, which lead to subsequent statements of the defendant and because of continued violation of due process and right to counsel, when interrogations continued without notifying defense counsel and allowing counsel to confer with client prior to any of the statements. (R. 1723-1731) Ore specifically admitted he "did not" give Brown Miranda warning prior to questioning, because Lackey told Brown "he did not have to speak with [Ore] at all." (R. 969-970) Defendant signed only one previous waiver form, which Ore considered authenticated for his inquiry purposes. (R. 970)

The court erred in denying defense motion to suppress in violation of Brown's rights under the Fifth and Sixth amendments to the United States Constitution and the Declaration of Rights to the Florida Constitution. Defendant is therefore entitled to a new trial.

The generally accepted rule is if a suspect is incarcerated in a jail or prison, he is in custody for purposes of any interrogation. Thus, a person who was incarcerated in a penitentiary for one offense was held to be in custody for purposes of interrogation conducted by Internal Revenue Service agents with respect to another criminal offense. Mathis v. U.S., 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) However, where a murder suspect was advised of his constitutional right to remain silent before he was questioned by police officer, there was no requirement for second Miranda warning before he talked with detective while still at the crime scene. Moreno v. State, 418 So.2d 1223, 1226 (Fla. 3rd DCA, 1982) Detective Ore was not at the crime scene with Brown, but interrogated him in a Colorado jail at least 8 days after the murder.

The right to present a defense includes the right of compulsory process which defendant tried to exercise by subpoenaing the Gainesville investigators based on initial Miranda violations. In Miranda the United States Supreme Court held a person

> taken into custody or otherwise deprived of his freedom by the authorities in any significant way ... must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.

384 U.S. at 478-79, 86 S.Ct. at 1630. The record reflects, this was not done prior to questioning by Hess, Lackey and Ore.

Subsequent statements such as those repeated by Kite, which purportedly came from the defendant must also be suppressed, because of the original violation, which lead to subsequent statements of the defendant and because of continued violation of due process and right to counsel, when interrogations continued without notifying defense counsel and allowing counsel to confer with client prior to any of the statements.

The court erred in denying defense motion to suppress in violation of Brown's rights under the fifth and sixth amendments to the United States Constitution and the Bill of Rights to the Florida Constitution. Defendant is therefore entitled to a new trial.

**ISSUE VIII**

**THE COURT ERRED FAILING TO GRANT DEFENSE MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL PER RULE 3.191, FLORIDA RULES OF CRIMINAL PROCEDURE.**

**" \I 2** Defense counsel filed a petition for writ of prohibition absolute to be issued to the Honorable J. Tim Strickland, Circuit Judge, Tenth Judicial Circuit, on May 14, 1991, restraining Judge Strickland from conducting further proceedings in this case and in particular prohibiting the jury trial scheduled for April 22, 1991. (R. 2127) The basis for invoking the jurisdiction of this court at that time was petitioner was a defendant charged with first degree murder in Florida and styled CF90-3054-A1-XX in the Circuit Court of Polk County. The petition sought review of an order denying motion for discharge for denial of speedy trial. Motion was filed by appellant on March 12, 1991, (R. 1969-1970, 2003-2005) and the "snap-out" reflecting respondent's denial of motion was executed on March 15, 1991.[43] (R. 2015, 2017). Counsel filed a second motion for discharge on April 1, 1991 in case counsel's speedy trial calculations where not correct on March 15, 1991. (R. 2001-2002, 2014-2015). The court denied the motion on April 5, 1991. (R. 2006, 2015, 2017)

At the end of the April 5, 1991 motion hearing the judge responded to defense issue of speedy trial, as follows:

> THE COURT: Gentlemen, on the second motion to discharge, I see the specificity with which the motion has been drawn in terms of the particular approach to the problem. But it seems that in our various and sundry machinations we've discussed this approach in the past. I thought maybe we had.
>
> MR. AGUERO: He just extended the dates, Judge.
>
> MR. DOYEL: Yes. Your Honor, my calculation in, in all of my arguments and motions has been based on the difference between, or the time span between status conferences. And I discovered when I was preparing my motion for writ of prohibition that there was an additional week added between the last two trial blocks, so that there was a one week later, if you calculate it from trial block to trial block, rather than status conference to status conference, there is an extra week, and if that's true and if my--and if that's the period of time that's used for calculation, assuming my argument is correct, then I had filed my earlier motion prematurely. And all I've covered myself time wise but, you know, I expected the same ruling as before but I just wanted to be covered technically on, on the calculation in the event

[43]On March 15, 1991 defense counsel moved the court to discharge defendant on the outstanding charges due to denial of speedy trial (R. 1973-1996), and noticed hearing for April 5, 1991 on the motion and a second motion for discharge due to denial of speedy trial on April 1, 1991. (R. 2000-2002) On April 5, 1991 judge authorized another defense attorney, Ronald Toward, to represent a key third party witness, Glenn Hicks, to aid in discovery of the prime "serial killer" suspect, Danny Harold Rolling, regarding the similar murder of Horace Brown. (R. 2008-2014, 2017)

On April 5, 1991 the judge denied defendant's motion for discharge based on the speedy trial argument. (R. 2015, 2017)

> the way I interpret the rule turns out to be correct.
> THE COURT: All right, gentlemen. Well, it's been the court's position that the waiver was a waiver without limitation,[44] so the Court would deny this motion likewise.

(R. 2015, 2017)

Prohibition was then appropriate to review an order denying a motion for discharge due to denial of speedy trial. This Court denied the writ on April, 3, 1991 under the Case Number 77,663 cited at 581 So.2d 163 (Fla. 1991). Appellant requests reconsideration of the contents and arguments in his original petition for writ of prohibition in context of the new issues of this brief, and incorporated by reference in this brief. The danger of which he had feared prior to trial occurred, ie. a substantially delayed trial in violation of his entitlement under Florida's Speedy Trial rule and of his substantive Sixth Amendment right to speedy trial, compounded by the state's delay and prohibition of adequate preparation of a defense argued under Issue II of this brief, and the court's denial of adequate or effective assistance of counsel argued under the following Issue VII. Lowe v. Price, 437 So.2d 142 (Fla. 1983). Appellant additionally argues the following case authority supports discharge under these case circumstances: Baxter v. Downey, 581 So.2d 596 (Fla. 2nd DCA 1991); Massey v. Graziano, 564 So.2d 287 (Fla. 5th DCA 1990); Ariza v. Cycmanick, 548 So.2d 304 (Fla. 5th DCA 1989); State v. Freeman, 520 So.2d 110 (Fla. 2nd DCA 1988); and Cook v. Snyder, 582 So.2d 1239 (Fla. 3rd DCA 1991).

**ISSUE IX**

**THE COURT ERRED BY FAILING TO APPOINT SEPARATE COUNSEL TO REPRESENT APPELLANT DURING PENALTY PHASE.**

[44]State's argument during a previous hearing on this issue on January 23, 1991 (R. 1710) was attacked as violative of intent behind the 1980 amendment comments. (R. 1710-1711)

**" \I 2** Defense counsel failed to file a pretrial motion requesting the judge appoint separate counsel to represent Brown for the penalty phase. (R. 1194) At least three months before trial, the judge did not appoint co-counsel on its own motion, even though he noted the state had several prosecutors available and potentially prepared to try the case, without comparing Brown's one lawyer staff. (R. 1712) On January 23, 1991 Assistant State Attorney Paul Wallace was apparently prepared to represent the state and argued several pending issues before the court on this case and on trial preparation. (R. 1705-1750) Mr. Wallace acknowledged Assistant State Attorney Kevin Cox had significantly represented the state regarding the speedy trial waiver issue during the January 23 hearing. (R. 1709-1710) The court and acting prosecutor acknowledged Assistant State Attorney Hardy Pickard was also experienced in prosecuting numerous murder cases and forseeably able to try the case upon proper scheduling. (R. 1706-1708) On its own judicial notice the court acknowledged Assistant State Attorney Lank Havice would have also been available to try the case. (R. 1712) The record never reflects the court's appreciation of the disparity of available and apparently prepared legal representation for the state versus the single champion for the defendant.

What the court and the defense counsel should have feared occurred. The jury found Brown guilty, leaving defense counsel in the position of arguing mitigation at penalty phase. As a result, he presented very little mitigation. Had he not been forced to choose between continuing to profess his client's innocence or admitting guilt and presenting extensive mitigation, Brown might well have received a life recommendation and sentence.

We know Brown was an alcoholic. Dr. Dee testified to that at trial. (R. 1314, 1318) Officers quoted George in their testimony and Judy Etherington corroborated George went bars often to drink beer. (R. 650, 7783, 787-788, 972, 1413, 1415) Mrs. Brown

and waitresses at the Siesta Bar in Lakeland said Horace frequently did the same. (R. 849, 943-951, 951-955) The prosecutor acknowledged this fact during guilt phase closing argument. (R. 1185) Horace's regular consumption is verified by George Brown's statements about their "casual friendship" at bars. (R. 654, 972, 1413, 1415) George told the officers he and Horace had already drunk a few beers by the time they arrived at the convenience store and bought some more before Horace drove on toward Polk City. (R. 650, 972, 1413, 1415) Evidence of impairment through drug or alcohol abuse must be considered in mitigation. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). Yet no such mitigation was presented.

Only George Brown's mother testified from his family. (R. 1333-1356) George had family members, who could have testified. (R. 1312, 1342, 1350-1351) The jury heard a considerable amount about his childhood, his family, whether he had been married or fathered children, and his employment background. Brown had a bad childhood, to which some other family members or friends could testify. He had a bad childhood, to which his psychiatrists testified. Before the aggravated assault on his wife in Montana (R. 1279, 1285, 1304), before his grand theft auto (see ISSUE V), his life was miserable.

Significant psychiatric testimony was presented. Other family members existed and could have been made available. (R. 1312,1342, 1350-1351). Although we have no way of knowing for certain, it seems likely their mitigation testimony would have implicated George Brown in the homicide and further destroyed counsel's credibility. This may well have been the reason counsel decided not to call other witnesses. Defense counsel's concern over his credibility was not imaginary. In Jones v. State, 528 So.2d 1171, 1175 (Fla. 1988), defense counsel had the same concern. The defendant filed a Rule 3.850 motion alleging ineffective assistance because his counsel did not present psychiatric testimony during penalty phase. Defense counsel justified

not putting the psychiatrist on the stand during penalty phase because to do so would have been contrary to his theory of the case. As with our attorney, he spent the entire trial attempting to prove defendant did not commit the murder. The same lawyer destroyed any credibility earned with the jury switching defense argument in penalty phase to prove defendant committed the crime because of mitigating factors. This court found decision not to call the psychiatrist in Jones a reasonable tactical decision. Id.

Our counsel's tactical decisions was were irrelevant not reasonable because testimony from Dr. Dee and defendant's mother was elicited from the same lawyer who zealously denied and defended against conclusions of defendant's guilt and the court could reasonably foresee rhetorical dilemma would inherently deny Brown a fair penalty phase trial. The judge noted Brown, through his single court appointed attorney, was unable to provide a sufficient quantity of relevant evidence to overcome "reverse William's rule" scrutiny (R. 2023, See ISSUE III); and even re-appointed another defense attorney to represent the state's prospective witness, Glenn Hicks, during Brown's deposition of Hicks regarding the "Gainesville murder" suspects. (R. 2008-2014) Still, George Brown was entitled to truly "effective" counsel, Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to effectively investigate facts of his defense and to present mitigation evidence. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the United States Supreme Court determined the eighth amendment requires the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. In Riley v. Wainwright, 517 So.2d 656 (Fla. 1988), this Court held Lockett applies equally to the jury's recommendation of sentence. 517 So.2d at 657-659. The Riley court based its holding in part on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1921, 95 L.Ed.2d 347 (1987), in which the Court found a Lockett violation even though the judge and jurors heard mitigating evidence because their consideration was restricted to statutory mitigating

factors.

The instant case is worse. The jurors never heard the statutory or nonstatutory mitigation that might have been presented had defense counsel not been forced to choose between 1) presenting extensive mitigation and losing credibility, or 2) omitting the mitigation and maintaining his credibility to effectively argue for a life sentence in his closing. Had Brown been represented by the public defender, counsel would not have been forced to make this decision. When the public defender represents a client in a death penalty case, a different lawyer is always available to represent the client during penalty phase if he is convicted.[45] In this respect, Brown was denied the same representation provided to defendants who are represented by the public defender.

The United States Constitution defines the basic elements of a fair trial largely through the sixth amendment right to counsel. Strickland v. Washington, 466 U.S. 668, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland, the United States Supreme Court adopted a "reasonably effective assistance" standard for assessing the performance of counsel. The Strickland court held the same standard applies to a capital sentencing proceeding as provided by Florida law. Counsel's role at a penalty phase proceeding is to ensure the adversarial process works to produce just results. 466 U.S. at 687.

The case at hand is not like Strickland, in which counsel did not conduct a thorough penalty phase investigation, or like Holsworth v. State, 522 So.2d 348 (Fla. 1988), in which defense counsel failed to prepare for the penalty phase. We do not know to what extent counsel prepared for the penalty phase in the case at hand because he was effectively prevented from presenting substantial mitigation due to the court's failure to

[45]Disparity between public defender death cases and private counsel court appointed cases is an inherent part of this appellate issue. Appellant reserves the right to further document cases to support this supposition in his reply brief.

appoint separate counsel on its own motion.[46] Because defense counsel's credibility was tainted by his defense Brown was innocent, the jury probably gave little weight to his argument for a life sentence. Thus, Brown received ineffective assistance of counsel because of court reluctance and state interference with the ability of counsel to render effective assistance. See e.g., United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The government violates right to effective assistance when it interferes with ability of counsel to make independent decisions about how to defend. Strickland, 466 U.S. at 686. State interference with counsel's assistance raises a presumption of prejudice. In such circumstances, prejudice is so likely that case by case inquiry into prejudice is not worth the cost. Strickland, 466 U.S. at 692; Cronic, 466 U.S. at 658. The presumption counsel's assistance is essential requires the conclusion the trial is unfair, if accused is denied counsel at a critical stage of trial. The Supreme Court has uniformly found constitutional error when counsel was totally absent or prevented from assisting the accused during a critical stage of a proceeding. Cronic, 466 U.S. at 658 & n.25.

Constitutional error results when counsel entirely fails to subject state's case to meaningful adversarial testing. Cronic, 466 U.S. at 658. There may be circumstances of such magnitude where counsel is available to assist accused and the likelihood that even a competent lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into actual conduct. See e.g., Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (defendant denied

[46]Ironically, such automatic appointment of counsel had existed in the Public Defenders' office in the Tenth Judicial Circuit, already at the time of this trial. However, the court does not regularly require such appointment. Had the court refused to grant public defender's motion to withdraw and had the court not appointed private defense counsel, but rather another public defender's office in another district, appellant would have unquestionably received "effective" co-counsel for the penalty phase.

right of effective cross-examination); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932) (court appointed unprepared Tennessee lawyer in highly publicized capital offense "with whatever help the local bar could provide"). The case at hand presents a similar situation. Although counsel was there to assist Brown throughout the penalty phase, the action of the court in failing to appoint additional counsel rendered his assistance totally ineffective. He was effectively precluded from presenting meaningful mitigation. Moreover, if the jury no longer believed in defense counsel's integrity or credibility, nothing he said subjected the State's case for death to meaningful adversarial testing. The prejudice created by his guilt phase argument that Brown was innocent was such that no lawyer in defense counsel's position, no matter how competent, could provide effective assistance. Defense counsel's loss of credibility rendered him ineffective and tainted jury's sentencing advisory opinion, violating fifth, sixth, eighth, and fourteenth amendments.

Showing actual prejudice in a case such as this is unnecessary because the conduct of counsel does not cause the prejudice. The prejudice arose from the circumstances that put counsel in the position of representing a convicted defendant at penalty phase the day after he proclaimed his innocence during guilt phase. Had the court granted defense counsel's motion to appoint new counsel for penalty phase, the prejudice could have been avoided.

There is no assurance counsel's assistance produced a just penalty phase result. See Strickland, 466 U.S. at 686 (criteria for judging ineffective assistance claim is whether counsel's conduct so undermined proper functioning of adversarial process trial could not be relied on as having produced just result). The jury recommended death by a 9 to 3 vote even with the small amount of mitigation presented. Had separate counsel been appointed, and had other counsel presented psychiatric testimony regarding alcoholism, and background, jury recommendation might well have been life.

A life recommendation would have materially changed the sentence. See Walsh v. State, 418 So.2d 1000 (Fla. 1982); Tedder v. State, 322 So.2d 908 (Fla. 1975).

A key aspect of the penalty phase proceeding is that the sentence be individualized. Lockett, 438 U.S. 586. It cannot be individualized, if the jurors are reacting to their distrust of defense counsel rather than making a rational decision based on the evidence and the law. Thus, the jury's advisory opinion was tainted and should not have been relied upon by the trial court in sentencing. Because the advisory opinion can be a "critical factor" in whether a death sentence is imposed, LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974), a new penalty phase with a new jury is required. Most recently this court acknowledged the court's propriety to appoint special counsel for death cases in Klokoc v. State, 589 So.2d 219 (Fla. 1991). However, in Durocher v. State, 604 So.2d 810, 811 (Fla. 1992) the court limited Klokoc.

> In considering Klokoc's appeal, however, we did not rule on the propriety of appointing special counsel.
>
> Reliance on Klokoc is misplaced both because we rejected the requirement for special counsel when a defendant waives the presentation of mitigating evidence in Hamblen v. State, 527 So.2d 800 (Fla. 1988)

604 So.2d 811-812

In our case Brown did not waive his presentation of mitigating evidence and maintains Klokoc does apply to his issue of an unprovided co-counsel in his murder trial.

**ISSUE X**

**THE COURT ERRED INSTRUCTING JURORS ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.**

**" \l 2** Section § 921.141(5) of the Florida Statutes enumerates certain statutory aggravating factors which the judge and jury may consider in determining whether to impose the death penalty. Only those circumstances may be considered by the sentencer. § 921.141 (5), Fla. Stat. (1990); Miller v. State, 373 So.2d 882 (Fla. 1979); Purdy v. State, 343 So.2d 4 (Fla. 1977). Misapplication of the sentencing statute produces the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which Florida's death penalty statute was designed to remedy. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Thus, an incorrectly imposed death sentence violates the eighth and fourteenth amendments to the United States Constitution.

Over defense objection (R. 1287), the court instructed the jury on the heinous, atrocious or cruel (hereinafter "HAC") aggravating factor set forth in § 921.141(5)(h), Fla. Stat. (R. 1395-1396) In his written findings supporting the death sentence, however, the court found the crime was HAC based on different reasoning from the instructions. (R. 2115-2116) Because the factor was clearly not supported by the evidence, the jury should not have been instructed to consider it.

The HAC aggravating factor is intended to apply "where 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." 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). Horace Brown died from three stab wounds. (R. 608-609) Because he was elderly, the death probably occurred very quickly. His physical and mental faculties may have been impaired from his high blood alcohol level. (R. 1902) If so, he may have been only partially conscious or unconscious when he was strangled, and may not have known what happened to him. Once a victim loses consciousness, he or she cannot suffer the pain contemplated by the HAC aggravating factor. Jackson, 451 So.2d 463 (Fla. 1984). There were no additional acts that set the crime apart from other capital felonies, and no evidence that the crime was unnecessarily torturous to the victim.

In Jackson, defendant shot victim in the back, drove to a remote area, wrapped him in plastic bags, shot him again, then put the still alive victim in the trunk. Nevertheless, the court found HAC aggravating factor inapplicable because "the record contains no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time. Therefore, he was incapable of suffering to the extent contemplated by this aggravating circumstance." 451 So.2d at 463. In this case, there was no unequivocal evidence to suggest Horace was conscious more than a few moments, if that long.

Aggravating factors must be proven beyond a reasonable doubt before they can be considered by the judge or jury. Atkins v. State, 452 So.2d 529, 532 (Fla. 1984). Yet, the prosecutor encouraged jurors to base their recommendation on speculation. He suggested Horace struggled while being stabbed (R. 1161-1162; denied by Detective Ore at 1036) and was robbed. (R. 1153-1156) If jurors found the HAC aggravating

factor applicable based on such speculation, their advisory recommendation was clearly unreliable.

The prosecutor compounded error by arguing in support of the HAC aggravating factor that George was much bigger and stronger than the "62 year old man." (R. 1156, 1184-1185) Based on prosecutor's reasoning, homicide would be mitigated if Appellant had killed a large and younger man.

In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853,100 L.Ed.2d 372 (1988), the United States Supreme Court found the Oklahoma aggravating circumstance, "especially heinous, atrocious or cruel," unconstitutionally vague and over broad under the eighth amendment because the language gave the sentencing jury no guidance as to which first degree murders met the criteria. The Oklahoma Court of Criminal Appeals had not adopted a limiting construction to cure its overbreadth. Consequently, the sentencer's discretion was not channeled to avoid risk of arbitrary imposition of the death penalty. The ordinary person could honestly believe every intentional taking of human life is "especially heinous." Maynard v. Cartwright, 108 S.Ct. at 859.

Florida's statute gives no more guidance than does Oklahoma's. A reasonable juror might well conclude that this aggravating circumstance is applied to all murders unless there was a question of self-defense or accident. Application of the factor has become the rule rather than the exception in Florida. See 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).

Florida and federal courts have limited construction of the HAC aggravating factor, see Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Except for the judge's erroneous reading of the word "violent" instead of "vile," he informed the jury pursuant to this court's 1990 limiting construction prescribed by this Court in cases such as State v. Dixon, 283 So.2d 1, 9 (Fla.1973). However, after federally directed resenting, this court in Proffitt v. State, 510 So.2d 896, 897 (Fla. 1987) found that one stab wound to the victim of murder during a burglary was insufficient to suggest the killing was HAC. A strong armed robbery perpetrated with 37 stab wounds was held to be an improper aggravating circumstance to justify upward sentencing departure "cruel and heinous manner" exemplifying "excessive force," but was a proper departure circumstance when viewed as "trauma to victim." Davis v. State, 534 So.2d 821, 822-823, 13 Fla. L. Week. 2605 (Fla. 4th DCA 1988) However, in Hansbrough v. State, 509 So.2d 1081, 1086 (Fla.1987) this court cited a medical examiner's testimony that several of the victim's thirty-some stab wounds were defensive to prove the victim was aware of what was happening to her and that she "did not die or necessarily lose consciousness, immediately" so as to support the "HAC" aggravating circumstance. In spite of these findings, this court reversed the judge's death "override" sentence and imposed a life sentence on Hansbrough. Id. at 1083, 1088.

Thus, a case comparison as to the number of stabbings, which may justify consideration of this aggravating circumstance, does not appear to be as important as the circumstances in which the stabbings took place. More than one shot used to kill does not set a crime apart from the norm of capital felonies to justify the HAC aggravating factor. Clark v. State, 609 So.2d 513,514 (Fla. 1992) Similarly more than one stabbing to kill does not set this homicide apart from the norm to justify HAC.

In Oklahoma, the jury is the sentencer and must make written findings of which

aggravating factors were found. Maynard v. Cartwright. The Florida jury recommendation is advisory only and jurors are not polled as to their individual votes. The judge compared Florida and Texas law on this point. (R. 1287, 1730) We do not know whether some or all of the jurors found George's crime as befitting HAC circumstances. There is a reasonable possibility, however, that at least some jurors found this aggravating circumstance applicable and that at least one of those jurors joined in the death recommendation. If jurors had not been instructed on HAC, they might have recommended life.

Before sentencing defense counsel argued for a life sentence:

> This [HAC] factor was not established by the state. Dr. Melamud testified that Horace Brown was stabbed three times. There was no evidence of other injury, such as skull fractures. Horace Brown bled to death, but Dr. Melamud could not say how long it took him to die. Horace Brown was able to feel the stab wounds when they were inflicted, but Dr. Melamud could not say the extent of the suffering after the wounds were received. Thus, while this offense, as all murders, was a horrible crime, it does not begin to qualify for sentencing under the "heinous, atrocious, or cruel" category. (R. 2097)

After quoting the passage previously cited in this brief from the Dixon decision, counsel pointed out the following clarification from Tedder v. State, 322 So.2d 908, 910 (Fla. 1975):

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe that the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder. Tedder, supra, at 910.

Trial counsel correctly averred that the Tedder passage is directly in opposition to the argument made by the state with regard to Horace Brown's manner of dying. (R. 2098) Furthermore, the state's proof regarding the onset of unconsciousness and the fact that Horace Brown was injured was inadequate to establish this aggravating circumstance. (R. 2098) See Kampff v. State, 371 So.2d 1007 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

In the Florida scheme of attaching great importance to jury recommendations, the jury be given adequate guidance so that its recommendation is rational and appropriately given the great weight to which it is entitled. When, as here, the jury is not given correct or adequate instruction, its penalty verdict may be based on caprice or motion, or an

incomplete understanding of the law. Although a Florida jury recommendation is advisory rather than mandatory, it can be a "critical factor" in determining whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). Because the jury was instructed on the HAC aggravating factor, Brown's death sentence was unreliable, thus violating his constitutional rights under the eighth and fourteenth amendments to the United States Constitution.

We are aware this Court rejected similar arguments in Smalley v. State, 546 So.2d 720 (Fla. 1989). We also acknowledge the new HAC jury instruction was intended to remedy questions under Cartwright. In re STANDARD JURY INSTRUCTIONS CRIMINAL CASES - NO. 90-1, 579 So.2d 75 (Fla. 1990) We nonetheless, request the court reconsider this important constitutional question.

**ISSUE XI**

**THE COURT ERRED BY DRAWING INFERENCES TO IMPLY COLD, CALCULATED AND CRUEL AGGRAVATING CIRCUMSTANCES NEITHER SUPPORTED BY THE EVIDENCE NOR INSTRUCTED TO THE JURY.**

**" \I 2** The judge's written findings drew inference from the position of the body when found to suggest Horace "experienced conscious pain and suffering before death" and "experienced apprehension of impending death even absent physical pain while bleeding to death after having been left to die by the Defendant" (R. 2115) However equally plausible inferences could be made that Horace was stabbed after falling in the ditch and/or passing out from his apparent intoxication and never regained consciousness. Ore had no idea what position the body was in at the time of death, but conjectured the "manner in which the pants, the way they were located on the body" would suggest the body had been moved. (R. 1046) Dr. Melamud said he could not tell whether the body was face up or face down before or after death. (R. 615-617) Prosecution argued "it doesn't make any difference where the body was lying."

The judge's inferences of other aggravating circumstances are unmistakably broader that what the evidence would support. Reciting unfounded facts of premeditation, suggests that the judge imposed the death sentence because of an aggravating factor (cold, calculated, and premeditated), which was not submitted to the jury. See, Jones v. State, 332 So.2d 615 (Fla. 1976) The written judgment and sentence should not vary from the oral pronouncements. Reber v. State, 611 So.2d 91 (Fla. 2nd DCA 1992)

**ISSUE XII**

**THE COURT ERRED BY FAILING TO FIND AND ADEQUATELY WEIGH TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.**

**" \l 2**In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court pointed out a "finding" that no mitigating factors exist has been construed in several different ways: "(1) that the evidence argued in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to out-weigh the aggravating factors involved." Id. at 534. Quoting from Lockett v. Ohio, 438 U.S. 586, 804-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978), the Rogers court reiterated that the court may not be precluded from considering any mitigation the defendant proffers as a basis for a sentence less than death. 511 So.2d at 534. "[N]either may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Rogers, 511 So.2d at 534 (quoting from Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (emphasis in original)).

Applying these principles, the court must first determine whether facts alleged in mitigation are supported by evidence. The court must then determine whether facts established are "of a kind capable of mitigating the defendant's punishment, i.e, ... extenuating or reducing the degree of moral culpability for the crime committed." Finally, the sentencer must determine whether mitigation is of sufficient weight to counter-balance aggravating factors. Rogers, 511 So.2d at 534. Citing Rogers, this Court remanded for re-sentencing in Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988) because the court's conclusion that no mitigation "rose to the level of a mitigating circumstance to be weighed in the penalty decision" was ambiguous as to whether the judge properly considered all mitigating evidence or whether he found aggravation outweighed mitigation.

Dr. Henry Dee relied on objective testing, corroborating medical records, and subjective personal history to conclude since George was shot in the head by his father as a teenager and in particular on April 22, 1990, he suffered from organic brain damage. (R. 1309-1314) Dee relied on objective testing, corroborating medical records, and subjective personal history to conclude George incurred a bullet shot as a teenager in the lower occipital region of the brain, suffered numerous other blows to the head including an automobile accident, labored under very impaired memory function, epilepsy, and alchoholism. (R. 1313-1318, 2100) Dee provided unrebutted diagnostic opinion George suffered from an organic brain syndrome manifested by significant memory impairment and organic personality syndrome. (R. 1317, 1321) Brown's alcoholism is further affected by his propensity to anxiety, which is 96% for frequent than the rest of the population. (R. 1320, 2100) Brown's organic mental condition and experiential background have also made him subject to temporary psychotic thinking, to impulsive actions without heeding consequences to himself or others, and to

uncontrollable rages. (R. 1318-13, 1321, 1327, 1329, 1331) Brown suffered from significant depression. (R. 1322) Dee ruled out malingering, based on administration of seventeen (17) neuropsychological tests. (R. 1332) Dee specifically opined on the date of the murder George Brown suffered from extreme mental or emotional disturbance, because of cognitive memory disturbance and emotional disturbances found with his Organic Personality Syndrome. (R. 1322) Dee also found Organic Personality Syndrome greatly impaired Brown's capacity to conform his conduct to requirements of the law at the time of the murder. (R. 1322-1323)

Death penalties have been reversed because of one or both of Brown's two mental mitigating circumstances, which the state failed to rebut with competent testimony. See, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989); Long v. State, 529 So.2d 786 (Fla. 1988); Fitzpatrick v. State, 526 So.2d 809 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987). The Smally, Long, Fitzpatrick, and Ferry facts involved much more aggravation than in this case.

Brown's mother, Juanita Lamey, remembered Brown as a child suffered considerable physical and mental abuse from his father, Willie Brown. (R. 1342-1345) She corroborated George's explanation that he found his wife with her lover in bed, when he grabbed his gun and shot into the walls of his home and not at the people, for which he pled guilty to an aggravated assault charge in Montana. (R. 1345-1346, 1327) She acknowledged George's musical talent in playing and "writing music." (R. 1350-1351)

Nonstatutory mitigation included several considerations supported by competent evidence during guilt and penalty phases. George was apparently abandoned by his mother before age 3 (R. 1309, 1336, 1338-1339, 1343), but his mother attempted to suggest he and the other children were involuntarily separated from her from age 3 to age 15 even though she had opportunities to find and reclaim them from Willie. (R. 1338-1340) He thought she was dead because his father told him so. (R. 1343) He felt branded as Willie Brown's bastard son, reflecting his feelings of resentment for both parents. (R. 1309) Willie brutally beat and shot George. (R. 1310, 1312-1313, 1340, 1342, 1349) Willie caused George great embarrassment by his lifestyle--including stints in prison and jail. (R. 1337) Willie sexually abused George's sisters. (R. 1347-1348) Willie was married to one woman, Mary Lou Stabler, while keeping another woman, in the same house with her, George, and the rest of the kids. (R. 1342-1343) Willie fathered children indiscriminately. (R. 1312, 1342) He put them to work to make money for his alcohol consumption. (R. 1312-1313, 1341-1343) He also shuffled them off to foster homes and moved them around because of his, and their, work as migrant farm workers. (R. 1310, 1312-1313)

As a result of the physical and mental abuse Willie imposed on George, George developed the above mental and emotional disabilities described under the statutory mitigating circumstances. He also became an alcoholic (R. 1313-1314) and manifests an easily affected emotional sensitivity. (R. 1318-1319)

Brown also exhibited positive character traits. He was very protective of his sister, Anita. (R. 1348) He especially protected her from Willie, for which he earned more abuse. (R. 1348, 1313) She was the only person with whom he ever had a lasting relationship, while enduring five (5) broken marriages. (R. 1311, 1313-1314) Anita is now dead and he has no effective relationships other than the temporary entertainment situations described with Judy Etherington, her handicapped boarder

"Gary", and her children and with his mother through his musical performances. (R. 801-805, 1350-1351)

Brown has provided musical entertainment to many people. (R. 1350-1351, 801-805) Judy Etherington said he played guitar and sang for her and her children; and he worked and helped support Judy and her children. (R. 801-805) His mother said he played and sang for her. (R. 1350-1351) He even writes lyrics and composes music. (R. 1350-1351) He was occasionally in country bands, entertaining many people. (R. 776, 1295-1296) Defense counsel read one of George's songs, offered as mitigation at the close of penalty phase to show George's artistic ability. (R. 1358-1359) "Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation." Rogers, 511 So.2d at 535.

The evidence during guilt phase, showed clearly that Horace and George were alcoholics. George exhibited nicotine dependency to Hess when he began his statement in Colorado and requested cigarettes before he asked for an investigator. (R. 635) Horace frequented the same bar enough to be known there as "peanut man." (R. 943-955) Horace and George left a bar which apparently served them alcoholic beverage before they left for Polk City, suggesting that Horace and George were drinking on the night of the homicide. (R. 650, 972, 1413, 1415) Evidence of impairment through drug or alcohol abuse must be considered in mitigation. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988); see also Gardner v. Florida, 430 U.S. 349, 352, 97 S.Ct. 1197, 51 L.Ed.2d 393, 398 (1977); Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986).

The judge disregarded all of the mitigation evidence.[47] He found "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (R. 2109, 2117-2118) Although he cursorily addressed the statutory mitigating circumstances, he did not even vaguely refer to Brown's non-statutory mitigating circumstances, which were either argued directly by defense counsel or irrebuttably apparent on the record, ie. (1) artistic abilities and entertainment provided to family, community, or society, (2) abused and neglected childhood, (3) contributions of physical protection to George's now deceased sister against his abusive father, (4) financial support to Judy Etherington's family, (5) advanced age of 42 with prison release expectancy into his seventies,[48] (6) George's mental capacity was not only greatly impaired by

[47]The judge was not influenced by the prosecutor having agreed to the mitigating circumstances of organic brain damage during penalty phase closing argument.(R. 1367) He argued several circumstances, unsupported by evidence, which were supposed to suggest HAC conditions:(1) undefined weight and height differences would suggest,(2) taking victim to the murder scene and stabbing 3 times in a desolate area,(3) not one of the knife wounds killed the victim, because he bled to death,(4) while victim was bleeding to death defendant was stealing his car and using his credit cards, (5) defendant did not care about victim's suffering, because defendant did not call the police or for help,(6) conclusion: a merciless and pitiless crime.(R. 1367-1368)

[48]The judge found at least one non-statutory mitigator in the fact that a defendant was of an "advanced age" of 43. See, State v.Eutzy, 458 So.2d 755 (Fla. 1984), habeas denied

his drinking at the time of the murder so as to support one of the statutory mitigators, he also suffered from "chronic alcohol abuse" and like Nibert was a nice person when sober but was completely different when drunk, and was drinking heavily on the day of the murder and at the time of the offense, (7) Defendant has the separate and distinguishable mitigating circumstance of "organic brain damage" per Sireci, 502 So.2d 1221, Carter, 554 So.2d 37 and supported by approved sources including: hospital records, medical records, family, psychiatrist, and psychologist, (8) Defendant had an unrebutted record "mental health problems and/or commitment to mental health facilities," See Mason v. State, 489 So.2d 734 (Fla. 1986), Meeks v. Dugger, 576 So.2d 713 (Fla. 1991), Smalley, 546 So.2d 720 (treated for depression) Fitzpatrick, 527 So.2d 809 and supported by sources: hospital and treatment center records, family, psychologist, and defendant. The judge's comments clearly show that he did not consider the mitigation. He, therefore, gave it no weight.

As in Lamb, the judge in the instant case found no mitigation presented "rose to the level of a mitigating circumstance to be weighed in the penalty decision." See Lamb, 532 So.2d at 1054. He should have instead weighed the mitigation discussed above against the two aggravating factors. Thus, George Brown's sentence of death was unconstitutionally imposed in violation of the eighth and fourteenth amendments to the United States Constitution. See Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Rogers, 511 So.2d at 534. A new sentencing is required.

Although there was abundant evidence to support them, the judge failed to find statutory mitigating factors that (1) the defendant was under the influence of extreme mental or emotional disturbance, § 921.141(6)(b), Fla. Stat. (1989); and (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, § 921.141(6)(f), Fla. Stat. (1990). (R. 553-54) Even if the judge did not abuse his discretion by concluding that "there is not one shred of evidence" to indicate impaired faculties due to alcohol, and "total lack of evidence" to indicate mental or emotional disturbance, and "the relationship [of defendant's abused childhood and brain damage to the murder in this case]... was not sufficiently explained", he erred by failing to consider these factors as nonstatutory mitigation. This Court is required to review the record in each death penalty case and to make an independent determination of whether the judge's written findings are supported by the record. The Court cannot ignore evidence of mitigating circumstances in the record. Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812, 824-27 (1991).

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes

---

at 500 So.2d 544 on 12/4/86; second motion to vacate death sentence and habeas writ denied again at 541 So.2d 1143 (Fla. 1989)

> from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

In Rogers, this Court stated "judges may not refuse to consider relevant mitigating evidence." 511 So.2d at 535 (citing Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982)). In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court held that if the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it a mitigating circumstance and weigh it against the aggravating factors. The judge cannot dismiss a factor as having no weight. Similarly, in Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Court held that, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the court must find that the mitigating circumstance has been proved. 574 So.2d at 1062. A judge can reject a defendant's claim that a mitigating circumstance has been proven only if the record contains competent substantial evidence to supports rejection.

The court did not base rejection of two statutory mitigating factors on rebutting state's witnesses to contradict Dr. Dee testimony. Dee testified Brown suffered from emotional disturbance, caused by organic brain damage and that his capacity to appreciate the criminality of his acts was substantially impaired. (R. 1322-1323) In Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), this Court observed the death penalty statute required "extreme" emotional distress, but directed

> it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the

> sentencer, no matter what the statutes say. Lockett; Rogers. Any other rule would render Florida's death penalty statute unconstitutional.

568 So.2d at 912. The Cheshire Court continued that, under Rogers, the court is obligated to consider and weight each and every mitigating factor apparent on the record, whether statutory or nonstatutory. Id. In this case, we submit that both statutory mental mitigating circumstances were established. Even if this Court determines that the judge did not abuse his discretion in finding that the statutory requirements were not met, because "shreds of evidence" and "sufficient explanations" were not observed, the court erred by failing to consider and weigh these factors as nonstatutory mitigating factors. See Cheshire, 568 So.2d at 912.

Whether emotional distress and alcoholism are evident require a subjective determination. Just because Dee did not explain more to the jury or the court regarding Brown's emotional disturbance did not mean that these factors were not established. (R. 2118) One could easily differ with Dee's opinion, if his opinion had been rebutted by competent expert testimony from a state forensic psychologist. However, this was not done.

In the opinion remanding a similar case for a new penalty proceeding, this Court noted that the state's forensic psychologist stated "in his opinion Stewart was drunk at the time of the shooting and that his control over his behavior was reduced by his alcohol abuse." Stewart v. State, 558 So.2d 416 (Fla. 1990) This Court noted the judge determined penalty phase jury instruction on impaired capacity was inappropriately based on state's expert witness testimony that he believed Stewart was impaired but not substantially, and said, to allow an expert to decide what constitutes "substantial," is to invade the provence of the jury. See Id. Accordingly, the judge in this case should not be permitted to rely on phantom experts' opinion instead of independently considering all unrebutted evidence.

Emotional Distress

The judge did not find this mitigator based on Dee's testimony that George's emotional disturbance was extreme enough to produce psychosis. He observed that Dee diagnosed Brown as having "supposed brain damage," but failed to see the relationship "sufficiently explained." (R. 2118, compare 1322-1323)

Aggravating and mitigating factors are intended to separate ordinary murder from the "most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d at 7. Thus, the judge unconstitutionally based his rejection of emotional disturbance mitigating factor on a criterion applicable to every capital defendant.

The insanity standard cannot be used to determine the weight of a mitigating factor. See Campbell v. State, 571 So.2d at 418-19; Mines v. State, 390 So.2d 332, 337 (Fla. 1980) (finding of sanity does not eliminate consideration of statutory mitigating factors concerning mental condition). If the court were permitted to use insanity standard, then extreme emotional distress of many years duration would somehow became normal and thus ceased to exist. The judge appears to reason that although some distress and impairment still exists, it is no longer extreme or substantial enough to be considered.

As discussed below, all of the evidence showed that Brown suffered from chronic alcoholism. In Nibert, 574 So.2d at 1063, this Court found that evidence of chronic and extreme alcohol abuse "is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior." See also Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Evidence of Brown's drinking discussed below also supports the emotional distress mitigating factor.

Impaired Capacity

The unrebutted evidence in this case showed (1) Brown had been visiting bars and drinking heavily for years, following the example of his abusive and alcoholic father; (2) around the time of the homicide, he was drinking at least one six-pack of beer after

leaving a bar where he had consumed more beer (650, 972, 1413, 1415); (3) homicide occurred after Horace and George had been drinking heavily. (R. 650, 783, 787-788, 972, 1413, 1415) This unrebutted testimony came not only from the defendant through his statements made to the police and psychologist, but also from the state's key witness, Judy Etherington during guilt phase and Brown's mother in penalty phase. In fact, all evidence indicated Brown was continually drinking. Evidence of impairment through drug or alcohol abuse must be considered in mitigation. Nibert, 574 So.2d at 1063 (Nibert suffered from chronic and extreme alcohol abuse since his preteen years and was drinking heavily when he committed the crime); Cheshire, 568 So.2d at 911; Hardwick v. State, 521 So.2d at 1076.

In Nibert, this Court found the court erred by failing to find and weigh a substantial amount of mitigation. The Court determined that, when a reasonable quantum of uncontroverted evidence of a mitigating factor is presented, the trial must find and weigh the factor. The judge may reject the factor only if the record contains "positive evidence" which refutes the evidence of a mitigating circumstance. 574 So.2d at 1062. In this case, the record contains no evidence even suggesting that Brown was not habitually drunk and under the influence of alcohol when he committed the homicide. Even the testimony of the state's key witness supported this mitigating factor. Etherington said George drank beer that evening. (R. 783, 787-788)

The judge rejected this factor in part because Dr. Dee testimony recited Brown's own "self-serving statements" that he was an alcoholic. (R. 2117) The problem is Dee's conclusion followed from his other findings, as well. (R. 1313-1314. 1318-1319) Related to the alcoholism, Dr. Dee observed George suffered from cronic depression and loss of ability to control behavior. (R. 1313-1314, 1318-1319) Excessive alcohol consumption over a period of years causes a chemical and, eventually, a structural change in the brain. In some cases, such brain damage might annihilate one's ability

to appreciate the criminality of his conduct or conform his conduct to the requirements of law. Dee believed Brown's brain damage significantly reduced his awareness of legal consequences of his actions. (R. 1322-1323) Thus, although his ability to appreciate the criminality of his conduct was impaired because of his alcohol intake and other physical abuse, the judge did not think it was so substantially impaired that George did not understand what was going on.

Again, this sounds like the insanity standard. One does not need to be so substantially impaired that he does not know what is going on to show the impaired capacity mitigator. "Total annihilation" is not required. One who does not know what is going on either lacks necessary intent to commit the crime or is legally insane. Insanity standards cannot be used to determine weight of mitigating factors. See Campbell, 571 So.2d at 418-19.

**ISSUE XIII**

**A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE.**

**" \l 2** In 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), this Court noted the death penalty was reserved for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this court's function in capital appeals is to review the case in light of other decisions and determine whether the punishment is too great. 283 So.2d at 10. In this case, the court found three aggravating factors and only one was related to the murder itself. Stabbing Horace Brown was clearly not one of the most aggravated of first-degree murder cases. The state need prove at least one aggravating factor beyond a reasonable doubt to make a defendant death-worthy. 283 So.2d at 9.

The judge found only three aggravating circumstances: (1) that George had a previous conviction of a felony involving the use or threat of violence (aggravated assault in Montana); (2) that George committed a felony (robbery), while murdering Horace; and (3) Horace's murder was especially HAC because Horace D. Brown experienced conscious pain and suffering before death as a result of being stabbed three times by the Defendant with a knife and because the victim experienced apprehension of impending death even absent physical pain while bleeding to death after having been left to die by the Defendant. (R. 2115-2116) . The first circumstance was not related to the murder and the other two would be related to the murder only upon the very broadest inferences of circumstantial evidence.

Prior to sentencing, defense counsel presented a memorandum in support of a life sentence. (R. 2095-2102) Counsel argued the aggravating circumstance of previous conviction of a felony involving the use or threat of violence to the person under § 921.141(5)(b) "does not weigh as heavily in this case as it would in other, more aggravated, circumstances." (R. 2096)

> By its very nature, aggravated assault, as opposed to battery, is a crime not involving physical injury. The state's documentary proof on this issue is contradictory in that it states that there was physical injury but describes shooting the dwelling, not people. Additionally, the state's proof, in combination with testimony by Dr. Dee and Mrs. Lamey, shows that the Montana assault was a domestic altercation precipitated by George Brown's wife's infidelity. If he were convicted of murder in that situation, the fact that the death occurred in a domestic dispute would be a mitigating, not an aggravating, circumstance. Ross v. State, 474 So.2d 1170 (Fla. 1985). Finally, the incident occurred many years ago under circumstances far removed from those surrounding the death of Horace Brown, so the present crime can hardly be considered an escalating course of wrong-doing as the state argued to the jury.

(R. 2096)

Judge's written findings state there were only "two major mitigating circumstances:"

(1) commission of first degree murder while "under the influence of extreme mental or

emotional disturbance" or "by the use of alcohol," and (2) "Defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired." (R. 2116-2118) He concluded

> "These two major mitigating circumstances, as well as all other mitigating evidence in the record, taken in a light most favorable to the Defendant are found by the Court to have no actual connection to the deliberate, cold-blooded murder committed by the Defendant, GEORGE WALLACE BROWN, in this case." (R. 2118)

Thus, he only truly considered two mitigation circumstances. Besides evidence of Brown's artistic qualities, there was substantial evidence he was an alcoholic and suffered from brain damage and significant child abuse. (See Issue IX, supra and R. 1322-1323). In spite of miserable background he exhibited significant altruistic qualities by caring for Etherington's children and a physically handicapped boarder named "Gary." (R. 801-805) The judge refused "to compare this incident to other incidences, so [he] examined it singularly on its own merits, on its own pros and cons." (R. 2108-2109) If he had considered all mitigation evidence, the record does not reflect the particular attention and type of mitigating circumstances. He should have concluded that those particular and identifiable mitigating circumstances overcame three, possibly only two, aggravating factors.

There have been numerous much more aggravated murders in which defendants were sentenced to life. In Holsworth v. State, 522 So.2d 348 (Fla. 1988), for example, defendant burglarized the mobile home of a mother and her daughter. Holsworth stabbed both, killing the daughter. Three years earlier he had attacked another woman in her mobile home during early morning hours. Although the court found three aggravating factors (including HAC) and no mitigation, this Court found Holsworth's conduct was affected by drugs and alcohol and that the jury might have believed other mitigation presented. Despite the depravity of the crime, this Court reduced

Holsworth's sentence of death to life imprisonment in accordance with the jury's recommendation.

Tavern keepers described our victim as alone and without friends (R. 1185-1186); victim's wife indicated that Horace Brown picked up hitchhikers frequently and brought them to other locations for various purposes (R. 1159-1160) and George referred to their relationship as "casual friends." (R. 654, 972, 1413, 1415) Under the state's theory of a violent struggle, George and Horace may have had a sudden and violent struggle because Horace brought George to an isolated place and attempted to leave George there. The evidence that they were getting along well and that the weapon probably did not belong to George supports the theory that the discord and murder were sudden and in the heat of passion.

A death penalty was recently upheld as not disproportionate, in spite of the fact that the judge had overridden the jury's life recommendation, where the cell-mate victim was attacked twice, "and the victim was at least conscious during the second attack. He was struck six times on the back of the head, and witnesses heard him plead for mercy." Marshall v. State, 604 So.2d 799, 805, 806 (Fla. 1992) However, Chief Judge Barkett's partial dissent stated

> I believe this view of the evidence provided a reasonable basis upon which the jury could recommend a life sentence. While the jury may not have believed that Marshall acted in self defense to excuse the killing, it could have reasonably inferred from the evidence that a fight erupted between Marshall and Henry and that Marshall killed Henry in a fit of rage.

Id. at 807.

A life sentence for appellant would be consistent with other cases involving similar circumstances. Although most cases in which the sentence is reduced to life were appealed from judge overriding jury life recommendation, in Wilson, the jury recommended death. Like this case, Wilson involved a dispute between defendant and victim, who previously knew each other. Despite the jury recommendation, this Court

reduced Wilson's sentence to life because of the nature of the crime.

Although the jurors recommended death, the recommendation likely resulted from their shock and abhorrence when they saw the badly decomposed body of Horace Brown and heard George's declarations to the Colorado officers. George Brown's moral culpability is simply not great enough to deserve a sentence of death. Even if the state's theory that George and Horace were strangers were true, this fact does not require the death penalty any more than Holsworth did not require it. A murder in a fit of rage does not require the death penalty, as in Wilson and Irizarry v. State, 496 So.2d 822 (Fla. 1986). George and Horace frequented at least one bar together. This was not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. Dixon, 283 So.2d at 7. George Brown's sentence should be reduced to life in prison.

**ISSUE XIV**

**THE COURT ERRED BY FAILING TO FIND UNREBUTTED NONSTATUTORY MITIGATION WHICH WAS CLEARLY ESTABLISHED BY THE EVIDENCE.**

**" \l 2** The judge must consider all relevant mitigating evidence before determining whether to impose a life or death sentence. See Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Under no circumstances may the court give a mitigating circumstance no weight by excluding evidence from consideration. Eddings, 455 U.S. at 114-15. The judge only feigned to find statutory or nonstatutory mitigation, and failed to find any value to mitigating circumstances. (R. 2116-2118) The judge failed to find and properly weigh all mitigating factors established in the record.

Mitigation supported by the evidence, which reduces moral culpability for homicide, must be weighed against the aggravating circumstances. Rogers, 511 So.2d 533. In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court held the judge must expressly evaluate in his written sentencing order every statutory and nonstatutory mitigating factor. If evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it a mitigating circumstance and weigh it against the aggravating factors. Once established, the judge cannot dismiss a factor as having no weight. The decision must be supported by "sufficient competent evidence in the record." Id.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Court found that, where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the court must find that the mitigating circumstance has been proved. 574 So.2d at 1062 (emphasis added). A court can reject a defendant's claim that a mitigating circumstance has been proven only if the record contains competent substantial evidence to support rejection.

> Whether a particular nonstatutory factor is "mitigating in nature" is a question of law. Any factor that reasonably may serve as a basis for imposing a sentence less than death is mitigating.

Campbell, 571 So.2d at 419 n.4 (citing Lockett).

The judge noted only two possible statutory mitigating factors, but ignored the non-statutory mitigating circumstances in evidence, in spite of numerous examples of similarly valid non-statutory mitigating circumstances set out in Campbell and post-Campbell cases. Arguably present in Brown's case: (1) abused or deprived childhood, Id. 419, n. 4; (2) transition from being an abused child to altruistic protector of his sister before her recent death and supporter of the Etherington family, both resembling

Campbell "contribution to community or society as evidenced by an exemplary work, military, family, or other record," Id.;(3) artistic giftedness manifested in sharing and caring expression toward other's needs and enjoyment, which again resembles Campbell "exemplary work" and "charitable or humanitarian deeds," Id.;(4) George Brown's apparent "remorse and potential for rehabilitation," Id., ie."All I'm going to do is apologize to this court and to Mr. Brown's family for the pain they've suffered. And to my own mother for the pain she's suffering now." (R. 2108);(5) that George Brown was 42 years old at the time of sentencing (R. 1412, 1413), at which time he could serve a minimum 25 year life sentence for murder plus consecutive robbery sentence of life allowing for earliest possible release in his early seventies when he would be of little or no threat to society. (R.2106-2107)

The judge found neither statutory nor non-statutory mitigators.

**A**. A defendant's disadvantaged or pathological family background and/or his traumatic childhood and adolescence are valid nonstatutory mitigating factors. See, e.g., Nibert v. State, 574 So.2d 1059, 1061-62 (Fla. 1990); Stevens v. State, 552 So.2d 1082, 1086 (Fla. 1989); Brown v. State, 526 So.2d 903, 907-08, (Fla. 1988), cert. denied, 488 U.S. 944 (1988); Burch v. State, 522 So.2d 810, 813 (Fla. 1988); Rogers, 511 So.2d at 535; and Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). The judge erroneously found to the contrary.

The judge apparently concluded Brown's committing the murder was not significantly influenced by his childhood experience so as to justify its use as mitigating circumstance. He stated effects produced by Brown's childhood trauma had not been sufficiently explained as to support a mitigating circumstance. (R. 2118) Such reasoning is refuted by logic and case law.

In Nibert, the judge dismissed uncontroverted evidence of physically and psychologically abused childhood because defendant committed the murder at age 27

and had not lived with his mother since age 18. This Court observed:

> The fact that a defendant had suffered through more than a decade of abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

574 So.2d at 1062. The judge's reasoning in this case -- that Brown's "act of murder" was not "sufficiently explained" by his horrible childhood -- reflects the same logic faulted by this Court in Nibert.

Disadvantaged childhood need not be related to the crime. In Brown v. State, 526 So.2d 903, 908 (Fla. 1988), the judge erred by concluding "disadvantaged childhood, his abusive parents, and his lack of education and training, do not establish mitigation in the eyes of this court or the eyes of the law." Mitigating evidence is not limited to facts surrounding the crime but can be anything in defendant's life, which might mitigate against the death penalty for defendant. Id. (citing Hitchcock v. Dugger, 481 U.S. 393; Eddings v. Oklahoma, 455 U.S. 104, Lockett v. Ohio, 438 U.S. 586).

Penalty phase testimony contains much convincing and uncontroverted evidence of childhood abuse, neglect and identity crisis. Brown's mother testified about George's abusive father and disadvantaged childhood. Dr. Dee opined Brown's childhood traumas caused his antisocial personality, ie. "Organic Personality Syndrome greatly impaired Brown's capacity to conform his conduct to the requirements of the law at the time of the murder. (R. 1322-1323); Because of his unsuccessful search for identity, Brown reached the point where he had no attachment to basic social relationships.

The court erred as a matter of law by failing to consider and weigh Brown's abusive and traumatic childhood, which established by the evidence.

**B**. The judge chose to totally disregard Brown's mother's testimony that Brown had been significantly abused during his childhood and had overcome a great deal of the personal pain and rejection through protecting his sister and performing music for

others.

This is clearly contrary to the law. The judge seems to think that, although he believes Brown's mother's testimony that Brown was seriously abused, the "real" George Brown is a "psychopath" who murdered rather than the warm, caring individual Brown's mother described. Apparently, the judge determined that no matter how much Brown showed socialization or potential for rehabilitation, it did not mitigate the act of murder.

This somewhat like the judge's fundamentally erroneous conclusion in Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988). Lamb's judge concluded no mitigating circumstances rose "to the level of a mitigating circumstance to be weighed in the penalty decision." This Court reversed for re-sentencing because it was not clear whether the judge considered mitigating evidence.

In this case, it is clear that the judge did not consider the mitigating evidence because he said that he did not. He decided that none of the statutory mitigating factors were established and that the two arguable nonstatutory mitigating factors were not mitigating -- even though this Court has stated repeatedly that they are mitigating and must be given some weight. See Nibert; Campbell; Rogers.

**C**. The judge failed to mention several other nonstatutory mitigating circumstances such as defendant's artistic communication and social responsiveness to others' needs, which were argued or at least proffered in the evidence by the defense. Defense counsel argued the following in his memorandum in support of a life sentence (R. 2095-2102):

**1. The Aggravating Circumstances contained mitigating circumstances**

(a) inherent mitigation could be found in less than absolute aggravating circumstance of "prior violent felony conviction," and "does not weigh as heavily in this case as it would in other, more aggravated, circumstances," because the prior crime was (1)

"shooting a rifle in or into a dwelling in which his wife was then located with another man," (R. 2096) as opposed to this alleged stabbing death in the woods (2) only the threat of violence took place during the prior felony and there was no prior physical injury, because the conviction was based on aggravated assault and not battery (R. 2097); (3) "the Montana assault was a domestic altercation precipitated by George Brown's wife's infidelity," (R. 2096) which would have been a mitigating circumstance had George been convicted of murder, see Ross; (4) the prior incident "occurred many years ago under circumstances far removed from those surrounding the death of Horace Brown" without "an escalating course of wrong-doing as the state argued to the jury" (R. 2096);

(b) "Death in the commission of robbery" although supported by one the state's theories as to how the murder took place, is not supported by other reasonable and unrebutted evidence: (a) "It is not robbery to take property from someone who is dead at the time of the taking"[49] (R. 2092), this theory is just as plausible under the circumstances of the case as the supposition that the killer had to kill Horace Brown after robbing him; (b) no struggle was apparent at the scene (R. 1036, 1046, 614-617);

(c) HAC is inapplicable as argued under previous Issues. (R. 2097-2098);

**2. The Mitigating Circumstances Outweighed the Aggravating ones**

(a) Statutory mitigation was unrebuttably established in that "(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (R. 2099-2100);

(b) Statutory mitigation was unrebuttably established in that "(f) The capacity of the defendant . . . to conform his conduct to the requirements of law was substantially

[49]There was no res gestae evidence to suggest a robbery, as was established in the robbery plus kidnapping plus murder of Knight v. State, 338 So.2d 201, 204 (Fla. 1976), or as was established in the "principal in the second degree" conviction of robbery and murder in Hornbeck v. State, 77 So.2d 876, 878-879 (Fla. 1955).

impaired." (R. 2099-2100, 1322-1323);

(c) Non-statutory mitigation was unrebuttably established in that:

(1) Defendant has artistic abilities and provided entertainment to family, community, or society; (2) Defendant suffers from an abused and neglected childhood; (3) Defendant has contributed physical protection his now deceased sister against his abusive father; (4) Defendant provided financial support to Judy Etherington's family; (5) George was of the "advanced age" of 42, which would forseeably allow the earliest prison release after he has reach his seventies; (6) George's mental capacity was not only greatly impaired by his drinking at the time of the murder so as to support one of the statutory mitigators, he also suffered from "chronic alcohol abuse;" (7) Defendant has the separate and distinguishable mitigating circumstance of "organic brain damage;" (8) Defendant had an unrebutted record of "mental health problems and/or commitment to mental health facilities." (cites were previously provided for all of this mitigating circumstances under Issue IX)

If the judge did not err by failing to find and weigh the two statutory mental mitigators, he should clearly have found them to be nonstatutory mitigators. If Brown did not suffer from "extreme" emotional distress at the time of homicide, he clearly suffered from some emotional distress. (R. 2118)

Similarly, if Brown's ability to appreciate the criminality of his conduct was not "substantially" impaired, as required to establish the statutory mitigation, it was to some extent impaired. Dr. Dee said so. (R. 1322-1323) Ill effects of chronic alcohol during the offense is a well-established mitigating circumstance, which the court must consider, especially when, as in this case, it is established by uncontroverted evidence. Hardwick, 521 So.2d at 1076; Nibert, 574 So.2d at 1063; Carter v. State, 560 So.2d 1166, 1169 (Fla. 1990); Fead v. State, 512 So.2d 176, 178 (Fla. 1987).

Accordingly, the court abused its discretion by failing to find and weigh unrebutted

nonstatutory mitigating factors against aggravating factors. Death sentence imposed after erroneously failure to consider relevant mitigating evidence violates the eighth and fourteenth amendments. Lockett, 438 U.S. at 608. Court's failure to even consider this myriad of nonstatutory mitigation also violates the Florida Constitution. Sentence of death must be vacated.

## CONCLUSION

For above reasons, GEORGE WALLACE BROWN, respectfully requests this Court to grant a judgment of acquittal or to reverse his conviction and remand for a new trial for second-degree murder because the state failed to prove the murder was premeditated. If the Court does not grant this relief, Appellant requests this Court reverse and remand for new trial based on other errors discussed in this brief. As a lesser alternative, Appellant asks this Court to vacate his sentence of death and remand for imposition of life sentence or, if none of the above is granted, to award him a new penalty trial and sentencing.

## CERTIFICATE OF SERVICE

I certify copy has been mailed to Office of Attorney General, Ste. 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, this 12 day of October, 2010.

Respectfully submitted,

/s/ Ronald E. Smith

_____

RONALD E. SMITH, Attorney at Law
FLORIDA BAR NUMBER 0349232
(678) 462-7777