IN THE SUPREME COURT OF FLORIDA

LANCELOT ARMSTRONG,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 78,180
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following symbols will be used in this brief:

"R"	Record on Appeal
"1SR"	Supplemental Record (received August, 1992)
"2SR"	Second Supplemental Record (received March, 1993)
"AB"	Appellee's Answer Brief

Appellant will rely on his Initial Brief for argument on Points XIV, XVI-XXIV.

STATEMENT OF THE FACTS

Appellant would rely on the statement of the facts contained in Appellant's Initial Brief. Appellee has not disputed Appellant's version of the facts, but has added its own version which isolates certain facts. A number of Appellee's statement of the facts are either misleading or inaccurate. First, Appellee states that the record at 1303 and 1320 shows that Appellant told Ruel Allen that he shot at the police (AB at 2). The record at 1303 shows that Appellant told Ruel Allen that there was a shoot out with police and "he" returned shots (R1303). The term "he" was neither identified as Appellant or Wayne Coleman. At 1319-1320 of the record Ruel Allen testified that Appellant did not identify whether it was "the other guy" [i.e. Coleman] or himself that shot the police officer (R1319-20). Allen specifically testified that Appellant did not admit to shooting a police officer (R1317). Second, Appellee states that the record at 807 shows that Sallustio shot Appellant twice (AB at 3). However, at page 807 there is absolutely no mention of Appellant, nor is there any mention of Sallustio shooting anyone. At page 859 of the record Sallustio testifies that he assumed he had shot Appellant because Appellant was running away. Third, Appellee states that Sallustio was shot twice by the same gun that fired the bullets that killed Greeney (AB at 3). Actually, the record shows that Sallustio was shot <u>three</u>

times by the same gun which killed Greeney (R1636,1619). Since the testimony and ballistics evidence is discussed more thoroughly in the briefs of the parties, Appellant will discuss further areas of disagreements as to the evidence of the shootings in the appropriate portion of the reply brief. Finally, Appellee's rendition of Appellant's prior felony is incomplete and misleading (AB at 3).[1]

Since Appellee had repeated the relevant facts in the argument portion of its brief, the discussion, or dispute, of such facts in their appropriate context as they apply to this case will be covered in the argument portions of Appellant's briefs.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FORMULATING ITS SENTENCING DECISION PRIOR TO GIVING APPELLANT AN OPPORTUNITY TO BE HEARD AS TO SENTENCING.

Appellee claims it was not improper for the trial court to reach its sentencing decision prior to giving Appellant an opportunity to be heard because Appellant did have an opportunity to be heard afterward.[2]

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[1] Appellee mentions a sexual assault. However, Appellant's only prior record is for an assault and battery. This conviction was used at the penalty phase and did not involve a sexual battery (R1833). In that case, the trial court found insufficient evidence to find sexual battery (2SR523). However, there was sufficient evidence for assault and battery, and Appellant was placed on probation (2SR523).

[2] Appellant was allowed to speak in the midst of the trial court reading its final sentencing order which the trial court had previously prepared after "a period of thoughtful reflection" (R2036,2430). It should also be noted that Appellee's characterization that "the penalty phase was completed on May 9, 1991" (AB at 9) is not accurate. Actually, only the jury recommendation was received on that date. The second part of the penalty phase, where parties present evidence and argument to the trial judge, was set for June 20, 1991. However, The trial court had already reached its sentencing decision prior to this hearing. Also, Appellee's characterization as the trial court taking attendance at the June 20 proceeding was in actuality the trial court getting the appropriate people to approach the bench for the formal reading of the final sentencing decision which had already been formulated (R2035-37). Again, the problem is that Appellant was only

By reaching the sentencing decision before allowing the defense to present its position to the trial court, Appellant had been denied due process -- the opportunity to be heard. See Mason v. State, 366 So. 2d 171, 172 (Fla. 3d DCA 1979) (allowing defendant to present its position regarding sentencing after decision is made does not constitute an opportunity to be heard at sentencing).

In Point IX of Appellee's brief, by pointing out that the victim impact information could not influence the sentencing decision because the victim's statements "at the final sentencing hearing were made after the judge had already written the sentencing order" (AB at 40), Appellee has recognized that Appellant was denied a meaningful opportunity to be heard before the trial court.[3]

Appellee claims that this Court's decision in Spencer v. State, 615 So. 2d 688 (Fla. 1993) is irrelevant because in the present case the sentencing decision was made prior to Appellant having the opportunity to be heard at the sentencing hearing, but after the hearing on the motion for new trial (AB at 16). The fact that the sentencing decision was made prior to the motion for new trial is not the dispositive fact.[4] Rather, the dispositive fact is that the sentencing decision was made prior to giving the defense the opportunity to be heard:

> In *Grossman*, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement

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later allowed to speak.

[3] The victims' statements occurred at the same time that Appellant was allowed to argue and present evidence to the trial court; after the court had formulated its sentencing decision.

[4] In Spencer, the motion for new trial occurred prior to the sentencing hearing. Thus, as in this case, the sentencing decision was reached prior to the sentencing hearing where the defense is supposed to have the opportunity to be heard.

> of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statute (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. such a process was clearly not followed during these proceedings.

Spencer v. State, supra, at 690-91 (emphasis added).

Appellee's position allows the untenable result of permitting the trial court to make its decision prior to giving the parties the opportunity to be heard as long as the decision is not made prior to the new trial hearing.

Appellee also notes that there was an ex parte communication in Spencer. In other words, there were two improprieties in Spencer. However, the mere fact that the trial court was not involved in the additional impropriety of an ex parte communication does not mean that the court can formulate its sentencing decision prior to giving the parties an opportunity to be heard. Appellee's argument is without merit.

Appellee next claims that this issue cannot be reviewed due to lack of preservation. However, the due process violation of not giving the opportunity to be heard can be reviewed. First, Appellant made the trial court aware that he wanted the opportunity to be heard (R2034); yet the trial court had already made its sentencing decision.

Additionally, the denial of the opportunity to be heard is the type of denial of due process which constitutes fundamental error which may be reviewed despite the lack of objection. Fundamental error includes error which rises to the level of the denial of due process. Hargrave v. State, 427 So. 2d 713 (Fla. 1983). Denial of due process by denying the opportunity to be heard is fundamental error. Wood v. State, 544 So. 2d 1004 (Fla. 1989); Deter v. Deter, 353 So. 2d 614, 617 (Fla. 4th DCA 1977) (failure to meet due process requirements in criminal contempt case constitutes fundamental error). As noted in Wood, supra, the very heart of due process is adequate notice and a meaningful hearing:

> Our opinion in *Jenkins* is founded upon constitutional rights of due process and the most basic requirements of adequate notice and meaningful hearing prior to the termination of substantive rights or some other state-enforced penalty.... This holding goes to the very heart of the requirements of due process clauses of our state and federal constitutions. The denial of these basic constitutional rights constitutes fundamental error.... Unfortunately, costs are sometimes incorrectly assessed against defendants. It is the rights of these persons whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights. Without adequate notice and a meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful hearing, the requirements of due process have not been met.

544 So. 2d at 1006 (emphasis added).

Although Wood deals with the opportunity to be heard as to imposition of costs, the same due process requirements must be deemed to be as important in imposing the ultimate penalty of death.

In Engle v. State, 438 So. 2d 803 (Fla. 1983), this Court recognized that due process is required not only at the penalty phase before the jury, but also at the penalty phase before the trial judge:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is deter-

> mined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge.

438 So. 2d at 813 (citations omitted).

This Court has recognized that the opportunity to be heard is the essence of due process:

> We agree that the trial court's haste in resentencing Scull violated his due process rights. One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process....
>
> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. *See* art. I. § 9, Fla. Const.

Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990) (emphasis added); see also State v. Smith, 547 So. 2d 131, 134 (Fla. 1989) (discussing due process and the fundamental requirements of notice and the opportunity to be heard). Heightened due process has been especially recognized in the context of the death penalty:

> The plurality opinion, like the opinion concurring in the judgment, emphasized the special importance of fair procedure in the capital sentencing context. We emphasized that "death is a different kind of punishment from any other which may be imposed in this country." *Id.*, at 357, 97 S.Ct. at 1204. We explained:
>
> > "From the point of view of the defendant, it is very different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action....

Lankford v. Idaho, 111 S.Ct. 1723, 1732 (1991) (emphasis added).

In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 1206-07, 51 L.Ed.2d 393 (1977), the Court noted that the opportunity to be heard is essential to due process:

> Moreover, the argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.... We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

(emphasis added). Denial of the opportunity to be heard is fundamental error. Wood, supra; Deter, supra.

The due process error of reaching the sentencing decision before giving the defense the opportunity to be heard can never be deemed harmless. Defense counsel's only function at the sentencing is to be Appellant's voice to argue and present evidence as to the appropriate sentence. Defense counsel's sole function at sentencing was eliminated by reaching the sentencing decision prior to the opportunity to be heard. In effect, Appellant was involuntarily denied counsel at a critical stage of the proceeding which constitutes per se reversible error because it is always harmful. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2065-66, 80 L.Ed.2d 657 (1984).

In Huff v. State, 622 So. 2d 982 (Fla. 1993), this Court rejected the state's arguments that the violation of procedural due process by itself, where the trial court reaches a decision prior to giving the defense an opportunity to be heard, is not harmful in itself and places form over substance:

> The State further argues that Huff has only addressed the procedural improprieties and has not presented any specific objections to the contents of the order and thus has not demonstrated that reversal on this issue would serve any purpose. In effect, the State seems to argue that Huff's claim puts form over substance. We do not agree. When a procedural error reaches the level of a due process violation, it becomes a matter of substance ... the overriding

> concern is "the appearance of the impartiality of the tribunal," rather than actual prejudice.

622 So. 2d at 984 (emphasis added).

Likewise, in Scull v. State, 569 So. 2d 1251 (Fla. 1990), where the opportunity to be heard was impaired by "rushing" the sentencing process, this Court found that the denial of procedural due process was itself as prejudicial as actual bias:

> Haste has no place in a proceeding in which a person may be sentenced to death. Thus, we cannot agree with the state's assertion that the trial court's "rush" to resentence resulted in no prejudice to Scull.
>
> Here, the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness. This, we believe, is as much a violation of due process as actual bias would be. Accordingly, we must vacate the sentence and remand for another sentencing hearing in compliance with this opinion and with the dictates of due process.

569 So. 2d at 1252.

Also, the error of the trial court in reaching its decision prior to giving Appellant the opportunity to be heard cannot be deemed harmless because it cannot be shown beyond a reasonable doubt that the evidence and argument could not have influenced the trial court in reaching its decision. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).[5]

On pages 13-16 of its brief, Appellee reviews the arguments made by defense counsel to claim that they are unpersuasive and without

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[5] Appellee apparently claims that the trial court's post-decision remark about one of Appellant's pieces of evidence indicated that the evidence would not have changed the sentencing decision. However, this remark by the trial court cannot legitimately be used to evaluate the impact of the error. Once the trial court reaches a decision, prior to giving a party the opportunity to be heard, the court is deemed to be biased toward the decision. See State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1987) (trial judge judging case before hearing evidence was per se reversible error); Lewis v. State, 530 So. 2d 449 (Fla. 1st DCA 1988) (trial judge who had made up his mind as to sentencing decision prior to sentencing should have disqualified himself from making the sentencing decision).

merit and thus the error is harmless. However, harmless error cannot be evaluated on what one party perceives as the persuasiveness of the other party's argument. As explained in Lankford v. Idaho, 111 S.Ct. 1723 (1991), the issue is not whether the defense would prevail, rather the error of denying the opportunity to be heard is harmful in itself:

> Whether petitioner would ultimately prevail on this argument is not at issue at this point; rather, the question is whether inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made.

111 S.Ct. at 1731.

In addition, Appellee claims the error is harmless because Appellant "could have presented the evidence and arguments at the hearing on the motion for new trial (AB at 13-14). Such a claim is without merit. The proper subject at the motion for new trial is whether Appellant should receive a new trial, and not what the appropriate sentence should be.

Appellee claims that the same evidence and arguments had previously been presented. First, assuming arguendo that the arguments had been made earlier, earlier arguments made in different context do not substitute for the right to be heard at the sentencing hearing regarding the appropriate sentence. For example, Appellant arguing at the hearing on the motion for new trial is no substitute for such an argument at the sentencing hearing. Second, Appellant was not merely presenting cumulative evidence and arguments. For example, evidence was presented at the sentencing hearing, after the court had formulated its decision, that Appellant suffered the loss of fingers and that due to the deformity other children teased him thus forcing him to change schools (R2041). On appeal, this has been raised as one of

the uncontroverted mitigating circumstances which the trial court failed to find. See Point IV. Appellee's response in Point IV, footnote 24, is that there is no evidence in the record showing that Appellant was ever teased by other children (AB at 28). Obviously both the trial court and Appellee have failed to recognize the evidence and arguments presented after the trial court had formulated its sentencing decision. This illustrates one reason why the error cannot be deemed harmless.

Also, the letter from Appellant's previous attorney was attached to the PSI which had not been available until sentencing. Thus, Appellant did not have a prior opportunity to point it out and to argue it to the judge.[6]

Appellant's statement to the trial court regarding his background was not permitted until after the trial court had formulated the sentencing decision (R2041-45). Contrary to Appellee's allegation, this statement included details regarding Appellant's background and character that had never been brought out during the penalty phase in front of the jury.[7] Any statement to the contrary shows a lack of attention to Appellant's statement -- probably due to the fact the sentencing decision had already been made. Appellee's representation that Appellant's argument regarding the aggravating factors (at R2039) had been previously ruled on by the trial court at page 1986 of the record, is not true. The trial court had merely denied the motion for

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[6] Appellee makes the claims that the prior felony was for sexual battery. This is false -- the conviction was for assault and battery (R1833). The trial judge in Massachusetts found the evidence of sexual battery to be insufficient (2SR523), and Appellant was placed on probation for assault and battery (2SR523).

[7] For example, the details of Appellant changing schools due to children teasing him about his deformity (R2041).

new trial without giving its reasons. Apparently, the trial court did not believe Appellant had met the high burden required for proving entitlement to a new trial. However, this does not mean that Appellant could not challenge the appropriateness of the death sentence in lieu of the additional testimony of Kay Allen. Appellant's challenge to the PSI obviously was not, and could not be, challenged in an earlier hearing where it was only ordered after the jury recommendation. For all the reasons stated above, the error of denying Appellant a meaningful opportunity to be heard before the trial court on sentencing cannot be deemed harmless.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED LIMITING INSTRUCTION ON THE CONSIDERATION OF DUPLICATE AGGRAVATING CIRCUMSTANCES.

In its answer brief Appellee acknowledges the error of denying the requested instruction under Castro v. State, 597 So. 2d 259 (Fla. 1992), but claims that Castro is a change in law which should not apply to the instant case. Specifically, Appellee argues the law in effect at the time of trial was Suarez v. State, 481 So. 2d 1201 (Fla. 1985). In Castro this Court made it clear that Suarez did not involve the issue whether a limiting instruction on duplicative factors should be given:

> The court refused the instruction on the authority of *Suarez*. However, *Suarez* did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was instructed on both aggravating factors. When applicable, the jury may be instructed on "doubled" aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

597 So. 2d at 26. Thus, Castro did not announce a change in law from Suarez precluding application of the proper legal analysis.

In addition, Castro, supra, is clearly the law at the time of this appeal. As this Court held in Smith v. State, 598 So. 2d 1063 (Fla. 1992), any decision announcing a new rule of law, or applying an established rule of law to a different situation, must be applied to every case pending direct review or which is not yet final:

> Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, §§ 9, 16, Fla. Const.

598 So. 2d at 1066 (emphasis added).[8] Thus, assuming, arguendo, that Castro, supra, is a change in law, it should be applied to the present case pending on direct appellate review.[9]

Appellee claims that the error is harmless. Appellee's discussion regarding the trial court's sentencing order on page 19-20 is irrelevant as to whether the error of failing to give a limiting instruction to the jury was harmless. Specifically, Appellee argues that because the trial court found three aggravating factors the error must be deemed harmless. However, in determining whether the error of denying a jury instruction is harmless, the impact of the error on the jury, rather then the trial court, is important. None of the cases cited by Appellee for claiming the error is harmless deal with

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[8] This Court has consistently held before Smith that the case law at the time of the appeal should be applied at the time of the appellate decision. See e.g. Lowe v. Price, 437 So. 2d 142 (Fla. 1983); Dougan v. State, 470 So. 2d 697 (Fla. 1985); Gonzalez v. State, 367 So. 2d 1008 (Fla. 1979); Jones v. State, 569 So. 2d 1234 (Fla. 1990).

[9] Smith, supra, at ftnt. 5. As opposed to a situation unlike the direct appellate review here where it may or may not apply.

the failure to give a proper jury instruction.[10] Also, none of the cases cited involve the prosecutor asking the jury to consider duplicating factors separately as was done in this case (R1933-34).

As beneficiary of the error, Appellee has failed to meet its burden of proving beyond a reasonable doubt that the error is harmless. Without the limiting instruction, the prosecutor specifically urged the jury to consider the duplicating circumstances separately even though they were based on the same aspect of the offense (R1933-34). The jury's only guidance as to what aggravating factors it is to weigh is the jury instruction listing the aggravating factors. The lack of a limiting instruction permits the jury to give weight to each of the duplicating circumstances separately even though they are based on a single aspect of the offense and this aspect deserves to be weighed only one time. Error which affects the weighing process in such a way cannot be deemed harmless. Especially, contrary to Appellee's unsupported claim, in light of the substantial mitigating circumstances presented in this case. See pages 33-36 of Appellant's Initial Brief.

Appellee analyzes the mitigating evidence presented in the court below to conclude that the error was harmless. In doing so, Appellee comments that "without knowing what was actually considered [by the jury] it becomes somewhat difficult to assess the effect a particular

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[10] Appellee has combined its answers to Appellant's points II and III in one single point. However, Point II focuses on the error of failing to give a limiting instruction to the jury, while Point III deals with the trial court's sentencing findings. The points deal with different subjects and the mixing of the different arguments leads to unnecessary confusion. This is especially true in addressing the harmless error arguments. Thus, Appellant in this point will only address Appellee's argument relating to the failure to give the limiting instruction and will address the arguments relating to the trial court's sentencing order in Point III.

error may have had on a sentencing determination" (AB at 21). In other words, Appellee admits that in this case it cannot be shown beyond a reasonable doubt that the error in failing to give the jury instruction is harmless.

Additionally, it should be noted that Appellee analyzes only a portion of the mitigating evidence to claim the error is harmless. A more complete discussion of the mitigating evidence is at pages 33 through 36 of Appellant's Initial Brief. Appellant did not discuss the mitigating evidence in an effort to conclusively state that the jury must have given such evidence great weight.[11] Only the jury knows its decision to give the circumstances great or very little weight. However, in its Answer Brief, Appellee has decided to put itself in the place of the jury and to reweigh some of the mitigating circumstances to claim the error was harmless. This Court has noted that the harmless error test is not a device for one to substitute its opinion for that of the jury by reweighing the evidence. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). As explained above, because the error in not giving the instruction could have affected the jury's weighing of the aggravating factors, the error cannot be deemed harmless.

One does not know for certain what weight the jury gave to the aggravating or mitigating circumstances. Appellee states that the cases cited by Appellant with regard to this point are distinguishable and reliance on these cases is misplaced to argue that a life sentence

[11] Rather, the mitigating evidence was discussed to show that it was present and could be considered by the jury so that any error could not be deemed harmless.

is warranted.[12] In this Point, Appellant cited the cases to show only that the mitigating circumstances have been recognized by this and other courts. Appellant's argument as to proportionality is in Point VI. Appellant also analyzes each mitigating factor individually and out of context to claim that none of the circumstances could support a life recommendation. Appellee's approach is wrong. The total, cumulative effect of the mitigating circumstances must be considered. Again, it is the jury's, rather than Appellee's, view of the total mitigating circumstances that is important. As explained in Appellant's Initial Brief, there were at least 9 mitigating circumstances which the jury could have found as significant in this case. It cannot be legitimately said beyond a reasonable doubt that the error affecting the weighing process was harmless. Appellant relies on his Initial Brief for further argument on this Point.

POINT III

THE TRIAL COURT ERRED IN SEPARATELY AND INDEPENDENTLY FINDING AND WEIGHING AGGRAVATING FACTORS WHICH WERE DUPLICATIVE.

Appellee claims that these aggravators are not duplicative. Such a claim is without merit. The test for whether two aggravating factors are duplicative so that they cannot be considered separately is whether they are based on the same aspect of the offense. Bello v. State, 547 So. 2d 914, 917 (Fla. 1989). The evidence, rather than the elements of the aggravating circumstances, must be analyzed. See Oats

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[12] Appellee states "In the instant case the jury has determined that the mitigating evidence is not significant enough to warrant a life recommendation" (AB at 21). Such is not necessarily true. A majority of the jurors found that the aggravators outweighed the mitigators. This decision may have been that the aggravators barely outweighed the mitigators -- and the giving of the doubling instruction could have tipped the scales in favor of the mitigating evidence. In addition, 3 jurors believed that there was very significant mitigation as shown by their vote for a life recommendation.

v. State, 446 So. 2d 90, 95 (Fla. 1984) (emphasis added) ("these two circumstances must be considered cumulative and may not be considered individually when the only evidence that the crime was committed for pecuniary gain was the same evidence of the robbery underlying the capital crime") (emphasis added); Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986) (to determine whether "avoid arrest" and "hinder law enforcement" doubled, one must examine the evidence of the law enforcement activity which the defendant disrupted -- since it was arrest, the factors doubled). Clearly, the killing of Officer Greeney "a law enforcement officer engaged in the performance of his lawful duties" and the killing of Greeney to "avoid arrest" are based on the same aspect of the crime. Valle v. State, 581 So. 2d 40, 47 (Fla. 1991).

In addition, Appellee has not challenged that the trial court erred in considering the fact that the instant offense involved a robbery in two separate aggravating circumstances -- (1) § 921.141(5)(d), Florida Statutes (1989), the killing occurred during a robbery (R2431), and (2) the robbery (even though contemporaneous with the killing) constitutes a prior violent felony (R2430). Utilization of this single aspect of the crime (i.e. that a robbery occurred) in two different aggravators is improper.

Appellee next claims the error is harmless because the trial court found that the aggravating circumstances outweighed the mitigating circumstances. This cannot make the error harmless. The trial court failed to properly consider some very important and substantial mitigating factors (See Point IV). Also, the error is not harmless where it has the potential of interfering with the weighing process directed by statute. Improper consideration of an aggravating

circumstance clearly affects the weight to be given the aggravating circumstances. It cannot be said beyond a reasonable doubt that the improper consideration of an aggravating circumstance may not have played a role in tipping the scale in weighing against the mitigating circumstances.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO FIND THE NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH WERE UNCONTROVERTED.

In its Answer Brief, Appellee has mixed together its responses for Points IV and V. Appellant will address Appellee's responses separately in Points IV and V.

In discussing issue IV, Appellee mischaracterizes Appellant's complaint as being that the trial court did not give the mitigating evidence "the weight deemed warranted." This is not the error which is the subject of this issue. Rather, the error is that the trial court failed to find mitigating circumstances that were uncontroverted.[13]

Appellee first notes that the trial court mentioned that Appellant presented witnesses who testified to three mitigating factors: Appellant's troubled and sickly childhood, his good character, and his religious upbringing. However, this does not mean that the trial court found any mitigating circumstances. In fact, the trial court made it clear that it was not finding any mitigating circumstances:

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[13] There is a clear difference in the two issues. Appellee's statement of the non-issue deals with how the trial court would exercise its discretion in weighing circumstances. Appellant does not complain about how the trial court exercised its discretion. Rather, the complaint is that the trial court erred in not finding uncontroverted mitigating circumstances and thus never exercised any discretion in weighing the mitigating circumstances [whether it be in giving the circumstances very little weight or great weight].

> In summary, the Court finds that of the aggravating circumstances, four were applicable in this case. As to mitigating circumstances, none may be applied to this case.

(R2434). Next, Appellee recognizes the potential mitigating nature of the nine factors that Appellant listed, but argues that they are "not deserving of much consideration" and thus it was not error for the trial court to fail to find them (AB at 26).[14] Such an analysis misses the whole point of this issue. By not finding the uncontroverted evidence as mitigation, the trial court never exercised its discretion as to what weight to give the mitigating evidence. Thus, it was error not to find the uncontroverted mitigating evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

Appellant will briefly address Appellee's specific claims with regard to the trial court's failure to find the 9 uncontroverted mitigating factors that were presented.

1. Significant physical problems during childhood.

Appellee acknowledges that the evidence supported this factor, but claims it is not mitigating based on Rogers v. State, 511 So. 2d 526 (Fla. 1987). Unlike in the present case, in Rogers this mitigator was rejected because there was no evidence of any childhood trauma. Childhood problems have been recognized as mitigating. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Reilly v. State, 601 So. 2d 222, 223 (Fla. 1992). These problems affected Appellant during his formative years and thus impacted his "character." For example,

[14] As recited in the Initial Brief, there was evidence, which was uncontroverted, to support each and every mitigating factor.

contrary to Appellee's claim,[15] there was evidence from Appellant that he suffered due to other children teasing him over his childhood injuries:

> While learning the trade of cutting sugar cane, I had suffered a loss of my right hand index and ring fingers, which disabled me for a while, also causing me to lose educational time because I had to take time away from school to allow proper healing. When I returned to school, I had to suffer with other children teasing me and making fun of me because I no longer was normal to them since my loss of fingers. I was forced to change school and try to start over in a new environment.

(R2041). This certainly would impact on a person's character and has been recognized by this Court as mitigating. Reilly v. State, 601 So. 2d 222, 223 (Fla. 1992) (among the mitigating factors presented was the fact "the defendant has had a physical problem with an eye muscle ... resulting in some uncaring persons taunting him").

Appellee also claims that other problems as a child such as a brain hemorrhage, aspiration, sever injuries almost resulting in death, and dyslexia have no mitigating value because they do not explain the specific criminal action. Appellee's narrow view demonstrates a misunderstanding of mitigation. First, these events occurred during Appellant's formative years which can impact on his character and his actions throughout his life. Second, the function of the capital sentencing process is to separate the "worst of the worst." As part of this process, a person with childhood problems, and other hardships in life, is to be separated from those who have gone through life without any problems but still kill. Thus, although not necessarily dispositive, childhood problems will be mitigating in separating the worst of the worst.

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[15] Appellee falsely claims there is no record evidence that Appellant was teased by other children due to his physical problems at footnote 24 of its brief.

In summary, Appellee claims there was no error in "failing to attach any great weight" to this mitigating factor (AB at 27). However, the error was in totally failing to find this factor.

2. Appellant helped others and had a positive impact on others.

Appellee's only argument is that this is not entitled to great weight. It may, or may not, be entitled to great weight, but that is beside the point. The trial court erred in totally failing to find this uncontroverted circumstance.

3. As a child, Appellant was present when his mother was abused and would come to her aid.

In footnote 22 of its brief, Appellee recognizes this as mitigation, but argues that by itself it is "not compelling enough to outweigh the aggravating factors." Appellant is not claiming that this factor alone warrants a life sentence. It may be entitled to great weight, but the error is the trial court's total failure to find this uncontroverted circumstance.

4. Appellant could be productive in prison.

Appellee argues that this factor does not deserve great weight. Again, this misses the point. The trial court totally ignored the evidence showing that Appellant might be productive. A conclusive showing is not required for some recognition of this mitigator. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("might be productive within a prison setting").

5. Appellant is a good prospect for rehabilitation.

Appellee seems to indicate that it is permissible to ignore this factor because, although it is uncontroverted, it is based on the testimony of friends and relatives. Such a claim is without merit. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("family and friends

feel he is a good prospect for rehabilitation" was valid mitigating factor).

6. The co-defendant received a life sentence.

Appellee does not address this factor. The trial court erred in failing to find this uncontroverted circumstance.

7. The alternative sentence is life imprisonment without the possibility of parole.

Appellee simply says that this alone may not be a significant factor. This may be true, but the trial court should not ignore this factor.

8. Appellant is religious.

Appellee does not address this uncontroverted circumstance other than to say it need not be given great weight. The trial court erred in totally failing to find and weigh the uncontroverted circumstance.

9. Appellant failed to receive care and treatment he required.

Appellee claims that Appellant is arguing this circumstance by itself requires a life sentence (AB at 27). Such a claim is not true. Again, the trial court erred in failing to find and weight this circumstance.

In summary, the argument here is not that the trial court abused its discretion in the amount of weight given to these 9 mitigating circumstances. Instead, the trial court failed to exercise any discretion where it failed to find or weigh any of these uncontroverted mitigating circumstances.

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE NON-STATUTORY MITIGATING CIRCUMSTANCES IN ITS SENTENCING ORDER.

Appellee notes that the trial court mentioned that witnesses testified to Appellant's childhood, his assistance to his family, his

good character and religious upbringing.[16] However, the trial court failed to address any of the other mitigating circumstances. Appellant relies on his Initial Brief for further argument on this point.

POINT VI

APPELLANT MUST BE GIVEN A NEW TRIAL OR ALTERNATIVELY A NEW SENTENCING HEARING WHERE KENEGRAL ALLEN ADMITTED SHE HAD LIED ABOUT MATERIAL FACTS DURING TRIAL.

Appellee concedes that the prosecutor used some perjured testimony, but claims it cannot be reviewed because the motion for new trial was untimely. However, a conviction procured by fraudulent testimony deserves no protection and a motion for new trial based on the use of such testimony may be reviewed despite the fact it is untimely. State v. Glover, 564 So. 2d 191 (Fla. 5th DCA 1990). Also, it should be noted that Kenegral Allen's first admission that she lied to the jury occurred in a letter a month after the jury verdict.

There were at least two occasions where Allen admitted lying to the jury.[17] Appellee acknowledges that Allen lied to the jury when she testified that Appellant pulled a gun. Appellee says this perjury is immaterial because other evidence showed that Appellant used the murder weapon. However, nothing could be further from the truth. The prosecutor used Allen's perjured testimony about Appellant pulling a gun to claim Appellant had the murder weapon (R1679). Other than the perjured testimony, there was little or no reliable evidence even inferring that Appellant had the weapon. Deputy Sallustio never saw

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[16] The trial court rejected these as having any mitigating value (R2434).

[17] On page 31 to 32 of the Answer Brief, Appellee points out that the context of Allen's testimony did not show that Appellant had ordered Coleman to take Allen out of the car. Appellant acknowledges that this is true. Allen's testimony shows that Coleman was not acting due to orders by Appellant; instead, he was acting independently on his own in taking Allen out of the car and into the store.

Appellant shoot any weapon. The only time he testified that he saw Appellant with a weapon was after the shooting, and Sallustio was impeached where he had previously identified Wayne Coleman as the person who followed him with the weapon. Coleman was also later seen cleaning the blood off the weapon (R1129).

Appellee claims that Allen did not admit she lied to the jury about who was the father of her children. However, Allen testified to the jury that Terry Jones was the father (R672).[18] At the motion for new trial Allen admitted that this was a lie and that Appellant was the father (R1967,1969). Appellee claims that this fabrication is not material. However, the prosecutor made this a material factor by arguing to the jury that this testimony [which was false] showed Allen's honesty:

> [Prosecutor] ... I mean, who told you about her relationships, and who fathered her children, and what she did, and what she talked about in the car about the guns? She did. I mean, did she appear to be a dishonest person to you?

(R1677) (emphasis added). The prosecutor used lies to bolster his case. Certainly, if the jury had been aware that they were being lied to by Allen, they could have had reasonable doubts about all of her testimony.[19]

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[18] Appellee points not to Allen's testimony to the jury as to who was the father of her children, but to pages 705 and 764 of the record which involve Allen's testimony as to what she had told Appellant [which was the truth, but which she had told the jury was a lie]. The lie to the jury is what is important, not the fact that Allen had told the truth to Appellant.

[19] The fact that Allen was lying was of no help to the defense. The defense theory was that, because of Allen's close relationship with Appellant she had agreed to perform a theft of the store with him. Hiding the close relationship from the jury weakens the theory. If the jury knew of the relationship, and thus that the incident had begun as an "inside job", they would be aware of Allen's motive to lie about the nature of the incident -- i.e. to protect herself from criminal charges.

As described on page 45 of Appellant's Initial Brief, a very troubling aspect is the prosecutor's knowingly using and emphasizing the perjured testimony as part of its trial strategy. Appellee does not even address this problem. This by itself warrants reversal. DeMarco v. U.S., 928 F.2d 1074 (11th Cir. 1991). Appellee does claim that Allen's opinion as to Appellant's innocence is not material. However, Allen was not merely giving an unsubstantiated opinion; Allen was stating that due to the order of the gunfire Appellant could not be guilty of killing Greeney (R1970).[20] Appellant relies on his Initial Brief for further argument on this point.

POINT VII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

In its Answer Brief, Appellee first cites to cases involving the killing of police officers to essentially claim that such a crime automatically warrants the death penalty. However, as pointed out in the Initial Brief, there are other cases involving the killing of other police officers which have resulted in a sentence of life. For example, in Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988), the defendant took hostages and stated that he would shoot the police and when the police arrived he killed two officers. This cold and planned killing was clearly more egregious than a situation like this where Appellant did not go out looking to kill or to do any violence. See pages 47-48 of the Initial Brief. While the instant crime is not excusable, it is clear that the manner of the crime is not the most aggravated type for which the unique punishment of death is reserved.

[20] Although, Allen like Sallustio, could not see who was firing shots, she could hear shots and their sequence and thus could conclude that Appellant had not killed Greeney.

Appellee attempts to distinguish the cases cited by Appellant on the ground that the mitigating factors are different from those which exist in this case. However, proportionality review is not grounded on the existence of on point cases. It is based on a principle -- that the unique punishment is reserved only for the most aggravated and least mitigated of crimes. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). As already noted, this offense is not as egregious as other killings of police officers which resulted in the imposition of a life sentence. Nor is this one of the least mitigated of crimes. There was substantial mitigation presented which was uncontroverted. See pages 48-50, and 33-35, of the Initial Brief.

Appellee's main argument for death being proportional is the speculation that Appellant was the person who shot Deputy Greeney. However, the co-defendant, Wayne Coleman, was equally, or more, culpable and received a life sentence. It is undisputed that Wayne Coleman's actions of shooting at the police officers, while Appellant was in custody, initiated the tragedy. As to who actually shot Greeney, there is no certain answer. The only person Sallustio ever saw fire any shots was Wayne Coleman. Inferences have to be used to identify the shooter. The physical evidence implicates Coleman as the shooter of Greeney. It is undisputed that the first shot that hit Sallustio in the chest was fired by Coleman (R804). Sallustio was aware that this bullet was fired from the same gun that fired the fatal bullet into Greeney (R850). The state's ballistics expert also testified that this bullet came from the same gun that fired the bullets that killed Greeney (R1616-17,1621,1636). In other words, this evidence indicates that Coleman killed Greeney. As explained in the Initial Brief, the mitigating factor of the equally culpable

Coleman receiving a life sentence, combined with at least eight other mitigating factors, take this out of the category of least mitigated cases for which the death penalty is reserved. Appellant relies on his Initial Brief for further argument on this point.

POINT VIII

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A MAGNETIC RESONANCE IMAGING EXAMINATION.

Appellee claims that this issue is not preserved for appellate review. However, Appellant twice requested an MRI (2SR472-73,147) and the trial court said it would not do any good (R148). This is sufficient to preserve the issue, despite the fact that the trial court never revisited the issue again. It would have been a futile gesture to reraise the issue.

Appellee claims the error is harmless because an MRI would not be relevant toward competency and the guilt phase. However, Appellant primarily raised this issue with regard to the benefit of an MRI toward capital sentencing. For reasons stated in the Initial Brief, Appellant should be granted a new sentencing hearing after the allowance of an MRI test.

POINT IX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR AND RELIABLE SENTENCING WHERE VICTIM IMPACT INFORMATION WAS BEFORE THE TRIAL JUDGE PRIOR TO SENTENCING.

Appellee argues that the presentation of victim impact information in this case was harmless. Appellee is correct in terms of the victim's family making statements at the sentencing hearing because, as Appellee notes, the trial judge had already formulated his sentencing decision before hearing from both sides at the hearing (AB at 40). However, the trial judge had received other letters prior to this sentencing hearing and the trial court acknowledged the letters

(R2050). For the reasons stated on page 56 of the Initial Brief, the error cannot be deemed harmless.

POINT X

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A SUFFICIENT INQUIRY INTO COUNSEL'S INEFFECTIVENESS WHEN APPELLANT MOVED TO DISCHARGE HIS COURT-APPOINTED COUNSEL.

On pages 42-43 of Appellee's brief, Appellee makes representations that "Appellant complains" about a lack of inquiry into trial counsel's failures to pursue a certain defense, and provide Appellant with depositions. Appellant has not raised these issues on appeal! Pages 42 and 43 are totally irrelevant to the issue on appeal.[21] This issue deals with the motion to discharge counsel for the sentencing hearing due to ineffectiveness for failure to get the witnesses from Boston to testify at the sentencing phase. Appellee addresses this issue only on page 44 of its brief and claims that there was insufficient evidence to grant the motion to discharge counsel. This is because, despite the serious allegation, there was no inquiry[22] into the failure to present these witnesses at sentencing as required by Watts v. State, 593 So. 2d 198, 203 (Fla. 1992) and Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

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[21] Appellant would like to address one comment by Appellee on these pages. Appellee states that there was direct evidence that Appellant shot Deputy Greeney. This is not true. The pages Appellant cites to show, at best, circumstantial evidence against Appellee if all inferences are resolved against Appellant. For example, pages 800-808 of the record are Sallustio's testimony as to the sequence of events. Sallustio testified that he never saw Appellant with a weapon or fire any shots (R854). Sallustio never saw the shooting of Greeney; nor did he even know when it occurred. We do know there was evidence that Coleman shot Sallustio in the chest and that bullet came from the same firearm that fired the fatal shots into Greeney (R850,1616-17,1621,1636).

[22] The trial court, without hearing any explanation as to who these witnesses were, or why they had not been called, merely concluded on this matter that defense counsel did the best he could (R2002-03).

Appellee also asserts the motion was untimely. This is not true.[23] The case had not yet reached the sentencing phase in which evidence and argument is to be presented to the trial judge. Appellant was seeking to discharge his counsel from this stage and, as noted in this point, there was a failure to adequately inquire into the allegation that counsel was not presenting relevant sentencing witnesses.

Finally, Appellee cites Ventura v. State, 560 So. 2d 217 (Fla. 1990) to claim that this issue should be raised on post-conviction rather than on direct appeal. However, Ventura goes directly against Appellee's claim. In Ventura, this Court addressed the issue, on the inquiry into the motion to discharge counsel due to ineffectivenes, on direct appeal. This Court found that there was a sufficient inquiry. It was only as to direct attacks on the effectiveness of trial counsel that this Court said were better suited for later review. Rather, the trial court erred in failing to conduct an adequate inquiry pursuant to Watts, supra.

POINT XI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT INADMISSIBLE EVIDENCE UNDER THE GUISE OF REFRESHING ITS WITNESS'S RECOLLECTION.

Appellee claims that the issue of the prosecutor getting the out-of-court statement before the jury under the guise of refreshing a witness's memory is not preserved for appeal. Such a claim is specious. While maybe not always using the magic term, "I object,"[24] Appellant twice objected to two prior statements being used when it

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[23] It should be noted that this issue relates only to sentencing.

[24] Magic words, such as "object" and "objection," are not required to preserve an issue, as long as there is a complaint in the court below. Williams v. State, 414 So. 2d 509 (Fla. 1982).

did not refresh recollection (R1126,1127). The trial court recognized the objections and overruled them.[25] Once the responses showed the content of the hearsay statements, Appellant moved to strike the responses (R1127,1128). The trial court denied the motions (R1127, 1128). Appellant has attached the portion of the record as an appendix showing that the issue was preserved.

Appellee also claims the issue is not preserved because Appellant failed to request a curative instruction. However, Appellant need not ask for a remedy of a curative instruction where the trial court overruled the initial objection. Ralston v. State, 555 So. 2d 443, 444 (Fla. 4th DCA 1990).

Appellee does not contest that it was improper to place the statement before the jury, but does argue that the error was harmless because it was cumulative to what Ruel Allen testified to at pages 1302-04 and 1319-20 of the record. Such a claim is without merit. These pages of the record do not show that Appellant told Allen that he had actually shot a police officer.[26] In fact, Allen specifically testified that Appellant did not say he shot a police officer (R1317). Thus, the error is not harmless.

Appellee also looks at the circumstantial evidence in a light most favorable to the state to claim that there could be other

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[25] While the trial court may not have used the magic word "overruled" he ruled that the witness could answer the question (R1126), thus effectively overruling the objection.

[26] At the very best, Ruel Allen's testimony shows a shoot out, rather than an officer actually being shot. The record at 1303 shows that Appellant told Ruel Allen there was a shoot out with police and "he" returned shots -- not that a police officer was actually shot and the term "he" was not identified as Appellant or Coleman. At 1319-20 of the record, Ruel Allen testified that Appellant did not identify whether it was "the other guy" [i.e. Coleman] or himself that shot the police officer (R1319-20).

evidence that Appellant killed Greeney. The sufficiency of the evidence to create a jury question as to who killed Greeney is irrelevant to whether the error is harmless. What is important is the possible effect of the improper evidence on the jury. As noted in the Initial Brief at page 61, the improper evidence was the very thing that the prosecutor used to claim that Appellant shot Greeney. The error of admitting this statement cannot be deemed harmless. Appellant would also note that Appellee's recitation of the circumstantial evidence is incomplete and misleading. Deputy Sallustio did not see who shot Greeney (R856). He never saw Appellant with a weapon (R854). He did see Wayne Coleman shoot and that shot hit Sallustio in the chest (R804). Sallustio was aware that this bullet was fired from the same gun that fired the fatal bullet into Greeney (R850). The state's ballistic expert also testified that this bullet came from the same firearm which was used to kill Greeney (R1616-17,1621,1636). Coleman was seen cleaning the blood off the murder weapon after the shooting (R1129). This is strong evidence that Coleman killed Greeney. The evidence that the prosecutor used to claim Appellant was the shooter was circumstantial and based on Sallustio's allegedly seeing Appellant with the weapon <u>after</u> the shooting and was based on Sallustio's ability to listen and sequence the shootings he heard. However, Sallustio was impeached on his identification of the person with the murder weapon when it was revealed that he identified Coleman as this individual earlier (R842).[27] Also, Sallustio's ability to sequence and identify the gunfire, after being shot and under stress

[27] Specifically, Sallustio testified that the person chasing him wore white pants and that Appellant wore dark pants (R842).

from the situation, is also in question.[28] The main point is that the error discussed in this point cannot be deemed harmless. Appellant relies on his Initial Brief for further argument on this point.

POINT XII

THE TRIAL COURT ERRED IN REFUSING TO ALLOW RELEASE, OR AT LEAST IN CAMERA REVIEW, OF THE GRAND JURY TESTIMONY.

Appellee claims that the specificity of Appellant's request was not sufficient. However, Appellant requested release, or in camera review, of the grand jury testimony because "it may reveal the names of favorable witnesses and other exculpatory evidence" (2SR300) was essentially the same as the request in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 995, 94 L.Ed.2d 40 (1987), which was for a file because it "might contain the names of favorable witnesses as well as other, unspecified exculpatory evidence." As noted in the Initial Brief, the principles of Ritchie apply to grand jury testimony.

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS DEPUTY SALLUSTIO'S IDENTIFICATION OF APPELLANT.

Appellee claims that there is no likelihood of misidentification because of the lighting, the distance, and conditions under which Sallustio viewed the person who followed him. Appellee neglects to mention one fact -- at a time closer to these supposedly infallible conditions, Sallustio actually identified Wayne Coleman as the person who followed him. None of the cases Appellee cites in this point deal with the situation where another individual has been identified.

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[28] After being shot, Sallustio described himself as being "pretty out of it" (R859).

Appellee also claims the misidentification is harmless because there was other evidence that Appellant shot Greeney. However, Appellee never explains what evidence shows this. Sallustio never saw Appellant in possession of a firearm (R854), other than the time the misidentification occurred. Other evidence indicated that Coleman shot Greeney.[29] The error cannot be deemed harmless.

POINT XV

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT BAD CHARACTER EVIDENCE.

Appellee claims that Appellant's statement a year before the incident that he hated police was relevant to his state of mind to prove his subsequent behavior. Such a claim is without merit. Prior statements can be relevant to prove a plan or intention stated by the declarant was subsequently acted upon. Van Zant v. State, 372 So. 2d 502, 503 (Fla. 1st DCA 1979). However, if the statement does not refer to any plan or intention the statement is not relevant. Id. In this case, the statement does not refer to any plan or intention. This is a situation unlike State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 1990), where the defendant gave a statement indicating his plan or intention that he would shoot a police officer if one got in his way. The prosecution's theory in this case was not that Appellant went looking for a police officer to shoot because he "hated" them. This was not a hate crime. The theory was that the shooting solely occurred to "avoid arrest." The only purpose of the statement was for bad character evidence.

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[29] The state's evidence showed that Coleman first fired from the store and the bullet struck Sallustio in the chest (R804). The state's firearm expert testified that the bullet that struck Sallustio in the chest was fired from the same gun that fired the bullets that killed Greeney (R1617,1620-21,1636). Sallustio also testified to this fact (R850).

Finally, Appellee claims that the error was not harmless because the prosecutor did not mention it in closing argument. However, the prosecutor did emphasize it during closing argument:

> And you can say to yourself, well, who would do this, and talking about premeditated design, it is the kind of person that would tell somebody that, hey, I hate cops, and I would kill them?

(R1703) (emphasis added). Moreover, the improper evidence was clearly and unequivocally in front of the jury during Allen's testimony. It was an egregious form of bad character evidence. In a case such as this it could have tipped the scales toward a conviction. The state has not shown beyond a reasonable doubt that the error was harmless.

The evidence in this case was far from overwhelming. The jury could have reasonably concluded that a theft, rather than a robbery, was planned. Appellant did not go out looking to kill or do any violence. In fact, the state's evidence at best shows in Appellant's mind the taking would be without any violence. On the day of the incident that Appellant told Ruel Allen that he received a call from a girl at Church's Chicken saying that he could come in and take some money from the store (R1300). Appellant told Allen that all he had to do was take money from the manager and that he did not have to use a gun and shots would not be fired (R1315). Ruel Allen understood that it would be an "inside job" (R1316).[30] The jury could have reasonably

[30] Corroborating this evidence was other state evidence. Kay Allen was the night manager at Church's and her duty was to close the store (R673-74). She was also Appellant's girlfriend for a period of time (R684). Kay Allen and Appellant had met and talked earlier on the day of the incident (R690). Kay Allen's reaction to Appellant's arriving before the other employees had left was an exclamation, "Oh my God. Oh shit" (R631), rather than a mere comment that her ride had arrived early. Allen told Appellant to leave and she would "beep" him later (R633). This is when the Appellant intended the theft.

believed that Wayne Coleman had killed Greeney and that Appellant had not contemplated Coleman's actions.[31]

Evidence that Appellant was the person who shot Greeney is based on inferences from the testimony of Deputy Sallustio.[32] The jury could believe that Sallustio was confused as to the sequencing of the gunfire; especially in light of his confusion as to other matters.[33] As noted above, the jury could also believe Appellant never intended to use any force or violence during the incident.[34]

Because of the nature of the improper evidence, and the jury question as to Appellant's guilt, the error cannot be deemed harmless.

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[31] Wayne Coleman changed when Allen decided not to cooperate (R713). Coleman then called Allen a "bitch" and talked about playing rough (R714-15). Wayne Coleman pointed a gun at her head to get her to open the safe (R723). It was Wayne Coleman who would start shooting at police when Appellant was in custody (R804). It is clear that Appellant went to the store that night thinking that Allen would help in the theft. Appellant was not intending a robbery with violence. We know that the first bullet that Coleman fired hit Deputy Sallustio in the chest and that this bullet was fired from the same gun that fired the shots that killed Deputy Greeney (R850,1616-17,1636). In other words, Coleman was in possession of the murder weapon at the time of the shootings. Coleman was also observed cleaning the blood off the murder weapon after the shootings (R1129).

[32] Sallustio never saw who shot Greeney. There were only inferences based on the sequencing of the gunfire heard by Sallustio.

[33] Sallustio gave different accounts as to who the person was that followed him.

[34] To the extent that Kay Allen denied that she was not involved in a planned theft, the jury could disbelieve Allen's credibility on the basis that it would be against her self-interest to admit involvement in a planned theft.

CONCLUSION

Based on the foregoing, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 23rd day of November, 1993.

Jeffrey L. Anderson

Of Counsel