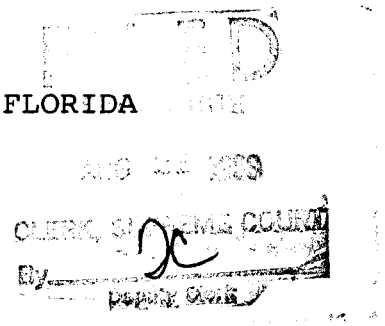
IN THE SUPREME COURT OF FLORIDA



MARK J. ASAY,

Appellant,

v. CASE NO. 73,432

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

A Duval County grand jury indicted Mark James Asay for two counts of first degree murder on August 20, 1987. (R 11-12) Count I charged murder for the shooting death of Robert Lee Booker on July 18, 1987. (R 11) Count II charged a second murder committed on the same day for the shooting death of Robert McDowell. (R 11) Asay pleaded not guilty. (Tr 4-11) He proceeded to a jury trial, and the jury found him guilty as charged on September 29, 1988. (R 121-122) (Tr 182, 961-964) The penalty phase of the trial began on October 28, 1988. (Tr 990-1080) Both the State and defense presented additional evidence. (Tr 1008, 1013) The jury recommended a death sentence for each murder. (R 143-144) (Tr 1074-1075)

Circuit Judge L. Page Haddock adjudged Asay guilty on November 18, 1988, and sentenced him to death for each murder. (R 156-159, 160-162) (Tr 1104-1108) In his written finding in support of the sentences, Judge Haddock found two aggravating circumstances applicable to both counts: (1) Asay was on parole at the time of the homicides; and (2) Asay had been previously convicted of a capital felony based on the contemporaneous conviction for the other murder count in this case. (R 160-161) The court found a third aggravating circumstance applicable to Count II -- the homicide was committed in a cold, calculated and premeditated manner. (R 161) In mitigation, the court found Asay's age of 23 at the time of the offenses. (R

161) The court's sentencing findings did not mention Asay's alcohol use at the time of the crimes which was a significant portion of the mitigating evidence presented during the penalty phase. (R 160-162) (Tr 1013-1022)

Asay filed his notice of appeal to this Court on December 8, 1988. (R 166)

Facts of the Offense and Guilt Phase

On Friday night, July 17, 1987, Mark Asay went to The Doghouse Bar to drink and play pool with his brother, Robbie Asay and Robbie's friend, Bubba O' Quinn. (Tr 490-491) Except for an hour during which Mark drove his girl friend home, the three men were at the bar together until 12:00. (Tr 492, 493) Bubba said he drank four or five beers and Robbie and Mark drank a couple less than that while at the bar. (Tr 492-493) After midnight, the three decided to go to Brinkman's, another bar. (Tr 493) Each of the men had six to eight beers there before the bar closed at 2:00 a.m. (Tr 495-496, 555) Bubba said they were not falling down drunk, but they were "buzzed." (Tr 495) Robbie and Bubba has also smoked marijuana that night. (Tr 492, 517) After Brinkman's closed, Bubba suggested they drive downtown to find a prostitute, and he would pay for oral sex for all of them. (Tr 497) Robbie said he wanted to pick up a girl he had seen in the bar. (Tr 496, 556) Consequently, he drove off alone in his truck. (Tr 554-556) Mark and Bubba drove away in Mark's red, four-wheel-drive, Ford truck. (Tr 554) Bubba was driving Mark's vehicle. (Tr 497)

After trying to pick up two women they saw on the corner of Sixth and Laura, Mark and Bubba saw Robbie's truck parked on Sixth between Laura and Main. (Tr 497-498) Robbie was inside his truck talking to a black male standing at the driver side door. (Tr 498) The black male was Robert Lee Booker, a local pimp. (Tr 410-412, 571-573)

Bubba parked Mark's truck close and catty-cornered to Robbie's. (Tr 498, 519) Mark, apparently thinking Robbie was having difficulties with Booker, immediately got out of the truck and began confronting Booker verbally. (Tr 498-499) he said, "You know you ain't got to take no shit from these fucking niggers." (Tr 559) Robbie told Mark that "everything is cool," but Mark and Booker continued to curse and point their fingers in each other's face. (Tr 499, 559-560) Booker said, "Don't put your finger in my face." (Tr 499) Mark said, "Fuck you, nigger," and then Mark pulled his gun and shot one time. (Tr 499) Booker said, "Oh," grabbed his side and ran away. (Tr 560) Robbie drove away immediately. (Tr 500, 561) He went to his mother's house, parked in the street and passed out in his truck while waiting for Mark and Bubba to return. (Tr 562-563) Mark jumped into the back of his truck and Bubba drove it two blocks away and stopped. (Tr 501) When Mark re-entered the cab of the truck, Bubba asked him why he did it. (Tr 501) Mark responded, "Because you got to show a nigger who is boss." (Tr 501) Bubba then asked Mark if he thought he killed him and Mark replied, "No, I just scared the shit out of him." (Tr 501)

Alexander Pace had a minor automobile accident around 2:00 a.m. on July 18th. (Tr 597-599) He hit a parked car on Laura Street. (Tr 597, 608) Pace and the owner of the parked car, Clifford Patterson, were talking about the accident when a black male ran passed, holding his side, and said "I've been shot" or "Someone shot me." (Tr 599-604, 609) The man ran between some houses and disappeared. (Tr 600, 609) Patterson said he had seen the man before at either the Silver Dollar Bar or The Idle Hour Bar. (Tr 610) He also identified a photograph of Booker as the man he saw. (Tr 609-610) About 7:30 a.m. on July 18th, Officer David Smith was advised of a body near a house on Laura Street. (Tr 613-615) He found Booker's body under the edge of a house. (Tr 615-616)

Dr. Bonofacio Floro performed an autopsy on Booker. (Tr 419) He had been shot one time in the abdomen with a .25 caliber firearm. (Tr 420-426) The bullet perforated the intestines and the left ileac artery causing internal hemorrhaging. (Tr 421) Cause of death was loss of blood due to the gunshot wound. (Tr 421-425) With this wound, Booker could have remained conscious for up to ten minutes and could have run for a block or more. (Tr 425-426) Floro stated that the gunshot wound was from a distance of greater than 18 inches because he found no powder residue. (Tr 428) Booker was under the influence of cocaine and alcohol at the time of his death. (Tr 441-443)

After the shooting, Mark and Bubba continued to drive around looking for a prostitute. (Tr 503) Bubba saw someone at

a Lil' Champ store on 16th Street whom he knew as Renee. (Tr 503-504) At this time, Bubba did not know that Renee was actually a man, Robert McDowell, dressed as a woman. (Tr 503-504) He had met Renee two years earlier at his cousin's house and had had oral sex with him at that time. (Tr 504) Bubba pulled the truck into the parking lot and called Renee to the truck. (Tr 504) Bubba negotiated oral sex for him and Mark for $10 a piece. (Tr 504) McDowell refused to get into the truck, so Bubba parked in an alley across the street. (Tr 505-506) McDowell walked to the truck. (Tr 507) Mark walked away from the truck to act as a look out for the police while Bubba and McDowell had sex. (Tr 508) Just as McDowell started to get into the truck with Bubba, Mark returned. (Tr 509) According to Bubba, Mark grabbed McDowell, pulled him from the truck and started shooting him. (Tr 509) McDowell backed up, screamed and tried to get away. (Tr 510) Mark shot several times, entered the truck and told Bubba to drive away. (Tr 511) They went down the alley toward 15th Street and ultimately to Robbie's mother's house. (Tr 512) While en route, Bubba asked Mark why he shot Renee, and Mark replied that she had beaten him out of $10 on a blow job. (Tr 512)

Willie Bradshaw was using a pay telephone at the store where Mark and Bubba talked to McDowell. (Tr 619-620) Bradshaw knew McDowell as Renee Torres who lived in the same apartment building as his brother. (Tr 619-620) Bradshaw saw McDowell talk to two white males in a red truck and then follow the truck into an alley across the street.(Tr 621-626) Later,

Bradshaw heard three gunshots. (Tr 626, 630) He walked across the street into the alley and saw McDowell on the ground. (Tr 626) Bradshaw left in the taxi cab he had called earlier, but the police stopped the cab and returned him to the scene. (Tr 630) Deputy A.C. Lewis, who was patrolling the area, heard the shots and arrived on the scene quickly. (Tr 634-644)

An autopsy revealed that McDowell had suffered six gunshot wounds from a .25 caliber firearm. (Tr 431-436) Dr. Floro recovered four projectiles. (Tr 436) One bullet entered near the waistline and remained just beneath the skin. (Tr 432) Two entrance wounds were in the back, and one of these bullets entered the left side of the back and penetrated the lungs and the aorta. (Tr 433) A fourth gunshot entered the chest. (Tr 433) A fifth shot went through the hand. (Tr 434) Floro found stippling on this wound indicating that the barrel of the gun was within inches at the time fired. (Tr 434) Finally, a sixth shot struck the forearm. (Tr 434) The three shots entering the chest cavity were fatal. (Tr 435-436) Floro also found that McDowell had taken cocaine within four hours of his death. (Tr 451-452)

David Warniment, a ballistics expert examined the bullets recovered from Booker and McDowell. (Tr 716-726) He concluded that all five were fired from the same gun. (Tr 724-726) Based on the markings on the bullets and the fact they were .25 caliber, Warniment further concluded that the weapon was either a Colt, a Raven or an Astra pistol. (Tr 727-730) Mark, Robbie and Mark's girl friend each owned Raven .25 caliber pistols.

(Tr 473, 481-482, 576-577) Warniment examined a .25 caliber pistol submitted for examination, and while he could not be completely positive in his conclusions, he found it unlikely that that particular pistol fired the bullets. (Tr 730-734)

When Mark and Bubba drove to Mark's mother's house, they saw Robbie in his truck which was parked in the street. (Tr , 562) Bubba drove to a union hall which was in the neighborhood to turn around. (Tr 562) However, Robbie pulled up in his truck. (Tr ,562) Bubba got out of Mark's truck and told Robbie about the second shooting. (Tr 563) Robbie said he and Mark exchanged words, and then he and Bubba went home. (Tr 563)

Charlie Moore, a longtime friend of Mark's, said he received a telephone call from Mark during the month of July at 2:00 a.m. in the morning. (Tr 680-681) Mark had talked to Moore about building a bumper for his truck several months earlier, and he called wanting Moore to begin work on it immediately. (Tr 681-682, 690) Mark had purchased his truck without a bumper because it was $500 cheaper. (Tr 690-691) When Moore asked Mark why he needed the bumper at that time of night, Mark replied it was a life or death situation. (Tr 682) He told Moore that he had been involved in a shooting, someone had identified his truck, and he wanted to change his truck's appearance. (Tr 682-683) Moore said he had watched a Crime Watch segment on television about the McDowell shooting and he realized that Mark may have been involved in that shooting. (Tr 683-685) He called Crime Watch and said that Mark Asay could

be the person who committed the shooting. (Tr 685) Moore did not help Mark with a bumper. (Tr 702)

A few days later, Mark was with Charlie and Moore's cousin, Charles Moore, Jr., who goes by the nickname "Danny." (Tr 646, 686) The three were riding in Charlie's truck going after tools at a metal fabrication shop. (Tr 686) During the ride, Mark allegedly said he committed the shooting. (Tr 648-651, 686-690) According to Charlie Moore, Mark pointed out the building on 16th and Main where the McDowell shooting occurred. (Tr 688) He said he saw the boy who had cheated him out of $10 on a drug deal. (Tr 688-689) Mark said he had Bubba stop the truck in order to get the man into the truck to take him somewhere to beat him up. (Tr 689) They could not get him into the truck, so Mark grabbed him, stuck the gun in his chest and shot him four times. (Tr 689) The man fell and Mark shot him again. (Tr 689) According to Danny Moore, Mark said he and Bubba were looking for prostitutes and Mark saw McDowell whom he had given money to for marijuana in the past. (Tr 650) Mark and Bubba stopped the truck and had planned to take the prostitute off and kill her. (Tr 651) When Bubba could not get her in the truck, Mark approached, realized the prostitute was a man and shot him four times. (Tr 651) McDowell allegedly said, "Please don't hurt me" just before Mark shot. (Tr 651) Danny Moore had also seen the Crime Watch segment and decided to call and collect the reward money. (Tr 652-654) He later talked to Detective Spaulding. (Tr 652)

While in jail awaiting trial, Mark allegedly made a statement to a cellmate, Thomas Gross. (Tr 744-770) Gross said he was in a cell housing eight inmates at the Duval County Jail. (Tr 749) There were five black inmates and three whites, including Mark and Gross. (Tr 750) At a time when the five black inmates were out of the cell at the recreation area, Mark allegedly told Gross that he was awaiting trial on two murders. (Tr 750) According to Gross, Mark pulled some newspaper articles from under his mattress and said, "I shot them niggers." (Tr 759) Gross said Mark told him that he had been drinking beer and riding around in his truck. (Tr 751) At the time of the shootings, Mark pulled to the side of the road, called the person over and as the person approached, Mark would step out of his truck and shoot. (Tr 751) Gross said he and Mark also discussed their tattoos. (Tr 752) Mark has many tattoos, and Gross described three which he believed evidenced a racial prejudice against blacks. (Tr 752-759) One contained the initials "SWP" which Gross said was an abbreviation for "supreme white power." (Tr 752) The second was a swastika and the third tattoo was actually two words-- "White Pride." (Tr 752) Gross admitted that he contacted the State Attorney's Office with the information in hopes of obtaining a better plea bargain on his robbery charges. (Tr 745-746)

Defendant's Request to Dismiss Trial Counsel

At the conclusion of Bubba O'Quinn's testimony, Mark told the trial judge that he was dissatisfied with his lawyer's

performance. (Tr 537) He related several complaints including his lawyer's failure to adequately cross-examine O'Quinn. (Tr 537-543) Mark expressed concern about the fairness of his trial and an unwillingness to continue the trial with Raymond David as his lawyer. (Tr 537-538) Mark presented an oral, pro se motion to dismiss his lawyer from the case. (Tr 538) The trial judge told Mark "[I]f you don't hire them, you can't fire them." (Tr 539) Judge Haddock then tried to assure Mark that his lawyer was doing a good job for him at trial. (Tr 540-543) The court denied Mark's motion. (Tr 543-544) Mark continued to express his displeasure and said he would advise the jurors of the problems when they returned. (Tr 544) Judge Haddock said he would have Mark bound and gagged if he commented to the jury. (Tr 544) After an off-the-record discussion between Mark and his lawyer, his lawyer explained his cross-examination strategy on the record. (Tr 544-546) He also noted that Mark still maintained his objections to his continued representation, but Mark also agreed not to disrupt the trial. (Tr 546) Judge Haddock advised Mark that if he had further objections or comments he wished to make he could do so outside of the presence of the jury. (Tr 546-549)

Prosecutor's Closing Argument

Throughout his closing argument, the prosecutor repeatedly said Mark killed the victims because they were black. (Tr 851-854, 869, 879-880, 884-886, 893) He commented several

times on Mark's tattoos and their racial connotations, and the use of the term "nigger." (Tr 851-854)

Penalty Phase and Sentencing

The penalty phase of the trial was held approximately four weeks after the guilt phase. (Tr 964-968) Prior to the proceedings, Mark's lawyer told the court that Mark wished to address the court. (Tr 999) Mark presented his own request for an additional seven days in order to secure the presence of mitigation witnesses. (Tr 999-1005) He advised the court that he had black friends willing to testify in his behalf. (Tr 1000) The court inquired of the relevance of these witnesses, and Mark replied that he expected them to testify to his good character, specific acts of good character and to the fact that Mark did not behave in a racially prejudiced manner. (Tr 1001) Noting that the State had presented a guilt phase argument claiming the homicides were racially motivated, Mark also believed the witnesses could rebut that allegation. (Tr 1002) Mark stated that he had no opportunity to work with his lawyer on securing these witnesses because his lawyer had been treating him as though he was incompetent. (Tr 1003) The court advised that he had instructed the State not to continue the claim that the murders were racially motivated since such an argument was irrelevant to the sentencing. (Tr 1002) Furthermore, the court ruled that Mark would be prohibited from producing a witness to state that he was not a racist. (Tr 1003) Because of those decisions, the trial judge denied

Mark's request for a seven days continuance to secure mitigation witnesses. (Tr 1003)

Mills Roland, a probation officer, was the State's only witness. (Tr 1009) He testified that Mark was on parole from a 1985 auto theft conviction from Texas. (Tr 1009-1013)

Mark's lawyer presented two witnesses. (Tr 1013-1014) First, Dr. Ernest Miller, a psychiatrist and an expert in alcohol abuse, testified about the effects of alcohol consumption on the body and behavior. (Tr 1014-1021) Miller never examined Mark, but he testified to his opinion on Mark's alcohol consumption based on an hypothetical question. (Tr 1016-1021) He said a person of Mark's size who consumed 12 to 15 beers over a six hour period would have a measurable blood alcohol level above .20 percent which would substantially impair his ability to make judgments. (Tr 1017-1018)

The second mitigation witness was Mark's mother, Joan Baumgartner. (Tr 1023) She said that Mark is her youngest of seven children and was 23 years old at the time of his arrest. (Tr 1023-1024) She said she is closer to Mark than her other children and he is protective of her and his other family members. (Tr 1031) While he was incarcerated in Texas, Mark wrote his mother consistently. (Tr 1024-1025) She said he never missed a birthday or holiday, and since he was unable to buy a gift, Mark would draw pictures for his mother. (Tr 1024-1025) During his imprisonment, Mark earned his GED. (Tr 1030) When Mark returned from prison, he lived at home and regularly gave his mother most of his paycheck. (Tr 1026) Mark

and his brother also remodeled the inside of their mother's house. (Tr 1026-1027) His mother stated that Mark was generous to other inmates in the county jail while awaiting trial. (Tr 1029-1030) He asked her to secure shoes for a man who was having trouble obtaining his size in the jail and he gave away several items of clothing to others. (Tr 1029)

During his penalty phase argument, the prosecutor made several references to the jury's role in recommending a sentence. (Tr 1036-1037, 1051-1052) These comments told the jury not to feel guilty about recommending a death sentence because Judge Haddock is paid to make that ultimate decision. (Tr 1036-1037)

SUMMARY OF ARGUMENT

1. The prosecutor improperly injected racial prejudice into the trial as an asserted motive for the murders. Mark Asay is white and the victims are black. During its case, the State presented evidence that Mark has tattoos suggesting a racial bias and allegedly used the term "nigger" when referring to the victims. However, there was no evidence linking any racial bias as motive for the murders. The State's evidence and argument on this point served no purpose other than attacking Mark's character on an irrelevant issue and inflaming the jury. Racial prejudice was made a feature of the case, depriving Mark of his right to due process and a fair guilt and penalty phase trial.

2. Mark Asay asked to dismiss his court appointed lawyer from the case. He told the trial judge that he was dissatisfied with his lawyer's performance and stated that he was unwilling to continue the trial with him. Mark asked for new counsel. The trial judge responded, "[I]f you don't hire them, you can't fire them" and tried to assure Mark that his lawyer was doing a good job for him. The court denied Marks' motion. After Mark continued to press his objections, the court warned him that he would be bound and gagged if he attempted to address the jury. During the entire process, the court never told Mark, in accordance with the requirements of Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), that he could dismiss his lawyer if he preferred to represent himself. As a result,

Mark was deprived of his Sixth Amendment right to represent himself at trial.

3. The State failed to prove that the homicide of Robert Booker charged in Count I of the indictment was a first degree murder. There was no proof of premeditation, which was the only theory of first degree murder prosecuted. At best, the State proved nothing more than a second degree murder since the two eyewitnesses testified that Mark, while under the influence of alcohol, shot the victim one time during a brief heated argument. Moreover, Mark's alleged admissions after the shooting showed that he harbored no intent to kill. The trial court should have granted Mark's motion for judgment of acquittal.

4. Before the penalty phase of the trial, Mark presented his own request for a continuance of seven days in order to secure the presence of mitigation witnesses. He told the court that he had black friends willing to testify in his behalf. They would testify to his good character and to the fact that Mark did not hold prejudices against blacks. Mark also believed the witnesses could rebut the State's allegation that the murders were racially motivated. The court said that the State would not argue that the murders were racially motivated, since such an argument was irrelevant to the sentencing. Moreover, the court ruled that Mark would be prohibited from producing a witness to say that he was not a racist. On this basis, the trial judge denied Mark's request for a continuance. The court abused its discretion and rendered the penalty phase

of Mark's trial unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

5. The trial court should not have found that the homicide of Robert McDowell qualified for the cold, calculated and premeditated aggravating circumstance. There was no evidence of a prearranged plan to kill. At best, the State showed that the homicides were the product of spontaneous, impulsive acts committed while under the influence of alcohol.

6. The death sentences imposed in this case are disproportional. First, the homicide of Robert Booker was not a first degree murder and a death sentence is not a possible penalty for second degree murder. Second, the only validly found aggravating circumstances established nothing more than Mark was on parole for an auto theft at the time of the two homicides. The premeditation aggravating circumstance the court found applicable to the homicide of Robert McDowell was improper. Finally, the homicides were simply impulsive shootings committed while Mark was under the influence of alcohol. These are not the kind of crimes warranting a death sentence.

7. During his penalty phase argument, the prosecutor repeatedly told the jurors that the sentencing decision was not theirs and that Judge Haddock shouldered the entire responsibility. These comments gave the jury the clear impression that its role in sentencing was virtually meaningless. The trial judge never corrected the misleading comments. Instead, the penalty phase jury instructions merely emphasized prosecutor's position. The prosecutor's uncorrected argument, which was

actually confirmed by the jury instructions, unconstitutionally diminished the role of the jury in the sentencing process in violation of the Eighth and Fourteenth Amendments.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INJECT IRRELEVANT AND UNFOUNDED ISSUES OF RACIAL PREJUDICE INTO THE TRIAL, WHICH INFLAMED AND PREJUDICED THE JURY, THEREBY DEPRIVING ASAY OF A FAIR TRIAL.

The prosecution improperly inserted racial prejudice into the trial of this case. Mark Asay is white and the victims are black. And, while Mark does have tattoos suggesting a racial bias and allegedly used the term "nigger," there was no evidence linking any racial bias as motivation for the homicides. The State's evidence and argument on this point served no purpose other than attacking Mark's character on an irrelevant issue and inflaming the jury which included black jurors. (Tr 902) This Court has recently reaffirmed the fundamental principle that racial prejudice has no place in our criminal justice system. Robinson v. State, 520 So.2d 1, 6-8 (Fla. 1988), see, also, Cooper v. State, 136 Fla. 23, 186 So. 230 (1939). Unfortunately, the State made racial prejudice a feature of this trial, thereby depriving Mark of his right to due process and a fair guilt and penalty phase trial. Amends. V, VI, VIII & XIV, U. S. Const. He must be afforded a new trial.

During his closing argument, the prosecutor repeatedly told the jury that Mark was a racist and killed the victims because they were black. In fact, there was no evidence to support this argument. Bubba O'Quinn and Robbie Asay said that

Mark used the term "nigger" during the verbal confrontation with Booker. (Tr 499, 501, 559) Thomas Gross said that Mark used the term "nigger" when he allegedly admitted to the shootings and that he had tattoos evidencing a racial bias. (Tr 759) However, there was no testimony indicating that racial prejudice was the motive for the shooting. Testimony from Robbie and Bubba showed the homicide of Booker was the result of a confrontation. (Tr 498-502, 559-563) Testimony from Bubba, Charlie Moore and Danny Moore indicated the McDowell shooting was over money for sex or drugs. (Tr 512, 650, 688-689) Contrary to the prosecutor's contention, Gross never said Mark killed because the victims were black. (Tr 744-770) His testimony was that Mark said he "killed them niggers" and that he was prejudiced against blacks. (Tr 750-759) Gross never attributed a motive for the killings to Mark's alleged prejudice. (Tr 744-770) Nevertheless, the prosecutor pushed this theory as the overriding motive for the shootings. His argument on this point proceeded as follows:

> ... I'm going to focus on what's at issue here. What really is the issue? Mr. David is arguing that it's a black and white issue, that the State doesn't have -- well, they got a weak case, so they are trying to make a black and white issue, they are trying to get everybody riled up, so you will go out there and say, Oh, he's guilty, he's got tatoos[sic], Nazi tatoos[sic]. I guess we all know what that stands for. He just happened to think of supreme white power, and he just happened to think white pride, but we pick on him because he hates blacks. I mean, that's why we pick on him, he just happened to take certain words, exclusive language, "Fuck you, nigger," but

we're going to pick on him, we're trying to make it a black and white issue.

Ladies and gentlemen, who has made it a black and white issue? Who said those words? Who's got those tatoos[sic]? Was it the defendant when he was arrested? Was he held down by Detective Housend and Detective Moneyhun? And was he branded with a tatoo[sic], a Nazi tatoo[sic]? Use your common sense. Why do we have those. (Tr 851-852)

* * * *

There is no mistake he told everybody he killed him because he was black. I mean, there is not issue about that, that hasn't been contradicted. (Tr 853)

* * * *

And, Mr. Gross, you know, he's not all -- these tatoos[sic], of course, he's talking about the other guy, "I killed him because he was black," too. You know, "I killed those niggers." That's what really happened there. (Tr 854)

* * * *

He also said what the defendant said, and that's corroborated by Robbie, the statement the defendant said, excuse me, I got to say this again, but, "Fuck you, nigger." That's important. I'm not going to inflame you, but that's a fact, he called this guy, because the guy was a black guy. He thought this guy was having some kind of argument with his brother. That's why his brother testified . . . (Tr 869)

* * * *

All we can go on is the facts in this case, what the defendant said he killed him for, that's all we have, we can't make up stories why he killed him, all we can rely on is what the defendant's own statements are. Number one, he killed him because of the prior sex he got ripped off. And, number two, he killed him because prior marijuana he had ripped him off. And,

number three, he killed him because he was black.

Rely on what the defendant said why he killed him, prior sex, prior marijuana rip-off, and prior fact that he's black. You-all decide. But it just happened to be a coincidence this guy's got a Nazi swastika, SWP, and white power. (Tr 879-880)

* * * *

But the key is here, that he told Mr. Gross when he was talking about the murders, he indicated that that's the reason he did it. That's the reason those tatoos[sic] are important. That's what he told Mr. Gross, he's bragging about it, Yeah, man.

What's important, also, about Mr. Gross, and that's really the next witness he had lied to, he waited for all the other black people in the room to leave, that's a smart move. (Tr 880)

* * * *

...Mr. Booker, this is why I submit to you there has to be premeditation in this case as to Mr. Booker.

No. 1, and we're talking about the defendant's actions now, he saw the victim in this case, Mr. Booker, talking with his brother.

No. 2, he realized that the victim was black.

No. 3, he got out of that truck with a gun. That means he thought about it, and he had the gun with him. (Tr 884)

* * * *

Again, he said, blank blank, "You nigger." He thought about it, and he knew why he was killing him. (Tr 885)

* * * *

...when Robbie also testified as to why he did it, because, if you will excuse my language, "You have got to show those fucking niggers who's boss." That's why he did it.

> ...[Defense counsel] would argue that we're attempting to argue to you that these guys went out that night and said, Okay, we're going kill some blacks. No, it wasn't that type of thing. It's a type of think he saw his brother talking to a black person, and he thought that black person was giving his brother a hard time, and his brother told him it was cool. (Tr 886)
>
> * * * *
>
> Why did the defendant kill Mr. Booker? Why did he? Is it just a coincidence that he has a Nazi swastika right here, SWP, and white pride on his arms? Is that just a coincidence? Why did he kill Mr. McDowell? (Tr 893)

This argument improperly inflamed the jury with an irrelevant and highly prejudicial consideration. Racial bias simply had no place in this case.

In McBride v. State, 338 So.2d 567 (Fla. 1st DCA 1976), the State elicited testimony, during this robbery prosecution, that the defendant yelled a slur at the arresting deputy wife suggesting she was having sex with "niggers." Finding that the admission of the testimony denied the defendant a fair trial, the district court stated:

> Such alleged statement had no relevance to the case being tried but was undoubtedly offensive to two members of the jury who were of the black race. The effect of this remark attributed to appellant was to prejudice her in the eyes of the jury--particularly the two black members.

338 So.2d 568. The court also concluded that the trial judge's cautionary instruction to disregard the remark was insufficient to remove its prejudicial impact. Ibid.

This Court, in Robinson v. State, 520 So.2d 1, vacated a death sentence because the prosecutor had presented evidence designed to arouse racial prejudices during the penalty phase of the trial. On cross-examination of the defendant's psychological expert, the prosecutor insinuated that the defendant, a black man, had a habit of preying on white women. Concluding that this argument was an improper attempt to make a racial appeal to the all-white jury, this Court stated:

> The prosecutor's comments and questions about the race of the victims of prior crimes committed by appellant easily could have aroused bias and prejudice on the part of the jury. That such an appeal was improper cannot be questioned. The questioning and resultant testimony had no bearing on any aggravating or mitigating factors.

520 So.2d at 7. In a footnote, this Court rejected the relevance of the testimony:

> We disagree with the trial judge's conclusions that the testimony was proper because it was brought up by defense counsel on direct. The only reference to race made by Dr. Krop on direct was his testimony that the defendant stated that he shot the victim the second time because "he wouldn't get a lot of mercy from having shot a 'white woman.'" This testimony does not justify prosecutorial speculation that the defendant's crimes were racially motivated. Nor do we believe defense counsel's apparent attempt to rebut the prosecutor's innuendos on redirect were sufficient to cure any risk of prejudice.

Ibid, at 7 n. 3.

Appeals to racial bias have been resoundingly condemned for many years. Robinson; Cooper. Even without objection, reversible error occurs because the racial remarks are "so

obviously prejudicial and of such a character that neither rebuke nor retraction may entirely destroy their sinister influence." Cooper, 136 Fla. at 28; accord, Robinson, 520 So.2d at 7. As this Court aptly recognized in Robinson, the danger of prejudice is particularly great in a capital case where the racial bias may affect the jury's sentencing recommendation. The sole purpose of the evidence and argument in this case was to impugn Mark's character before the jury. Introduction of this irrelevant and blatantly inflammatory racial evidence and argument compels a reversal this case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO ADVISE ASAY OF HIS RIGHT TO REPRESENT HIMSELF AND IN FAILING TO CONDUCT AN INQUIRY PURSUANT TO FARETTA V. CALIFORNIA, WHEN ASAY ASKED TO DISCHARGE HIS COURT APPOINTED LAWYER.

Mark presented an oral, pro se motion to dismiss his court appointed lawyer from the case. (Tr 538) After Bubba O'Quinn testified, Mark told the trial judge that he was dissatisfied with his lawyer's performance. (Tr 537) Among Mark's complaints was his lawyer's failure to adequately cross-examine O'Quinn. (Tr 537-543) Mark stated that he was unwilling to continue the trial with Raymond David as his lawyer, and asked for new counsel. (Tr 537-538) The trial judge responded, "[I]f you don't hire them, you can't fire them." (Tr 539) Judge Haddock then tried to assure Mark that his lawyer was doing a good job for him and denied Marks' motion. (Tr 540-544)

After the court's ruling, Mark continued to express his displeasure and said he would advise the jurors of the problems in his case when they returned. (Tr 544) Judge Haddock said he would have Mark bound and gagged if any such comments were made to the jury. (Tr 544) After an off-the-record discussion between Mark and his lawyer, his lawyer explained his cross-examination strategy on the record. (Tr 544-546) Mark maintained his objections to his court appointed lawyer, but he also agreed not to disrupt the trial in order to avoid being bound and gagged in the presence of the jury. (Tr 546) Judge Haddock advised Mark that if he had further objections or comments he

wished to make he could do so outside of the presence of the jury. (Tr 546-549)

When a criminal defendant asks to discharge his court appointed lawyer, the trial judge must make inquiry to insure that the defendant is receiving competent representation. The court in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), outlined the requirements:

> It follows from the foregoing that where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reasons for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. See Wilder v. State, Fla.App. 1963, 156 So.2d 395, 397. If the defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel.

Ibid, at 258-259; accord, Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla. 1988). Furthermore, when a defendant persists

in his request to dismiss appointed counsel, his request is then equivalent to a request to represent himself. Jones v. State, 449 So.2d 253 (Fla. 1984); McCall v. State, 481 So.2d 1231, 1232 (Fla. 1st DCA 1985); Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984); Williams v. State, 427 So.2d 768, 770 (Fla. 2d DCA 1983). The court must then follow the procedures concerning a defendant's waiver of counsel as outlined in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) and Fla.R.Crim.P. 3.111(d).

The trial judge correctly followed the first requirement of Nelson, when he inquired into Mark's complaints about his lawyer's representation. However, the court completely failed to comply with the second part of the procedures -- the judge never advised Mark that he could represent himself without counsel. Mark had the option of either accepting his appointed lawyer or representing himself, and the trial court had the duty to advise him of these options. Nelson; Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984); see, also, Smith v. State, 444 So.2d at 544-545; McCall v. State, 481 So.2d at 1232-1233. Instead of treating Mark's continued request to dismiss counsel as a request to proceed pro se, Judge Haddock did just the opposite. He told Mark, "[I]f you don't hire them, you can't fire them." (Tr 539) See, Black v. State, Case No. 88-1402 (Fla. 4th DCA, June 14, 1989)(district court reversed denial of defendant's request to discharge court appointed lawyer where trial judge's response to the request was "Forget it") The judge further compounded the misleading advise when he told

Mark he could not make any comment to the jury under penalty of being bound and gagged. As a result, Mark felt that he had no choice but to quietly continue the trial with his appointed lawyer. This deprived Mark of the opportunity to exercise his Sixth Amendment right to represent himself.

In Chiles v. State, 454 So.2d 726, the Fifth District Court of Appeal reversed the defendant's conviction because the trial judge failed to comply with the Nelson procedures. The defendant moved to dismiss his court appointed lawyer alleging his lawyer was not doing enough on the case and had a conflict of interest. Summarily denying the motion, the trial judge said:

> "I see no matters contained in that motion that constitutes a legal cause to dismiss Mr. Saunders as your Court appointed counsel in this matter. If you are to have a Court appointed counsel provided for you, that court appointed counsel in going to be the Office of the Public Defender, and they have designated Mr. Saunders to represent you in this matter."

Ibid. The Court of Appeal reversed noting that the trial court's failure to follow Nelson indicated to the defendant that he had no choice but to proceed with his court appointed counsel. The defendant was never apprised of his option to represent himself.

> If the judge concluded that no reasonable basis existed for a finding of ineffective assistance, he should have informed Chiles that if he discharged counsel, the state would not be required to appoint a substitute. See, Williams v. State, 427 So.2d 768 (Fla. 2d DCA 1983). Had this procedure been followed and Chiles been advised that substitute counsel would not

> be appointed, he could have insisted on dismissal of Saunders and chosen to exercise his right to represent himself provided his demand to do so was unequivocal. See, Raulerson v. State, 437 So.2d 1105 (Fla. 1983) and Frazier v. State, 453 So.2d 95 (Fla. 5th DCA 1984). In this case, the procedure outlined in Nelson, was not followed and in summarily denying Chiles' motion, the trial judge indicated to Chiles that his only course was to accept Saunders as his advocate.

Ibid, at 727. Judge Haddock, likewise, indicated to Mark that his only option was to proceed with Raymond David as his counsel. Mark never knew that he could represent himself at trial rather than continuing with court appointed counsel. Mark is now entitled to a new trial.

The trial court's denial of Mark Asay's Sixth Amendment right to represent himself affected both the guilt and penalty phases of the trial. Mark reasserted problems with his lawyer's representation just prior to penalty phase. (Tr 999-1005) (See, Issue IV, infra.) Consequently, Mark's death sentences were unconstitutionally imposed. Amends. V, VI, VIII, XIV, U.S. Const. His judgments and sentences must be reversed.

ISSUE III

THE TRIAL COURT ERRED IN DENYING ASAY'S MOTION FOR JUDGEMENT OF ACQUITTAL TO THE FIRST DEGREE MURDER CHARGED IN COUNT I, SINCE THE STATE'S EVIDENCE, AT BEST, PROVED ONLY A SECOND DEGREE MURDER.

The State failed to prove that the homicide of Robert Booker was a first degree murder. There was no proof of premeditation, which was the only theory of first degree murder prosecuted. (Tr 928-929) At best, the State proved nothing more than a second degree murder, and the trial court should have granted Mark's motion for judgment of acquittal on the first degree murder charged in Count I of the indictment. (Tr 794-796)

This Court discussed the premeditation element for first degree murder in Forehand v. State, 126 Fla. 464, 171 So. 241 (1936) as follows:

> A premeditated design to take life of the person killed or any human being is an essential element of the crime of murder in the first degree. The fact of premeditation may be established by circumstances as any other fact and 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 thereform[sic] in so far as the life of the assaulted person is involved. [citations omitted]
>
> Premeditation have been defined by this Court to mean intent before the act, but not necessarily existing any extended time theretofore. Ernest v. State, 20 Fla. 383. Lowe v. State, 90 Fla. 255, 105 South. Rep. 829, holding that the intent to kill may enter the mind of the killer a moment before the act. [citations omitted]
>
> The substance of the holding in these cases upon the subject of premeditation as

> an element in the offense of murder is that if the purpose or intention to kill is definitely framed in the mind of the killer and he proceeds to act in the execution of such thought or design, the element of premeditation exists. It is not a question of how long the definite design or purpose to kill has been entertained by the killer. It is only sufficient that the evidence adduced shows to the exclusion of a reasonable doubt that the purpose to kill was definitely formed and definitely acted upon an appreciable length of time prior to the commission of the act which resulted in the taking of human life.

126 Fla., at 468-469. Impulsive shootings during a heated argument typically do not contain the reflection and forethought necessary to establish premeditation. See, e.g., Forehand, at 471-473, (Defendant shot a police officer who, while intervening in a fight outside a bar, was struggling with the defendant's brother.); State v. Bryan, 287 So.2d 73 (Fla. 1973) (Defendant struck victim with a loaded gun during an argument. The gun discharged, killing the victim.); Spence v. State, 515 So.2d 312 (Fla. 4th DCA 1987) (Defendant, while engaged in a verbal argument with the victim, knocked victim to the ground and fired his pistol into the air. When the victim began to get up, defendant fired one fatal shot.); Presley v. State, 499 So.2d 64 (Fla. 1st DCA 1986) (Defendant, during an argument with a passenger in a car, fired into the car killing another passenger). The homicide of Robert Booker also falls into the impulsive shooting during an argument category.

While possibly sufficient to support a second degree murder verdict, Mark's actions and comments do not prove the premeditation required for first degree murder. Both Robbie

Asay and Bubba O'Quinn testified that Mark shot Booker one time during a heated verbal altercation. (Tr 498-503, 559-561) There was no evidence of prior difficulties between Booker and Mark. There was no evidence of any prior threat to kill or even to shoot. Furthermore, Mark's actions and comments actually disprove premeditation. First, Mark was intoxicated to some degree at the time of the shooting; he was "buzzed." (Tr 495) Second, Mark perceived, perhaps incorrectly, that his brother, Robbie, was having difficulty with Booker. (Tr 498-499, 559) Third, Mark pulled his gun and fired only after an emotional argument with Booker. (Tr 498-503, 559-561) Fourth, Mark fired only one shot and then immediately fled. (Tr 499) Had Mark intended to kill, he could have easily fired more than one shot. Fifth, when asked why he shot, Mark said, "Because you got to show a nigger who is boss." (Tr 501) Finally, when O'Quinn asked Mark if he thought he killed Booker, Mark replied, "No, I just scared the shit out of him." (Tr 501) Mark's comment about only scaring Booker is evidence of Mark's state of mind at the time of the shooting.

During his closing argument, the prosecutor pointed to only two circumstances to support his premeditation theory. (Tr 884-886) First, he said that Mark would have had sufficient time to form a premeditated design to kill because of the time it took to pull his gun and fire one time. (Tr 885) While the prosecutor belabored the number of steps involved in pulling a gun and firing it, the fact is the entire argument and shooting transpired quickly. (Tr 499-500, 521) O'Quinn testified that

the confrontation and shooting took about one minute. (Tr 521) Moreover, merely having sufficient time to premeditate, without further evidence, does not establish that element of the offense. Second, the prosecutor claimed Mark premeditated the murder because the victim was black. (Tr 884-885) This position is totally untenable and aimed at inflaming the passions of the jurors. (See, Issue I, supra.) Although Mark allegedly used the term "nigger," nothing more than the prosecutor's speculation links any racial bias Mark may have had with a premeditated design to kill.

The trial court erred in not granting Mark's motion for judgment of acquittal on Count I of the indictment. He asks this Court to reverse his judgment for first degree murder on that charge.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING ASAY'S PRO SE MOTION FOR A CONTINUANCE OF THE PENALTY PHASE OF THE CASE FOR THE PURPOSE OF SECURING WITNESSES WHO COULD TESTIFY IN MITIGATION TO HIS CHARACTER AND ALSO REBUT THE PROSECUTOR'S INFERENCES THAT RACIAL PREJUDICE MOTIVATED THE MURDERS.

Prior to the penalty phase of the trial, Mark presented his own request for a continuance of seven days in order to secure the presence of mitigation witnesses. (Tr 999-1005) Mark told the court that he had black friends willing to testify in his behalf. (Tr 1000) The court inquired of the relevance of these witnesses, and Mark replied that he expected them to testify to his good character, specific acts of good conduct and to the fact that Mark did not harbor prejudices against blacks. (Tr 1001) Noting that the State had presented a guilt phase argument claiming the homicides were racially motivated, Mark also believed the witnesses could rebut that allegation. (Tr 1002) He said that he had had no opportunity to work with his lawyer on securing these witnesses because his lawyer had been treating him as though he was incompetent. (Tr 1003) The court said that the State would not continue the claim that the murders were racially motivated, since such an argument was irrelevant to the sentencing. (Tr 1002) Furthermore, the court ruled that Mark would be prohibited from producing a witness to say that he was not a racist. (Tr 1003) For these reasons, the trial judge denied Mark's request for a continuance. (Tr 1003)

While the granting or denying of a motion for continuance is within the discretion of the trial judge, see, e.g., Williams v. State, 438 So.2d 781 (Fla. 1983); Magill v. State, 386 So.2d 1188 (Fla. 1980); Cooper v. State, 336 So.2d 1133 (Fla. 1976), the court, here, abused that discretion. The requested continuance was not a general one merely asserting inadequate time to prepare without reasons. See, Williams, 438 So.2d at 785. Instead, the request was for a short period of time for the specific purpose of securing specific mitigation witnesses. Furthermore, the court's basis for denying the continuance -- that the mitigation evidence was irrelevant -- was blatantly wrong. The witnesses' testimony would have been admissible to rebut the State's argument that the murders were racially motivated and as evidence of good character. Even though the trial court correctly ruled that the State could not argue that the murders were racially motivated as aggravation, Robinson v. State, 520 So.2d 1, 6-8 (Fla. 1988), that did not erase the State's guilt phase argument that racial prejudice was a motivation for the murders. Mark was entitled to rebut these inferences even though not reasserted during penalty phase. This need is vividly emphasized by the fact that the trial judge, himself, improperly relied on the alleged racial motivation for the murders to find the premeditation aggravating circumstance. (Tr 161) (See, Issue V, infra.) Moreover, Mark also stated the witnesses would testify to his good character and specific acts of good conduct towards blacks. Such

evidence is admissible in mitigation regardless of the State's position concerning the racial motivation for the homicides.

Denying the motion for continuance deprived Mark of his rights under the Eighth and Fourteenth Amendments to a fair opportunity to present relevant evidence in mitigation. 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). The jury's recommendation of death is thereby flawed, and Mark's death sentences must be reversed.

ISSUE V

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF ROBERT McDOWELL WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See,e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed -- one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987).

In finding that the premeditation aggravating factor applied to the homicide of Robert McDowell, the trial judge stated:

> 3. The crime for which the Defendant is being sentenced was committed in a cold, calculated and premeditated manner, without any pretense of any moral or legal justification. This is especially so because the Defendant committed one premeditated murder, then rode around the downtown area of Jacksonville for a period of time, during which he could reflect on the fact that he had just taken the life of another human being. Subsequently, without the slightest remorse or hesitancy, he selected

> a second person of the same race and social circumstances as the first victim, and proceeded to coldly and calculatedly to execute him, shooting him repeatedly to ensure his death.

(R 161) Contrary to the judge's finding, the required heightened degree of premeditation was not proven beyond a reasonable doubt. This aggravating circumstance should not have been considered in sentencing.

The trial judge considered several improper factors in finding this aggravating circumstance. First, the court made unfounded conclusions concerning Mark's state of mind based on the earlier homicide of Booker. There was no evidence that Mark could have reflected on having just taken Booker's life because he did not know Booker died from the shooting. Booker ran from the scene. (Tr 501, 560-561) According to Mark's alleged statement to O'Quinn, he thought he had merely scared Booker. (Tr 501, 521) Second, the court improperly considered lack of remorse for the earlier shooting as a basis for finding the aggravating circumstance. Since Mark did not know Booker died at the time of the second shooting, any inference of lack of remorse from his conduct is flawed. Just such mistakes in drawing inferences to find an individual lacks remorse has lead this Court to hold that "absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), accord, Patterson v. State, 513 So.2d 1263 (Fla. 1987); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Consequently, even if the trial judge had correctly concluded

Mark lacked remorse, such a conclusion could not be used in the sentencing equation. Third, the court improperly used the race of the victim and the prosecutor's unsupported theory that the homicide was racially motivated. Robinson v. State, 520 So.2d 1 (Fla. 1988); see, also, Issue I, supra. There was no evidence that Mark "selected" a victim at all, much less used race or social circumstances as a basis for selection. The courts use of the alleged racial motivation for the murder was also done completely without notice to the defense. When denying Mark's motion for a continuance of the penalty phase, the judge specifically said the prosecutor's theory of race as motive would not be used in sentencing. (Tr 1002-1003) (See, Issue IV, supra.) As a final factor, the trial court attached significance to the multiple gunshot wounds inflicted. (Tr 161) However, this Court has rejected the premeditation circumstance even though the victim suffered several gunshot wounds. E.g., Hamilton v. State, Case No. 72,502 (Fla. July 27, 1989) (multiple wounds to two victims); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times). Without more, multiple wounds do not prove the heightened premeditation required.

The shooting of Robert McDowell was, at best, an impulsive act. Impulsive killings do not qualify for the premeditation aggravating circumstance. See, e.g., Rogers v. State, 511 So.2d 526, (defendant shot robbery victim three times because he was "playing hero" and trying to flee); Hamblen v. State, 527 So.2d

800 (Fla. 1988) (defendant shot robbery victim in the back of the head after becoming angry with her for activating a silent alarm); Thompson v. State, 456 So.2d 444 (Fla. 1984) (defendant shot gas station attendant after being told there was no money on the premises); Maxwell v. State, 443 So.2d 967 (Fla. 1984) (defendant shot his robbery victim when he verbally protested handing over his gold ring); White v. State, 446 So.2d 1031 (Fla. 1984) (defendant shot two people and attempted to shoot two others during a robbery). There is no evidence of a plan to kill. As this Court held in Rogers, the crime must be calculated, which involves a plan or prearranged design to kill. 511 So.2d at 533. No motive was clearly established. Although witnesses testified that Mark allegedly said he killed McDowell over a prior disagreement about money for sex or drugs, other evidence contradicted such a motive. Danny Moore came up with the story that Mark killed McDowell after kissing him and discovering McDowell was actually a man. (Tr 651) Bubba O'Quinn said he had previous contact with McDowell and did not know McDowell was a man until after the homicide investigation began. (Tr 503-504) O'Quinn testified that he recognized McDowell and made the decision to approach him for sex. (Tr 503-504) A plan to kill cannot be inferred from a lack of evidence and a mere suspicion is insufficient. LLoyd v. State, 524 So.2d 396, 403 (Fla. 1988); see, also, Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Drake v. State, 441 So.2d 1079 (Fla. 1983). The trial judge improperly concluded a plan to kill existed.

Including the premeditation aggravating factor in the sentencing process tainted the court's imposition of death. Mark Asay has been sentenced in violation of the Eighth and Fourteenth Amendments, and he urges this Court to vacate his death sentence.

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING ASAY TO DEATH SINCE SUCH A SENTENCE IS DISPROPORTIONAL TO THE OFFENSES COMMITTED.

Mark Asay's death sentences are disproportionate and must be vacated. The homicides in this case were nothing more than impulsive shootings committed while Mark was under the influence of alcohol. These are not the kind of crimes justifying his execution.

Initially, the homicide of Robert Booker was not a first degree murder and should never have exposed Mark to a death sentence. The insufficiency of the evidence for first degree murder is addressed in Issue III, supra. Asay incorporates that argument by reference here.

Second, the only validly found aggravating circumstances carry little weight. They do nothing but establish that Mark was on parole for an auto theft at the time of the two homicides in this case. Being on parole at the time of the homicides is insufficient to uphold a death sentence. See, Songer v. State, Case No. 72,043 (Fla. May 25, 1989). The same is true for a previous conviction for a violent felony based on a contemporaneous conviction at the time of the murder conviction. See, Wilson v. State, 493 So.2d 1019 (Fla. 1986). The premeditation aggravating circumstance the court found applicable to the homicide of Robert McDowell was improper. (See, Issue V, supra.) These remaining aggravating circumstances simply do not carry enough weight to support the sentences.

Finally, this Court has frequently recognized that spontaneous, impulsive killings during stressful circumstances are not the aggravated murders for which the ultimate penalty is required. Heated domestic disputes are a common situation where such stress occurs. See, Smalley v. State, Case No. 72,785 (Fla. July 6, 1989) (defendant baby-sitting for his girl friend's sick 28-month-old child beat child, dunked her head in water and banged her head on the floor); Wilson v. State, 493 So.2d 1019, (defendant beat his stepmother and father with a hammer and stabbed his five-year-old cousin with scissors). This factor has also been addressed in the felony murder context. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987)(defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.496 (Fla. 1985)(defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984)(defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). The impairment of the defendant's capacity by way of drugs or alcohol has also been an important variable in these cases. See, Ross v. State, 474 So.2d 1170 (Fla. 1985) (defendant had been drinking at the time he bludgeoned his wife); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (defendant "had drunk a considerable amount of beer"). Although the homicides here did not involve family disputes or other felonies, they were, nevertheless, impulsive shootings. Mark was also suffering

from the influence of alcohol at the time of the homicides. Consequently, the principles of these cases apply.

Mark Asay's death sentences are disproportional to his crimes. This Court must reverse his sentences with directions to impose sentences of life.

ISSUE VII

THE TRIAL COURT ERRED IN FAILING TO CORRECT PROSECUTORIAL REMARKS AND ARGUMENTS WHICH MISLEAD THE JURY AS TO THE IMPORTANCE OF ITS SENTENCING RECOMMENDATION AND DIMINISHED THE ROLE OF THE JURY IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [A]n uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (1987), reversed on other grounds, Dugger v. Adams, 498 U.S. ___, 109 S.Ct. ___, 103 L.Ed.2d 435 (1989). A recommendation of life affords the capital defendant greater protections than one of death; a judge may not override a life recommendation absent clear and convincing reasons. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell.

In Mann v. Dugger, 817 F.2d 1471 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988), cert. den., Dugger v. Mann, ___ U.S. ___ (Case No. 87-2073 March 6, 1989), the Eleventh Circuit Court of Appeals reversed a denial of habeas corpus relief where judicial and prosecutorial remarks stating that the sentencing decision was ultimately and solely the judge's responsibility went uncorrected. The same error occurred in this case. The prosecutor made comments, which mislead the jury as to the importance of its sentencing recommendation. (Tr 1036-1037, 1051-1052) The penalty phase jury instruction failed to correct the error leaving the jury with the impression that its recommendation was of little importance.

Comments the prosecutor made emphasizing that the jury's role was merely advisory demonstrate the error. While making his penalty phase argument, the prosecutor said:

> And you've got to remember, also, and I'm talking about the law, that Judge Haddock decides the penalties. So don't any of you feel guilty--if you feel that you should recommend death, don't feel guilty that you are the person that put the defendant on the chair, you are not.
>
> Your are making a recommendation that carries great weight, but you are making the recommendation to the Judge, he can override--if you recommend life, he can override you recommendation, or vice versa. If you recommend death, he can still decide life. He's the one that determines that, that's what he gets paid for.
>
> * * * *
>
> So, don't go back there and say, hold on, that all going to be all of mine--it's not your decision, you just recommend, just

> like you did when you came back and determined that he was guilty of both crimes, first degree murder.
>
> * * * *
>
> But the bottom line is, you are making a recommendation, I can't stress that enough, to Judge Haddock, he's the one that imposes the sentence. You should not feel bad for being here or having to vote. If your vote is for death which I argue is appropriate and just, then you are following the law....

(Tr 1036-1037, 1051-1052) These comments gave the jury the clear impression that its role in making a recommendation was virtually a meaningless part of the sentencing process. The prosecutor expressly told the jurors that they carried none of the sentencing burden.

The trial judge never corrected the misleading comments. Instead, the jury instructions merely emphasized them. In part, those instructions stated:

> The final decision as to what punishment shall be imposed rests solely with the Judge of this court, however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> * * * *
>
> As you have been, told the final decision as to what punishment shall be imposed is the responsibility of the Judge, however, the law requires me to give great weight to your recommendation.
>
> It is your duty to follow the law that will now be given to you by the Court, and render to the Court an advisory sentence....

(Tr 1007, 1064) Although not a misstatement of Florida law, the instructions were incomplete and misleading. They failed to advise the jury of the importance of its recommendation. And, certainly, the instructions did nothing to cure the improper prosecutorial argument.

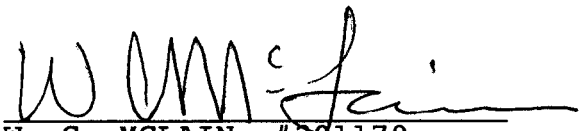
Just as in Mann, the prosecutor's misleading remarks diminishing the role of the jury in the sentencing decision went uncorrected. The jury's death recommendation is tainted, and the Mark Asay's death sentence violates the Eighth and Fourteenth Amendments. This Court must reverse the death sentence with directions for a new penalty phase trial.

CONCLUSION

For the reasons presented in Issues I and II, Mark Asay asks this Court to reverse his convictions for a new trial. Upon the argument made in Issue III, Asay asks that his conviction of first degree murder in Count I of the indictment be reduced to one for second degree murder. Alternatively, in Issues IV through VII, Asay asks this Court to reduce his death sentences to life imprisonment.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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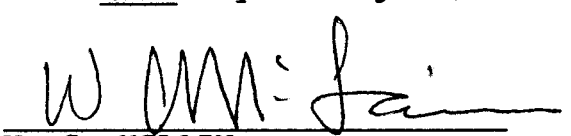
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand-delivered to the Attorney General's Office, The Capitol, Tallahassee, Florida, 32302 on this 21 day of August, 1989.



W. C. MCLAIN