IN THE SUPREME COURT OF FLORIDA

FRED ANDERSON, JR.,)
)
Appellant,)
)
vs.) CASE NO. SC01-336
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT OF THE CASE

Fred Anderson, Jr., hereinafter referred to appellant, was charged with a five count Indictment with Burglary of a Structure; Grand Theft with a Firearm; Armed Robbery; Attempted First Degree Murder; and First Degree Murder. (Vol. I, 6) The appellant filed numerous pre-trial motions concerning the Florida Death Penalty Scheme.[1] The appellant also filed a pre-trial Motion to Suppress Confession and Motion for Change of Venue. (Vol. III, 508; Vol. IV, 541) The Motion to Suppress Confession, and Motion for Change of Venue were denied. (Vol. IV, 639, 643)

[1] Vol. I, 88; 92; 94; 112; 115; 126; 145; 153; Vol. II, 339; 342; 345; 348; 353; 355; Vol. III, 366; 368; 387; 406; 412; 420; 430; 437; 443; 451; 467; 484; 486; 493.

The state moved into evidence three photographs of Marisha Scott. (Vol. VIII, 1597) The appellant objected to the introduction of the photographs because they show the injuries three days after the shooting including stitching and other repairs and rescue efforts; and the pictures are cumulative and prejudicial. (Vol. VIII, 1598) The objection was overruled. (Vol. VIII, 1598) The state moved into evidence an exhibit of the configuration of the bank vault to explain the blood pattern analysis. (Vol. IX, 1619) The appellant objected to the exhibit because it does not accurately reflect the configuration of the vault at the bank. (Vol. IX, 1615) According to appellant's measurements, the counter top, which is critical to any kind of blood pattern analysis is thirty-seven and a half inches from the floor, and the exhibit is less than that. (Vol. IX, 1615) The objection was overruled. (Vol. IX, 1616)

The state tendered Farley Caudill as an expert on blood pattern analysis. (Vol. IX, 1619) The appellant objected to Mr. Caudill's qualifications as an expert because Caudill is totally lacking any educational background to understand the mathematical formulas and computations that are involved. (Vol. IX, 1619) The objection was overruled. (Vol. IX, 1640) The appellant renewed his objection to Caudill's designation as an expert which the court denied. (Vol. IX, 1714) The appellant then moved to strike Caudill's testimony because his opinion was based

upon the assumption that the blood stains originated from the same source, and the counter is cosmetic nature which had not been factually established. (Vol. IX, 1715) The Motion to Strike was denied. (Vol. IX, 1715)

During the testimony of the forensic serologist, the following transpired:

> Q. What does the term "forensic" mean?
>
> A. Forensic means -- it's taking science and applying it to law and in the courtroom setting and I tried to preserve as much of the sample as possible so that additional testing could be done, if need be, by the Defense, if they wanted to hire their own laboratory and do further testing on it, they could. But as a forensic serologist, I'm trying to get the most information out of the stain, while yet preserving the stain.
>
> Q. In case a Defense expert would want to do an independent analysis.
>
> A. That's correct. (Vol. IX, 1767)

The appellant objected to the above and moved to strike on the grounds that it improperly shifted the burden to the Defense and required the Defense to confer with their own expert to refute this evidence. (Vol. IX, 1768) The appellant moved for a mistrial because a curative instruction would not be sufficient to cure the problem. (Vol. IX, 1772) The trial court denied the Motion for Mistrial and gave a curative instruction to the jury. (Vol. IX, 1774)

The State rests. (Vol. XI, 2034) The defense made a Motion for Judgement of Acquittal as to Count I, IV and V. (Vol. XI, 2035) The Trial Court granted the Motion for Judgement of Acquittal as to Count I, and denied the Motion for Judgement of Acquittal as to Count IV and V. (Vol. XI, 2040) The defense rested. (Vol. XI, 2155) During closing argument the prosecutor made the following argument:

> I've come to the conclusion that if I had to put this defense in a category that it doesn't fit in any of the standard categories, what I would call this defense is "the National Enquire Defense." Inquiring minds want to know. Ladies and gentlemen, my job is not to satisfy the defendant's curiosity, or his attorneys' curiosity, or the Judge's curiosity, or even your curiosity about these details. I've got one job, one job here today. If you folks have questions that you just have to know the answer to, after this trial is over, my office is up on the fourth floor, you are welcome to come up there and ask me about any of these little details – (Vol. XI, 2213)

The appellant objected on the grounds that the prosecutor's argument was an improper comment on the defendant's right to counsel and validity of his defense. The appellant further argued that the last remark is an improper comment on matters that are not in evidence, and speculation that might be drawn from matters that are not in evidence. (Vol. XI, 2213) The trial court overruled the objections but

warned the prosecutor that inviting jurors to his office is improper. (Vol. XI, 2214)

The jury returned a verdict of guilty as charged on all counts. (Vol. XII, 2230) The appellant requested a specialized penalty phase verdict form to assist the trial court in weighing the mitigation and aggravating factors. (Vol. XII, 2328) The state argued that the standard verdict form has been in effect for more than 20 years and is appropriate. (Vol. XII, 2328) The trial court denied the requested specialized penalty phase verdict form. (Vol. XII, 2328)

The jury recommended a sentence of death by a vote of 12-0. (Vol. XIV, 2667) The state called Marisha Scott's mother to describe her daughter's injuries at the sentencing hearing over defense objection based upon relevance. (Vol. XIV, 2683) The trial court allowed as a proffer and would rule on the admissibility after receiving written argument from counsel. (Vol. XIV, 2684)

The trial court sentenced Anderson to death as to Count V; Life Imprisonment as to Count IV; Life Imprisonment as to Count III consecutive to Count V; Five Years as to Count II consecutive to Count V. (Vol. XIV, 2738) The appellant filed a Motion for New Trial which was denied.

STATEMENT OF THE FACTS

Sherry Howard went to the bank on Saturday morning, March 20, 2000. (Vol. VII, 1340) She arrived in the bank parking lot at about 11:50 a.m.; ten minutes before closing. (Vol. VII, 1341) Howard walked into the branch with her children. (Vol. VII, 1341) After entering the door, Howard noticed that it was dark near the manager's office and in the bank; and there was no one in the lobby nor at the teller windows. (Vol. VII, 1342) Howard heard some women talking near the vault and observed a black man just inside the vault door. (Vol. VII, 1343) Howard never heard a man's voice from the vault. (Vol. VII, 1343) Howard then heard teller Marisha Scott say "Please don't"; or "Please no." (Vol. VII, 1343; 1352) Howard then heard 2 to 3 gunshots. (Vol. VII, 1343)

Howard grabbed her children and ran outside the bank. (Vol. VII, 1344) Howard went into Publix and asked store personnel to call the police. (Vol. VII, 1344) The police arrived in seconds. (Vol. VII, 1345) The black man who was in the doorway of the vault never observed Howard come into the bank. (Vol. VII, 1346)

Officer Michael R. Thomas of the Mount Dora Police Department got a call at about 11:50 in the morning that there were shots fired at United Southern Bank. (Vol. VII, 1355) Thomas arrived at the bank in less than a minute. (Vol. VII,

1356) Corporal Cantwell of the Mount Dora Police Department also arrived within seconds of Officer Thomas. (Vol. VII, 1356) Thomas immediately jumped out of his vehicle with his weapon drawn, and using tactical cover and concealment approached the bank front door. (Vol. VII, 1356) Thomas looked through the plate glass window of the bank and saw a black male with his back turned, yanking VCR equipment from the wall. (Vol. VII, 1357) The black male also had a trash can in his hand. (Vol. VII, 1357)

Thomas and Cantwell rushed in the bank and started yelling at the black male to get on the ground keep his hands up, and that they were the police. (Vol. VII, 1357) The black male was surprised and shocked and stated that whatever you want me to do, don't shoot. (Vol. VII, 1360) The black male had a trash pail full of cash and a VCR in his hands. (Vol. VII, 1360) Thomas told the black male to get on the ground, and drop the stuff on the ground, and the black male complied. (Vol. VII, 1362) After the black male was secured, Thomas heard moans, like human voices, help me, very fain voices which later turned out to be Marisha Scott and Heather Young. (Vol. VII, 1363) After the bank was cleared, Officer Thomas read the suspect Fred Anderson his constitutional rights. (Vol. VII, 1365) Anderson told Officer Thomas that he was the bank janitor. (Vol. VII, 1365) As soon as Officer Thomas declared on the radio that the bank was safe, paramedics

entered the bank to administer help to the bank tellers. (Vol. VII, 1367) Officer Thomas searched Anderson and found latex gloves in his pockets. (Vol. VII, 1368) Officer Thomas also observed two handguns at the crime scene. (Vol. VII, 1368)

Lori Weed is employed with United Southern Bank as a teller floater. (Vol. VII, 1387) At the time of the bank shooting, Weed was in the McDonald's drive-thru directly in front of the bank. (Vol. VII, 1388) Weed noticed police coming to the bank. (Vol. VII, 1389) Weed saw Sherry Howard and then a man being taken out of the bank in handcuffs. (Vol. VII, 1390) Weed recognized Anderson as someone she had seen inside the same bank branch the day before. (Vol. VII, 1390) Anderson had come to Weed's teller window, and he introduced himself and said that he was from a college. (Vol. VII, 1391) Anderson further told Weed that he was interviewing banks, and that he wanted to talk to somebody about banking procedures. (Vol. VII, 1391) Anderson was referred to the branch manager Allen Seabrook. (Vol. VII, 1392).

Lake County Deputy Sheriff Devon Turner responded to a call of gunfire at the bank. (Vol. VII, 1396) Upon arrival, Turner observed Officer Thomas and Cantwell handcuffing a black male in the bank. (Vol. VII, 1398) The black male exclaimed several times: "I did it. I did it by myself. I'm by myself." (Vol. VII, 1399)

Mount Dora Fireman Randall Kirk Lewis responded to the bank shooting and got to the bank as the police officers had arrived. (Vol. VIII, 1408) Lewis waited outside until the police secured the scene. (Vol. VIII, 1409) As soon as the police indicated that the bank was safe, Lewis went in to render aid. (Vol. VIII, 1409) Lewis entered the bank and two female patients were lying on their backs, facing up, feet towards the front of the vault, heads towards the back of the vault. (Vol. VIII, 1409) It appeared that one collapsed and the other one kind of fell right beside her. (Vol. VIII, 1410) The patients were moved so that there was room to work on them. (Vol. VIII, 1410) Lewis assessed the victim's injuries. (Vol. VIII, 1411) Heather Young had the most severe injuries with several shots in the head and torso area . (Vol. VIII, 1411) As Lewis started to work on Young she was convulsing as if she was having seizures, an indication of a massive head injury. (Vol. VIII, 1411)

Fire Lieutenant Mark O'Keefe arrived on the scene of the shooting and gave aid to Marisha Scott. (Vol. VIII, 1430, 1435) Scott's skin color was blue or purple, known as cyanotic, which is indicative of someone who is not getting enough oxygen. (Vol. VIII, 1435) O'Keefe performed a surgical cric on Scott and administered oxygen to her. (Vol. VIII, 1438) Young was administered IV's into her veins with medications to try to restart her heart. (Vol. VIII, 1440) Young had

no heartbeat when she was transported from the bank. (Vol. VIII, 1440) Marisha Scott was taken by a helicopter to Orlando Regional Medical Center. (Vol. VIII, 1442)

Nathaniel E. Griffin, Jr. is an acquaintance of Geneva Anderson and her son, Fred Anderson. (Vol. VIII, 1494) Griffin loaned his car to Mrs. Anderson the morning of the bank shooting. (Vol. VIII, 1495) The police seized the car that day and searched the vehicle. (Vol. VIII, 1495) Among the things the police found was .357 caliber bullets that belonged to Griffin's gun. (Vol. VIII, 1495) The gun was in the car the day Griffin loaned the car to Mrs. Anderson. (Vol. VIII, 1496)

Greg Smith is an auditor for all the offices of United Southern Bank. (Vol. VIII, 1557) Smith was called in to assist in determining if there was any money missing from the bank. (Vol. VIII, 1558) Smith performed an audit of the money that was recovered from the trash can, as well as the other money in the bank to determine if any money was missing. (Vol. VIII, 1558) Smith found that no money was missing, the trash can had Seventy-two thousand, five hundred dollars in cash. (Vol. VIII, 1559)

Dr. Susan Rendon is the medical examiner that performed the autopsy on Heather Young. (Vol. VIII, 1566) Heather Young was 39 years old. (Vol. VIII, 1566) Young had multiple gunshot wounds, including wounds surrounded by

powder, indicating it was a close range wound. (Vol. VIII, 1566) Young had another wound in her chin, that went up through her sinus and came out her right eye. (Vol. VIII, 1566) Young had an additional wound in her upper right chest, which exited over the left side of her body. (Vol. VIII, 1566) She had three more gunshot wounds in her right chest, where Rendon found the bullets in her back, under the skin in her back. (Vol. VIII, 1566) Young had some abrasions on her abdomen, that were graze wounds. (Vol. VIII, 1567) She also had another gunshot wound on her left side that ended up in her abdomen, down near her left hip. (Vol. VIII, 1567) She also had a wound on her right side that came out the back of her head. (Vol. VIII, 1568)

The gunpowder residue found on the victim suggested that the gun was within eight inches of the victim when the gun was fired. (Vol. VIII, 1569) Young also had two parallel lacerations on her head caused by being struck in the head with a blunt instrument. (Vol. VIII, 1570) Young also had a defensive wound on her thumb. (Vol. VIII, 1570) Young suffered a total of seven different entrance wounds. (Vol. VIII, 1575) All of the wounds could have been fatal by themselves, except the wound to her chin. (Vol. VIII, 1575) The cause of Heather Young's death was the bleeding associated with multiple gunshot wounds. (Vol. VIII, 1576) The first shot was likely the close range wound to the head, followed

by a shot to the chin. (Vol. VIII, 1582) The initial shots rendered Young to be unconscious, however, Dr. Rendon could not say whether Young felt pain. (Vol. VIII, 1584)

Lake County Deputy Farley Caudill performed blood stain pattern analysis. (Vol. IX, 1659) There were some splashed blood stains and dripped stains on the counter top. (Vol. IX, 1659) The drip stains indicate that the person was somewhat stationary as blood was being issued. (Vol. IX, 1660) The blood pattern on the counter was well defined elongated stains that are classified as medium velocity. (Vol. IX, 1664) It appeared that some degree of force was used, that someone's face met the counter with some degree of force to spatter the blood out to the side of the original stain, transferring the makeup and chipping or removing the tooth. (Vol. IX, 1664) One victim was bleeding over the counter, then there was blunt force trauma and then the person struck the counter with some degree of force in order to cause side spatters. (Vol. IX, 1665)

The blood stains found on a back wall were consistent with cast off blood stains caused by blunt force trauma. (Vol. IX, 1669) Inside the vault doorway there were some blood stain patterns consistent with somebody having been struck with blunt force. (Vol. IX, 1671) The exterior doorway area also had a blood stain pattern consistent blunt force trauma. (Vol. IX, 1672) Caudill could not associate

any of the blood spatters with the individual victims. (Vol. IX, 1684) Caudill admitted that medium velocity blood stain patterns could also be caused by clothing being slung or pitched that casts off blood, or activities of emergency medical personnel. (Vol. IX, 1693)

Deborah Lightfoot, a senior crime laboratory analyst with the FDLE Gunshot Residue Analysis Section, examined the gunshot residue test performed on Fred Anderson. (Vol. IX, 1719) The gunshot residue test was positive. (Vol. IX, 1720)

Susan M. Komar, a senior crime laboratory analyst with the FDLE Firearms and Toolmark Section, test fired a .22 caliber handgun recovered from the crime scene. (Vol. IX, 1731) Komar received several exhibits that contained .22 caliber long rifle fired bullets including one having come out of the body of Heather Young. (Vol. IX, 1733) Three of the bullets recovered from the crime scene did not come from the .22 caliber handgun, and four other bullets recovered from the crime scene displayed poor rifling characteristics consistent with the barrel of the .22 caliber firearm recovered from the crime scene. (Vol. IX, 1735) The three bullets that do not match the .22 caliber handgun, matched the FAB Rohm revolver recovered from the crime scene. (Vol. IX, 1736)

Vicki Bellino of the FDLE Serology and DNA Section, obtained stain cards containing the known blood of Marisha Scott, Heather Young and Fred Anderson.

(Vol. IX, 1778) Bellino also examined cuttings from clothing, and a swab taken from a shoe worn by Fred Anderson. (Vol. IX, 1778) Bellino successfully developed a clear DNA profile on each of the three individuals. (Vol. IX, 1778) None of Heather Young's blood nor Fred Anderson's blood was found on Fred Anderson's clothing or shoe. (Vol. IX, 1780) Marisha Scott's DNA profile matched the DNA profile that Bellino obtained on Anderson's clothing samples. (Vol. IX, 1780) The chances of finding that DNA profile in the various populations is 1 in 2.9 million caucasians; 1 in 2.4 million blacks; and 1 in 2.3 million hispanics. (Vol. IX, 1781)

Katherine Carver of the Florida State Probation and Parole supervised Fred Anderson's community control sentence beginning in April 1997 until Anderson's arrest in March of 1999. (Vol. IX, 1787) Anderson was ordered, as a condition of his community control, to pay restitution to the victims in that case. (Vol. IX, 1787) In March of 1999 Anderson still owed four thousand, seven hundred seventy-eight dollars and eight cents. (Vol. IX, 1788) Anderson did not pay the restitution in a timely way and Carver applied to the Court to institute proceedings to violate his community control for failure to pay restitution. (Vol. IX, 1788)

On March 15, 1999 Anderson attended a violation of Community Control

hearing, and the Judge in Volusia County revoked his community control and sentenced him to five hundred and twenty nine days of community control, with one year to be served at the PRC Center in Pine Hills, Florida. Anderson was instructed to report to Carver on March 16 to get his reporting instructions to the PRC. (Vol. IX, 1790) The following day, Anderson reported to Carver and received his reporting instructions. (Vol. IX, 1791) Anderson was scheduled to report to the PRC on March 19, 1999 at 4:00 pm. (Vol. IX, 1794) Anderson's community control was to be terminated on March 30, 1999 but was not because the restitution was not paid. (Vol. X, 1807) Carver denied pressuring Anderson to pay his restitution in March of 1999. (Vol. X, 1807) Anderson went to the Probation Office on the morning of March 19 and told a probation officer that he was waiting for his mother and brother to bring him money. (Vol. X, 1836) That afternoon a person claiming to be Fred Anderson called the Volusia County Probation Office indicating that he had the money to pay off the restitution. (Vol. X, 1872)

Lori Beech went to United Southern bank on March 20, 1999 to make a deposit. (Vol. X, 1876) Fred Anderson was in the lobby with his hands in his pockets talking with another gentlemen. (Vol. X, 1876) The one gentlemen went up and was waited on and Beech asked Anderson: "Are you next?" and Anderson

said, "No, I'm waiting on the other teller." (Vol. X, 1876) Anderson wore a long sleeve coat, and long pants despite the warm weather. (Vol. X, 1876) Johnnie Janice Scott also observed Anderson in the bank lobby shortly before the shootings, and had seen him in the bank lobby two days before. (Vol. X, 1887) Scott knew Anderson from the Church Choir. (Vol. X, 1887)

Charles Drosen, the Director of Admissions and Student Records at Valencia Community College, confirmed that Fred Anderson was not a student at that college. (Vol. X, 1967)

Anderson paid ninety-six dollars and fifteen cents restitution during his nearly two years of community control. (Vol. X, 1969)

Marisha Kay Scott worked at United Southern Bank as Head Teller at the Mount Dora office on March 20, 1999. (Vol. X, 1987) On the morning of March 19, 1999, Fred Anderson came to the bank explaining that he was a college student. (Vol. X, 1988) Anderson wanted to talk to Scott about her banking duties, and Scott referred Anderson to the branch manager. (Vol. X, 1988)

The following day the bank hours were 9-12, and Scott and Heather Young worked that shift. (Vol. X, 1988) Anderson entered the branch and asked questions for over an hour about the banking industry and the new accounts. (Vol. X, 1991) Anderson told Scott that his name was John Stewart and that he attended

Valencia Community College. (Vol. X, 1991) Nothing was said to Anderson that made him angry or upset nor did he appear to be under the influence of drugs or alcohol. (Vol. X, 1992)

Minutes before closing Anderson left the bank to get his business cards, and Scott went to lock the bank doors, when Anderson reentered the bank. (Vol. X, 1996) Anderson then pointed the gun at Scott and Young, and said, "I want you to go to the vault and not to set off any alarms." (Vol. X, 1996) Scott and Young complied with Anderson's demands. (Vol. X, 1996) While Scott retrieved keys Anderson again warned Scott not to set off any alarms. (Vol. X, 1997) The three entered the vault and Scott and Young opened the cash drawers and started putting cash into a trash liner. (Vol. X, 1999, 2000)

After the cash locker was cleared of money, Scott handed the bag full of money to Anderson. (Vol. XI, 2003) Anderson then asked Young and Scott which one wanted to die first. (Vol. XI, 2003) Scott pleaded "Please don't shoot, don't hurt me", wherein a lady entered the bank and asked if it was open, and Anderson replied: "No, we're not, we're closed."[2] (Vol. XI, 2005) Anderson then shot Young then shot Scott. (Vol. XI, 2004) Scott was then laying on the floor when a

[2] Scott could not recall whether or not Anderson had shot her at this point. (Vol. XI, 2005)

black object coming at her forehead. (Vol. XI, 2005) Scott asked Heather Young if she was okay, and there was no answer. (Vol. XI, 2006)

Fred Anderson, Jr. lived with his mother in the family residence in Umatilla. (Vol. XI, 2045) On March 18, 1999 Anderson saw Johnnie Scott's car in the parking lot at Sandy Ridge Shopping Center, and stopped to see her at the United Southern Bank to inform her that he was in the process of planning a community choir, and wanted to let her to join. (Vol. XI, 2047) Anderson went back to that bank the next day with an invented story about being a student at Valencia Community College, because he didn't have any bank business there, and wanted to look around in the bank. (Vol. XI, 2049)

Anderson decided to rob a bank because he did not make restitution pursuant to court order, and he was having problems with the probation officer and had no other way of getting the money. (Vol. XI, 2052) Anderson had no steady employment nor did he have an automobile. (Vol. XI, 2052) Earlier in the week, Anderson was sentenced to a Probation and Restitution Center, a center where offenders go to live and have to find employment, and pay back the restitution. (Vol. XI, 2060) At Court Anderson learned that he was to report on Friday March 19, and that he needed to be there before 4:00 p.m. (Vol. XI, 2061)

Anderson's mother was unemployed, disabled and recovering from cancer.

(Vol. XI, 2061) Anderson had to care for his mother. (Vol. XI, 2061) Anderson had student loans in default, had no job, and his mother's home was in foreclosure. (Vol. XI, 2062) The day before the bank robbery, Anderson went to Colonial Bank to get information about opening a savings account. (Vol. XI, 2066) Anderson intended to take the funds from the bank robbery and deposit the money in a savings account. (Vol. XI, 2066)

The day of the robbery Anderson first checked on his mother, made coffee, made his bed, brought his mother breakfast. (Vol. XI, 2068) Anderson's mother got up and went grocery shopping. (Vol. XI, 2072) While she was gone, Anderson removed a pistol from her dresser drawer. (Vol. XI, 2075) Anderson got the pistol because he decided to rob the bank. (Vol. XI, 2076) When Anderson's mother returned, he borrowed the car and drove to Mount Dora. (Vol. XI, 2078) He had two guns with him and did not know whether the guns were loaded, nor did he know how to load the guns. (Vol. XI, 2080)

Anderson stopped at WalMart and bought orange juice and donuts to provide a reason to go into the bank. (Vol. XI, 2084) Anderson arrived at the bank and rode around in the parking lot because he was scared and trying to make up his mind about robbing the bank. (Vol. XI, 2085) After twenty minutes, Anderson entered the bank and offered orange juice and donuts to Heather Young. (Vol. XI,

2086) Anderson left the guns in the car because he had not made the final decision to rob the bank. (Vol. XI, 2087) Anderson left the bank deciding not to go through with the robbery. (Vol. XI, 2089) At the car Anderson thought about his mother, the Restitution Center and the money and decided to rob the bank. (Vol. XI, 2090)

Anderson entered the bank and pointed one of the pistols at the two ladies and said: "Back away from the counter, and do not set off any alarms." (Vol. XI, 2095) Anderson then told the ladies to go to the vault and they started walking towards the vault. (Vol. XI, 2096) Miss Scott stopped at a counter that is behind the teller line to get some keys, and Anderson warned her not to set off any alarms. (Vol. XI, 2096) Someone came in to do some business, and at that time Miss Young turned around in front of Anderson and told her the bank was closed because the computers were down. (Vol. XI, 2097) Once in the vault, Anderson told Miss Scott to put the money in the trash bucket which she did. (Vol. XI, 2102)

After all the money was taken out, Miss Scott stated: "That's it, That's all." (Vol. XI, 2103) Scott kept talking, and in the process of Anderson telling her to shut up, the gun fired three times. (Vol. XI, 2104) The first shot hit Miss Young, the second shot hit a wall, and the third shot was unknown. (Vol. XI, 2106) Anderson did not strike any of the women. (Vol. XI, 2118) The shots scared

Anderson. (Vol. XI, 2107) Anderson then went to retrieve the video cassette from the machine, and the tape would not come out. (Vol. XI, 2111) Anderson pulled the VCR from the wall. (Vol. XI, 2111) Anderson then heard a voice coming from the vault area and noticed blood coming from Miss Scott's neck. (Vol. XI, 2112) Anderson dropped the VCR in shock when he saw the blood. (Vol. XI, 2112) Anderson did not have any intention of hurting any one, did not think he could be identified because they did not know his name. (Vol. XI, 2119)

PENALTY PHASE

Thelma Williams has known Fred Anderson his whole life, and worked with him at the Piney Grove Baptist Church as an Young Adult Supervisor. (Vol. XIII, 2407) Anderson was responsible for the Church Program and the service on the third Sunday of the month and whenever the minister would permit, they would have a speaker. (Vol. XIII, 2408) Anderson would also sing in the Church Choir and was a very good singer. (Vol. XIII, 2410)

Williams was a cook at Camp LaNoche, a boy scout camp, and one summer was short-handed and called on Fred Anderson to help. (Vol. XIII, 2413) Fred showed-up 30 minutes later, and without direction prepared meals for 400 children, and worked very well the rest of the summer. (Vol. XIII, 2415) As a child, Anderson was a boy that stayed out of trouble, stayed off the streets, and was

always involved with the church. (Vol. XIII, 2417)

Mary Quashie was a next door neighbor and has known Fred Anderson his entire life. (Vol. XIII, 2419) Anderson had a reputation in the community for being non-violent and not causing trouble in the neighborhood. (Vol. XIII, 2420) Anderson would send cards for Quashie's birthday. (Vol. XIII, 2421) Anderson sang beautifully at Quashie's grandson's funeral. (Vol. XIII, 2421)

Reverend Clarence A. Reeves has known Fred Anderson and his family a long time. (Vol. XIII, 2425) Anderson was a quiet guy that never caused a fuss. (Vol. XIII, 2427) It was out of character for Fred Anderson to commit a violent crime; it was not his demeanor; something must have happened to him. (Vol. XIII, 2428)

Loretta Dobson Cunningham was involved in church activities with Fred Anderson, including the decoration of the church bulletin board. (Vol. XIII, 2434) Anderson helped Cunningham with painting her living and dining room; arranging furniture and hanging blinds. (Vol. XIII, 2437) Anderson also looked after an elder neighbor named Ida Mae Witherspoon. (Vol. XIII, 2438) Anderson would cook meals for Witherspoon. (Vol. XIII, 2438) Anderson would help Cunningham with anything she would ask. (Vol. XIII, 2439) Cunningham has known Anderson his whole life and never has seen him mad or angry. (Vol. XIII, 2438)

Brenda Mitchell was a neighbor of Fred Anderson and has known him his whole life. (Vol. XIII, 2448) Anderson was non-violent and did not get involved in drugs. (Vol. XIII, 2448) Mitchell worked with Anderson on Church activities. (Vol. XIII, 2448) Anderson helped Mitchell's children with college forms, and graduation invitations. (Vol. XIII, 2449)

Linda Green of the Lake County Sheriff's Office was associated with the investigation of Fred Anderson's case. (Vol. XIII, 2454) Anderson met with Green on three occasions regarding the case and made lengthy admissions to her. (Vol. XIII, 2456)

Kevin Drinan, Captain of the Lake County Sheriff's Office Corrections Division, was responsible for overseeing the operations of the jail that housed Anderson for more than one year. (Vol. XIII, 2462) During the time period that Anderson was in jail, he had no disciplinary actions, nor altercations with any of the other inmates. (Vol. XIII, 2463)

Rhonda Bayse was the Store Manager at a Shell Service Station convenience store in Umatilla. (Vol. XIII, 2470) Bayse hired Anderson for the position of Cashier. (Vol. XIII, 2471) Anderson immediately told Bayse about his past problems with the law and his probation status. (Vol. XIII, 2472) Anderson's honesty was the main reason that he was hired. (Vol. XIII, 2472) Anderson was

given a position of trust and handled cash. (Vol. XIII, 2473) During Anderson's eight months of employment there were never any problems with shortages in his register, or inappropriate entries. (Vol. XIII, 2475) Anderson would assist Bayse in identifying people that were in the store that were suspicious and needed special attention. (Vol. XIII, 2475) Anderson got along well with the customers and was an excellent employee. (Vol. XIII, 2475) Anderson found out that Bayse was going to walk to a certain part of town, and he came to the store to walk with Bayse to insure that she would arrive safely. (Vol. XIII, 2476)

Anderson was a caretaker of Sheila K. Munday's son Shawn when Anderson worked at the Elks Children's Hospital. (Vol. XIII, 2488) Initially women came to bathe Shawn and Shawn screamed complaining that he did not want to be bathed by women. (Vol. XIII, 2489) Fred Anderson stopped and scooped him up like a baby and stated: "Come on, we'll bathe you, Shawn" and from then on, Fred took care of Shawn when he was on duty. (Vol. XIII, 2489) Munday saw that Anderson had a gift with children because Anderson made sure that Shawn had the radio station on that he liked; made sure Shawn had a hot dog; and sat next to Shawn at dinner. (Vol. XIII, 2489) Whatever Shawn needed, Anderson made an extra effort to get it. (Vol. XIII, 2489)

Geneva Anderson is Fred Anderson's mother and resided with Anderson

until his arrest. (Vol. XIII, 2493) Anderson has been in poor health since being diagnosed with cancer in 1988. (Vol. XIII, 2495) Anderson helped his mother with her various illnesses including cooking her breakfast, cleaning the house, doing the laundry and tending to her open wounds. (Vol. XIII, 2495) Geneva Anderson is a Deaconess in the Piney Grove Baptist Church and her son was active in the Church and the Church Choir. (Vol. XIII, 2496) When Fred was growing up there were no problems with getting in fights or fighting with people. (Vol. XIII, 2516) When Fred was going to school, Mrs. Anderson never had to go to school to talk to the principal or the teachers about his behavior. (Vol. XIII, 2517)

Anderson was designated the "most talented" in his high school. (Vol. XIII, 2541) Anderson was a member of the student government in High School. (Vol. XIII, 2542) Anderson was a member of Christian Athletes and Future Business Leaders of America. (Vol. XIII, 2545) Anderson completed correspondence courses in the Source of Light Ministries. (Vol. XIII, 2558) When Anderson found out about his report date for the Restitution Center he didn't tell his mother because he did want to worry her with his problems with all her health problems. (Vol. XIII, 2566) Anderson stated that he was sorry and has shown genuine remorse. (Vol. XIII, 2568)

SUMMARY OF ARGUMENT

Point I: The trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification where the finding is unsupported by the evidence. The record in this case is inconclusive that Fred Anderson planned and calculated the killing of Heather Young well in advance of the shooting. The totality of the evidence indicates that the shooting was quickly accomplished in seconds and was probably the product of panic.

Point II: The trial court erred in finding that the murders were committed for pecuniary gain. The dominant motive for the murder of Heather Young was not the bank robbery. Moreover, the killing of bank teller Heather Young was not an integral step in the bank robbery. The tellers had fully cooperated with Anderson's demands and Anderson already had the money out of the vault. Once Anderson had the bank security tape that had recorded his image he would have completed the crime, and no one would have been hurt.

Point III: The comparison of the facts of this case to other cases reviewed by this Court demonstrates that the death penalty is disproportionate to other similarly culpable defendants that have been sentenced to life imprisonment.

Point IV: The trial court erred in failing to consider available mitigating

evidence and in giving little weight to valid mitigation based on a mistake of law. By giving valid circumstances little weight, the trial court is, in effect, concluding that valid mitigation was not very mitigating at all. The sentencing order does not reveal the trial court's rationale for giving this valid mitigation "little weight." Evidence at trial established that Anderson was a model prisoner, had no history of violence, was engaged in Bible study and was a trusted employee.

Point V: The state tendered Farley Caudill as an expert on blood pattern analysis during the guilt phase. The appellant objected to Mr. Caudill's qualifications as an expert because Caudill was totally lacking any educational background to understand the mathematical formulas and computations that are involved. The trial court wrongfully allowed Caudill to testify over strenuous defense objection. The trial court then erred by permitting the state to present incompetent and prejudicial evidence that the murder was cold, calculated and premeditated. The testimony of Caudill would discount the defense theory that the shooting was made in panic where the state is contending that Anderson not only shot the victims but beat them with a blunt object before or after he shot them.

Point VI: The trial court erred to denying Anderson's Motion to Suppress his Confession where his waiver of his right to remain silent was not knowingly and voluntarily made. Anderson was not clear on what his rights were, and law

enforcement did not fully explain Anderson's rights to him. Law enforcement took advantage of Anderson's confusion and elicited incriminating statements.

Point VII: The trial court erred by admitting inflammatory photographs which were not relevant to any contested issue. Anderson objected to the to the introduction of the photographs because they show the injuries three days after the shooting including stitching and other repairs and rescue efforts; and the pictures are cumulative and prejudicial. The objection was overruled. The admission of this evidence denied Fred Anderson's due process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case.

Point VIII: Anderson's constitutional right to a fair jury trial was violated in light of the cumulative errors that occurred throughout the trial. Anderson objected to testimony of a state expert and moved to strike it on the grounds that it improperly shifted the burden to the Defense and required the Defense to confer with their own expert to refute this evidence. During closing argument the prosecutor made improper argument. The prosecutor's argument has been an improper comment on the defendant's right to counsel and validity of his defense. The trial court overruled the objection but warned the prosecutor that inviting jurors

to his office is improper.

Point IX: Florida's death penalty statute violates the Florida Constitution, Article I, Sections 9 and 17, and the U.S. Constitution, Amendments VIII and XIV, because it does not require notice of aggravating circumstances, does not require specific jury findings regarding the sentencing factors, permits a non-unanimous recommendation of death, improperly shifts the burden of proof and persuasion to the defense, and fails adequately to guide the jury's discretion, thereby precluding adequate appellate review.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

In finding that the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, the trial court wrote:

> Defendant planned the robbery over the period of at least two days. He cased the bank the day before the robbery and obtained two loaded firearms. When he returned on Saturday morning the two victims recognized him from the day before. He never made any attempt to prevent them from seeing his face or to disguise his appearance. Neither the testimony of the surviving victim nor the video tape provide any support for Defendant's argument that he panicked. He was attempting to take the VCR from the manager's office when the police arrived. The evidence does not support the defense argument that the Defendant was in fear and panicked. Rather, the evidence proved beyond a reasonable doubt that Defendant had a careful plan to rob a bank. An integral part of than plan was to kill the only eye witnesses and to destroy the video tape so that he could not be identified. (Vol. V, 854)

Like all aggravating circumstances, this one must be proved beyond a reasonable

doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The State failed to meet its burden of proof in this case.

This Court set forth the definitive commentary on Section 921.141(5)(i), Florida Statutes (1995) (the CCP aggravating factor), in Jackson v. State, 648 So.2d 85, 89 (Fla. 1994):

> in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)...; and that the defendant exhibited heightened premeditation (premeditated)...; and that the defendant had no pretense of moral or legal justification.

(Citations omitted). A pretense of justification is **any** color able claim based at least partly on uncontroverted evidence, even though such evidence is insufficient to excuse the murder. Walls v. State, 641 So.2d 381 (Fla. 1994). "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). This Court has "consistently held that application of this aggravating factor requires a finding of ... a cold-blooded intent

to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

The record in this case is inconclusive that Fred Anderson planned and calculated the killing of Heather Young well in advance of the shooting.[3] The totality of the evidence indicates that the shooting was quickly accomplished in seconds and was probably the product of panic.

The evidence is overwhelming that Fred Anderson had planned the bank robbery for two days. The actions in furtherance of planning the bank robbery do not mean there was a careful plan or prearranged design to kill. See Rogers v. State, 511 So.2d 526 (Fla. 1987) Although Anderson entered the bank with two guns, the evidence is uncontroverted that he did not know whether the guns were loaded, nor did he know how to load the guns. (Vol. XI, 2080) Moreover, Anderson had no previous experience with guns, nor history of violence. By his own account, he had no intention of hurting anyone.

The trial court relied upon the surviving victim Marisha Scott to uphold this aggravating factor. Scott testified that she handed Anderson the bank money,

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[3] In fact, the State failed to prove an advanced "plan" to kill of **any** duration, much less a plan of **lengthy** duration.

Anderson then asked the tellers which one wanted to die first. (Vol. XI, 2003) This testimony, if true, supports the trial court's finding. However, viewing all the evidence in its totality, Miss Scott is likely mistaken.

According to Scott, after Anderson asked who wanted to die first, she pleaded "Please don't shoot, don't hurt me", wherein a lady entered the bank and asked if it was open, and Anderson replied: "No, we're not, we're closed." (Vol. XI, 2005) Scott could not recall whether or not Anderson had shot her at this point. (Vol. XI, 2005)

The independent witness to this crime support's Anderson's version of events. According to Sherry Howard, when she entered the bank she heard some women talking near the vault and observed a black man just inside the vault door. (Vol. II, 1343) **Howard never heard a man's voice from the vault**. (Vol. II, 1343) (Emphasis added) Howard then heard teller Marisha Scott say "Please don't"; or "Please no." (Vol. II, 1343; 1352) Howard then heard 2 to 3 gunshots. (Vol. II, 1343) Anderson had been very cooperative from the time of his arrest. Anderson's testimony at trial was consistent with Howard's version. Both Young and Anderson testified that a customer came in to the bank after the robbery began, but prior to the shooting. In Anderson's version, Miss Young turned around in front of Anderson and told the customer that the bank was closed because the

computers were down. (Vol. II, 2097) In Young's version, Anderson told the visitor that the bank was closed then turned to the teller's and asked who wanted to die and then began shooting.

Young's version of events is not credible. After the unidentified customer came in and left, there was time for Howard to enter the bank unobserved. Upon entering, Howard heard only women's voices talking just as Anderson had testified. As Anderson was gesturing to tell the tellers to shut-up the teller's screamed and he shot the tellers.[4] (Vol. II, 2104) Anderson testified that he had not spoken before he shot the tellers and Howard testified that she had not heard a man's voice speak before the shots were fired.

This was a shooting that happened after a robber panicked. This type of homicide does not qualify as cold, calculated, and premeditated without any pretense of moral or legal justification. See, e.g., Crump v. State, 622 So.2d 963, 972 (Fla. 1993); Mitchell v. State, 527 So.2d 179 (Fla. 1988); and Jackson v. State, 648 So.2d 85 (Fla. 1994). In the penalty phase, witness after witness testified that Fred Anderson was a quite, non-violent man dedicated to his family and his church. Moreover, Anderson had never used a gun before, and did not even know whether

[4] After all the money was taken out, Miss Scott stated: "That's it, That's all." (Vol. II, 2103) Scott kept talking, and in the process of Anderson going to tell her to shut up, the gun fired three times. (Vol. II, 2104)

the guns were loaded or knew how to load guns. This should eliminate the application of this aggravating factor.

This Court has rejected this particular aggravating factor in other cases where the proof was much greater than in the instant case. See, e.g., Barwick v. State, 660 So.2d 685, 696 (Fla. 1995) (defendant selected his victim in a calculated manner and armed himself but only planned to rape, rob, and burglarize -- not kill); Douglas v. State, 575 So.2d 165 (Fla. 1991) (following prison release, defendant kidnapped girlfriend and her new husband at gunpoint, led them to a remote location, forced them to have sex at gunpoint [like a last meal], then shattered the man's skull with the stock of the rifle and fired several shots into his head); and Irizarry v. State, 497 So.2d 822 (Fla. 1986) (ex-wife killed and her new lover critically injured in machete attack by defendant who had a prearranged alibi[5]).

The state may argue that there was multiple wounds to two victims which circumstantially proves this aggravating factor. This Court has rejected CCP even though the victims suffered several gunshot wounds. See Hamilton v. State, 547 So.2d 630 (Fla. 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

[5] This Court's opinion did not directly address whether the aggravating factors were improperly found; it simply reversed the death sentence as disproportionate under the circumstances.

(Fla. 1984) (victim shot seven times)

The State failed to meet its burden of proving this circumstance beyond a reasonable doubt. The State failed to show **any** evidence of a calculated plan. The State clearly failed to prove that the killing was the product of cool and calm reflection. The shooting was accomplished in a matter of seconds, not minutes. Finally, there was at least a **pretense** of moral or legal justification. At the very least, he acted in a panic. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED FOR PECUNIARY GAIN.

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

> The defendant's plan was to rob the bank, deposit the stolen bank, pay his restitution in order to stay out of the Probation and Restitution Center, and then continue to live a normal life. In order to successfully carry out this plan, he had to kill the two eyewitnesses who had observed and talked with him for hours over a two day period.

Section 921.141(5)(f), Fla.Stat. (1991) provides: "The capital felony was committed for pecuniary gain." The elements of this aggravating factor are: The defendant committed a capital felony; and the dominant motive for the commission of the capital felony was for financial gain.

In order for this Court to uphold this aggravating factor there must be substantial competent evidence that financial gain was the reason for the killing. In Hardwick v. State, 521 So.2d 1071(Fla. 1988) this court rejected this aggravating factor, although there was evidence that defendant killed the victim for stealing Quaaludes. This Court concluded that that fact alone does not establish that the killing itself was to obtain financial gain:

> We have permitted this aggravating factor only

> where the murder is an integral step in obtaining some sought-after specific gain. Hardwick at 1076; See also Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). Simmons v. State, 419 So.2d 316 (Fla. 1982).

In McCray v. State, 516 So.2d 804 (Fla. 1982) the defendant broke into a van and took guns, placing them in the woods next to the van. When the defendant returned to retrieve the guns he encountered the owner of the van; the owner was murdered. This Court disapproved the finding of the aggravating circumstance of pecuniary gain under these circumstances. Logically, that same reasoning applies here.

The trial judge found the existence of this aggravating circumstance because of Anderson's desire to obtain funds to repay his restitution. The killing of Heather Young was not an integral step in accomplishing this goal. The tellers had fully cooperated with Anderson's demands and Anderson already had the money out of the vault. Once Anderson had the bank security tape that had recorded his image he would have completed the crime, and no one would have been hurt.

The murder occurred after Anderson panicked during a confrontation with Ms. Scott. Therefore, the murder was not an integral part of the robbery. Since the evidence in this case fails to show beyond a reasonable doubt that Anderson committed the murder to improve his own financial gain, the pecuniary gain

aggravating circumstance must be stricken, the death sentence vacated, and the matter remanded for resentencing with a new penalty proceeding.

POINT III

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

The trial court imposed a death sentence here after finding four statutory aggravating factors. (Vol. V, 854) As previously set forth in Point I and Point II, the findings of cold, calculated and premeditated murder and pecuniary gain were improper both legally and factually. Only two statutory aggravating factors may properly be said to have been proven beyond a reasonable doubt, that being that Anderson was under confinement for the third degree felony of grand theft which the trial court gave little weight and the contemporaneous violent felony of attempted murder of Miss Scott (great weight).

This Court has rejected imposition of the death penalty where the Court held that there was greater weight to the prior violent felony in Almeida v. State, 748 So.2d 922 (Fla, 1999). Almeida's prior violent felony was that he shot and killed two prostitutes weeks before because they ridiculed and insulted him when they got out of his car and haggled over money. Almeida at footnote 4 The Almeida case had substantial statutory mitigation, [6] however, the prior violent felony has

[6] (1) age (Almeida was twenty years old at the time of the crime); (2) extreme emotional disturbance; and (3) impaired capacity.

substantially more weight (contemporaneous attempted murder versus double homicide).

The non-statutory mitigation has much more weight in the instant case. In Almeida the trial court found 8 non-statutory mitigating circumstances.[7] In the instant case the defense provided 17 non-statutory mitigating circumstances, and the trial court found them all proven grouping them into 9 categories.[8] The trial court gave Anderson's religious faith and church activities substantial weight. Likewise, the trial court also gave Anderson's lack of prior violent history substantial weight. Moreover, the trial court gave moderate weight to Anderson's remorse and Anderson's contributions to the community and society through exemplary work. Finally, the trial court recognized that Anderson would be productive in prison.

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[7] (1) capacity for rehabilitation; (2) good behavior while incarcerated; (3) cooperation with police after arrest; (4) confession to police; (5) alcohol abuse; (6) difficult childhood and physical abuse; (7) remorse; and (8) genuine religious beliefs. Almeida at Footnote 8.

[8] (1) Remorse; (2) Cooperation; (3) Strong Religious Faith; (4) Past Achievements; (5) Contributions to Society; (6) Loving Relationships with Family; (7) Employment History; (8) Care for Family and Community; (9) Potential for Rehabilitation; (10) Skills to be Productive in Prison; (11) No Prior History of Violence; (12) Well Liked in His Community; (13) Sympathetic and Thoughtful of People; (14) Active in his Church; (15) Active in Community Churches; (16) Appropriate Courtroom Demeanor; and (17) Willingness to Plead.

In Thompson v. State, 456 So.2d 444 (Fla. 1984) this Court upheld the prior violent felony and felony murder aggravating factors and found some non-statutory mitigating circumstances.[9] This Court held that there was sufficient mitigating factors for the jury to reasonably conclude that the aggravating circumstances were overcome and that life imprisonment was a proper sentence. Thompson at 448.

The Florida sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation. State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974); See also Hargrave v. State, 366 So.2d 1 (Fla.1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). The trial court gave great weight and little weight to the two aggravating circumstances, while they gave substantial weight and moderate weight to several non-statutory mitigating circumstances. Comparison of the facts of this case to those of the preceding cases shows that the death penalty here is disproportionate because other similarly culpable defendants have been sentenced to life imprisonment. Accordingly, the death sentence should be reversed and the matter remanded for imposition of a life sentence.

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[9] The trial court in Thompson found that no mitigation existed. This Court found as non-statutory mitigation that Thompson was "street smart" but mildly retarded; good husband; good son; Thompson's father suffered from mental illness and died in an institution.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AVAILABLE MITIGATING EVIDENCE AND IN GIVING LITTLE WEIGHT TO VALID MITIGATION BASED ON A MISTAKE OF LAW.

In its sentencing order, the trial court assigned "little weight" to two of the valid mitigating circumstances that had been proven. The trial court's action was based on a misapplication of the law. For example, the trial court agreed that Fred Anderson had an employment history. However, the trial court assigned only "little weight" to this particular mitigating circumstance because:

> The defendant's supervisor at the Shell convenience store, near his house, where he worked for a relatively short time said he was a reliable and trusted employee. The mother of a patient at Florida's Elks Children's Hospital testified that the defendant provided care for her son, and they developed a friendship with the defendant. Other work performed by the defendant, as described in the evidence, could be classified as odd jobs for neighbors and volunteer charitable work.

(Vol. V, 860) Based on similar rationale, the trial court gave little weight to the fact that appellant has the potential for rehabilitation ["..defendant has not created any problems or controversy while in custody for this offense and has attended several Bible study courses while in the county jail."] (Vol. V, 860) Appellant has skills to

be productive in prison ["...he could use his experience as a leader of a church youth group and his ability to cook for large groups to be productive in prison."] (Vol. V, 860) (Vol. III 1528).

Whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review by this Court. Campbell v. State, 571 So.2d 415 (Fla. 1990). Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard. Id. The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. Id. By giving valid circumstances little weight, the trial court is, in effect, concluding that valid mitigation was not very mitigating at all. The sentencing order does not reveal the trial court's rationale for giving this valid mitigation "little weight." Evidence at trial established that Anderson was a model prisoner, had no history of violence, was engaged in Bible study and was a trusted employee.

Anderson's trial court made the same mistake as the trial judge in Nibert v. State, 574 So.2d 1059 (Fla. 1990). Nibert's trial judge found Nibert's physical and psychological abuse during his youth to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-

seven (27) years old and had not lived with his mother since he was eighteen (18)". Nibert v. State, 574 So.2d at 1062. This Court pointed out that the fact that a defendant had suffered through more than a decade of psychological and physical abuse during his formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Id.

The trial court's misapplication of the law unconstitutionally tipped the scales in favor of death. Fred Anderson's death sentence violates due process.

POINT V

ALLOWING IRRELEVANT, PREJUDICIAL, AND INCOMPETENT EVIDENCE TAINTED THE JURY'S RECOMMENDATION OF DEATH.

The state tendered Farley Caudill as an expert on blood pattern analysis during the guilt phase. (Vol. IX, 1619) The appellant objected to Mr. Caudill's qualifications as an expert because Caudill was totally lacking any educational background to understand the mathematical formulas and computations that are involved. (Vol. IX, 1619) The trial court allowed Caudill to testify over strenuous defense objection.

Caudill testified that the blood stains found on a back wall were consistent with cast off blood stains caused by blunt force trauma. (Vol. IX, 1669) Inside the vault doorway there were some blood stain patterns consistent with somebody having been struck with blunt force. (Vol. IX, 1671) The exterior doorway area also had a blood stain pattern consistent with blunt force trauma. (Vol. IX, 1672)

On cross-examination, Caudill could not associate any of the blood spatters with the individual victims. (Vol. IX, 1684) Caudill admitted that medium velocity blood stain patterns could also be caused by clothing being slung or pitched that casts off blood, or activities of emergency medical personnel. (Vol. IX, 1693) The

appellant then moved to strike Caudill's testimony because his opinion was based upon the assumption that the blood stains originated from the same source, and the counter is of a cosmetic nature which had not been factually established. (Vol. IX, 1715) The Motion to Strike was denied. (Vol. IX, 1715)

The trial court ostensibly allowed the evidence so that the State could attempt to prove to the jury that the murder was cold, calculated and premeditated. The testimony would discount the defense theory that the shooting was made in panic where the state is contending that Anderson not only shot the victims but beat them with a blunt object before or after he shot them.

Farley Caudill Was Not Qualified to Express an Expert Opinion

Caudill obtained his high school diploma in Louisville, Ohio. (Vol. IX, 1621) Caudill never attended college and took "as little as possible" mathematics in High School because he hated it.[10] (Vol. IX, 1621) Caudill did attend a Blood Splatter Analysis Course sponsored by the FDLE in 1993. However, he did not know why his course materials included a square root table to perform blood splatter analysis. (Vol. IX, 1627) Moreover, Caudill has never sought certification as a blood stain pattern analyst. (Vol. IX, 1631)

[10] Caudill had no trigonometry, physics, geometry or algebra courses in High School. (Vol. IX, 1622)

The trial court overruled the defense objection to have Caudill qualified as an expert in blood stain analysis. This was error. A witness may only testify as an expert in the areas of his or her expertise. Ehrhardt, Florida Evidence, § 702.1, p. 515. It is not enough that the witness is qualified in some general way. Id. The witness must possess special knowledge about the discrete subject about which an opinion is expressed. Id. An expert will not be allowed to testify in an area beyond his expertise. See, e.g., Hall v. State, 568 So.2d 882 (Fla. 1990) (Religion professor not qualified to "testify to the sanity of any individual.") How can an expert witness testify without any specified area of expertise? He cannot! Caudill wrongfully testified as an unspecified expert.

Appellant also objected to Caudill's testimony based on the lack of a sufficient predicate for the "expert" opinion. Specifically, the appellant moved to strike Caudill's testimony because his opinion was based upon the assumption that the blood stains originated from the same source, and the counter is of a cosmetic nature which had not been factually established. (Vol. IX, 1715) The Motion to Strike was denied. (Vol. IX, 1715)

The admission of expert testimony is judged using four factors: (1) the expert opinion must aid the trier of fact; (2) the expert must be qualified at such; (3) the opinion must be applicable to evidence presented at trial; and (4) the danger of

unfair prejudice must not outweigh the probative value of the opinion. Glendening v. State, 536 So.2d 212 (Fla. 1988). Appellant contends that Caudill's testimony fails each of the four factors.

As previously argued, Caudill's testimony led the jury to believe that Anderson struck the victim's with a blunt force object in addition to shooting them. This improperly exposed the jury to a taint that would bring further support to the CCP aggravating factor. Farley Caudill was not qualified to express his opinion. He is an investigator for the Sheriff's Department that did take one FDLE Blood Stain Pattern Analysis Course. Additionally, he based his conclusion, not on his training and expertise, but rather on merely reading "literature." Moreover, he did not know the source of the blood stain. See Hall v. State, 568 So.2d 882 (Fla. 1990). Caudill relied **completely** on reviewing material provided by a training course.

The State never even showed that Caudill possessed any expertise in the area of concentration to which the training material pertained. All Caudill did was read literature. He did not do so with comprehension and understanding.[11] A trial judge is required to exclude expert testimony where the expert has insufficient knowledge

[11] Caudill did not know why the square root table was in the training materials.

of the facts of the case at hand. See, e.g., Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971). Experts with insufficient personal knowledge of the facts of the case should not be permitted to testify. Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983).

Caudill's testimony was of dubious probative value, completely speculative, and highly inflammatory. The trial court clearly erred in allowing the testimony. Garron v. State, 528 So.2d 353 (Fla. 1988) [Error to allow prosecutor to testify that appellant did not appear to be insane at the first appearance hearing conducted the day after the shooting. Prosecutor's lack of contact with defendant rendered the opinion testimony invalid.]; Fassi v. State, 591 So.2d 977 (Fla. 5th DCA 1991) [Error to admit handwriting examiner's conclusion that spray-painted graffiti matched hand-written letter. Comparison was too speculative and lacked sufficient indicia of reliability.]. Appellant submits that the extent of the objectionable evidence resulted in a denial of Anderson's constitutional right to a fair trial.

POINT VI

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS CONFESSIONS, ADMISSIONS AND STATEMENTS.

Anderson was arrested in the bank and taken to the police station for questioning. Anderson was given his Miranda[12] rights and then during questioning Anderson provided incriminating statements. Anderson's statements should be suppressed because his waiver of his right to remain silent was not knowingly and voluntarily made. Anderson was not clear on what his rights were, and law enforcement did not fully explain Anderson's rights to him. Law enforcement took advantage of Anderson's confusion and elicited incriminating statements.

The United States Supreme Court has stated that in order for a valid waiver of Miranda rights to be knowingly, voluntarily and intelligently made, the evidence must show that the waiver was made with a full awareness of the nature of the rights given up. Moran v. Burbine, 475 U.S. 412 (1986) When the interrogation began, Anderson did not have a full awareness of the nature and consequences of the rights he was asked to waive. Immediately following the reading of his rights, Anderson stated: "I am not quite clear on it." (Transcript, page 3, line 4) The

[12] Miranda v. Arizona, 384 U.S. 436 (1966)

interrogation should have stopped, and the law enforcement officer should have made a good faith effort to simply and accurately inform Anderson of his Miranda rights. Almeida v. State, 737 So.2d 520 (Fla. 1999)

Improper Miranda Warnings

The explanation of Miranda rights was deficient because law enforcement did not properly inform Anderson that anything he said would be used against him in Court. The officer stated, "If you say something to me, I'm going to write it down and use it." (Transcript page 3, line 8) This explanation was totally inadequate. The officer failed to explain to Anderson that his statements would be used against him in future court proceedings. This Court has explained the self- incrimination safeguard required by the Florida Constitution as follows:

> The Self Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida, suspects must be told.....that anything they say will be used against them in court.

Thompson v. State, 595 So.2d 16, 17 (Fla. 1992) The law enforcement officer failed to properly explain Anderson's right against self-incrimination and therefore his statement should have been suppressed.

The explanation of Anderson's Miranda rights was further deficient because Anderson was not properly informed that he was entitled to free counsel before

being questioned. This Court has directed that "the police must somehow communicate to the accused the basic idea of the right to consult with a free attorney before being questioned. Thompson at 17. In Thompson , a suspect was inadequately given his Miranda rights as follows:

> I further understand that prior to or during this interview that I have the right to have an attorney present. I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate. I further understand that at any time that I desire I can have this interview stopped.

Thompson at 17. This Court determined that the above Miranda warnings were inadequate because it did not clearly delineate the right to a free attorney prior to questioning. In the instant case, Anderson was not clearly told that he had a right to a free attorney before being interrogated. The officer explained to Anderson what he could say after being questioned. Moreover, Anderson was told that "The attorney will be appointed to you when you go to jail." (Transcript page 3, line 18)

Involuntary Statement

Anderson statements to police were involuntary because they were obtained by promise and improper influence. This Court has held that in order to determine the issue of voluntariness, the inquiry is whether the confession was "free and

voluntary"; that is it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by exertion of any improper influence." Brewer v. State, 386 So. 2d 232, 235 (Fla. 1980)

The following is an exchange between the officer and Anderson that illustrates the Brewer violation.

> Officer: Do you want...
>
> Defendant: Um.....I'm not trying....I'm not trying to make this difficult.
>
> Officer: Okay, but you know me....
>
> Defendant: My main concern is.....
>
> Officer: but you know me, I'm pretty fair.
>
> Defendant: My main concern right now is getting my mother notified. Me I'm not. I am (inaudible)
>
> Officer: I'll let you call you're mom and everything. I'm not arguing - I did that before.
>
> Defendant: Yeah. I really don't have to be the one to call her.
>
> Officer: Okay. I'll let you call her. You....you explain it to her. Okay, after we get done , I'll sit you in my office you can make the phone call and you can tell her.
>
> Defendant: I had asked the other officer if he would – he said he would.

> Officer: Okay. After we get done, I'll make - if you want to call her you can call can. You know me - I did that before to ya.

Transcript pages 3-4. The officer made improper promises to Anderson that he could call his mother. The officer took advantage of Anderson's grave concern that his mother be notified of his whereabouts. The interrogating officer capitalized upon Defendant Anderson's statement, "My main concern right now is getting my mother notified." (Transcript, page 4, line 1). With this in hand, the officer then bargained and twice promised Defendant Anderson, "after we get done," you can call your mother. (Transcript, page 4 lines 7 and 10). The transaction is clear. If Defendant Anderson would make statements, the officer promised him in exchange, a phone call to his mother. Because a promise was used to elicit statements, the statements were not voluntary. Because the statements were not voluntary they must be suppressed.

Second, the interrogating officer used improper influence over Anderson to elicit statements. The interrogating officer approached defendant Anderson as a wolf dressed in sheeps clothing. He exerted improper influence as a law enforcement officer who had prior dealings with the defendant. The interrogating officer masked his true investigatory intent by twice stating, "you know me, I'm pretty fair" and "you know me..." Each statement was a ruse to capitalize on his

position as a law enforcement officer and violate any prior fiduciary relationship.

Because improper influence was used to elicit statements, the statements were not voluntary. Because the statements were not voluntary they must be suppressed.

Request For Counsel

Defendant Anderson's alleged statements should be suppressed because state agents did not honor his request to end questioning, or his request for counsel, instead, they reinitiated interrogation thereby allegedly eliciting incriminating statements.

The Florida Supreme Court has set forth a series of guidelines, similar to those announced in Miranda, and has repeatedly and expressly addressed the right to counsel:

> Under [Article I, Section 9, Florida Constitution], if the suspect indicates in any manner that he or she does not want to be interrogated, interrogations must not begin, or, if it has already begun, must immediately stop. If the suspect indicates **in any manner** that he or she wants the help of a lawyer, interrogations must not begin until a lawyer has been appointed and is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present...(emphasis added). A statement obtained in violation of the proscription cannot be used by

> the State. Traylor v. State, 596 So.2d 957, 966 (Fla. 1992); Almeida v. State, 737 So.2d 520, 524 (Fla. 1999).

Notwithstanding the above protections against self-incrimination, the Florida Supreme Court has taken additional steps to make clear there exists another layer of protection designed to prevent police from badgering suspects into waiving previously asserted rights:

> Once the right to counsel has been invoked, any subsequent waiver during a police-initiated encounter in the absence of counsel during the same period of custody is invalid...

Traylor v. State, 596 So.2d 957, 966 (Fla. 1992)

Here, Defendant Anderson made a clear invocation of his right to terminate questioning and invoke his right to counsel. This is illustrated by the following exchange:

> DEFENDANT: ...though I don't want to cooperate. But I just ahhh...
>
> OFFICER: But you do want to cooperate, right?
>
> DEFENDANT: I do - I just don't ...prefer not to wait until there's an attorney...
>
> (Transcript page 28, lines 14-17)

This exchange clearly indicates Defendant Anderson's desire to terminate

questioning and invoke his right to counsel. As a result, all questioning was required to immediately cease. However, in an alarming disregard for Defendant Anderson's right to counsel, state agents reinitiated interrogation. (Transcript, pages 28, 29 and 30) The state agents questionable police practices continued by obtaining al alleged oral and written waiver of rights, where they thereafter interrogated Anderson for another 70 pages of transcripts, ultimately eliciting alleged incriminating statements.

Traylor has expressly addressed all of the above violations of Anderson's rights. First, after Anderson requested counsel, interrogation was required to immediately cease. Second, state agents were not permitted to reinitiate interrogation of Anderson because Defendant Anderson had requested an attorney. Third, Anderson's alleged waiver of rights were not valid because he had previously requested an attorney, yet he was not provided an attorney.

In summary, Anderson's statement should be suppressed because they were obtained by state agents in violation of his rights after he had requested questioning to cease and after he had requested an attorney.

POINT VII

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE NOT RELEVANT TO ANY CONTESTED ISSUE.

The state moved into evidence three photographs of Marisha Scott. (Vol. VIII, 1597) The appellant objected to the introduction of the photographs because they show the injuries three days after the shooting including stitching and other repairs and rescue efforts; and the pictures are cumulative and prejudicial. (Vol. VIII, 1598) The objection was overruled. (Vol. VIII, 1598) The admission of this evidence denied Fred Anderson's due process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by its prejudice. §90.403, Fla. Stat. (1998).

The test for the admissibility of a photo of a crime victim is relevance, not necessity. Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999). The determination of the admissibility of such photos is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse. Id. In Ruiz, this Court found error in the penalty phase admission of a two by three feet blow-up of a photo

showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. Id.

This Court has outlined the standard for the admission of potentially prejudicial photos.

> To be relevant, a photo of the deceased victim must be probative of an issue that is in dispute. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Emphasis in original.) (Footnote omitted.) In a footnote, this Court quoted McCormick on Evidence, 773 (John Williams Strong ed., 4th Ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida v. State, 748 So.2d at 929 (n.17).

Concerning the attempted murder of Marisha Scott, the primary issue in appellant's trial was whether her shooting was intentional. Appellant unsuccessfully

argued to the jury that he shot Scott during a verbal confrontation, and the shooting was not an intentional act.

Since the only real issue at trial was whether the shooting was an intentional act, the state did not need to introduce photographs that showed Marisha Scott in the hospital 3 days after the shooting. When defense counsel first objected to the inflammatory photographs, the prosecutor reminded the court that there was no picture of Scott in evidence. The photographs showed stitching and other rescue efforts performed on the victim. (Vol. VIII, 1597) The trial court disregarded defense counsel and overruled the objection and allowed all three photographs into evidence.

Defense counsel was correct. Any probative value was outweighed by the extreme prejudicial effect. Section 90.403, Fla. Stat. (2000). The prosecutor's assertion that there was no picture of the victim in evidence was not adequate reason to overcome the obvious inflammatory nature of a photo of a shooting victim in a hospital bed. Great care should be taken prior to waiving inflammatory pictures in front of lay jurors who will never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt and penalty. In this case, it is clear that Fred Anderson was denied a fair trial when the court

allowed inflammatory photographs of Marisha Scott to go to the jury. In this case, the photographs which were admitted could serve no purpose other than to inflame and prejudice the jury.

POINT VIII

APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR JURY TRIAL WAS VIOLATED IN LIGHT OF THE CUMULATIVE ERRORS THAT OCCURRED THROUGHOUT THE PROCEEDINGS.

The Due Process Clauses of the United States and Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2nd DCA 1977). See also State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) [A defendant has a constitutional right to a fair trial free from harmful error]. Appellant submits that he was denied his right to a fair trial based on the cumulative effect of the errors discussed herein.

During the testimony of the forensic serologist, the following transpired:

> Q. What does the term "forensic" mean?
>
> A. Forensic means -- it's taking science and applying it to law and in the courtroom setting and I tried to preserve as much of the sample as possible so that additional testing could be done, if need be, by the Defense, if they wanted to hire their own laboratory and do further testing on it, they could. But as a forensic serologist, I'm trying to get the most information out of the stain, while yet preserving the stain.
>
> Q. In case a Defense expert would want to do an

independent analysis.

A. That's correct. (Vol. IX, 1767)

The appellant objected to the above and moved to strike on the grounds that it improperly shifted the burden to the Defense and required the Defense to confer with their own expert to refute this evidence. (Vol. IX, 1768) The appellant moved for a mistrial because a curative instruction would not be sufficient to cure the problem. (Vol. IX, 1772) The trial court denied the Motion for Mistrial and gave a curative instruction to the jury. (Vol. IX 774)

During closing argument the prosecutor made the following argument:

> I've come to the conclusion that if I had to put this defense in a category that it doesn't fit in any of the standard categories, what I would call this defense is "the National Enquire Defense." Inquiring minds want to know. Ladies and gentlemen, my job is not to satisfy the defendant's curiosity, or his attorneys' curiosity, or the Judge's curiosity, or even your curiosity about these details. I've got one job, one job here today. If you folks have questions that you just have to know the answer to, after this trial is over, my office is up on the fourth floor, you are welcome to come up there and ask me about any of these little details – (Vol. II, 2213)

The appellant objected on the grounds that the prosecutor's argument has been an improper comment on the defendant's right to counsel and validity of his defense.

And the last remark is an improper comment on matters that are not in evidence, and speculation that might be drawn from matters that aren't in evidence. (Vol. II, 2213) The trial court overruled the objection but warned the prosecutor that inviting jurors to his office is improper. (Vol. II, 2214)

The cumulative effect of the prosecutor's improper comments vitiated the fairness of appellant's trial. He is entitled to a new trial. See Caraballo v. State, 762 So.2d 542 (Fla.App. 5 Dist. 2000)

POINT IX

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

The U.S. Supreme Court recently held that held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2355 (2000) [quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)]. Grounding its decision both in the traditional role of the jury under the Sixth Amendment and principles of due process, the Court made clear that:

> "[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not

> — at the moment the state is put to proof of those circumstances — be deprived of protections that have, until that point unquestionably attached."

Id. at 2359. These essential protections include (1) notice of the government's intent to establish facts that will enhance the defendant's sentence, (2) determination by a jury that (3) such facts have been established by the government beyond a reasonable doubt. Id. at 2362-63; Jones, 526 U.S. at 231.

While the majorities in Apprendi and Jones attempted to distinguish capital sentencing schemes, the distinction is not logically tenable, as the dissenters in Jones noted:

> If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for car jacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death.

Jones, 526 U.S. at 272 (Kennedy, J., dissenting; see also Apprendi, 120 S.Ct. at 2388 ("If the Court does not intend to overrule Walton,[13] one would be hard pressed to tell from the [majority] opinion.") (O'Connor, J., dissenting). As Justice Kennedy anticipated, the majority's ruling compels a reexamination of the Court's capital jurisprudence regarding the roles of judge and jury. Jones, 526 U.S. 272..

[13]Walton v. Arizona, 497 U.S. 639 (1990).

Florida's capital sentencing scheme, like the hate crimes statute at issue in Apprendi, exposes a defendant to enhanced punishment — death rather than life imprisonment — when a murder is committed "under certain circumstances but not others." Id. at 2359. Indeed, this Court has emphasized that "[t]he aggravating circumstances" in Florida law "actually define those crimes . . . to which the death penalty is applicable . . ." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). While this Court properly recognized in Dixon that individual aggravating circumstances must be proved beyond a reasonable doubt, it has thus far failed to apply other due process requirements, as outlined in Apprendi, to the capital sentencing context. Thus, under Florida law (1) the state is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the state is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

1) Notice.[14] Under Florida law, in contravention of basic due process

[14] Appellant unsuccessfully sought, prior to trial, the aggravating circumstances on which the state intended to rely. (I 92-93; I 126-33)

principles, the state is not required to provide notice of the aggravating circumstances it intends to prove at the penalty phase. See, e.g., Vining v. State, 637 So. 2d 921, 927 (Fla. 1994). In other contexts, however, this Court has properly recognized that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. See, State v. Harbaugh, 754 So. 2d 691 (Fla. 2000) (felony DUI); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (sentencing enhancement for use of a firearm).

2) Specific Jury Findings.[15] Although the sentencing jury is instructed to determine whether individual aggravating circumstances have been established beyond a reasonable doubt, it is not required to make any specific findings regarding the existence of particular aggravators, only to make a recommendation as to the ultimate question of punishment. The jury is thus a "black box"that renders a life or death decision without disclosing its reasoning.

Apprendi logically compels the conclusion that a sentencing jury must make findings regarding the existence of individual aggravating circumstances. Two of the four aggravating circumstances at issue in this case (HAC and CCP), like the

[15] Appellant unsuccessfully requested interrogatory verdict forms at the penalty phase. (XII 2328) Appellant also challenged the statute based on the failure of the instructions to adequately channel the jury's discretion. (III 366-67)

biased motive factor in Apprendi, involve "[t]he defendant's intent in committing a crime," a consideration that "is perhaps as close as one might hope to come to a core criminal offense 'element,'" requiring a jury's determination. See, Apprendi, 120 S. Ct. at 2364.

Even if Apprendi did not compel jury findings regarding every aggravator, its logic would appear, at a minimum, to require a jury finding of death eligibility. Again, as the dissenters in Jones and Apprendi noted, the defendant could not be sentenced to death under the Arizona statute at issue in Walton, "unless the trial judge found at least one of the enumerated aggravating factors." Jones, 526 U.S. at 272 (dissenting opinion); accord Apprendi, 120 S.Ct. at 2388 (O'Connor, J., dissenting). Precisely the same is true in Florida. See § 921.141 (2)(b) (1997).

The Jones majority attempted to distinguish Hildwin v. Florida, 490 U.S. 638, 640 (1989), on the ground that a Florida jury **implicitly** finds the existence of the necessary aggravating circumstances when it recommends a sentence of death. 526 U.S. at 250-51. This, however, leaves no record of which aggravators the jury did or did not find. Moreover, if the jury recommends life, there is no jury finding implicit or otherwise regarding the existence of **any** aggravating circumstance. Consequently, in an override case, the defendant's sentence is increased from life to death based **solely** upon judicial findings of fact, in violation of the defendant's

due process and jury trial rights.

Hildwin does not, moreover, address the Eighth Amendment concerns raised by the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing. See Combs v. State, 525 So. 2d 853, 859 (1988) (Shaw, J., specially concurring) (lack of jury findings, combined with Tedder deference, raises serious arbitrariness problem); cf. Parker v. Dugger, 498 U.S. 308, 321 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

3**) Burden and Standard of Proof.**[16] Apprendi reaffirmed that the due process prohibition on burden-shifting enunciated in Mullaney v. Wilbur, 421 U.S. 684 (1975), and the reasonable doubt standard apply to the determination of sentence enhancements. Apprendi, at 120 S.Ct. at 2362, 2359, 2364. Florida's capital sentencing statute violates these constitutional requirements by placing the burden on the **defendant** to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b),

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[16] Appellant challenged the constitutionality of this aspect of Florida's statute prior to trial. (Vol. I, 145-152)

(3)(b), Fla. Stat. (1993); see also Dixon, 283 So. 2d at 9. The plain meaning of this language requires imposition of a death sentence if the aggravating and mitigating evidence is in equipoise. This impermissibly relieves the state of its burden to prove, beyond a reasonable doubt, that death is the appropriate sentence.

The burden-shifting instruction also "vitiates the individualized sentencing determination required by the Eighth Amendment." See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.), cert. denied, 486 U.S. 1026 (1988) (instruction that advised jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . mitigating circumstances" violated Eighth Amendment).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well

as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate Fred Anderson's convictions and remand for a new trial as to Points VI, VII and VIII. As for Points I, II, III, IV, V and IX vacate his death sentence and remand for the imposition of a sentence of life in prison without possibility of parole.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Fred Anderson, Jr., DC#218693, Florida State Prison, P.O. Box 747, Starke, FL. 32091, this 19th day of November, 2001.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER