IN THE SUPREME COURT OF FLORIDA

ROBERT MORRIS,	:	
Appellant,	:	
vs.	:	Case No. SC95623
STATE OF FLORIDA,	:	
Appellee.	:	
______________________________	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse

P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 35

ARGUMENT 39

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF DEFENSE WITNESS TONI MALONEY. 39

ISSUE II

APPELLANT SHOULD RECEIVE A NEW TRIAL DUE TO THE IMPROPER CONTACTS BETWEEN MEMBERS OF THE JURY AN A BACKSTRUCK JUROR WHO ATTENDED THE TRIAL AS A SPECTATOR. 54

ISSUE III

THE DEATH SENTENCE IS DISPROPORTION- ATE. 61

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S HISTORY OF DRUG ABUSE IS NOT MITIGATING. 70

ISSUE V

TOPICAL INDEX TO BRIEF (continued)

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SPECIFIC NON-STATUTORY MITIGATING CIRCUMSTANCES. 76

CONCLUSION 85

CERTIFICATE OF SERVICE 85

TABLE OF CITATIONS

CASES	PAGE NO.
Almeida v. State, 748 So. 2d 922 (Fla. 1999)	61, 69
Atkins v. State, 452 So. 2d 529 (Fla. 1984)	75
Barnes v. State, 743 So. 2d 1105 (Fla. 4th DCA 1999)	51
Blanco v. State, 706 So. 2d 7 (Fla. 1997)	36, 71, 76
Brooks v. State, __ So. 2d __ (Fla. 2000)[25 FLW S417]	51
Brown v. State, 538 So. 2d 833 (Fla. 1989)	59
Campbell v. State, 571 So. 2d 415 (Fla. 1990)	71, 72
Collins v. State, 698 So. 2d 1337 (Fla. 1st DCA 1997)	51
Cooper v. State, 739 So. 2d 82 (Fla. 1999)	61, 69
Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994)	83
Durano v. State, 262 So. 2d 733 (Fla. 3d DCA 1972)	54, 59
Eddings v. Oklahoma, 455 U.S. 104 (1982)	70, 71
Elledge v. State, 346 So. 2d 998 (Fla. 1977)	75
Finney v. State, 660 So. 2d 674 (Fla. 1995)	76

TABLE OF CITATIONS (continued)

Foster v. State,
603 So. 2d 1312 (Fla. 1st DCA 1992) 77

Foster v. State,
614 So. 2d 455 (Fla. 1992) 83

Fuller v. State,
540 So. 2d 182 (Fla. 5th DCA 1989) 51

Garcia v. State,
564 So. 2d 124 (Fla. 1990) 52

Goodwin v. State,
751 So. 2d 537 (Fla. 1999) 52

Gordon v. State,
745 So. 2d 1016 (Fla. 4th DCA 1999) 77

Gudinas v. State,
693 So. 2d 953 (Fla. 1997) 51

Hamilton v. State,
703 So. 2d 1038 (Fla. 1997) 51

Hudson v. State,
708 So. 2d 256 (Fla. 1998) 72, 78

Jackson v. State,
421 So. 2d 15 (Fla. 3d DCA 1982) 51

Johnson v. State,
696 So. 2d 317 (Fla. 1997) 59

Jones v. State,
569 So. 2d 1234 (Fla. 1990) 2

Jones v. State,
705 So. 2d 1364 (Fla. 1998) 69

Knight v. State,
721 So. 2d 287 (Fla. 1998) 61

TABLE OF CITATIONS (continued)

Larkins v. State,
739 So. 2d 90 (Fla. 1999) 70

Livingston v. State,
458 So. 2d 235 (Fla. 1984) 54

Lockett v. Ohio,
438 U.S. 586 (1978) 70

Mahn v. State,
714 So. 2d 391 (Fla. 1998) 36, 70, 74

Meixelsperger v. State,
423 So. 2d 416 (Fla. 2d DCA 1982) 54, 60

Mellins v. State,
395 So. 2d 1207 (Fla. 4th DCA 1981) 77

Merck v. State,
__So. 2d__ Fla. 2000)[25 FLW S584] 70

Morton v. State,
689 So. 2d 259 (Fla. 1997) 52

Nibert v. State,
574 So. 2d 1059 (Fla. 1990) 71, 72, 74

Norman v. Gloria Farms, Inc.,
668 So. 2d 1016 (Fla. 4th DCA 1996) 54, 57, 59

Pardo v. State,
563 So. 2d 77 (Fla. 1990) 71

Parker v. Dugger,
498 U.S. 308 (1991) 71

Phillips v. State,
705 So. 2d 1320 (Fla. 1997) 78

Policari v. Cerbasi,
625 So. 2d 998 (Fla. 5th DCA 1993) 54

TABLE OF CITATIONS (continued)

Redish v. State,
525 So. 2d 928 (Fla. 1st DCA 1988) 51

Robinson v. State,
684 So. 2d 175 (Fla. 1996) 70

Robinson v. State,
574 So. 2d 108 (Fla. 1991) 76

Ryan v. State,
457 So. 2d 1084 (Fla. 4th DCA 1984) 50

Santos v. State,
629 So. 2d 838 (Fla. 1994) 67

Santos v. State,
591 So. 2d 160 (Fla. 1991) 71

Scott v. State,
603 So. 2d 1275 (Fla. 1992) 70

Simmons v. State,
722 So. 2d 862 (Fla. 5th DCA 1998) 51

Sinclair v. State,
657 So. 2d 113 (Fla. 1995) 61

Smith v. Dept. of Ins.,
507 So. 2d 1080 (Fla. 1987) 76

Snelling v. Florida E. Coast Ry.,
236 So. 2d 465 (Fla. 1st DCA 1970) 54

State ex rel. Larkins v. Lewis,
54 So. 2d 199 (Fla. 1951) 60

State v. Cummings,
389 S.E. 2d 66 (N.C. 1990) 78

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 52

TABLE OF CITATIONS (continued)

State v. Gray,
654 So. 2d 552 (Fla. 1995) 76, 84

State v. Gunn,
78 Fla. 599, 83 So. 511 (1919) 53

State v. Hamilton,
574 So. 2d 124 (Fla. 1991) 57

State v. Johnson,
257 S.E. 2d 597 (N.C. 1979) 77, 83

Steele v. State,
561 So. 2d 638 (Fla. 1st DCA 1990) 77

Stoll v. State,
__ So. 2d __ (Fla. 2000)[25 FLW S591] 52

Street v. State,
636 So. 2d 1297 (Fla. 1994) 51, 59

Taylor v. Kentucky,
436 U.S. 478 (1978) 77

Tillman v. State,
591 So. 2d 167 (Fla. 1991) 61

Trease v. State,
__So. 2d__ (Fla. 2000)[25 FLW S622] 71

Urbin v. State,
714 So. 2d 411 (Fla. 1998) 61

Walker v. State,
707 So. 2d 300 (Fla. 1997) 72, 74

Weiand v. State,
732 So. 2d 1044 (Fla. 1999) 84

Wike v. State,
648 So. 2d 683 (Fla. 1994) 75

TABLE OF CITATIONS (continued)

Woods v. State,
733 So. 2d 980 (Fla. 1999) 61

Yohn v. State,
476 So. 2d 123 (Fla. 1985) 77

STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

Appellant, ROBERT MORRIS, was the defendant in the trial court, and will be referred to in this brief as appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by volume number, followed by a page reference. The supplemental record will be referred to as SR. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Robert Morris was charged by indictment on September 29, 1994 in Polk County with the first degree murder of Violet Livingston, burglary, armed robbery, and sexual battery (1/3-6). Appellant's motion to sever the sexual battery count was granted. The state unsuccessfully sought certiorari review in the Second District Court of Appeal of the order granting a severance. The state then elected to try the sexual battery count first, and that case went to trial in November, 1998, resulting in a hung jury (6/995-1000, 1029-30; 7/1146,1224.1232,1247-48,1250,1276,1283-97; 8/1321, 1332-33). The trial court then granted a judgment of acquittal, on the ground that the evidence did not exclude the reasonable hypothesis that the victim died prior to the commencement of the sexual battery (8/1332-33).[1] The defense moved in limine to exclude evidence of sexual activity from the upcoming murder trial. The trial court ruled that the state could introduce evidence that biological materials and fluids recovered from Violet Livingston's body during the autopsy were submitted for DNA testing, and could introduce the results of the DNA tests, but that the state would not be permitted to introduce evidence inferring sexual activity (6/1034-35;7/1147). The case proceeded to trial on counts one, two, and four from February 15 - March 11, 1999, before Circuit

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[1] See Jones v. State, 569 So. 2d 1234, 1237 (Fla. 1990).

Judge Robert A. Young and a jury. On the Friday before jury selection, the state offered an eleventh hour plea deal of a sentence of life imprisonment in exchange for a guilty plea. Appellant did not accept the offer (see 11/10-12; 10/1801; SR98).

The jury found appellant guilty as charged on each count (9/ 1560-61; 29/3550-51), and, after the penalty phase, recommended a death sentence by a vote of 8-4 (9/1625; 35/4586-87). Appellant received concurrent sentences of life imprisonment for the burglary and robbery convictions (10/1732, 1735-45). On April 30, 1999, Judge Young imposed the death penalty for the murder conviction, finding four aggravating factors,[2] one statutory mitigating factor,[3] and numerous nonstatutory mitigating factors[4] (10/1806-09; SR90-99). Notice of appeal was filed on April 30, 1999 (10/1812).

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[2] Prior felonies involving the use or threat of violence (moderate weight), parole status (moderate weight), financial gain (great weight), and HAC (great weight) (SR91-93).

[3] Capacity of defendant to conform his conduct to the requirements of law was substantially impaired (moderate weight) (SR97).

[4] Among these are eight nonstatutory mitigating factors arising from appellant's background and childhood experiences, which were considered in the aggregate and accorded great weight (SR94,95,98).

STATEMENT OF THE FACTS

A. **Trial**

On the morning of September 2, 1994, 88 year old Violet Livingston was found dead in her Lakeland apartment by her son (25/ 2684,2691-95). The police responded to the scene at the Martin's Landing apartment complex. Mrs. Livingston was lying on the bedroom floor between the two beds. Her head was wrapped tightly in bedsheets. There was blood on the walls and furniture, and on a walking cane which was on the bed. Both bedrooms were in disarray (20/1773-74,1776-78,1780-86,1789,1791-93,1796-1803,1806-09; 22/ 2106,2112-14,2119-22; 24/2527; 25/2694-95).

The point of entry appeared to be the kitchen window on the south side of the apartment. The screen was off the window and was leaning against the building. The window was shut but the glass was broken. There were window latches and broken glass on the ground. To the right of the window was a yellow chair, sitting underneath the porch light. The porch light cover was off the fixture, and was lying on the ground (20/1738,1743-47,1752-54; 21/ 1981-82; 24/2525-26; 25/2767-74).

The apartment was processed for fingerprints. A total of eighteen prints were obtained from the interior and exterior of the apartment. Eleven of these were of value for comparison purposes. A single print, obtained from the partially unscrewed light bulb outside the kitchen

window, was later matched to appellant in a search of the AFIS database. One print belonged to the victim's son, four belonged to a police department intern, and five were never matched to anyone (20/1729,1816,1827-29,1834; 21/1906-07,1916-19,1939-42,1954-62; 24/ 2528-29,2553-54,2594-2601). The five unidentified prints could have belonged to one individual, or up to five individuals (21/ 1971).

According to the associate medical examiner, Mrs. Livingston died as a result of multiple injuries. She had sustained bruises, lacerations, abrasions, rib fractures, brain hemorrhage, and mechanical asphyxia due to suffocation. Some of the injuries were consistent with having been inflicted with her walking cane. There were neck injuries consistent with possible strangulation, and wounds to her right forearm, hand, and knee which could be classified as defensive. Dr. Melamud could not determine the sequence of the injuries, but Mrs. Livingston was alive for a short period of time after the attack began. Dr. Melamud could not tell when she would have become unconscious (26/2837-60,2864).

The four main categories of evidence presented by the state against appellant were (1) the fingerprint on the light bulb outside the kitchen window; (2) his possession of various items taken from Mrs. Livingston's residence, including collectible coins (which were spent by him in several neighborhood stores); and coin wrappers, coin booklets, and a Sort-n-Save bank (found in and around his residence,

and in a clothes hamper which had been in his residence);[5] DNA test results; and a jailhouse informant named Damion Sastre. The state's DNA experts testified that appellant could not be excluded as the source of the DNA obtained from two locations on Mrs. Livingston's body,[6] and from the kitchen curtain (23/2267-76,2282-93,2311-12,2430-33; 24/2434-42,2458-63,2486-93, 2502-04,2510-13). According to the state's population geneticist, the frequency of this DNA pattern in the African-American database would be 1 in 7.1 million (meaning a "ballpark range" of 1 in 710,000 to 1 in 71 million (23/2296-98,2355-57). The defense challenged on cross-examination the reliability of the DNA tests performed by Cellmark, and whether the proper procedures were followed (23/2301-57; 24/2447-63,2506-17). The defense also presented its own population geneticist (originally retained by the prosecution) who testified that the frequency of the DNA pattern demonstrated by appellant within the African-American population is 1 in 2.2 million (or a range of 1 in 220,000 to 1 in 22 million). Using the National Research Council's "upper confidence limit" (i.e., the number at which you can be assured that you are accurate between 90-95% of the

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[5] See 20/1839-61; 24/2529-42,2566-70,26003-09,2637-38; 25/2638-39, 2668-69, 2706-12,2715,2751-53.

[6] Blood and biological fluids were obtained during the autopsy from the vaginal, rectal, and oral areas. In keeping with the trial court's order in limine, these were referred to at trial as Locations A, B, and C (see 8/1417-18,1464; 9/1500; 21/1986-91, 1995-96,2036-38).

time), it would be 1 in 220,000 (26/2992-95; 27/3011-12,3019,3024-25,3033).

One Negroid body hair and one Negroid body hair fragment were found in the debris from the kitchen curtain. These were not suitable for microscopic comparison. A Negroid pubic body hair was recovered from one of the coin wrappers found in appellant's back yard. This hair was both visually and microscopically very different from appellant's known hair sample, and could not have come from him (22/2172-74,2181,2189-90).

Damion Sastre, a seven-time convicted felon, testified that appellant told him in jail that he committed the murder. Sastre claimed that appellant said he would take a life sentence but not a death sentence.[7] Sastre denied getting details of the crime from the discovery materials, such as police reports and depositions, which appellant had in his cell. According to Sastre, appellant said they didn't have anything on him except a partial thumbprint on a light bulb. Since appellant had already told Sastre he had previously stolen a bicycle from there, Sastre suggested to appellant that he say that that was when he touched the light bulb (26/ 2884-94,2884-94,2897,2912-13). Sastre testified that appellant told him there was a screen porch, and that he (appellant) had to cut a slit in the screen to

[7] Note that when appellant was offered a life sentence in exchange for a guilty plea on the eve of trial, he declined (11/10-12; 10/1801; SR98).

unlatch a door to gain access to where the light bulb was. Sastre acknowledged, upon being shown a photograph, that there is no screen porch to Violet Livingston's apartment (26/2915-17).

Appellant took the stand in his own defense, and stated that he did not kill Violet Livingston or break into her apartment (27/ 3096-97). He had gone over to Martin's Landing to play basketball, but nobody was there. Starting for home, he remembered that a friend had asked him if he could get a bicycle for her, so he walked in the back of the apartments and saw a bike on the top stairs. It was too bright back there, so he unscrewed the light bulb to go upstairs. The bicycle was secured by a big lock and he couldn't get it so he headed back home (27/3097,3100-06). As he passed by the Farm Store, he saw a brown paper sack, which he picked up and heard some jingling. Thinking it had change in it, he took it home. There he emptied the bag on the couch. There was a coin sorter, about half a dozen coin books, a chain necklace, and some little bags, some containing coins, some empty. Thinking he just got lucky and found some change, he spent the coins in a neighborhood sub shop and Texaco station (27/3006-14).

On September 11, 1994, appellant was arrested when his lady friend's mother reported her car stolen.[8] A couple of days later, detectives questioned him about a murder that happened at Martin's

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[8] Appellant's friend had spent the night with him; he used her car and kept it too long. He later learned that the car did not belong to his lady friend, but to her mother (27/3120).

Landing. Appellant looked at them like they were crazy; he didn't know what they were talking about. The detectives kept accusing him, telling him he did it, and that they had found his fingerprints inside the home. Appellant said that was not possible, because he was never inside anyone's home. Frightened by the accusatory tone of the interrogation, appellant told them they might find his fingerprint on the light bulb, but he did not explain how it got there (27/3119-26).

Appellant testified that he never talked to Damion Sastre about his case. He never told Sastre he killed Violet Livingston, or that he took coins out of her apartment, or that he gained entry to where the light bulb was by going through a screened porch, or that he would take a life sentence but not the death penalty (27/ 3133,3192-93). Sastre was in the same dorm as appellant, and he had access to all the cells in the dorm. Appellant had his discovery materials in a folder under his bunk, and there was no way to lock it up when he was called out for attorney visits (27/3129-34,3184-85; 28/3197).

B. <u>Penalty Phase</u>

The state introduced documents to establish appellant's two 1989 robbery convictions in Missouri (based on two purse snatching incidents, one of which resulted in the victim sustaining a fractured wrist), and the fact that he was on parole from those convictions at

the time of the instant offense (31/3833-34; see 10/1762, 1773-77; SR91-92).

The state then recalled the associate medical examiner, Dr. Melamud, who testified that Mrs. Livingston sustained multiple (at least 31) bruises, abrasions, and lacerations. She was alive for several minutes while these injuries were inflicted, but Dr. Melamud could not pinpoint the time or tell the sequence of the injuries (31/3836-47,3851). Most likely the injuries to her head and face occurred before her head was wrapped with bedsheets (31/ 3845). The injuries would have caused pain while she was conscious, but not after she became unconscious (31/3836,3847). The injuries to Mrs. Livingston's head could have caused unconsciousness, and Dr. Melamud couldn't say when those were inflicted in relation to the other injuries (31/3847,3851-52).

FDLE bloodstain pattern expert Leroy Parker stated the opinion that there was some movement of or by the victim within the bedroom during the time she received the forceful impacts. Based on his observations of the bloodstains, he concluded also that she was in an upright position at one point, then lower, and then down or close to the floor. Objects in the bedroom were in disarray, indicating a struggle (31/3868-71).

The state called Mrs. Livingston's two sons, a grandson, and a granddaughter as victim impact witnesses (31/3873-87).

The first defense witness was appellant's mother, Linda Bell. Linda met appellant's father when she was just turning 15, and she soon became pregnant. She did not know how that happened, or anything about the facts of life. Her stomach kept getting big and she stopped having a period, and eventually one of the other girls in school explained what was happening. This frightened Linda, because her mom had told her if she got pregnant she couldn't live there any more. (At the time she received that warning from her mom, Linda didn't even know what she meant by the word "pregnant"). She tried to hide her condition with bulky sweaters, but eventually her sister found out and told their mother, who said "You made your bed hard, you lie in it", and put Linda out of the house (31/3927-30).

After her sister Clara put her out as well, a relative by marriage of Clara's took her in, and here the baby was born on March 3, 1963. She named him Robert Dwayne Morris.[9] When Linda went for her six-week checkup she found out she was pregnant again. Paula was born ten months after Robert, and a third child -- Sharon -- was born seventeen months after Paula (31/2931-33). Linda did not marry Robert, Sr.; they lived together as common-law husband and wife until Sharon was about three months old. Robert, Sr. decided to go to California and get a job. Six months later he sent for Linda and the kids. When they

[9] In the section of the brief summarizing the testimony of appellant's family and friends, he will be referred to as Rob or Robert. His father will be referred to as Robert, Sr.

arrived, Robert, Sr. moved them into his uncle's house. A few months later, Linda learned that Robert, Sr. had brought another woman with him when he moved to California; they were living together and the woman was either pregnant or had just had the baby. Linda was furious, and in retaliation began seeing another man who was married and had two daughters. One day Robert, Sr. saw her with this guy, and she got scared and decided she'd better move out of his uncle's place. She moved with the kids into an apartment and applied for welfare (31/ 3933-40).

After she stopped seeing the married man, Linda got a job as a nurse's aide and began using drugs. Part of her job was to set up medications for the residents. A co-worker told her, "Start taking these, these will make you feel good, make you forget about stuff." Linda started taking the pills, and decided her colleague was right. From then on, she was on the pills (Seconal, known on the street as Red Devils) every day (R31/3939-41). At that time, the only type of men she would involve herself with were men with drugs, because the pills were three for a dollar and she felt like she couldn't afford them herself (31/3941).

During this period of time, Linda was leaving her children -- ages one, two, and three -- home alone. The lady downstairs across the fence was keeping an eye on them, but they stayed in the house by themselves (31/3941-43,3945).

One night Linda went out to the all-night movies with a group of friends; they were all high on pills and drinking. They got involved in an altercation where they thought a younger man was beating up an older man, but it turned out the perceived aggressor was a cop. The officer pulled his weapon and shot one of Linda's friends ("I think he lost his liver or something"), and they all went to jail (31/3141-42).

Linda was in jail for ten days or more. When she got out, she had been evicted from her apartment and she couldn't find her children. An acquaintance took her to the welfare office and they located the children, who were in separate foster homes (31/3943-44). It turned out that since Linda "had no one to call" while she was in jail, the neighbor lady didn't know where she was, so she called the welfare office and they came and got the children (31/ 3943).

When Linda was allowed to visit her children, the two older siblings complained of the conditions of their foster care. Robert told her he wasn't being fed, and they were very cruel to him. Paula was getting beaten for wetting the bed. Sharon, the youngest, was apparently being treated better, but she didn't understand why they weren't together (31/3944-45).

After three months in foster care, the children were returned to Linda. Although a social worker had told her she had to clean herself up, she continued to use drugs on a daily basis. She was taking

prescription sleeping pills in addition to the illegal drugs, and it caused her to break out in a terrible rash over most of her body. The doctor refused to renew her prescription, but she was so hooked into the Seconal that she had no idea what she was doing to herself. Every day she would bring her children to the dope house and make them wait outside while she went in and got her drugs. She would then stop by the candy store and buy the kids some candy; then she'd go home and take her pills. Eventually the doctor threatened to put her in the hospital, but she knew she couldn't go there because she didn't have anyone to keep the kids. This finally motivated her to get off the Seconal and her rash cleared up. Once off the "downers", she promptly replaced them with "uppers" ("Bennies", which were speed)(31/3946;32/3951-54). Also, she got introduced to Valium, which was just coming out then, and which "kind of made you feel like you did when you were taking Seconal" (32/3954).

Around this time, she allowed a male platonic friend named Tony to move in with her and the children (now ages 3, 4, and 5), after Tony's wife had put him out. One day Linda went to the grocery store and left Tony alone with the kids. When she returned, Tony had just left the house. Her oldest child, Rob, came running to her crying hysterically. He told her that Tony had had his sister Paula in the bathroom. Paula was screaming for Rob to help her, but Tony wouldn't let him in. Linda then talked to Paula, who told her what had

happened, that Tony had raped her (32/3950-51, 3954-55,3959-60). Linda went to Tony's mother's house, and when she told them what happened, they threatened her and called her a liar. Linda called the police, who came and interviewed Paula and Rob. Tony was prosecuted, and four year old Paula and five year old Rob testified in court (32/3960-62). Linda was present in the courtroom, but because she was on drugs so heavy, she never found out the outcome of the trial (32/3962).

Linda and her children moved back to her mother's house in her hometown of Springfield, Missouri, so "we could start all over again and put everything behind us" (32/3962-64). Unfortunately, not everything was put in the past:

> At that time I was just wild. I had a built-in baby-sitter; so I just went wild on drugs, heavier drugs. I got introduced to different other things.

(32/3964).

These other things included marijuana, mescaline, and acid. She habitually stayed out half the night and slept all day (32/3964-65). Soon she met a man named Wesley Scott, known as Santee, who became her boyfriend as well as her pimp (32/3965,3967).

When they first started seeing each other, Santee was nice to her. Santee got put out of wherever he was living, so he and Linda and her children got a small house and moved in together. Then Santee became very violent. Linda didn't know at first how he made his living, until he put her on the street. He convinced her they could make a lot of

money and have a better life. He would send her to Elks conventions and places where businessmen were in town and wanted a black woman. Santee would take all the money and never give her any of it. Eventually she tired of this and started hiding some of the money, or giving it to her son Rob to hide. This only resulted in Santee beating her because she didn't have as much money as he expected (32/3966-69). The beatings became an everyday occurrence. Santee would use his hands or a coat hanger; and he sometimes made the children watch, saying he was going to show them how to mind. The kids would try ineffectually to help their mother. One time when the three kids jumped on him, he kicked the two little girls off his legs, picked up Rob and threw him against the wall, and continued beating Linda (32/3969-70, 3976). Rob would always try to come to her aid when she was being hurt by Santee, but he was just a little boy and there wasn't much he could do about it (32/3970).

In addition to pimping, Santee also dealt and used drugs (32/ 3972,4000-01). He was a heroin user, and he convinced Linda to try shooting up at least one time to see how it would feel. It made her deathly sick (32/4000-01). One day Santee told Linda he'd made a big sale and he had to go out to California right away. The next morning some big white men with guns surrounded the house. They were looking for Santee because he had sold them baking soda instead of the drug they had paid for. They searched all the rooms and closets, as Linda

and her three kids watched. When Linda told the men Santee had gone to California, one of the men said they would be watching her, and they would kill him if he came back (32/ 3972).

After Santee's departure, things improved for a while. Linda got her nursing certificate, learned how to drive, and got a small car. She and her kids moved into a low-income apartment complex. She had eased off the hard drugs, although she was still using marijuana and drinking alcohol (32/3974,3978-81).

After a couple of years there, she moved in with a man named David Barker. David liked her kids and he was a good provider, but he chased other women. After learning of one cheating incident, Linda took a gun and went to the other woman's house looking for David; they wouldn't let her in so she shot through the door. This resulted in another ten day jail stay for Linda, followed by three years probation, and it ended her relationship with David Barker (32/3981-84,3986-88).

Rob was about eleven years old at this time (32/3987-88). He had problems learning in school and he was put in special education (32/4002-03,4023). When Rob was younger he would steal to buy candy for himself and his sisters. There were times when the family had no food or money. Rob "would go to the store, and he would come back with hamburger and chicken or whatever he could put in his pants. And I would cook it" (32/4003-04). Rob was fascinated with bicycles, but they could never afford them. One time Linda found a bunch of bicycles

and bicycle parts under the crawlspace of their house, where Rob had put them (32/3989-90). Once when they had no money during the holiday season, Linda and another person were on a shoplifting spree; "we had done hit a lot of stores" (32/4004). Rob, then about 13, was with them, and somebody saw him put an outfit down his pants. The officer who arrested them had gone to school with Linda, so they didn't have to go to court; she promised that it wouldn't happen again (32/4004-05, 4022).

Around the same time, Rob started having stomach problems and had to go to the hospital. The diagnosis was an acute duodenal ulcer. The doctor said she had never seen an ulcer like that on a thirteen year old kid, and she asked Linda what was going on in his life that he would have an ulcer. Linda was afraid to tell her about the stealing or to tell her about anything, so she said she didn't know. The doctor prescribed medication and urged Linda to help Rob avoid stressful or upsetting situations (32/4011-18).

The ulcer, however, kept getting worse, and Rob was admitted to the hospital for a second time early the next year. The doctor was concerned about whether he was taking his medication regularly (32/4117-20).

Linda testified that despite the circumstances in which her son Rob was raised, and despite the fact that he had very little contact with his own father until he was in high school (32/4021, 4024-25), he

maintained close ties with his family. He had a very good relationship with his grandmother, who lived to be 98 but had lost her eyesight. Rob would make sure she got to church and back, he would go to the store and get her whatever she needed, and help her with the laundry (32/4027-28,4032). A few years after Rob graduated from high school, his daughter Janisha was born. He was a very protective and loving father (32/4027,4029,4031-32). He also continued to be protective of his mother. When Linda's last long-term boyfriend (and father of her youngest child Charles Jr.) became an alcoholic, started using massive amounts of crack cocaine, and began getting in Linda's face threatening to rearrange it with his fists, it was Rob -- then incarcerated in Missouri -- who gave her the encouragement to leave the relationship, even though it meant her leaving the state. Linda didn't want to leave Rob, but he said he couldn't do his time in peace knowing she was being abused. Linda felt she would never get out of Springfield alive if word that she was leaving got back to Charlie, so she slipped out of town surreptitiously with her young child. She went to Los Angeles where her daughter Paula was living; the only person in Missouri who knew where she had gone was Rob (32/4032-39).

In the time since Rob has been in jail in Florida, he has stayed in touch whenever he can. He tries to keep them all together as a family. Linda testified:

> . . . [S]ometimes he will write me and send me a verse or two to look up to get me back on

> track. He knows I'm struggling really hard. . . . I don't do drugs. I have a good job. I work with good people. But its a struggle because I'm alone, mentally alone. So he helps me through that a lot, just to hear him talk to me sometimes.

(32/4039-40).

The middle sister, Paula, currently works as a counselor with Eckerd's Youth Development Center, a program for juveniles convicted of serious crimes, in Okeechobee, Florida (32/4070-72). She testified that when she and her brother Robert were growing up, ten months apart in age, they thought of themselves as twins. Rob "was my protector. He is my protector" (32/4073). She remembered when she and her brother and sister were placed in foster care. Robert wanted them to be together, and he couldn't understand why they were separated. After they would have visits, when it was time to go back to their respective residences, all three would start crying (32/4074-77).

After they were returned to their mother, when Paula was three or four (and Rob a year older), a man raped her in the bathroom. Paula remembered calling to her brother for help, and Robert banging on the door trying to get in. When it was over, Robert was very upset about not being able to protect his sister (32/4078-79).After they had moved back to Missouri, their mother was using drugs and living with Santee. Santee beat their mother all the time, and he would make the children watch. Sometimes he would beat her so bad that she would pretend to be unconscious. Santee especially hated the two brighter-

skinned children, Robert and Paula. (He favored Sharon, who had the same complexion as himself). He would beat Robert. One time Santee pointed a gun to their mother's head and said he was going to kill her and the children too (32/4080-83,4086).

The children rarely saw their father (32/4083-84). There was an older neighbor, Mr. Hill, who lived behind their grandmother. Mr. Hill was like a grandfather or a mentor to Robert; they always talked about everything and they respected each other (32/4084-85). Robert always had stomach problems. At first they thought he had worms and they gave him worm pills. Eventually he was diagnosed as having an ulcer (32/4086-87).

Paula testified that her brother Robert "has always been there for me." When they were children, their mother was never around very much, and it was Robert who always took care of everything. It was he who made sure they were fed and got them ready for school (32/4087-90). Now that they are grown, Paula's daughter Tamecia is Robert's only niece. He has been there for Tamecia as a father figure, because she doesn't have much of a relationship with her own father (32/4088).

The youngest sister, Sharon, remembered Santee beating their mother, and she recalled one specific instance when he beat her with a wire hanger, in front of the children. Another time Santee threatened their mother with a sharp knife. Sharon recalled that her mom was naked and crying. Sharon took her by the hand and led her into the

bedroom "[a]nd I put her in the bed with me" and pulled a sheet over her (32/4101-03). The three children talked about what they could do to protect their mother from Santee. They were going to boil a pot of water and pour it on him, but it never happened (32/4103). Sharon did not know why, but she was aware that Santee did not treat her as badly as he treated Robert and Paula (32/4103-04).

Sharon testified that their mother used to smoke marijuana in front of the children. When there were still in elementary school, she offered them marijuana, on the theory that she'd rather have them smoking with her than with someone else. Sharon recalled all three kids smoking marijuana with their mom (32/4104-05). She did not have a memory of her mother drinking; only that she would go out with a girlfriend and when she came back home she was drunk (32/4105).

Sharon testified that her brother Robert had a very good relationship with his grandmother and with the neighbor Mr. Hill. Robert would willingly do chores for them and help them with whatever they needed (32/4105-06).

As a child, Robert would steal bikes. He was very good with his hands, so he liked to fix the bikes and then sell them or give them to someone. When they were growing up, they never really understood that stealing was wrong. It was hard not being able to have things other kids had, and their mother never told them it was wrong to steal.

Sharon acknowledged that she too would steal things back then (32/4106-07).

Robert's childhood friend Tony Page grew up with him. Their mothers and their siblings were also close, just like blood family (32/4109-12). Robert's mother Linda was kind of wild. She would drink and use drugs in front of her own children and also in front of Tony and his siblings. Linda also had a pattern of involvement with abusive boyfriends; it seemed to happen over and over. Tony was aware of what Robert and his sisters were experiencing with Santee. Whenever a male was abusing his mother, Robert was "someone that stood in between it" (32/4113-17). In their families, the parent/child roles were inverted; the children "more or less watched out for our parents" and attended to their needs; "[i]t's just that simple" (32/4115). Tony observed that Robert's protectiveness toward his mother was natural because he was the only male child (32/4116-17).

After a while, it became really obvious to Tony that Robert had started using marijuana and liquor. That stuff was readily available to Robert in his house, so it was easy for him to start. Later, Tony became aware that Robert was using other drugs as well (32/4117-18).

Mandy Candie is a lifelong friend of Robert's mother Linda; they grew up together like sisters in Springfield (33/4174-76). However, when Linda returned from California with her three small children, Mandy didn't even recognize her. Linda, who had always been a bit

hefty, now looked like an Ethiopian person or someone with Aids. In addition to being bone thin, she had very little hair and no top teeth. It was obvious to Mandy that she was using drugs (33/4179-80,4184-86,4194). The children appeared sad (33/ 4180).

When Linda became involved with Santee, the children were "scared to death". Santee was dominating and mean, and Mandy saw him hit Linda many times. Santee would allow Linda to associate with Mandy only if she would agree to try to talk Mandy into being a prostitute for him. When Linda was unable to persuade her friend, Santee would become angry and knock Linda to the ground. This scenario occurred repeatedly (33/4181-82).

Santee also threatened the children, and "they were really petrified of him." Nevertheless, Robert always tried to protect his mother when Santee beat her (33/4182).

Linda was on drugs, and she was usually in bed in the morning, while Robert got his sisters ready for school. It was Robert's role to take care of the family. He always seemed upset, and he reminded Mandy of a sheepdog trying to get the sheep to safety (33/ 4186,4191-92).

Linda would give marijuana to her own children, and on one occasion she angered her friend by blowing marijuana smoke in Mandy's kids' faces, trying to make them go to sleep before the baby-sitter arrived (33/4191,4195-96). Linda also encouraged her children to steal. Once, when Linda and Mandy had jobs in a rest home, they went

into a store which sold uniforms. Robert, then nine or ten years old, was with his mother. Mandy heard Robert whining, and saw Linda putting stuff under his shirt. Linda said to her son, "You steal for yourself; now steal for me." Outside the store, Mandy chastised her friend for encouraging such a "little bitty fella" to shoplift (33/4187-88).

Mandy didn't appreciate the way Linda's lifestyle was affecting her children. She started hearing people say "that not only did Santee have Linda doing things, he was having -- taking the kids and they were performing acts on people." Mandy became so concerned that she called the family service agency three or four times, but they never did anything, saying they needed to have more complaints (33/4188-89).

In Mandy's observation, Linda was stuck in a pattern where she would let men get power over her and abuse her; Santee was merely the worst in a series. During her relationships with David Barker, Charlie Blakey, and her first boyfriend Kenneth, Mandy would see her with bruises or a black eye or a swollen lip; Linda would initially explain that she walked into a door or a light fixture fell on her face, then weeks or months later confide that her boyfriend hit her. Mandy attributed her friend's passivity to the drugs (33/4189-91).

Another close family friend, Dorothy Tracy, first encountered Linda under inauspicious circumstances. Around midnight on a cold, icy, snowy night in late 1972, Dorothy heard some noise outside followed by a loud thump. She went to the door and saw some kids

trying to maneuver an adult woman through the snow. They had picked her up and dropped her. Dorothy mentioned this to her boyfriend Lloyd, who explained that it was just his half-sister; she was drunk and her kids were trying to get her home. Lloyd was not inclined to help, as there was no great love between them. The kids were small. Sharon was crying, and Robert and Paula were really struggling. It took about an hour before they finally got their mother up enough to where they could drag her on home (33/ 4197-4200).

In time, Linda's kids became friends with Dorothy's kids, and then Linda and Dorothy became friends (33/4200-01). One time Linda's boyfriend Santee came in drunk and became enraged because dinner wasn't ready, and he commenced beating on Linda. She yelled for the kids to run, but they all jumped on Santee, who just continued beating Linda. Dorothy couldn't intervene because she was pregnant (33/4201-03).

Robert, as the oldest child, felt like he had to be the man of the house and hold things together for his mother and sisters. He lived with this for years. When Linda was on drugs and there was no food in the house, Robert would go out and steal to get food for himself and his sisters (33/4203-04).

Donna Lewis is a teacher of special needs students in Springfield, Missouri (32/4128-29). She first came in contact with Robert Morris and his family in 1972 through playing softball with Robert's mother Linda. Linda often failed to show up for games because of substance

abuse or other types of abuse. She was showing obvious effects of using drugs or drinking too much, and when she did make it to the game it affected her play. They couldn't afford to have a catcher who couldn't catch the ball, so Linda was replaced (32/4132-35).

Ms. Lewis was aware of Linda's string of abusive boyfriends, including Santee. Robert always tried to protect his mother and sisters at all costs, although he wasn't always able to do so. He was more concerned for his family than himself. Ms. Lewis became concerned for Robert's safety because he wasn't very bit. She told him "these guys are awfully big . . . [a]nd you're going to get yourself hurt if you continue this" (32/4135; 33/4145-48). Ms. Lewis was also aware that Robert had the responsibility of taking care of his younger sisters, including such tasks as providing food, cooking, and doing the laundry (32/4135-36; 33/4141,4148).

In her capacity as a special needs teacher, Ms. Lewis had Robert in her class for three years in high school, and he was also on a Special Olympics basketball team she coached (32/4137-38; 33/4141,4147). She already knew him through her acquaintance with Linda, and through her substitute teaching in the earlier grades (32/4136; 33/4140-41). Ms. Lewis's classes combined several categories of special needs students: educable mentally retarded [EMR], learning disabled [LR], behavior disorders, and orthopedically handicapped (33/4142). Robert's earliest testing showed very low reading and math

levels, and he had been in the EMR program all through elementary and middle school, before he was in Ms. Lewis' class in high school (33/4144-45). Robert was a well-mannered, well-behaved student (this was a prerequisite for the Special Olympics team, which Robert was on for all four years). He tried very hard in his schoolwork and began to make some real strides (33/4141,4146-47).

Constance Hobson is the mother of Robert's daughter, Janisha (33/4217-19). Constance has known Robert for twenty years, since she was thirteen. She began dating him four years later, beginning with her prom night when she was a high school senior (33/4217, 4230-31). Robert was spending the winters in California and returning to Springfield for the summertime. He was in California when Constance found out she was pregnant (33/4217-18,4231).

After Janisha was born in 1984. Robert and Constance lived together with the baby for about three years. Robert fully participated in taking care of Janisha; "[h]e did everything" that dads do. Before Janisha, Robert was always with his friends. Once she was born, Janisha became his number one priority, and he was always around. Wherever he went, the baby went. The only thing they ever argued about was who was going to take Janisha with them when they left the house (33/4219-21,4230).

Around 1987, Constance began to notice a change in Robert. He started coming home late and not talking to her. They began to argue

(33/4223). At first Constance thought it was another woman, but then she found out it was drugs, specifically cocaine (33/4223-24). When she saw him with the pipe, she confronted him, they argued, and he told her he was using drugs (33/4233,4237-38).

This caused them to break up; Constance moved back home with her mother and Robert moved back to California. He returned a year later and they tried unsuccessfully to work it out. Constance believed he was still on drugs and she didn't want Janisha around him for that reason (33/4224).

A couple of years later, Constance became aware that Robert had been arrested and gone to prison. Constance married someone else. Robert stayed in touch with Janisha after he and Constance broke up, and even while he was incarcerated (33/4224-26). When he was released, Robert used to pick Janisha up and spend the weekend with her (33/4225-26).

Robert eventually moved to Florida, and he asked Constance (who was by now divorced) to come down and try to reconcile. He wanted to spend more time with his daughter, and for them to be a family again. Constance decided to give it a chance, but she left after a month because they weren't getting along. In March 1994, she moved back to Springfield with Janisha, but they continued to stay in touch with him (33/4226-27,4335-36).

After Robert's arrest in this case, his relationship with Janisha has remained close, through visits, phone calls, and letters. Robert has remained a big part of Constance's life as well. When Constance and Janisha (now a teenager) had problems or disagreements, each would write to Robert, who would write back and try to keep them happy with each other. Janisha gets sad because her dad isn't there for her school events. The two of them have a bond between them, and a lot of things in common. They write poetry and draw pictures and exchange them in their letters (33/4228-29). Constance believes that Janisha is still the number one priority in Robert's life, and it will be important for her to continue to have this relationship with her father (33/4329-30).

Janisha, age 14 and in the ninth grade, testified that she stays in touch with her dad on the phone and through their letters, poems, and drawings. He encourages her to take care of her mom and to do well in school. Her communications with her dad are important to her, and something would be missing from her life if they didn't continue (33/4240-45).

Robert's nineteen year old niece Tamecia (Paula's daughter), who is in the U.S. Army, also testified. Tamecia doesn't have a close relationship with her own father. Her uncle Robert has been her father, friend, and confidant. She described him as the backbone of the family, the one who tries to keep all of them together. Even while

in jail, he puts aside his own needs and thinks of his family first. He stays in contact through calls and letters, and it is important to the family members that he continue to do that while incarcerated (33/4209-13).

The last defense witness was Dr. Henry Dee, a clinical psychologist and neuropsychologist who evaluated Robert Morris (33/4290-95). Dr. Dee met with Robert on about eight different occasions, for 1-4 hours each. He reviewed school and medical records, and spoke with Robert's mother, both sisters, his daughter, and family friends Mandy Candie and Dorothy Tracy (33/4296-99; 34/4375-78).

Dr. Dee categorized Robert's intelligence level as borderline to dull normal. His IQ test scores, over the years he was in school, fall in the vicinity of 76 to 82 (33/4306-07). "[I]n the school system frequently this is seen as EMR, educable mentally retarded, special education, various names put on that" (33/4307). On the Wechsler intelligence scale administered by Dr. Dee, Robert scored in the bottom thirteen percent (33/4301-05).

School records indicated that Robert had learning disabilities as a child. He was unable to sit still very long, he could not process information, had absolutely no concept of math, and was going to have a very difficult time doing second grade work. It was then he was placed in the EMR program (33/4309). Dr. Dee was of the opinion that Robert had undiagnosed ADHD (attention deficit hyperactivity disorder),

a condition which was not commonly identified in the 1960s and early 1970s (33/4309-10; 34/4333). Robert was in EMR classes throughout all of his school years, and although he tried hard, he consistently functioned below grade level (33/ 4310-11; 34/4334,4383-84,4388).

Dr. Dee testified that Robert "witnessed and experienced a great deal of abuse as a child, abuse of himself, abuse of his sisters, abuse of his mother in some very savage ways" (33/4314). His father was never really available, and his mother -- who during a significant portion of his childhood was a drug addict and a prostitute -- lived with a series of abusive men (34/4315; 34/ 4330,4401). As a young child, after he was returned to her from foster care, Robert began stealing food and other items as a method for securing his mother's approval (33/4315,4327; 34/4400). Although he minimized his own experiences, his sisters reported that Robert was beaten regularly by Santee and others in the house (33/4316; 34/4431-33). He also tried to protect his sister Paula from sexual abuse (33/4315-17).

Regarding the impact of Robert's stint in foster care, Dr. Dee explained that it is terrifying for a young child to be taken away from his parents, and to not know when or if they will be reunited. This is especially true when the child has only one parent. Even though the parent has been inadequate and has failed to provide for the child's physical and emotional needs, the child feels such a strong attachment that when he is taken away he feels totally helpless (33/4220-23). It

is also a sad fact that kids in foster homes are often not particularly well cared for, and Robert remembered neglect and abuse (33/4221).

A male child who witnesses substantial abuse of a parent, especially in a poverty stricken home, may develop a kind of pseudo-maturity and take on a protective role; actually an inappropriate parental role (33/4317). This, Dr. Dee explained, was the case with Robert. He became "[t]he one that provides things", and the one who cared for his mother and his sisters in the way you would expect a father to (33/4317-18). Asked why this is pseudo- maturity and not real maturity, Dr. Dee answered:

> Well, you can't expect a seven to ten year old child to solve the problems of adulthood, and they really can't. Their solution is a very short term solution like a child jumping on an adult male to protect his sister from sexual abuse. It's really not mature and it's kind of silly in some ways because the child can't do anything to effectively protect the sister, but he's trying.

(33/4318).

Where, as in Robert's case, the mother is so inadequate and so frequently impaired by drugs, the child typically develops a sense of shame and embarrassment, which often leads to social isolation (33/4318-19).

Medical records documented that Robert was diagnosed with an ulcer at age thirteen, and in Dr. Dee's opinion that condition must have been developing for years before that (34/4334-36).

Dr. Dee testified that when a child sees drug abuse by his mother during his formative years, the predictable result is that the child will turn to the same solution when under stress as an adolescent or young adult (33/4323-27). Robert could not remember a time when he didn't smoke marijuana, even as a very young child. It was around. He would pick it up and use it (34/4329). He found himself becoming an alcoholic in high school, until the ulcer forced him to give it up (33/4326). He then turned to a variety of controlled substances including marijuana, powdered cocaine, freebase, and later rock cocaine (33/4326-27). The Missouri PSI indicated that at the time of the two purse snatching incidents which resulted in convictions for second degree robbery, Robert Morris was a drug addict who was motivated by his need for money to feed his habit (34/4390-94).

Finally, Dr. Dee testified that Robert's very close relationship with most of his family members is almost unique among capital defendants. He has acted as a father to his daughter and as a father figure to his niece in a very responsible way; "[a]nd honestly I almost never see that in a situation like this" (34/ 4338-39; see 34/4405-06,4410-12,4435-36). Dr. Dee believes that Robert would continue these emotionally nurturing relationships if incarcerated, as he has done for the past four years (34/4339).

Dr. Dee was recalled by the defense during the Spencer hearing before Judge Young. He testified that he administered a series of

psychological and neuropsychological tests to Robert Morris, over a total of twelve hours in several sittings (9/1647-51). On the tests which were designed as indicia of frontal lobe brain damage, Robert was grossly defective (9/1654-59). Dr. Dee found evidence of both diffuse frontal lobe damage (which is associated with increased impulsivity and an inability to control one's behavior) and basal injuries impairing memory functioning; his diagnosis was chronic brain syndrome with mixed features (9/1658-63,1666-68). Brain damage can have many causative or contributing factors, including traumatic head injury, malnourishment, congenital injury, or drug abuse (10/1707-09). Robert fell out of a tree at a young age and was knocked unconscious; he was also accidentally hit in the head with the blunt end of a hatchet and was severely dazed (9/1663-64; 10/1701-04). "[I]n addition in Mr. Morris' case we have years of extensive drug abuse, which can certainly cause all kinds of damage, specific damage to the cerebrum" (9/1664-65).

Asked how drug abuse interacts with brain damage, Dr. Dee replied, "It exacerbates it terribly" (10/1691). "It further impairs your functioning beyond that of a normal individual who isn't brain damaged and further damages your brain at the same time" (10/1691-92). Dr. Dee was aware of Robert's history of drug addiction and dependence, particularly cocaine (10/1684).

> And each time he has been in serious trouble in his life it's been when he's taking drugs. It further destroys his self-control, which I think at other times he's really surprisingly good

> given the personality profile he has. And when he's intoxicated or dependent on drugs, or any one of those cycles in which he's using it more heavily, I think his behavioral control becomes just totally infected -- the combination of those things.

(10/1684).

The results of the MMPI (a grossly elevated score on the scale measuring drug or alcohol addiction), as well as the Missouri pre-sentence investigation and Dr. Dee's interviews with family members, all confirmed Robert's chronic problem with drug abuse (10/ 1683-85, 1690-91).

Dr. Dee testified that in his opinion, Robert's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was, at the time of the offense, substantially impaired (10/1692-94).

SUMMARY OF THE ARGUMENT

The trial court committed harmful error in excluding the proffered testimony of defense witness Toni Maloney, which was relevant and crucial to dispel the impression -- deliberately created by the prosecutor during his cross-examination of a reluctant defense witness named Sherry Laventure -- that the defense (through Ms. Maloney) had improperly tried to influence Ms. Laventure's testimony. The prejudicial effect of the error was compounded by the prosecutor's prominent use of Ms. Laventure's testimony (which the defense was prevented from effectively countering) in his closing argument [Issue I].

A new trial is also necessitated by the improper contacts which occurred, apparently throughout the trial, between members of the jury and a woman (Mrs. Sanders) who was originally selected to be on the jury but was removed by backstrike just prior to the commencement of the trial. Mrs. Sanders attended the trial as a spectator and was privy to a great deal of prejudicial information which the judge and counsel were carefully trying to keep from the jury. In circumstances like these, the potential prejudice from improper juror contact can be so great that a new trial may be required as a matter of public policy to maintain confidence in the integrity of jury trials. In a case where the defendant's life is at stake, the integrity of the trial, and the importance of guarding the jury from outside influence, are all the more sacrosanct [Issue II]].

The death sentence in this case fails to meet the second prong of the proportionality standard. Far from being one of the least mitigated of first degree murders, the evidence established (and

the trial court found) substantial and compelling mitigation, including the impaired capacity statutory mental mitigator; frontal lobe brain damage affecting appellant's impulse control and memory functioning; borderline intelligence and learning disabilities; an emotionally devastating and nightmarish childhood; and (both despite and because of his childhood experiences) his unusually close and responsible relationships with the members of his family. Under Florida law, a sentence of life imprisonment without possibility of parole is the appropriate penalty [Issue III].

Still another important mitigating circumstance was not found by the trial court, but under the law it should have been. The judge correctly recognized that appellant's history of alcohol and drug abuse was "established and uncontroverted", but then erroneously concluded that the fact "[t]hat the defendant used drugs in the past <u>is not mitigating</u>." That conclusion is flat wrong, and contrary to the established caselaw. See e.g. <u>Mahn v. State</u>, 714 So. 2d 391, 400-01 (Fla. 1998). As stated in <u>Blanco v. State</u>, 706 So. 2d 7, 10 (Fla. 1997), whether a particular circumstance is mitigating in nature is a question of law, subject to <u>de</u> <u>novo</u> review on appeal. In this case, appellant's drug abuse began in early childhood when his mother (a drug addict herself) smoked marijuana with her kids, and left it lying

around the house for him to pick up and use. He progressed from marijuana and alcohol to powder cocaine, to freebase, and to crack cocaine. It wrecked his relationship with Constance (the mother of his child) and it landed him in prison in Missouri (his prior purse snatching offenses). According to Dr. Dee, the drug abuse exacerbates terribly the effects of appellant's frontal lobe brain damage, both by increas-

ing the extent of the brain damage itself, and by totally infecting his behavioral control. Regarding appellant's history of drug addiction and dependence, especially to cocaine, Dr. Dee noted that every time he had been in serious trouble in his life it's been when he's taking drugs. In light of this evidence, recognized by the trial judge as established and uncontroverted, his error of law in finding it not to be mitigating cannot be deemed harmless [Issue IV].

Finally, the trial court erred in refusing to give the defense's requested jury instruction on nonstatutory mitigating circumstances. The prosecutor's own argument to the trial court in opposition to the requested instruction amply demonstrates why it should have been given. The prosecutor did not contend that the proffered nonstatutory factors weren't recognized mitigators, nor did he argue that they lacked evidentiary support. Rather, he repeatedly complained that, while the defense was free to <u>argue</u> the nonstatutory mitigators to the jury, an instruction from the court would "legitimize" those mitigators. <u>That is exactly the point</u>. Just as the jury is entitled to clear and

specific instructions on the aggravating factors, there is no reason why they shouldn't receive clear and specific instructions on the nonstatutory mitigating factors. The "catchall" instruction does not solve the problem. If it did, the judge (who has knowledge of the law and mandatory education in capital sentencing) would not have found that appellant's history of drug abuse was not mitigating. Who can say that, under the vague and circular catchall instruction, the jury-- or individual jurors -- did not make the same mistake of law, either as to that mitigator or any of the others? The point is,

the jury should not be making mistakes of law, because they should not be deciding issues of law. The jury's role is to resolve issues of fact, and to apply the law as instructed by the court. This Court should reconsider its prior decisions on this issue, and reverse for a new penalty trial [Issue V].

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF DEFENSE WITNESS TONI MALONEY.

In his opening statement, defense counsel told the jury:

> Is there other evidence, is there other materials to support the argument that Robert Morris is not the person who went inside that apartment? Indeed there is. You will hear that shortly before, just a couple of days before September the 2d of 1994, a family moved into the Raintree subdivision. The Raintree subdivision is one of these individual houses on zero lot lines, basically, immediately to the south of Martin's Landing apartment complex. Because of where Mrs. Livingston's apartment was, it's literally just yards from her back kitchen window area to the first house there in Raintree Village. One day, September 1st, the day before Mrs. Livingston's body was discovered, the wife and mother who had just moved into that house was getting ready to pick her children up from school, three o'clock, something like that, in the afternoon, and she had occasion to look over at Martin's Landing because she saw someone walking all around Mrs. Livingston's apartment, looking at the windows, looking at the doors. She didn't know the neighbor. She had just been there. She didn't know who was living there. And her reaction was this is someone who has locked themselves out trying to find a way in. <u>She will explain to you that the person she saw that afternoon scoping the place out, looking it over, was definitely not a black man, could not have been Robert Morris.</u>
>
> Is there some evidence to support the State's theory that Robert Morris committed these crimes? Sure. I'd by lying to you if I told you there wasn't. Is there some evidence to support the theory that I put forth, that someone else committed these crimes? Sure, there is.

(20/1710-12)

A week later, when it was the defense's turn to present its case, Sherry Laventure was called to the stand. In August 1994, she and her family moved into a house on Raintree Court, right beside the Martin's Landing apartment complex. Hers was the closest house to the first building of the complex, directly behind the unit occupied by Violet Livingston (whom Ms. Laventure did not know) (27/3036-37; see 25/2644-45). Ms. Laventure recalled that on September 2, 1994, there was a great deal of police activity at Martin's Landing (27/2028). The afternoon before that, September 1, around 2:00 or 2:30 p.m., while Ms. Laventure was going to her mailbox, she noticed someone at the first apartment in the first building who looked like he was locked out of his apartment (27/ 3038-39,3051). It "looked like he was trying to figure out how he could get into the sliding glass door, like he had lost his key" (27/3039). Asked to described this person, Ms. Laventure said he was male, but she didn't really see his face, and couldn't identify him (27/3040). Defense counsel asked:

> What was it that you did notice about the person?
>
> MS. LAVENTURE: <u>That he wasn't white.</u>
>
> MR. DIMMIG [defense counsel]: Okay. What nationality did he appear to be?
>
> MS. LAVENTURE: I don't know.
>
> MR. HARB [prosecutor]: I'm sorry. I was unable to hear the response.
>
> MS. LAVENTURE: I don't know. You know, I can't say. It was four and a half years ago. I have no idea.

> MR. DIMMIG: Okay. Do you recall talking to me about the identification and description to this person before?
>
> MS. LAVENTURE: I talked to a few people.
>
> MR. DIMMIG: Okay. On the phone?
>
> MS. LAVENTURE: Uh-huh.
>
> MR. DIMMIG: Late 1997, something like that?
>
> (Witness nodding head).

(27/3040-41)

Defense counsel asked Ms. Laventure if she recalled having a telephone conversation with him in October, 1997 in which she had indicated that the person she saw did not appear to be either Caucasian or African-American, but appeared to be from Puerto Rico or the Islands (27/3043-44). Ms. Laventure replied, <u>"All I know is that he wasn't white"</u> (27/3044). She did not recall whether or not she had a phone conversation with Mr. Dimmig in October, 1997 (27/3044).

The day after the crime, when the police activity was occurring at Martin's Landing, Ms. Laventure saw a group of people, some of whom were in uniform. She went over and told them what she'd seen the afternoon before, about the man who looked like he was locked out of his apartment (27/3044-47). Afterward some people called and came to talk to her, but she didn't remember who they were (27/3045). Ms. Laventure denied being reluctant to be in court testifying (27/3045-46).

On cross-examination, the following occurred:

> MR. HARB [prosecutor]: <u>Were you ever interviewed by anybody from the public defender's office other than over the phone?</u>

MS. LAVENTURE: No.

MR. HARB: Did anybody ever come to your house from the Public Defender's office and talk to you about that?

MS. LAVENTURE: No.

Q. Do you remember speaking to an investigator that had a beard?

A. Yes, yes.

Q. Do you remember his name?

A. No.

Q. Do you remember who he worked for?

A. It was -- I think it was the public defender.

Q. Did you talk to him in person?

A. Yes.

Q. How many times?

A. That I can recall, a couple times.

Q. Did he tape record your statement?

A. No.

Q. Did you give him a handwritten statement?

A. No.

Q. Did you tell that person that the person you saw was not white?

A. Yes, I told him he was not white.

Q. What about the color of the skin? Obviously, you saw something enough to tell you that this person was not white. What color was the skin of that person?

A. It was dark. He wasn't white, that I know.

Q. Was it light black skin?

A. Yes.

Q. What about the age group, can you put an age with the person?

A. Thirty-five, 40 years old.

Q. Between 35 and 40?

A. Uh-huh.

Q. How about the height?

A. I'm not sure. He looked like a medium build, that I can recall. I wasn't out that day trying to figure out what this person looked like.

Q. Yes ma'am. We understand. Let me ask you specifically about the height. Could you give a height estimate?

A. (No response.)

Q. If you can't, we understand, ma'am.

A. Maybe 5'8", 5"9".

Q. Medium build?

A. Yeah.

Q. Not white?

A. No.

Q. When you talked to the detectives, was that on the same day when you saw that person by the sliding glass door?

A. You're talking about the gentleman with the beard?

Q. No. I'm sorry. Let me be more specific. Mr. Dimmig asked you the question about you talked to law enforcement officials and you said you talked to detectives because they had a uniform on.

> A. Uh-huh.
>
> Q. When did that happen? Was that --
>
> A. When I gave my statement or whatever was the day after I saw the person, when they were putting crime tape around the fence, and it was like a mid after -- mid morning.
>
> Q. Were you ever told by anyone that all you have to do is come to this courtroom and say that the person was not black?
>
> A. Yes.
>
> Q. Who made that statement to you, ma'am?
>
> A. The defense side.
>
> Q. Do you remember -- do you have a name with that person?
>
> A. I think it was Maloney. It was a lady.
>
> Q. A lady, last name Maloney?
>
> A. Uh-huh.
>
> Q. Would the name Toni Maloney ring any bells?
>
> A. Yes.
>
> MR. HARB: No further questions, Your Honor.

(27/3047-50)

After a couple of brief intervening witnesses, defense counsel told the judge his next witness was going to be Toni Maloney (27/3066):

> THE COURT: We could come back early if you want to think about it and the plan is to impeach your witness with prior inconsistent testimony?
>
> MR. DIMMIG: I plan to rebut her [Ms. Laventure's] statement that she was directed to say anything in particular in this courtroom.

> THE COURT: I don't know that that matters since she didn't say anything in this courtroom one way or the other, but I see your point, I suppose.
>
> MR. DIMMIG: She testified at the request of the prosecution that a representative of my office told her to come in here and say that the individual was not black. I intend to elicit testimony concerning that.

(27/3066-67)

After the lunch break, defense counsel expressed deep concern that, through the prosecutor's cross-examination of Ms. Laventure and through her answers, the integrity of the defense had been called into question before the jury (27/3073-76). Counsel suggested that in order to counter this implication, it might be necessary not only to present the testimony of Toni Maloney, but also that of both defense attorneys (Mr. Dimmig and Ms. Garrett). Counsel recognized that the rules regulating the Florida Bar strongly discourages an attorney in a case from becoming a witness for his client, but he pointed out that the set of circumstances which had just taken place could not have been anticipated (27/ 3073-74).

The trial court asked the prosecutor if the person with the beard whom he'd referred to was Mr. Dimmig. The prosecutor said it wasn't; he thought it was an investigator named Brad Barfield (27/ 3074, see 3047). Defense counsel argued that what had occurred "goes to the constitutional ramifications of [the] right to a fair trial" (27/3076):

> . . . [W]hat this witness has done is impugn the entire defense in this case, impugn the integrity of counsel in this particular case, and, you know, that cannot stand because it infringes upon Mr. Morris's right to a fair trial and his right to counsel. If there is an insinuation before

> the jury that counsel has engaged in improper conduct, that should not impugn Mr. Morris in any way or impact upon this jury's deliberations as it relates to his guilt or innocence, and at this point it's necessary to eradicate that particular inference.

(27/3075-76)

The trial court wondered aloud "why the State was trying to suggest that the witness's testimony that was favorable to the state was attempted to be changed unsuccessfully", and also "why the defense would put on a witness who gave testimony that was not favorable to their case" (27/3076). He asked the prosecutor what was the purpose of his question to the witness whether someone tried to get her to say something different than what she said in court (27/3078). The prosecutor answered:

> The defense, in their direct examination of Mrs. Laventure, they got into the -- there were suggestions that she made different statements.
>
> THE COURT: Yeah, and she said she didn't or didn't remember it.
>
> MR. HARB [prosecutor]: Well, exactly, that's what she said, that she didn't remember. Okay? And clearly, there was no report as to what interviews, if anything, she had given to the defense. And her response -- the question regarding statements or contacts she had with the defense was relevant to highlight whether she gave inconsistent statements before or not and explaining if she gave one.

(27/3078-79)

The judge asked defense counsel if he thought it was just a broad brush attack on the defense, and defense counsel replied that he did, and moved for a mistrial (17/3079). The prosecutor disagreed, saying:

> Your honor, parties' contact with jurors will be told, as the jury instruction says, that the fact that if an attorney talks to a witness or witness talking to the client, it is not for them to consider or hold it against the witness or the attorney. Okay? Clearly, the State questions within the boundaries of that instruction, legal questions and -- this whole thing was brought up by the direct examinations of this witness. I didn't call this witness. <u>They chose to call her and they got into the fact whether she gave inconsistent statements and that really explains that if she gave an inconsistent statement.</u> It's not a direct attack. It's a direct comment on her statement or statements.

(27/3079-80)

As the dispute continued, defense counsel brought up the possibility of a stipulation, and -- after a recess -- counsel stated to the trial court:

> Well, I think the State and I have drafted a stipulation. <u>The defense stands by its motion for mistrial.</u> If that is not favorably ruled upon, then I believe that we have some language of a stipulation <u>that addresses at least a part of the issue.</u>
>
> THE COURT: <u>The motion for mistrial is denied.</u>

(27/3083).

The trial court agreed to read to the jury the stipulation which said, "The parties stipulate and agree that no attorney representing the defendant, nor any representative of the public defender's office, has suggested or encouraged any witness to present false testimony" (27/3084; see 9/1520). Defense counsel renewed his request to call Toni Maloney as a witness, and the trial court denied the request (27/3084-85). Defense counsel subsequently proffered Ms. Maloney's

testimony, as well as the testimony of both defense attorneys (28/3200-01,3210-26). [In this Point on Appeal, appellant is challenging only the exclusion of Ms. Maloney's testimony].

Toni Maloney testified on proffer that, as an employee of the Tenth Circuit Public Defender's office, she attempted to serve a subpoena on Sherry Laventure at her home prior to the then-scheduled trial date of April 21, 1998 (28/3211-12). Ms. Laventure was very aggravated and she refused to sign the subpoena, so Ms. Maloney marked the date and time on it and returned the original (28/3212-14). Ms. Maloney did not attempt to conduct an interview, but Ms. Laventure, in her exasperation, started volunteering information (28/3213-14). She stated that on the day she saw the crime scene tape go up, she approached someone in law enforcement and said "that she saw a man milling about the apartment of Mrs. Livingston, he looked as though he had been locked out <u>and that he was definitely not a black man</u>" (28/3213-14). Ms. Laventure expected at that time that she would be interviewed, but she never was until someone from the defense spoke with her. Then nothing happened again, until Ms. Maloney showed up with a subpoena. Ms. Laventure "thought it was very unfair and she wanted nothing to do with it and she did not want to have to appear in court" (28/3214). Asked how she responded to Ms. Laventure's statements, Ms. Maloney testified:

> I responded to her that her responsibility as a witness was to appear in court and just tell what she saw or what she heard, whatever it was, just appear and tell the truth.

(28/3213, see 3217).

Asked whether, at any time during her contacts with Ms. Laventure, she ever advised her that all she had to do was come into court and testify that the person she saw at Martin's Landing was not black, Ms. Maloney answered, "No, I never told her what to say. I wouldn't do that" (28/3217).

In keeping with the trial court's ruling, Toni Maloney's testimony was not heard by the jury. Closing arguments were made the next day. The prosecutor, Mr. Harb, led off with a defense witness -- Sherry Laventure. He contended to the jury that the person Ms. Laventure saw outside Violet Livingston's apartment on the afternoon preceding the burglary and murder <u>was a black man; specifically appellant, Robert Morris</u>:

> His Honor told you that opening statements are not evidence, closing arguments are not evidence, but he told you to please listen carefully to openings and closings and we ask you to do the same thing. You need to reflect back to what was said in opening statements. One of the things that was said, that there is a witness who was moving into or recently moved into the Raintree apartments <u>that will say that the person that she saw out there on the 1st of September, 1994, between 2:00 and three o'clock in the afternoon was not black. Is that what she said? She said that person was not white.</u> Now, this is a prime example of what we tell you is not evidence. It's what comes out of the witness's mouth.
>
> The fact that an attorney asked a question such as when was the last time that you beat your child, that's not evidence. If the response is never, that is evidence. Do not let that confuse you. It will be a miscarriage of justice if you do not follow the law.

(28/3351-52).

. . .

> But Sherry Laventure told you -- I knew that was going to happen -- she told you that the person that she saw was about 35, 40. Well, the defendant was 32. She said he was medium built. The defendant is medium built. She said he was about 5'8", 5'9". He told you he was about 5'5". That's evidence.

(28/3353-54).

The defense was seriously harmed by the erroneous exclusion of Ms. Maloney's testimony. Under Florida's Evidence Code, relevant evidence is evidence tending to prove or disprove a material fact, and all relevant evidence is admissible, except as provided by law. Fla. Stat. §§90.401, 90.402. When the state, through its cross-examination of Sherry Laventure, called into question the integrity of the defense in the following manner:

> Q. Were you ever told by anyone that all you have to do is come to this courtroom and say that the person was not black?
>
> A. Yes.
>
> Q. Who made that statement to you, ma'am?
>
> A. The defense side.
>
> Q. Do you remember -- do you have a name with that person?
>
> A. I think it was Maloney. It was a lady.
> Q. A lady, last name Maloney?
>
> A. Uh-huh.
>
> Q. Would the name Toni Maloney ring any bells?
>
> A. Yes.

the testimony of Ms. Maloney became critically relevant to dispel the very damaging implications conveyed to the jury by the prosecutor and

Sherry Laventure. The stipulation was quite simply insufficient to cure all of the prejudicial effects of what had taken place. As a general principle of law, a party cannot be required to stipulate to a material fact; he is entitled to present his evidence in the manner he sees fit, and to have the trier of fact know the details of what occurred. Ehrhardt, Florida Evidence, §403.1, p. 155-56 and n.32 (2000 Ed.), citing 9 Wigmore, Evidence Sec. 2691 (3d Ed. 1940) for the proposition that a "colorless admission by the opponent may sometimes have the effect of depriving the party <u>of the legitimate moral force of his evidence</u> . . ." (emphasis in treatise).

In the instant case, the moral force of the evidence was especially crucial, because the defense had been accused in front of the jury of unethical conduct designed to mislead them. The impact of Toni Maloney's live testimony could not be equalled by a bland stipulation that no representative of the public defender's office had suggested or encouraged a witness to present false testimony. The jury had heard Sherry Laventure testify that the person she saw was <u>not white</u>, but that Toni Maloney of the defense side had told her that all she had to do was come into the courtroom and say that the person was <u>not black</u>. To effectively counter this attack on the integrity of the defense, appellant should have been permitted to let the jury hear from Ms. Maloney that Sherry Laventure was an angry and reluctant witness who had told her that the person she saw was <u>not black</u>, and that the only thing Ms. Maloney had said in reply was that Ms. Laventure's "responsibility as a witness was to appear in court and just tell what

she saw or what she heard, whatever it was, just appear and tell the truth."

Attacking the integrity of defense counsel is "an improper trial tactic which can poison the minds of the jury." Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984); see e.g., Brooks v. State, __ So. 2d __ (Fla. 2000) [25 FLW S417, 425]; Barnes v. State, 743 So. 2d 1105, 1106-07 (Fla. 4th DCA 1999); Fuller v. State, 540 So. 2d 182 (Fla. 5th DCA 1989); Redish v. State, 525 So. 2d 928, 931 (Fla. 1st DCA 1988); Jackson v. State, 421 So. 2d 15 (Fla. 3d DCA 1982). Here, by accusing Ms. Maloney -- an employee of the Public Defender's office acting on behalf of appellant's attorneys -- of trying to improperly influence a witness to testify favorably for appellant, the prosecutor and Ms. Laventure impugned the integrity of the entire defense. Short of granting a mistrial, the trial court should have at least let Ms. Maloney present her side of the encounter, so the jury could properly evaluate the demeanor and credibility of both witnesses, and decide who was being straight with them and who was not.

A secondary reason why the jury should have heard Ms. Maloney's testimony is so it could decide whether Sherry Laventure had stated during the investigation that the person she saw milling around Violet Livingston's apartment was not white (as she claimed at trial), or whether she had said that the person was not black (as she told Toni Maloney). This witness, called by the defense, gave testimony which

was both unexpected and affirmatively harmful to the defense, and which was directly contradictory to her pretrial statements.[10]

The exclusion of Tony Maloney's testimony was harmful, reversible error. The defense was made to look dishonest and unreliable in the jury's eyes, and any potential curative effect which the stipulation might have had was vitiated by the prosecutor's use of Ms. Laventure's testimony at the beginning of his closing argument,[11] where he reminded the jury that what defense counsel had told them in opening statements was the opposite of what the evidence had turned out to be, and then proceeded to argue that the non-white person Ms. Laventure saw milling around in the vicinity of the victim's sliding glass door was appellant.[12]

Because the integrity of the defense was unfairly compromised before the jury, and because of the way the prosecutor turned this

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[10] See e.g., Hamilton v. State, 703 So. 2d 1038, 1041-42 (Fla. 1997); Gudinas v. State, 693 So. 2d 953, 963-64 (Fla. 1997); Street v. State, 636 So. 2d 1297, 1302 n.6 (Fla. 1994); Simmons v. State, 722 So. 2d 862 (Fla. 5th DCA 1998); Collins v. State, 698 So. 2d 1337, 1339-40 (Fla. 1st DCA 1997), discussing Fla. Stat. §90.608(1).

[11] See Morton v. State, 689 So. 2d 259, 265 (Fla. 1997) ("The prosecutor's improper use of the impeachment testimony vitiated any potential curative effect that the trial court's limiting instructions may have had").

[12] In actuality, even apart from the racial description, it is highly unlikely that the person could have been appellant. Sherry Laventure observed the man between 2:00 and 2:30 in the afternoon; she was sure of the time because she was on her way to pick up her daughter at school (27/3039). Employment records from Taco Bell showed that appellant was at work that afternoon from 2:00 until 5:30 (27/3052-55). The prosecutor, through his cross-examination, questioned the accuracy of the work record (27/3057), and in his closing statement to the jury clearly suggested that the person Ms. Laventure saw was appellant (28/3053-54).

incident to his own advantage in closing argument,[13] the state cannot show beyond a reasonable doubt that the sequence of events involving Sherry Laventure's testimony, and the exclusion of Toni Maloney's contrary testimony, had no impact on the jury's deliberations or on the outcome of the trial.[14] It can reasonably be assumed that the prosecutor would not have used this tactic if he believed it would have no effect.[15] During its deliberations, the jury came back with several questions and requests for readbacks of testimony (9/1556-59; 29/3529-34,3536-49). The testimony of appellant was read back at the jury's request (9/1559; 29/3544-49). One of the jury's questions was written out in one handwriting, "Five unknown fingerprints, were they all from different people or the same person?", and in another handwriting, printed instead of cursive, "Were five unknown prints good enough to ID? Do they belong to the same person or all different?" (9/1557; 29/3537,3342).[16] These inquiries are a strong indication that some or all of the jurors were giving serious consideration to appellant's testimony and to the defense's position that someone else committed the

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[13] See Stoll v. State, __ So. 2d __ (Fla. 2000)[25 FLW S591, 593-94]; cf. Garcia v. State, 564 So. 2d 124, 128-29 (Fla. 1990).

[14] See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), and Goodwin v. State, 751 So. 2d 537 (Fla. 1999) (holding DiGuilio "harmless error" standard, under which the state must prove that there is no reasonable possibility that the error contributed to the conviction, applies to both constitutional and non-constitutional errors in a criminal case, and has not been abrogated by the enactment of §724.051 (7)).

[15] See State v. Gunn, 78 Fla. 599, 83 So. 511 (1919).

[16] The judge's reply to the fingerprint questions was that the jurors had heard all of the available evidence in the case, and they would just have to rely on their collective and individual recollections and decide the case solely upon the evidence or lack thereof (29/3542-43).

burglary and murder. This issue on appeal involves a witness, Sherry Laventure, who was called to support the defense's theory, but who ended up -- as a result of the erroneous exclusion of Toni Maloney's counter-testimony -- a key player on the state's side. The error was harmful, and appellant should receive a new trial.

ISSUE II

APPELLANT SHOULD RECEIVE A NEW TRIAL DUE TO THE IMPROPER CONTACTS BETWEEN MEMBERS OF THE JURY AN A BACKSTRUCK JUROR WHO ATTENDED THE TRIAL AS A SPECTATOR.

The right of a defendant to have the jury determine his guilt or innocence free from any outside or improper influences "is a paramount right which must be closely guarded." Durano v. State, 262 So. 2d 733, 734 (Fla. 3d DCA 1972); see Livingston v. State, 458 So. 2d 235, 237 (Fla. 1984); Meixelsperger v. State, 423 So. 2d 416 (Fla. 2d DCA 1982). Safeguarding the right to be tried by an impartial jury is especially important in a capital case [see Livingston, 458 So. 2d at 238-39]; "[t]he right is fundamental and is guaranteed by the sixth amendment to the United States Constitution and article I, section 16 of the Florida Constitution." 458 So. 2d at 238. In some circumstances, the potential prejudice from improper juror contact can be so great that a new trial may be required "as a matter of public policy for the purpose of maintaining confidence in the integrity of jury trials." Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1020 (Fla. 4th DCA 1996), citing Policari v. Cerbasi, 625 So. 2d 998 (Fla. 5th DCA 1993) and Snelling v. Florida E. Coast Ry., 236 So. 2d 465, 466 (Fla. 1st DCA 1970).

In the instant case, such circumstances occurred. While appellant acknowledges that he cannot show actual prejudice on this record, the potential for prejudice was so great that it cannot be confidently assumed that he was tried by an impartial and untainted jury.

Dorothy Sanders was initially chosen to be a member of the jury (19/1531-32, 1540-41). On the Friday afternoon before the trial, the twelve jurors were informed of their selection and were told to return the following Monday (19/1540-41). The first thing Monday morning, as the jury had not yet been sworn, the defense exercised a backstrike on Dorothy Sanders (19/1645,1659,1665).[17]

After she was excused from the jury, Mrs. Sanders decided to attend the trial as a spectator (33/4284,4286,4288; 10/1719). She also apparently remained on a friendly basis with the members of the jury (see 33/4286-87). During the penalty phase, appellant's two sisters saw Mrs. Sanders discussing something with the jurors who were smoking outside (33/4284). They became concerned and brought it to the attention of defense counsel, who in turn brought it to the attention of the court (33/4284). The judge said, "We can ask her or we can ask them" [the jurors], but that it would probably be easier to start with Mrs. Sanders (33/4285). Mrs. Sanders was then sworn, and was questioned by the trial court as follows:

> Q. You were originally on the jury. I don't know when.
>
> A. Quite awhile back. At the beginning.
>
> Q. And I don't know at what point you were excused. But I know you have been present, and that's good. We're delighted to have you. Both you and other folks have reported that you have had conversation with the jurors at lunchtime.

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[17] Defense counsel, explaining the lateness of the peremptory challenge, told the court that in reviewing his notes he discovered a response that he did not recall earlier (19/1645). The judge, while annoyed, agreed that the backstrike was legally proper (19/ 1645-46,1660).

A. Not about the trial. We have just been talking.

Q. Well, that's what I want to know about. So why don't you just tell us the nature of the conversation, when it occurred, and what was said.

A. Which time? I mean, we were just talking about family.

Q. Okay?

A. And things.

Q. Well, let's start with today's time, and then we'll go back to some other time.

A. Today's time? There was nothing about the trial. I mean, it was just general talking.

Q. Okay. And do you know which jurors you talked to?

A. Quite a few of them.

Q. Today I mean.

A. The alternate. One of them was sitting there. The teacher, whatever his name is. And the guy with the beard. I don't remember who else. I mean, we were just all in a big group just standing there talking.

Q. And that was today?

A. Yeah.

Q. Was there any conversation at all about the case itself either today or any other day?

A. No. The only thing that was said was that ya'll was working, that we didn't get out of here until five till 12:00. And I said, well, I said, they do work, honest.

Q. Thank you.

A. That's all that was said.

Q. I'm glad someone said that.

A. Mainly.

THE COURT: Any other questions from either of you?

MR. HARB [prosecutor]: No sir.

THE COURT: And thank you for being here every day, Ms. Sanders.

MRS. SANDERS: Sure, you're welcome.

THE COURT: We appreciate it.

MRS. SANDERS: Well, I got paid for it. I mean, I didn't have nothing else to do.

THE COURT: Okay. Thank you.

(33/4286-88)

After Mrs. Sanders was excused and the jury returned to the courtroom, the judge said:

> Thank you, ladies and gentlemen. I trust you had a good lunch. And there's nothing you have to report about any contacts about the case in your presence or that you know about?

(33/4289)

The jurors indicated that they had nothing to report (33/ 4289).

When improper and potentially prejudicial outside contact with jurors has been shown, the burden shifts to the opposing party to show that there is no reasonable possibility that the verdict was affected. State v. Hamilton, 574 So. 2d 124, 129 (Fla. 1991); Norman v. Gloria Farms, supra, 668 So. 2d at 1019-20. Here, short of granting a new trial, the court should at least have examined the jurors individually to ascertain whether their conversations with Mrs. Sanders throughout

the course of the trial were truly as innocuous as she claimed. Mrs. Sanders was in a unique position in the trial. She had initially been selected to be on the jury, and she apparently established a peer relationship with the other jurors. Yet, as a spectator, she was privy to information, and discussions among counsel and the trial judge, which were scrupulously kept from the jurors. During the course of the trial, on numerous occasions the jury would be taken out of the courtroom while testimony was proffered, or motions for mistrial and motions in limine were argued. Almost invariably, the discussions involved the severed sexual battery charge, and the order in limine prohibiting the state from eliciting evidence suggesting that a sexual battery had occurred. See 21/1974-77 (order in limine; prosecutor discusses vaginal, oral, and anal swabs); 21/2008-22 (proffer of forensic serologist Rosemary Horvat); 21/2050-61 (motion for mistrial; discussion of "fluids that relate to any sexual type materials"); 22/2086-91 (order in limine; mention of vaginal swabs); 22/2136-44 (order in limine; mention of rape trial and accusation of rape); 25/2727-43 (motion for mistrial and order in limine; mention by prosecutor of semen (2734), vaginal and rectal areas (2735), and sperm (2738)); 26/2818-21 (prior to calling associate medical examiner, prosecutor tells judge that he had cautioned the doctor not to mention prior trial, possible injuries to genitalia, rape, sex, semen, or vaginal, oral, or rectal swabs); 26/2867-83 (proffer of jailhouse informant Damion Sastre); 26/2925-67 (proffer of a second jailhouse informant, Cedric Leath, to whom the defense objected based on a discovery violation, and whom the state then elected not to call); and

see 26/2868-69, 2926-28 (Sastre and Leath cautioned by prosecutor during their respective proffers not to mention rape, sex, semen, or the street term jerking off).

Since Mrs. Sanders, having as she put it nothing else to do, was present throughout the trial, and since spectators are not ordinarily removed from the courtroom when proceedings occur in the absence of the jury, it is clear that Mrs. Sanders heard most if not all of what the jury was not allowed to hear (because the judge had determined it to be irrelevant, or more prejudicial than probative). [Moreover, she heard it in the form of assertions in the context of legal argument, rather than as evidence subject to cross-examination and rebuttal]. If Mrs. Sanders in any way conveyed anything of what she knew or thought she knew to one or more of the jurors, then -- whether intentionally or inadvertently -- she tainted appellant's trial beyond repair.

While Mrs. Sanders testified that she never talked about the case other than to assure the jurors that the judge and counsel did work while the jury was out, is it safe in this death penalty case to accept her potentially self-serving assurance of no misconduct at face value? At the very least, the potential for prejudice arising from this unique and ongoing peer relationship between the jury and a backstruck juror-turned-spectator should have at least alerted the trial judge of the necessity to carefully question each juror individually, to ascertain whether any of them had talked about the case with Mrs. Sanders, or whether she had conveyed any information or impressions to them by words, facial expressions, or body language. See e.g. <u>Durano v. State</u>, <u>supra</u>, 262 So. 2d at 734; cf. <u>Johnson v. State</u>, 696 So. 2d 317, 321-24

(Fla. 1997); Street v. State, 636 So. 2d 1297, 1302 (Fla. 1994). Once a prima facie case of potential prejudice has been established, the burden is on the State to rebut the presumption of prejudice. Johnson, supra, 696 So. 2d at 323; Norman v. Gloria Farms, supra, 668 So. 2d at 1020. Either the prosecutor or defense counsel should have requested the judge to question the jurors, or the judge should have done it sua sponte.[18] The right to be tried by an impartial jury, untainted by outside influences, is too fundamental -- especially in a capital case -- to be waived by an imperfect objection, or even in some instances by lack of any objection. See Brown v. State, 538 So. 2d 833, 834-36 (Fla. 1989). Therefore, whether the burden of requesting further inquiry was on the state, or the defense, or the judge, the point is that under the unique circumstances involved here, it needed to be done. As stated in Meixelsperger v. State, supra, 423 So. 2d at 417:

> We are not of the opinion, nor do the circumstances suggest, that the trial brief reached the jurors through an intentional act of any party connected with the trial below. The inclusion of the trial brief was obviously unintended and inadvertent, although "assessing fault" or "placing blame" does not concern us here. We are, however, deeply concerned with an incurable violation of fundamental justice and fair play.
>
> Whether or not one or more of the jurors were influenced by the inclusion of this brief is not readily apparent nor necessary to our decision. It clearly appears that at the very least, the jury was subjected to an extraneous influence which we consider fundamentally improper. State ex rel. Larkins v. Lewis, 54 So. 2d 199 (Fla.

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[18] Before questioning Mrs. Sanders, the judge said, "We can ask her or we can ask them. I think you're probably right. It's easier to do it this way to start" (33/4285).

> 1951). One of the most sacred and carefully protected elements of our system of criminal--or civil, for that matter --justice is the sanctity of an impartial jury that has not been infected by unlawful or improper influences. This is absolutely vital to the guarantee of a fair trial to an accused. The safeguarding of that ideal must be zealously guarded.

Accordingly, appellant's conviction and death sentence should be reversed for a new trial.

ISSUE III

THE DEATH SENTENCE IS DISPROPORTIONATE.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first degree murders. Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999)[24 FLW S336,339]. "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders". Cooper, 739 So. 2d at 82; Almeida, 748 So. 2d at 933 (emphasis in opinions).[19]

In the instant case, the trial judge found four aggravating factors, giving two of them great weight (HAC and financial gain) and two of them moderate weight (prior Missouri convictions and parole status) (SR91-93). Undersigned counsel will concede that, as in Cooper v. State, 739 So. 2d at 85, the aggravation prong of the proportionality standard is satisfied. The remaining -- and critical -- question is whether this Court can conclude after considering the penalty phase evidence and the trial court's sentencing findings that this is also one of the least mitigated first degree murders. In light

[19] Proportionality review is a "unique and highly serious function of this Court", which arises from a variety of sources in the Florida Constitution, and "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Sinclair v. State, 657 So. 2d 113, 1142 (Fla. 1995); Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Knight v. State, 721 So. 2d 287, 299-300 (Fla. 1998); Woods v. State, 733 So. 2d 980, 990 (Fla. 1999).

of (1) the trial court's finding of the statutory mental mitigating circumstance of impaired capacity (SR97); (2) the findings of eight interrelated nonstatutory mitigators arising from appellant's life history, which the trial court found to be "clearly established and . . . entitled to great weight" (SR94-95); along with (3) his lifelong drug problem ("established and uncontroverted" but erroneously found not to be mitigating, see Issue IV) (SR96); (4) his borderline intelligence and learning disabilities (SR94); (5) his loving and protective relationships with his family members and his ability to continue those relationships while incarcerated (SR96-97); (6) the cumulative impact of all the mitigation ("The court has . . . considered the mitigating factors individually as well as together. Indeed, many of the factors combine together to have an impact greater than the sum of their individual weights. For instance, the factors relating to the defendant's upbringing, taken together, <u>are truly substantial factors</u> in the court's consideration") (SR98), the "least mitigated" prong of the proportionality standard has not been established, and therefore the death sentence is disproportionate.

Regarding appellant's life history and background, the trial court combined eight proffered nonstatutory mitigators[20] and found:

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[20] (1) That appellant was born to a teenaged unwed mother; (2) that he was physically and emotionally abused as a child; (3) that he suffered neglect and physical deprivation; (4) that his mother was a drug and alcohol abuser; (5) that he grew up in extreme poverty; (6) that he witnessed the physical and sexual abuse of his mother and sisters; (7) that his father was absent for most of his life; and (8) that his mother was arrested and had a criminal record while he was growing up.

> All of these factors were clearly established by the evidence and are certainly mitigating. They are evaluated together because it is impossible to consider them separately. <u>The defense painted an obviously accurate picture of extreme poverty and the worst kind of abuse and neglect.</u> Robert Morris was born to a 15-year old mother. As he was growing up, he was simultaneously a child, and a father to his sisters and mother. Early on, he learned to steal to eat. Later, with his mother's guidance and encouragement, he stole for pleasure. His role models in his early years were a series of abusive and exploitive men. He watched his mother do their bidding and take their drugs. He was very close to his oldest sister and protective of both of them, but he was separated from them in foster homes with strangers.
>
> On the other hand, Robert Morris was not deprived of all positive influences in his teenage years. His teacher, Donna Lewis, was a wonderful influence for all three years of high school. His friend, Terrence (Tony) Page and his mother's friend, Mandy Candy, and his own sisters could have been positive influences, if he had allowed them to be.
>
> <u>All together these factors are clearly established and are entitled to great weight.</u>

(SR95)

The uncontroverted evidence, accepted as accurate and given great weight by the trial judge, showed more than could be summarized in a paragraph or two. Appellant will rely on, without repeating, the evidence set forth in the Statement of Facts, but several aspects are worth highlighting. Appellant's role as "man of the house" began early; when their pill-addicted mom was working or partying, the three kids (appellant was three years old, his sisters two and one) were left alone in the house. The neighbor lady downstairs across the fence was keeping an eye on them while they were home by themselves. After the

neighbor lady didn't know where the children's mom was (she was in jail, after she and a group of friends, all high on pills and alcohol, got into an altercation which led to a shooting), the neighbor called the welfare office and the kids wound up in foster care.

In their respective foster homes, the children were emotionally devastated by their forced separation, and the helplessness of not knowing when or whether they would ever be together. Although their mother was an inadequate parent, she was the only parent they knew and there was an intense bonding. Appellant was abused and neglected while in foster care.

Unfortunately, when Linda did get her kids back, her addiction to the pills just got worse, to the point where she would take her kids on shopping trips; first, to the dope house -- for her -- where she would park them outside while she went in and got her drugs, and then -- for them -- to the candy store. She let a male friend named Tony move in. One day while she was at the grocery, Tony locked four-year-old Paula in the bathroom and raped her as she screamed in vain for her five year old brother (appellant) to help her. Appellant was banging on the door trying to get in, but he was powerless. When their mother got home and Tony had slipped out, appellant was crying hysterically and was very upset about not being able to protect his sister.

Nor was he able, in the years that followed, to protect his mother. She -- looking like an Ethiopian refugee or an AIDS victim from the ravages of her drug abuse -- moved them all back to Missouri where she became even wilder on drugs than before. The picture of her three small kids struggling for an hour to drag her semi-conscious

adult body home through the ice and snow is from this time-frame. Also around that time is when she met Santee, a pimp, drug dealer, and woman-and-child beater, who became the worst of her long string of abusive boyfriends. Santee wasted no time in turning Linda into a prostitute, and whenever she failed to bring him enough money he would beat her savagely with his fists, or with a coat hanger. He liked to make the children watch. On one occasion he threatened their mother with a sharp knife, while she was naked and crying, in front of the kids; another time he held a gun to her head and said he was going to kill her and the children. The kids were "scared to death", "petrified" of him. Santee especially hated appellant and Paula because of their skin coloring, and he beat appellant regularly. Despite his fear, and despite being warned by a teacher that he could get seriously hurt, appellant always tried to protect his mom from Santee's onslaughts, but Santee would just shake him off or throw him against a wall and continue about his business.

As described by family friends Tony Page, Mandy Candie, Dorothy Tracy, and teacher Donna Lewis there was an extreme reversal of family roles from a very young age: the children (especially appellant as the only male) took care of his mother, and he, as the oldest, also took care of his two sisters. On one level, it was (he felt) his responsibility to see to it that his sisters didn't get raped and his mother didn't get beaten up. Since he was an elementary school age child (or, in the case of the rape, younger) he failed miserably, or at least that's how he must have seen it. He was more successful -- on the surface -- on another level of pseudo-adulthood. It was

appellant's responsibility from a very early age to do much of the cooking, the cleaning, the laundry, to make sure the girls got to school, and he did it pretty responsibly for a seven-to-ten year old; although it left him, in Mandy Candie's words, with the permanently worried look of a sheepdog trying to get the sheep to safety. (These are the years when appellant's ulcer, eventually diagnosed at age thirteen, was brewing inside). The cooking could be a big problem because there was often no food in the house. Putting food on the table was another of appellant's childhood responsibilities, and when necessary he would steal food, or steal money to buy food. His mother was a shoplifter, and when appellant was as young as nine or ten, she was using him to smuggle outfits out of a store. The three kids were never taught that stealing was wrong; to the contrary, they were by words and example encouraged to steal. Appellant, who was good with his hands and fascinated with bicycles, took to stealing bikes, fixing them up, and then giving them away or selling them.

Appellant's mother was a drug addict throughout his formative years. According to Dr. Dee, the predictable result of this is that the child will turn to the same solution when he is under stress as an adolescent or young adult. Appellant did not have to wait even that long. His mother smoked marijuana with appellant and his sisters when they were small children. Marijuana and liquor were readily available in his house. He couldn't remember a time he didn't smoke marijuana; he'd just pick it up and use it. He found himself becoming an alcoholic in high school, until his ulcer forced him to switch to harder drugs; he then progressed over time from marijuana, to powdered

cocaine, to freebase, to rock cocaine. It was his persistent use of cocaine which broke up his relationship with Constance, the mother of his daughter. It was, according to the Missouri PSI, his need to feed his drug habit that motivated the two purse snatching incidents in that state. Dr. Dee testified that each time appellant has been in serious trouble in his life, it has been when he is taking drugs; it exacerbates his frontal lobe brain damage, and "his behavioral control becomes just totally infected . . . " (10/1684).

As this Court recognized in Santos v. State, 629 So. 2d 838, 840 (Fla. 1994), the circumstances "establishing substantial mental imbalance and loss of psychological control" are among the weightiest mitigating factors. In the instant case, the trial court found the statutory mental mitigator that appellant's capacity to conform his conduct to the requirements of law was substantially impaired, and said:

> Established and uncontroverted. The evidence is clear that Robert Morris suffers from chronic brain syndrome with mixed features including frontal lobe brain damage. Also clear is the fact that this condition could have been caused by a congenital defect, malnutrition (protein deficiency), head trauma or drug abuse. While not part of the testimony, the court assumes that the condition could have been caused by exposure to drugs, in utero. What is not clear from the evidence is how this condition relates to the murder. Dr. Henry Dee testified that people with this condition typically make choices against the odds, that when they commit crimes, they are unplanned and disorganized crimes. It is unusual for such patients to form bonds with others, he said. Knowing his condition, Dr. Dee would have expected a more extensive criminal record for the defendant. The court is left with the overall impression that impulsiveness is a dominant feature. The defendant is not powerless to

> control his behavior, but his ability to do so may be substantially impaired. The court is reasonably convinced that this factor exists and has given it moderate weight.

(SR97)

Likely related to appellant's brain damage (see SR94) are his borderline intelligence (IQ scores in the 76-82 range) and his learning disabilities, which led to his being placed in special ed or EMR (educable mentally retarded) classes throughout his elementary, middle, and high school years. He was on a Special Olympics team for all four years of high school. Despite all of his academic difficulties, as well as the overwhelming array of personal difficulties previously discussed, he was a well-behaved student who tried hard and succeeded in graduating from high school.

Another area in which appellant has done much better than anyone could reasonably have expected in light of his background is in his close and loving relationships with his family members. This is something which Dr. Dee found to be almost unique among capital defendants. Appellant has acted as a father to his daughter and as a father figure to his niece in a very responsible way. The recurrent theme of each of those relationships -- with his mother (32/ 4039-40, see 4032-39); his sister Paula (32/4073, 4087-90); his daughter Janisha (32/4027-32; 33/4219-30,4240-45); his niece Tamecia (32/4088; 33/4209-13); his ex-girlfriend (and Janisha's mother) Constance (33/4228-29); his grandmother who lived to be 98 (32/4027-28,4032,4105-06); his grandfather figure and mentor Mr. Hill (32/4084-85,4105-06) -- is

appellant putting the needs of the other person above his own.[21] He is the glue of the family, the one who holds everyone together, and in Dr. Dee's opinion he can continue to fulfill this role while incarcerated.

In conclusion, while the aggravating factors surrounding this murder are sufficient to meet the first prong of the proportionality standard, the inquiry does not end there. The crime was completely out of character. While (due in part to appellant's claim of innocence) the circumstances of the crime are not entirely clear, the trial court recognized that it was likely an impulsive, disorganized act which occurred in the midst of a burglary (see SR97). Appellant has frontal lobe brain damage, which impairs his ability to control his impulses, and a longstanding drug problem which worsens the effects of the brain damage. The trial court found the "impaired capacity" mental mitigator, as well as eight interrelated nonstatutory mitigators whose cumulative impact is greater than the sum of its parts, and "taken together, are truly substantial factors in the court's consideration" (SR98). The jury's penalty vote was a relatively close 8-4 margin.[22] Considering the totality of the mitigating evidence presented in this case, the second prong of the proportionality standard has not been met. This clearly is not one of the least mitigated first degree mur-

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[21] The one apparent exception to this pattern, his inability to maintain a family unit with Constance, was attributed by her to cocaine. Appellant has remained a big part of Constance's life, as well as his daughter's (33/4228).

[22] The closeness of the jury's penalty vote is a relevant factor for this Court to consider in its proportionality determination. See Cooper v. State, supra, 739 So. 2d at 86 (vote of 8-4); Almeida v. State, supra, 748 So. 2d at 933 (7-5); Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998)(7-5).

ders. Appellant's death sentence should be reversed, and the case remanded for imposition of life imprisonment without possibility of parole.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S HISTORY OF DRUG ABUSE IS NOT MITIGATING.

The defense submitted to the trial judge as a nonstatutory mitigating circumstance that appellant began using alcohol and drugs at an early age, and developed a lifelong addiction problem (10/1795-96). Where supported by the evidence, a history of drug and/or alcohol abuse has been repeatedly recognized by this Court as a valid nonstatutory mitigating factor. Mahn v. State, 714 So. 2d 391, 400-01 (Fla. 1998); see e.g., Merck v. State, __So. 2d__ Fla. 2000) [25 FLW S584]; Larkins v. State, 739 So. 2d 90, 94 (Fla. 1999); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992). Moreover, the question of whether a defendant was under the influence of drugs or alcohol at the time of the offense is not the correct standard for evaluating long-term substance abuse as a mitigator. Mahn, 714 So. 2d at 401. In the instant case, the trial judge found that appellant's history of alcohol and drug abuse is "established and uncontroverted" (SR96), but then went on to say, "That the defendant used drugs in the past is not mitigating. Moreover there is no evidence that he was using drugs in September, 1994 when he murdered Mrs. Livingston. This factor is entitled to little weight" (SR96).

In finding that a history of drug abuse is not mitigating, the trial judge committed plain and prejudicial error, depriving appellant of his right guaranteed by the Eighth Amendment to full and fair

consideration of all mitigating factors. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. 308 (1991); Santos v. State, 591 So. 2d 160, 164 (Fla. 1991).

In Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997), this Court said:

> The Court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), established relevant standards of review of mitigating circumstances: 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) 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; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. [Footnotes omitted].

Trease v. State, __So. 2d__ (Fla. 2000) [25 FLW S622, 623], involves the third standard discussed in Blanco, while the instant case involves the first standard. As the United States Supreme Court emphatically stated in Eddings v. Oklahoma, supra, 455 U.S. at 113-114, "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (Emphasis in opinion). In contrast to Trease, (which involves the discretionary assignment of weight to a mitigator), the trial court in the instant case did precisely what Eddings forbids. And, as this Court recognized in Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) and Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), the reviewing court

need not accept the trial court's findings when they "are based on misconstruction of undisputed facts and a misapprehension of law."

In the instant case, the trial court, after erroneously concluding that appellant's history of drug abuse is not mitigating, then proceeded to say that it was "entitled to little weight". The state may argue that since he purported to weigh it anyway, the Campbell[23] line of cases shouldn't apply. The fallacy of such an argument is twofold. First, what was he weighing it as? A non-mitigating circumstance? If -- as the judge wrongly believed -- prior drug abuse isn't mitigating, then how could he give it any meaningful weight as a mitigating factor? Secondly, the judge's legal error (subject to de novo review) necessarily resulted in his giving it less weight than he would have given it if he understood that a history of drug abuse is mitigating. Absent the error, he might well have given it great weight or substantial weight. Therefore, while the weight accorded a mitigating factor is reviewed under the abuse of discretion standard, the judge's mistake of law resulted in just such a abuse of discretion, or more accurately a failure to exercise his discretion to give appropriate weight to a legitimate mitigator which was established and uncontroverted in the evidence. As stated in Walker v. State, 707 So. 2d 300, 319 (Fla. 1997) and Hudson v. State, 708 So. 2d 256, 259 (Fla. 1998):

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[23] Campbell v. State, 571 So. 2d 415 (Fla. 1990), and its progeny, e.g. Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Walker v. State, 707 So. 2d 300, 317-19 (Fla. 1997); Hudson v. State, 708 So. 2d 256 (Fla. 1998).

> . . . the "result of this weighing process" can only satisfy <u>Campbell</u> and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence.

In the penalty phase in this case, the evidence showed that appellant's mother -- a drug addict herself during his formative years (34/4315; 31/3939-41,3946; 32/3951-54,3962-65) -- smoked marijuana with appellant and his sisters when they were small children (32/4104-05; 33/4191,4195). His friend Tony Page said it became really obvious that he was using marijuana and liquor, which were readily available in his house (32/4117-18). Later Tony became aware that appellant was using other drugs as well (32/ 4118). Appellant's girlfriend Constance -- the mother of his daughter -- testified that their relationship was good and he was an active and caring father, but around 1987 he began to change. At first Constance thought it was another woman, but then she found out it was drugs, specifically cocaine (33/4223-24). She confronted him when she saw him with the pipe, and he told her he was using drugs (33/4233,4237-38). This caused them to break up. A year later, when they tried to work it out, the reconciliation failed because Constance believed he was still on drugs, and she didn't want Janisha around him for that reason (33/4224).

When appellant was a child, his mother would combine her trips to the drug house (where the kids would wait outside while she made her purchase) with taking them to the candy store (32/3953). Dr. Dee

testified that when a child sees drug abuse by his mother during his formative years, the predictable result is that the child will turn to the same solution when under stress as an adolescent or young adult (33/4323-27). Appellant could not remember a time when he didn't smoke marijuana, even as a young child. It was around; he would pick it up and use it (34/4329). He found himself becoming an alcoholic in high school, until his ulcer forced him to give it up (33/4326). He then turned to a variety of controlled substances including marijuana, powdered cocaine, freebase (when that became available in the late 1970s and early 1980s), and later rock cocaine (33/4326-27). The Missouri presentence investigation indicated that at the time of the two purse snatching incidents which resulted in convictions for second degree robbery, appellant was a drug addict who was motivated by his need for money to feed his habit (34/4390-94).

In the Spencer hearing, in which Dr. Dee testified that appellant has diffuse frontal lobe brain damage impairing his behavioral control, as well as basal injuries affecting memory functioning, he was asked how drug abuse interacts with brain damage. Dr. Dee replied that "[i]t exacerbates it terribly"; it further impairs your functioning and, at the same time, it further damages your brain (10/1691-92). Regarding appellant's history of drug addiction and dependence, particularly to cocaine, Dr. Dee noted that each time he has been in serious trouble in his life it's been when he's taking drugs (10/1684). At those times, "his behavioral control becomes just totally infected . . . " (10/1684). According to Dr. Dee, the results of the MMPI (a grossly elevated score on the scale measuring drug or alcohol addiction), as

well as the Missouri PSI and interviews with family members, all confirmed appellant's chronic problem with drug abuse (10/1683-85,1690-91).

All of this evidence, which the trial judge acknowledged was established and uncontroverted, may well have been accorded great or substantial weight, if the judge hadn't made the flat-out legal error of concluding that it isn't mitigating. The improper rejection of a valid nonstatutory mitigating factor is reversible error. See e.g., Merck, 25 FLW at S584-85; Mahn, 714 So. 2d at 400-01; Walker, 707 So. 2d at 318-19; Nibert, 574 So. 2d. at 1061-62. In view of the nature and quantity of the mitigating circumstances in this case [See Issue III, supra], considered along with the closeness of the jury's 8-4 penalty recommendation, the state cannot show beyond a reasonable doubt that this significant legal error had no effect upon the judge's weighing process. See e.g., Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); Atkins v. State, 452 So. 2d 529, 533 (Fla. 1984); Wike v. State, 648 So. 2d 683, 688-89 (Fla. 1994) (Anstead, J., concurring, joined by Justices Overton, Shaw, Kogan, and Harding). Appellant's death sentence must therefore be reversed, and the case remanded for resentencing.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SPECIFIC NON-STATUTORY MITIGATING CIRCUMSTANCES.

". . . Stare decisis does not command blind allegiance to precedent. `Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court.'" State v. Gray, 654 So. 2d 552, 554 (Fla. 1995), quoting Smith v. Dept. of Ins., 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring in part, dissenting in part). While appellant recognizes that this Court has previously declined to hold that the trial court must instruct the jury on specific nonstatutory mitigating circumstances [see e.g. Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991); Finney v. State, 660 So. 2d 674, 784 (Fla. 1995)], he respectfully requests that this Court reconsider its position in light of the circumstances of the instant case.

In every Florida criminal trial, including this one (19/1672), the jury is given the following preliminary instruction:

> It is the judge's responsibility to decide which laws apply to this case and to explain those laws to you. It is your responsibility to decide what the facts of this case may be, and to apply the law to those facts. Thus, the province of the jury and the province of the court are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Florida Standard Jury Instructions in Criminal Cases 1.01.

Whether a particular circumstance is truly mitigating in nature is a question of law; while, on the other hand, whether that

circumstance has been established by the evidence in a given case is a question of fact. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). That is why the jury is given clear instructions on the aggravators and the statutory mitigators; they are told what the factors are, and it is then the jury's role to determine if they are established by the evidence and how much weight to give them. Nonstatutory mitigators -- for no good reason -- are treated differently. The jury is given only the vague and circular "catchall" instruction, and then (since unanimity is not required) each juror is left to his or her own devices to try to figure out whether the various aspects of the defense's evidence are "mitigating." Many nonstatutory mitigators (e.g. abused childhood, history of substance abuse, low intelligence and/or learning disabilities, potential for rehabilitation, and others) have long been recognized as legitimate mitigating factors, but the jury is never told this critical information.

"In criminal cases, the trial judge bears the responsibility of ensuring that the jury is fully and correctly instructed on the applicable law." Foster v. State, 603 So. 2d 1312, 1315 (Fla. 1st DCA 1992); see Yohn v. State, 476 So. 2d 123, 126-27 (Fla. 1985); In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598, modified 431 So. 2d 599 (Fla. 1981); Steele v. State, 561 So. 2d 638, 645 (Fla. 1st DCA 1990); Gordon v. State, 745 So. 2d 1016, 1019 (Fla. 4th DCA 1999). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978); Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981). The "catchall" instruction is wholly

insufficient to guide the jury in its consideration of nonstatutory mitigating circumstances. Essentially it amounts to defining a mitigating factor as "whatever"; and it has a denigrating effect, especially when contrasted with the clear and specific instructions on aggravating factors. See State v. Johnson, 257 S.E. 2d 597, 616-17 (N.C. 1979); State v. Cummings, 389 S.E. 2d 66, 80-81 (N.C. 1990).

Moreover, the "catchall" -- because of its lack of specificity -- does not prevent the jury from rejecting a legitimate mitigating circumstance which it found to be supported by the evidence in the mistaken belief that the factor, although proven, is "not mitigating". This is precisely the error of law which the trial judge made in this case when he rejected appellant's long history of drug abuse as "not mitigating". See Issue IV, supra. But at least when the judge commits an error of law, it can be corrected on appeal. The jury should not be making errors of law, because it should not be resolving questions of law. The jury's proper role is to decide questions of fact, under clear and correct instructions on the law. Judges presiding over capital trials in Florida are required to have successfully completed the "Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies, and they receive in that course the capital sentencing materials developed by Judge Susan Schaeffer of the Sixth Circuit. Florida Rules of Judicial Administration 2.050(b)(10); see Phillips v. State, 705 So. 2d 1320, 1323 (Fla. 1997); Hudson v. State, 708 So. 2d 256, 260 (Fla. 1998). The jurors, in contrast, have no prior knowledge of capital sentencing law -- in fact, in the rare instance that a juror does have some knowledge, the juror is subject to

challenge for cause unless he or she can set it aside and decide the case solely on the evidence and instructions of the court. If Judge Young, notwithstanding his education and experience, can mistakenly conclude that a history of substance abuse is not mitigating, then there is nothing in the catchall instruction to save the jury from making the same critical error, as to that nonstatutory mitigator or any of the others.

In the instant case, defense counsel submitted to the trial court a written request for jury instructions on sixteen nonstatutory mitigating circumstances (see 9/1603; 30/3648-49,3676,3684; 33/4254-55).[24] In the charge conference, the judge said "I see your point. But in the absence of a definition [of mitigating circumstances], they're anything you say they are." Defense counsel replied:

> Yes. But that's not the same as anything you say they are, Your Honor. And what I say they are is X, Y, and Z, if they don't hear you say they're X, Y, or Z, that doesn't mean the same as having you say it, Your Honor. Because there's not the imprimatur of the court having what I said.
>
> So, you know that's why I think a definition is valuable. Because, you're right, I can define them and my definition -- my umbrella can be very large. But without a definition coming from the court, I don't think they would necessarily find my . . . definitions persuasive.

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[24] The written request for instructions on specific nonstatutory mitigating factors was omitted from the record on appeal. The sixteen mitigators are the same ones discussed in the trial judge's sentencing order (SR94-97); they are also listed in the defense's (10/1784-99) and the state's (10/1763-64) sentencing memoranda. Appellant is filing concurrently with this brief a Second Motion to Supplement the Record with a copy of Defendant's Requested Special Jury Instruction Re: Mitigating Circumstances, dated March 8, 1999.

(30/3644).

The prosecutor, dissembling, suggested that if defense counsel's request to define the specific mitigators were granted, it might be ineffective assistance of counsel, because the jury might think those mitigators were all they could consider (30/ 3645).[25] Defense counsel replied that her goal was not to be ineffective; it was to be as effective as possible:

> . . . [M]y reasons remain the same. I think that what I argue or present to the jury doesn't mean as much to the jury. The jury doesn't think what I have said is mitigating is, in fact, as a matter of law a mitigating circumstance.

(30/3645-46)

Defense counsel pointed out that the jury would still have to decide whether they were reasonably convinced by the evidence that a mitigating factor was established, and what weight to give it (33/4258) "But they would know what they were, and they would understand the meaning of them from the Court, which is, after all, where they seek their authority" (33/4258). The prosecutor disagreed. Evidently believing that nonstatutory mitigators are per se less meaningful, he said, "It's not the State's fault that Robert Morris doesn't have any statutory mitigators" (33/4259).[26]

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[25] To obviate the concern that the jury might think the list of proposed mitigators was limiting, the defense's requested instruction begins with the catchall ("any aspect of the defendant's character, record, or background, and any other circumstance of the offense"), and then -- before listing the sixteen specific nonstatutory mitigators -- states that "Mitigating circumstances include, but are not limited to [the following]: "(Second Supplemental Record; see 33/4255-56).

[26] The evidence supporting the "impaired capacity" statutory mitigator, which was found by the trial court, was not introduced until

The prosecutor -- arguing that specific instructions on nonstatutory mitigators should not be given -- then repeatedly hammered home the very point that defense counsel had been making all along:

> . . . [T]he State's concern is that the defense obviously in their argument want -- and this is exactly how it's going to be perceived by the jurors. They want the court legitimizing their argument, and that is where our problem arises.
>
> I mean, we're not saying that they can't argue that. They're entitled, and I'm sure they will. But to add legitimacy to that after the jurors are told arguments of attorneys are not evidence and then we give instructions to legitimate one party's argument is unfair to my case, Your Honor.
>
> They chose for some reason, obvious or maybe not so obvious, not to go the route of statutory mitigators. Judge, I think it's -- you know, some of the stuff that are listed in the 16 factors they can argue. But for the court to step in and give legitimacy to the fact the defendant was born to a teenage unmarried mother and so forth, I don't want to -- I don't want to dwell on that issue.
>
> I don't think the court should step in an legitimize their argument. They can -- they're not by the fact that the court is not giving an instruction does not constrain or re[s]train or hamper the defense from arguing all of these factors if they wish to.

(33/4259-61)

Defense counsel pointed out that:

> . . . the State's argument that this would add legitimacy to the mitigating factors speaks exactly to the problem. It suggests that the mitigating factors are illegitimate, that they are somehow different in and kind or nature or

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the Spencer hearing.

> weight from statutory mitigators and that they do not have legitimacy.
>
> They are very legitimate mitigating factors. The only thing that would be in quotes illegitimate is that they are not listed in the statute. That's the only difference. They're listed in plenty of cases, all different ways and different language. But, you know, that's not -- they are legitimate mitigating factors.

(33/4261).

The judge suggested that the jury could deduce that any evidence they heard must be mitigating, because if it were not mitigating he would have excluded it (33/4262). Defense counsel answered that that was a subtlety that the jury might or might not catch (33/4262). [Note that the trial judge allowed the defense to introduce considerable evidence of appellant's history of drug abuse, and then erroneously found this not to be mitigating].

The trial judge denied the defense's request for specific instructions on nonstatutory mitigating circumstances, saying, "I think it's [A], a comment on the offense [evidence?], and [B], it diminishes the depth of the mitigating argument by listing some of them" (34/4452-53). The defense on several occasions renewed its request for the instructions and its objection to the court's refusal to give them (34/4469,4504-07,4509; 35/4575). The court gave the jury only the "catchall" instruction (35/4580). The jury recommended the death penalty by a vote of 8-4 (9/1625; 35/4586-87).

In her sentencing memorandum to the court, defense counsel wrote:

> The mitigating circumstances presented to the jury were and are legion, but the jury which considered them had no measure by which to judge them, other than the argument of counsel (which

> argument, as the court had plainly instructed the jury, was to be considered as neither evidence nor the law). As a result, the jury was left without any direction whatsoever from the court to answer their obvious questions: are these things the lawyers are talking about "mitigating factors"? do these mitigating factors really matter? is this really the kind of thing that's considered mitigating? what does it mean, "to mitigate"? Without having these and untold numbers of other questions answered, the jury could not meaningfully assign weight to the unrebutted mitigation they heard, and the jury's recommendation was thereby rendered unreliable.

(10/1780-81)

The trial court's rationale for refusing the requested instruction was flawed. Instructing the jury on nonstatutory mitigators is no more a comment on the evidence than instructing them on aggravators, or statutory mitigators. In each instance, the jury is not told to find the aggravating or mitigating factor, nor is it told that the evidence supports the factor. The instruction simply tells the jury that under the law, the particular factor is an aggravating circumstance or is a mitigating circumstance. The jury then applies its findings of fact to the law which was given them by the judge. These are the traditional, non-overlapping roles of judge and jury. The jurors should not be deciding the legal question of whether a given factor is or is not mitigating.

The judge's second rationale is equally unsound. The requested instruction does not limit or "diminish" the nonstatutory mitigation; to the contrary, it brings it up to equal status with the aggravating factors, thereby "levelling the playing field." Cf. Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994) ("No truly objective tribunal can

compel one side in a legal bout to abide by the Marquis of Queensbury's rules, while the other fights ungloved"). It is the failure to give clear and specific instructions on the nonstatutory mitigators, as contrasted with the well-delineated aggravators, which unfairly diminishes the impact of the mitigating evidence. See State v. Johnson, 257 S.E. 2d 597, 616-17 (N.C. 1979). The instruction requested by the defense was similar to the one approved by this Court in Foster v. State, 614 So. 2d 455, 461-62 (Fla. 1992), and it clearly informed the jury that the list of sixteen nonstatutory mitigators was neither limiting nor exclusive. Regardless of whether the source is the legislature (aggravating factors), the Eighth Amendment (nonstatutory mitigating factors), or both (statutory mitigating factors), there is no principled basis for treating them differently in the instructions.

As the prosecutor candidly acknowledged, the state's concern in this case was that the requested instruction would "legitimize" the defense's evidence and argument concerning nonstatutory mitigation (33/4260-61). That is exactly right. The state got instructions from the court to "legitimize" its evidence and argument as to the aggravating factors, and the defense should have received no less. In light of the closeness of the jury's penalty vote (8-4); the fact that all of the extensive mitigating evidence presented to the jury was nonstatutory; and the fact that the jury could easily have made the same error as the judge did, and rejected one or more legitimate

mitigating factors as "not mitigating",[27] the refusal to give the instruction was harmful error. If this Court agrees, appellant is entitled to the benefit of the decision [see Weiand v. State, 732 So. 2d 1044, 1058 (Fla. 1999); State v. Gray, 654 So. 2d 552, 554 (Fla. 1995)], and his death sentence must be reversed for a new penalty trial before another jury.

[27] The trial judge mistakenly concluded that appellant's history of drug abuse was not mitigating. The jury could have made the same mistake, and it could also have rejected as "not mitigating" one, or several, or many of the other factors argued by defense counsel.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests this Court to grant the following relief:

Reverse his convictions and death sentence and remand for a new trial [Issues I and II].

Reverse the death sentence and remand for imposition of a sentence of life imprisonment without possibility of parole [Issue III].

Reverse the death sentence and remand for a new penalty trial [Issue V].

Reverse the death sentence and remand for resentencing [Issue IV].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ___ day of September, 2001.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddj