

STATEMENT OF THE CASE

Paul H. Evans appeals his murder conviction and death sentence in the death of Alan Pfeiffer.

The state's theory was that Alan's 31-year-old wife, Connie Pfeiffer, wanted to kill Alan, her husband, for insurance money. According to this theory, Connie unsuccessfully solicited two persons before a co-worker, 21-year-old Donna Waddell, agreed to commit the murder with her 19-year-old roommate, appellant. Also involved was appellant's girlfriend, 16-year-old Sarah Thomas. Waddell, Thomas and appellant lived in an apartment at a complex called Idlewild in the Vero Beach area.

Around 4:00 a.m. on March 23, 1991, officers found Alan's body in the Pfeiffers' Vero Beach mobile home. Connie, Donna Waddell and appellant were indicted and arrested in 1997. Sarah Thomas was never charged. Donna plead guilty to second degree murder and testified against Connie and appellant in separate trials. Connie was convicted of first degree murder and sentenced to life imprisonment. Appellant's first trial ended in a mistrial when the jury could not agree on a verdict. T 1798-1800. His second trial ended in a mistrial at the end of jury selection. T 2120. At the third trial, the state argued alternatively that appellant shot Alan or abetted the crime by joining in the planning and receiving benefits. The jury found him guilty of first degree murder, and recommended a death sentence by a vote of 9-3. R 411-12.

A. The case as presented in the Complaint Affidavit. Appellant was indicted August 6, 1997. R 13. On July 21, 1997,

Det. John Morrison executed a "Complaint Affidavit", R 2-8, putting the time of the murder as "BET. 2030 AND 2230" on March 23, 1991. R 2. It said officers going to Alan's trailer at #19 Malibu Lane found "the front door ... cracked open". R 3. Alan's body was in the living room. Id. A neighbor, Leo Cordary, said that Connie had asked if he knew anyone who would "take care" of Alan - "she wanted him dead". Id.

"Cordary also stated that on the night of the homicide he heard approximately three shots in the evening hours, but could not be sure what time." Id.

Four surrounding neighbors said they heard possible gun shots "between the hours of 9:00 PM and 10:30 PM coming from the area of #19 Malibu Lane." Id.

"Witness Jesus Cruz stated he definitely heard what he thought to be gun shots between 9:30 PM and 10:30 PM on the night of 03/23/91. Cruz stated he heard three shots in succession. Cruz lived directly across the street from #19 Malibu Lane." Id.

Connie, Donna Waddell, Sarah Thomas and appellant all said they were at the fair on the night of the murder. R 4-5. Connie said she left the fair at 9:00 PM, took her children home, returning to the fair about an hour later. R 4. She and the others stayed at the fair until midnight, when they all went to Denny's to eat, and then to Waddell's home to spend the night. Id.

Donna Waddell said Connie hung around with Greg Hill at the fair until 9:00 PM, then left to take her kids home and meet

Hill. Id. Connie did not return to the fair until 11. Id. They then went to Denny's, and then to Waddell's home. Id.

Sarah Thomas said they stayed at the fair until 11, then went to get something to eat, and then went home. R 5.

According to the affidavit, appellant said that during the afternoon they all went to the Pfeiffer trailer to wash clothes and borrow some stereo speakers, a stereo and some video tapes. Id. He and Donna returned to the trailer to pick up some more clothes before getting Connie and going to the fair; Sarah was with them. Id. At the fair, he went his own way and met the others when it was time to leave; they went to Denny's before going home. Id.

In June 1997, Sarah Thomas told the police that Connie and appellant had been planning to kill Alan. R 6. Appellant got a camcorder as part payment, and they were all to get money, but Sarah did not want any. Id. Sarah said that on the afternoon of March 23, she, Connie and Waddell went to the trailer to wash and collect clothes, and they left a door unlocked so appellant could later go in to kill Alan; appellant was not present at this time. Id. After they returned to their apartment, Waddell drove appellant to a field near the Pfeiffer trailer, then returned home to take Thomas to the fair. Id. When they went to get appellant around nine, he was not there; they went back to the fair, stayed for a half hour, then returned and picked appellant up; he had a gun in a bag, and changed his clothes. Id. She said appellant said "It's done, let's go", said he turned the music up very loud to drown out the shots, that he

hid in the bedroom, that he was hiding behind something when Alan came in, and he shot Alan three or five times. Id. She said that Waddell and appellant burned his clothes in the bathtub; three days later, Thomas and appellant drove out on S. R. 60, and appellant threw the gun in a canal. Id. She said the gun was stolen from Donna Waddell's father. R 8.

"Sarah Thomas did state that Paul Evans never went to the fair on the night of the homicide, nor did they eat at Denny's." Id. On June 19, 1997, fitted with a body bug, Thomas told Waddell that she had a meeting with the police, and Waddell told her to stick to her original story; when Thomas said, "We helped", Waddell replied: "I think about it every day, how stupid we were." Id.

B. The case at appellant's 1999 trial. As the state told the jury in opening statement, Connie Pfeiffer was "looking for someone to kill her husband", Alan. T 3117.

She told Susan Cairns, a co-worker, that Alan was very abusive and was cheating on her, that she wished he was dead, she wished he would commit suicide. T 3379. She said she could not divorce him because she needed income from him. T 3375. But there were, she told Cairns, "other things she could do" to get rid of him. Id.

Connie asked Leo Cordary, the neighbor, if he knew anyone who could "take care of Alan". T 3386. Cordary "told her that I knew some Jamaican guys that would beat him up because, you know, she wanted - she wanted something done, and I said that I knew the guys that would do that. And she said, 'No, that's not

what I'm talking about.' She said, 'I want the problem taken care of. I want it done with and over.' And I told her, I says, 'I don't do that. I don't - I'm not getting involved in that.'" T 3386-87. She said "she would be willing to give a couple thousand dollars and her red Fiero up to have the job done." T 3392.

Connie told Geneva Williams that Alan was abusing her, but said, "if I leave and I divorce him, ... I won't get anything." T 3411. She asked Williams, "Have you ever known of anybody that's had anybody killed for money?" Id.

Connie told another co-worker, Donna Waddell, that she wanted to get rid of her husband. T 3798. She asked about finding somebody to kill him. T 3798-99.

Around 2:30 p.m. on March 23, 1991,¹ Cordary saw Connie drive up to the trailer in her red car. T 3387-88. She said she had just got home from a concert² and was moving out. T 3388. Cordary thought Alan's black Trans Am was at the trailer. T 3399. Later that day, Cordary heard slamming sounds in the Pfeiffer trailer; doors were slamming, there was banging around. T 3388-89.

Another trailer park resident, Charles Cannon, testified

¹ This was about eight weeks after Connie's earlier conversation with Cordary. T 3386-87.

² Geneva Williams testified to attending a concert in Kissimmee with Connie on the night of March 22, 1991. T 3407-3409.

that Connie and another woman³ were banging and making noise at the trailer around 2 p.m. T 3488. Preparing to go do laundry, he "noticed across the street in the Pfeiffer trailer two women coming in and out of the trailer repeatedly. And what caught my attention, which made me really watch what they were doing, was that I heard a lot of thumping and slamming. And ... what they were doing was kicking and throwing themselves up against the door. And I thought maybe they couldn't get the door closed." T 3488. "And what I noticed when I was looking out were two girls at this door, you know, slamming, kicking, pounding on the door. When I noticed the door was closed a few times, and I realized they weren't trying to get the door closed, they were just kind of - " T 3489. Outside the trailer were a red Fiero with its trunk and hood open and a white Grand Am with its trunk open. T 3489-90.⁴ "And they would go to the cars, go back in the house, come out, slam, kick the door, go to the cars, come back, kick at the door, hit it, go - I mean it was just weird, so I just watched what was going on because I didn't know what they were doing." T 3490. Connie had on black spandex pants. T 3491-92.

When Cannon returned around 4:00, only the Fiero was at the

³ Cannon described her as heavy set. T 3491-92. Donna Waddell, who weighed over 200 pounds, T 3810, testified she was at the trailer that afternoon. T 3807-08.

⁴ Although Kenneth Mischler, a mechanic, testified that there was nothing wrong with the Fiero, T 3437-38, Connie and Donna Waddell rented a white Grand Am on the afternoon of March 23. T 3315. "The car was rented so Donna's truck would not be seen at the trailer park place there." T 3678 (testimony of Sarah Thomas).

trailer. T 3492-93. Around 5:45 or when the sun was setting, he saw the white Grand Am drive up. T 3494-95. "[T]he car was facing me. I noticed one girl get out of the car, but there were several people in the car. But I don't remember whether they were male, female, how many there were. I just remember looking across and seeing people in the car. And I was thinking, 'I wonder what's going to happen now,' just because they were pounding at this door. But this was a different girl that got out that I hadn't seen before." T 3495. She had dark hair. T 3495-96.⁵ She went to the trailer's north door, "And I believe she knocked at it or was at the door doing something, and then got back in the car and they left. Nobody else got out." T 3496. Cannon went to sleep; when he awoke at 7 p.m. to go to a catering job, very loud music was coming from the Pfeiffer trailer. T 3497-3500.

Alan Pfeiffer was an account manager for a television rental store in Fort Pierce. T 3458. He was at work on the 23rd. T 3459. Around 7:00 or 7:15 p.m., Linda Tustin, his lover, entered the store. T 3476. Alan was on the phone, and was "agitated, aggravated." T 3476-77. When he got off, he said "his wife and her biker friends were going to clean him out." T 3477. Saying he had to go home, he left in his black Trans Am. T 3478-79.

Cordary, who had been drinking steadily since the afternoon,

⁵ In final argument, the state identified her as Sarah Thomas, T 4216, although it is contrary to the testimony of both Thomas and Donna Waddell.

T 3405, 3389-90, heard "all that banging around. And then I heard - it was the gunshots, you know, but it was - sounded like it happened back - it was off probably in the back of the trailer or somewhere to the left. But I really thought, you know, maybe it was the - what do they call that - industrial park over there. But later on, after it all settled down and they found out what happened, I realized, yeah, those were gunshots. And it was three shots." T 3390. He watched the trailer's south door for a few minutes, but saw nothing. T 3390-91. At trial, he said this was around 8:00 p.m. T 3390. He had made a sworn statement that he thought he heard the shots around 10:30 or 11. T 3401. He also made a sworn statement that the shooting occurred as it was just getting dark - around 6:30. T 3402-3403.⁶

Cannon came home from his catering job around 9:30 or 10 p.m. T 3498-3502, 3506. Loud music was still coming from the Pfeiffer trailer. T 3503. He did not remember if he saw any one parked there. T 3506. He had made a sworn statement that he believed the Fiero was there. T 3514. After further questioning at trial, he testified that he thought he did see the Fiero that night. T 3537. He did not remember seeing Alan's TransAm. T 3522.

Alan's trailer was "dark" when Cannon returned that night by the north entrance. T 3506, 3511. He had a clean view of the north side of the Pfeiffer trailer from his trailer. T

⁶ In final argument, the state referred to Cordary as "quite a character", "convicted of numerous felonies". T 4203.

3510. It was "dark all over" that area. T 3511. He did not remember seeing any lights on at all. Id. He went right to bed. T 3506.

The north porch light was on when police officers went to the Pfeiffer trailer around 4 a.m. T 3151, 3169, 3148.⁷ The light switch was inside, behind the locked north door.⁸ T 3169, 3148.

The stereo was blaring and the south door was ajar. T 3141, 3190-91. Entering through the south door, officers found Alan Pfeiffer dead from three gunshot wounds. T 3144-45, 3192-93.⁹

On the dinner table was a torn wedding photo, along with life insurance policies totaling over \$100,000 payable to Connie on Alan's death. T 3300-01. Outside the trailer were Alan's black Trans Am and Connie's red Fiero. T 3196-97.

Near the body was a lipstick-stained marijuana roach. T 3297, 3324-25. Marijuana cigarettes and paraphernalia were found in Connie's Fiero. T 3357-58.

The defense elicited testimony that Alan's body contained

⁷ The state introduced into evidence a photograph showing that the light was on when the police arrived. T 3151.

⁸ "It had a dead bolt that was thrown, and also there was a push-button lock." T 3148.

⁹ The medical examiner testified that one bullet entered under the right ear, traveling slightly outward and slightly front to back, another entered from the top of the head and passed through the brain, and the third entered the back, going upward through the spine. T 3219. There was no powder or stippling. T 3220. The autopsy showed no signs of a struggle. T 3249-50. Alan died between 3:30 p.m. Saturday and 4:10 a.m. Sunday. T 3257-59.

cannabinoids, but the court struck the testimony on the state's motion. T 3250-51.

The police never compared the lipstick on the roach near the body to Connie's or Donna's lipstick. T 3350-51. They performed no test to compare the marijuana in the roach to the marijuana in Connie's car. T 3358. There was no DNA testing of the marijuana roach. T 3325-26. (Donna Waddell testified that she never saw appellant smoke anything; he said he had asthma. T 3872.)

The police never searched the trunk of the Fiero, T 3350, and did not search the white Grand Am until after it had been returned to the rental agency. T 3567.

Black high heel shoes found near the body were never processed for blood; the police gave them to Connie's sister. T 3361-62. Connie was wearing black spandex and high heels on the night of the murder. T 3667 (testimony of Greg Hill).

The police found Connie's fingerprint on a fan light bulb that had been unscrewed. T 3544, 3572-73. They found Donna's fingerprint near the door. T 3348, 3563.

Connie told the police she had been at the Firefighters Fair with Donna Waddell, Sarah Thomas, and appellant; Donna, Sarah, and appellant confirmed her story. T 3320.

Connie's lover, Greg Hill, testified that he met Connie, Connie's two children, and two girls and a guy at the fair gate around 6:30 p.m., and that he, Connie and the children split up from the other three. T 3658.

After about three hours, they rejoined the others at the

front gate. T 3659. Connie went to take her children to her mother's house, then met Hill around 10:30 at his parents' condo. T 3659-60. When she arrived, there had been a change in her personality: "she was noticeably shaken and upset." "She said she was worried about going home." She left around 11:30 to go to a hotel or something; she may have gone back to meet her friends. T 3660.

After Alan's death, Connie bought a \$120,000 horse farm near Ocala while working as a waitress at Cracker Barrel. T 3643, 3650. Donna Waddell acquired a taxi company. T 3855, 4001. Appellant went to live in an apartment behind a convenience store. T 3644.

Questioned by the police again in 1997, Sarah Thomas implicated herself, Connie Pfeiffer, Donna Waddell, and appellant. The police then spoke with Waddell, who made a statement and agreed to plead guilty to second-degree murder, with sentence to be imposed after the trials of appellant and Connie Pfeiffer.

Thomas⁹ testified as follows at appellant's trial:

Several weeks before the murder, appellant said Connie wanted to pay him to kill Alan: "Donna had asked Paul. Connie had asked Donna if she knew of anybody that would do you [sic] do it and Donna had suggested that Paul might." T 3674-75. Paul said he would get a camcorder, a stereo, and half the

⁹ By the time of trial, she had married, and called herself as Sarah Haislip, but she is referred to as Sarah Thomas throughout the trial.

insurance money; they would all get something. T 3675-76. Thomas and appellant went to a knife store in Melbourne. T 3675.

On the afternoon of March 23, Connie, Waddell, and Thomas went to the Pfeiffer trailer: "Donna was going to leave the door unlocked so Paul could get in later that night." T 3681. They did laundry, picked up clothes and left the north door unlocked. T 3749. They did not use the south door. T 3750. They returned to the Idlewild apartment. T 3682.

Around sundown, after Connie was at the fair, Donna and Thomas "drove to the trailer, dropped Paul off, and then proceeded to the fair." T 3682-83. If anybody at the fair were to ask about him, "We were to say that he just went off to use the bathroom." Id. They paid for their entry with quarters; Donna "had taken them from her dad's house out of a big jar." T 3684.

Thomas continued: after she and Donna were at the fair for an hour or two, they went to a pick-up spot near the trailer park, but appellant was not there. T 3684. They returned to the fair, and stayed for 30-45 minutes before going back to the pick-up spot; this time appellant was there. T 3687. It was now between 10 and 11 p.m. T 3756. Appellant crawled out of a ditch, climbed into the back seat and said, "Hurry up. Let's go. It's done." T 3691.

(In her 1997 statement, the police asked about a dozen times if he said anything when they picked him up. T 3781-82. The detective said that appellant must have said what happened. T

3778. Finally, the detective said, "Did he say 'I shot him. It's done.'" T 3781. They asked about a couple of dozen more times until, after three and a half hours, she said, "It could have been, 'It's done.'" T 3782.)

Appellant changed his clothes in the car and put them in a brown bag. T 3691-92. He said he hid behind a couch, dimmed the lights, waiting about an hour, an hour and a half for Alan, turning up the music so the neighbors would not hear the shots. T 3692.

Thomas said she did not know about the gun before the murder. T 3681. They did not dispose of the gun or go out west on Highway 60 that night. T 3757. They did not go out later that night to get rid of the gun. T 3757-58. They went from the trailer to the fair, where they met Connie and her children. T 3692.

Connie took her kids home, then returned to pick up Waddell, Thomas and appellant and they went to Denny's. T 3692-94. Appellant's clothes were burned in the bathtub at Idlewild. T 3694. A few days later, Thomas and appellant went out on Highway 60 to dispose of the gun. T 3695.

Donna Waddell's testimony agreed with Thomas's in broad terms: they took appellant to the trailer and later picked him up. It varied from Thomas's in details. (See appendix B.)

According to Waddell, Thomas took part in discussions about the murder. T 3799. Connie said there was about \$10,000 in insurance, of which Waddell was to receive \$2000 via appellant.

T 3800.¹⁰ Donna was going to hold Alan down while appellant stabbed him; "we went up to Melbourne Mall to one of those knife shops" to get a knife. T 3801. Alan was a big man, and Donna decided she couldn't hold him down. Id.

On Saturday, Connie, Waddell, and appellant went to the Pfeiffer trailer to make it look like a robbery; they moved some VCR's and Nintendos by the back door so it would look like a robbery. T 3806-07. This was appellant's idea, and he was wearing gloves. T 3807. They were kicking the back door, trying to get it open, and then they had trouble getting it closed. T 3808.

Thomas, Waddell and appellant decided to get a gun from Waddell's father. T 3803-04. Waddell and appellant went to the Waddell home, where appellant entered a window and stole the gun and a jar of quarters. T 3813. Waddell had told him where the gun was, but did not "instruct" him to take anything else. Id.¹¹

¹⁰ Waddell testified that she and appellant never got any money, only Connie got any money. T 3904. Appellant got "absolutely nothing" for the murder. T 3877-78.

¹¹ Donald Waddell, Donna's father, testified that on the afternoon of March 23 he discovered the theft of a change jar and a .38 Special Smith and Wesson revolver from his bedroom. T 3414-17. His testimony was confused as to the time that he discovered this theft: he discovered it when he came home from work after lunch, putting the time as "like I say, 1:00 or 2:00, between 1:00 or 2:00, and probably 5:00, somewhere in that area." T 3416-17. There were 4 or 5 bullets in the gun's case, which was also missing. T 3436. The gun, gun case, and jar were never found.

A firearms examiner testified that the bullets recovered from Alan's body were all fired from the same .38 caliber revolver; they were consistent with a .38 Special; there were ten possible makes of gun that could have been used, including

Thomas, Waddell and appellant then went out west of town to test the gun. T 3815. Thomas, Waddell and appellant then went to the trailer, where appellant said he was going to hide behind some furniture and shoot him when he came in the door; he made sure it looked like a robbery, and told them to keep to the story that they were all at the fair together. T 3816.

After taking Thomas and appellant back to Idlewild, Waddell drove Connie and her children to the fair. T 3817. She then took Thomas and appellant to the fair. T 3818. There they met Connie, Greg Hill, and Connie's children. T 3819. Waddell, Thomas and appellant left the fair and arrived at the trailer around dusk. T 3828. All three entered the front door, and then the women locked the front door and departed, leaving appellant inside. T 3829.

The two women then drove around for a long time: "It just seemed like forever. We just drove and drove and drove." T 3890. They parked near the trailer park. T 3834. Waddell thought she heard a shot (Thomas said she heard nothing), and drove to the pick up spot, where appellant got in and said, "It's done." T 3834-35. She thought this was between 8:30 and 9 p.m. T 3896-97.

They drove out far west of town on Highway 60 toward Yeehaw Junction; appellant threw the gun out at the second deep canal sign after shooting off the remaining bullets. T 3837, 3899. They drove out on a grove road, where appellant got rid of his

Smith and Wesson; the bullets were coated with Nyclad, an S&W coating. T 3445-46.

shirt and shoes and changed clothes. T 3838.

They met Connie and the others back at the fair; Connie took her kids home, then returned to pick up the others. T 3839-40.

After stopping at Denny's, Waddell and Connie left Thomas and appellant at the Idlewild apartment, and then drove around. T 3844. Waddell and Connie twice went by Connie's brother's house to ask him to go to the trailer, so he would find the body. T 3845, 3848-49. They drove by the trailer and saw cop cars. T 3849.

The next day, they tried to burn appellant's pants with pool chemicals, but they would not burn. T 3842-43. They tried to burn the leather gun case. T 3843. They did this in the bath tub. Id.

Waddell said that appellant said he hid behind some furniture and got him when he came in; he turned up the stereo really loud so nobody could hear the shots. T 3843. He said he was not going to give any details, so they would not be able to tell too much. T 3844. He said to stick to the story about the fair. Id.

Donna and Thomas also testified about events between the time of the murder and the arrests.

Donna testified that she talked to the police again a year later, and turned down an offer of immunity. T 3850. She said that about three years after the murder, appellant told her she better keep her mouth shut or his old family members are going to kill her and her son; "he said that the person that killed Alan Pfeiffer was dead." T 3853-54. He wrote everything down,

did not talk, said he got the gun and took it apart and took a bus to the Ocala area and threw the gun parts in the woods; after writing this down, he burned the papers. Id. She saw him again after the police interview in which she again said she remembered nothing. T 3854. Again, he told her "Well, you better not, because you'll lose your child and the old family will kill you." T 3855.

Later, she and her cousin Ben Brown went to warn appellant. T 3862-63.¹² On June 19, 1997, Sarah engaged her in conversation about her having to go to the police and what should she say. T 3863. Donna told her to stick to the story. T 3864. Donna said she had no real contact with Sarah until 1997. T 3852.

Sarah Thomas testified that some time after the murder appellant took the camcorder apart in tiny pieces and threw it away, saying it would point evidence towards him. T 3699. About a month later, Sarah became pregnant and went back to her parents. T 3699-3700. She said that appellant said that three black males, "B.J., D.J., and Shotgun", committed the murder. T 3700. In June 1997, he called and said the police had reopened the case, and they would get in touch with her; "He just mainly said, 'Stick to the story.'" T 3703. Sarah's only contact with Donna before then was seeing her in passing and saying hi. T 3707. The police sent Sarah with a body bug to talk with appellant. T 3708. "He wrote down everything he

¹² Brown testified that, at some time after Sarah came over to Donna's in June 1997, he and Donna went to appellant's home and spoke with his roommate, telling him to tell appellant "to just watch out for Sarah." T 3668-70.

wanted to say on paper." T 3709. Then he burned the paper. T 3710.

On March 28, 1991, appellant made a taped statement to the police which the state played for the jury. He said he went to the trailer on the night or afternoon of the murder with Connie and Donna Waddell to watch videotapes and do laundry, and later returned with Donna and Sarah Thomas to put another load in. T 4019, 4024, 4037. After Donna took Connie and her children to the fair, she picked up Sarah and appellant, and they went to the trailer where Donna went in and put another load in the laundry. T 4055. They then went to the fair, arriving around 5:30 p.m. Id.

At the fair, "we went to (inaudible) saw Connie. Went walking around (inaudible) walking around. Was walking around riding rides, almost all the rides. Talked to my friends, said, hey." T 4056. He separated from the others for about five minutes to go to the bathroom, talk to friends. T 4056-57. They were with Connie and Donna for most of the time, and no one left for thirty minutes. T 4073-74. Connie took the kids to the kiddie thing, later she took them home. T 4057.

Appellant was unsure¹³ about how long they waited for Connie to pick them up at the fair, putting the time as between ten minutes and an hour and ten minutes. T 4059. They then went to Denny's, and afterward, Donna and Connie left appellant and Sarah at the Idlewild apartment and went off together. T 4061-62.

¹³ He said he was "buzzing" that night. T 4061.

On Saturday, appellant and Donna had gone to Donna's parents' house for some shirts. T 4069-70. They only went in the laundry room; the house was locked and Donna had lost her key. T 4070-71.

Connie let them borrow the stereo. T 4020. Connie got mad about a problem with the door at the trailer: "(Inaudible) you had to kick it, kick it real hard to shut it. And we couldn't get it shut."; "Donna kicked, I kicked it."; Connie did not want to make noise and bother people; the four of them left. T 4022. They went home, unloaded the stereo, and did not go to the fair until about 5; Connie's mom kept calling about when she was going to come get the kids. T 4023.

Connie had gone to a concert the night before, and when she came back around 2 a.m.,¹⁴ she and Sarah went driving around. T 4026-27. When they came back, they told appellant that Sarah had banged up the car. T 4030, 4027. Connie got the rental car because the Fiero was messed up. T 4027.

The next day (Saturday), Connie and Donna got the white rental car, and it was in that car that they went to the trailer. T 4037-38. At some point, appellant changed a light bulb (T 4047):

[Appellant] Oh, that night I changed a light bulb for them right there where that fan is, paddle fan. If that helps.

[Det.]:(Inaudible.)

¹⁴ Appellant said that Connie "always comes to our house. Because apparently Alan beats her or something like that when she's late or drunk or something." T 4028.

[Appellant]: She - I put all three of the (inaudible) she only uses one of them because the other one's (inaudible) or something. I don't know. She didn't explain it or nothing. I don't know. Whatever.

They were at the trailer "about an hour (inaudible) I guess." T 4049. They loaded tape, clothes, speakers and the stereo into the white car. T 4040. Connie showed Donna something inside the hood of the red car. T 4051.

C. The penalty phase. The state presented the jury with no evidence at penalty.

Appellant presented evidence as follows:

Appellant's father, Paul Evans, Sr., testified that appellant (P.J.) was born in January 1972, and, after his first year, he was raised largely by babysitters because of his parents' conflicting schedules. T 4318-19. He was diagnosed as hyperactive and treated with Ritalin when he was around three years old. T 4321. He had a learning disability, and "was very slow at picking up stuff." Id. Paul, Sr., was working 12 to 16 hours a day with a four hour commute, and also worked on weekends. T 4321-22. The parents were in a constant battle and struggle, living in a very small military apartment in New York where appellant could hear all of their arguments. T 4323-24. The parents separated in 1977, and the mother filed for divorce in 1978. T 4323. Another son, Matthew, was born in 1976. T 4321. Appellant was around six, and Matthew was two at the time of the divorce. T 4324. The father was then transferred to Alabama and then to Japan. T 4325. In the summer of 1979, the father and his new wife had the boys during the summer; they

were very hard to control - this was basically the only time he saw them between 1978 and 1984. T 4326.

In 1983, as the mother was having a lot of problems with the boys, the father offered to take custody, but she would let him have custody over only one of them. T 4328. He figured that if he got custody of one, he could probably then get custody of the other. Id. In 1984, he learned that Matthew was killed and appellant was questioned by the police. T 4329. The father did not remember the details. T 4329-30. He hired a lawyer and appellant was released to his custody. T 4329. Appellant was going through a very emotional traumatic time. T 4330. Appellant was placed in a residential program at Charter Woods, a mental hospital in Dothan. T 4330, 4332.

When he came out of Charter Woods, appellant (age 12) was "very defensive, very - kind of like 'what's going to happen next,' unsure of what his parents were doing to him. And we struggled there for a period of time." T 4331. The parents continued to fight over custody. Id.

The placement in Charter Woods as "an absolute detriment" to appellant. T 4332. Also, there were disputes about billing, over-statements of expenditures, "a lot of fraudulent overcharging and stuff". Id. Appellant did not get the help he needed. Id.

Appellant then returned to his mother. T 4333. He was involved in treatment with Health Services of Florida. Id. He went to a Methodist children's home in Orlando. Id. The parents kept fighting over custody. Id.

Appellant was on several medications, seeing several therapists, but never got the help he needed. T 4334.

Sandra Kipp, appellant's mother, testified next. She characterized Paul, Sr., as a very domineering person. T 4347. When appellant was six months old, Sandra went to work as a phlebotomist, working an evening shift so she could be with appellant in the daytime; the father was very active in extra-curricular activities in addition to working long hours. Id. Appellant was always "hyper" - it was like somebody wound him up; he would run into walls. T 4348. The parents did not get along; appellant would listen to them argue. Id.

About six months after the divorce, the father was due to be transferred and stopped seeing the boys, saying: "they're going to have to learn to be without me anyway." T 4349-50. Appellant was now in school; he had a hard time sitting still and listening to teachers, he was hyperactive and moved around, chasing around, there were problems with teachers. T 4350. Because of the divorce, they had to move from military housing and change schools.

Both boys were hyper, it was just a frenzy, exhausting, for the mother; the babysitters would get tired, and the mother always had to have backup babysitters. T 4351. Appellant was put on Ritalin. Id. It didn't help. T 4352.

At age 9, appellant was placed in Shilo Youth Camp to help him academically, but his situation worsened. T 4352-53. They tried to build morale with really easy work, but he could not keep up, and cried because he could not do the work. T 4353.

Appellant was on Ritalin and Cylert, and Matthew "was like a frenzy". T 4354.

In 1984, when appellant had just turned 12, the mother was called for an extra shift at the hospital, and had to leave the boys with her boyfriend. T 4355. Matthew was irritable from a bad cold. Id. Appellant called and said Matthew had been shot, and he called 911. T 4356. Matthew died. Id. The boyfriend had kept a loaded gun near his bed. T 4365. Ms. Kipp continued (T 4365-66):

The boys unloaded the gun to play cowboys and Indians, whatever, and, you know, one shoots, one turns, one looks behind things. And then they're too young to understand about things in the chamber, things that - the extra bullet. They unloaded it thinking it was empty.

And P.J. [appellant] called 911 trying to save his brother. And I'll always be grateful to him for trying to save his brother. If he could have lived, he would have because P.J. tried to get help for him. It's an awful thing to lose a child. I understand what Mr. Pfeiffer has gone through. I wouldn't wish it on anybody.

When the state asked if appellant showed remorse about this incident, Ms. Kipp testified (T 4367):

P.J. went dead panned (sic). He just went like he was in shock. I don't know if that's the same thing as no remorse. He was in the home by himself with his brother dying on the floor. I don't know how long he was there by himself having to watch that, and before the police and ambulance arrived. I wouldn't want anybody to have to go through that.

Appellant was put in Charter Woods in Dothan for about three months. T 4357. To see him, his mother would drive nine hours up, stay two hours, drive nine hours back, then sometimes go

straight to work. Id. Charter Woods suggested that he go into a half-way house, and appellant went into a Methodist Children's home. T 4358. They tripled appellant's medication, but it changed nothing. Id. Appellant did not get better. Id. He had a long series of behavioral problems. T 4359.

When he was 17, appellant went into Harbor Shores, a mental health facility for troubled youth, for three months; he was still on medications. T 4360. Appellant and the family never recovered from Matthew's death. T 4361. Appellant and Matthew were very close. Id. Appellant is very good at drawing. T 4362.

Appellant has two daughters. T 4364.

Dr. Gregory Landrum, a psychologist, reviewed extensive background material, including material provided by the State Attorney, hospital records, evaluations, school records. T 4374. He met with appellant for about three hours, and conducted six or seven psychological tests. T 4375-76. Appellant has a profile that responds well to structured environments, and has learned some pretty good survival skills and pretty good coping ability within structured settings. T 4376. He exhibited no behavioral problems in jail. T 4376-77. His intelligence is in the high average to superior range; he has problem-solving skills and positive adjustment; his reading is well within the average range. T 4377. He went to the United Methodist Child's Home twice. T 4379-80. The first time, he was there for about a year; as time went on, he began to display behavioral difficulties. T 4380. There were about twelve

threats; ten involved threats of violence. T 4380.

Dr. Laurence Levine, also a psychologist, testified that he spent an entire day performing neuropsychological and psychological tests on appellant. T 4389. He also interviewed appellant for a couple of hours, and reviewed about 300 pages of records. T 4391. He concluded that appellant would be able to respond very well in a strongly structured environment in which the rules were unequivocally clear and in which he knew what was expected of him and the consequences if he violated the rules. T 4391. Appellant had no disciplinary incidents in jail. T 4391-92. He would adapt to a prison setting. T 4392. His drawing ability is stupendous, his intellectual ability is above average, he is an avid reader, reading about all different kinds of subjects and religion. T 4392. Appellant had a number of adjustment problems at Charter Woods, the Methodist Child's Home and the Children's Psychiatric Center at Harbor Shores. T 4393. He was involved in treatment facilities as a child, and was very forthcoming in saying that when there he played games with the staff; sometimes he was interested in talking about his problems, sometimes he was not. T 4394. He did well in the Fort Pierce Detention Center in 1990. T 4395. He seemed to do better in a correctional facility than in a treatment facility. Id. Florida United Methodist had not been an appropriate place for a kid with the severe behavioral and emotional problems appellant had as a child. T 4396.

Deputy Gregory Cooper testified that no one had disciplinary problems with appellant during his year-and-a-half in jail;

there was nothing in his disciplinary file. T 4415.

Deputy Carl Lewis testified that appellant had caused no problems in jail and had no D.R.'s. T 4418.

Paul John George, a Jehovah's Witness minister, testified that he had conducted Bible study with appellant for a year-and-a-half, and that appellant had a very, very deep interest in God and his word. T 4423. Unlike others involved in Bible study, he did not lose interest over time. T 4423-24.

The court found two aggravators: the capital felony was committed for pecuniary gain, and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. R 502-506. As to mitigation, it gave little weight to appellant's age,¹⁵ little weight to good behavior in jail, little weight to his good attitude and conduct awaiting trial and behavior at trial, little weight to his difficult childhood, little weight to having been raised without a father, little weight to his broken home, gave no separate weight to his being the product of a dysfunctional childhood, moderate weight to his having suffered great trauma during his childhood, moderate weight to appellant's hyperactivity, prior psychiatric history and hospitalization for mental illness, very little weight to the fact that he is the father of two young girls, very little weight to his belief in God, very little weight to his ability to adjust to life in prison, no weight to his artistic ability, very little to his love for his family and

¹⁵ Appellant was born January 30, 1972, R 1, so he had turned 19 less than two months before the murder.

their love for him. R 506-10. It gave no weight to immaturity at the time of the homicide. R 509. It gave moderate weight to Connie Pfeiffer's life sentence. T 510-11.

SUMMARY OF THE ARGUMENT

1. The delay between the crime and the indictment so prejudiced appellant as to violate due process. Witnesses who would have refuted the state's case and cemented appellant's alibi disappeared, and he was unable to present evidence of his innocence. The court should have quashed the indictment or dismissed the charge.

2. Exclusion of evidence of cannabanoids in Alan Pfeiffer's blood requires reversal. The evidence supported the defense theory that Connie or Donna Waddell murdered Alan. It refuted the state's theory that he drove directly home so that the murder occurred around 8:30.

3. Det. Brumley testified on direct examination that officers followed up on leads resulting from a canvass of the neighborhood. The court should not have prevented appellant from cross-examining him about these leads.

4. It was error to bar appellant's family and the public from individual voir dire of the venire. Denial of a public trial is a structural defect to which the harmless error rule does not apply.

5. The use of alternative theories of guilt violated the state and federal constitutions under the circumstances at bar. The state's two theories were both legally and factually incompatible. At common law, the state could not pursue such conflicting theories. The error was even more prejudicial as to penalty.

6. The state's guilt-phase argument to the jury requires

reversal. The state based its argument on assertions of personal knowledge about the facts of the case and, taken as a whole, deprived appellant of a fair trial.

7. As it existed at the time of the indictment, the state's case was that the murder occurred at a time for which appellant had an alibi and which contradicted the testimony of the state's main witnesses. Further, the testimony of witnesses Cordary and Thomas at trial differed on crucial points from their stories at the time of the indictment. Under these circumstances, this Court should reverse the conviction under the principles set out in Anderson v. State, 574 So. 2d 87, 90 (Fla. 1991), with directions that the case be resubmitted to the grand jury.

8. Fundamental error occurred when the state assured jurors during voir dire that it would not present the testimony of co-defendants or co-conspirators unless it had corroborated their testimony and was trying to get the "bigger guy."

9. This case does not satisfy the requirement that the death penalty is reserved for the most aggravated and least mitigated murders. There are only two aggravators, there is ample mitigation, including that appellant had just passed his 19th birthday when the crime occurred. The crime's instigator, who most profited from it, and against whom the aggravators were stronger, received a life sentence. The sentence is disproportionate.

10. Use of alternative theories of guilt renders the death sentence illegal and unconstitutional. Under the state's alternative theory that Connie or Donna committed the crime,

appellant's death sentence is disproportionate to the crime.

11. The state's penalty argument deprived appellant of a fair capital sentencing. It began by referring to the time between the crime and the trial, making that time an aggravator. It referred to "30 pieces of silver", implying that appellant was like Judas and Alan Pfeiffer was like Jesus. It discussed that others had turned down Connie's offer, as though that were a valid sentencing consideration. It unconstitutionally urged jurors to disregard valid mitigation including appellant's traumatic childhood. It contended that appellant's age should not be considered on the invalid ground that teenagers had participated in World War II, and turned appellant's age into an invalid aggravator.

12. The court unconstitutionally erred in giving no weight to valid mitigators established by the evidence.

13. The death sentence violates the Jury and Due Process Clauses. The jury did not unanimously find the facts necessary to permit a capital sentence.

14. The court erred in giving dual consideration to the aggravators. Both arose from the same essential feature or aspect of the case.

ARGUMENT

The following errors, separately or cumulatively, require reversal of the conviction and/or sentence at bar.

1. WHETHER THE COURT ERRED IN DENYING THE MOTION TO QUASH THE INDICTMENT OR DISMISS THE CHARGE.

Appellant moved that the court quash the indictment or dismiss the charge on the ground that the delay between the March 1991 murder and his August 1997 indictment and arrest unconstitutionally prejudiced him. He alleged that a witness named Jesus Megia¹⁶ had made a statement to the police that he saw Connie Pfeiffer commit the murder, and that appellant could not now find Megia. R 367-68, T 1808-11. He alleged the unavailability of William Lynch, a trailer park resident who told the police that he heard gunshots at 2:00 to 3:00 a.m. on March 24, 1991. Id. He alleged that Christopher Ross, a motorcyclist intimate with Connie, was unavailable. Id. He further alleged that because of the delay he was unable to examine physical evidence at the scene of the crime.

The state did not dispute these facts. Instead, it argued that it had not caused the delay. T 1812-18. It seemed to tacitly acknowledge prejudice ("... the State has the same problem as the Defense does. There's witnesses out there that we would like to find but we didn't, we can't." T 1817).

The defense further argued that defense alibi witnesses (Chris Murdock, Bill Crowley, and Mike Johnson) could no longer

¹⁶ The written motion calls him Jesus Megia, but in the transcript the name appears as Jose Megia.

be found despite repeated attempts to do so. T 1818-19. The state said that other witnesses saw appellant at the fair. T 1819-20. The defense replied that the two still-available witnesses (Tony Kovaleski and Rosa Hightower) would give certain time periods that they saw appellant that evening, "but not the entire time line. These additional witnesses, Chris Murdock, Bill Crowley, and Mike Johnson, we expect would fill in the holes and give a complete alibi for Paul Evans at the fair." T 1820. The court ruled that the defense had "failed to demonstrate actual prejudice by the delay" and denied the motion. T 1820-21.

At the end of jury selection, appellant asked that the court recognize his standing objection as "to all the previously filed motions heard by this Court"; the state agreed, and the court ruled: "Okay. You may have a standing objection." T 3101-3102.

The record also shows that: On cross-examination of Det. Brumley, the defense began to ask about calls that came in during the early morning hours. T 3344. Before the defense finished the question, the state objected. At the bench, defense counsel said he wanted to bring out that calls were made to 911 about 2:30 or 3:00 a.m. on March 24, that they were excited utterances or spontaneous statements as to what was heard at the time. T 3344-45. The state objected that the defense had to lay a predicate, which it could not do because "We don't have the 911 tape." T 3345. The defense replied: "It's impossible for me to establish that type of foundation,

because through discovery I have no access to any 911 tapes.”; defense counsel said that there were reports of these 911 calls. T 3345. The judge said that the defense needed to have the operator to establish the predicate, adding: “You’re not going to be able to do that.” Id. Defense counsel replied: “But we were thwarted in our attempt to do that because we didn’t get any of that in our discovery, Judge.” T 3345-46. The call reported that a woman was crying between 2:30 and 3:00 A.M. down by a canal near the trailer park where they searched for the gun.¹⁷ T 3346. The discussion concluded as follows (T 3346-47):

THE COURT: Who are the witnesses?

MR. HARLLEE: We attempted to find Ms. Eachern for six months. E-A-C-H-E-R-N. We can’t locate her. She apparently was the 911 dispatcher that evening. We’ve made all attempts to locate her and can’t find her.

MS. ROBINSON: What about the person that made the call?

THE COURT: Who made the calls?

MR. HARLLEE: We don’t know that.

THE COURT: No, I’ll sustain the objection.

The delay between the crime and the arrest and indictment violated the defendant’s constitutional rights.

In Scott v. State, 581 So. 2d 887, 891 (Fla. 1991), this Court found that a seven-and-one-half year delay between the crime and the indictment violated due process. Scott set out the following procedure: The defense has the burden of proving

¹⁷ Brumley had testified that, pursuant to leads received from Jose Megia and Jesus Cruz, officers had searched for a weapon at a canal near the trailer park. T 3342-43.

prejudice. Once actual prejudice is shown, the court must balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and Fourteenth Amendment.

At bar, the court never reached the balancing step. Instead, it ruled that the defense had not shown actual prejudice. T 1812-18. The court erred.

In Hallman v. State, 462 So. 2d 120, 122 (Fla. 2d DCA 1985), the court found actual prejudice where a material witness who had investigated the case had died and the defendant's memory had dimmed regarding the material facts.

With respect to missing witnesses, the defendant "must offer some explanation as to how their testimony would have been both favorable and material." Marrero v. State, 428 So. 2d 304, 307 (Fla. 2d DCA 1983).

At bar, appellant showed actual prejudice.

The disappearance of eyewitness Megia, who identified Connie Pfeiffer as the murderer prejudiced the defense. The state did not dispute that his disappearance was prejudicial. Given the profound discrepancies in the testimony of the state's witnesses¹⁸ and the absence of any physical evidence against appellant, his testimony was very important.

The absence of witness Lynch, who heard gunshots at 2:00 or 3:00 a.m., was also prejudicial. He would completely contradict

¹⁸ See appendix B to this brief.

the theory that the murder occurred at 8:00 p.m. There was no theory of the state's evidence that could put appellant at the trailer at 2:00 a.m. Further, such testimony was consistent with Connie and/or Donna committing the murder late at night.

Also prejudicial was the disappearance of witnesses who could show that appellant was at the fair continuously during the claimed time of the murder. The absence of these witnesses lead directly to the following improper argument by the state (T 4176; e.s.):

What do we know about the accepted facts in this case? One accepted fact is on March 23rd of 1991, Paul Evans was at the fair at 6:30 P.M. There's been no testimony, and it's uncontroverted, that he was not seen again until 9:30 P.M., both times by Greg Hill.

The state used the unconstitutional delay to make an unconstitutional comment on appellant's failure to call the missing witnesses, so that the state's case appeared "uncontroverted". Cf. Rodriquez v. State, 753 So. 2d 29, 38-39 (Fla. 2000) (state generally may not comment on failure to present defense and refer to evidence as uncontroverted); Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992) (argument that state's evidence was "unrebutted and uncontradicted" violated 5th amendment).

The disappearance of Connie's biker friend (Ross) also prejudiced appellant. The evidence showed that Connie's "biker friends were going to clean [Alan] out". T 3477.

The state did not dispute that the passage of time made it impossible to examine evidence at the crime scene. Examination of the marijuana cigarette found near the body and comparison

with the marijuana in Connie's Fiero was especially important.

The court erred in ruling there was no prejudice at bar.

The "most important factor" in the balancing process is actual prejudice. Shaw v. State, 645 So. 2d 68, 70 (Fla. 4th DCA 1994).

There seems to be no case in which the state has come up with a justification that outweighed the degree of prejudice shown at bar. The state presented no such justification. It only argued that it did not have a case against appellant until six years after the crime. It appears that it could have obtained Sarah's cooperation earlier, but the police merely left the file inactive for many years before assigning it to a new detective. T 3593-94. At bar, there was actual prejudice such that the delay in bringing charges against appellant amounted to a denial of due process.

The delay was also prejudicial as to penalty. The state highlighted the delay as a fact for the jury to consider in imposing a death sentence. T 4429. Appellant could not show he was only an abettor, so that his sentence was disparate in comparison with the treatment of the others involved in the crime.

2. WHETHER THE COURT ERRED IN ITS RULING ABOUT CANNABANOIDS IN THE BLOOD OF ALAN PFEIFFER.

The medical examiner testified for the state about the autopsy and his findings. On cross, the defense brought out that he ordered blood tests as part of the autopsy process. T 3250. When the defense brought out that the tests showed cannabanoids in Alan Pfeiffer's blood, the state objected on the ground that the medical examiner "did not do the actual test" so that the defense could not lay a proper foundation for the results of the tests. T 3251. The court sustained the state's objection and granted its motion to strike. T 3251-52. The court erred.

A doctor need not perform blood tests in order to testify about their results. See Capehart v. State, 583 So. 2d 1009, 1012 (Fla. 1991). The state did not claim that the test was untrustworthy or that a medical examiner would not rely on such a test. Cf. Hitchcock v. State, 755 So. 2d 638 (Fla. 2000). The court erred in ruling that the expert had perform the blood test in order to testify about its results. In fact, it seems to be rare for doctors to actually perform blood tests themselves any more.

There was prejudice at bar. Alan Pfeiffer worked all day in Fort Pierce on March 23. He left around 7:30 p.m. because "his wife and her biker friends were going to clean him out." T 3477. The state argued that he rushed home, and was shot dead immediately upon arriving home in Vero Beach around 8:00. T 4168. The state's theory did not allow for cannabanoids to be

in his blood.

If, however, as appellant contended, T 4134, the murder was late at night, when Connie or Donna was smoking marijuana in the trailer, as is consistent with the physical evidence, the presence of cannabanoids in Alan's blood is understandable.

The state and federal constitution guarantee a defendant's right to cross-examine and to present evidence. Coco v. State, 62 So. 2d 892 (Fla. 1953), Davis v. Alaska, 415 U.S. 308 (1974), Webb v. Texas, 409 U.S. 95 (1972). Coco states at page 895:

When the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief....

Accord Gerald v. State, 674 So. 2d 96, 99 (Fla. 1996).

Exclusion of the evidence was not harmless beyond a reasonable doubt. This Court should reverse for a new trial.

The exclusion was also harmful as to penalty: the relative roles of Connie and appellant are an important penalty issue. The presence of cannabanoids in Alan's blood was relevant to Connie's degree of culpability.

3. WHETHER REVERSIBLE ERROR OCCURRED WHEN THE COURT LIMITED CROSS-EXAMINATION OF DET. BRUMLEY.

Det. Brumley testified on direct examination that officers made a neighborhood canvas and followed up on resulting leads. T 3316. The state then moved on hearsay grounds to bar the defense from eliciting on cross that there were persons who heard a gunshot at 10:30. T 3327-29. Appellant argued that the state had opened the door with the testimony that the officers followed up on the leads received during canvassing. Id. The judge erred by sustaining the state's objection. T 3329.

A defendant has the constitutional right to cross-examine and present evidence. Coco v. State, 62 So. 2d 892 (Fla. 1953), Davis v. Alaska, 415 U.S. 308 (1974), Webb v. Texas, 409 U.S. 95 (1972). Coco states at page 895:

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Accord Gerald v. State, 674 So. 2d 96, 99 (Fla. 1996).

When, as at bar, direct examination communicates hearsay to the jury, cross-examination about the hearsay is proper. See Williams v. State, 689 So. 2d 393 (Fla. 3rd DCA 1997) (after officer testified on direct that child said car was gold, no error to allow cross about rest of child's statement). Cf.

Sweet v. State, 693 So. 2d 644 (Fla. 4th DCA 1997) (officer testified on direct that defendant admitted committing robbery; error to refuse to allow cross regarding rest of statement; Johnson v. State, 653 So. 2d 1074 (Fla. 3rd DCA 1995) (same). The testimony on direct about receiving and following leads communicated hearsay to the jury. See, e.g., Postell v. State, 398 So. 2d 851, 854 (Fla. 3d DCA), pet. for review denied, 411 So. 2d 384 (Fla. 1981).

A judge has discretion in making rulings at trial, he may not depart from the law and make rulings contrary to the Evidence Code. See Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) ("As to abuse of discretion, we cannot agree, since the trial court's discretion here was narrowly limited by the rules of evidence.").

At bar, constitutional error occurred. The error was not harmless beyond a reasonable doubt. In final argument, having safely excluded the evidence refuting its theory of the case, the state repeatedly argued that "we know" the facts of the case were consistent with the state's theory and that Connie had an air-tight alibi for the time of the crime. The error was also prejudicial as to penalty, as the evidence was contrary to the state's maintaining that it was appellant, not Connie or Donna who shot Alan Pfeiffer.

4. WHETHER THE COURT ERRED IN CLOSING INDIVIDUAL VOIR DIRE TO THE PUBLIC AND APPELLANT'S FAMILY.

At the start of jury selection, the court said it would conduct general voir dire in the courtroom and individual voir dire in a hearing room, adding: "And what we'll do is escort each juror around to the hearing room, and we've set it up where we have the State Attorneys on one side, we have the Public Defenders and your client at the end of the table. And at the main bench we'll have a clerk and we'll have myself up there and the court reporter will be right around between the juror and the parties. . . ." T 2159. The defense objected (T 2161-62):

MR. HARLLEE: My client's parents wish to observe the proceedings. Is there any way they can do that with us in the hearing room?

THE COURT: Probably not. I made room in the courtroom for everybody, but not in the individual questioning sessions. We'll have to do that in the courtroom, and then we have to move all the jurors outside, and I don't really think that that's going to work out. So I don't know how we could accommodate that other than do the individual questioning inside the courtroom.

MR. HARLLEE: Is there an intercom system from the hearing room into any other room, like the press room or anywhere else?

THE COURT: Not that I'm aware.

THE CLERK: There is - if I record in there, the audio comes in here [the courtroom]. I can't shut this room off from the hearing room.

MR. HARLLEE: Are the people sitting out here going to be able to hear what we're doing in there?

THE CLERK: Yes.

THE COURT: Only if it's being recorded.

THE CLERK: If I'm recording. I looked it up because I thought maybe I could -

THE COURT: No, she's not going to be video recording. We're only going to have the court reporter.

Do you have a recorder that you're going to use?

THE CLERK: I have one, yes, a small one.

THE COURT: Hand recorder?

THE CLERK: Hand recorder.

THE COURT: All right. We'll use that, and then we have the court reporter for the individual questioning.¹⁹

After general voir dire in the courtroom, the court said it would conduct individual questioning in the hearing room while the rest of the panel remained in the courtroom. T 2219-20. 33 people were to be questioned individually. T 2210. The court spent the rest of the day conducting individual voir dire in the hearing room. T 2224-2354.²⁰ The next day, it held individual voir dire in the hearing room until 10:30 a.m., at which time, for some reason, it began conducting it in the courtroom. T 2414.

The next day, the court again conducted individual voir dire in the hearing room during the morning and afternoon. T 2725-2921.

¹⁹ At the first trial, the court conducted individual voir dire in the courtroom. T 514-49. At the second trial, the court conducted it in the hearing room, barring appellant's family from attendance. T 2095.

²⁰ Part way through, the court allowed a reporter into the room. T 2307-2308. The next day, with the reporter apparently gone, the court allowed a student into the room. T 2362.

Article 1, section 16 of our constitution, and the sixth amendment of the federal constitution guarantee the right to a public trial, as does Florida Criminal Rule 3.251. Article 1, section 4, and the first amendment also protect this right. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (sixth and first amendment); cf. Bundy v. State, 455 So. 2d 330 (Fla. 1984) (Florida common law right to attend criminal proceedings). These rights extend to jury selection. Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984), Williams v. State, 736 So. 2d 699 (Fla. 4th DCA 1999), People v. Taylor, 612 N.E.2d 543 (Ill. App. 1993). Exclusion of the defendant's family from jury selection is unconstitutional. Williams, People v. Taylor.

Even when partial closure has been upheld, a defendant at least may have friends and relatives present. See In Re Oliver, 333 U.S. 257, 271 (1948); Douglas v. Wainwright, 739 F.2d 531, 532 (11th Cir.), vac. and rem., 468 U.S. 1206, vac. and rem. on other grounds, 468 U.S. 1212 (1984), panel opinion reinstated, 739 F.2d 531, cert. denied, 469 U.S. 1208 (1985) (members of defendant's family, victim's family, and press allowed in); Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975) (defendant's relatives, defendant's clergymen, press); U.S. v. Kobli, 172 F.2d 919 (3d Cir. 1949) (press and persons designated by defendant); Tanksley v. U.S., 145 F. 2d 58 (9th Cir. 1944) (press and defendant's relatives; case reversed as exclusion of all others was overbroad).

There is a violation even if only part of the trial is

closed. See Globe Newspaper Co. (closure only for one person's testimony), Renkel v. State, 807 P.2d 1087 (Alaska App. 1991) (same).

There must be "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise Co., 464 U.S. at 510; Waller v. Georgia, 467 U.S. 39, 45 (1984). This standard applies to both total and partial closures. Williams, 736 So. 2d at 702 (citing Waller and Pritchett v. State, 566 So. 2d 6 (Fla. 2nd DCA 1990)); Renkel. Some federal courts, however, have used a lesser standard of only a "substantial reason" for a partial closure. See Bell v. Jarvis, 198 F.3d 432, 438-39, 442 (4th Cir. 2000) (applying Waller when only family and friends of prosecuting witness allowed in courtroom during her testimony; rejecting "substantial reason" standard applied in some other circuits).

The Cruel Unusual Punishment Clauses of the state and federal constitutions apply a higher standard of due process in capital cases.

At bar, there was no overriding or even substantial reason for the closure. In fact, after many hours, the court without explanation moved back into the courtroom. The next day, however, for no apparent reason (much less for an overriding or substantial one), it returned to the small closed room.

The reason for closure at bar is even weaker than the one

in Williams. The courtroom, with ample room for spectators, could have been used (and at times was used) for individual voir dire. Individual voir dire was to prevent other jurors from hearing what went on. The court gave no reason for why appellant's parents²¹ and the general public should not be present.

Denial of a public trial is a "structural" error, which cannot be harmless. Neder v. United States, 119 S.Ct. 1827, 1833 (1999), Williams.²² This Court should order a new trial.

²¹ It is important to note that even when the courtroom is closed for the testimony of minors in cases involving sex offenses, the defendant's family is allowed to remain in the courtroom. § 918.16, Fla. Stat.

²² Courts in other states have followed Williams. See Carter v. State, 738 A.2d 871, 880 (Md. 1999) (closure of courtroom during testimony of child was "structural defect"); P.M.M. v. State, 1999 WL 1267793 (Ala.Crim.App. Dec. 30, 1999) (same).

5. WHETHER THE COURT ERRED IN DENYING THE DEFENSE MOTION FOR STATEMENT OF PARTICULARS AND LETTING THE STATE ARGUE ITS ALTERNATIVE PRINCIPAL THEORY.

The state told jurors that half of them could find appellant guilty as the person who shot Alan Pfeiffer, and half of them could convict him on a theory that he was not present at the time of the murder, but was guilty as an abettor. T 4172-74, 4207-11, 4228-30.

The state could make this argument because the court denied the defense motion for a statement of particulars asking the court to require that the state choose its theory of prosecution, R 398-99, T 2137-38, 2147-56, and overruled the motion at close of the evidence to bar argument of the alternative theories. T 4089-92.

Under Rule 3.140(n), the court, on motion "shall order" the state to furnish a statement of particulars if the indictment fails to provide sufficient information to enable preparation of the defense. It provides further: "Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant." Under Rule 3.140(d)(1), the charging document must allege the essential facts constituting the offense charged, and recite the statute the defendant is alleged to have violated.

The state's use, in a capital case, of two mutually exclusive factual theories so that the jury may be divided as to the elements of the crime violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions.

In Schad v. Arizona, 501 U.S. 624 (1991), the Court found no constitutional violation where the jury instructions did not require unanimity on one of the alternative theories of premeditated and felony murder. The plurality wrote that there is "a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed." Id. 631. But at some point "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." Id. at 633.

Justice Scalia, concurring with the fifth vote,²³ stressed the importance of historical practice. He began his opinion by tracing the law of murder from the early 16th century up to the present. Id. 648-49 (Scalia, J., concurring). He continued (id. 649-50):

As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. [Cit.] That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire

²³ Hence, his opinion is especially important. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in Caldwell, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.") (citing authorities).

accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her. While that seems perfectly obvious, it is also true, as the plurality points out, see ante, at 2497-2498, that one can conceive of novel "umbrella" crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process.

He wrote that examination of historical practice is the basis of due process analysis: "It is precisely the historical practices that define what is 'due.' 'Fundamental fairness' analysis may appropriately be applied to departures from traditional American conceptions of due process" Id. 650 (emphasis in original).

In Richardson v. United States, 526 U.S. 813 (1999), the Court cast some light on Schad. Richardson was convicted of engaging in a continuing criminal enterprise. One element of the crime was that the defendant committed a "continuing series of violations". The Supreme Court held that the jury had to unanimously agree as to which specific "violations" made up the "continuing series". It wrote regarding Schad (id. 817-18):

Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime. A (hypothetical) robbery statute, for example, that makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank would have defined the crime of robbery in terms of the five elements just mentioned. Cf. 18 U.S.C. § 2113(a). Calling a particular kind of fact an "element" carries certain legal consequences. Almendarez-Torres v. United States, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. Johnson v. Louisiana, 406 U.S. 356, 369-371, 92 S.Ct. 1620, 32

L.Ed.2d 152 (1972) (Powell, J., concurring); Andres v. United States, 333 U.S. 740, 748, 68 S.Ct. 880, 92 L.Ed. 1055 (1948); Fed. Rule Crim. Proc. 31(a).

The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. Schad v. Arizona, 501 U.S. 624, 631-632, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality opinion); Andersen v. United States, 170 U.S. 481, 499-501, 18 S.Ct. 689, 42 L.Ed. 1116 (1898). Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement--a disagreement about means--would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force. See McKoy v. North Carolina, 494 U.S. 433, 449, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (Blackmun, J., concurring).

In this case, we must decide whether the statute's phrase "series of violations" refers to one element, namely a "series," in respect to which the "violations" constitute the underlying brute facts or means, or whether those words create several elements, namely the several "violations," in respect to each of which the jury must agree unanimously and separately. Our decision will make a difference where, as here, the Government introduces evidence that the defendant has committed more underlying drug crimes than legally necessary to make up a "series." (We assume, but do not decide, that the necessary number is three, the number used in this case.) If the statute creates a single element, a "series," in respect to which individual violations are but the means, then the jury need only agree that the defendant committed at least three of all the underlying crimes the Government has tried to prove. The jury need not agree about which three. On the other hand, if the statute makes each "violation" a separate element, then the jury must agree unanimously about which three crimes the defendant committed.

After rejecting various government arguments, the Court concluded that the jury had to unanimously agree as to which specific violations made up the continuing series. Id. 824.

Under Schad, one must look to the common law governing principals and accessories. Profs. LaFave and Scott write:

The common law classifications of parties to a felony consisted of four categories: (1) principal in the first degree; (2) principal in the second degree; (3) accessory before the fact; and (4) accessory after the fact.

LaFave, Wayne R. and Scott, Austin W., Jr., Substantive Criminal Law (1986), § 6.6. At common law, a principal in the first degree was the actual "criminal actor". Id. §6.6(a).

A principal in the second degree was "present at the commission" of the crime and abetted its commission. Id. §6.6(b). See also Savage and James v. State, 18 Fla. 909.

An accessory before the fact was one who abetted its commission, but was not present when the crime occurred. LaFave, §6.6(c).

"Under the common law rules of pleading, it was not necessary for the defendant to be charged specifically as a principal in the first degree or as a principal in the second degree; a general allegation that the defendant was a principal would suffice." LaFave, §6.6(d)(2). See also Neumann v. State, 116 Fla. 198, 156 So. 2d 237 (1934). Thus, this Court wrote in Pope v. State, 84 Fla. 428, 94 So. 865, 871 (1923) (e.s.):

While a principal in a murder trial must either have actually committed the felonious act or else have been present aiding and abetting his partner in the crime, the presence of the aider and abetter need not have been actual, but it is sufficient if he was

constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.²⁴

"If a defendant were charged as a principal, he could not be convicted upon proof that he was an accessory. Likewise, one charged only as an accessory could not be convicted if the evidence established that he was instead a principal." LaFave, §6.6(d)(2) (footnotes omitted). See also Chambers v. State, 22 S.E.2d 487, 489 (Ga. 1942), Thornton v. Comm., 65 Va. 657 (1874) ("At common law an accessory could not be convicted on an indictment against him as a principal felon").

Additionally, the common law had separate procedural requirements for the prosecution of principals and accessories. See 21 Am. Jur. 2d §§ 175-78; LaFave, § 6.6(d).

Although these common law distinctions have largely been abolished by statute, LaFave, §6.6(e), they are the key to due process analysis under Schad.

In common law terms, the state's main theory at bar was that appellant was guilty as a principal in the first degree. It also presented a theory that he was a common law accessory - that he participated in the planning and enjoyed the benefits of the crime but was far away at its commission. T 4172-7, 4207-11, 4228-30.

Common law did not permit the mingling of principal and accessory theories. To be a principal and to be an accessory

²⁴ Thus, principals included get-away drivers and lookouts.

were distinct crimes with different requirements of pleading, procedure and proof. Thus, unlike the combined felony murder and premeditation theories in Schad, the combination of theories at bar violates the due process and unanimity requirements of the state and federal constitutions.

Significantly, under either of the state's legal theories in Schad, it was Schad who actually committed the murder without any co-defendant. The facts, as discussed by the Supreme Court at 501 U.S. at 627-28, and by the state court in Schad v. State, 788 P.2d 1162, 1164 (Az. 1989), show that Schad was alone when he committed the murder. The legal question turned only on his state of mind.

Under Richardson, a court must decide if the state's two theories referred to a single element of murder or whether the state had to prove different elements to establish each crime.

For instance, in a case in which the state presents theories that the defendant is guilty of premeditated or felony murder, the two methods of proof go to the single element of mens rea. See State v. Enmund, 476 So. 2d 165, 168 (Fla. 1985) (Shaw, J., concurring specially) (citing cases and other authorities); Schad.

To prove its accessory theory at bar, however, the state had to show more than just a mental element commensurate with premeditation: it had to show that someone else committed the murder, that appellant had a conscious intent that the murder occur, and did or said something which was intended to, and did, abet its commission. Further, the defense of alibi applied to

one theory but not to the other.

A violation of due process occurred at bar when the state argued to the jury that it could divide 6-6 on the two theories of guilt.

This Court long ago held: "The purpose of the jury trial in a criminal case is to arrive at the judgment of the jury expressed by a unanimous vote upon the issue of fact at which the parties by their pleadings have arrived." Roberts v. State 90 Fla. 779, 107 So. 242, 245 (1925). At bar, there was a violation of the Jury Clause under Roberts and Schad. The jury unanimity requirement of the federal constitution should apply to state capital cases. At a minimum, at least 9 jurors would have had to agree to the facts constituting the offense. See Johnson v. Louisiana, 406 U.S. 356 (1972). The state constitution's jury unanimity requirement was violated. The Cruel Unusual Punishment Clauses of the state and federal constitutions require heightened standards of accuracy and due process. See Beck v. Alabama, 447 U.S. 625 (1980). The state's argument at bar renders the conviction and resulting death sentence unreliable and unconstitutional. This Court should order a new trial.

6. WHETHER REVERSIBLE ERROR OCCURRED IN THE STATE'S GUILT-PHASE FINAL ARGUMENT.

Throughout her argument, the prosecutor gave the jury her personal opinion of the facts, repeatedly said that "we know" certain facts, referred to facts not in evidence, argued that the state need not prove premeditation, and told the jury to convict appellant if it believed anything that Sarah Thomas and Donna Waddell had to say. Although the court corrected some of these improper arguments, and defense counsel did not object to others,²⁵ they deprived appellant of a fair trial.

The state began with an imaginative reconstruction of Alan Pfeiffer's final acts. It presented this reconstruction not as speculation and inference, but as a statement of historical fact. According to the state, Alan "didn't stop to buy lotto tickets", "didn't stop to see a friend," but "went directly home" after leaving his office. T 4168.²⁶ When he arrived he "picked up his mail at the mailbox and walked to the front door, the north door, the door they always used, and locked the door, and he fumbled for the light switch dropping a package of cigarettes." T 4168-69.²⁷

²⁵ "In this vein, we recognize that it is impractical for an attorney to interject constant objections to repeated improprieties by opposing counsel. See Wilson v. State, 294 So. 2d 327, 329 (Fla. 1974)." Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994).

²⁶ In fact, there was no such evidence.

²⁷ No one testified to seeing Alan gather the mail. The state's evidence was that Connie had been in and out all afternoon - she could have brought in the mail. There was no evidence that "they always used" the north door. The record did

It said that, on arriving home at 8:00, T 4168, Alan "managed to turn on the north porch light", and then was shot as he "leaned over to look at the [stereo] button to turn it off". T 4169.²⁸

The foregoing prefaced repeated assertions that "we know" various facts of the case (T 4170; e.s.):

But we do know this. On the night of march 23rd, 1991, these four individuals, Paul, Paul Evans, the Defendant, Sarah Thomas, Donna Waddell, and Connie Pfeiffer were together at the fair. We know there were only four people involved in this killing.

After discussing the jury instructions, it continued:

You should use your common sense in every day situations. You should use your common sense here in determining the credibility and the facts, because you are the fact finders in this case. You are here to determine what happened on March 23rd, 1991. There's no question that they all four were involved.

What do we know about the accepted facts in this case? One accepted fact is on March 23rd of 1991, Paul Evans was at the fair at 6:30 P.M. There's been no testimony, and it's uncontroverted, that he was not seen again until 9:30 P.M., both times by Greg Hill.

T 4176 (e.s.).²⁹ Again, the state may not term its case

not show that he fumbled for the light switch.

²⁸ The evidence does not show that Alan turned on the north porch light at 8:00. According to Charles Cannon, the light was not on later that night, T 3506, 3511 (trailer was dark when Cannon returned that night by the north entrance), although it was on when the police arrived that morning. T 3169. Hence, it was not turned on until well after 8:00.

²⁹ Det. Brumley testified for the state on direct examination that the officers made a neighborhood canvas and followed up on resulting leads. T 3316. During cross-examination, the state moved to prohibit the defense from eliciting that there were individuals who heard a gunshot at

uncontroverted, Rodriguez, Freeman, especially after successfully excluding evidence controverting it. Cf. Clark.

After discussing Connie's motive, the prosecutor said:

We also know that the gun used to kill Alan Pfeiffer was taken from the Waddell residence on March 23rd, 1991, between - unlike what Mr. Harllee represented to you, between 2:30 and 5:00 P.M., which is what Donald Waddell testified to.

T 4178 (e.s.).³⁰ See also transcript pages 4181 and 4215.

After relating other facts that "we know", the prosecutor said Connie needed "an iron-clad alibi",³¹ and "couldn't kill her husband herself. She would have to hire someone to do it." T 4179.

After discussing Sarah Thomas and Donna Waddell, and discrepancies between their stories, she said (T 4195 (e.s.)):

10:30. T 3327-29. Appellant argued that the state had opened the door with the testimony that the officers followed up on the leads received during canvassing. Id. The judge sustained the state's objection. T 3329. It is improper to exclude evidence and then use the absence of such evidence in argument to the jury. See Clark v. State, 756 So. 2d 244 (Fla. 5th DCA 2000) (manifest necessity for mistrial where defense counsel excluded evidence and then argued absence of same evidence to jury). The evidence was only "uncontroverted" because the passage of time and the state's objection prevented the defense from controverting it.

³⁰ Defense counsel had noted that, at one point in his testimony, Mr. Waddell had said that he did not notice that the coin jar was missing at 2:30 p.m., but did notice it missing when returning home around 5:00 p.m. T 4146-47. Mr. Waddell never testified that he actually knew when the gun was stolen, and the defense never contended that he did so testify.

³¹ Connie had "an iron-clad alibi" only because the jury was unaware of the reports of gunshots after 10:00 p.m., when her whereabouts were unknown. Thus, the state actually knew that she did not have an iron-clad alibi.

Now are these contrived stories? Because if they're contrived or fabricated, I would expect them to be matching perfectly. It's the fact that they don't match which makes them more reliable. You're talking about two different people viewing events from six-and-a-half years ago, one of them being an alcoholic.

On the next page, she reiterated her own faith in their stories (T 4196 (e.s.)):

You are here to decide the credibility of the witnesses. They all agree as to the basic facts, the disposal of the gun, the gun that was used, the plan. But the details? Again, if they fabricated their story, they should have matched. And if they had come in here after six and a half years, two individuals, one of them being an alcoholic, and told you the exact same story, then you should be worried. Then I would say there's a chance they fabricated the story.

Shortly thereafter, she said (T 4202; e.s.):

First of all, we know that Connie calls Alan at Curtis Mathis in Fort Pierce at 7:10 - somewhere between the time of 7:10 and 7:30. The basic message is 'Come home. I'm cleaning you out. Come home.' But we know that phone call was not placed from the trailer. That phone call will to have been placed from the fair after Connie saw Sarah Thomas, Donna Waddell, and Paul Evans leave. It was a lure to get Alan to come home at 8:00 o'clock.

The state argued against appellant's theory that Connie may have been the murderer, and said at transcript page 4205:

And again, if she did it by herself, she would have had to have done it after 9:30, and there is no one who hears shots after 9:30. Even C. J. Cannon, 9:30, 9:45, he didn't hear shots after that time period.³²

The prosecutor also began to give her personal opinion about the cigarettes at the scene: "... And I seriously doubt [Alan]

³² To repeat, the state had successfully excluded testimony that persons at the trailer park heard shots after 9:30. T 3327-29.

was smoking a cigarette, a regular cigarette and smoking -". T 4206. The defense objected to her statement of personal opinion, and the court sustained the objection. Id.

The state argued that, by supplying an alibi, appellant was guilty as a principal. T 4207. Appellant objected, and, after argument at the bench, the court advised the jury "that simply providing an alibi does not make a person a principal to the crime." T 4210. The state then continued with its alternative theory that appellant was guilty as a principal.

The state argued that Alan was shot in the back and fell, and that the shooter then came out from the corner. T 4219. The court overruled an objection that this was not in evidence, T 4219-20, and the state continued: "The shooter comes out from this corner (indicating), bumping into this table, which is right here (indicating), causing all the items - there's the beanbag - causing all these items to slide, jumps out and shoots Alan on the ground from over here (indicating), which is the trajectory that Dr. Bell talked about, this angle." T 4219-20.³³

The prosecutor turned to the lack of physical evidence linking appellant to the crime and again began to state her personal opinion that the lack of physical evidence showed appellant's involvement in the crime (T 4225-26):

Now, what about the fact that we have no physical evidence? What I think is more uncanny about this entire event is -

³³ In fact, there was no evidence that the shooter jumped out of a corner and bumped into a table. Hence, the defense was correct in objecting that these facts were not in evidence.

MR. HARLLEE: Object to personal opinion, Your Honor.

THE COURT: Sustained as to personal opinion.

MS. ROBINSON: What is uncanny about this entire event is the fact that 60 fingerprints were lifted out of this trailer; and the Defendant, specifically, in his statement, talks about touching the cabinets back here (indicating), touching the tapes, touching the phones, walking through the back bedroom, telling us where clothes were, different items, touching the phones, touching the light bulb, touching different items throughout the house, and not one fingerprint of Paul Evans is found in that trailer.

The state returned to statements of personal knowledge when arguing that appellant was guilty as a principal (T 4228-29; e.s.):

We also know that he was - we also know that he was involved with the gun being stolen sometime between 2:30 and 5:00 o'clock with Donna Waddell; that's from his own mouth. So he knew what was going to happen, intended to participate actively, or by sharing an expected benefit and actually did something by which he intended to help. Knew what was going to happen: He had to have heard the discussions among the four of them. We know that all four of them are involved. He knew that Connie Pfeiffer wanted Alan Pfeiffer killed. He knew that the alibi was going to be the fair that night.

....

We also know that he admitted unscrewing the light bulb,³⁴ which played a role in Alan Pfeiffer's death. He also did something to help by providing an alibi. Means to aid, plan, or assist.

We also know that the Defendant made some statements to Sarah Thomas and then later to Donna Waddell about other people committing the crime. But we know that

³⁴ In his taped statement, appellant said only that "that night I changed a light bulb for them right there where that fan is, paddle fan." T 4047.

the gun that was stolen from the Waddell residence is the gun that killed Alan Pfeiffer.

The state then concluded its argument (T 4229-30) (e.s.): What I'm telling you, ladies and gentlemen, is there are two ways the State can prove he's either the shooter or he was actively participating as a principal, by knowing what was going to happen, participating actively, or by sharing an expected benefit, and actually doing something to help. He doesn't have to be present, but we're saying that he was present.

Six of you may agree that he is the actual shooter. Six of you may agree he's a principal. Under either theory, he is guilty of first degree murder.

Now, if you don't believe anything that the State has presented to you, let him go. Let him walk out, never to be tried again in a court of law. But if you believe anything that Sarah Thomas and Donna Waddell have to say because of the corroboration - the testimony from Greg Hill, Leo Cordary, Susan Schultz, Donald Waddell, Ken Mischler - then find the Defendant guilty of first degree murder.

Thank you.

"An attorney's expression of his personal opinion as to the credibility of a witness, or of his personal knowledge of facts, is fundamentally improper." Airport Rent-A-Car, Inc. v. Lewis, 701 So. 2d 893 (Fla. 4th DCA 1997); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996); Moore v. Taylor Concrete & Supply Co., Inc., 553 So. 2d 787, 792 (Fla. 1st DCA 1989); Silva v. Nightingale, 619 So. 2d 4, 5 (Fla. 5th DCA 1993); Kaas v. Atlas Chemical Co., 623 So. 2d 525, 526 (Fla. 3d DCA 1993). An attorney may not present her personal views about the evidence or the witnesses. See, e.g., Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) ("Clearly, it was improper for the prosecutor to express his personal belief about Gore's guilt.").

At bar, use of the first-person plural ("we know he did it") was especially improper: it allied the prosecutor with the jurors. Cf. Hill v. State, 477 So. 2d 553, 556 (Fla. 1985) (prosecutor acted improperly by asking jury to consider him a "thirteenth juror" when it retired to deliberate; error harmless only because case did not involve "substantial factual disputes").

This assumes that the state was using the inclusive "we" (meaning "you and I").

Alternatively, "we" may have been exclusive ("I and someone other than you"), in which case the state's argument was to the effect that the prosecutor and her colleagues in law enforcement believed in the defendant's guilt. This alternative does not help the state: it is improper to suggest that law enforcement officers think the defendant is guilty. See Ryan v. State, 457 So. 2d 1084, 1090 (Fla. 4th DCA 1984) ("And Sheriff Holt and Jay King, you've heard their testimony. They're sitting over there. Do you think that they would bring this to you and have the State spend its time and money if there wasn't evidence that they wanted you to consider?"); DeFreitas v. State, 701 So. 2d 593, 597-98 (Fla. 4th DCA 1997) (citing Ryan); Gianfrancisco v. State, 570 So. 2d 337 (Fla. 4th DCA 1990) (improper to admit testimony that officer believed that one witness was more culpable than other witness); Martinez v. State, 761 So.2d 1074 (Fla.2000) (testimony that officer believed defendant was guilty).

How would "we know" "from his own mouth" that appellant was

involved with the gun being stolen? He did not testify, and his taped statement made no such assertion. How would "we know" there were four people involved in the killing, and that Donald Waddell's gun was in fact the murder weapon? These matters were in dispute.

The state's final argument, that the jurors should acquit if they did not "believe anything" the state presented, and should convict if they "believe[d] anything" said by its witnesses, shifted the constitutional burdens of proof and persuasion.

Freeman v. State 717 So. 2d 105, 106 (Fla. 5th DCA 1998) found fundamental error where, among other things, "the prosecutor impermissibly shifted the burden of proof when he told the jurors that if they believed the police officers instead of Freeman, then they should find Freeman guilty and that 'the question' was who they wanted to believe." See also DeFreitas, 701 So. 2d 593, 599 (Fla. 4th DCA 1997) (citing Knight v. State, 672 So. 2d 590, 591 (Fla. 4th DCA 1996) (fundamental error)). See generally Northard v. State, 675 So. 2d 652, 653 (Fla. 4th DCA 1996) (citing Bass v. State, 547 So. 2d 680, 682 (Fla. 1st DCA 1989) (arguing that if jury is going to tell state's witness he lied, then find defendant not guilty, but if jury is going to tell defendant he lied, then find defendant guilty) and Clewis v. State, 605 So. 2d 974 (Fla. 3^d DCA 1992)).

Viewed in totality, the state's argument to the jury deprived appellant of a fair trial. Art. I, § 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const. Taken

as a whole and fully considered, it requires a new trial. Cf. Urbin v. State, 714 So. 2d 411 (Fla. 1998).

The argument was prejudicial as to penalty: it assured jurors of appellant's guilt and of his role in the case, so that jurors would feel confident in recommending the ultimate punishment.

7. WHETHER ANDERSON V. STATE, 574 So. 2d 87 (Fla. 1991) REQUIRES REVERSAL BECAUSE THE STATE'S TESTIMONY AT TRIAL CONTRADICTED ITS CASE AS PRESENTED TO THE GRAND JURY.

In Anderson v. State, 574 So. 2d 87, 90 (Fla. 1991), the court considered "the specific issues raised when the state presents false testimony to the grand jury or discovers prior to trial that the indictment upon which a defendant is to be tried is based on perjured testimony."

This Court discussed cases from other jurisdictions, including United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). The chief witness against Basurto told the prosecutor that his grand jury testimony was false. The prosecutor informed the defense, but did not inform the court or the grand jury. At trial, he referred to the witness's false prior testimony, but minimized it. The appellate court found a denial of due process when the case went to trial on an indictment based on materially false testimony. In an excerpt quoted in Anderson, the court wrote:

We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel -- and, if the perjury may be material, also the grand jury -- in order that appropriate action may be taken.

497 F.2d at 785-86.

After reviewing other cases, this Court wrote:

We agree with the authorities cited by Anderson that

due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony without informing the court, opposing counsel, and the grand jury. This policy is predicated on the belief that deliberate deception of the court and jury by the presentation of evidence known by the prosecutor to be false "involve[s] a corruption of the truth-seeking function of the trial process," United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976), and is "incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972) (citation omitted). Moreover, deliberate deception is inconsistent with any principle implicit in "any concept of ordered liberty," Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), and with the ethical obligation of the prosecutor to respect the independent status of the grand jury. Standards For Criminal Justice § 3-3.5, 3-48--3-49 (2d ed.1980); United States v. Hogan, 712 F.2d 757, 759-60 (2d Cir.1983); Pelchat, 62 N.Y.2d at 108-09, 464 N.E.2d at 453, 476 N.Y.S.2d at 85 (the "cardinal purpose" of the grand jury is to shield the defendant against prosecutorial excesses and the protection is destroyed if the prosecution may proceed upon an empty indictment).

The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The state violates that section when it requires a person to stand trial and defend himself or herself against charges that it knows are based upon perjured, material evidence. Governmental misconduct that violates a defendant's due process rights under the Florida constitution requires dismissal of criminal charges. State v. Glosson, 462 So. 2d 1082, 1085 (Fla. 1985).

Anderson at 91-92. This Court found no error in Anderson's case because the change in a witness's trial testimony from her grand jury testimony concerned an immaterial matter.

At bar, the state's case at the time of the indictment, as

set out in the "Complaint Affidavit",³⁵ and its case at trial were materially different from each other:

The state insisted at trial that the shooting occurred at 8:00 p.m. based on Cordary's testimony that he looked at his clock when he heard the noises and that, during the initial investigation, he told the police the shooting was at 8:00. T 3402-03 (testimony of Cordary), 4203 (final argument). The police "Complaint Affidavit", however, states: "Cordary ... stated that on the night of the homicide he heard approximately three shots in the evening hours, but could not be sure what time." R 3.

At trial, the state successfully excluded evidence that the shooting occurred at 10:30, T 3327-29, and argued to the jury that it was "uncontroverted" that appellant had no alibi until 9:30. T 4176. The police "Complaint Affidavit", however, puts the time of the murder as: "BET 2030 AND 2230" on March 23, 1991. R 2. It further states that "four surrounding neighbors" "stated they heard loud music and possibly gun shots between the hours of 9:00 PM and 10:30 PM coming from the area of #19 Malibu Lane [Pfeiffer's trailer]." It further states that "Witness Jesus Cruz stated he definitely heard what he thought to be gun shots between 9:30 PM and 10:30 PM on the night of 03/23/91. Cruz stated he heard three shots in succession. Cruz lived directly across the street from #19 Malibu Lane." R 3.

³⁵ The affidavit was produced 16 days before the indictment, reflecting the state's case as it existed at the time of the grand jury proceedings.

The trial testimony was that the trailer's front door was locked when officers arrived. The "Complaint Affidavit", however, states: "Upon arrival, [officers] observed the front door of the residence was cracked open and the stereo was very loud." R 3.

The "Complaint Affidavit" says as to Thomas's 1997 statement: "Sarah Thomas did state that Paul Evans never went to the fair on the night of the homicide, nor did they eat at Denny's." R 8. At trial, Thomas testified on direct examination that appellant did go to the fair after the shooting, T 3692-93, and that they went to eat at Denny's, staying there for about an hour. T 3694.

The "Complaint Affidavit" misrepresented appellant's statement to the police. In his statement, appellant said he was separated from the others at the fair for about five minutes. T 4056-57. Det. Morrison swore in the affidavit: "Evans did state that when they arrived at the fair he went his own way and met up with the other three when it was time to leave." R 5.

From the foregoing, constitutional error occurred. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const. This Court should reverse the conviction and sentence.

8. WHETHER FUNDAMENTAL ERROR OCCURRED IN THE STATE'S VOIR DIRE EXAMINATION OF THE JURY REGARDING THE TESTIMONY OF CO-CONSPIRATORS OR CO-DEFENDANTS.

The state's case against appellant depended on the jury's believing the testimony of Donna Waddell and Sarah Thomas. The state questioned potential jurors at length about their willingness to believe the testimony of co-conspirators or co-defendants who had entered into plea bargains. T 2483-99.

As the state was asking jurors if they understood why the state would make a plea agreement, the court sustained an objection that it was arguing the case. T 2494-95.

Nevertheless, the state continued asking jurors about this subject; after one juror opined that you have to listen to everything with an open mind, the state continued(T 2495-96):

MS. ROBINSON: And Mr. Murtaugh?

MR. MURTAUGH: Yeah, I agree. I mean they don't make deals unless they fully collaborate [sic] what they're saying; right? I mean they would have to collaborate [sic] what they're saying before they would make a deal with them to testify; correct? I'm asking you.

MS. ROBINSON: That's normally the case, yes. And I think, again, the evidence will bear some of these concerns out for you all as far as, you know, what you all are going to have to determine as far as the credibility of the witnesses.

Yes, Mr. Combs?

MR. COMBS: Isn't a plea bargain like you take a lesser criminal and have him more or less tell you what the bigger guy did so you can get the bigger guy?

MS. ROBINSON: That could be the case. And again I think the evidence will bear out a lot of answers to your questions concerning that.

In this colloquy, the state communicated that it normally

would not enter a plea agreement for testimony unless the story was fully corroborated, and that such bargains were entered into with the lesser criminal in order to get the bigger guy.

Thus, it assured jurors that it vouched for the credibility of the witnesses by making sure that their testimony was fully substantiated and that the state considered them to be lesser participants in the crime, and that appellant was "the bigger guy."

"An attorney's expression of his personal opinion as to the credibility of a witness, or of his personal knowledge of facts, is fundamentally improper." Airport Rent-A-Car, Inc. v. Lewis, 701 So. 2d 893 (Fla. 4th DCA 1997); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996); Moore v. Taylor Concrete & Supply Company, Inc., 553 So. 2d 787, 792 (Fla. 1st DCA 1989); Silva v. Nightingale, 619 So. 2d 4, 5 (Fla. 5th DCA 1993); Kaas v. Atlas Chemical Co., 623 So. 2d 525, 526 (Fla. 3d DCA 1993). A prosecutor may not "allude to evidence not formally before the jury". U.S. v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991).

Adding to the prejudice were the state's exclusion of evidence which did not corroborate its witnesses, and repeated assertions in final argument that "we know" various facts about the case, the claim that the evidence was "uncontroverted", and the concluding argument that the jury should convict if there was "corroboration" of Donna's and Thomas's testimony.

Constitutional reversible error occurred. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S.

Const. The error was also prejudicial as to penalty: it assured jurors that appellant was the "bigger guy" so that they would not consider the mitigating effect of the treatment of Donna and Thomas, and that the state had fully corroborated their stories placing most of the blame on appellant.

9. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

The hallmark of post-Furman death penalty law is that capital punishment is reserved for the most aggravated and least mitigated crimes. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) held that the death penalty statute provides "concrete safeguards beyond those of the trial system to protect [the defendant] from death where a less harsh punishment might be sufficient." This Court wrote at page 8:

Review of a sentence of death by this Court, provided by Fla.Stat. s 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

Hence: "Our law reserves the death penalty only for the most aggravated and least mitigated murders". Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). Accord Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997).

Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, [cit.]. Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, [cit.]. We conclude that this homicide, though deplorable, does not place it in the category of the

most aggravated and least mitigated for which the death penalty is appropriate.

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996).

Proportionality review "involves consideration of the totality of the circumstances of a case and comparison of that case with other death penalty cases." Snipes v. State, 733 So. 2d 1000, 1007 (Fla. 1999).

Proportionality review "requires a discrete analysis of the facts," Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in Tillman v. State, 591 So. 2d 167 (Fla. 1991):

We have described the "proportionality review" conducted by this Court as follows:

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases 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. Art. I, § 9, Fla. Const.; Porter.

... Thus, proportionality review is a unique and

highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of "the totality of the circumstances in a case" in comparison with other death penalty cases. Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d at 965).

Urbain v. State, 714 So. 2d 411, 416-417 (Fla. 1998).

In Ray v. State, 755 So. 2d 604 (Fla. 2000), Terry Ray and Roy Hall committed a well-planned robbery in which Hall used a pistol and Ray used a rifle. Their truck later broke down, and an investigating deputy was killed by the rifle in a gun battle in which Hall was wounded. Gunshot residue was on Ray's hands, but not on Hall's. Ray's prints were on the deputy's car and on the rifle. Hall's wounds were consistent with the hypothesis that he was firing the rifle when hit. Hall denied killing anyone and asked if the officer was dead.

At sentencing, the state argued that Hall instigated the gun fight and both men shot the deputy. Ray was sentenced to death, Hall to life.

As to the blame attaching to each defendant, this Court wrote that at a minimum they were "equally culpable": both actively participated in planning and committing the robbery, and both kept fleeing after the deputy was shot. This Court further noted that Hall seemed to be in command of the robbery. This Court concluded that, under the facts, the entry of disparate sentences was error.

This Court further wrote at page 612 that, regardless of Hall's sentence, Ray's sentence was disproportionate:

Without comparison to Hall's sentence, the imposition of the death penalty in this case is still disproportionate. The trial court found substantial nonstatutory mitigating factors.³⁶ In contrast, it found three aggravating factors, two of which we combine based on an improper doubling. Furthermore, Ray's criminal history was scant. Under a proportionality analysis a death sentence is not appropriate in this case, as this is not one of the most aggravated and the least mitigated of first-degree murders. See Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998).

The mitigating and aggravating evidence in this case is very similar to the evidence presented in Woods v. State, 733 So. 2d 980 (Fla. 1999). In Woods, the trial court found numerous mitigating factors and two aggravating factors, the contemporaneous conviction for attempted murder of the other victim, and cold, calculated and premeditated (CCP). This Court, however, found the evidence insufficient to support CCP. Of the mitigating factors, this Court was most persuaded by Woods' low I.Q. and by the fact that he had lived a life free of violent crimes until the offenses in that case. Woods, like Ray, was also an involved family man. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional, we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993) (citation omitted). As in Woods, we find that the circumstances in the present case are insufficient to support the death penalty. We vacate the sentence of death and direct the trial court to enter a sentence of life imprisonment.

At bar, we have the unique fact that the state argued an alternative theory that appellant was not present at the

³⁶ The court found one statutory mitigator (lack of substantial criminal history) and five other mitigators.

shooting. See points 5 and 11 on appeal. The physical evidence points to his absence. Connie's presence is in keeping with the physical evidence. Connie instigated the entire criminal episode, and profited from it handsomely. Doubts about relative roles are at least as strong as in Ray. At a minimum, appellant and Connie were equally culpable.

The two aggravators at bar weigh more against Connie than against appellant. She solicited various people to kill Alan, so that the CCP circumstance is stronger in her case. She got a large amount of money, whereas appellant got almost nothing, so that the pecuniary gain circumstance applies more strongly to her.

The facts at bar are like those in Snipes, 733 So. 2d at 1001-1002, which also involved a murder-for-hire:

The facts of this case are as follows. Snipes and John Saladino were charged with the first-degree murder of Markus Mueller. Saladino was allowed to plead guilty to second-degree murder, and he was sentenced to fifteen years in prison to be followed by ten years of probation. Snipes was tried and convicted based on the following evidence presented at trial. In February 1995, Markus Mueller was found dead in his home by his former girlfriend, Danielle Bieber. Mrs. Bieber called police when she found him. When police arrived, she was very upset and had to be asked to leave. She told police that her husband, David Bieber, "could have done this." David Bieber had followed Mrs. Bieber to Mueller's home in a separate vehicle but did not enter Mueller's home; police spoke briefly to him at the scene but did not arrest him.

Medical evidence reflected that Mueller had been shot three times; twice in the torso and once in the head. He died from the gunshot wound to the head. The bullets could have been fired from a .38 snub-nose revolver. The murder weapon was not recovered.

For some time, Mr. Bieber was the main suspect. He had made numerous statements to others that he wanted Mueller dead and he had contacted Mueller on the night of the crime. There were two possible motives: steroid trafficking and jealousy over Mrs. Bieber. Mrs. Bieber had married Mr. Bieber just four days before the crime. Apparently, before that marriage, Mrs. Bieber had been dating Mueller but had been seeing Mr. Bieber secretly while she was dating Mueller. Mr. Bieber disappeared some time after the murder and has not been found; there is an outstanding warrant for his arrest.

Subsequent to the murder, Michael Larson told police that he lived next door to David Snipes; that he and Snipes were friends; that Snipes had borrowed Larson's .38 pistol shortly before the murder; and that Snipes had never returned the gun. In February, Snipes' girlfriend also noticed that Snipes had extra money. Snipes told his girlfriend that he had been hired to shoot Mueller for \$1,000. While Snipes was in jail awaiting trial, he also confessed to two of his uncles, telling one of them that Mr. Bieber had asked Saladino to find someone to commit the murder and that Saladino had then arranged for Snipes to commit the murder. Additionally, Snipes gave a taped confession to police.

In Snipes, as at bar, there were two aggravators: pecuniary gain and CCP. The only statutory mitigator was the defendant's age: Snipes was 17 and appellant 19 at the time of the crimes. There is ample nonstatutory mitigation in both cases.

Age of Appellant at the time of the offense. Appellant had turned 19 years old within two months of the offense. (By contrast, Connie was 31.)³⁷ He suffered a traumatic adolescence which began with the accidental shooting of his brother. He was in and out of treatment programs, caught in the war between his

³⁷ Connie was born in January 1960, R 13, and was 31 at the time of the March 1991 murder.

parents. Instead of learning and growing and maturing during this ordeal, he behaved as a disturbed adolescent attempting to manipulate the environment around him.

The court also found other mitigators: good behavior in jail; good attitude and conduct awaiting trial and at trial; difficult childhood; having been raised without a father; growing up in a broken home and being the product of a dysfunctional childhood; having suffered great trauma during his childhood; hyperactivity, prior psychiatric history and hospitalization for mental illness; being the father of two young girls; belief in God; ability to adjust to life in prison; love for his family and their love for him; Connie Pfeiffer's life sentence. T 506-11.

(1) **Capacity for rehabilitation.** "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). In Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for rehabilitation" was a mitigator this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Evidence as to the possibility of rehabilitation is so important that its exclusion requires reversal. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). At bar, there was ample totally un rebutted testimony from jailers about appellant's good behavior, showing his

ability to live well in prison.

After behaving badly and making threats while at treatment facilities earlier in his childhood, appellant did well in the Fort Pierce Detention Center in 1990. After his arrest at bar, his behavior in jail was excellent.

This important mitigator shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). It has even greater weight when, as here, the evidence comes from jailers owing no particular loyalty to the defendant (id. 1673; e.s.):

The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations.

(2) **Prior psychiatric hospitalization.** The record shows that appellant was repeatedly placed in a mental health facilities at an early age. T 4330, 4332, 4360. The treatment at one was "an absolute detriment" to him. T 4332. Psychiatric hospitalization is an important mitigating circumstance. See Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) (reversing for failure to consider, inter alia, defendant's prior psychological hospitalization); Rivera v. State, 717 So. 2d 477, 484-485 (Fla. 1998).

(3) **Traumatic Childhood.** There is an irrefutable record that appellant suffered a traumatic, tragic childhood. He was

hyperactive from an early age: it was like somebody wound him up; he would run into walls. T 4348. His parents had a troubled marriage - his mother characterized his father as "very domineering", the father testified the marriage was a "constant battle". T 4347, 4323. They divorced when appellant was only six, and the mother and the boys were expelled from military housing. T 4350. Even before the divorce, the father was never around. T 4321-22, 4347.

Medication did not help his hyperactivity; he had a terrible time in school. T 4351-52. He was put in a youth camp, but it did no good - he wept because he could not keep up in school. T 4353.

Around appellant's twelfth birthday, the parents planned to separate appellant from his brother Matthew. T 4328. The father figured that if he got custody of one, he could later get the other. Id. Shortly before the planned separation, Matthew was shot in an accident involving appellant. T 4329, 4356, 4365-66.

It was a very emotional trying time. T 4329-30. The parents quarreled even about the funeral arrangements. T 4330. Meanwhile, appellant "was going through a very emotional traumatic time." Id. He and his brother had been very close. T 4361.

Appellant was put in a program, and, when he came out, he was "very defensive, very - kind of like 'what's going to happen next,' unsure of what his parents were doing to him. And we struggled there for a period of time." T 4331. The father saw

the program as "an absolute detriment" to appellant. T 4332. Appellant did not get the help he needed. Id. There was fraudulent overcharging by the program. Id.

Appellant went to another program, and his medication was tripled with no improvement. T 4358, 4334. Meanwhile, his father "always had a motive of trying to get custody of him." T 4333.

Appellant had "a long series of behavioral problems. ... nothing was working out." T 4359. At age 17 he was put in a mental health facility, still on medication. T 4360.

Appellant's traumatic, tragic childhood offers an insight as to what went on in his life and is important mitigation.

(4) **Genuine religious beliefs.** The court found this mitigator. R 509-10. It is valid mitigation. Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992).

Further, the record significantly shows no prior violent felony convictions.

This is not among the most aggravated and least mitigated of cases for which the death penalty is reserved.

The death sentence is also inappropriate in view of cases such as Chaky v. State, 651 So. 2d 1169 (Fla. 1995) (two aggravators including prior violent felony; mitigation of potential for rehabilitation, good prison record, and good work, family, and military record); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (two aggravators including prior violent felony; two mitigating circumstances - age and unfortunate home life).

Finally, appellant's sentence is disproportionate in view of the cases in which Florida has actually executed inmates in the post-Furman era. See app. C. This almost thirty year record shows that Florida has executed no one with only two aggravating circumstances, substantial mitigation, and who was under the age of 20 at the time of the crime. It appears that the only executed inmates who committed murder at age 20 were Jeffrey Daugherty and Aubrey Adams. Daugherty robbed and murdered a hitchhiker during a "killing and robbing spree", and had committed numerous prior violent felonies in other states. There were no mitigators. Daugherty v. State, 419 So. 2d 1067 (Fla. 1982). Adams, a prison guard, abducted an 8-year-old girl, attempted to have sex with her, and strangled her. Adams v. State, 412 So. 2d 850 (Fla. 1982).

Of the 49 persons, over half (26) were aged 30 or more. 39 were aged 25 or more. None were below age 20.

The bulk of the cases involve no mitigation at all. There are cases of serial murderers, or multiple murderers, or murderers of children, or of law enforcement officers. The heinousness circumstance predominates (at least 32³⁸ defendants).

Appellant respectfully submits that this Court should undertake its historical task of reserving the death penalty for those crimes which are truly the most aggravated and least mitigated. The death sentence at bar is disproportionate.

³⁸ This total does not include the case of James Henry (Henry v. State, 328 So. 2d 430 (Fla. 1976)), although the two-sentence discussion of the death sentence suggests that HAC was found.

10. WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE OR UNCONSTITUTIONAL WHERE THE STATE PRESENTED THE JURY WITH THE ALTERNATIVE THAT APPELLANT DID NOT DIRECTLY PARTICIPATE IN THE MURDER AND WAS GUILTY AS AN ACCESSORY.

As already noted, the state presented the jury with alternative theories that appellant was guilty of premeditated murder as the person who shot Alan Pfeiffer, T 4171-72, or was guilty as an accomplice. After discussing its premeditation theory, the state said (T 4173-74):

Now, if the shooter was Connie or the shooter was Donna, there is another way the State can prove first degree murder. "If two or more persons help each other commit a crime" - this is called a principal instruction. "If two or more persons help each other commit a crime and the Defendant is one of them" - and what have we talked about? There were four people involved in this homicide. There's no question about that - "the Defendant is a principal and must be treated as if he had done all the things the other person or persons did if the Defendant knew what was going to happen."

We already heard testimony from Sarah Thomas and Donna Waddell, Leo Cordary, Susan Cairns, Genny McAlpin, Connie wanted her husband killed. They were all part of that same little group; Paul Evans, Donna Waddell, Sarah Thomas, Connie Pfeiffer. "Knew what was going to happen, intended to participate actively, or by sharing an expected benefit and actually did something by which he intended to help commit the crime," like moving and making it staged like a burglary, providing an alibi.

"Help means to aid, plan, or assist. To be a principal, the Defendant does not have to be present when the crime is committed."

Those two instructions are the two ways the State can prove first degree murder against Paul Evans. Half of you could go back there and think that Paul Evans is the shooter and half of you could believe that he is so actively involved in this crime that he's involved

as a principal, that you can find him guilty of first degree murder. You don't have to agree as to which theory. You just have to agree to the verdict. And again, these instructions will be taken back with you in a written form.

T 4172-74. Similar argument is at transcript pages 4207-11.

The state ended its argument by again contending that the jury could convict appellant "if he helped somebody commit the crime". T 4228. It argued that he knew what was going to happen, expected to receive a benefit, "had to have heard the discussions", stole the gun, unscrewed the light bulb, T 4228-29, concluding:

What I'm telling you, ladies and gentlemen, is there are two ways the State can prove he's either the shooter or he was actively participating as a principal, by knowing what was going to happen, participating actively, or by sharing an expected benefit, and actually doing something to help. He doesn't have to be present, but we're saying that he was present.

Six of you may agree that he is the actual shooter. Six of you may agree he's a principal. Under either theory, he is guilty of first degree murder.

Now, if you don't believe anything that the State has presented to you, let him go. Let him walk out, never to be tried again in a court of law. But if you believe anything that Sarah Thomas and Donna Waddell have to say because of the corroboration - the testimony from Greg Hill, Leo Cordary, Susan Schultz, Donald Waddell, Ken Mischler - then find the Defendant guilty of first degree murder.

Thank you.

Under the state's alternative theory, the death sentence at bar is disproportionate and unconstitutional. A death sentence for a minor participant is disproportionate and

unconstitutional.

In Fernandez v. State, 730 So. 2d 277 (Fla. 1999), this Court reversed the defendant's death sentence where he was inside a getaway car during a robbery which led to the murder of a policeman. The defendant contended on appeal that, under Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), his death sentence was unconstitutional because he was a minor participant. This Court noted that the record showed that Fernandez's degree of participation in the crime was similar to that of other participants who received life sentences.

At bar, one cannot tell what the jury determined. It may have found that appellant's involvement was minimal or it may have found that he was the shooter. Appellant submits that, under the unique circumstances of this case, his death sentence is unconstitutional and improper under cases like Fernandez and Enmund where the jury has not specifically determined that he was the shooter.

In analogous situations, this Court has held that a jury finding that the defendant actually carried a firearm is a necessary predicate to an enhanced sentence for carrying a firearm. See State v. Hargrove, 694 So. 2d 729 (Fla. 1997).

Likewise, in State v. Estevez, 753 So. 2d 1 (Fla. 1999), this Court held that the jury must expressly determine the amount of cocaine involved before the relevant mandatory minimum sentence under cocaine trafficking statute can be imposed, even if the evidence is uncontroverted.

In State v. Estevez, this Court noted that Jones v. United States, 526 U.S. 227 (1999) had recently interpreted the federal carjacking statute to require separate jury findings regarding sentencing enhancements. This Court noted that Jones had "emphasized the importance of the role of the jury when its fact finding role is directly related to the severity of the punishment to be imposed". 753 So. 2d at 5. This Court quoted from Jones, where the Court wrote in footnote 6: "the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 753 So. 2d at 5-6. Jones noted that a contrary ruling would give rise to serious constitutional concerns. The Due Process and Jury Clauses applies this rule to the states. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In a capital case, the Cruel Unusual Punishment Clauses of the state and federal constitution impose higher standards for death penalty cases. Hence, the logic of Jones applies with even greater force at bar. Constitutional error occurred at bar. This Court should reverse appellant's sentence.

11. WHETHER FUNDAMENTAL ERROR OCCURRED IN THE STATE'S PENALTY ARGUMENT.

The state began its brief penalty argument by saying that "Paul Evans devised and executed an intricate plan of greed and deceit that ended in the cold-blooded murder of Alan Pfeiffer and kept it quiet for six-and-a-half years. This is the reason we're here today." T 4429.

Thus, the state used the time between the murder and the trial as a circumstance for the jury to consider in weighing appellant's fate. It is constitutional error for the state to argue a non-statutory aggravating circumstance to the jury. "Only statutory aggravating factors may be considered. Miller v. State, 373 So. 2d 882 (Fla. 1979)." Drake v. State, 441 So. 2d 1079, 1082 (Fla. 1983).

The state then argued (T 4429-30):

Ladies and Gentlemen, this is not a spur-of-the-moment crime. This is not a murder that happened while he was doing something else. This was a murder for money.

The aggravating circumstance in this situation is financial gain, pecuniary gain. Now the law is that you don't have to actually get the money, but that there had to be a reason for doing so, the motivation behind doing it. Killing someone by waiting for them in the dark to ambush them for what? A handful of money? Thirty pieces of silver? It doesn't get any worse than that. It doesn't get any worse than murder for hire.

The reference to thirty pieces of silver³⁹ neatly compared

³⁹ "Then one of the twelve, called Judas Iscariot, went unto the chief priests, And said unto them, What will ye give me, and I will deliver Him unto you? And they covenanted with him for thirty pieces of silver." Mat 26:14-15.

appellant to Judas Iscariot and Alan Pfeiffer to Jesus.

This Court has long condemned the use of such argument. In Washington v. State, 86 Fla. 533, 98 So. 605 (1923), Justice Terrell wrote: "It is proper to state in this connection that excessive vituperation or ridiculous epithets are out of place and should not be indulged in criminal prosecutions". See also United States v. Steinkoetter, 633 F.2d 719, 720 (6th Cir. 1980) (reversing for prosecution's reference to Pontius Pilate and Judas Iscariot); Comm. v. Valle, 362 A.2d 1021 (Pa. 1976) (finding counsel ineffective for failing to object to references to Al Capone). Cf. Washington v. State, 687 So. 2d 279 (Fla. 2nd DCA 1997) (comparing defense strategy to Joseph Goebbels' "big lie").

In Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991), the court sua sponte disapproved "numerous statements which we can only describe as outrageous", including "at one point even drawing an analogy to Judas Iscariot". See also United States v. Giry, 818 F.2d 120 (1st Cir. 1987) (defendant's statement compared to Peter's denial of Christ) and Comm. v. Chambers, 599 A.2d 630 (Pa.1991) (allusions to Bible in argument are per se reversible).

Invoking religion "can easily cross the boundary of proper argument and become prejudicial". Brooks v. State, 25 Fla. L. Weekly S417, n. 26 (Fla. May 25, 2000) (quoting Lawrence v. State, 691 So. 2d 1068, 1074 n. 8 (Fla. 1997) and citing Ferrell v. State, 686 So. 2d 1324 (Fla. 1996)).

An improper epithet, taken alone or with other improper

arguments, may constitute fundamental error. Cf. Duque v. State, 498 So. 2d 1334 (Fla. 2nd DCA 1986) (reference to witness as "scum bag" improper and prejudicial in view of implication that others in courthouse shared opinion was contention involving fundamental error, as totality of circumstances showed that defendant did not receive fair trial).

At bar, the state continued by arguing that, in weighing the circumstance, jurors should consider that other persons turned down Connie's offer. T 4430. This was another appeal to nonstatutory aggravation. Further, the evidence showed that those persons, unlike appellant, were gainfully employed, whereas appellant was unemployed and unable to meet the rent. T 3845-46 (testimony of Donna Waddell that they were behind on rent and, although Donna worked full time, appellant lived on social security).

The state urged at pages 4429-30 that planning and premeditation gave extra weight to the pecuniary gain circumstance, doubling the effect of the CCP circumstance.

It repeated the doubling line of argument after discussing CCP: "How much should you weigh that aggravating factor, financial gain? It's cold, calculated, and premeditated." T 4431.

The state continued: "Now, let's talk about mitigation. Divorce and family problems rarely breed murderers. He will do time well? When faced with the death penalty, 'I don't make trouble until my trial occurs, I'll get a mitigator.' Do time well." T 4432. Thus, it unconstitutionally urged to the jury

not to consider valid mitigation. In Hitchcock v. State, 755 So. 2d 638, 642 (Fla. 2000), this Court found improper argument telling jurors to disregard childhood mitigating evidence. Citing Lockett v. Ohio, 438 U.S. 586, 604 (1978), it wrote that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a life sentence.

Further, there is no evidence that appellant said the remark ("I don't make trouble until my trial occurs, I'll get a mitigator.") which the state attributed to him. To present the jury with an imaginary statement of the defendant is improper. Cf. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999) (disapproving state's embellishment on what the victim may or may not have said, without factual support in the record).

The state then told the jury to disregard appellant's age (19) because in World War II 18 and 19 year olds "were hitting the beaches and those men were pouring out of those boats",⁴⁰ concluding: "He's old enough to drive, old enough to drink, old enough to vote, and old enough to kill." T 4432. This argument would automatically bar application of the age circumstance to any person aged 19. It would apply the circumstance would apply only to 17-year-olds. Again, the state urged the jury to

⁴⁰ The state may not use a patriotic theme to divert the jury from deciding the case based on the law and facts before it. Cf. Ruiz v. State, 743 So. 2d 1 (Fla. 1999) (reference to prosecutor's father's service in Desert Storm).

automatically disregard valid mitigation. It illegally and unconstitutionally urged consideration of appellant's age in aggravation.

The state then told jurors to disregard appellant's childhood, saying "a rotten childhood can either be made terrible for you or you can make it terrible." T 4432. It said: "A lot of people and adults have rotten childhoods, and they don't commit a murder like this. Some even may be so bad that they may commit some kind of spur-of-the-moment crime, 'let's go knock over a 7-Eleven or a bowling alley.' But what about this? Not an extensive plan, an intricate planning to commit a murder where you shoot someone two times in the head and once in the back." Id.

Thus, the state contended that the circumstance would never apply in a CCP case. Such argument is contrary to law. For instance, in Parker v. State, 643 So. 2d 1032 (Fla. 1994), a case involving the CCP circumstance, it was error not to consider in mitigation evidence of the defendant's troubled childhood.

In its totality, the state's argument deprived appellant of a fair sentencing. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const. This Court should reverse for resentencing.

12. WHETHER THE COURT ERRED IN GIVING NO WEIGHT TO VALID MITIGATION.

The court unreasonably gave no weight to the mitigating factors of appellant's immaturity and his artistic ability.

Merck v. State, 25 Fla. L. Weekly S584 (Fla. July 13, 2000), citing to Campbell v. State, 571 So. 2d 415 (1990), stated: "a sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." This Court disapproved the trial court's conclusory rejection of two nonstatutory mitigators relating to alcohol abuse, writing:

In the sentencing order, the trial court correctly stated that Merck had urged the court to find the two alcohol-related nonstatutory mitigators. However, we find the court's reference back to a one-sentence discussion of evidence of Merck's long-term alcohol abuse in the statutory mitigation section of the order to be insufficient as to our Campbell sentencing order requirement. Likewise, although the trial court did discuss in the sentencing order evidence of Merck's drinking alcohol the night of the murder, this discussion was only in the context of finding that this evidence did not prove a statutory mitigator and is insufficient as to our Campbell sentencing order requirement. The sentencing order concludes that the long-term alcohol abuse was considered together with nonstatutory factors of Merck's "learning disability, ... his chemically dependent parents, his rejection by two father figures, his lack of a parental role model, his lack of a male parent, and his capability to form loving relationships." State v. Merck, sentencing order at 12. Merck alleges this analysis of nonstatutory mitigation does not evaluate the evidence presented as nonstatutory mitigation or explain the reasoning for the trial court's weighing of nonstatutory mitigation. This is a violation of the requirements we set forth in Campbell. See Hudson v.

State, 708 So. 2d 256, 259-60 (Fla. 1998). The nonstatutory mitigation section of the sentencing order for this resentencing must deal directly with any evidence, including Merck's alleged alcohol abuse, that Merck presents to the court as nonstatutory mitigation.

At bar, the court wrote concerning appellant's immaturity: "The defendant has failed to establish that he was in fact immature at the time of the murder. This court does not give this any weight." R 509. It set out no reason for its outright rejection of the overwhelming evidence that a profoundly troubled adolescence had produced a defendant who, at age 19, was in a relationship with an alcoholic 16-year-old, was unemployed, was unable to pay his rent, and whose actions revealed a lack of judgment.

The court wrote respecting unrebutted evidence of appellant's artistic ability: "The defendant presented drawings he made in jail to show the defendant's positive prognosis for prison life. This court does not recognize this as a mitigating circumstance and gives no weight." R 510. Contrary to the court's view, artistic ability is a mitigator. See Jones v. State, 705 So. 2d 1364 (Fla. 1998) (mitigators requiring a life sentence included artistic ability); Thompson v. State, 647 So. 2d 824, 826, n.2 (Fla. 1994) (mitigation resulting in a life sentence included the defendant's possession of "some rudimentary artistic skills").

Failure to consider valid mitigation violates the Due Process and Cruel Unusual Punishment Clauses of the state and federal constitution. This Court should reverse for

resentencing.

13. WHETHER THE COURT ERRED IN IMPOSING THE DEATH PENALTY WHEN THE JURY MADE NO UNANIMOUS FACT-FINDINGS AS TO DEATH ELIGIBILITY.

The judge imposed a death sentence when the jury did not unanimously find the facts required for death eligibility, in violation of the Due Process and Jury Clauses. Amends. 5, 6, 8, 14, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 22, Fla. Const.; Jones v. United States, 526 U.S. 227 (1999). This is especially true when all the aggravators relate to the criminal episode. State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984) (overruled on other grounds in State v. Gray, 654 So. 2d 552 (Fla. 1995)).

In Jones, the Court decided that, where the federal carjacking statute established higher penalties when the offense resulted in death or serious bodily injury, the jury had to unanimously find that element. The Court relied, in part, on the principle of constitutional doubt: "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter". 526 U.S. at 239.

The Court noted that an opposite interpretation of the statute would raise serious constitutional questions under decisions involving the Due Process and Jury Clauses. Id. at 239-43. It discussed three capital cases (id. 250-52):

Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), contains no discussion of the sort of factfinding before us in this case. It addressed the argument that capital sentencing must be a jury task and rejected that position on the ground that capital sentencing is like sentencing in other cases, being a choice of the appropriate disposition, as

against an alternative or a range of alternatives. Id. at 459, 104 S.Ct. 3154.

Spaziano was followed in a few years by Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam), holding that the determination of death-qualifying aggravating facts could be entrusted to a judge, following a verdict of guilty of murder and a jury recommendation of death, without violating the Sixth Amendment's jury clause. Although citing Spaziano as authority, 490 U.S., at 639-640, 109 S.Ct. 2055, Hildwin was the first case to deal expressly with factfinding necessary to authorize imposition of the more severe of alternative sentences, and thus arguably comparable to factfinding necessary to expand the sentencing range available on conviction of a lesser crime than murder. Even if we were satisfied that the analogy was sound, Hildwin could not drive the answer to the Sixth Amendment question raised by the Government's position here. In Hildwin, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved. Hildwin, therefore, can hardly be read as resolving the issue discussed here, as the reasoning in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed. 511 (1990), confirms.

Walton dealt with an argument only slightly less expansive than the one in Spaziano, that every finding underlying a sentencing determination must be made by a jury. Although the Court's rejection of that position cited Hildwin, it characterized the nature of capital sentencing by quoting from Poland v. Arizona, 476 U.S. 147, 156, 106 S.Ct. 1749, 90 L.Ed. 123 (1986). See 497 U.S. at 648, 110 S.Ct. 3047. There, the Court described statutory specifications of aggravating circumstances in capital sentencing as "standards to guide the . . . choice between the alternative verdicts of death and life imprisonment." Ibid. (quoting Poland supra, 156, 106 S.Ct. 1749 (internal quotation marks omitted)). The Court thus characterized the finding of aggravated facts falling within the traditional scope of capital sentencing as a choice between a greater and lesser penalty, not as process of raising the ceiling of the sentencing range available. We are frank to say that we emphasize this

careful reading of Walton's rationale because the question implicated by the Government's position on the meaning of § 2119(2) is too significant to be decided without being squarely faced.

In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. [Fn omitted.] This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Justices Stevens and Scalia wrote concurring opinions explicitly stating that it is unconstitutional to remove from the jury the assessment of facts which increase the maximum punishment for an offense. Id. 252-53.

The sentence at bar violates the reasoning of Jones and Richardson v. United States, 526 U.S. 813 (1999) (jury must find which specific violations make up a continuing series of violations so as to constitute continuing criminal enterprise).

In Florida, a first degree murder conviction alone does not make one death-eligible. One or more aggravators must be proven beyond a reasonable doubt and found sufficiently weighty to call for the death penalty. Florida Statute 921.141; State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Here, the jury made no unanimous finding of aggravators. It did not unanimously find them so weighty as to call for the death penalty. All we know is that it found appellant guilty of first degree murder, and that a majority felt that death is the appropriate sentence.

The sentence here is contrary to Jones, which states (526

U.S. at 243-44):

The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury was merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determination of guilt to the relative importance of low-level gatekeeping. In some cases, a jury finding of fact necessary for a minimum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing a unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of a jury's function to a point against which a line must necessarily be drawn.

The Court was troubled by the fact that the Government's interpretation of the carjacking statute would allow findings by a judge alone to raise the maximum penalty from fifteen years to life. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) discussed the need for individualized capital sentencing.

The concerns of Jones are magnified when one raises the penalty from life to death. The jury did not make any of the factfindings required for death eligibility. Appellant's sentence is unconstitutional.

The death sentence in this case violates the Florida Constitution. Blair v. State, 698 So. 2d 1210, 1212-13 (Fla. 1997) emphasized the importance of the right to a jury trial. Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65, 71 (Fla. 1973) states:

Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking a jury trial for that right is fundamentally guaranteed by the U. S. and Florida Constitutions.

This Court wrote along the same lines in State v. Overfelt, 457 So. 2d at 1387:

The district court held, and we agree, "that before a trial court may enhance a defendant's mandatory sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. [Cit.] The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

The reasoning of State v. Overfelt that only the jury can be the finder of fact concerning the criminal episode supports the unconstitutionality of the sentence at bar. The potential death eligibility facts in this case all relate to the criminal episode and must be found by a jury pursuant to State v. Overfelt.

14. WHETHER THE COURT ERRED IN GIVING DOUBLE CONSIDERATION TO THE COLDNESS AND PECUNIARY GAIN CIRCUMSTANCES.

Improper doubling occurs when two aggravators rely on the same essential feature or aspect of the crime. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), Banks v. State, 700 So. 2d 363, 367 (Fla. 1997). At bar, the same essential feature or aspect of the crime covered both the CCP and pecuniary gain circumstances, and the state so argued to the jury. T 4429-30, 4331. It was error to consider them separately. See Snipes v. State, 733 So. 2d 1000, 1009 (Fla. 1999) (Anstead, J., concurring) (citing to Downs v. State, 572 So. 2d 895 (Fla. 1990) (trial court merged aggravators of CCP and pecuniary gain in killing-for-hire case)).

Properly considered, there was only aggravating circumstance at bar. Accordingly, the death sentence is unconstitutional in that the court considered an invalid circumstance. See Espinosa v. Florida, 505 U.S. 1079 (1992).

With only one aggravator, the death sentence is improper. A death sentence is disproportionate when there is only one aggravating circumstance unless there is little or nothing in mitigation. Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989), Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990), Deangelo v. State, 616 So. 2d 440 (Fla. 1993), Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994), Jones v. State, 705 So. 2d 1364 (Fla. 1998).

As to the proportionality of the sentence, appellant also refers the Court to his argument at points 9 and 10 on appeal.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the conviction and sentence, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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I HEREBY CERTIFY that a copy Appellant's Initial Brief with attached Appendices has been furnished to LESLIE CAMPBELL, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401 by courier 31 August 2000.

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IN THE SUPREME COURT OF FLORIDA

PAUL H. EVANS,)
)
 Appellant,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Appellee.)
)
)
)
_____)

CASE NO. SC96404

INITIAL BRIEF OF APPELLANT

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This brief was prepared in a Courier new Regular 12-point font.

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