IN THE

Supreme Court of the State of Florida

Case No. 66,204

ANTHONY RAY PEEK,
Appellant,

versus

STATE OF FLORIDA,
Appellee.

APPELLANT'S MAIN BRIEF

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
STATE OF FLORIDA

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PRELIMINARY STATEMENT

This case is guaranteed to shock the sensibilities and conscience of the Court. The record overflows with overt racism, such as where the trial judge referred to Appellant's family as "niggers," where the prosecutor used his preemptory challenges to exclude all but one black from the jury, and where all assumed that the assailant was black only because a fragment of a strand of hair found in the victim's garage probably came from a black man, even though that fragment could have come from a black police officer, or, most probably, from a source totally unrelated to the crime, such as one of the black gardeners, a black acquaintance of the victim, or any white person.[1]

This case has been to this Court before. Following a narrow affirmance, the Honorable Judge Dewell granted a new trial when it was shown that the State had misled both the initial jury and this Court as to the facts. Once it was determined that the perjured and damaging hair testimony used in the first trial was unavailable to the State, the State knew there was insufficient remaining evidence to convict. Thus, over strenuous objection, the State successfully introduced the detailed testimony of a young woman who Appellant admittedly raped six years ago. That crime had nothing in common with the instant crime, but the same judge who called Appellant's family "niggers" decided to "let it all hang out" since he would "not be in the criminal court anyway if and when this thing is reversed." Perhaps the only similarity

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[1] The assumption that if a black person had ever been in the victim's home, it must have been in connection with the crime, is abhorrent.

between the two offenses were that both victims were white and lived in Winter Haven (although they lived about five miles apart). Evidence which would have demonstrated the lack of similarity of the two crimes was excluded.

A review of the table of contents reveals what seem like an inordinate number of issues. However, the trial below was such a travesty that it would be no surprise if this Court reversed on many of the issues raised.

Throughout this brief, Anthony Ray Peek will be referred to as "Appellant." The record will be referenced by the letter "R", followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE

In 1978, Appellant was convicted of first degree murder and sentenced to death. Over two dissents based upon insufficiency of the evidence, this Court affirmed. Peek v. State, 395 So. 2d 492 (Fla. 1980). Appellant then filed a motion for post-conviction relief in the trial court pursuant to Fla. R. Crim. P. 3.850. On November 2, 1983, the Honorable Judge Dewell granted the motion on the grounds that Appellant was denied a fair trial and was denied the effective assistance of counsel at his trial. See Appendix "A". Particularly, the Court held that the State's use of untrue probability statistics were so prejudicial as to deny Appellant a fair trial. Judge Dewell's order was appealed to this Court and was later dismissed. State v. Peek, Case No. 64,540 (Order dated March 22, 1984).

Judge Langston was then assigned to the case. Numerous defense motions were denied prior to trial. On August 20, 1984, trial was held in Bartow, Florida. On August 24, 1984, the jury returned a verdict of guilt against Defendant to first degree murder, and the lesser offenses with which he was charged. When the judge and attorneys were entering Judge Langston's chambers to discuss jury instructions, Judge Langston referred to Appellant's family as "niggers." Defense attorney Dale Jacobs remembered the comment as follows: "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpeona them back at cost to the State" (R-1398). Investigator Roy Matthews heard the comment a little differently: "Since the niggers are here, maybe we can go ahead with the sentencing phase" (R-1399). A motion for disqualifica-

tion of Judge Langston was filed along with affidavits stating that the prejudicial comment was made (R-1240-43). Motions for mistrial and new trial on this, as well as other grounds were denied (R-1238, 1259, 1266). Judge Langston was later replaced by Judge Norris who presided over the sentencing phase (R-1258). By a 9-3 margin, the jury recommended death (R-1388). Judge Norris imposed the death penalty, finding three aggravating factors and no mitigating factors (R-1426-32). A timely appeal was filed to this Court (R-1444).

STATEMENT OF THE FACTS

Sixty-four year old Erna Carlson spent the evening of May 21, 1977, with her sister and daughter, Angela Wertz and Leah Smith, respectively (R-491,508). When Carlson did not arrive at work the following day, Wertz was notified and went to check on her. Wertz found Carlson dead in her bed (R-496). Carlson had been raped and murdered (R-522-26). The only factual issue is whether Appellant was involved.

The victim's purse was on the bedroom floor with its contents strewn about (R-511). Wertz did not know where Carlson normally kept her car keys, but Smith believed that they were kept in her purse (R-499, 510).

Dr. Luther Youngs, a pathologist, performed an autopsy the next day and determined that the victim died of strangulation (R-522-26). Because the victim's temperature was not immediately taken by the police, Youngs could only make a crude estimate of the time of death, which he placed between 11:50 A.M. and 11:50 P.M. on May 21 (R-527-30). Because the victim returned home at about 9:00 P.M. (R-491), the time of death must have been between 9:00 P.M. and 11:50 P.M.

Numerous police personnel arrived at the scene. No fingerprints were found in the house (R-725). It was determined that the perpetrator probably gained entrance by cutting the screen door in the carport (R-537). The telephone wire outside the house had been cut (R-549). Bedclothes containing blood and semen stains were taken to the lab as were parts of hose found in victim's garage [1A] (R-539, 719, 737).

[1A] While one officer said that the hose were found on the clothes line and floor, Donnelly said they were all on the floor (R-539,737).

Later that day, the victim's car was found in a parking lot near Lake Martha Park (R-570). The driver's door was open; the passenger's side was locked (R-604). The park was located 1.0 miles from the Carlson home and .7 miles from Appellant's residence, all in something of a triangle (R-1073). A fingerprint taken off of the inside window of the car belonged to Appellant (R-873). The fingerprint expert did not know when the print was placed on the car (R-879).

The blood stains from the victim's bedclothes came from a type "O" secretor (R-860). The victim was blood type "O" (it is unknown if she was a secretor, but 80% of the population are) as is Appellant (R-854, 514). Just under half of all people have type "O" blood and 37.6% are type "O" secretors (R-853,862).

Diana Bass, a microanalyst at the Sanford Crime Lab, testified that she discovered a tiny fragment of a strand of hair on a piece of stocking collected from the victim's garage (R-769). This one quarter inch hair fragment has been the subject of considerable controversy.

In the first trial, Bass testified that this fragment was microscopically consistent with Appellant's hair in all 30-35 characteristics that she compared and that "various studies by many experts in my field have concluded that in only two cases out of 10,000 will this occur." On direct appeal, this Court accepted and quoted this testimony verbatim. In fact, at the 3.850 hearing, it was shown that no study has ever reached such a conclusion and that the fragment was so small that only a few

characteristics were even capable of analysis.[2] It was further shown that Bass resigned shortly after the first trial following an employee evaluation finding her incompetent in many areas, but most notably in the area of evidence handling. The evaluation was excluded from evidence, but rated her as unsatisfactory in "Evidence Handling" and conditional in, among other areas, "Job Skill Level," "Quality of Work," and "Volume of Acceptable Work." Specific comments in the evaluation included:

> Evidence Handling Procedures
>
> Evidence handling is one of Ms. Bass' most problematical areas. She does not appear to have the proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory tabletop overnight. This failure to protect the items by repackaging them when not actually involved in an analysis leaves **a very strong probability of extraneous contamination, cross-contamination among items, and possible loss of trace evidence.**
>
> Job Skill Level
>
> Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been acquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting, should be indicative of a lack of adequate background training in this

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[2] In order to understand Bass' outright perjury, it is best to look at her original trial and hearing testimony side by side, as is set out in Appendix "C".

> area. Her general scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is considered to be a serious fault.
>
> Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, AA and other instrumental methods. The inability to choose appropriate methods of instrumental analysis and the lack of knowledge needed to competently perform these analyses should be considered an extremely serious deficiency.

Bass testified that, at the time of the reception of this evidence, poor lab procedures resulted in a high probability of a mix-up in the evidence. She stated that this strong possibly occurred in the instant case (R-791-2). She also stated that she was required to complete quotas of cases which, in her view, could have led to errors. She said that she was required by her supervisors to work on several cases at the same time, including hair cases, which, in her opinion, also increased the likelihood of mix-up. In fact, one of her supervisors, who had no experience in hair analysis herself, came into the lab with arms outstretched and handed Bass "a bunch of hair cases at one time." See Appendix "B". At the time, the lab had inadequate space to store evidence, and evidence, including hair, was placed outside or left on a tabletop overnight. Evidence was routinely left all over the lab in various places. See Appendix "B".

After the fragment was discovered and identified in a lab report dated June 20, 1977, it again arrived in the lab on July 12, 1977, together with a known sample from Appellant, and was

received by technician Linda Kerner. Bass did not know nor did any witness testify where the fragment was in the interim (R-779). According to the testimony from the first trial, this evidence was again received by the lab on December 7, 1977, by technician Susan Coquine, although there is now no documentation to support this (R-781-82); see also appendix "D". Neither Bass nor anyone else could say where these samples were between July 12 and December 7, or between December 7 and December 20, the date the samples were compared (R-784-85).

At the time of the first trial, the actual hair evidence had been lost. 395 So. 2d at 495. Yet, following the 3.850 hearing, it was found. Officer Hutzell claimed she retrieved the samples from the lab in 1981 and had held them until this trial (R-796). Despite all of these problems concerning the reliability of this evidence, it was admitted (R-819).

The State's hair expert testified that the hair fragment had characteristics similar to those found in negroid hair (R-828,847), but it could possibly have come from a white person (R-845). The sex of the hair donor could not be determined (R-842). As he explained:

> [I]n this particluar case, some hairs and some examinations are too limited due to their size, in order that a comparison cannot be made. There's not enough hair present to be able to make a determination, whether it did or did not originate from a particular individual. Since this was the case in this particular hair examination, no comparisons -- or no further comparisons -- were performed.

(R-832). He did notice that the "general color" of the hair from the hose was "somewhat consistent" with Appellant's hair color, as was "some pigment distribution", and when he measured the

cuticular margin, there were "some consistencies" (R-833-34). The fragment on the hose had frayed (split) ends (R-834). At first, he testified that Appellant's hair did not have any split ends, and then said he noticed some (R-835). Anyone who brushed their hair, wore a cap, or did not take care of their hair would likely have some split ends (R-843, 845). There were no significant dissimilarities, but, of course, the great majority of characteristics usually examined were not examined (R-832,835).

The expert did not know how long the hair was on the stocking or how it got there (R-838).

There was also evidence that the victim's black gardener and his son frequented the garage for the purpose of getting tools (R-505,515) and that black officers had come in contact with the stocking and the garage floor (R-618,636,742).

Various officers testified about Appellant's prior statements. Officer Gay Henry said that he and Officer Latner had interviewed Appellant and Appellant said he knew where Lake Martha Beach was (where the car was found), that he had been there, that he knew how to get there, and that he had nothing to do with the Carlson murder (R-614-15,628). However, Latner's testimony and his written report state that Appellant said he had not been there. (R-657). When Henry was reminded of this, he changed his testimony to conform it to the police report (R-637-38). Then, Henry was reminded of his deposition testimony of March, 1978, where he testified that Appellant said he had been there (R-640). He said that this information had come to him from Officer Donnelly (R-641). He also said that Appellant never

made any statements to him in Donnelly's presence (R-629).

Donnelly, on the other hand, testified that Appellant told him in Henry's presence that he had never been to the park (R-1102-12). Donnelly's former wife testified that, at the time of the Carlson investigation, Donnelly had been drinking heavily and when he got off work, he was usually intoxicated "to the point of being drunk" (R-1095).

Much of the police testimony concerning Appellant's prior statements is confused. Appellant testified that he had told the police that he had not been to the lake area because he was on probation at the time and knew he had attempted to burglarize a car at that area (R-943).

The State also presented substantial evidence about another offense in which Appellant has admitted guilt. It was admitted to show identity under the "Williams Rule." Linda Jamison, the rape victim, testified at length about the details of the rape perpetrated upon her (R-696-710). She cried during her testimony (R-702). The primary similarities between the two crimes were that both victims were white females, both were raped, and both lived in Winter Haven. The following is a partial list of the dissimilarities between the two offenses:

Carlson	Jamison
Entry gained by cutting of screen door (R-537)	No forced entry (R-701)
Offense occurred in late night or early morning hours (R-491,527)	Offense occurred in broad daylight (R-698)
Perpetrator probably attempted to conceal identity with hose over head and face	No attempt made to conceal identity

Fingerprints concealed by perpetrater	No attempt to conceal fingerprints
Victim strangled and tied up -- unique killing with nightgown tied around neck and tied to bedpost (R-719)	Victim not strangled or tied
Victim had been severely beaten	Victim was not beaten
Telephone wire cut outside of victim's home cut (R-549)	Wires ouside victim's home not tampered with, although, during attack, phone rang and Appellant tore it out of wall (R-904,703)
Other than victim's purse, no evidence that home was disturbed	Appellant ransacked victim's home in search of valuables (R-704)
Victim's car and car keys stolen	Neither car nor keys stolen
Victim is young, attractive woman of 29 years of age (R-238)	Victim is elderly woman of 65 years (R-238)
Crime occurred five miles from Carlson murder (R-248)	Crime occurred five miles from Jamison home (R-248)
Victim lived with her family	Victim lived alone

The State also introduced fingerprint evidence from Jamison's car which matched Appellant's to show a similarity in the crimes because in both cases, a fingerprint was found on the victims' care (R-911). However, the fingerprint on Jamison's car was made as Appellant was being chased by Jamison at gunpoint and, while running, he hurdled her car (which blocked his path) by placing a hand on the hood thereof (R-904). This is obviously very different than the events leading to the fingerprint on the Carlson car.

Appellant attempted to introduce the testimony of Dr. Norman, whose proffered testimony was that the two crimes are dissimilar and unlikely to be committed by the same type of individual, but this evidence was excluded (R-1070).

The evidence further showed that, within eight weeks of the Carlson murder, another elderly white woman named Raiden was murdered in much the same manner as Carlson and a man named Shelton was convicted of that murder. That murder occurred at night, and the victim was beaten in a manner similar to Carlson (R-672,1035-36,1082-88). In both cases, the telephone wires were cut outside the home. In both cases, the entry was gained by cutting a screen, and Shelton was known to be involved in auto thefts. Id. Indeed, he stole car keys from the victim's home and stole the car (R-1079). Carlson was strangled with a bathrobe; in the Raiden case, Shelton carried a bathrobe into the house. Id. Like Appellant, Shelton had type "O" blood and is black (R-1086).

Shelton was known to use a stick to cut screen and gain entry in his burglaries (R-1040). Such a stick was seen by the victim's sister upon her arrival at the Carlson home (R-504), but the police failed to collect it as possible evidence. Shelton was charged on another occassion with sexually molesting a woman (R-1090).

Despite the obvious similarities between the Carlson case and Shelton's previous crimes, he was dropped as a suspect when Appellant's fingerprint was found on the Carlson car (R-1088). Due to understaffing at the Florida Department of Law Enforcement lab, Shelton's prints were never cross-referenced to the Carlson case (R-1044-45). Another suspect, named Keaton, was not investigated because he was a friend of one of the officers who was able to vouch for him (R-630-31).

Dale Newt, forensic scientist and former supervisor for FDLE, testified that the crime scene investigation did not meet the standards prevailing at the time. Too many people wandered through the home, there was insufficient documentation, evidence was not collected properly, and much evidence was not collected at all (R-1023-29). There were "major errors" in the procedure used. Id.

Appellant presented an alibi defense. At the time of the crime, he was living in the Lake Region Hotel, a halfway house for first offenders (R-960). He testified that he was on "restriction" during the weekend of the Carlson murder because he was behind on his rent (R-928-31,963,985). Under this rule, he was not permitted to leave the house. The sign-in sheets reflect that he signed in at 6 P.M. that Friday and signed out again at 6:37 A.M. that Monday morning (R-932). He was given permission to leave on Sunday morning by the counselor, despite his status, so he could get breakfast. He rode a bicycle to a local restuarant and then took his food to the lakeside park to eat. It was there that he noticed Carlson's car with the door open and he attempted to burglarize it (R-934).

Appellant's testimony was fully corroborated by two counselor's who worked at the state agency, Ted Smith and Ken Boyce (R-959-995). Smith worked the 4:00 P.M. to midnight shift on Saturday. His records reflect that all persons were present or accounted for at his 11:00 P.M. bedcheck, including Appellant (R-968). Because Appellant was on restriction, he had to have been in bed. Id. Smith admits that, at one time, there was a problem with residents sneaking out, but this had been cured by this time

(R-971).

Boyce took over from Smith at midnight (R-987). His records reflect that he made rounds at midnight, 2,3,5,6,7 and 8:00 A.M. (R-988). During each check, all persons who were supposed to be there were present and no windows or doors had been opened. Id. Indeed, the windows were booby-trapped so that, if they were opened, a counselor was sure to know (R-995). Boyce further testified that he allowed Appellant to leave to obtain breakfast the following morning despite his "restriction" status because there was no one present to get it for him (R-989).

In surrebuttal, Officer Donnelly, who was unable to recall many details of the investigation, and, according to his ex-wife had a severe drinking problem at the time, testified that the two state employees must have been lying because he remembered seeing the records on an earlier occasion and the 11 P.M. and midnight notations were not there (R-1099).

ARGUMENT

I. THE TRIAL JUDGE'S REFERENCE TO APPELLANT'S FAMILY AS "NIGGERS" DENIED APPELLANT A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

As Judge Langston and the attorneys entered the judge's chambers to discuss jury instructions, Judge Langston referred to Appellant's family as "niggers." Defense attorney Dale Jacobs remembered the comment as follows: "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpeona them back at cost to the State" (R-1398). Investigator Roy Matthews recalled the comment as follows: "Since the niggers are here, maybe we can go ahead with the sentencing phase" (R-1399). There was no doubt in their minds that the judge, in fact, referred to Appellant's family as niggers, and the judge did not deny it.

Motions were filed for mistrial, new trial, and for the disqualification of Judge Langston, along with affidavits stating that a prejudicial comment was made (R-1240-43). The comment itself was placed on the record at a later date,[3] as was another

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[3] The undersigned was not present when the comment was made. However, Roy Matthews, the investigator, had also been the investigator in the prior 3.850 proceeding, and worked closely with the undersigned therein. When the comment was made, Mr. Matthews telephoned the undersigned immediately and advised him of same. The undersigned, in turn, telephoned the defense attorney, who initially expressed a reluctance to place the comment on the record because he practices in Polk County and he expressed a fear that such an action would harm his practice. At the urging and insistence of the undersigned, he later placed the exact comment on the record. He indicated to the undersigned that he first approached Judge Langston ex parte and explained to him that the undersigned telephoned him (Jacobs) and explained to (cnt'd)

of the judge's improper comments.[4] The motions were denied with the exception that, based upon the motion for disqualification, Judge Langston was later replaced by Judge Norris, who presided over the sentencing phase of the trial (R-1258).

Despite Judge Langston's eventual disqualification, the failure to grant a mistrial or new trial on the basis of this comment resulted in error requiring reversal.

The reference to Appellant's family as "niggers" gives the appearance of impropriety and injustice. This Court has supervisory responsibility and authority over the administration of justice in the courts in this state. Fla. Const. art. V. In that capacity, it has an ongoing responsibility to assure that trials are not only fair, but that they appear fair. As both this Court and the United States Supreme Court have explained, "justice must satisfy the appearance of justice." Potts v. State, 430 So. 2d 900, 903 (Fla. 1982); Offut v. U.S., 348 U.S. 11, 14 (1954). And, as the Offut Court explained, perhaps the most essential element of the appearance of justice is the impartiality of the trial judge. "A fair trial in a **fair tribunal** is a basic requirement of due process . . . . Our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1959); Scott v. Anderson, 405 So. 2d 228, 234 (Fla. 1st DCA 1981); State v. Lewis, 80 So. 2d 685 (Fla. 1955). These principles are no less true in a case where the death penalty is in issue, especially in light of this

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[3] (cnt'd) him that it was his ethical duty to place the comment on the record. See Appendix "E".

[4] See p. 22, infra.

Court's obligation to oversee the fair application of that penalty. Proffit v. Florida, 428 U.S. 242 (1976); Peek v. State (dissenting opinion).

Canons 1 and 2 of the Code of Judicial Conduct recognize that "an honorable judiciary is indispensible to justice in our society" and "a judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In furtherance of the principles set out therein, the Courts have vigorously reviewed cases involving allegations of judicial bias, and, where there is any doubt, the courts have reversed. Thus, in State v. Steele, 348 So. 2d 398, 401 (Fla. 3rd DCA 1977), the Court explained:

> It is the established law of this State that every litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard the right of the litigant . . . . The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice [citations omitted]. A judge must not only be impartial, he must leave the impression of impartiality upon all of those who attend court.

The court also held that when the judge seemed to be prejudiced, such error "constitutes a denial of due process and, accordingly, is per se reversible error." Id. at 403.

In Driessen v. State, 431 So. 2d 692 (Fla. 3rd DCA 1983), when the judge intimated that he did not believe defendant's version of the facts, the court found that the judge was not impartial and reversed the conviction.

In Anderson v. State, 287 So. 2d 322, 324-25 (Fla. 1st DCA 1973), when the sentencing judge made a comment which intimated

that he considered the defendant a threat, the court reversed the sentence and wrote:

> A judge must not only be impartial, but he must leave the impression of his impartiality upon all who attend court. . . . We are not concerned with form, but substance. The appearance of and absolute impartiality is essential. There must be no taint of any lack of objectiveness in all acts of a judge.
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> While we cannot find from the written record that the court below failed this standard, we do believe that in the interests of justice and to promote the continued confidence of our people in their judiciary which, after all, is the greatest protector of constitutional rights, this cause is . . . reversed and remanded.

The trial judge's use of the word "nigger" in the instant case not only creates an air of prejudice and lack of objectivity, but demonstrates a racial animus towards black persons. As one court explained:

> Although the slang epithet "nigger" may have once been in common usage, along with such other racial characterizations as "wop," "chink," "jap," "bohunk," or "Shanty Irish," the former expression has become particularly **abusive and insulting** in light of recent developments in the civil rights movement as it pertains to the American Negro.

Alcorn v. Ambro Engineering, 468 P. 2d 216, 219 (Cal. 1970); Contreras v. Crown Zellerbach Corp., 565 P. 2d 1173 (Wash. 1977). Indeed, in Alcorn, as in many other cases, the court held that the use of the word "nigger" can result in the tort of intentional infliction of emotional distress. E.g., Agarwal v. Johnson, 603 P. 2d 58, 64 (Cal. 1979); Ledsinger v. Burmeister, 318 N.W. 2d 558, 562 (Mich. 1981); Ware v. Reed, 709 F. 2d 345, 352 & n. 12 (5th Cir. 1983); see generally Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-

Calling, 17 Harv. Civ. Rights & Liberties L. R. 133 (1982).

"[T]he use of the word 'nigger' automatically separates the person addressed from every non-black person; **this is discrimination per se.**" Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984). The Minnesota Supreme Court explained it thusly:

> We cannot regard the term "nigger" . . . as anything but discrimination . . . based upon . . . race. . . . When a racial epithet is used to refer to a [black] person . . ., an adverse distinction is implied between the person and other persons not of his race. **The use of the term "nigger" has no place in the civil treatment of a citizen.**

City of Minneapolis v. Richardson, 239 N.W. 2d 197, 203 (Minn. 1976) (emphasis supplied). Numerous other courts have harshly condemned racial slurs and particularly the use of the word "nigger". E.g., Harris v. Harvey, 605 F. 2d 330, 338 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980); Allen v. City of Mobile, 331 F. Supp. 1134, 1145 (S.D. Ala. 1971), aff'd, 466 F. 2d 122 (5th Cir. 1972); Stevens v. Tillman, 568 F. Supp. 289, 293 (N.D. Ill. 1983); Holt v. Hutto, 363 F. Supp. 194, 214 (E.D. Ark. 1973), modified, 505 F. 2d 194 (8th Cir. 1974).

In In Re Stevens, 645 P. 2d 99 (Cal. 1982), the California Supreme Court publicly censured a trial judge for using ethnic epithets, even though they were not used in open court and he conducted his courtroom free from actual bias. The California Supreme Court concluded that the judge's conduct was "prejudicial to the administration of justice [and] brings the judicial office into disrepute."

Judge Langston's subsequent disqualification cannot and did not cure the problem because the damage had already been done.

That damage was done not only by the actual use of the word "nigger," but by the judge's rulings on the many issues of the trial despite the fact that he evidently harbors racial prejudices. His use of the word "nigger" indicates a definite racially prejudicial attitide against black persons. As Professor Delgado explains: "[t]he racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted." A person using such epithets evidently believes that "distinctions of race are distinctions of merit, dignity, status, and personhood." Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. Civ. Rights & Liberties L. R. 133, 135-36 (1982). When a person uses the term "nigger," "we can be almost certain that the speaker intends not only to characterize the person's membership, but also to disparage and reject him." Albert, The Nature of Prejudice 77-78 (1954).

The judge's remarks not only give the definite appearance of injustice, the lack of partiality, and impropriety, but demonstrate attitudes which cannot be tolerated in those whom this Court has endowed with judicial discretion. For example, in the instant case, when defense counsel continually complained that the prosecutor was using his preemptory challenges to exclude blacks from the jury, the trial judge failed to even inquire into the prosecutor's actions. This issue is now before this Court,[5] but as this Court wrote:

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[5] See Issue II, infra.

> We emphasize that the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion.

State v. Neil, 457 So. 2d 481, 487 n.10 (Fla. 1984). The exercise of such discretion by one who calls blacks "niggers" cannot be allowed.

In another situation, the trial judge determined that the Williams Rule testimony could be admitted.[6] In his ruling, he stated "let it all hang out" and that he would not "be on the criminal bench if and when this thing gets reversed" (R-249, 1399). Indeed, this comment alone gives an appearance of a lack of impartiality and could require reversal. See State v. Steele, 348 So. 2d 398, 401 (Fla. 3rd DCA 1977); Driessen v. State, 431 So. 2d 692 (Fla. 3rd DCA 1983); Anderson v. State, 287 So. 2d 322, 324-25 (Fla. 1st DCA 1973). But this comment also shows a lack of attention to the dignity that attaches to judicial decisions which may ultimately determine life and death and is very possibly a result of the judge's evident belief that blacks are "niggers."

Besides this inappropriate comment and the judge's failure to even inquire on the Neil issue, there were literally dozens of other decisions made by the judge where his racial beliefs could have influenced the outcome, including Appellant's motions for directed verdict and new trial. Under these circumstances, both the appearance of injustice and the actual favoritism which is almost sure to have occurred require reversal.

Racism, in even its most subtle forms, harms not only the

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[6] See Issue IV, infra.

individual victim but society as a whole. Racism is a breach of the ideal of egalitarianism, that "all men are created equal" and each person is an equal moral agent, an ideal that is the cornerstone of the American moral and legal system. "The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance." Delgado, supra at 141.

This Court and the federal courts have continually rejected challenges to the death penalty based upon statistics which show disparate racial application. E.g., McCleskey v. Kemp, Case No. 84-8176 (11th Cir. January 29, 1985) (en banc); Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978). But, in those same cases, the courts have expressed a willingness to carefully examine claims of discrimination in individual circumstances. Thus, as Justices Hatchett, Johnson, and Clark wrote in McCleskey, supra (slip opinion at 15), quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979):

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. It is the duty of the courts to see to it that throughout the procedure for bringing a person to justice, he shall enjoy "the protection which the Constitution guarentees." In an imperfect society, one has to admit that it is impossible to guarentee that the administrators of justice, both judges and jurors, will successfully wear racial blinders in every case. However, the risk of prejudice must be minimized and where clearly present eradicated.

As the U.S. Supreme Court wrote in 1979 in Rose v. Mitchell, supra at 558-59:

> we also cannot deny that, 114 years after the close of the War between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today discrimination takes a form more subtle than before. But it is no less real or pernicious.

The Florida courtroom is no place for racial epithets. An affirmance of this case would disgrace our judicial system and our State. As the commentary to Canon 2 of the Code of Judicial Ethics provides, "public confidence in the judiciary is eroded by irresponsible and improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety." The appearance of impropriety and injustice created by the judge's remarks violate the equal protection and due process clauses of the Florida and U.S. Constitutions. The actual injustice caused by the exercise of judicial discretion by and the various rulings of, an individual who, in 1985, refers to black persons as "niggers" also violates these provisions and requires reversal of this cause. Lastly,

> [i]f discrimination is especially pernicious in the administration of justice, it is nowhere more sinister and abhorrent than when it plays a part in the decision to impose society's ultimate sanction, the penalty of death.

McCleskey, supra (opinion of Johnson, Hatchett, and Clark) at 16. Thus, the imposition of the death sentence under these circumstances, in addition to the other constitutional violations set out above, violates the constitutional prohibition against cruel and unusual punishment.

II. THE PROSECUTOR'S USE OF FOUR PEREMPTORY CHALLENGES TO EXCLUDE ALL BUT ONE BLACK FROM THE JURY, WITHOUT EXPLANATION, DENIED APPELLANT A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY AND A JURY COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION

Of the initial twelve jurors summoned to the box, two were immediately challenged by the State (R-260). Their race is not revealed in the record. Two additional jurors were summoned. The panel now consisted of two blacks and ten whites.

Following voir dire, over defense objection, the prosecutor used two (2) of his first three (3) peremptory challenges to excuse Ms. Elrod and Mr. Stevenson, both of the blacks, as well as one white (R-356-57). The defense also excused three jurors, and six new jurors were seated (R-358). These six contained two blacks, Mr. Anderson, and Ms. Wilson. The State excused Mr. Anderson. The record reflects the following:

THE COURT: You're going to make a speech?

MR. JACOBS: Sure do. Your Honor, I'd like to note that [the State] has again struck another black male from the panel and has struck out all four[7] that were on there. . . .

THE COURT: OK. Who are you going to strike?

(R-386).

The defense then struck three jurors. Each side had four

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[7] The record explicitly reflects only three blacks that had been struck by the State at this point. However, early on, the State struck two prospective jurors (R-260), and their race is not reflected in the record. One of these jurors was probably the fourth black to whom the defense referred.

challenges remaining (R-386). Four more jurors were summoned, none of whom were black. One was excused by the Court because of his opposition to the death penalty[8] (R-398,408-09), and each side excused one additional juror (R-409). Seven additional jurors were called (to enable alternates to be selected), of whom one was black. The defense excused two and the State excused two, including Ms. Hinson, the black (R-441). The defense again protested: "Your Honor, let the record reflect that Harriet Hinson is a black female and that once again, [the State] has removed from the jury a black person as part of his excuses" (R-441).

Thus, the State used nine peremptory challenges and excused either four or five blacks[9], although one black remained seated. On three occasions, the defense protested (R-356,386,441). The State offered no explanation for its "coincidental" exclusion of at least four of five blacks, nor did the court require any explanation.

The controlling case on this issue, State v. Neil, 457 So. 2d 481 (Fla. 1984), and the instant case are almost indistinguishable. There, this Court declared that where a defendant timely shows that peremptorily challenged prospective jurors are members of a distinct racial minority and that it is likely that they were challenged solely because of their race,

> the trial judge must determine if there is a strong likelihood that peremptory challenges

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[8] See Issue VI, infra.

[9] The record does not reflect the race of the first two persons challenged by the State. See note 7, supra.

> are being exercised solely on the basis of race . . [I]f the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely on the basis of the prospective juror's race.

Id. at 486-87 (footnote omitted).

Although this issue was timely raised below, the trial judge made no express ruling, evidently believing that the State was free to use its peremptories in any way it wished.[10] This is plainly not so. In Neil, this Court granted a new trial, writing:

> We cannot tell . . . whether or not the trial court would have found that Neil had shown a sufficient likelihood of discrimination in order for the court to inquire as to the state's motives. . . The bottom line . . . is that we simply cannot tell.

Id. at 487. Similarly, the instant record cannot certainly tell us whether an inquiry should have been made, although the prosecutor offered no explanation for his seeming use of his peremptory challenges to exclude blacks. Moreover, any inquiry would have been highly suspect in light of the trial court's racial comment indicating his prejudices.[11] Under these circumstances, Appellant's conviction violated his rights under article I, section 16, of the Florida Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. See McCray v. Abrams, Case No. 84-2026 (2nd Cir. Dec. 4, 1984). Accordingly, as in Neil, this cause must be reversed.

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10 The trial court referred to defense counsel's protestations about this issue as "making a speech" (R-386).

11 See Issue I, supra.

III. THE TRIAL JUDGE ERRED AND APPELLANT WAS DENIED A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BY THE FAILURE TO GRANT HIS MOTION TO DISMISS, HIS MOTION FOR DIRECTED VERDICT, AND HIS MOTION FOR NEW TRIAL, WHERE THE CIRCUMSTANTIAL EVIDENCE FAILED TO ESTABLISH HIS GUILT BEYOND A REASONABLE DOUBT AND WAS NOT INCONSISTENT WITH APPELLANT'S REASONABLE HYPOTHESIS OF INNOCENCE

In Peek v. State, 395 So. 2d 498 (Fla. 1980) (hereinafter Peek I), a 4-2 majority[12] of Supreme Court justices found the evidence sufficient to sustain Appellant's first conviction. However, even the majority admitted the highly circumstantial nature of the evidence:

> The case against appellant is concededly circumstantial. But we are satisfied that, when considered in combination, the evidence relating to the matching fingerprints, the hair comparison, and the blood and semen analysis, enabled the jury to reasonably conclude that appellant's guilt was established beyond a reasonable doubt.

Id. at 495. The dissenters disagreed:

> In my mind the evidence is insufficient to prove beyond a reasonable doubt that appellant was the perpetrator of this heinous crime. The hair, blood and semen analysis coupled with the fingerprints found in the victim's automobile are simply insufficient to support the conviction, in view of the statistical probability of like-type hair, blood and semen in the general population and the inability of the state to establish that the fingerprints were placed in the automobile at the time the crime was committed.

Id. at 500 (Sundberg and England, dissenting).

There are significant differences in the evidence presented below with that presented in Peek I, and this case was far more

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[12] The four member majority was joined by Associate Justice Vann.

circumstantial. Indeed, the facts presented below were so circumstantial that they cannot sustain the conviction. The trial court therefore erred by denying Appellant's motion to dismiss (R-212-215), Appellant's motion for directed verdict (R-913-916), and Appellant's motion for new trial (R-1238). Moreover, because the evidence clearly fails to establish guilt beyond a reasonable doubt, the instant conviction violates the due process clauses of the United States and Florida constitutions. Jackson v. Virginia, 443 U.S. 307 (1979).

When, as here, the State relies upon circumstantial evidence, "a special standard of review of the sufficiency of the evidence applies":

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

Jaramillo v. State, 417 So. 2d 257 (Fla. 1982), citing McArthur v. State, 351 So. 2d 972, 976 n.12 (Fla. 1977); McArthur v. Nourse, 369 So. 2d 578 (Fla. 1979).

With this standard in mind, we examine below each of the pieces of incriminating evidence, and highlight the differences with the evidence in the first trial.

A. The Fingerprint on the Vehicle

Both below and in the first trial, the fingerprint found on the victim's car was the only evidence linking him to the victim, although it does not establish that he was at the victim's home. The car was found the next day at a lakeside park about 1.0 miles from the Carlson home and 0.7 miles from Appellant's residence (R-1073). As Judge Dewell found in his order granting the new

trial, "the only properly admitted evidence identifying the defendant as the [perpetrator] was the fingerprint." Appendix "A" at 2.

The law is clear that where, as here, the State relies primarily upon fingerprint evidence found in a place to which the public has access, in order to sustain a conviction based upon that evidence, the State must prove that they "could only have been placed [there] at the time the [crime] was committed." Jaramillo, supra at 257; Mobley v. State, 363 So. 2d 170 (Fla. 5th DCA 1979); State v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976); Williams v. State, 308 So. 2d 595 (Fla 1st DCA 1975), cert. denied, 321 So. 2d 555 (Fla. 1976); Knight v. State, 294 So. 2d 387 (Fla. 4th DCA 1978), cert. denied, 303 So. 2d 29 (Fla. 1979); Wilkerson v. State, 232 So. 2d 217 (Fla. 2nd DCA 1970); Tirko v. State, 138 So. 2d 388 (Fla. 3rd DCA 1962).

In all of the above cases, convictions based upon fingerprint evidence were reversed where fingerprints were found **at the crime scene and often in inaccessable places**, but the State could not show how or when they were placed there. In the instant case, the fingerprint was found about one mile from the crime scene on property that happened to belong to the victim. **There is no other evidence positively, or even strongly circumstantially, linking Appellant to the victim, the crime or crime location.**

It is thus clear that even if this fingerprint evidence were found outside of the victim's home, it could not sustain the conviction. Because it was found one mile away on property which happened to belong to the victim, its significance does not come

close to sustaining the conviction. Thus, we turn to the other evidence.

B. The Blood Evidence

The blood evidence showed that somewhere between one third and one half of the male population could have committed the crime (R-853-862). In Polk County alone, over 100,000 people and 50,000 males fit this description. Such evidence has little, if any, weight. As Judge Dewell wrote: "The blood semen evidence had no positive probative value. If the comparison had been negative, it would have proven him not guilty, but the positive reports proved nothing but possibility. However, the scientific community in our society today has such a mystique that we feel, if it is scientific, it must be true. In this case, it is illusory. The blood semen and the hair evidence seem to be proving guilt, when actually they merely fail to prove him innocent." Appendix "A" at 2.

C. The Hair Evidence

The greatest differences in the facts presented below and those of the first trial pertained to the hair testimony. In the first trial, the perjured evidence showed that "although it is never possible to say that two hairs are identical, the hairs of approximately two out of every 10,000 persons exhibit consistent microscopic characteristics." The analyst further testified that the two hairs were consistent in all 30-35 characteristics examined and that it was the most affirmative response she could give. See Appendix "C". In affirming the conviction, this court

relied heavily on this testimony and it is compelling indeed,[13] albeit out-and-out lies.

The truth about the hair evidence is that a one quarter inch fragment of a strand of hair was found on a stocking in the victim's garage. It was not totally inconsistent with Appellant's hair and possibly with the hair of every other black person, and possibly many white persons, it could have been left at the victim's house at any time, may have been there for years, it had been lost by the police for years, it may have been involved in a mix-up, and it was handled primarily by a lab analyst who, shortly after the first trial, resigned after being evaluated as incompetent in evidence handling, and it is incapable of any meaningful analysis.

1. How the Hair Got On The Stocking Or In the Victim's Garage, And How Long It Was There

Assuming that the correct hair was identified and analyzed, it is not possible to say how the hair got on the stocking found in the victim's garage or how long it had been there (R-838). Even assuming that it came from a black person, a few possible explanations are that it came from one of the black gardeners who frequented the garage to get tools (R-505,515), it could have come from one of the black police officers at the scene (R-618,636,742), it could have come from a friend or acquaintance of

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13 As Judge Dewell explained:

> This testimony changed the whole posture of the hair evidence. Instead of "it could have been him", the testimony became there's only one or two chances out of 10,000 that it was not him". Those odds can also be stated as being 98.98 percent certain.

the victim[14], it could have come from any number of business or maintenance persons who may have been at the victim's home in the preceding months or years, it could have come from a public washing machine where the victim washed the stocking, or it could have come when the victim passed by any black person in the street or in the hospital where she worked and a hair fell from that person and embedded itself in the victim's hose. These are but a few of the possible explanations.

2. There Is A Serious Question Of Whether The Police Had The Correct Hair

There was such a strong possibility that the hair evidence had been mixed up, that it should not have been admitted. See Issue VII, supra. Even if it is admitted, this strong possibility for mix-up requires that any significance attached to this evidence be severely limited.

3. The Expert's Findings

In recognition of the fact that the analyst from the first trial would not qualify as an expert, the State utilized a new expert. He examined the hair and concluded that the hair fragment had characteristics similar to those found in negroid hair (R-828,847), but it could possibly have come from a white person (R-845). The sex of the hair donor could not be determined (R-842). As he explained:

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14 The underlying assumption throughout the trial was that, based upon the hair evidence, the assailant must have been black. This assumption precludes the possibility that the victim had black friends or acquaintances who may have frequented the house. The assumption that she did not have such acquaintances, without any evidence to support it, should not be condoned by this Court.

> [I]n this particular case, some hairs and some examinations are too limited due to their size, in order that a comparison cannot be made. There's not enough hair present to be able to make a determination, whether it did or did not originate from a particular individual. Since this was the case in this particular hair examination, no comparisons -- or no further comparisons -- were performed.

(R-832). He did notice that the "general color" of the hair from the hose was "somewhat consistent" with Appellant's hair color, as was "some pigment distribution", and when he measured the cuticular margin, there were "some consistencies" (R-833-34). The fragment on the hose had frayed (split) ends (R-834). At first, he testified that Appellant's hair did not have any split ends, and then said he noticed some (R-835). Anyone who brushed their hair, wore a cap, or did not take care of their hair would likely have some split ends (R-843, 845). There were no significant dissimilarities, but, of course, the great majority of characteristics usually examined were not examined (R-832,835).[15]

In sum, as Judge Dewell found, in the light most favorable to the State, this evidence shows that Appellant could have left that fragment of hair at the home. It does not show or even suggest that he did. It is a far cry from the perjured evidence used by the State in the first trial.

D. Appellant's Prior Statement

Another significant difference in the evidence introduced in Peek I and the instant case were the prior statement of Appel-

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[15] This finding differed from the original analyst's worksheet which found that three characteristics were consistent, two were partially consistent, in two, there were no significant differences, one was questionable ("close enough for government work"), and eleven were incapable of examination. See Appendix "C".

lant.

In Peek I, after Appellant explained that he touched the car while attempting to burglarize it, Officer Donnelly testified that Appellant had previously told him that he had not been to the area where the car was found. Below, he still maintained that Appellant made such a statement to him (R-1102).

First, Appellant probably did make such a statement to him. Appellant readily admits that when asked, he told the police that he had not been to the lake because he was on probation and did not want to be implicated in an auto burglary (R-943). While Donnelly's statement may have been admissable as impeachment, it does not constitute substantive evidence against Appellant. Smith v. State, 379 So. 2d 996, 997 (Fla. 5th DCA 1980).

Moreover, during the time of this investigation, when Donnelly got off of work, he was usually "intoxicated to the point of being drunk" (R-1095). Also, his memory is so poor that he barely has a memory. He says he spoke with Appellant two or three times, and that he thinks on one occasion, Officer Latner was there, and on another occasion, Officer Henry was there (R-1109). However, he cannot recall on which occasions the other officers were there. At his earlier deposition, he stated that Latner was present at the first interview and Henry at the second (R-1108, 1111). He also stated on another occasion that he only spoke with Appellant once.

The State called Officer Henry as a witness. On direct, he testified that he and Officer Latner interviewed Appellant and that Appellant stated knew where that park was, he **had** been there, and he had nothing to do with the murder (R-614-15).

Officer Latner and Latner's report state that Appellant said he had not been there (R-657). The State used this report to impeach their own witness and cause Henry to change his testimony to say that Appellant said he had not been there (R-657). However, Henry was then reminded of his previous deposition testimony where he said Appellant said he had been there **and he said he was told this by Officer Donnelly** (R-640-41).

At best, the entire incident is completely confused and is extremely unreliable. In fact, Appellant probably did lie to the police and said he had not been to the lake because he was on probation and knew he had attempted to burglarize a car (R-943).

It is crucial to understand that this in no way proves that Appellant was in any way connected with the murder. Appellant admitted he lied to the police to avoid implication in the auto burglary. To the extent that this may have been contradicted by the police testimony, that may be used to impeach him, but not as substantive evidence against him. Smith v. State, 379 So. 2d 996, 997 (Fla. 5th DCA 1980).

E. The Other Suspects

Within eight weeks of the Carlson murder, another elderly white woman named Raiden was murdered in much the same manner as Carlson and a man named Shelton was convicted of that murder. That murder occurred at night, and the victim was beaten in a manner similar to Carlson (R-672,1035-36,1082-88). In both cases, the telephone wires were cut outside the home. In both cases, the entry was gained by cutting a screen, and Shelton was known to be involved in auto thefts. Id. Indeed, he stole car

keys from the victim's home and stole the car (R-1079). Carlson was strangled with a bathrobe; in the Raiden case, Shelton carried a bathrobe into the house. Id. Like Appellant, Shelton had type "O" blood and is black (R-1086).

Shelton was known to use a stick to cut screen and gain entry in his burglaries (R-1040). Such a stick was seen by the victim's sister upon her arrival at the Carlson home (R-504), but the police failed to collect it as possible evidence. Shelton was charged on another occasion with sexually molesting a woman (R-1090).

Despite the obvious similarities between the Carlson case and Shelton's previous crimes, he was dropped as a suspect when Appellant's fingerprint was found on the Carlson car (R-1088). Due to understaffing at the Florida Department of Law Enforcement lab, Shelton's prints were never cross-referenced to the Carlson case (R-1044-45). Another suspect, named Keaton, was not investigated because he was a friend of one of the officers who was able to vouch for him (R-630-31).

Dale Newt, forensic scientist and former supervisor for FDLE, testified that the crime scene investigation did not meet the standards prevailing at the time. Too many people wandered through the home, there was insufficient documentation, evidence was not collected properly, and much evidence was not collected at all (R-1023-29). There were "major errors" in the procedure used. Id.

F. The Alibi Defense

At the time of the crime, Appellant was living in the Lake Region Hotel, a halfway house for first offenders (R-960). He

testified that he was on "restriction" during the weekend of the Carlson murder because he was behind on his rent (R-928-31,963,985). Under this rule, he was not permitted to leave the house. The sign-in sheets reflect that he signed in at 6 P.M. that Friday and signed out again at 6:37 A.M. that Monday morning (R-932). He was given permission to leave on Sunday morning by the counselor, despite his status, so he could get breakfast. He rode a bicycle to a local restuarant and then took his food to the lakeside park to eat. It was there that he attempted to burglarize the Carlson car (R-934).

Appellant's testimony was fully corroborated by two counselor's who worked at the state agency, Ted Smith and Ken Boyce (R-959-995). Smith worked the 4:00 P.M. to midnight shift on Saturday. His records reflect that all persons were present or accounted for at his 11:00 P.M. bedcheck, including Appellant (R-968). Because Appellant was on restriction, he had to have been in bed. Id. Smith admits that, at one time, there was a problem with residents sneaking out, but this had been cured by this time (R-971).

Boyce took over from smith at midnight (R-987). His records reflect that he made rounds at midnight, 2,3,5,6,7 and 8:00 A.M. (R-988). During each check, all persons who were supposed to be there were and no windows or doors had been opened. Id. Indeed, the windows were booby-trapped so that, if they were opened, a counselor was sure to know (R-995). Boyce further testified that he allowed Appellant to leave to obtain breakfast the following morning because there was no one present to get it for him (R-

989).

Once more, Officer Donnelly, whose memory was extremely poor and was drunk much of the time, was called upon to cover up the shoddy police work. He testified that the two state employees must have committed perjury because he remembered seeing the records on an earlier occasion and the 11 P.M. and midnight notations were not there (R-1099).

G. Conclusion

There is no doubt that the evidence, individually or taken as a whole, is not inconsistent with any reasonable hypothesis of innocence. Besides Appellant's fingerprint found a mile from the scene, the other evidence is nothing but innuendo. It is far less than was presented to this Court 5 years ago, when this Court narrowly affirmed over two dissents. Appellant's explanation that he was in the half way house on the night of the murder, which is corroborated by two independent state employees with no possible motive for committing perjury, and his explanation of how and why he placed the fingerprint on the car are perfectly possible and reasonable, as is his explanation of why he would have lied to the police about having been to the park.

Perhaps the closest case factually is Knight v. State, 294 So. 2d 387 (Fla. 4th DCA 1978), where the defendant's fingerprint had been found on the door of a business that had been burglarized and a policeman testified that a car to which defendant sometimes had access was seen at the station the night of the burglary. Reversing the conviction, the court wrote:

> At best, and even after pyramiding allowable inferences, this evidence raises only a mere possibility of guilt, or only a wonderment

> that the accused was implicated. This is insufficient to uphold a conviction.

294 So. 2d at 388.

As the dissent of Justices Sundberg and England in Peek I explained, we are not unmindful of the atrocities committed upon the victim. Nevertheless, Section 921.141(4), Florida Statutes, and Fla. R. App. P. 9.140(f), require that this Court conduct an independent review of the evidence and reverse where justice so demands. In this case, justice demands.

IV. THE TRIAL JUDGE'S ADMISSION OF EVIDENCE OF ANOTHER CRIME WHICH HAD NO SIMILARITY WITH THE CRIME CHARGED AND WHICH SEVERELY PREJUDICED THE JURY AGAINST APPELLANT, ADMITTED BASED UPON THE TRIAL JUDGE'S FEELING THAT "IT SHOULD ALL HANG OUT" AND THAT HE WOULD NOT BE ON THE CRIMINAL BENCH IN THE EVENT OF REMAND, VIOLATED FLORIDA'S EVIDENCE CODE AND DENIED APPELLANT A FAIR TRIAL AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Linda Jamison, who Appellant admittedly raped in July, 1977, testified at length about the details of the rape perpetrated upon her (R-696-710). She cried during her testimony (R-702). This testimony was introduced over repeated objections by Appellant and Appellant's motion in liminae (R-132,240).

Once again, trial court error resulted in a substantial injustice. The State was well aware that without the Williams Rule testimony, there was little chance of a conviction. As the prosecutor explained:

> [T]his testimony is very important to the State's case and if the Court should rule that it is not admissable, it is my present intention to request the case not be tried, so I can appeal that ruling. . . .

(R-235). The Court noted that this testimony had not been presented at the initial trial and the prosecutor told him it was not available at that time (R-235). In fact, not only was it available during the first trial, but it was presented as part of the State's case in the penalty phase to show that Appellant was a bad person. However, for this trial, the State claims it is not used for that purpose, but to show identity. Despite the fact that the Jamison rape had little in common with the Carlson murder, the judge ruled:

> Well, I'm going to, as they say in the vernacular, let it all hang out and allow the Williams Rule testimony.

(R-249). The judge's off-the-record remark, later made part of the record, indicates that, in conjunction with this ruling, he stated that he would not "be on the criminal court anyway if and when this thing is reversed" (R-1399).

A look at the applicable case law demonstrates that the facts of this case come nowhere near to the criteria needed for the admission of Williams Rule testimony. The admission of this evidence not only violated clear principles of Florida law, but caused such fundamental error as to amount to the denial of a fair trial as is guaranteed by the constitution.

The only similarities between the two crimes were that both victims were white females, both were raped, and both lived in Winter Haven. The following is a partial list of the dissimilarities:

Carlson	Jamison
Entry gained by cutting of screen door (R-537)	No forced entry (R-701)
Offense occurred in late night or early morning hours (R-491,527)	Offense occurred in broad daylight (10 A.M.) (R-698)
Perpetrator possibly attempted to conceal identity with hose over head and face	No attempt made to conceal identity
Fingerprints concealed by perpetrater	No attempt to conceal fingerprints
Victim strangled and tied up -- unique killing with nightgown tied around neck and tied to bedpost (R-719)	Victim not strangled or tied
Victim had been severely beaten	Victim was not beaten

Telephone wire cut outside of victim's home cut (R-549)	Wires ouside victim's home not tampered with, although, during attack, phone rang and Appellant tore it out of wall (R-904,703)
Other than victim's purse, no evidence that home was disturbed	Appellant ransacked victim's home in search of valuables (R-704)
Victim's car and car keys stolen	Neither car nor keys stolen
Victim is young, attractive woman of 29 years of age (R-238)	Victim is elderly woman (65 years old (R-238)
Crime occurred five miles from Carlson murder (R-248)	Crime occurred 5 miles from Jamison home (R-248)
Victim lived with her family	Victim lived alone

The State's argument in favor of similarity bordered on the absurd and is insulting to the intelligence. For example, the State argued heavily that in both instances, entry was gained through a screen door (R-244-45). In fact, in the Jamison case, the door was unlocked and Appellant simply walked in; in the Carlson case, the murderer cut the screen door. The State pretends that the fact that both happened to have screen doors on their houses somehow shows the identity of the killer. This is more than absurd: it is wholly ridiculous and preposterous.

The State also argues there was, in each instance, "a lone female inside" (R-245). Again, this is not a similarity between the offenses which establishes an identity, any more than the fact that both victims had two arms and two legs.

The State also makes much about the "similarity" in that the phone lines were disconnected. Id. In the Carlson case, the phone lines were deliberately cut outside the house prior to entry; in the Jamison case, there is no evidence of such tampering, but the phone rang during the rape and Appellant angrily

pulled it from the wall. This is not a similarity, but a dissimilarity. It does not show an identity, but shows, if anything, a probability that the offenders were different individuals, one of whom cut phone lines before entering and the other who did not.

The "similar evidence" which takes the cake is the supposedly similar facts that in both cases, Appellant's fingerprint was found on the victims' cars. In the Carlson case, the State's theory was that Appellant stole the car and in the process left his fingerprint on the inside window. In the Jamison case, Appellant fled the house after the attack on foot. In the process, Jamison's car blocked his path. He hurdled the car, leaving his palmprint on the hood of the car (R-904). If this shows identity of assailants, the Evidence Code and rules of logic might as well be abandoned in favor of a ouija board.

This evidence was used for two purposes and two purposes only: first, to show that Appellant was a bad person and a criminal, and second, to show that he had raped a white woman, an offense which, when committed by a black man, is so enraging that for many years, lynching was the remedy. While our laws do not allow lynching for this offense today, the prosecutor twisted the Williams Rule to arrange for Appellant's death in a case where he had insufficient evidence to convict.

Our law requires that in order to introduce evidence of another crime to prove identity, there must be something "so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to establish . . . that he committed

the crime." Sias v. State, 416 So. 2d 1214, 1215 (Fla. 3rd DCA 1982); Beasley v. State, 305 So. 2d 285 (Fla. 3rd DCA 1974); Duncan v. State, 291 So. 2d 241 (Fla. 2nd DCA 1974); Marion v. State, 287 So. 2d 419 (Fla. 4th DCA 1974); Davis v. State, 376 So. 2d 1198 (Fla. 2nd DCA 1979). The features of the offenses must be so unique that they represent a "fingerprint" of the perpetrator. Green v. State, 427 So. 2d 1036 (Fla. 3rd DCA 1983).

Perhaps the factually closest case to the instant one is that of Davis v. State, 376 So. 2d 1198 (Fla. 2nd DCA 1979). There, although both crimes involved a burglary and rape, in both cases a window was used to gain entry of young women living alone, the crimes were committed within three weeks of each other and took place about the same time of night, and money was taken, the Court reversed the conviction because the manner of the rapes were different and the attitude of the assailants differed. Moreover, the court noted, in only one instance did the assailant ransack the house.

In Helton v. State, 365 So. 2d 1101 (Fla. 1st DCA 1979), a showing that in both crimes a female victim was abducted, taken to an isolated wooded area where sexual acts were compelled, and where the victims ultimately escaped and hailed passing cars, was held insufficient to admit evidence that the defendant committed the crime.

In Banks v. State, 298 So. 2d 543 (Fla. 1st DCA 1974), evidence that both crimes involved homosexual attacks on young boys was inadmissable to prove identity.

In Flowers v. State, 386 So. 2d 854 (Fla. 1st DCA 1980),

where both victims lived in second floor apartments and both had balconies next to the living rooms from where the perpetrator entered through a sliding glass door, but the attacks occurred six weeks and four miles apart, and in one, money was taken and profanity used, but not in the other, the court held that the prior crime evidence was inadmissable.

In White v. State, 407 So. 2d 247 (Fla. 2nd DCA 1981), the Court reversed based upon the admission of collateral crime evidence. There, in both crimes, (1) the assailant admonished his victim not to scream, (2) the eyes of both victims were taped and then wrapped with material torn from a sheet, (3) both victims were tied up, (4) both victims were raped, (5) the assailant disguised his voice, (5) the assailant talked about himself. However, the Court held that the admission of evidence of this other crime was error where one victim was 76 years old and one was 15 years old and the details of the offense were different.

Applying the above principles to the instant case, it is clear that the facts of the neither the Jamison rape nor the Carlson murder are particularly unique or unusual. The similarities are at best vague and the dissimilarities are overwhelming. The age differences alone between the victims suggest that the crimes were wholly dissimilar and were committed by different types of individuals. See Issue V infra.

The error of admitting evidence of similar crimes under these circumstances is demonstrated by the facts surrounding Mr. Shelton. Within eight weeks of the Carlson murder, another

elderly white woman named Raiden was murdered in much the same manner as Carlson and a man named Shelton was convicted of that murder. That murder occurred at night, and the victim was beaten in a manner similar to Carlson (R-672,1035-36,1082-88). In both cases, the telephone wires were cut outside the home. In both cases, the entry was gained by cutting a screen, and Shelton was known to be involved in auto thefts. Id. Indeed, he stole car keys from the victim's home and stole the car (R-1079). Carlson was strangled with a bathrobe; in the Raiden case, Shelton carried a bathrobe into the house. Id. Like Appellant, Shelton had type "O" blood (R-1086). Shelton was known to use a stick to cut screen and gain entry in his burglaries (R-1040). Such a stick was seen by the victim's sister upon her arrival at the Carlson home (R-504), but the police failed to collect it as possible evidence. Shelton was charged on another occasion with sexually molesting a woman (R-1090). Despite the obvious similarities between the Carlson case and Shelton's previous crimes, he was dropped as a suspect when Appellant's fingerprint was found on the Carlson car (R-1088). Due to understaffing at the Florida Department of Law Enforcement lab, Shelton's prints were never cross-referenced to the Carlson case (R-1044-45).

It is easily seen how badly the above implicates Shelton in the Carlson murder. Indeed, he is a far more likely suspect than Appellant. This shows how many persons can be made to appear guilty by this type of evidence and demonstrates the need for extreme caution in its use, especially where the death penalty is involved.

In the instant case, the Jamison rape did not show identity

and its admission by a judge who thought it should "all hang out" because he would not be on the bench anyway if there was a reversal is clearly error and violates the Evidence Code, the constitution, and Appellant's right to a fair trial.

Lastly, even if this Court were to find that the two crimes showed identity, the admission of this evidence became a feature of the trial and should thus not have been admitted. Sias v. State, 416 So. 2d 1213, 1216 (Fla. 3rd DCA 1982); Knox v. State, 361 So. 2d 799 (Fla. 1st DCA 1978); Davis v. State, 276 So. 2d 846 (Fla. 2nd DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974); Reyes v. State, 253 So. 2d 903 (Fla. 1st DCA 1971); Green v. State, 228 So. 2d 397 (Fla. 2nd DCA 1969); Williams v. State, 117 So. 2d 473 (Fla. 1960). An interracial rape is bound to cause strong feelings on the jury. Jamison's testimony about oral sex, the clothes she was wearing, and the ransacking of her home, could not have shown identity, but were introduced deliberately to inflame the jury. When the introduction of such a collateral matter, despite a complete lack of similarity with the crime charged, is so important to the State that the prosecutor states he would not proceed to trial if it is not admitted (R-235), that other crime has become a feature of the trial and its admission denied Appellant a fair trial.

V. THE TRIAL JUDGE'S EXCLUSION OF EVIDENCE THAT THE SUPPOSEDLY SIMILAR CRIME WAS TOTALLY DISSIMILAR WITH THE CRIME CHARGED WAS ERROR AND DENIED APPELLANT A FAIR TRIAL, THE RIGHT TO PRESENT EVIDENCE IN HIS OWN DEFENSE AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The Williams rule testimony was supposedly admitted to show identity, that is, the Jamison and Carlson crimes were so similar that they must have been committed by the same person. Despite the ridiculousness of this proposition, Appellant sought to combat this implication through the testimony of Dr. Norman to show that the two crimes are dissimilar and unlikely to be committed by the same type of individual. However, this evidence was excluded by the court (R-1070).

Dr. Norman is a clinical psychologisst with expertise in forensic psychology (R-1051). He examined Appellant and the circumstances of the two crimes in detail and concluded that "the crime does not seem to have been committed by the same individual" (R-1059). He called the probability that Appellant did not commit the murder, based upon the circumstances of the rape, "overwhelming . . . from research and clinical experience" (R-1058). "The probabilities are almost non-existent." Id.

The exclusion of this relevant evidence was error and violated Appellant's right to present evidence in his own behalf and to a fair trial.

It is crucial to understand that Appellant did not offer this evidence as character evidence to show that he did not murder Carlson; rather, the evidence was offered to rebut the Williams Rule testimony that, because of similarities between the

rape and murder, and because Appellant committed the rape, he must have committed the murder (R-1069).

Because of the Williams Rule testimony, the similarities and the lack thereof between the two crimes became an important issue in the trial and Appellant was entitled to introduce any competent relevant evidence that showed a lack of similarity in the identity of the person who committed the two offenses. As an expert in forensic psychology, Dr. Norman was entitled to give an opinion, if he was able to form one, on whether the two crimes were likely to have been committed by the same person. Such evidence does not go to the character of Appellant, but shows that the psychological profile of the persons that committed the two offenses are not the same. This is an area where the expertise of the witness can assist the jury by providing insight which a lay person would not normally have.

The State argued below that psychological evidence of a defendant's character is not admissible. Appellant does not here quarrel with that principle, but asserts that Dr. Norman's testimony was not offered to show Appellant's character, but whether the two crimes were likely to have been committed by the same person, given the nature of the crimes. It is well settled that when evidence is admissible on one issue but inadmissable on another, it may nevertheless be admitted. Parkin v. State, 238 So. 2d 817 (Fla. 1970).

A similar situation arose in Sharp v. State, 221 So. 2d 217 (Fla. 1969). There, the State used the Williams Rule to show that in a number of transactions, the defendant had taken property without paying for it. The defendant proffered

testimony that, in other instances, he had taken property and paid for it. The Court wrote:

> We emphasize: the State introduced similar factual evidence pertaining to other purchases made and charged to the City . . .; the defendant's proffer was restricted to the same subject matter and the same period of time. Fair play and common sense dictates that what is sauce for the goose is sauce for the gander. The State opened the door and then attempted to lock same to defendant. Under these circumstances, we hold it is prejudicial error to deprive the jury of the evidence proffered by the defense.

Id. at 218-19.

The State was permitted to present expert evidence from a hair comparison expert to say that Appellant's hair was not inconsistent with the hair found in the victim's garage, albeit that this was error and had no probative value. See Issue VII, infra. Certainly, Appellant was entitled to rebut this with testimony that the hairs were not similar. And, in the same manner, where the State introduces "similar crime" testimony, Appellant is entitled to counter it through expert testimony that compares those crimes and finds they are inconsistent.

Appellant's right to present this evidence is guarded not only by the Evidence Code, but by the Sixth and Fourteenth Amendments to the United States Constitution, which guarantee the right to call witnesses in one's own behalf and the right to due process and a fair trial. Washington v. Texas, 388 U.S. 14 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284 (1973). Moreover, even an otherwise legitimate State evidentiary rule may not be used to defeat a criminal

defendant's constitutional right to present evidence in his own behalf, so long as the evidence is relevant. Id.

It is clear that, under these circumstances, Appellant was entitled to introduce this testimony. The trial judge's exclusion of the testimony is reversible error.

VI. THE TRIAL COURT'S EXCLUSION FOR CAUSE OF JUROR LOVE BASED UPON HIS OPPOSITION TO THE DEATH PENALTY AND THE REFUSAL TO POSTPONE "DEATH QUALIFICATION" UNTIL THE PENALTY PHASE VIOLATED FLORIDA STATUTE 913.13, AND DENIED APPELLANT A FAIR TRIAL, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY AND A JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION

During voir dire, the record reflects the following dialogue concerning Juror William Love:

Prosecutor: Mr. McGill, the possibility of the death penalty in this case, would that cause you a problem with serving on the jury? . . . Mr. Love?

Mr. Love: Yes, it would.

Prosecutor: In what regard?

Mr. Love: Well, it's my personal conviction, I do not believe in the death penalty.

Prosecutor: OK.

Mr. Love: And I'm certain I could not recommend death.

* * *

Prosecutor: I am going to challenge Mr. Love for cause on his questions and answers concerning the death penalty. . . .

THE COURT: The Court excuses him.

(R-398, 408-09).

Appellant readily concedes that Mr. Love cannot recommend the death penalty. However, he was never asked whether his scruples prevented him from finding guilt if the evidence suggested it. Juror Love should have been permitted to sit on the guilt-innocence jury and replaced on the penalty phase, if Appellant was convicted. Appellant contends that the exclusion of

persons such as juror Love from his guilt-innocence jury violates Section 913.13, Florida Statutes (1983), and the Sixth Amendment's impartiality and "fair cross-section" requirements. and violated Appellant's right to a fair trial.

It is precisely for this reason that Appellant filed a motion to postpone "death qualification" until the penalty phase. However, that motion was denied (R-250).

Appellant recognizes that this Court has heard and rejected related arguments before. In Riley v. State, 366 So. 2d 19 (1978), this Court rejected the argument that the exclusion of such persons violates the representativeness requirement because it found "no compulsion in law or logic to so structure capital case trials." This holding was reaffirmed in Gafford v. State, 387 So. 2d 333 (Fla. 1980) and Maggard v. State, 399 So. 2d 973 (Fla. 1981). Acknowledging these cases, the First District, in Nettles v. State, 409 So. 2d 85 (Fla. 1st DCA 1982), followed them, but noted that they dealt with the representativeness of the jury and not its impartiality. Id. at 87. The First District noted that it was still an open question "whether a jury which is death-qualified is more prone to convict." Id. The court noted that the United States Supreme Court declined to resolve this question in Witherspoon v. Illinois, 391 U.S. 510 (1968) because the data was "too tentative and fragmentary." Id. at 517. The First District further noted that no one has yet successfully proved the contention that a death-qualified jury is a conviction-prone jury, and further found that the defendant there did not prove this point either.

First, the exclusion of juror Love for cause because of his scruples against the death penalty without regard to whether he was able to find guilt violates Section 913.13. As this Court explained:

> The statute does not disqualify a person 'to serve as a juror on the trial of any capital case' merely because he may have 'conscientious scruples against the infliction of capital punishment for murder.' To be disqualified under the statute to serve as a juror in the trial of a capital case, the 'opinions' of the person **must be 'such as to preclude him from finding any defendant guilty of an offense punishable by death.'**

Williams v. State, 228 So. 2d 377, 380 (Fla. 1969), vacated, 408 U.S. 941 (1972) (emphasis supplied). Juror Love had scruples against the death penalty but was never asked whether he could find appellant guilty if the evidence so indicated. Under these circumstances, there was no reason to exclude him for cause from the guilt phase of the trial. As Professor Winick recently wrote:

> [T]he typical practice in Florida of excusing for cause jurors whose beliefs about capital punishment render them unable to recommend death, but which do not interfere with their ability to make a fair assessment of guilt, may not be authorized by state law, and even if authorized is unconstitutional.

Winick, Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. R. 825 (1983).

Moreover, in recent months, the jurisprudence in this area has changed and Professor Winick's view that the scheme is unconstitutional has been accepted by at least one federal appellate court. In Grigsby v. Mabry, Case No. 83-2113 (8th Cir. January

30, 1985) (en banc) (attached hereto as appendix "F"), the Court considered the data now available on the subject and, in a lengthy and complex opinion, concluded that a jury which is death-qualified is more prone to convict, and trial by such a jury violates both the cross-section and impartiality requirements of the Sixth Amendment. Grigsby's analysis is exhaustive and adequately discusses the extensive scientific data. Still further studies reached the same conclusion and are cited in Winick, supra at nn. 99-100. It is unnecessary to repeat all of the findings herein. However, after a thorough analysis of all of them, the Grigsby court concluded:

> All of the studies introduced were consistent in their conclusions that death penalty attitudes are related to criminal justice attitudes and conviction proneness. [The State] produced no contrary studies. The consistency over a wide range of survey methods and respondents is impressive. The State's attack is not well-founded.

Grigsby at 21 (emphasis supplied).

Under the facts of this case and the plain application of Florida law, it was error to exclude juror Love for cause. Section 913.13, Fla. Stat. Moreover, it is repectfully suggested that, now that the empirical data has established that the exclusion of death-qualified jurors violates the Sixth Amendment, this Court should recede from Riley and its progeny, which were written prior to the newest scientific data, and adopt the view that has now been firmly established by the empirical data, as set out in Grigsby, and find that the death-qualified jury in this case violated both the cross-section and impartiality requirements of the Sixth Amendment and denied Appellant a fair trial.

VII. THE TRIAL JUDGE'S ADMISSION OF HAIR EVIDENCE WHICH WAS WHOLLY UNRELIABLE AND HAD NO PROBATIVE VALUE EXCEPT TO INCITE RACIAL PREJUDICE AGAINST APPELLANT WAS ERROR AND DENIED APPELLANT A FAIR TRIAL AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Among the items of evidence collected at the victim's home were parts of hose found in the garage. Officer McDonald said he took hose from the clothes line and floor and gave them to Officer Donnelly (R-539). Donnelly testified that he was told that the hose were all on the floor and were brought to him by Officers Donnelly and Henry (R-737). On the following day, May 23, 1977, the hose were delivered to the Sanford Crime lab by Officer Donnelly (R-721, 723).

There was no testimony concerning the hose location from May 23, 1977, until shortly before June 20, 1977, when Diana Bass, a microanalyst at the Sanford Crime Lab, testified that she examined the hose and discovered a tiny fragment of a strand of hair on a piece of hose (R-769).

After the fragment was discovered and identified in the lab report dated June 20, 1977, it again arrived in the lab on July 12, 1977, together with a known sample from Appellant, and was received by technician Linda Kerner. Bass did not know nor did any witness testify where the fragment was in the interim (R-779).

According to the testimony from the first trial, this evidence was again received by the lab on December 7, 1977, by technician Susan Coquine, although there is now no documentation to support this (R-781-82); see also appendix "D". Neither Bass

nor anyone else could say where these samples were between July 12 and December 7, or between December 7 and December 20, the date the two samples were compared by Bass (R-784-85).

Following December 20, 1977, and through the time of the first trial, the actual hair evidence had been lost. 395 So. 2d at 495. The hair remained lost until 1983, when following the 3.850 hearing and the judge's order granting a new trial, the evidence was miraculously "found." Officer Hutzell claimed she retrieved the samples from the lab in 1981 and had held them until this trial (R-796).

Not only does the constant shipping, loss, and unaccountability of the evidence for long periods of time make it unreliable, but other evidence also strongly suggests unreliability.

At the lab, the hair evidence was handled twice by Bass. Shortly after the first trial, Bass resigned following an employee evaluation finding her incompetent in many areas, but most notably in the area of evidence handling. The evaluation was excluded from evidence,[16] but rated her as unsatisfactory in "Evidence Handling" and conditional in, among other areas, "Job Skill Level," "Quality of Work," and "Volume of Acceptable Work." Specific comments in the evaluation included:

> Evidence Handling Procedures
>
> Evidence handling is one of Ms. Bass' most problematical areas. She does not appear to have the proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many

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[16] See Issue VIII infra.

occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory tabletop overnight. This failure to protect the items by repackaging them when not actually involved in an analysis leaves **a very strong probability of extraneous contamination, cross-contamination among items, and possible loss of trace evidence.**

Job Skill Level

Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been acquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting, should be indicative of a lack of adequate background training in this area. Her general scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is considered to be a serious fault.

Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, AA and other instrumental methods. The inability to choose appropriate methods of instrumental analysis and the lack of knowledge needed to competently perform these analyses should be considered an extremely serious deficiency.

Bass readily admitted that, at the time of the reception of this evidence, poor lab procedures resulted in a **high probability of a mix-up in the evidence.** She stated that this strong possibility occurred in the instant case (R-791-2). She also stated that she was required to complete quotas of cases which, in her view, could have led to errors. She said that she was required

by her supervisors to work on several cases at the same time, including hair cases, which, in her opinion, also increased the likelihood of mix-up. In fact, one of her supervisors, who had no experience in hair analysis herself, came into the lab with arms outstretched and handed Bass "a bunch of hair cases at one time." See Appendix "B".

At the time, the lab had inadequate space to store evidence, and evidence, including hair, was placed outside or left on a tabletop overnight. Evidence was routinely left all over the lab in various places. See Appendix "B".

Despite the chain of custody and other admitted problems concerning the reliability of the hair evidence, it was admitted (R-819).

Over objection, the State's hair expert testified that the hair fragment had characteristics similar to those found in negroid hair (R-828,847), but it could possibly have come from a white person (R-845). The sex of the hair donor could not be determined (R-842). As he explained:

> [I]n this particular case, some hairs and some examinations are too limited due to their size, in order that a comparison cannot be made. There's not enough hair present to be able to make a determination, whether it did or did not originate from a particular individual. Since this was the case in this particular hair examination, no comparisons -- or no further comparisons -- were performed.

(R-832).

The factors to be considered in making the admissibility determination include the nature of the article, the circumstances surrounding its preservation and custody, and the

likelihood of tampering. U.S. v. Garcia, 718 F. 2d 1258 (11th Cir. 1983), cert. granted, 104 S. Ct. 1706 (1984). Normally, the trial judge's decision is given great discretion. However, in this case, given the trial judge's use of the word "nigger" and demonstrated cavalier attitude towards evidence by suggesting that "it all hang out" and that he would "not be on the criminal bench anyway if this thing is reversed", it is suggested that this Court must make a de novo review of the admissibility. Such a review, in light of the applicable factors and the record, require the conclusion that the admissibility of this evidence constituted reversible error.

In Peek I, Bass testified that when she examined the hair, the bags did not appear to have been "opened, tampered with, or in any way, adulterated." 395 So. 2d at 495. Thus, this Court held that the trial judge "did not abuse his discretion in permitting the introduction of the hair comparison analysis." Id. In the instant case, the bagshad been opened at least twice by Bass, had been "lost" for six (6) years and nobody could say where they were for several lengthy periods of time. Moreover, Bass herself readily admitted that, under the prevailing conditions in the laboratory, **the probability of mix-up was high.**

It must be remembered that we are dealing with a one quarter inch fragment of a piece of hair. This object is highly mobile and the slightest breath, wind, or movement can cause its displacement. There are millions of hair fragments on floors and in many other places. It would be difficult to think of an article where the chain of custody and care in its preservation could be more crucial. Given this fact, together with the strong

possibility of tampering, the evidence should clearly have been excluded.

Moreover, even if the hairs themselves were admissible, the analyst's testimony was not admissible because it was legally irrelevant. Where evidence tends to mislead or confuse, rather than enlighten, and the confusion and prejudice outweighs its usefulness, it should be excluded. Section 90.401, Fla. Stat. (1983); 23 Fla. Jur. 2d, Evidence, Section 124. In this case, all the analyst could say was that the "general color" of the hair from the hose was "**somewhat** consistent" with Appellant's hair color, as was "**some** pigment distribution", and when he measured the cuticular margin, there were "**some** consistencies" (R-833-34). The fragment on the hose had frayed (split) ends (R-834). At first, he testified that Appellant's hair did not have any split ends, and then said he noticed some (R-835). Anyone who brushed their hair, wore a cap, or did not take care of their hair would likely have some split ends (R-843, 845). There were no significant dissimilarities, but, of course, the great majority of characteristics usually examined were not examined (R-832,835).

All of the above tells us nothing about who murdered Mrs. Carlson. According to this testimony, even if we assume that the hair on the stocking was left by the murderer, that the hair removed from the stocking was actually the hair left on the stocking, that there was no mix-up in the many shipments of the evidence or its six year loss, and that there was no tampering with it, all of which are quite bold assumptions, we still con-

clude that the hair fragment could have come from virtually any human being. However, the testimony had tremendous prejudicial and misleading value. The jury was misled to believe that the hair evidence must link Appellant to the crime or why would we be hearing about it at such length. The average juror does not have the scientific mind necessary to carefully scrutinize this type of evidence and reject it for what it is: a red herring. The State used this evidence just as it used the Williams Rule testimony and all of its evidence except the fingerprint, on the theory that if it places enough red herrings in front of the jurors, they will convict. It worked; but principles of law and justice require that this Court reverse. The admission of this evidence not only violated the Florida Evidence Code, but was such fundamental error as to deny Appellant a fair trial.

VIII. THE TRIAL JUDGE'S EXCLUSION OF NUMEROUS ITEMS OF EVIDENCE INCLUDING POLICE REPORTS, WITNESS STATEMENTS TAKEN BY POLICE, AND THE HAIR ANALYST'S EMPLOYEE EVALUATION WAS ERROR AND DENIED APPELLANT A FAIR TRIAL, THE RIGHT TO PRESENT EVIDENCE IN HIS OWN DEFENSE AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The trial court excluded from evidence numerous matters which Appellant sought to introduce to support his innocence. Among the most significant matters were the following:

1. The testimony of Officer McDonald that he spoke to a witness (whose name he did not presently know) who lived near the park where the Carlson car was found, and told McDonald that she heard the victim's car arrive at about 2:30 or 3:00 A.M. (R-563), a time when Appellant was undisputedly in the halfway house.[17]

2. The employee evaluation of Diana Bass, the hair analyst who handled the evidence, which showed that she had significant problems relating to the proper handling and evaluation of evidence (R-881-896).

3. The police report of Officer Latner which identified another more promising suspect who was not investigated (R-1034).

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[17] Appellant's testimony, that of the two counselor's from the halfway house, and the records from the halfway house all place Appellant in the house all night on May 21, 1977. However, the State sought to cast doubt on that testimony through the testimony of Officer Donnelly, who said that he previously had seen the records and that there was no entry for 11 P.M. or 12 midnight. If Donnelly was believed, despite his drunkenness at the time, and Appellant and his two state employee witnesses are disbelieved, this could mean that Appellant was somehow out of the halfway house sometime between 11 P.M. and 1 A.M. But, if it could be shown that the Carlson car arrived at the park at around 3 A.M., the testimony of Appellant, his witnesses, and the records, becomes undisputed and undeniable that he was in the halfway house at that time and could not have committed the crime.

Normally, in matters involving the admission of evidence, the trial judge's decision is given great discretion. However, as argued extensively earlier, in this case, given the trial judge's use of the word "nigger" and demonstrated cavalier attitude towards evidence by suggesting that "it all hang out" and that he would "not be on the criminal bench anyway if this thing is reversed", it is suggested that this Court must make a de novo review of the admissability. Such a review, in light of the applicable factors and the record, require the conclusion that the exclusion of the above evidence constituted fundamental and reversible error.

Officer McDonald's proffered testimony showed that, during his investigation, he located a woman who lived in an apartment facing Lake Martha, who told him that she heard a car arrive at the park at about 2:30 or 3:00 in the morning (R-561-62). The court excluded this testimony because based upon the State's objection that it was hearsay and immaterial.

First, it was extremely pertinent and material. If the murderer was driving the car, this testimony would have exhonorated Appellant. The woman could not say what car it was, but there is at least a reasonable probability that it was the Carlson car, given traffic flow at that time of night in that area. The incriminating hair evidence was admitted because it was consistent with the State's theory of guilt, although it did not point to Appellant; certainly, this evidence, which is consistent with Appellant's theory of innocence should be admitted, even though he cannot conclusively show that the car that arrived at 3:00 A.M. was driven by the murderer.

Even if the testimony was hearsay, it was entitled to admission under these circumstances. The declarant was unavailable because McDonald did not obtain her name and there was no way to find her seven years later without a name. Certainly, if she would have told McDonald that she saw Appellant driving that car, he would have recorded her name and address. But because her statement turned out to be exculpatory, the police simply dropped it, thus rendering the testimony unavailable to Appellant. This violates the principles of Brady v. Maryland, 373 U.S. 83 (1963). A state normally has no obligation to produce favorable witnesses who are unavailable, unless the state is responsible for the witness' unavailability. See Western, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 594-601, and particularly cases cited in n.79, cited approvingly by the U.S. Supreme Court in Green, infra. However, as Professor Western writes: "The state is deemed equally responsible for witnesses whether it wrongfully fails to produce them while they are still available or wrongfully causes them to become unavailable." Id. at 596. When the state is responsible for a witness' unavailability, it must produce the witness or face dismissal of its case. Id.

Where the defendant loses the opportunity to present exculpatory evidence because the police simply fail to secure the name of the witness, at the very least, the confrontation and compulsory process clauses, combined with the State's constitutional duty to provide the defense with exculpatory evidence, require that the next best thing, a reliable hearsay

statement be admitted. Id. The State cannot use its hearsay rule to exclude trustworthy exculpatory evidence. Chambers v. Mississippi, 410 U.S. 284 (1973). As the Court explained in Green v. Georgia, 442 U.S. 93, 98 (1979), holding that the literal application of the state's hearsay rule to exclude reliable, probative, and exculpatory evidence results in a due process violation, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Thus, the exclusion of this statement was error.

Similarly, the exclusion of Bass' employee evaluation (R-881) on the ground it was opinion was error. Shortly after the first trial, Bass received an employee evaluation setting out many shortcomings.[18] The evaluation was authored by her supervisor at the Sanford Crime Lab who is authorized and required to conduct such evaluations periodically.

The evaluation is detailed and factual, pointing primarily to particular shortcomings, and not mere general opinion. It was highly probative. Moreover, the evaluator is not a lay person, but a person to whom the State of Florida has designated the authority and responsibility to make such evaluations. Under these circumstances, the evaluation was admissible and its exclusion was error.

The last major erroneous evidentiary ruling was the exclusion of Officer Latner's police report (R-1034). This report, authored prior to Appellant's arrest, identified Mr. Shelton as a

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18 Some of the evaluation is quoted at p. 56-57 supra.

primary suspect in the Carlson slaying.[19] Appellant sought to introduce it to show that the entire investigatory team was on notice of Shelton as a suspect, but did not investigate his possible involvement. Id. The State contended that it was hearsay and not admissible. Id.

This report was not offered to show the truth of the matter, i.e., that Shelton was a suspect; rather, it was offered to show that the investigators were on notice of Shelton's possible involvement and failed to investigate. Because it was not offered to prove the truth of the matter, it is not hearsay. Section 90.801(c), Florida Statutes (1983). The exclusion of this evidence was also reversible error.

In sum, the exclusion of the above items violated the Evidence Code, and Appellant's right to a fair trial. Justice requires reversal of this cause.

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19 For a summary of the facts pointing to Shelton as the assailant in the instant case, see p. 13 supra.

IX. THE PROSECUTOR'S QUESTIONING OF APPELLANT ABOUT THE EXERCISE OF HIS RIGHT TO REMAIN SILENT IN A PREVIOUS CASE VIOLATED FLA. R. CRIM. P. 3.250 AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Appellant testified in his own defense in this case. He had previously been convicted of the Jamison rape. However, exercised his right to remain silent in that case and did not testify at that trial. See Appendix "G". Yet, the prosecutor questioned him about his "claim of innocence," expressed through his silence, in the Jamison case:

Q: You went to trial in the [Jamison] case, didn't you?

A: Yes, sir.

Q: And the jury found you guilty on that case, right?

A: Yes, sir.

Q: Now back -- now you admit now that you are guilty of that crime; is that correct?

A: Yes, sir.

Q: But back when it happened, you didn't admit you were guilty of it, did you?

A: No, sir.

Q: You were going to trial and claiming you didn't do it and all that stuff?

A: Yes, sir.

(R-957-58). Of course, Appellant was not required to "admit [he] was guilty of [the Jamison rape] . . . back when it happened." In fact, during that trial, Appellant claimed nothing except silence, and put the State to its burden to prove his guilt, see appendix "G", a right to which he is entitled. It is only in the sense that Appellant had put the State to its burden that he

"claimed innocence." The State's improper questioning about the exercise of that right constituted reversible and fundamental error.

Appellant's "claim of innocence" in the Jamison case, expressed through his silence, was used as evidence against him in this case. The prosecutor implied that because he exercised his right to silence "to claim innocence" in the Jamison case, but was found guilty, his testimony in this case should not be believed.

This is a clear case of a prosecutorial comment on the right to remain silent. A defendant cannot be asked to explain his previous silence, and to do so is reversible error. Gardner v. State, 170 So. 2d 461 (Fla. 3rd DCA 1965). Nor can a defendant be questioned about the fact that he did not admit that he was guilty at the time he committed a prior crime. Molina v. State, 447 So. 2d 253 (Fla. 3rd DCA 1983) (Pearson, concurring), and cases cited therein.

The fact that Appellant's silence had been exercised in a previous trial does not change the result. In Willinsky v. State, 360 So. 2d 760 (Fla. 1978), this Court expressly resolved this issue in favor of Appellant. The Court wrote:

> In Simmons v. State, 190 So. 756 (Fla. 1939), the prosecutor asked defendant if he had testified at the preliminary hearing and at the habeus corpus hearing. The defendant answered that he did not. Subsequently, the prosecutor commented on the failure of the defendant to testify. No objection was made by the defendant. The Court . . . stated:
>
> > This statute [the predecessor to Fla. R. Crim. P. 3.250] applies to comment on the failure to testify at

> a preliminary hearing, an application for bail, a habeus corpus hearing or **a former trial**, as well as the failure to testify in the present trial.
>
> * * *
>
> We hold that calling the attention of the jury, by the prosecuting officer of the State, to the failure of the accused to testify . . ., no matter how innocently it may be done . . . deprives the defendant . . . of his constitutional right to a fair and impartial trial.
>
> Impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process. It should not be material at what stage the accused was silent so long as the right to silence is protected at that stage.
>
> * * *
>
> We hold that disclosure of accused's silence at the preliminary hearing is error. . . . We [further] hold that the harmless error rule is not applicable . . .
>
> * * *
>
> In our opinion, the rule in Simmons v. State, supra, was correct. . . .

(emphasis supplied). See also Wilson v. State, 294 So. 2d 327, 330 (Fla. 1974).

Willinsky has been followed by the district courts and the First District has expressly applied it where reference was made to the failure of a defendant to testify in a previous trial. Cooper v. State, 413 So.2d 1244 (Fla. 1st DCA 1982).

While there was no objection below, once the prosecutor's comment was made, it was too late, and "neither rebuke nor retraction would have cured the error." Under those circumstances, this Court has long held that the error is fundamental and rever-

sible. Willinsky, supra; Wilson v. State, 294 So. 2d 327 (Fla. 1974); Grant v. State, 194 So. 2d 612 (Fla. 1967); Ogelsby v. State, 23 So. 2d 558 (1945); Simmons v. State, supra.

Thus, it is clear that Appellant's rights under Fla. R. Crim P. 3.250 and the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as corresponding provisions of the Florida Constitution, have been violated, and this cause must be reversed.

X. WHERE THE GRAND JURY WHICH INDICTED APPELLANT CONTAINED ONLY ONE BLACK AND THE WHITE FOREMAN WAS SELECTED BECAUSE HE WAS AN ACQUAINTANCE OF THE JUDGE, APPELLANT WAS DENIED A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Appellant filed a motion to dismiss the indictment on the grounds that the grand jury and grand jury foreman were selected in a discriminatory manner (R-65-66). The motion was denied.

The venire consisted of fifty (50) persons, five (5) of whom were black (10% black). Of those, eighteen (18) persons were selected, one (1) of whom was black (R-216-220). The foreman was a white male. Thus, twenty percent (20%) of the blacks on the venire were selected, while thirty eight percent (38%) of the whites were selected. Whites were thus selected at nearly double the rate of blacks.

Further, while ten percent (10%) of the venire was black, in 1977, about twenty percent of the population of the Tenth Judicial Circuit was black. See Desk Book to Florida Jurisprudence.

Moreover, the white foreman was selected because he was an acquaintance of the presiding judge (R-107). In selecting the foreman, the presiding judge used totally subjective factors and stated that he would not select someone he knew nothing about (R-109-111). He recalled one occassion in which he selected a black as foreman, but could not remember if it was after or before the grand jury that indicted Appellant (R-108, 112).

Appellant acknowledges that four judges of this Court have held that discrimination in the selection of grand jury foremen does not constitute a cognizable claim. Andrews v. State, 443

So. 2d 78 (Fla. 1983). Nevertheless, Appellant respectfully suggests that the dissenting opinion of Justices Shaw, Adkins and Ehrlich represents the better view. Under the majority view, if a Circuit Court judge were to testify that he deliberately did not select blacks as grand jury foremen, there would be no relief available. Even in the absence of actual prejudice, such a result is inconsistent with the fundamental notion that "justice requires the appearance of justice." Offut, supra.

The procedure employed for the selection of grand jurors and particularly for the selection of foremen in Polk County in 1977 resulted in the exclusion of blacks from the grand jury that indicted Appellant and in the selection of a white as foreman. The numbers demonstrate a statistical disparity. Moreover, when wholly subjective procedures with no objective standards or criteria are utilized to make selection decisions, those decisions become suspect. The courts have "repeatedly held that subjective selection processes involving white [decision-makers] provide a ready mechanism for discrimination." Johnson v. Uncle Ben's, Inc., 628 F. 2d 419 (5th Cir. 1980); Rowe v. General Motors, 457 F. 2d 346 (5th Cir. 1972). It is well known that whites tend to associate with whites and blacks with blacks. Therefore, when the judge selects foremen on a basis of prior acquaintance, it is unlikely that a white judge will ever select a black foreman. Under these circumstances, the motion to dismiss the indictment should have been granted.

XI. APPELLANT'S ABSENCE FROM THE COURTROOM DURINGPORTIONS OF THE TRIAL VIOLATED HIS RIGHTS TO CONFRONTATION, DUE PROCESS AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Prior to trial, there was a hearing concerning the introduction of the Williams Rule testimony. Appellant was not present, although his defense lawyer purported to waive his presence (R-236). Because of Appellant's absence, the judge evidently felt free to make such statements as "let it all hang out" referring to the Williams Rule evidence (R-249), and "I'm not going to be on the criminal court anyway if and when this thing is reversed" (R-1399).

Appellant was again excluded from the charge conference on jury instructions (R-1116). It was at this time that Appellant's family was referred to as "niggers" (R-1199).

A motion for new trial based upon Appellant's absences was made and denied (R-1238, 1266).

It has long been held that the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment guarantee a criminal defendant the right to be present at every stage of a criminal trial where his absence might frustrate the fairness of the proceedings. Illinois v. Allen, 397 U.S. 337, 338 (1959); Hopt v. Utah, 110 U.S. 574 (1884); Hall v. Wainright, 733 F. 2d 766, 775 (11th Cir. 1984); Proffitt v. Wainwright, 685 F. 2d 1256 (11th Cir. 1982), modified on rehearing, 706 F. 2d 311 (11th Cir. 1983).

This Court and the District Courts have carefully guarded against potential prejudice that may arise by reason of a defen-

dant's absence from various parts of the trial. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Ivory v. State, 351 So. 2d 26 (Fla. 1977); Shaw v. State, 422 So. 2d 20, 21 (Fla. 2nd DCA 1982).

The question here is whether Appellant's absences came at times which frustrated the fairness of the proceedings. This same question has sometimes been addressed in terms of harmless error in absence from the courtroom issues. In order for the error to be harmless, the State has the burden to show it is harmless beyond a reasonable doubt. Francis, supra, quoting Chapman v. California, 386 U.S. 18 (1967). Assuming the correctness of a harmless error rule, which Appellant does not concede, the error below was certainly not harmless herein. In both situations, the judge used Appellant's absences to make improper remarks, one of which concerned Appellant's race. Had defendant been aware at the time of the first hearing that the judge had said "let it all hang out" and that he would not be on the bench anyway in the event of reversal, he undoubtedly would have instructed his counsel to seek the judge's recusal at that time, thereby preventing his presiding over the trial.

Lastly, the current state of the law is such that there can be no waiver of the right to a defendant's presence in a capital trial. Hall, supra at 775; Proffitt, supra. Even if waiver were possible, waiver requires, at a minimum, that the defendant himself makes a statement on the record in open court waiving his presence. Francis, supra; Cross v. United States, 325 F. 2d 629 (5th Cir. 1963).

Under the circumstances of this case, Appellant's absence

from the courtroom during these stages of the proceedings, when the judge used the occasions to make improper remarks, violated Appellant's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

XII. THE TRIAL JUDGE'S EXCLUSION OF PENALTY PHASE EXPERT TESTIMONY OFFERED TO SHOW THAT ERRORS IN THE DETERMINATION OF GUILT SOMETIMES OCCUR IN CASES LIKE THE INSTANT ONE AND THAT THE IMPOSTION OF THE DEATH PENALTY ON APPELLANT WOULD HAVE NO DETERRENT EFFECT VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT AND LOCKETT V. OHIO, 438 U.S. 586 (1975)

During the penalty phase, Appellant sought to introduce the testimony of Professor of Sociology Radelett from the University of Florida. The testimony was excluded by the court (R-1341-42).

The proffered testimony of Professor Radelett deals with his study which shows that persons convicted of crimes beyond a reasonable doubt are not always guilty and that of a sample of 332 persons executed, 19 were later determined to be innocent. In 15 of those cases, the estates of the persons were indemnified by the state for the error (R-1317). Professor Radelett indicated that his study was particularly applicable to Appellant's case because, although the jury found him guilty beyond a reasonable doubt, his guilt was not one hundred percent certain, whereas he had previously refused to testify about this study in capital cases where there was no doubt as to guilt (R-1320).

Dr. Radelett also sought to tetify about the studies concerning the deterrent effect of the death penalty. The proffered testimony showed that the "overwhelming majority" of the "literally dozens" of studies in the area show that the death penalty has no deterrent effect (R-1326-27).

The courts have held that a defendant must be able to present all evidence in the sentencing phase bearing on the appropriateness of the death penalty in his case. Lockett v. Ohio, 438 U.S. 586 (1975). Even though the jury found Appellant

guilty beyond a reasonable doubt, there could have still been a doubt in their mind so as to cause them to not recommend the ultimate and irreversible sanction. Moreover, the deterrent effect of the death penalty was obviously on their minds. While deliberating, the jury returned with a question:

> Your Honor, in arriving at a sentence recommendation, we are seeking to understand the relevance of whether whatever sentence we recommend will be concurrent with or serial to existing sentences. Our concern stems from our efforts to weigh the protection of society and appropriate punishment.

(R-1384). The jury ultimately returned a 9-3 recommendation in favor of death (R-1388). Yet, they were precluded from hearing evidence on an issue which was evidently foremost in the jurors minds, the protection of society and the appropriateness of the death penalty. Under these circumstances, the sentence violated the Eighth and Fourteenth Amendments and it is respectfully submitted that this Court should reverse.

XIII. THE USE OF DIFFERENT JUDGES FOR THE GUILT AND PENALTY PHASES, WHERE A CHANGE WAS REQUIRED BECAUSE OF RACIAL COMMENTS MADE BY THE PRIOR JUDGE, VIOLATED SECTION 921.121(1), FLORIDA STATUTES, AND DENIED APPELLANT A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

After Appellant complained about Judge Langston's racial comment, Judge Langston recused himself. Judge Norris presided over the penalty phase of the trial. He imposed the death sentence based upon the penalty phase evidence and his reading of the transcript from the rest of the trial.

Section 921.141, Florida Statutes (1983) provides:

> Upon conviction or adjudication of guilt, of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding. . . The proceeding **shall** be conducted **by the trial judge** before the trial jury as soon as is practicable. If through impossibility or inability, the trial jury is unable to convene for a hearing on the issue of peanlty . . . the trial judge may summon a special juror or jurors . . . .

(emphasis supplied).

The legislature was quite explicit that **the** trial judge must provide over the sentencing phase. The use of the word "shall" indicates that this provision is mandatory and there is no room for discretion. See Tuscano v. State, 363 So. 2d 405 (Fla. 1st DCA 1978); In the Interest of S.R. v. State, 346 So. 2d 1018 (Fla. 1977); Holloway v. State, 342 So. 2d 966 (Fla. 1977). Moreover, the fact that a specific alternative is provided in situations where juror(s) become unavailable, but no provision is made if the judge cannot continue, indicates that, in the latter situation, the remedy is a new trial.

Perhaps a different situation would be present where the

trial judge could not serve through impossibility. That situation is not before the Court. Rather, Appellant was deprived of a sentencing judge who could fully appreciate the tenuous nature of the evidence against him because the judge had to be removed for making a racial slur. Under these circumstances, the remedy cannot be a new judge, who has nothing but a cold record upon which to make his evaluation of the circumstances of the offense. The statute and the Constitution entitle Appellant to a judge fully aware of those circumstances. And where the trial judge cannot serve, a new trial must be granted.

XIV. THE IMPOSITION OF APPELLANT'S DEATH SENTENCE WITHOUT A CLEAR FINDING THAT APPELLANT INTENDED TO TAKE LIFE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The jury was instructed on premeditated murder and on felony murder (R-1192-93). In his closing argument, the prosecutor explained to the jury as follows:

> There is a second type of first degree murder that is applicable in this case. What we call felony murder. . . . Even if there is no premeditation, the fact that the killing was a complete accident, if it was committed in the course of a robbery it is automatically first degree murder. How that applies in this case is that Mrs. Carlson obviously was raped, what we now call sexual battery under the law. If she was killed during the commission of a rape, it is automatically first degree murder. **Even if the killing was accidental, even at the time Mr. Peek was committing the rape he accidentally killed her, he is still guilty of first degree murder, under the felony murder theory. If in the course of committing a burglary the homeowner is killed, even accidentally, the perpetrator of the burglary is guilty of first degree murder automatically. The State feels that both of these theories are applicable in this case.**

(R-1129-30).

Thus, under the law on which the jury was instructed, as argued by the prosecutor, the jury was not required to find that Appellant intended to kill the victim, but it would be sufficient to find first degree murder and later impose the death penalty if the jury found that the victim was killed in the course of a felony, even if by total accident. Of course, Florida is free to define first degree murder in this fashion. But, the imposition of the death penalty based upon such a conviction, when the jury may have determined that the killing was a complete accident, violates the Eighth and Fourteenth Amendments to the U.S. Consti-

tution.

In Enmund v. Florida, 102 S. Ct. 3368 (1982), the United States Supreme Court held that the death penalty is unconstitutional where the defendant did not have the intent to kill. Where a jury is instructed so that they may find first degree murder without finding an intent to kill, a death sentence may not be imposed upon such a conviction. Clark v. Louisiana State Penitentiary, 694 F. 2d 75 (5th Cir. 1982), reh. denied with opinion, 697 F. 2d 699 (5th Cir. 1983).

As in Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982), "there was no direct evidence of a premeditated murder, so we must presume that the conviction rests on the felony murder theory." And, as in Menendez, under these circumstances, the death penalty is not appropriate.

It is clear that if the evidence showed that Appellant killed the victim by purely by accident, a death sentence based upon this finding would be excessive, disproportionate, and constitutionally infirm. We do not know what the jury found. But it is clear that they could have determined that the killing was pure accident and imposed the death sentence. Where there is a chance that the death sentence was imposed on this basis, the constitution requires that the sentence be reversed. See generally Lockett v. Ohio, 438 U.S. 586 (1975); Gregg v. Georgia, 428 U.S. 153 (1976); Hooks v. Georgia, 433 U.S. 917 (1977); Enmund, supra.

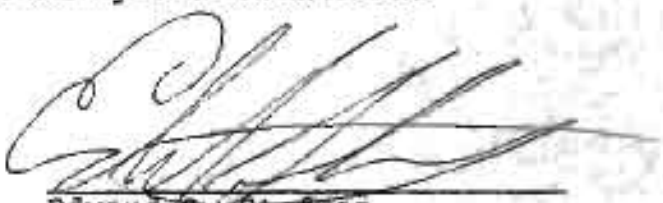
XV. THE IMPOSITION OF APPELLANT'S DEATH SENTENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE IT IS RACIALLY DISCRIMINATORY IN THAT BLACKS AND PERSONS WHO KILL WHITES ARE DISPROPORTIONATELY LIKELY TO RECEIVE A DEATH SENTENCE THAN WHITES AND PERSONS WHO KILL BLACKS

Appellant recognizes that this argument has been rejected by the Courts. Based upon the dissenting opinion in McCleskey v. Kemp, Case No. 84-8176 (11th Cir. Jan. 29, 1985), Appellant respectfully suggests that this Court should reconsider and reverse the conviction and sentence on this ground.

Conclusion

As promised at the outset, this brief has demonstrated that the conviction and death sentence of Anthony Ray Peek is a sham. Had he been charged with it, he should have been convicted of attempted burglary of an automobile, and that is all. Instead, as the result of his race, innuendo, and numerous trial court errors, he was sentenced to our most severe penalty, that of death.

The affirmance of this conviction would not only do a terrible injustice, but would confirm the claims of death penalty opponents all over the country that Florida's death penalty discriminates on the basis of race and can easily result in the death of an innocent individual. This Court cannot allow that to happen. Appellant respectfully suggests that this matter must be reversed with directions that all charges be dismissed.[20]



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[20] Appellant must still serve the remainder of his life sentence for the Jamison rape.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief and appendix has been served by United States Mail upon the Office of the Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, on this 26th day of March, 1985.

Edward S. Stafman
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