IN THE

SUPREME COURT OF FLORIDA

BURLEY GILLIAM, JR.,	*	
	*	
Appellant,	*	
	*	
vs.	*	CASE NO. 66,850
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	
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DIRECT APPEAL FROM THE CIRCUIT COURT
DADE COUNTY, FLORIDA
Case No. 82-14766

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Burley Gilliam, Jr., will be referred to in this brief as "defendant" or "Mr. Gilliam." Appellee, the State of Florida, will be referred to as "appellee," "the State," or "the prosecutor(s)." References to the pleadings and transcripts of pre-trial, trial and sentencing contained in this Record on Appeal will be designated as "R," followed by the appropriate page number(s), set forth in parenthesis [Example: (R. 1)]. References to the transcripts of certain pre-trial proceedings in this case will be referred to as "Supp. R," followed by the appropriate page number(s), set forth in parenthesis [Example: (Supp. R. 1)].

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING AND REFUSING TO HOLD A PATE HEARING TO DETERMINE WHETHER BURLEY GILLIAM WAS COMPETENT TO STAND TRIAL OR BE SENTENCED, THUS VIOLATING APPELLANT'S RIGHTS GUARANTEED UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS AS WELL AS FLORIDA'S STATUTES AND RULES.

II

MR. GILLIAM DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO BE REPRESENTED BY COUNSEL AT EITHER THE TRIAL OR SENTENCING HEARING, AND THE COURT'S FAILURE TO ASCERTAIN HIS COMPETENCY VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE CONDUCT OF THE JURY SELECTION PROCESS.

IV

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATE'S WARRANTLESS SEIZURE OF PHYSICAL EVIDENCE FROM THE TRUCK IN BURLEY GILLIAM'S POSSESSION AND CONTROL, WHERE THE TRUCK WAS NOT ABANDONED AND THE SEARCH WAS NOT VALIDLY CONSENTED TO.

V

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENT MADE BY MR. GILLIAM WHICH WAS OBTAINED ILLEGALLY.

VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL OR STRIKE THE MEDICAL EXAMINER'S OPINION THAT CERTAIN MARKS ON THE DECEDENT'S HEAD WERE CAUSED BY THE STOMPING OF A SNEAKER, SINCE THE WITNESS CONCEDED THAT SHE WAS NOT AN EXPERT IN THIS AREA.

VII

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE AND TESTIMONY CONCERNING PHOTOGRAPHS AND MODELS WHICH FORMED THE BASIS OF DR. SOUVIRON'S EXPERT OPINION THAT BITE MARKS WERE CAUSED BY BURLEY GILLIAM.

VIII

THE COURT ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING WHEN COUNSEL LEARNED FOR THE FIRST TIME DURING TRIAL THAT TWO WITNESSES HAD IDENTIFIED SOMEONE OTHER THAN MR. GILLIAM AS HAVING BEEN THE DRIVER OF THE TRUCK AT THE SCENE OF THE MURDER.

IX

THE COURT FAILED TO INSTRUCT THE JURY AS TO ALL NECESSARILY LESSER INCLUDED OFFENSES OF CAPITAL MURDER, AND MR. GILLIAM DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER ON THE RECORD, THUS REVERSAL IS AUTOMATICALLY REQUIRED UNDER HARRIS V. STATE.

X

BECAUSE OF ACTIONS AND INACTIONS BY THE PROSECUTORS AND BY THE TRIAL COURT, FUNDAMENTAL ERRORS OF CONSTITUTIONAL SIGNIFICANCE OCCURRED DURING MR. GILLIAM'S TRIAL, AND THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERRORS DENIED MR. GILLIAM HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

XI

THE COURT ABUSED ITS DISCRETION IN ARBITRARILY REQUIRING AN ADVISORY JURY SENTENCING RECOMMENDATION, OVER MR. GILLIAM'S OBJECTION.

XII

THE COURT ABUSED ITS DISCRETION IN FAILING TO ORDER A PRESENTENCE INVESTIGATION REPORT PRIOR TO SENTENCING BURLEY GILLIAM TO DIE IN THE ELECTRIC CHAIR.

STATEMENT OF THE CASE AND FACTS

Joyce Marlow was employed as a topless dancer at the Orange Tree Lounge in June, 1982. The bartender, Kathryn Gordon, testified that Joyce Marlowe had worked a double shift on June 8, 1982. (R. 542). In between her dancing acts, when Ms. Marlowe came out to pick up her tips, she had been sitting with a man and talking for about three hours. (R. 545-46). She described that man as weighing about 135 pounds, 5'7 or 5'8" tall with curly, blondish, shoulder-length hair and a mustache. (R. 547). This man had been in the bar for about five hours and had had about five Budweisers. He did not appear to be drunk or have difficulty walking. (R. 548).

The bartender testified that about 9 p.m. Ms. Marlowe told her that she could not hold out any longer, that she needed something to eat. Ms. Marlowe was "getting pretty drunk" (R. 543), because she had been drinking champagne all day and had not had anything to eat. Ms. Marlowe had been waiting for her boyfriend to pick her up to take her out to dinner, but he never arrived. (R. 543).

Ms. Marlowe went into the kitchen and told the bartender that she did not want to wait any longer for dinner and that a customer said he would take her down to the Clock Restaurant, which is about a half a mile away and bring her back. (R. 547).

The bartender estimated that Joyce had approximately $500.00 cash on her when she left the topless bar. The bartender

identified Burley Gilliam in court as the man with whom Ms. Marlowe left the bar.

Joyce Marlowe's dead body was found on June 9, 1982, on a sandy beach approximately 156 feet from the roadway located north of 135th Street in Dade County. (R. 463-466). There were no witnesses. The medical examiner found food remains in her stomach, showing that she had been to dinner several hours before her death. (R. 891). Photographs of the scene showed tire marks in the sand, a lady's purse, and marks in the sand which looked as if the body or some other object had been dragged across the sand. (R. 470-473). A left shoe with a white sock in it was found 84 feet from the body. (R. 476).

The cause of death was strangulation. (R. 868). She was also sexually assaulted and there were bruises on her arms and head and bite marks on her chin, ear and breast. (R. 868-79). One of her nipples had been bitten while she was alive such that it was almost hanging off of the breast. (R. 871). A blunt object had been forced into her anus while she was still alive, causing great trauma and bleeding. (R. 880-81). There were certain head injuries and circular marks left on her head. Over Mr. Gilliam's objection, the medical examiner testified that she believed that those head injuries were caused by some one stomping on her head, while she was alive, while wearing the sneakers found one at the scene and one in a truck assigned to Mr. Gilliam. (R. 888-89).

Appellant, Burley Gilliam, Jr. was charged by indictment with the first degree murder (§782.04, Fla. Stat.) of Joyce Marlowe, with her sexual assault (§794.011(3) Fla. Stat.) and grand theft (§812.014, Fla. Stat.). (R. 1134A-1135).

At his trial, Dectective Merritt testified, over defense objection, that Burley Gilliam had made an oral inculpatory statement, and an exculpatory statement that "he didn't have sex with [the decedent] because when he was drinking he couldn't get an erection." (R. 750).

Assistant Public Defender, Art Koch, was appointed to represent Mr. Gilliam.

In November, 1983, the court appointed (R. 1327) Drs. Haber, Jacobson and Mutter to evaluate Mr. Gilliam to determine his competency to stand trial. Dr. Stillman examined Mr. Gilliam at defense counsel's request. On November 28, 1983, the assistant public defender stipulated that the testimony of each of the court appointed doctors would be consistent with their respective reports binding Mr. Gilliam's competency to stand trial. (R. 10). Dr. Stillman, however, found that Mr. Gilliam was not competent. (R. 8). Mr. Koch waived Mr. Gilliam's rights under Fla.R.Crim.P. 3.211 to cross examine and present the witnesses. (R. 11). The court held that Mr. Gilliam was competent to stand trial. (R. 12).

The court granted the Motion for Leave to File Notice of Intent to Rely on Insanity Defense one year late. (R. 13-14).

The court then commenced evidentiary hearings on the previously filed defense 1) Motion to Suppress Statements to Dectective Merritt, 2) Motion to Suppress Statements to Judge Gray, 3) Motion to Suppress Physical Evidence and Motion to Suppress Photograph Identification.

Mr. Gilliam's assistant public defender put on the record that he had a concern about his ability to effectively represent Mr. Gilliam regarding those motions because he was unable to advise Mr. Gilliam as to whether to go forward with the insanity defense until he received additional neuropsychological test results and various hospital records. (R. 4-7). Therefore, the defense attorney stated that he could not advise Mr. Gilliam whether to testify at the Motion to Suppress hearing. (R. 7).

Mr. Gilliam and his assistant public defender both advised the court that they could not get along with each other. The basis for the conflict was that the attorney refused to provide Mr. Gilliam with copies of medical reports and other documents pertaining to his defense. (Supp.R. 18). The court granted the public defender's Motion for Conflict (Supp.R. 63), and the court conducted colloquys with Mr. Gilliam as to whether he desired or was able to represent himself. Mr. Gilliam told the court that he did not want to represent himself and the court found that he was unable to represent himself. (Supp.R. 54).

The court appointed Stuart Adelstein and William Surowiec to represent Mr. Gilliam. It came to the attention of the court, on

numerous occasions, that Mr. Gilliam was having a similar problem with these attorneys regarding copies of all pleadings, reports and discovery. (R. 4; 162).

A week before his trial was scheduled Mr. Gilliam again advised the court that he was disatisfied with his court appointed attorneys because they had failed to provide him with certain requested materials particularly information regarding the penalty phase and medical reports. (R. 153-54; 169).

Attorneys Adelstein and Surowiec related to the court their unsuccessful attempts to communicate with Mr. Gilliam and his inability to understand or assist them. They requested that Mr. Gilliam be examined to determine his mental competency to stand trial. (R. 174).

The court had previously been advised that Mr. Gilliam had a history of psychiatric problems and had been takng psychotropic medication while in the jail. (R. 1325). Mr. Gilliam had a history of epilepsy and at the time of trial he was taking several prescribed medications, specifically dilantin and phenobarbital. Without specifying the grounds reasonably leading him to question Mr. Gilliam's competency, the trial judge ordered Dr. Leonard Haber to examine Mr. Gilliam and return a report the following day. (R. 177-185).

The following day, January 23, 1985, Dr. Haber testified that, on the preceeding evening, he had gone to the Dade County jail and attempted to conduct a competency evaluation on

Mr. Gilliam. (R. 185). Dr. Haber testified that he was only able to speak with the defendant for "less than five minutes" (R. 186) which is "not a usual competency examination." (R. 186). Nevertheless, Dr. Haber believed that he was able to render an opinion as to Mr. Gilliam's competency.

On cross examination, Dr. Haber admitted that he had not performed a complete competency examination on Gilliam either during the preceding evening or on that morning (R. 188), and he further admitted that he based his opinion upon the examination he performed over a year earlier in November of 1983. (R. 187-188). Dr. Haber conceded that he did not know whether certain medications had been ordered for Gilliam or whether or not he was receiving required medication. Dr. Haber acknowledged that phenobarbital is a medication prescribed to control seizures (R. 188) and that dilantin is a medication also frequently used to control seizures. (R. 190). Dr. Haber advised the court that such medications might effect one's competency. (R. 190).

The trial judge made a finding that Mr. Gilliam was competent to stand trial based upon Dr. Haber's limited examination.

The trial judge further found that Mr. Gilliam's requests to discharge appointed counsel and have a different attorney was tantamount to a request to represent himself. (R. 116). The court proceeded with a colloquy pursuant to Faretta v. California, 422 U.S. 806 (1975), even though the jail had failed

to provide Mr. Gilliam his required medication that morning. (R. 192-93). The trial judge determined that the trial would proceed with Mr. Gilliam representing himself. No evaluation, inquiry or hearing was conducted to determine whether Mr. Gilliam was competent to waive his right to counsel. Stuart Adelstein and William Surowiec remained in the courtroom as standby counsel throughout the trial.

It was four days before the trial date, that Mr. Gilliam learned that he would be proceeding pro se. The court denied his request for continuance despite the undisputed fact that until that day his attorneys had not provided him access to any of the pleadings, medical reports, depositions or other discovery necessary for his defense. Mr. Gilliam had not even been advised of the state's witnesses.

During the course of the trial and penalty phase, Mr. Gilliam's demeanor deteriorated, he acted irrationally, cried (R. 756) and otherwise exhibited unusual behavior which prompted standby counsel to request an emergency medical and mental competency evaluation numerous times (see Minutes of Clerk, R. 1127-54). Without ordering an exam or holding a hearing, the trial judge made a finding on each occasion that Mr. Gilliam was competent. The trial judge concluded that Mr. Gilliam was faking. (R. 1122).

In many asides for purposes of the appellate record, the trial judge explained his reasoning. The trial judge explained

that he "pushed" (R. 1124) Mr. Gilliam to trial to make an example of him for others awaiting trial.

After the advisory sentence was rendered, the trial judge apologized to the jurors, explaining that he made a decision to allow Mr. Gilliam, who had a 10th grade education, to represent himself in a capital case in order to send a message to those awaiting trial, that "if you don't avail yourself of [appointed counsel], then you can twist in the wind like you saw here this week." (R. 1116).

There were no eyewitnesses to the murder. The state's case against Mr. Gilliam was established through circumstantial evidence. The primary connection between Mr. Gilliam and the scene of the murder revolved around a truck which Mr. Gilliam had been assigned by his employer to drive to Florida. (R. 659-660).

The truck had been stuck in the sand at the scene. Two witnesses picnicking by the lake testified that they saw the driver at the scene and helped him pull out the truck onto the road, but it wouldn't start. (R. 605-606). Both witnesses testified that they identified the driver from a police photo display, but did not see that man in court. (R. 606-608; 614). The prosecutor never advised Mr. Gilliam or his attorneys that these witnesses had identified someone other than appellant.

The truck and its driver were towed to the Cloverleaf Amoco Station (R. 621), but the tow truck driver could not identify Mr. Gilliam as the driver. (R. 622).

The gas station attendant, Armando Rago, remembered fillng out a work order at the request of the driver, and calling a taxi cab for the driver because the mechanic would not be in until the next day. (R. 629).

Even though Mr. Rago could not identify the signature on the work order as belonging to Burley Gilliam, it was admitted into evidence as State's Exhibit No. 24, over Mr. Gilliam's objection as to lack of predicate. (R. 627; 645-648).

Metro Dade Police Department crime lab documents expert, Frank Norwitch, testified that he had taken handwriting exemplars from Burley Gilliam (State's Composite Exhibits 33 and 34). (R. 802-803). Based upon his comparison of the exemplars with the work order for the Cloverleaf Amoco Station (State's Exhibit 24), it was his opinion that all documents were authored by the same individual, Burley Gilliam. (R. 800).

Taxi cab driver, Freedie King, testified that in June, 1982, he worked for Metro Cab. On the afternoon in question (R. 652-653), he picked up a man at the Amoco Station. The cab driver described this man as being a nervous cigarette smoker, perhaps smoking Marlboros, whom he delivered to the 163rd Street bus station. He identified the gentleman as Burley Gilliam. (R. 654).

The trial judge allowed into evidence, over a defense objection, certain physical evidence found in the truck after a warrantless search. A right sneaker and white sock found inside

the truck formed a matching pair with a left sneaker and sock found at the lake. (R. 668-669). The medical examiner testified, over defense objection, that although it was outside of her area of expertise, she had performed certain experiments upon which she based her conclusion "to a reasonable medical certainty" that trauma marks on the decedent's head were caused by impact from those sneakers.

Dr. Souviron testified that certain marks found on the decedent's body matched Burley Gilliam's teeth. (R. 906-952). Dr. Souviron based his opinion upon certain photographs with overlays which had not been disclosed to Mr. Gilliam's attorneys despite a specific request made by written motion as well as at his deposition. (R. 900-906). The court refused to conduct a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971).

The jury returned a verdict of not guilty as to the count for grand theft, and guilty as to first degree murder and as to sexual assault (R. 1453-1455), however, the court had failed to instruct as to all lesser included offenses of capital murder.

The trial judge gave the jury a lunch break, then immediately conducted the penalty phase hearing. Mr. Gilliam initially requested to waive the advisory jury recommendation proceeding (R. 1065) or to be absent during that proceeding. When the trial judge denied his requests, Mr. Gilliam asked that standby counsel be dismissed (R. 1068-1069) and he refused to

participate. The Court refused to have Mr. Gilliam examined for competency and "assumed" (R. 1068) that he wanted to represent himself.

During the penalty hearing, however, Mr. Gilliam testified upon questioning by standby counsel. (R. 1096). He told the jury that he did not get a fair trial and asked the jury to sentence him to death. (R. 1096). Mr. Gilliam made no closing statement.

The trial judge, upon the jury recommendation (R. 1111), imposed upon Mr. Gilliam the sentence of death by electrocution. (R. 1126-1127).

The Court based its imposition of the death penalty upon finding three aggravating circumstances: (1) the capital felony was committed while engaged in the commission of sexual battery §921.141(5)(d), Florida Statutes; (2) Mr. Gilliam had been previously convicted of another capital offense involving the use of threat or violence, pursuant to §921.141(5)(b), Florida Statutes; and (3) the capital felony was especially heinous, atrocious or cruel under §921.141(5)(i), Florida Statutes. (R. 1461). The trial judge found no mitigating factors applied. (R. 1461).

The defense motion for new trial was denied (R. 1465-1466a), and this appeal followed.

SUMMARY OF ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING AND REFUSING TO HOLD A PATE HEARING TO DETERMINE WHETHER BURLEY GILLIAM WAS COMPETENT TO STAND TRIAL OR BE SENTENCED, THUS VIOLATING APPELLANT'S RIGHTS GUARANTEED UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS AS WELL AS FLORIDA'S STATUTES AND RULES.

The trial judge observed behavior in Mr. Gilliam which could have been interpreted either as reasonable grounds to warrant a competency hearing or that Burley Gilliam was faking incompetency. The trial judge committed reversible error in failing to order a competency hearing in accordance with Pate v. Robinson, 383 U.S. 375 (1966), but rather in guessing that the appellant was "crazy like a fox." The one evaluation ordered by the judge was inadequate because the one psychologist appointed testified that he did not perform a complete evaluation on Mr. Gilliam and was unaware that Mr. Gilliam was taking prescribed medication, which he conceded "might affect one's competency."

II

MR. GILLIAM DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO BE REPRESENTED BY COUNSEL AT EITHER THE TRIAL OR SENTENCING HEARING, AND THE COURT'S FAILURE TO ASCERTAIN HIS COMPETENCY VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Even if Mr. Gilliam was appropriately found competent to stand trial, the court utterly failed to ascertain whether he was competent to waive counsel, which is measured by a higher

standard. In addition, the Faretta inquiry did not establish that Mr. Gilliam voluntarily and intelligently waived that right, even if he was competent to do so.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE CONDUCT OF THE JURY SELECTION PROCESS.

Mr. Gilliam proceeded pro se at jury selection, as well as, during the trial and penalty phase. The court refused to allow Mr. Gilliam to back-strike prospective jurors before they were sworn, in direct contravention on this court's edict in Rivers v. State, 458 So.2d 762 (Fla. 1984). The entire selection process was tainted by prejudicial comments.

IV

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATE'S WARRANTLESS SEIZURE OF PHYSICAL EVIDENCE FROM THE TRUCK IN BURLEY GILLIAM'S POSSESSION AND CONTROL, WHERE THE TRUCK WAS NOT ABANDONED AND THE SEARCH WAS NOT VALIDLY CONSENTED TO.

Certain crucial evidence found in the truck at the Amoco station should have been suppressed because the warrantless seizure was unlawful. The truck had not been abandoned and the person with custody did not give permission for the search.

V

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENT MADE BY MR. GILLIAM WHICH WAS OBTAINED ILLEGALLY.

Likewise, the trial court erred in failing to suppress Mr. Gilliam's statements which were elicited after a request for an

attorney and in exchange for the delivery of his required medication.

VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL OR STRIKE THE MEDICAL EXAMINER'S OPINION THAT CERTAIN MARKS ON THE DECEDENT'S HEAD WERE CAUSED BY THE STOMPING OF A SNEAKER, SINCE THE WITNESS CONCEDED THAT SHE WAS NOT AN EXPERT IN THIS AREA.

During the trial, the medical examiner conceded that she was not an expert regarding testing for the cause of a certain head injury, but testified nonetheless as to her opinion within a reasonable medical certainty. The trial judge not only refused to strike her testimony or declare a mistrial, but exacerbated the problem by telling the jury that he had previously accepted her testimony as a medical expert, thereby commenting on her credibility.

VII

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE AND TESTIMONY CONCERNING PHOTOGRAPHS AND MODELS WHICH FORMED THE BASIS OF DR. SOUVIRON'S EXPERT OPINION THAT BITE MARKS WERE CAUSED BY BURLEY GILLIAM.

Despite a pretrial defense motion to produce models and photographs taken by the State's forensic ordontologist, so that a defense expert could examine them, the trial court refused to conduct a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), when at trial the expert produced such photographs with overlays, previously undisclosed to the defense, and based his testimony upon them.

VIII

THE COURT ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING WHEN COUNSEL LEARNED FOR THE FIRST TIME DURING TRIAL THAT TWO WITNESSES HAD IDENTIFIED SOMEONE OTHER THAN MR. GILLIAM AS HAVING BEEN THE DRIVER OF THE TRUCK AT THE SCENE OF THE MURDER.

The court also refused to hold a Richardson hearing when two witnesses revealed at trial for the first time that they had identified a man other than Burley Gilliam from a police photographic identification display as having been at the scene of where the body was found.

IX

THE COURT FAILED TO INSTRUCT THE JURY AS TO ALL NECESSARILY LESSER INCLUDED OFFENSES OF CAPITAL MURDER, AND MR. GILLIAM DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER ON THE RECORD, THUS REVERSAL IS AUTOMATICALLY REQUIRED UNDER HARRIS V. STATE.

The court did not instruct the jury on the lesser included offenses of capital first degree murder and Mr. Gilliam did not make a personal waiver on the record that was shown to be voluntary and intelligent. This requires automatic reversal in accordance with Harris v. State, 438 So.2d 787 (Fla. 1985).

X

BECAUSE OF ACTIONS AND INACTIONS BY THE PROSECUTORS AND BY THE TRIAL COURT, FUNDAMENTAL ERRORS OF CONSTITUTIONAL SIGNIFICANCE OCCURRED DURING MR. GILLIAM'S TRIAL, AND THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERRORS DENIED MR. GILLIAM HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Throughout the trial and penalty phase, the state took

advantage of the fact that Mr. Gilliam did not have a lawyer. The prosecutor failed to provide him with a complete list of witnesses or exhibits relied upon by experts at trial as well as at the penalty phase. The prosecutor rehabilitated witnesses on direct examination, and failed to lay the proper predicate for introduction of evidence. The court failed to remedy these errors and, more importantly, failed to give Mr. Gilliam a continuance so that he could be properly prepared for trial and sentencing.

XI

THE COURT ABUSED ITS DISCRETION IN ARBITRARILY REQUIRING AN ADVISORY JURY SENTENCING RECOMMENDATION, OVER MR. GILLIAM'S OBJECTION.

At the penalty phase, the court abused its discretion in denying Mr. Gilliam's request to waive the jury advisory sentencing proceeding. Since the pro se appellant was not prepared to rebutt the State's case or present mitigating evidence, it was a unique situation in which Mr. Gilliam's request should have been adhered to.

XII

THE COURT ABUSED ITS DISCRETION IN FAILING TO ORDER A PRESENTENCE INVESTIGATION REPORT PRIOR TO SENTENCING BURLEY GILLIAM TO DIE IN THE ELECTRIC CHAIR.

After the jury made its recommendation for the imposition of the death penalty, the court abused its discretion in failing to order a presentence investigation report so that an individualized sentence could be imposed.

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING AND REFUSING TO HOLD A PATE HEARING TO DETERMINE WHETHER BURLEY GILLIAM WAS COMPETENT TO STAND TRIAL OR BE SENTENCED, THUS VIOLATING APPELLANT'S RIGHTS GUARANTEED UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS AS WELL AS FLORIDA'S STATUTES AND RULES.

A. BURLEY GILLIAM WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

This Court, in Hill v. State, 473 So.2d 1253 (Fla. 1985), recently reviewed the law which controls the disposition of this issue. This Court recognized that the constitutional principles which guide the courts in determining whether to vacate a conviction and direct a hearing to determine competency to stand trial have been outlined by the United States Supreme Court in Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Pate v. Robinson, 383 U.S. 375. 96 S.Ct. 836, 15 L.Ed.2d 815 (1966); and Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

This Court reviewed these decisions with care in Hill, therefore only the relevant principles will be briefly summarized here. Dusky sets out "the test uniformly applied in this country to determine competency to stand trial."[1] In Dusky, the United

[1]This Court further noted that it has implemented the Dusky test in Florida Rules of Criminal Procedure 3.210 and 3.211, discussed at subsection C, infra.

States Supreme Court noted that:

> The test must be whether he [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him. (emphasis added)

362 U.S. at 402 (quotation marks omitted).

This Court found that the Bishop case:

> ... stands for the principle that the trial court must conduct a hearing on the issue of a defendant's competency to stand trial when there are reasonable grounds to suggest incompetency.

473 So.2d at 1256.

In the Pate v. Robinson decision, the Supreme Court expanded that point. There, the defendant was convicted of murder and was not given a hearing on his competence to stand trial. The United States Supreme Court found the court's failure to make such an inquiry deprived the defendant of his constitutional right to a fair trial. This Court explained the Robinson decision as follows:

> The Court rejected the reasoning of the Illinois Supreme Court that the evidence "was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's 'colloquies' with the trial judge." Id. (Citation omitted). In its opinion, the Court stated that, although "Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that only issue."

473 So.2d at 1257 (emphasis added).

This Court distilled the essence of the Robinson case that:

> The significance of the Robinson decision is that it places the burden on the trial court, on its own motion, to make an inquiry into and hold a hearing on the competency of the defendant when there is evidence that raises questions as to that competency. Further, the Robinson court recognized that mental alertness at trial is not sufficient to eliminate the need for a hearing if other information brings a defendant's competency into question.

473 So.2d at 1257-58. (emphasis supplied)

The hearing guaranteed by the Pate v. Robinson decision is called a Pate hearing. Pate, supra, 383 U.S. at 385, 86 S.Ct. at 842; Acosta v. Turner, 666 F.2d 949, 954 (5th Cir. Unit B 1982). A Pate analysis focuses on what the trial court did in light of what it then knew.

Finally, the Drope decision further elaborated on Pate v. Robinson:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors, standing alone may, in some circumstances, be sufficient.

420 U.S. at 180, 95 S.Ct. at 908.

The Court noted the difficulty of the task:

> There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the qustion is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id.

Applying these constitutional standards, it is clear that Burley Gilliam was denied his constitutional right to a fair trial below. The trial court both failed on its own motion, and refused upon numerous motions by standby counsel,[2] to order a proper evaluation of Mr. Gilliam, or to hold a hearing on his competence to stand trial. This was error of constituional dimension because the record demonstrates reasonable grounds to suggest incompetency. A defendant competent to stand trial at the commencement of his trial may become incompetent during the proceedings. The Supreme Court has cautioned that "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope v. Missouri, 420 U.S. 62, 181, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Indeed, Fla.R.Crim.P.

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[2]The trial court denied standby counsel's requests for competency evaluation even after the following behavior occured: (R. 218) (responses to attorneys not coherent); (R. 311-12) (Mr. Gilliam fell asleep for 21 minutes; when he awoke, he had to hold his head up; tripped over a chair on way to sidebar and appeared impaired); (R. 363-64) (when medication was late, Mr. Gilliam mumbled a few words, started to quiver, went to his knees, then burst into tears); (R. 366) Mr. Gilliam was sitting on the floor, holding his head saying that he had a migrane and was exhausted after not sleeping for four days; (R. 511-12) ("I can hardly hold my eyes open. I need to see a doctor."); (R. 590-92) ("I'm under some heavy medication ... enough to knock a horse down. I don't even know what's going on ..."); (R. 578) (trembling and shaking); (R. 784-85) (crying and throwing papers on the floor); (R. 899-900) (confusion regarding substitution of attorneys); (R. 982) (Mr. Gilliam confuses the trial judge with a television game show host); (R. 986) (Mr. Gilliam claims that he has consulted some lawyer in the street other than his standby counsel).

3.210(b) requires a competency evaluation if reasonable grounds to question the defendant's competence emerge "before or during the trial." Each of the three factors outlined in Drope will be separately applied to the facts of this case in the following subsections. Each factor, standing alone, may be sufficient to warrant reversal.

1. Mr. Gilliam Acted Irrationally.

The first factor outlined in Drope is the defendant's irrational behavior, which must be considered in determining whether a Pate hearing should have been conducted. There is no question that Mr. Gilliam acted irrationally. The standard for rational action against which Burley Gilliam's conduct should be measured is that of an ordinary man on trial for his life. Measured against this standard, Mr. Gilliam acted irrationally throughout the trial. Rather than cooperate with counsel, he discharged appointed counsel on two occasions and proceeded to trial with only standby counsel. Rather than participate in voir dire, he acted in a manner which the trial judge found precluded effective participation.[3] The transcript reflects that during trial Gilliam was more concerned with when he would be served lunch (R. 648-49), what was for lunch (R. 682;899-900; 954), where he would eat lunch (R. 954-56), how he would be escorted to

[3]See issue III, infra for a description of Mr. Gilliam's conduct during voir dire.

and from the jail (Supp. R. 50), which jail personnel would escort him (R. 437); which jail personnel would be permitted to search his legal materials (R. 579-581; 851), and when the library would be open (R. 581; 848-51), than he was with the legal matters which would determine whether he would live or die. Mr. Gilliam was so constantly preoccupied with the details of when and what he would eat that the trial judge once exclaimed, "... get him something to eat. I don't care if Merritt Stearheim [the county manager] has to do it, get him something to eat. ..." (R. 956). The episodes demonstrate Mr. Gilliam's lack of proper perspective.

Mr. Gilliam was also obsessed with his own death. He advised the judge in the pre-trial proceedings that if convicted he wanted to be sentenced to death (Supp. R. 53). Throughout the trial there were several ghoulish exchanges between Mr. Gilliam and the trial judge where Mr. Gilliam flirted affectionately with the concept of being electrocuted. In discussing how many more witnesses would be called, Burley Gilliam estimated he would have twenty-five, and the following discussion ensued:

> The Court: Have all 25 here tomorrow because we are going to roll.
>
> * * *

(R. 571).

> Prosecutor: I'm assuming that the witnesses the defendant is referring to would be relevant to the penalty phase as opposed to the evidentiary phase?

> The Court: He will tell me that tomorrow. You'd better start cooking with gas here.
>
> The Defendant: Electricity works better. Have you heard the expression, "getting juiced?"

(R. 572). (Emphasis added)

Another time, Burley Gilliam commented, "I will be smilling all the way to the [electric] chair." (R. 831-832).[4]

Throughout the trial, Gilliam engaged in other blatant self-defeating behavior. Mr. Gilliam through his own cross examination of witnesses brought out evidence, unknown to the prosecutor, which placed him at the topless bar, and assured his own conviction.

For example, the court noted that after Mr. Gilliam's cross examination of Jeff Sherry, "there is no question in anybody's mind" that Mr. Gilliam was in the bar where the murdered girl worked. (R. 636). In another instance, when cross examining the cab driver who identified Gilliam as being the passenger whom other evidence tended to link to the crime, Gilliam made the witness get off the stand, come near him, then accused: "You were not so sure until you heard me talking though, were you?" (R. 657). The cab driver replied, "... we didn't have a conversation in the cab so I couldn't remember your voice." (R. 657).

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[4]The record reflects that Mr. Gilliam was indeed inappropriately smiling at the time the trial judge was reciting his reasons for imposing the death sentence. (R. 1124).

Mr. Gilliam's cross examination of Shelton Merritt began more like a confession than a cross examination. (R. 753). It covered such irrelevant topics as Burley Gilliam's feelings about chicken for lunch (he hates it) (R. 755) and that he didn't start shaving until he was twenty-five (R. 755). During that cross examination, he broke down and cried. (R. 756).

Similar self-defeating behavior was observed in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983). In that case, the court found that Goode's attempt to convict himself and assure his own death sentence did not render the trial fundamentally unfair, but the court acknowledged:

> ... these as facts raising serious doubts as to Goode's competence.

704. F.2d at 601 n.6.

The Eleventh Circuit, however, looked to the adequacy of the psychiatric examinations and found that the psychiatrists had taken Goode's intentions into consideration and "after full fair and adequate hearing, the state trial judge found that Goode was competent." 704 F.2d at 601 n. 6. Based upon three fully informed psychiatric opinions, the court agreed.

While self-defeating behavior is not proof positive of incompetence, it is found in cases involving mental illness. See, e.g., Gray v. Lucas, 677 F.2d 1086, 1094-95 (5th Cir. 1982) (test showing 95% probability of marked disturbance noted "RESPONSES ARE INAPPROPRIATE, UNREALISTIC AND SELF-DEFEATING"); Henderson v. United States, 360 F.2d 514, 517 (D.C. Cir. 1966)

(Bazelon, J., concurring, quoting a psychiatric report, which found the defendant's self-defeating behavior in directing his counsel to abandon the issue of insanity on appeal "is materially motivated by his impaired mental condition" (emphasis in text), and noting "Not infrequently, persons who have had a psychotic break wish to deny that they are in any way mentally ill, when their acute symptoms are in remission." Mr. Gilliam refused to allow his first attorney to enter a plea of not guilty by reason of insanity (Supp. R. 62), even though the attorney announced in court that his defense hinged on his insanity. (Supp. R. 62). Mr. Gilliam did not defend the case on that basis.

There is really very little question that Mr. Gilliam was acting in a manner different than one might expect of a man on trial for his life. The trial court attributed this to cleverness rather than irrationality.[5]

The court committed reversible error because it made this critical determination without the benefit of a full evaluation and without a Pate hearing. As this court noted in Hill, the court is required to make inquiry and hold a hearing "when there is evidence that raises questions" about competence. 473 So.2d at 1257. The court's conclusion that Mr. Gilliam was not

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[5]The Court: ... As far as your incompetency, I don't think you are incompetent at all Mr. Gilliam. I think you are clever. I think you are cunning. I think you are manipulative ... (R. 1122).

irrational, but clever, cunning and manipulative, rather than irrational, shows that the trial judge observed evidence that raised questions concerning competence, and resolved those questions without a hearing.[6]

It is no doubt difficult to fully capture in recitations from a cold record the subtleties which convinced the trial court that Mr. Gilliam was clever, cunning and manipulative, or which moved the trial judge to send Dr. Haber to interview Mr. Gilliam on that one occasion, in recitations from a cold record. Nevertheless, such evidence must have existed, because the trial court did initially find reasonable grounds to warrant an evaluation and throughout the trial the judge felt compelled to justify his decision to proceed without a full and complete competency evaluation and hearing.

The court failed to hold a Pate hearing because it incorrectly viewed the evidence that might lead it to find Mr. Gilliam competent at the Pate hearing as sufficient to dispense with the hearing altogether. Thus, the court noted that Mr.

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[6] Similarly, the court's decision to have Dr. Haber examine Mr. Gilliam is proof that the court observed evidence that raised questions about competence. The court never proceeded to require a full evaluation or hold a hearing when it summarily concluded Mr. Gilliam had refused to be interviewed. At least one court has held that whenever a court orders a psychiatric examination as to the defendant's present competency, then a bona fide doubt is immediately established as a matter of fact and as a matter of law. Brizendine v. Swenson, 302 F.Supp. 1011, 1019 (W.D. Mo. 1969).

Gilliam was "very sharp, responsive" (R. 786), that he "at all times has been conducting himself as a gentleman. He has never been disrespectful of the court. He has had no problem communicating with the court." (R. 1066). The court also stressed the fact that he objected quickly and "most of [Mr. Gilliam's] objections were legally sound objections" (R. 1122) and that he "knew more about hearsay than some of the lawyers practicing in these courts" (R. 1122) and that he had "miraculous recoveries" every time the jury was excused. (R. 1122).

Of course, the proper focus is on the fact that the court recognized that there was something occurring from which Mr. Gilliam was recovering while the jury was in the courtroom. It is that something, which may be feigned or may be real, which is the "evidence" which this court and the United States Supreme court have held requires the trial judge to inquire further and hold a hearing.[7] The error committed here was the same error

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[7]The trial court in Estelle v. Smith, 451 U.S. 454, 457 n.1. (1981):

> The psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial on his sanity at the time of the offense. The trial judge later explained: "In all cases where the stae has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt."

committed in Pate v. Robinson. As in Pate, the court relied upon evidence relevant to sanity to dispense with a hearing on that issue.

2. The Defendant's Demeanor At Trial.

The trial court was on notice that Mr. Gilliam's demeanor was suspect. Perhaps it was a change in Mr. Gilliam's demeanor when the jury entered and left the courtroom that led the court to observe his "miraculous recoveries." (R. 1122). Certainly, Mr. Gilliam did not look well when Detective Merritt was on the stand. Merritt testified that, when he last saw Mr. Gilliam 1-1/2 years ago, "[Mr. Gilliam] was in a lot better shape than he is looking right now." (R. 719). Mr. Gilliam at one point "appeared to be in a trance" prompting the trial judge to sua sponte request his bailiff to see if Mr. Gilliam was breathing. (R. 452-53). The trial judge noted that he observed Mr. Gilliam "ricocheting off the wall." (R. 452-53). Mr. Gilliam was observed closing his eyes, putting his head down, shaking his head, and falling asleep. (R. 529-30). During the cross examination of Detective Merritt, Mr. Gilliam broke down and cried, exclaiming "Stay away." (R. 756). The prosecutor asked that the jury be taken out of the room so Mr. Gilliam could compose himself. (R. 756). Repeated requests for evaluation in connection with these incidents were denied. (R. 530; 756).

It is in the area of demeanor that the written record is of little help. As Learned Hand noted in National Labor Relations

Board v. Universal Camera Corp., 179 F.2d 749, 752 (2nd Cir. 1950) rev'd on other grounds sub nom. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), [o]bviously no printed record preserves all the evidence, on which any judicial officer bases his findings." Something in Mr. Gilliam's demeanor was suspect. Precisely what that was may never be known. Because the manifestations for which we search are wide ranging and subtle, Drope, 420 U.S. at 180, 95 S.Ct. at 900, and because they may have vanished like dew from the face of the record, we must accord great weight to the trial court's reaction to them. Clearly, he saw something which deviated from normally accepted behavior. The trial judge interpreted that something as faking, but made that interpretation without benefit of expert evaluation or a Pate hearing. Therefore, this court should reverse the conviction and remand for a Pate hearing.

3. Prior Medical Opinion.

Unfortunately, there was very little medical evidence developed in this record. This was perhaps a result of Mr. Gilliam's refusal to permit the insanity defense and because he proceeded to trial without counsel. The trial judge did know that Mr. Gilliam was taking psychotropic medication (R. 1325) and had a history of serious personality disturbances that could deteriorate. (R. 1325). The trial judge also knew that Mr. Gilliam had been diagnosed as suffering from epilepsy and was receiving medication during the trial. (R. 219; 230; 276-77).

The record reflects that the trial judge felt the medicine important enough to Burley Gilliam's ability to function that the court took "great pains" to assure it was administered. (R. 786). The record also reflects that at least two powerful medications, dilantin and phenobarbital, had been prescribed for Mr. Gilliam, and that they were not always timely and/or properly administered throughout the trial. (R. 192; 219; 222; 230; 363; 675; 678).

The well-respected medical hornbook, Harrison's Principles of Medicine, describes the effects of epilepsy and the drugs Mr. Mr. Gilliam was taking at the time of trial:

> "Not infrequently, the convulsive disorder [epilepsy] is but one manifestation of a widespread static cerebral disease that in itself interferes with education and work ...
>
> As with all medications, there are side effects. Toxic levels may cause confusion, stupor or coma. Diphenylhydantoin [otherwise known as Dilantin] may induce cerebellar atoxia, nystymus, ocular palsies, asterixes, chorea, or choreoathetosis; chronic overdoes may leave in its wake a permanent cerebellar atoxia due presumably to degeneration of Pukinje cells. Chronic use of barbituates leads to addiction and withdrawal effects."

Harrison's Principles of Internal Medicine, at pp. 138-139, K. J. Issebach, M.D., editor (9th ed. 1980 McGraw-Hill Book Co.) (Emphasis added).

> "The toxic effects of phenobartital, which are drowsiness and mental dullness, nystagmus, and staggering, should be used as indications of excess dosage ... Dilantin ... leads to atoxia, stupor, or coma if given in excess dosages."

Harrison's Principles of Internal Medicine, at p. 138, K. J.

Issebach, M.D., editor (9th ed. 1980 McGraw-Hill Book Co.) (Emphasis added).

Mr. Gilliam's standby counsel noted "I think he wakes up and at times is real clear." (R. 530). Standby counsel attributed that to the medication and advised the court that an evaluation was necessary. (R. 530). Standby counsel repeatedly requested both a medical (R. 365; 373; 530; 678) as well as psychiatric examination.

The fact that Mr. Gilliam was being maintained on such powerful drugs could, itself, explain much of his behavior and could be a basis for determining the defendant was not competent to stand trial. In Lopez v. United States, 439 F.2d 997 (9th Cir. 1971), Lopez was examined by a psychiatrist appointed on his counsel's motion. The psychiatrist reported he was competent to stand trial, and the judge found him competent. He pled guilty. Lopez then moved to vacate his conviction. The trial court denied the motion as frivolous. The Ninth Circuit reversed. Lopez entered the plea while confined in the "psycho ward" at the Los Angeles County Jail and, during that time was being given phenobarbital, dilantin and musline. Like Burley Gilliam here, he had an epileptic history. The court found that Lopez' claim that he was under the influence of drugs and had been misled by his counsel required reversal for an evidentiary hearing notwithstanding the fact, related in the dissent, that the trial judge had observed the defendant's demeanor while taking the plea.

Similarly, in this case, where powerful drugs are being administered during trial, and where the record does not reflect the relevant medical and factual details of that administration, and where no hearing was held to inquire whether the administration of drugs was related to Mr. Gilliam's strange behavior, he was denied a fair trial. See also Osborne v. Thompson, 481 F.Supp. 162 (M.D. Tenn. 1979) (habeas corpus relief granted where petitioner, who was a heavy drinker with a history of seizures for which dilantin was prescribed, presented evidence of mental problems and trial court failed to hold competency hearing in connection with entry of judgment on guilty pleas).

Thus, while the record contains scant medical evidence, what little medical evidence is found in the record raises grave doubts concerning Mr. Gilliam's competence. The judge's concern that Mr. Gilliam be promptly medicated during the trial suggests that it had doubts about Mr. Gilliam's ability to function when he was not medicated. Those doubts should have been explored by a qualified psychiatrist and considered in a Pate hearing. Therefore, reversal is required.

4. All the factors, considered together, demonstrate the error of failing and refusing to conduct a Pate hearing.

Although each of the three factors outlined in Drope have been reviewed separately, they obviously overlap and should be considered together as well. When viewed as a whole, they show a man whose behavior is inappropriate, erratic, and self-defeating,

whose demeanor at trial appeared poor to the detective who investigated the crime, and who is being medicated regularly at the court's direction during trial. Although the charge was murder and the penalty death, no inquiry was made when evidence raising competency was observed. Instead, the court resolved, without a full psychological examination and without a hearing, that the defendant was a fraud. This court must reverse the conviction.

5. The Court's only inquiry into Mr. Gilliam's competence was totally inadequate.

The only inquiry which the Court made into Burley Gilliam's competency was legally insufficient.[8] It occurred five days before Burley Gilliam's trial was scheduled to begin. At that time, Burley Gilliam requested that the court remove his appointed attorneys from the case. Based upon his responses in the course of a Faretta[9] examination, his attorney at that time made a request for an emergency competency evaluation. (R. 174;

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[8]For purposes of comparison, in the competency hearing held in the state court proceeding reviewed in Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985), ten witnesses testified for the defense, including three psychiatrists. Seven witnesses wer called by the state. In Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984), seven witnesses were called on behalf of the defense, including a psychiatrist and a psychologist. The state called seven witnesses.

[9]Faretta v. California, 422 U.S. 806 (1975); see issue II infra for additional facts concerning the determination that Mr. Gilliam would proceed pro se.

176). The prosecutor had no objection. (R. 177). The court ordered an evaluation be done immediately, returnable the next day. (R. 177). The court appointed Dr. Leonard Haber (R. 179), a licensed clinical psychologist in the State of Florida (R. 185), and ordered him to go to the jail forthwith and examine Mr. Gilliam. (R.180). The following day, January 23, 1985, Dr. Haber testified that, on the preceeding evening, he had gone to the Dade County jail and attempted to conduct a competency evaluation on Mr. Gilliam. (R. 185). Dr. Haber testified that he was only able to speak with him for "less than five minutes" (R. 186) which is "not a usual competency examination."[10] (R. 186). Nevertheless, Dr. Haber believed that he was able to render an opinion as to Mr. Gilliam's competency based upon the interaction that he had with Gilliam, his observations of Mr. Gilliam in the courtroom on the previous morning, and upon the competency examination he had performed pursuant to court order over a year earlier, on November 8, 1983. (R. 186-187). Dr. Haber testified:

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[10]The Eleventh Circuit Court of Appeals in describing an adequate hearing on the issue of competency to stand trial, relied upon the length and comprehensiveness of the personal interview. In that case, "Each of three court-appointed psychiatrists examined Goode twice. Dr. Than's first examination took about three and a half hours; his second about two and a half hours. Dr. Haber's first examination was extensive, and his second took about two hours. Dr. Wald also examined Goode twice and was satisfied that he had adequate information upon which to base his opinion." Goode v. Wainwright, 704 F.2d 593, 597 n.3 (1th Cir. 1983).

> In my opinion, Your Honor, based upon my evaluations, previous contact and contact with defendant last night, I believe that he is competent to stand trial. (R. 187).

On cross examination, Dr. Haber admitted that he had not performed a complete competency examination on Mr. Gilliam either during the preceding evening or on that morning (R. 188), and he further admitted that he based his opinion upon the examination he performed over a year earlier in November of 1983. (R. 187-188).

Dr. Haber conceded that he did not know whether certain medications had been ordered for Mr. Gilliam or whether or not he was receiving required medication. Dr. Haber acknowledged that phenobarbital is a medication sometimes used to control seizures (R. 188) and that dilantin is a medication frequently used to control seizures. (R. 190). Dr. Haber testified that such medications might effect one's competency. (R. 190). The record reflects that it is uncontroverted that Mr. Gilliam was reliant upon such medication (R. 230; 434; 589-90). In fact, he had problems receiving needed medication and the court had on several occasions ordered the jail medical staff and the corrections officers to provide him with such medication. (R. 192; 276-77; 314; 404-05; 434; 786).

The court was therefore aware that Dr. Haber had been unable to perform a proper competency evaluation,[11] that Mr. Gilliam was under medication that he sometimes did not receive and that Dr. Haber's opinion concerning competency had been made without knowledge of either the prescribed medication or the fact that Mr. Gilliam had problems obtaining it. The court was also aware from Dr. Haber's testimony, that such medication might affect competency. Despite this information, the court failed and refused to order a proper evaluation. This was reversible error.

It appears that the court's failure to order a proper evaluation was based upon a misunderstanding of its responsibility under applicable law. When defense counsel sought to inquire whether Dr. Haber knew whether or not Mr. Gilliam was receiving the required dosage of phenobarbital, the court interrupted saying:

> The Court: ... I think you are getting a little bit beyond the purpose of this inquiry. Now, the record will reflect, and the doctor testified, that Burley Gilliam refused to be interviewed yesterday. It is

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[11]For comparison purposes, in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), the court found that Goode received an adequate hearing on the issue of competence where three court appointed psychiatrists (including Dr. Haber) and one defense psychiatrist personally examined the defendant twice. Each read at least the relevant parts of an exhaustive, 187-page report on Goode's educational, psychological, familial, and criminal background, which was completed less than a year before Goode's Florida trial. The psychiatrists were satisfied that they had sufficient information to reach an opinion s to Goode's competence. Id. at 597.

> obvious why he is refusing to be interviewed, because it is on the eve of trial.

(R. 189).

It is clear from the trial judge's statements that he had made up his mind regarding Mr. Gilliam's competency without the benefit of the full and complete examination required by law.

In fact, the trial court seemed predisposed to treat all of Mr. Gilliam's strange behavior as cunning without inquiry. It had apparently decided early on that Mr. Gilliam was faking, and all its rulings on motions by standby counsel for evaluation were apparently denied based upon that assumption. Unfortunately, the court seemed to base its conclusion that Mr. Gilliam was a fraud on things like Mr. Gilliam's skill at making hearsay objections (R. 1122), things which fall within the impermissible area outlined in Hill.

Such matters can be considered in determining competence in a Pate hearing, but not in denying requests that the question of competence be explored. The fact that strong drugs were being administered by the court, that no psychiatrist had examined Mr. Gilliam, that the only psychologist who examined Mr. Gilliam did not know crucial facts and had not made a full evaluation should have made the court more open to full inquiry. Given the irrevocable finality of the sentence imposed, there was no excuse for failing to fully inquire concerning Mr. Gilliam's competence to stand trial.

Just as in Gibson v. State, 474 So.2d 1183 (Fla. 1985), the

court below committed the reversible error of finding the defendant competent by relying on past medical reports and the court's own observations.

A proper inquiry would have involved the appointment of competent psychiatrists to evaluate Mr. Gilliam and participate in an evidentiary hearing to determine if he is competent to stand trial. Due process requires that appointed psychiatrists render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Section 768.45(1) Fla. Stat. (1983). In psychiatry, as in other medical specialties, the standard of care is the national standard of care recognized among similar specialists, rather than a local "community"-based standard of care. Section 768.45(2)(b) Fla. Stat. (1983). It is this standard which Dr. Haber failed to meet.

First, the record reflects that Dr. Haber was a clinical pschologist and not a psychiatrist. (R. 185). The instant case is readily distinguishable from Ross v. State, 386 So.2d 1191 (Fla. 1980) in which this court held that the trial court did not abuse its discretion in failing to appoint a psychiatrist after the defendant was determined competent by a psychologist. This court grounded its decision in Ross on two factors, 1) the psychologist unequivocably stated his opinion that Ross was competent and testified that his opinion would not be altered

even if he were told defendant had organic brain damage (386 So.2d at 1196), and 2) Ross did not present any evidence which demonstrated a need for further medical examinations. 386 So.2d at 1195.

The instant case is more akin to the Louisiana decision of State v. Bennett, 345 So.2d 1129 (La. 1977) considered by this court in Ross, supra, at 1196. Here, Dr. Haber was unable to conduct a full examination, but rather relied upon prior medical reports and "previous contact" (R. 187) as disapproved by this court in Gibson v. State, 474 So.2d 1183 (Fla. 1985).

Because of his inability to fully exam Mr. Gilliam, the psychologist here, unlike the psychologist in Ross, supra, was unable to provide the trial court with an unequivocal opinion as to competency. More over, Dr. Haber conceded that he was unaware that Mr. Gilliam was taking phenobarbital and dilantin. That may have altered his opinion because he admitted that those medications were used to control seizures (R. 188, 190), and "might affect one's competency." (R. 190).

Thus, the trial court abused its discretion in failing to appoint a psychiatrist to perform the necessary tests and evaluation when Mr. Gilliam presented information which warranted more sophisticated examination. C.f., Ake v. Oklahoma, 470 U.S. ____, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

In the context of diagnosis, exercise of proper "level of care, skill, and treatment" requires adherence to the procedures

that are deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient but he or she must also employ methods that are recognized as necessary and customary by similar health care providers as being acceptable under similar conditions and circumstances." 36 Fla.Jur.2d, Medical Malpractice Section 9, 147 (1982). See also, Olschefsky v. Fischer, 123 So.2d 751 (Fla. 3d DCA 1960). Because the below-standard evaluation of Mr. Gilliam resulted in an erroneous diagnosis, the inquiry focuses upon the acceptable methods of diagnosis of a person presenting symptoms that include violent and antisocial behavior.

Competent psychiatric specialists doing complete evaluations seek not only to discover psychiatric and psychological disorders, but also the existence of brain damage:

> Psychiatrists have a clear responsibility to search out organic causes of psychic dysfunction either through their own examinations and workups or by referral to competent specialists. As we learn more and more about the manner in which the physical dysfunction produces psychological dysfunction, the psychiatrist assumes an increasing medical obligation to ascertain that the patient's physical condition is thoroughly evaluated.

S. Halleck, Law in the Practice of Psychiatry 66 (1980). Because of this widely accepted principle, "only in the absence of organic, psychotic, neurotic or intellectual impairment should the patient be ... categorized [as suffering antisocial

personality disorder] J. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry 1866 (4th Ed. 1985). A careful evaluation includes the assessment of medical and organic factors.

The method of assessment must include the following, which Dr. Haber omitted[12]:

(a) An accurate medical and social history must be obtained. Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub and F. Black, Organic Brain Syndromes 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." Kaplan and Sadock, at 837. See also, J. McDonald, Psychiatry and the Criminal, 102-03 (1958) (emphasizing the singular importance of a "painstaking clinical history" in order to differentiate an underlying seizure disorder from an antisocial personality disorder). Among other matters, the medical history must ascertain whether the patient ever experienced serious head injury, and if so, whether the patient's personality changed in the wake of that injury. See Kaplan and Sadock, at 489, 877 (explaining that the organic personality

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[12]This Court considered a similar argument in Ronnie L. Jones v. State of Florida, 478 So.2d 347 (Fla. 1985) (a capital case), and the following argument concerning methods of assessment is found in the brief of appellant in that case also.

syndrome "is characterized by a marked change in personality that is attributable to some specific organic factor," which most commonly is a closed head injury). See also, Strub and Black, at 42-44.

(b) Historical data must be obtained not only from the patient, but from sources independent of the patient. It is well recognized that the patient is often an unreliable data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan and Sadock, at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> It is impossible to base a reliable reconstructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> It is impossible to base a reliable reconstructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and

> psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock, at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d Edition 1965).

Dr. Haber did not seek relevant data from sources other than Mr. Gilliam. He did not have time to.

(c) A thorough physical examination (including neurological examination) must be conducted. See, e.g., Kaplan and Sadock, at 544, 837-38, and 964; McDonald, at 48. Although psychiatrists may choose to have other physicians conduct the physical examination, Kaplan and Sadock, at 544, psychiatrists

> still should be expected to obtain detailed medical history and to use fully their visual, auditory, and olfactory senses. Loss of skill in palpation, percussion, and oscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of the indication of somatic illness, subtle as well as striking, should also be part of their function.

Kaplan and Sadock, at 544.

No such exam was conducted by Dr. Haber.

(d) Appropriate diagnostic studies must be undertaken in light of the history. The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures, may be critical to determining the presence or absence of organic brain damage. Among the available diagnostic tests developed to detect such disorders -- neuropsychological test batteries -- have proven to be the most valid and reliable diagnostic instrument available. See Filskov and Goldstein, Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, and Snow, The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment, 162 J. of Nervous and Mental Disease 360 (1976); J. McDonald, Psychiatry and the Criminal, 102-03 (1958).

No neuropsychological testing was done by Dr. Haber. If it had been, Mr. Gilliam's epilepsy would have been found. In short, Dr. Haber conducted no testing for organic brain damage. Dr. Haber's evaluation is unreliable, and Mr. Gilliam was denied his constitutional right to a fair trial because he was tried while incompetent to stand trial and the trial court failed to provide him with a proper Pate hearing for such determination.

B. THE TRIAL COURT'S FAILURE TO ORDER A MENTAL COMPETENCY EVALUATION PRIOR TO THE PENALTY HEARING OR AT LEAST PRIOR TO IMPOSITION OF SENTENCE REQUIRES REVERSAL AND A NEW SENTENCING HEARING.

Even if a defendant is competent to stand trial, the issue of his competence to participate at other stages of the criminal proceedings may arise. See Lane v. State, 388 So.2d 1022, 125 (Fla. 1980). It has long been recognized in Florida that "if at any time while criminal proceedings are pending against a person accused of crime, whether before or during or after the trial, the trial court ... has facts brought to its attention which raise a doubt of the sanity of the Defendant, the question should be settled before further steps are taken." Brown v. State, 245 So.2d 68, 70 (Fla. 1971), modified on other grounds 408 U.S. 938.

After the jury returned its verdict, standby defense counsel advised the judge that Mr. Gilliam wanted to address the court against the advice of standby counsel, whereupon Mr. Gilliam told the court:

> Burley Gilliam: I would like to waive this part of the trial, Judge Mastos, and if it means death, give it to me.

(R. 1065).

As a result of this behavior, as well as his behavior during the preceeding four days, standby defense counsel again renewed his request for an emergency evaluation. (R. 1065). The court denied the request for competency evaluation, and stated:

> The Court: The Court finds that all times he has been competent but I don't think Mr. Gilliam, that you can waive. I don't think this is one of those rights.

(R. 1066).

Burley Gilliam argued with the judge, stating: "Judge, I prefer death over life." (R. 1066).

After some discussion between the court and Burley Gilliam, the prosecutors told the court that Mr. Gilliam did not have the right to waive the advisory sentencing hearing but that he should be readvised of his right to be represented by counsel because this is a separate proceeding. (R. 1067).

Standby defense counsel suggested that since the court was giving the State an hour or two to get their witnesses to the penalty phase, that during that lunch break the court should order a doctor to evaluate Mr. Gilliam. (R. 1067). The court refused to order a competency evaluation, in direct violation of Fla.R.Crim.P. 3.740, which requires the trial judge to -- "immediately" postpone sentencing and appoint experts to examine the defendant if reasonable grounds exist to believe the defendant is insane.

Rather, the court advised Mr. Gilliam that he had the right to have standby counsel actually represent him in the penalty phase. Mr. Gilliam, however, stated that he wanted them dismissed from the case and out of the courtroom altogether. (R. 1068-1069). Standby counsel asked to be discharged (R. 1069), however, the court refused and requested that they remain in the courtroom.

Within the hour Mr. Gilliam had apparently radically changed

his mind regarding counsel. After the State rested its case on penalty, Mr. Gilliam asked for a side bar stating that his standby attorney had a motion that Burley Gilliam had requested him to make. (R. 1091). Standby counsel advised the judge that against the advice of both standby attorneys, Mr. Gilliam wanted to take the stand and testify. Rather than removing the jury and conducting a full inquiry of Mr. Gilliam, as requested by standby counsel, the court inquired of Mr. Gilliam at side bar as to whether or not he was voluntarily testifying. (R. 1092-1093).

The following is the full extent of Burley Gilliam's testimony:

> Examination begins by Mr. Adelstein:
> Q: Burley, State your name.
> A: Burley Gilliam, Jr.
> Q: How old are you?
> A: Thirty-six.
> Q: Do you want to make a statement to this jury?
> A: Yes. I want you to sentence me to death. That is what I want. I don't want to spend the rest of my life in prison.
> Q: Is there anything else you would like to say?
> A: That is it.
> Adelstein: I don't have any further questioning.

(R. 1096).

Upon the court's questioning as to whether Mr. Gilliam had anything else, Mr. Gilliam began arguing with the judge regarding his inability to call witnesses and acusing the judge, "You denied me all of the witnesses." (R. 1097). The court denied Mr. Gilliam's renewed motion for continuance so that he could

call witnesses for the sentencing hearing. (R. 1097).

Although the prosecutor made a closing argument, Burley Gilliam announced that he no argument for the jury. (R. 1103).

A majority of the jury, by vote of 12 to 0, advised and recommended to the court that it impose the death penalty upon Burley Gilliam. (R. 1111).

After the court dismissed the jury (R. 1112), standby counsel again requested that prior to sentencing, the court have Mr. Gilliam evaluated both medically and psychiatrically. (R. 1121). The court again denied that motion. (R. 1121).

Just before the court ended its lengthy explanation of its ruling, the judge noted that Burley Gilliam was smiling at the court. (R. 1124). Notwithstanding Mr. Gilliam's clearly inappropriate behavior which showed a lack of appreciation for the proceedings at hand, the court did not order any evaluation, but rather imposed the sentence of death in the electric chair, for the first degree murder charge, as well as sentencing him to 134 years in the state penitentiary on the count of sexual battery, to run concurrent with the death sentence. (R. 1126-1127). Upon the prosecutor's advice on the law, the court changed the sentence on the sexual battery count to life or 40 years.

The court based its imposition of the death penalty upon finding three aggravating circumstances: (1) The capital felony was committed while engaged in the commission of sexual battery

§921.141(5)(d), Florida Statutes; (2) Mr. Gilliam had been previously convicted of another capital offense involving the use of threat or violence, pursuant to §921.141(5)(b), Florida Statutes; and (3) the capital felony was especially heinous, atrocious or cruel under §921.141(5)(i), Florida Statutes.

A defendant competent to stand trial nonetheless may become incompetent following his conviction and before sentencing. Here, no penetrating inquiry occurred with regard to whether Mr. Gilliam understood the nature of the sentencing proceeding or whether he had a complete comprehension of the possible outcome.

Mr. Gilliam's initial waiver of the advisory jury and despondent request for the death penalty signaled a break down in his ability to understand and rationally appreciate the nature of the proceedings. Standby counsel requested an emergency competency evaluation and since the trial had concluded on a Friday, counsel asked that the sentencing take place on Monday, so that a mental competencey examination could be performed over the weekend. (R. 1065). But the court retorted that:

> Mr. Gilliam at all times has been conducting himself as a gentleman. He has never been disrespectful of the court. He has had no problem communicating with the court.

(R. 1066).

The court, in an effort to get the case over with as soon as possible (R. 1066), found that Mr. Gilliam was and had been at all times competent, and refused to order any evaluation despite Mr. Gilliam's confused and irrational behavior. The court could

at least have had an expert examine Mr. Gilliam during the lunch recess as suggested by standby counsel.

When Mr. Gilliam told the judge that he did not intend to call any witnesses or talk to the jury, and he asked standby counsel dismissed from the case and out of the courtroom (R. 1068-1069), the prosecutor suggested that the court instruct Mr. Gilliam "as to what the penalty phase is all about and what his alternatives are. (R. 1068). But even such minimal precautions were not taken because the judge relied upon an incompetent's representation that he understood:

> The Defendant: I know what it is all about so let us get it over. I just want to waive this.
>
> The Court: Fine. What we will do then, due to the hour, it being 11:15 ... take the jury to lunch ... and return at 12:30 to begin the sentencing phase.

(R. 1069).

Within the hour, Mr. Gilliam had completely changed his mind. He wanted to testify with the assistance of standby counsel. Again, at that point and especially after Mr. Gilliam testified and argued with the judge, a competency evaluation should have been ordered and was not.

It is clear that the judge need not order a clinical examination before sentencing, however, in the absence of some evidence suggesting incompetence. Gray v. State, 310 So.2d 320 (Fla. 3d DCA 1975). Where "reasonable ground to believe that the defendant may be incompetent to be sentenced," however, the court

must set a hearing to determine the issue. Rule 3.740.

Upon discharging the advisory sentencing jury, the court, as required under Fla.R.Crim.P. 3.710(a), asked whether there was any legal reason why sentence should not be imposed on this Defendant at this time? Standby defense counsel responded:

> Mr. Adelstein: Yes. You know. It is my position that Mr. Gilliam has been incompetent not only today but throughout the entire proceedings and I would ask Your Honor, prior to sentencing, to once again, to immediately have an evaluation done medically and psychiatrically.

(R. 1121).

The court noted the continuing objection (R. 1121) but proceeded to sentence Mr. Gilliam.

A defendant may not be sentenced while incompetent, Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957); State ex rel Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933) reh. den. 156 So. 261. When reasonable grounds have been raised as to the defendant's competence to be sentenced, the court must inquire into the issue. Wojtowicz v. United States, 550 F.2d 786 (2d Cir. 1977), cert. den. 431 U.S. 972. The inquiry should focus on whether the defendant is "able meaningfully to exercise his right of allocution or rationally comprehend the nature of the [sentencing] proceedings." Wojtowicz, supra at 790. Under Rule 3.740, when the court has reasonable ground to believe that the defendant may be incompetent to be sentenced, it must postpone sentencing and "immediately fix a time for a hearing to determine

the defendant's mental condition." Experts may be appointed to examine the defendant for this purpose and testify at the hearing, and other evidence regarding the defendant's mental condition may be introduced as well.

Reasonable grounds were raised concerning Mr. Gilliam's competence to be sentenced. The court itself noted that Burley Gilliam was smiling inappropriately during the court's preliminary explanation to Mr. Gilliam as to the basis for the court's soon to be imposed sentencing of death. The court committed reversible error in failing to order a competency evaluation of Mr. Gilliam before the sentencing proceedings or prior to the pronouncement of sentence.

C. THE PROCEDURE FOLLOWED BY THE TRIAL JUDGE IN FAILING TO ORDER A PROPER EVALUATION OR CONDUCT A PATE HEARING WAS IN DIRECT CONTRAVENTION TO FLORIDA'S RULES AND STATUTES.

Where state law requires a hearing to determine competence when a reasonable doubt exists about the defendant's competence, then the trial court's failure to make adequate formal inquiry results in automatic reversal. Drope v. Missouri, 420 U.S. 162 (1975).

Here Fla.R.Crim.P. 3.210(b) provides that "if before or during trial" the court "has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter an order setting a time for a hearing to determine the defendant's mental state." The committee note reflects that the definition of competence to stand trial is

taken verbatim from Dusky v. United States, 362 U.S. 402 (1960).[13] Therefore, under Drope, supra, automatic reversal is required here based upon the numerous grounds described in the foregoing subsections.

Rule 3.210 further requires that the court "shall order the defendant to be examined by no more than three or fewer than two experts prior to the date of the hearing." See also, §916.11, Fla. Stat. Here the court only appointed one expert, in direct contravention to this provision.

Further, the Florida Rules of Criminal Procedure require certain factors to be considered in determining competency. Fla.R.Crim.P. 3.211(a)(1) provides the following minimum factors which the experts must consider and include in their reports:

> (1) In considering the issue of competence to stand trial, the examining experts should consider and include in their report, but are not limited to, an analysis of the mental condition of the defendant as it affects each of the following factors:
> (i) Defendant's appreciation of the charges;
> (ii) Defendant's appreciation of the range and nature of possible penalties;
> (iii) Defendant's understanding of the adversary nature of the legal process;
> (iv) Defendant's capacity to disclose to attorney pertinent facts surrounding the alleged offenses;
> (v) Defendant's ability to relate to attorney;

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[13]See, Section 916.12, Fla. Stat.

(vi) Defendant's ability to assist attorney in planning defense;
(vii) Defendant's capacity to realistically challenge prosecution witnesses;
(viii) Defendant's ability to manifest appropriate courtroom behavior;
(ix) Defendant's capacity to testify relevantly;
(x) Defendant's motivation to help himself in the legal process;
(xi) Defendant's capacity to cope with the stress of incarceration prior to trial.

In the instant case, the court's appointed expert only conferred with Mr. Gilliam for about five (5) minutes (R. 186) and his written report and testimony (R. 185-88) were just as cursory, without consideration of the minimum factors required by Fla.R.Crim.P. 3.211(a)(1). Reversal is mandated where the written report and testimony of the expert appointed pursuant to Fla.R.Crim.P. 3.210 reveal that he conclusions were not based on a consideration of each of the factors and the report did not contain a discussion of each of the areas required by Fla.R.Crim.P. 3.211(a)(1). Livingston v. State, 415 So.2d 872 (Fla. 2d DCA 1982). This is especially important in a case where the answer to the question of competency determines whether a person lives or dies.

Finally, at the penalty phase, the trial court again violated not only Mr. Gilliam's constitutional rights, but the rules governing the conduct of that critical stage of the trial.

Florida Rule of Criminal Procedure 3.740 provides the

procedure trial courts must follow regarding a potentially incompetent defendant at the time of sentencing[14]:

> Rule 3.740 provides:
>
> > (a) When the cause alleged for not pronouncing sentence is insanity, if the Court has reasonable ground to believe that the defendant is insane, it shall postpone the pronouncement of sentence and shall immediately fix a time for a hearing to determine the defendant's mental condition. The Court may appoint not exceeding three disinterested qualified experts to examine the defendant and testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

The discussion in subsection B, supra, clearly demonstrates that reasonable grounds existed regarding Mr. Gilliam's mental incapacity to warrant the postponement of the hearing and the appointment of experts to examine Mr. Gilliam. The required postponement would not in any way have inconvenienced the court or jurors because the verdict was returned just before lunch on a Friday. Standby defense counsel requested that the court recess for the weekend and direct an examination to be conducted over

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[14]Before the 1977 amendments to the Florida Rules of Criminal Procedure, the procedure for raising and determining the issue of competency at the time of sentencing was governed by Fla.R.Crim.P. 3.720(a) and 3.740. The 1977 amendments combined the procedure for alleging incompetence to stand trial and incompetence to be sentenced in Rule 3.210(a), but they did not repeal Rule 3.740. In 1981, Rule 3.210 was amended to provide once again only for incompetency to stand trial. Rule 3.740 alone, therefore, provides the procedure for raising the issue of incompetency at time of sentencing.

the weekend, or at a minimum, to direct an expert to examine Mr. Gilliam during the lunch break and hold a Pate hearing. The trial judge denied those requests, thus violating not only the Federal and Florida constitutions but also the rules of procedure and state statutes.

Reversal is required in this case. The matter should be remanded with instructions that Mr. Gilliam be properly examined and a hearing on his competency held prior to retrying him.

II

MR. GILLIAM DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO BE REPRESENTED BY COUNSEL AT EITHER THE TRIAL OR SENTENCING HEARING, AND THE COURT'S FAILURE TO ASCERTAIN HIS COMPETENCY VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A. THE TRIAL COURT FAILED TO ASCERTAIN MR. GILLIAM'S COMPETENCY TO WAIVE COUNSEL AND/OR APPLIED THE WRONG TEST.

A defendant may be competent to stand trial and yet lack sufficient competence to proceed without counsel. Massey v. Moore, 348 U.S. 105, 75 S.Ct. 145, 99 L.Ed. 135 (1954); see Winick and DeMeo, Competence to Stand Trial in Florida, 35 Univ. of Miami L. Rev. 31 (1980).

Although a competent defendant has a constitutional right to waive the right to counsel and conduct his own defense, McKaskle v. Wiggins, ____ U.S. ____, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), reh. den. _____ U.S. _____; Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the court must conduct an inquiry to ensure that the waiver is knowing and voluntary, and, that the defendant is mentally competent to make the decision. Massey V. Moore, supra; Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966); Ausby v. State, 358 So.2d 562 (Fla. 1st DCA 1978), cert. den. 365 So.2d 715, McCain v. State, 275 So.2d 596 (Fla. 2d DCA 1973); State v. Bauer, 245 N.W.2d 848, 859 (Minn. 1976).

The standard for competence to waive counsel is higher than that of competence to stand trial. Westbrook v. Arizona, 384

U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975), cert. den. 426 U.S. 937; Silten & Tullis, Mental Competence in Criminal Proceedings, 28 Hast.L.J. 1053, 1065-72 (1977).

In Westbrook v. Arizona, supra, the Supreme Court recognized a distinction between a defendant's mental competence to stand trial, and his competency to waive his right to counsel at trial. The Court overturned a conviction because the trial court finding that the defendant was competent to assist counsel in his defense did not suffice as a finding that he was also competent to waive such a fundamental constitutional right as the right to the assistance of counsel.

Typically, i.e., where a defendant's mental capacity has not been placed in issue, the determination of the validity of the waiver of counsel by a defendant can be assessed with an assumption that he is mentally capable of making important decisions involved in giving up his right to counsel, for example, cross-examination, trial by jury or his privilege against self-incrimination, once adequately advised.

However, where a question regarding a defendant's mental capacity has arisen in a criminal proceeding, "it is logically inconsistent to suggest that his waiver can be examined by mere reference to those criteria we examine in cases where the defendant is presumed competent." Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973).

> When the question of a defendant's lack of mental capacity lurks in the background, however, the same inquiry, while still necessary, fails to completely resolve the question of whether the defendant can properly be said to have had a "rational, as well as a factual, understanding [Dusky v. United States, 362 U.S. 42, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Schoeller v. Dunbar, 423 F.2d 1183, 1184 (9th Cir. 1970)] that he was giving up a constitutional right. Cf. Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 150, 16 L.Ed.2d 583 (1966).

Id. 478 F.2d at 214.

The Westbrook case, supra, makes it plain that where a defendant's competence has been put in issue the trial court must look further than to the usual "objective" criteria of determining the adequacy of a constitutional waiver. In Westbrook, although the state court had concluded after a hearing that the defendant was mentally competent to stand trial, the United States Supreme Court deemed it essential that a further "inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel ..." was required. 384 U.S. at 150, 86 S.Ct. at 320.

Therefore, assuming arguendo that here, as in Westbrook, the trial court's determination that the accused was competent to stand trial was correct, such a determinaton was inadequate to determine competency to waive assistance of counsel because it did not measure the defendant's capacity by a high enough standard.

The Court did not elaborate on the standard in Westbrook, however, the degree of competency required to waive a constitutional right is that degree which enables him to make decisions of very serious import. Sieling v. Eyman, supra at 215.

The Ninth Circuit Court of Appeals, in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970) has adopted the following standard[15]:

> A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea.

478 F.2d at 215.

In Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), the Supreme Court addressed a closely related question regarding the standard by which to determine a defendant's competence to waive the filing of a petition for writ of certiorari. The Rees test applies with equal force to the present question of competency to waive assistance of counsel. That test is as follows:

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[15]Other courts have addressed the special circumstances of defendants whose mental capacity was impaired: United States v. Dougherty, 473 F.2d 1113, 1123 n. 13 (D.C. 1972); United States v. Davis, 365 F.2d 251 (6th Cir. 1966); Overholser v. DeMarcos 80 U.S.App.D.C. 91, 149 F.2d 23, cert. denied, 325 U.S. 889, 65 S.Ct. 1579, 89 L.Ed. 2002 (1945); Manson v. Pitchess, 317 F.Supp. 816 (C.A. Cal. 1970); United States v. Davis, 260 F.Supp. 1009 (E.D. Tenn. 1966).

> [W]hether [the defendant] has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees v. Peyton, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966).

The United States Circuit Court of Appeals for the Eleventh Circuit, while not deciding whether the Rees test applies to the issue of competence to waive counsel, concluded in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), that the trial court met that standard assuming arguendo that the same standard does apply.

In the instant case, the facts, as detailed in argument I, supra, reveal that the five minute examination and inquiry into Mr. Gilliam's competency was not directed at such a level of competency as contemplated in Rees or Sieling. Moreover, when measured against the penetrating examination and inquiry conducted in Goode[16], it is clear that the determination of competency here did not reach the questions to ascertain Mr. Gilliam's competency to waive counsel.

The insufficiencies of the examination and hearing to determine competency to stand trial are detailed in argument I,

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[16]In Goode v Wainwright, 404 F.2d 593, 597 n. 3 (11th Cir. 1983); see argument I, supra.

supra. In addition, at the time of the Faretta[17] colloquy the trial judge was advised that Mr. Gilliam was in need of his medication.

Just before the trial judge began the Faretta hearing, standby defense counsel advised the court that Mr. Gilliam had not received "his required phenobarbital or dilantin any time this morning and the latest that he is ordered to receive that, according to the doctors, is 10:00 o'clock." (R. 192).

Standby counsel advised the court that Mr. Gilliam usually receives his medication between 8:00 and 10:00 a.m. (R. 192) and standby counsel proffered to the court that based upon his conversations with Mr. Gilliam during the prior ten minutes standby counsel was of the opinion that the lack of timely medication was affecting Mr. Gilliam's competency. (R. 192). Nonetheless, the court proceeded with the Faretta hearing:

> The Court: All right, Mr. Gilliam, how do we stand at this point? This is now the third day of kicking the question around.
>
> You have indicated that you wish these attorneys be discharged, and of course I have told you --
>
> The Defendant: Judge Mastos, I would like to have my medication.
>
> The Court: You will get your medication.
>
> The Correctional Officer: Your Honor, he will be back in a few minutes.

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[17] Faretta v. California, 422 U.S. 806 (1975).

> The Court: Just answer my question, please.
>
> What is your position at this time, Mr. Gilliam, in regard to Mr. Adelstein and Mr. Surowiec representing you next Monday?
>
> The Defendant: None, none at all.
>
> The Court: All right.
>
> And of course you understand what has happened so far is tantamount to your right to self representation, and let me just advise you now on the record.
>
> How old are you again, Burley?

(R. 193).

Notwithstanding Mr. Gilliam's undisputed need for medication, specifically at that moment, the Court proceeded to advise Mr. Gilliam regarding the stages of the trial proceedings and the issues which would be unavailable for him to raise on appeal if he represented himself. (R. 192-197). During the course of this colloquy, Mr. Gilliam told the judge that he was not understanding "any of it" saying "I don't understand all these words you use." (R. 195).

It cannot be held that Mr. Gilliam knowingly, intelligently, voluntarily waived his right to counsel since Mr. Gilliam had not received his required medication on the morning of the Faretta hearing, and the trial court was on notice that the medication, and/or irregularity in its administration to Mr. Gilliam, affected his competence and ability to understand the proceedings. Yet, the trial judge failed to have Mr. Gilliam

examined or even make inquiry into his competency to waive counsel.

The trial judge utterly ignored even the most readily apparent signs that warranted a closer inquiry into Mr. Gilliam's mental ability to waive the assistance of counsel. The trial court relied upon the wrong standard, that is, the trial judge, in finding that Mr. Gilliam would proceed pro se also made a "finding" that Mr. Gilliam was competent (R. 204). The latter "finding" was not based upon any reliable testimony from an expert, nor did the trial judge inquire into Mr. Gilliam's mental capacity to make a waiver of counsel.

B. THE TRIAL COURT IMPROPERLY CONCLUDED THAT MR. GILLIAM HAD KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.

This subissue differs from the issue of Mr. Gilliam's competence to waive assistance of counsel, in that it focuses on the circumstances of the waiver itself, assuming arguendo that competency had been established.

The United States Supreme Court held in Faretta v. California, 422 U.S. 806 (1975), that there exists a constitutional right to proceed "pro se": "The Sixth Amendment, when naturally read [...] implies a right of self-representation." Faretta, 422 U.S. at 821. A trial court may not force unwanted counsel on an accused as "the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." Id.

The converse of the constitutional right to self-

representation is the right to be represented by counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461 (1938), which requires a knowing, intelligent, competent and voluntary relinquishment or waiver by the accused before he can proceed at any critical stage pro se. The defendant in a criminal case, therefore, has two contradictory constitutional rights, 1) the right to demand assistance of counsel, and 2) the right to insist upon self-representation by waiving the assistance of counsel.

The Faretta issues are addressed by a two-step process. First, the court must look to whether there has been a "clear and unequivocal assertion" of the right to proceed pro se (or some conduct amounting to a waiver of the right to counsel).

In this instant case, Mr. Gilliam did not unequivocably assert his right to represent himself at trial. Rather the Court made a finding that "where a defendant continues to persist in demanding that his appointed attorneys be discharged ... the situation is tantamount to that which exists when a defendant seeks to represent himself." (R. 205).

The second inquiry under Faretta is whether the trial judge has discharged his/her protective duty to insure that the concomitant waiver of counsel is knowing, intelligent and voluntary and that the defendant is competent to make such a decision.

An unequivocal assertion of the right to proceed pro se, being in effect a waiver of the right to the assistance to counsel, invokes the protective duty of the trial court to evaluate the waiver of counsel under the analyses articulated in Johnson v. Zerbst, 304 U.S. 458 (1938). See McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985). In order to discharge the duty of determining whether there is an intelligent and competent waiver of counsel, "a judge must investigate as long and as thoroughly as the circumstances of the case ... demand." Van Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). (Mere routine inquiry by trial judge not sufficient to discharge duty of determining a valid waiver before a plea of guilty.) Faretta, 422 U.S. at 835. Van Moltke flushed out some of the elements of an intelligent and competent waiver:

> To be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances on mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances.

Van Moltke, 332 U.S. at 424.

If an accused is to proceed pro se, the court must conduct a hearing to insure that the waiver of the right to counsel is valid and that the defendant is fully aware of the charges and disadvantages of proceeding without counsel. Raulerson v.

Wainwright, 732 F.2d 803, 808 (11th Cir. 1984).

Under Van Moltke, supra, the defendant must have "a broad understanding of the matter" that he faces, and the penetrating inquiry should uncover suspicions about mental conditions preventing such an understanding. Here, Mr. Gilliam did not unequivocably request to represent himself. Mr. Gilliam advised the court that he wanted to be represented by counsel, but his court appointed attorneys refused to let him look at medical reports, depositions and other legal materials.

Although the court explained to Mr. Gilliam that the attorneys available to him were excellent lawyers, Mr. Gilliam believed that each of the attorneys was, in his own way, sabotaging his defense or otherwise not acting in his best interest. The court refused, over defense requests, to order experts to evaluate Mr. Gilliam to ascertain whether he was competent. Rather, the court interpreted his behavior as deliberate and obstructive. The Court made a "finding" that Mr. Gilliam was competent, however, the Court's finding is without value because it was not based upon expert evaluation nor was a hearing conducted.

Throughout the trial, many situations arose when the court denied Mr. Gilliam's requests; for example, for discovery or for appointment of an investigator (R. 589-590), on the basis that he had waived certain rights by representing himself. (R. 855-856). On each of these occasions, the court told Mr. Gilliam

that he had advised him during the Faretta hearing that he would lose certain rights by representing himself. Mr. Gilliam insisted that he did not remember being so advised. (R. 972).

That Burley Gilliam did not understand the basic roles played by the judge, prosecutor and jury was perhaps best illustrated during the testimony of Dr. Roa, the medical examiner. (R. 933-937). Certain photographs of the decedent were arranged on an easel. Furniture was moved so that the jury could view the exhibits without getting out of their seats. As a result, the trial judge suggested that Mr. Gilliam, as well as standby counsel, move to the other side of the courtroom during this testimony for viewing purposes. Mr. Gilliam objected to standby counsel moving. (R. 936). After the judge overruled his objections and directed standby counsel to move, Mr. Gilliam requested that one side of the courtroom spectators also move because he believed it was necessary for "the whole court to see what is happening." (R. 937).

Mr. Gilliam was initially represented by Art Koch, assistant public defender. Both Mr. Gilliam and the assistant public defender expressed concern on several occasions to the court regarding their inability to cooperate with each other. Mr. Koch, on several occasions, advised the court that in his professional opinion the defense of Mr. Gilliam's case should proceed on the defense of insanity, however, Mr. Gilliam was not cooperating or allowing Mr. Koch to proceed.

The prosecutor advised the court that it was his opinion that if Mr. Koch was allowed to represent Mr. Gilliam, and Mr. Gilliam was convicted, that it would take "only a cursory reading to determine that the man didn't get representation" and the case would be reversed. (Supp. R. 66). And later, the prosecutor advised the court that "State doesn't want to proceed to trial if there is any possibility that the defendant is not going to get a fair trial (Supp. R. 64), thereby recommending that the court allow Mr. Koch to withdraw.

When Mr. Koch initially moved for leave to withdraw, the court queried Mr. Gilliam regarding his desire and ability to represent himself if the court did allow Mr. Koch to withdraw. Mr. Gilliam told the judge that he had a ninth grade education and the judge responded:

> The Court: Ninth grade. Well, I don't think just on that alone that you're exactly ready to start trying a case. Do you?
>
> The Defendant: No.
>
> The Court: Well, so that option is out.

(Supp. R. 44-45).

After further inquiry, the court concluded the hearing by stating:

> The Court: I'm satisfied that he is not qualified to represent himself.

(Supp. R. 54).

Mr. Gilliam's main complaint about Mr. Koch was that the attorney was not allowing Mr. Gilliam to participate in his own

defense, specifically, Mr. Gilliam was not being provided with copies of depositions and other pleadings and reports. Mr. Koch confirmed on the record that he had a personal policy of not allowing certain materials to be retained by his clients while in the jail.

The court then appointed Stuart Adelstein and William Surowiec to represent Mr. Gilliam as special assistant public defenders. One week before trial. Mr. Adelstein advised the court that Mr. Gilliam wanted both appointed attorneys to be removed from his case. (R. 152). Mr. Gilliam told the court that these attorneys did not provide him with his trial materials either, particularly regarding the sentencing phase of the trial. (R. 153-154). Mr. Adelstein confirmed that he did not want to give Mr. Gilliam the medical records. (R. 170).

Mr. Gilliam told the court that he wanted an attorney to represent him, but not Mr. Adelstein or Surowiec. (R. 171). When the court gave him only two choices, that is, he will be represented Adelstein and Surowiec or he will represent himself, Mr. Gilliam said: "I feel it will be myself." (R. 171).

The court on several occasions asked Mr. Gilliam whether he felt he was capable of trying a case and Mr. Gilliam replied "no." (R. 171-172).

Mr. Gilliam's dissatisfaction with all of his court appointed lawyers is well-founded in that they refused to allow him access to his file. It was not that Mr. Gilliam preferred to

proceed pro se, rather, he merely wanted to participate in his defense. The court, however, repeatedly chided Mr. Gilliam regarding his foolishness in firing his lawyers. (R. 401-402; 582-583; 589-590; 848-852; 855-856; 974; 986-987; 1000).

Four days before trial, the court allowed Mr. Adelstein and Mr. Surowiec to withdraw as counsel of record and ordered them to remain to serve in the capacity of standby counsel while Mr. Gilliam represented himself pro se.

From the trial judge's many statements, made solely for the purposes of the record, it is apparent, the trial court was not comfortable with its decision to allow Mr. Gilliam to represent himself. But the court used Mr. Gilliam as an example to other defendants awaiting trial that the court would make each and every one of them go to trial, whether or not they were prepared. The court best explained its motives, first to the jury after the advisory sentence had been announced:

> The Court: I had to make a decision, and based on the law available to me, the Court came to a conclusion that the firing of lawyers again and again prior to trial was tantamount to a request to represent yourself.
>
> There is a message here to be sent to those who care to listen, to those who may be incarcerated or awaiting trial, that ultimately you are going to trial. If the best resources of the system are available and you don't want to avail yourself of them, then you can twist in the wind like you saw here this week. [Emphasis added.]

(R. 1116).

And the Court further explained it to Mr. Gilliam during sentencing:

> The Court: ... [I]t was obvious, sir, that you didn't want to go to trial, and I pushed you to trial for a good reason, sir, and I want this in the record for the benefit of the Supreme Court. If I didn't push to trial, Mr. Gilliam, the way I did, this case never would have gone to trial and a whole bunch of jailhouse lawyers across the street would have adopted the same kind of tactics and their cases would never get tried either, so there was a great deal involved here and it involved the future and the integrity of the system. [Emphasis added.]

(R. 1124).

It is clear that the court's primary concern was to move this case to trial regardless of the due process implications. The Court knew from the outset that Mr. Gilliam would "twist in the wind" (R. 1116) representing himself and the Court guaranteed that result by refusing to grant Mr. Gilliam a continuance to prepare for trial.

C. THE TRIAL COURT ERRED IN FAILING TO ASCERTAIN WHETHER MR. GILLIAM KNOWINGLY AND VOLUNTARILY WAIVED COUNSEL FOR THE PENALTY PHASE, OR IF HE WAS COMPETENT TO DO SO.

By the time of the advisory sentencing proceedng, the court was merely going through the motions to "push to trial" (R. 1124) to make an example of Burley Gilliam. The penalty phase of a capital trial is a "critical stage." Proffitt v. Wainwright, 706 F.2d 311 (11th Cir. 1983), cert. denied, ____ U.S. ___, 104 S.Ct. 508 (1983).

The trial judge utterly failed to conduct a hearing as to whether Mr. Gilliam knowingly, intelligently and voluntarily waived his right to representation during the penalty phase, or whether he was competent to do so.

The prosecutor requested that the trial judge "re-advise him of his right to counsel" for this separate penalty proceeding. (R. 1067). Notwithstanding the request from the state, the trial judge did not conduct a probing inquiry into whether Mr. Gilliam knowingly, voluntarily or competently waived counsel. The Court merely "assumed" (R. 1068) that Mr. Gilliam waived counsel:

> The Court: ... You have the right to have Mr. Adelstein or Mr. Surowiec represent you in this case and I assume by shaking your head no, you do not want them to represent you. Is that correct? In other words, you want to go on the way you have been with them just being standby counsel and --
>
> The Defendant: I want them dismissed from the case right now ...
>
> * * *
>
> I know what it is all about so let us get it over. I just want to waive this.
>
> The Court: Fine ...

(R. 1068-1069).

The court denied standby counsel's request for competency evaluation (R. 1067; 1121) at the time of the sentencing hearing, so the court had no way of ascertaining whether Mr. Gilliam made a knowing and competent waiver of counsel at the penalty phase. Waiver of fundamental constitutional rights cannot be presumed

from a record without inquiry. Johnson v. Zerbst, 304 U.S. 358 (1938).

Here there has not been a reliable determination that Burley Gilliam was competent to waive his right to representation by counsel at trial and there was no determination with regard to the penalty phase. This court must remand for a new trial or, at least, a new sentencing hearing.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE CONDUCT OF THE JURY SELECTION PROCESS.

A. THE COURT ERRED IN PREVENTING MR. GILLIAM FROM EXERCISING PEREMPTORY CHALLENGES TO POTENTIAL JURORS PRIOR TO THE ADMINISTRATION OF THE OATH.

This court announced in Rivers v. State, 458 So.2d 762 (Fla. 1984), that a "no back-strike" procedure during the jury selection process violates Florida Rule of Criminal Procedure 3.310.

The trial court in this case refused Mr. Gilliam's request to back-strike, even though no juror had been sworn, in direct contravention to this court's edict in Rivers.

Before beginning voir dire, the trial judge explained the procedure to be followed. (R. 231-232). The court advised Mr. Gilliam that he had ten peremptory challenges available to him. (R. 231). The trial judge stated that approximately thirty-five prospective jurors would be brought in and seated. The parties would each have an opportunity to ask questions, and then "come side bar and ... strike any of the jurors that you feel you wish to strike." (R. 232).

After the foregoing explanation, Mr. Gilliam told the court that he did not understand the procedure. The following ensued:

> The Defendant: Your Honor, I don't understand what you mean Judge Mastos.
>
> The Court: Well, Mr. Gilliam, you have the right to strike ten jurors that you don't

> like, for whatever reason, or they don't appear like they would be sympathetic to you.

(R. 232).

After the prosecutor had questioned the first group of fourteen prospective jurors, the court offered Mr. Gilliam the same opportunity. Mr. Gilliam declined, saying that he did not have his notes with him because there had been a shake down at the jail which scattered his legal materials and notes.[18] (R. 220; 327; 855). When the court asked Mr. Gilliam whether he cared to strike any jurors, Mr. Gilliam again declined, saying, "I need my material." (R. 326; 328).

The court specifically asked whether Mr. Gilliam was waiving his right to participate in jury selection. Mr. Gilliam replied, "I'm not waiving any rights." (R. 326).

Nonetheless, the court, at that point, made a finding that Mr. Gilliam had "waived his right to ask questions of the jury and he has waived his right to participate in the jury selection." (R. 328). The trial judge then made a statement explaining his ruling is "so that an appellate court will understand what this court is experiencing at the moment." (R. 328-329). The trial judge explained that the court was precluding Mr. Gilliam's participating in jury selection based upon the judge's feeling that Mr. Gilliam was declining to ask

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[18]The corrections officer verified that there had been a shakedown of Mr. Gilliam's cell. (R. 316).

questions or strike jurors in an attempt to avoid a trial. (R. 329).

The prosecutor then announced which jurors would be stricken by the State, however, the prosecutor requested that the jurors not be sworn and the court agreed for the following reasons:

> The Court: Let's get a jury now because it is obvious Mr. Gilliam doesn't want to participate.
>
> Ms. Dannelly [prosecutor]: I will request once we do select the jury that they not be sworn at this juncture for obvious reasons.
>
> The Court: Right. I was going to suggest that, too. You may want to chat with your appellate people as to what I have done and see what they think.
>
> Mr. Schiffrin [prosecutor]: I'm sitting here with no easy answer to any of this.

(R. 329-330).

The State exercised four of its peremptory challenges. (R. 332). The remaining ten jurors were seated. (R. 333). The court, and then the prosecutor continued the questioning process with the next group of prospective jurors. (R. 333-361).

After the court and prosecutor had questioned the second group of prospective jurors, the court offered Mr. Gilliam the opportunity to question those jurors (R. 361), despite the former ruling. Mr. Gilliam advised that he did want to address the jurors. (R. 361). The court, however, adjourned for the day without Mr. Gilliam beginning any questions. (R. 367). The next day Mr. Gilliam did address the panel. (R. 405-406). Then the

court called the prosecutor and Mr. Gilliam side bar and asked if they were prepared to make a selection. Mr. Gilliam stated, "I don't -- Judge Mastos, I don't know how to select a jury." (R. 407). The court reassured Mr. Gilliam that there would be no problem, stating:

The Court: Well, I will show you how.

(R. 407).

Mr. Gilliam explained to the court that he did not even remember what happened the day before. The court explained to Mr. Gilliam that the State had already exercised three challenges and, "The way you do this is simple." "You have ten strikes." (R. 409). Mr. Gilliam again explained that he did not remember what questions had been asked the day before and therefore did not know which jurors he wished to strike. (R. 409).

The court told Gilliam that, of the people that you see there now, "Do you want to strike them, any of them?" "... You don't have to give a reason or anything, just if you don't like them, good-bye. That is it, gone." (R. 409). Mr. Gilliam wanted to know how many times they would be doing that and the court responded, "As many times as it takes to get a jury, until you use up your ten challenges." (R. 410). The court explained, "All you say to me is, I don't want the first juror, I don't want the second or third or whoever." (R. 410).

Mr. Gilliam explained that he needed to sit down and was going to sit down at counsel table because "I don't know how to

strike." (R. 410-411). The court stated, "Fine then." "Have a seat Mr. Gilliam. The defendant has refused to participate in jury selection." (R. 411). The State then proceeded to strike another four prospective jurors. (R. 413-414).

Questioning then began on new jurors. Mr. Gilliam requested to speak with the judge, however, the court merely responded, "Denied." (R. 415). After the court questioned the next panel, the State began questioning. (R. 422). Mr. Gilliam requested to speak to his standby counsel outside of the courtroom (R. 428), but the court denied his request, telling him either to talk to standby counsel in front of the jury or not at all. (R. 429). There is no indication on the record that Mr. Gilliam spoke to his standby counsel. However, he made an objection to the "circus-type atmosphere" regarding the jokes that the judge was telling to the prospective jurors. (R. 429-430).

The court allowed Mr. Gilliam to address the panel. (R. 430), then asked Mr. Gilliam to approach side bar with the prosecutors, however, Mr. Gilliam declined. (R. 430). The court made a finding that, "Participating at the side bar, is being waived by Mr. Gilliam." (R. 431). The court then, "[f]or purposes of the record" (R. 431) made a statement for the appellate court that "[Mr. Gilliam] is deemed to have waived his right to participate." (R. 431). The State exercised two peremptory challenges. (R. 432). The court called fourteen names, and excused all other prospective jurors. (R. 433). The court then sent those fourteen for lunch.

After the prospective jury members were excused for lunch, the record reflects that Mr. Gilliam was given his medication. (R. 434).

After the luncheon recess occurred, court reconvened. Outside of the hearing of the prospective jurors, who had not yet been sworn, Mr. Gilliam requested to exercise his peremptory challenges. (R. 438). Even though the prospective jurors had not been sworn, the judge refused to allow Mr. Gilliam to back-strike. The following colloquy occurred:

> The Defendant: Judge Mastos, I want to strike the whole jury. I had time to think it over.
>
> The Court: Is that so?
>
> The Defendant: Yes.
>
> The Court: You had the opportunity, Mr. Gilliam.
>
> The Defendant: What does that mean?
>
> The Court: You waived it.
>
> The Defendant: I didn't waive anything.
>
> The Court: What are the grounds, why do you want to strike the panel?
>
> The Defendant: You told me it didn't make any difference. That (sic) is your words, I believe it is on the record if you want to go back through it. I want to strike the whole panel.
>
> The Court: You want to strike the panel?
>
> The Defendant: Yes.
>
> The Court: Alright. Motion denied. Bring them in.

> The Defendant: I want to get rid of as many as I.
>
> The Court: Denied. It is too late. You have had your opportunity.
>
> The Defendant: They have not been sworn in, have they?
>
> The Court: Well, they're going to be in a couple of minutes, Mr. Gilliam.
>
> The Defendant: I want you to take note of what I said.
>
> The Court: I will note your objection, sir.

(R. 438-439).

Immediately following this colloquy, the jury entered the courtroom and the court ordererd the panel sworn. (R. 439). Both the jury and the alternate jurors were then sworn. (R. 440). The trial began.

Article I, Section 16 of the Florida Constitution and the Fifth and Sixth Amendments to the United States Constitution, secure to one accused of a crime a trial by an "impartial jury". The voir dire process is the only process for selection of such a jury. In Rivers v. State, 458 So.2d 762 (Fla. 1985), this court clearly held that the no back-strike procedure violates Florida Rule of Criminal Procedure 3.310, which provides that a defendant may challenge a prospective juror at any time before the juror is sworn. Here, Mr. Gilliam requested to exercise his available peremptory challenges before any juror was sworn, therefore, the issue is properly preserved for appeal. It can hardly be said that the evidence against him is so

overwhelming as to make noncompliance with this rule harmless error (see arguments infra).

This court, in Jackson v. State, 464 So.2d 1181 (Fla. 1985) in reversing that appellant's conviction of sentence of death, reaffirmed the right of a defendant to peremptorily challenge any juror before the jury is sworn. In Jackson, this court reiterated that the principle of law was adopted by this court more than 100 years ago in O'Connor v. State, 9 Fla. 215 (1860). See also, Jones v. State, 332 So.2d 615 (Fla. 1976). This court emphasized that a trial judge has no authority to infringe upon a defendant's right to challenge any juror prior to the time the jury is sworn, stating:

> We again emphasize that a party may challenge any juror at any time before the jurors are sworn. A trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn.

Jackson v. State, 464 So.2d at 1183.

Here the trial judge compounded the errors by repeatedly assuring Mr. Gilliam that the court would assist him in jury selection. Mr. Gilliam was unfairly misled. Taken together with Mr. Gilliam's absence during exercise of the State's peremptory strikes and the court's excusals for cause, it is clear that Mr. Gilliam did not knowingly waive his right to participate in the jury selection process.

The right to unfettered exercise of peremptory challenges, which includes the right to view the panel as a whole before the

jury is sworn, is an essential component of the right to trial by jury, a right that is "fundamental to the American scheme of justice." Grant v. State, 429 So.2d 758 (Fla. 4th DCA 1983), Hurley, J., concurring specially, quoting Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968); see also Barrack v. State, 462 So.2d 1196 (Fla. 4th DCA 1985).

B. THE COURT ERRED IN FAILING TO CONSULT MR. GILLIAM BEFORE EXCUSING JURORS FOR CAUSE AND FOR ALLOWING THE STATE TO EXERCISE ITS PEREMPTORY CHALLENGES OUTSIDE THE PRESENCE OF MR. GILLIAM.

As described above, the court allowed the State to exercise its peremptory challenges outside the presence of Mr. Gilliam, thus reversal is required because it is impossible to assess the extent of prejudice, if any. Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Francis v. State, 413 So.2d 1175 (Fla. 1982).

Likewise, Mr. Gilliam was not consulted on several occasions when the court excused jurors for cause (Jurors excused for language problem. (R. 415-16; 421; 428); Juror No. 17 excused for work schedule. (R. 278), or when the court gave the jurors a cautionary instruction (R. 282; 311).

C. THE COURT IMPERMISSIBLY INDICATED HIS OPINION OF MR. GILLIAM'S GUILT TO THE JURY.

On several occasions during the voir dire procedure, the trial judge made comments which communicated to the jury that the judge thought that Mr. Gilliam was guilty. In questioning juror No. 11, who was a kindergarten teacher, the court asked, in front of the panel, "Do you think that the kids will get away with

murder this week." (R. 259). After Mr. Gilliam, through standby counsel, objected and requested a mistrial, the court, without consulting Mr. Gilliam, stated:

> The Court: Ladies and Gentlemen, thank you for your attention and thank you for returning to the same seats. Ladies and Gentlemen, during the court's conversation with one of the juorors, the court had said something. I just hope, that hopefully was taken by the panel -- when the court mentioned to the lady on the end, the school teacher, as to when she is not there do the children try to get away with murder, and, of course, this is a murder charge and the court said it in the spirit of jest -- perhaps a poor choice of words by the court, but let me at this time, is there anybody that was offended or affected by that remark in any way such that they wouldn't be able to sit on this case? Anybody? Alright.
>
> The record will reflect that the court meant no reflection on the nature of the charges or anything. Certainly nothing was intended to offend anybody or make light of anything. Okay. Thank you. No one has any problems? The record will reflect the affirmance by the jury.

(R. 282).

The question is not whether any juror was offended or amused, but whether any juror got the impression that the court had made up its mind concerning Mr. Gilliam's guilt. The court failed to make proper and adequate inquiry regarding the prejudice which resulted from its "jest," and erred in denying a mistrial.

The court made other unnecessary comments that "the stakes are high here." (R. 422). Mr. Gilliam later made an objection to "the circus-like atmosphere" and "jokes" (R. 429-430).

Due process does not tolerate comment by the trial judge regarding his opinion as to the evidence or as to guilt omniscience. Cf. Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959); Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964).

Any one of the above errors requires reversal, however, taken together, the cummulative effect totally prejudiced the jury selection process, requiring reversal.

IV

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATE'S WARRANTLESS SEIZURE OF PHYSICAL EVIDENCE FROM THE TRUCK IN BURLEY GILLIAM'S POSSESSION AND CONTROL, WHERE THE TRUCK WAS NOT ABANDONED AND THE SEARCH WAS NOT VALIDLY CONSENTED TO.

In June of 1982, Burley Gilliam, as an employee of Jimmie Smith drove a truck to Florida for the purpose of picking up a shipment out of an Orlando terminal. (R. 116). When the police learned on June 9 that a truck had broken down in the area of the homicide, they were able to trace it to Cloverleaf Amoco Station. They also learned that at that time Gilliam took the truck there and left it to be repaired. He allegedly told the owner he would be back the next morning to pick it up. The State then kept up a constant surveillance from 8:00 o'clock a.m. on the 9th until the morning of the 10th. (R. 121). When Burley Gilliam did not return, they concluded it had been abandoned. It was at the point that the State telephoned Tri State Motor Company for permission to search the vehicle. (R. 125).

Jeffrey Schwartz, a representative of Dade County, called Tri State Motor Company (R. 91) at 8:45 a.m. on June 10. (R. 119). He spoke with Walter Burch and requested authorization to search the vehicle. (R. 106). He told them that the driver was a suspect in a homicide. (R. 106). Burch, chief of security at Tri State, gave his consent and at 12:45 p.m. on June 10 a search was conducted. (R. 123). The following items were seized: A brown shoe, a white sock, hair samples and pieces of paper. (R. 124).

These items were seized in violation of Burley Gilliam's right as guaranteed by the search and seizure clause of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution and Section 933.04, Florida Statutes.

The State's position is that it was justified in seizing the property without a warrant because the truck had been abandoned. The facts, however, do not constitute abandonment. At the suppression hearing, Detective Shelton Merritt was the only witness to testify on the issue of abandoment. He testified that his only personal knowledge regarding the facts was that he personally surveilled the truck and knew that Gilliam had not returned the following morning to pick it up. (R. 125). This, however, is not sufficient. In Hackett v. State, 386 So.2d 35 (Fla. 2d DCA 1980), a defendant who had left his luggage at a motel and informed the owner that he would return to pay his bill, did not "abandon" his luggage by his failure to return the following afternoon.

In addition to surveilling the truck, Merritt said he had determined that it was abandoned based on hearsay (R. 120, 126) including the service station's conversation with the driver about the truck being picked up the following morning. (R. 121). Hearsay evidence, however, is impermissible in this instance. See State v. Lofton, 418 So.2d 1259 (Fla. 4th DCA 1982). Subsequent to the search, certain other hearsay

information in addition to his conversation with Burley Gilliam himself also came to his attention, which confirmed his initial determination that the truck had been abandoned. (R. 131). However, it was error for the court to consider information that came to light subsequent to the time that the determination was made to search the vehicle. Whether the truck was abandoned so that only the consent of the property owner was required to make a warrantless search legal is primarily a factual determination that must be made upon all the relevant circumstances existing at the time of the search (emphasis added). Patty v. State, 276 So.2d 195 (Fla. 4th DCA 1973).

Notwithstanding that the driver told someone that he would be back the next day and did not return this is not sufficient to constitute abandonment. Hackett, supra. Based on the circumstances existing at the time of the search, the driver at all times exhibited an intention to return for the truck. If he had left the truck where it was when it broke down rather than have it towed to the service station, that may have demonstrated an intent to abandon it. Had he intended to abandon it, he would not have made arrangements to have it repaired. In United States v. Hunter, 647 F.2d 566 (5th Cir. Unit B 1981), appellant left his disabled aircraft unattended and unlocked and neither removed it to a safer more protected place nor notified anyone of his intention to repair it, therefore, the court found that it was abandoned.

After Merritt came to the erroneous conclusion that the truck was abandoned, the call was made to Tri State Motor Company for consent to search. Neither Burch nor Tri State Motor Company, however, was authorized to consent, regardless of whether the truck had been abandoned.

Burch, the only other witness at the suppression hearing, testified that although he was not the designated person to give consent or be the focal point in these types of investigations, he became involved because he had picked up the telephone. (R. 107). He testified that after the call came from a Jeffrey Schwartz, who did not testify, he went to the license and permit department of Tri State to get the records concerning the truck. He testified, however, that he was not an officer there, but rather it was a Mr. Hobbs who was a custodian of these business records. (R. 101). Nonetheless, Burch testified as to the terms of an agreement Tri State Motor Company of Missouri had with Jimmie Smith. Tri State Motor Company was not the owner of the truck, but rather the lessee. (R. 96). The truck was leased from Jimmie Smith who hired the drivers. It was Jimmie Smith and not Tri State Motor Company that employed Burley Gilliam and had the dominion and controll over hiring and firing. (R. 110). In addition, at the time the truck was found, Tri State Motor Company had relinquished control insofar as Burley Gilliam was authorized to be in Florida. (R. 117).

Burch and Tri State Motor Company were not the proper parties to have authorized the search of the truck. Only one who shares dominion and control may validly consent. Silva v. State, 344 So.2d 559 (Fla. 1971). Thus, since the driver had not abandoned the truck, only he could give consent. Assuming, however, that he had abandoned the truck or, in the alternative, that dominion and control of the truck was not exclusive, it was Jimmie Smith and not Tri State Motor that could give a valid consent.

Whether or not an area search is under the joint dominion and control of the third party has been decided on the basis of the individual's reasonable expectation of privacy, whether others generally have access to the area, and whether the object searched were the personal affects unavailable to consent. Silva v. State, supra. Under this test, a consent of Tri State Motor Company of Missouri to the search of the truck in Florida is invalid. (See also, Sheff v. State, 301 So.2d 13 (Fla. 1st DCA 1974) affirmed 329 So.2d 270, where it was held that so long as the occupant of a room is legally there and had paid or arranged to pay rent, and had not been requested to leave, a search of the room could not validly rest upon the consent of the proprietor.) Under any circumstances, however, Mr. Burch was not the proper person to give a legally binding, valid consent.

Thus, it was reversible error for the trial court to admit into evidence the physical items seized from the truck that had

neither been abandoned nor were under the joint possession and control of the party who consented to the search. Further, it was error for the trial court to reach a determination on the basis of out-of-court statements made both prior and subsequent to the search and on the basis of business records that were entered into evidence in violation of the hearsay rule. The warrantless search was illegal and a violation of Burley Gilliam's Fourth and Fourteenth Amendment rights guaranteed to the United States Constitution and Article I, Section 12, of the Constitution of the State of Florida. The court committed reversible error in denying Mr. Gilliam's timely motion to suppress. (R. 649-650).

V

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENT MADE BY MR. GILLIAM WHICH WAS OBTAINED ILLEGALLY.

The United States Supreme Court in the landmark case of Miranda v. Arizona, declared that an accused has a Fifth, Sixth and Fourteenth Amendment right to have counsel present during custodial interrogation. The Court concluded that only when there has been a "knowing and intelligent" waiver of that right, may a custodial interrogation be conducted in the absence of counsel. The determinaton of whether a knowing and intelligent relinquishment has occurred is a matter which depends in each case "upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

More recently, in Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court enunciated the absolute right of an accused to have counsel present at any custodial interrogation, stating:

> ... [A] valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated custodial interrogation ... an accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him...

Id. at 484.

The police interrogation of Mr. Gilliam in the instant case was a direct violation of the principles enunciated in Miranda

and Edwards. Mr. Gilliam was interrogated while custody in the Texas County jail. The detective came to the jail with an arrest warrant for the purpose of bringing him back to Florida. After he read him his rights, Mr. Gilliam explicitly stated that he wished to call his attorney. (R. 697-698). Despite his assertion of this right to remain silent and his wish to call his attorney, the detective asked Mr. Gilliam why he abandoned his truck in Florida and what he was doing there. (R. 716). He also told Mr. Gilliam that they knew that he had been in Florida and that he had committed the murder. (R. 700). Once a defendant has asserted his right to counsel, he may not be subject to further questioning unless it was he, the accused, who initiated the further communication. Edwards, supra, at 1885. Thus, in Bowen v. State, 404 So.2d 145 (Fla. 2d DCA 1981), where the defendant was asked how he arrived at the scene, it was held that the State had not scrupulously honored the accused's right to silence and thus had not met its heavy burden of showing that the defendant had knowingly waived his right. Similarly, in Silling v. State, 414 So.2d 1182, 1183 (Fla. 1st DCA 1982), the detective's question to the defendant as to "why she did it" was held to be a violation of Edwards.

Here Detective Merritt, however, stated that he had talked to Burley Gilliam only because he had changed his mind about wanting an attorney right after he asked for his attorney. (R. 698, 717). Even if the detective believed that Mr. Gilliam had

changed his mind, he was only permitted to further question him in order clarify his wishes. When a person expresses both a desire for counsel and desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes. Cannady v. State, 427 So.2d 723, 728 (Fla. 1983).

The test of determining whether a defendant has voluntarily waived his right is whether under the totality of the circumstances the confession was a product of mental or physical coercion or some other improper police procedure which caused it to be involuntary. Here Mr. Gilliam's medical condition must be taken into account. State v. DeConingh, 400 So.2d 998, 1001 (Fla. 3d DCA 1981) reversed, 427 So.2d 723 (Fla. 1983), cert. den. 104 S.Ct. 995.

In the instant case, Mr. Gilliam had a severe mental condition which required constant dosages of medication. Mr. Gilliam made it clear throughout the interrogation that he needed his medication (R. 717) and that he would have done anything to get it. (R. 719). Thus, at the time of the confession, Mr. Gilliam's mind was not sufficiently clear and unhampered by his physical condition that it can be said that he freely and voluntarily made his statement. If for any reason a suspect is physically and mentally incapacitated to exercise a free will, his self-condemning statement should not be used against him. Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). Whether the confession is true or not is not the determining element. Id. at 863.

It was only after the Mr. Gilliam made a statement that he was given the medication, and it was only as much as he needed to get him to Florida. (R. 719). Mr. Gilliam's statement were coerced and they were made in exchange for the hope of getting his medication. See Hollis v. State, 450 F.2d 1207 (5th Cir. 1971) (where the question was whether defendant's confession had been coerced by promising medical treatment). Where a confession is obtained by any direct or indirect promise, however slight, Brewer v. State, 386 So.2d 232, 235 (Fla. 1980), or by the promise of the benefit, however slight, it cannot stand. Henthorne v. State, 409 So.2d 1081 (Fla. 1982). The mind of the defendant must be free to act uninfluenced by either hope or fear. Frazier v. State, 107 So.2d 16, 21 (Fla. 1958). Where the confession is associated with an attraction too strong to resist, as in the instant case, the confession should not be relied upon. Id. at 24.

Additional factors must also be weighed in determining the voluntariness of a defendant's statement. There is stricter standard for showing that a defendant has knowingly and intelligently waived a previous request. This standard is met when the accused voluntarily executes a written waiver after being readvised of his rights. Cannady v. State, supra. In this case, Burley Gilliam executed neither a written waiver (R. 718) nor a formal written statement (R. 708); nor was he readvised of his rights. Indeed, Mr. Gilliam refused to give a formal

statement in writing. (R. 708). Also, the fact that the interrogation took place at a jail in Texas made the atmosphere inherently more coercive than it would have been at a less suggestive setting in Florida, and is a factor that should also be considered in evaluating the totality of the circumstances. See Drake v. State, 441 So.2d 1079 (Fla. 1983).

Thus, the interrogation of Burley Gilliam in the absence of counsel was in violation of his Fifth and Sixth Amendment rights as enforced by Miranda and Edwards. The record does not show that Mr. Gilliam knowingly, intelligently and voluntarily waived those rights. On these grounds, the statements should have been excluded at trial. The court's admission of his statement at trial constitutes reversible error, mandating a new trial.

VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL OR STRIKE THE MEDICAL EXAMINER'S OPINION THAT CERTAIN MARKS ON THE DECEDENT'S HEAD WERE CAUSED BY THE STOMPING OF A SNEAKER, SINCE THE WITNESS CONCEDED THAT SHE WAS NOT AN EXPERT IN THIS AREA.

The State tendered Valerie Rao, M.D., Dade County Examiner, as an expert in the area of forensic pathology. (R. 860-861). In accepting her, the court gratuitously made a direct comment on the credibility of her testimony as follows:

> The Court: The Court will note that she has testified in this Court before. The Court has previously accepted her testimony as an expert. ....

(R. 861).

Mr. Gilliam's standby counsel made a timely motion for mistrial, which was denied. (R. 957-958).

When the judge vouched for the expert witness of the State, Appellant was prejudiced. In a jury trial, the judge's dominant position makes his remarks and comments overshadow those of those of the litigants, the witnesses and the attorneys, and therefore, conduct which expressed or tends to express a judge's view as to the credibility of the witness denies the accused the impartial trial to which he is entitled. Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959). Thus, in Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964), where the judge commented that the witness was an honest, poor man with inferior education who was doing his best to answer questions, the court held that the denial of the

Motion for Mistrial was reversible error. There, the court did not say that the comment amounted to any preference or even an indication of such, but that if it could have been so interpreted, on that possibility it should be reversed for a new trial. "Where there is simply a doubt, as here, that an accused has been prejudiced by a remark of the court, we must grant him a new trial." Id. at 579.

Dr. Rao testified that it was her opinion based upon a medical reasonable probability that certain injuries to the decedent's head area were inflicted by the wearer of the sneakers previously introduced as State Exhibits 8 and 9 stomping on her head (R. 896), while she was still alive. (R. 889-890).

Dr. Rao explained that the basis of this opinion came from an experiment which she conducted using State's Exhibits 8 and 9 which had been found one at the scene, and one in the truck, respectively. Dr. Rao explained that when she shaved the decedent's head, she found circular marks. (R. 883-884). After having a photographer photograph that area of scalp, she made a mold of the imprint of the sole of one of the sneakers with play dough. That mold was introduced into evidence as State's Composite Exhibit No. 39. (R. 887).

Dr. Rao explained that the bottoms of the sneakers contained a pattern of both circles and squares, and both the circles and squares were imprinted on the clay mold. (R. 887). Dr. Rao explained that she had a theory that the circular marks on the

decedent's head were caused by someone stomping on her head with the sneakers. The decedent's head, however, had impressions of only circles.

In order to test her theory, Dr. Rao asked for a living volunteer from her office to participate in an experiment. (R. 888). She asked that individual to lift his shirt, and then Dr. Rao hit him on the back with a sneaker. (R. 887-888). A photograph was then taken of his back. (R. 888). The photograph showed only the circles imprinted on the volunteer's back and not the squares. (R. 888). Dr. Rao explained that the reason why only the circles imprinted is because of a suction action. She suggested that the jury feel the bottom of the sneaker as they passed it around, they would feel that the circles are depressed but the squares are elevated, flush with the surface, therefore, "if you hit somebody, the circles, because of the concave nature of the patterns, there was some kind of grip." (R. 888). Dr. Rao, however, qualified her opinion by stating:

> Dr. Rao: ... This is my explanation. I'm not an expert on shoes but this in fact was borne out by the experiment that was subsequently conducted on a living person.

(R. 888). (Emphasis added)

Dr. Rao then explained that the scalp area was plentiful in nerves and very sensitive, therefore, this injury caused the decedent a great deal of pain. (R. 889). Standby defense counsel timely moved for mistrial, or in the alternative, to strike all of that testimony, but the court denied those motions. (R. 958-959).

It was error for the court to admit the testimony of Dr. Rao regarding shoe marks on the victim's head, where she admitted that she had not the skill, knowledge or experience with respect to the subject matter. Pearson v. State, 254 So.2d 573 (Fla. 3d DCA 1971), cert. denied 409 U.S. 879. Thus, in Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977) where the forensic pathologist testified that the victim had been injured prior to burial and that the injuries had not been inflicted by the treads of a bulldozer, the court held that such evidence was beyond the medical examiner to give. Id. at 31.

Here, where the witness admitted that she had no knowledge of a scientific nature from which to justify her opinion, it was improper to permit her testimony. Fisher v. State, 361 So.2d 203 (Fla. 3d DCA 1978). Testimony that knife wounds were more characteristic of those made by a woman than a man were held improper. Id.

Where evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the test be recognized and accepted by scientists or that the demonstration pass from the stage of experimentation to that of reasonable demonstratability. Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983). Dr. Rao's "tests" and "experiments" certainly have not passed from the stage of experimentation to that of reasonable demonstrability and, therefore, it was reversible error to have permitted such prejudicial testimony. The erroneously admitted

testimony was especially harmful to Mr. Gilliam due to the fact that the trial judge had initially indicated his high esteem of this witness' credibility "as an expert." (R. 861). Therefore, due process requires a reversal under these circumstances.

VII

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE AND TESTIMONY CONCERNING PHOTOGRAPHS AND MODELS WHICH FORMED THE BASIS OF DR. SOUVIRON'S EXPERT OPINION THAT BITE MARKS WERE CAUSED BY BURLEY GILLIAM.

On March 24, 1983, Mr. Gilliam's attorney filed a motion to produce physical evidence (R. 1312), specifically requesting access to the following dental evidence:

> (a) All photographs taken by the State's forensic odonthologist [Dr. Souviron] (or taken under his direction);
>
> (b) All models prepared in connection with the dental evidence.

(R. 315).

The motion further advised that the defendant was aware that certain tests and such other experiements were performed in the area of forensic odontology, and that the defendant had retained the services of three forensic odontologists. (R. 1315).

At trial, the court allowed the State to introduce photographs with overlays which had never been disclosed to defense counsel or to Mr. Gilliam. At trial, standby counsel advised the court that on January 18, 1985, he took the deposition of Dr. Souviron and was not provided with the photographs with overlays which were composite exhibits marked for identification as State's 1-AAA, 1-CCC, 1-GGG, 1-HHH, 1-DDD, 1-III, and I-FFF. (R. 901). Standby counsel advised the court that there was no questioning about the overlays because, "We didn't even know these existed." (R. 902).

Standby counsel objected to the introduction of these exhibits and asked the court to remove the overlays which contain numbers based on the discovery violation. (R. 902). The court denied these motions (R. 902) and stated that allowing Mr. Gilliam to look at these photographs in the few moments before Dr. Souviron testified, provided, "plenty of time." (R. 903). Thereupon the State's Composite Exhibits marked for identification as 1-CCC, 1-AAA, 1-FFF, 1-GGG, 1-iii, 1-HHH, 1-DDD were moved into evidence as State's Exhibits 42 (R. 925), 44 (R. 925), 45 (R. 929), 46 (4. 940), 47 (R. 940), 48 (R. 942), and 49 (R. 946) respectively.

Based upon these composite photographs which neither defense counsel nor Mr. Gilliam had seen prior to the time of trial, Dr. Souviron testified that within a reasonable degree of dental/medical certainty (R. 939), the bite marks on Joyce Marlowe's body were made by Burley Gilliam's teeth. These exhibits greatly prejudiced Mr. Gilliam because Dr. Souviron relied upon them. Dr. Souviron testified that State's Exhibits 42 and 44 showed that Mr. Gilliam's upper teeth are broken and snaggled and he has chips and breaks on his upper front teeth. (R. 925). When compared to State's Exhibit 45 and 46, these photos showed how the bite mark on Joyce Marlowe's nipple and chin were made. (R. 933). State's Exhibit 47 depicted the bite mark on the left ear. (R. 940). Based on that photo, Dr. Souviron testified that, "I could feel reasonably sure that the bite mark on the ear was left by Mr. Gilliam. (R. 941-942).

Dr. Souviron also used State's Exhibit 48 which was a similar set of photos from the bite mark on the chin in which the model is compared on the overlay to a photograph of Mr. Gilliam's teeth, only this one is of the breast. (R. 942). Dr. Souviron relied upon this photograph to testify that this injury was also caused by Burley Gilliam. (R. 946). State's Exhibit 49 is another photo of the model of Mr. Gilliam's teeth. (R. 948). Dr. Souviron explained that State's Exhibit 42 is the indentation left by the stone model of Mr. Gilliam's teeth. (R. 929). Without these exhibits, Dr. Souviron would not have had any basis for his testimony.

Where there are discovery violations, Richardson v. State, 246 So.2d 771 (Fla. 1971) requires the trial court to determine whether the noncompliance has resulted in prejudice to the defendant. This discretion, however, can only be properly exercised after the court has made an adequate inquiry into all the surrounding circumstances. The establishment of nonprejudice must affirmatively appear in the record. The court's response here, i.e., that the few moments the pro se defendant had to look at the photographs and overlays prior to the witness' testimony was "plently of time" (R. 903) was not the full inquiry Richardson requires. See Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

In Raffone v. State, 11 F.L.W. 342 (Fla. 4th DCA Feb. 5, 1986), the state tendered a crime analysis of various items

pursuant to a demand for discovery. The day before trial, however, the state conducted a supplemental analysis which was provided to the defense at trial. The court, in Raffone held that the trial court had an affirmative duty to furnish full discovery and that it was error not to have held a Richardson hearing.

It cannot be assumed that errors of this type are harmless. Cumbie v. State, supra. Even if the error was harmless beyond a reasonable doubt, failure to conduct an inquiry as required by Richardson compels per se reversal. Hall v. State, 477 So.2d 572 (Fla. 4th DCA 1985).

The Richardson inquiry is designed to ferret out procedural prejudice occasioned by a party's discovery violation. The trial court must decide whether the discovery violations prevent the aggrieved party from properly preparing for trial. Smith v. State, 372 So.2d 86 (Fla. 1979). Thus, in the instant case where Mr. Gilliam had retained the services of three forensic odonthologists who were prevented from examining the photographs and overlays prepared by the State's odontologist, Mr. Gilliam was prevented from properly preparing for trial. In Alfaro v. State, 471 So.2d 1345 (Fla. 4th DCA 1985), the court held it was error to not conduct a Richardson inquiry where the defendant was not advised about the medical examiner's testimony regarding accident reconstruction. Likewise, in the instant case, the court's failure to conduct a Richardson hearing constitutes reversible error.

VIII

THE COURT ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING WHEN COUNSEL LEARNED FOR THE FIRST TIME DURING TRIAL THAT TWO WITNESSES HAD IDENTIFIED SOMEONE OTHER THAN MR. GILLIAM AS HAVING BEEN THE DRIVER OF THE TRUCK AT THE SCENE OF THE MURDER.

A defense motion to produce favorable and exculpatory evidence was filed February 16, 1983. (R. 1201-1202).

Two witnesses, Brad Beloff and his girlfriend, Sandy Burroughs, testified that they were at the scene of the murder and tried to help the driver of a truck push it out of the beach area and onto the street.

On cross examination, each indicated that they did not recognize anyone in the courtroom as the driver of that truck. (R. 606-609; 614). However, both Mr. Beloff and Ms. Burroughs testified that the police showed each of them, separately, a photographic lineup display, from which each identified the driver of that truck. (R. 609; 614).

When each witness was shown a copy of the photo display which had been provided to defense counsel, both Mr. Beloff and Ms. Burroughs stated that the picture that they had picked out was not part of that set of photos. (R. 609; 614). Both witnesses testified that the person that they picked out of the photo identification lineup was not in court that morning.

Mr. Gilliam timely requested a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), regarding why the

State never produced those photographs to any of Mr. Gilliam's attorneys or to Mr. Gilliam. (R. 641-642).

The court refused to hold a Richardson inquiry on the grounds that no prejudice resulted to Mr. Gilliam because neither of those witnesses was able to make an identification, therefore, any error did not inure to Mr. Gilliam's detriment.

> The Court: I think the outcome or at least where we sit right now, the inability of any of these people to either make a photo I.D. at the time of the offense or an in-court I.D. makes any further inquiry on this null and void.
>
> Now, while you may argue there has been a technical violation, the question at a Richardson inquiry is always prejudice and it seems to me that at this point, and as I have explained to Mr. Gilliam, that is probably the best thing for him that the people are not able to make that identification.

(R. 642).

The Court utterly failed to address the fact that this discovery violation could have inured to Mr. Gilliam's benefit by producing evidence that another person, rather than himself, was at the scene of the crime and in possession of the truck.

When Mr. Gillaim requested copies of the photograph display shown to State's witnesses Beloff and Burroughs (R. 617-618), the Court responded:

> The Court: I have no idea how many photographs they showed them and it really doesn't matter. Like I said, the best thing you have going is that both guys stood there and talked to you and they couldn't identify you but I will take up your motion.

(R. 618).

The court, however, without conducting a hearing required by Richardson v. State, 246 So.2d 771 (Fla. 1971), decided that although there had been a technical violation, there was no prejudice. R. 642). This exchange, however, did not satisfy Richardson. In Raffone v. State, 11 F.L.W. 342 (Fla. 4th DCA 1976), where the trial court in refusing to conduct a Richardson inquiry stated: "You have got your objections on the record. I don't think you have been prejudiced," the appellate court reversed the conviction.

Here, the trial court's investigation into the question of prejudice was not the full inquiry required by Richardson. No appellate court can be certain that errors of this type are harmless. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). This is why Richardson requires that the circumstances establishing nonprejudice to Mr. Gilliam must affirmatively appear in the record.

Thus, had the defense been advised that the witnesses had not only not identified Mr. Gilliam, but that they had positively identified another man from the photo display as the driver of the truck, and thus at the scene of the crime, this information could have inured to Mr. Gilliam's benefit and shifted focus of the defense.

The State had the burden of showing the trial court that there was no prejudice and that Gilliam's ability to prepare for

trial was not impaired by a disclosure violation. Thus, in McClellan v. State, 359 So.2d 869 (Fla. 1st DCA 1978), where the state argued that since the witness had testified in a deposition to a much more incriminating statement made by the defendant, the defendant obviously was not prejudiced at trial when the witness testified to a less damaging, undisclosed statement. The appellate court held that the state had not met its burden and it was reversible error to not conduct an inquiry into the question of prejudice. Likewise, here a new trial is required.

IX

THE COURT FAILED TO INSTRUCT THE JURY AS TO ALL NECESSARILY LESSER INCLUDED OFFENSES OF CAPITAL MURDER, AND MR. GILLIAM DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER ON THE RECORD, THUS REVERSAL IS AUTOMATICALLY REQUIRED UNDER HARRIS V. STATE.

In Harris v. State, 438 So.2d 787 (Fla. 1985), this Court recognized the fundamental right of an accused in a capital case to have the jury instructed as to the necessarily included lesser offenses. The violation of that right constitutes fundamental error, a waiver of which, to be effective, must be made on the record knowingly and intelligently by the accused personally rather than by counsel.

Here the Court made less than a perfunctory effort to explain to Mr. Gilliam, who was representing himself, what was involved in his fundamental right to have the jury instructed on lesser included offenses. Just before closing arguments, the Court casually inquired whether Mr. Gilliam would be waiving the reading of lesser included offenses:

> The Court: I assume, Mr. Gilliam, that you would like all lesser included offenses read to the jury, is that correct?
>
> The Defendant: I don't understand what you mean.
>
> The Court: Alright. You don't have to argue lessers, State.

R. 1001-1002.

Mr. Gilliam clearly did not understand either the practical

aspect or the ramifications of this right that the Court waived on his behalf. Shortly after the above colloquy, Mr. Gilliam indicated that he did not understand the legal terms of art used by the judge.

> Gilliam: I would appreciate it if you would speak a little simpler English. I realize you have several years of college education behind you but you have to consider that --

R. 1003.

During the charge conference, standby counsel advised the Court that he attempted to discuss the significance of lesser included offenses with Mr. Gilliam, but was having difficulty communicating with him. (R. 1014-1025). The Court stated to standby counsel:

> The Court: I just feel like, you know, it would be in his best interest, of course, to have lessers given ...

R. 1015

Standby counsel agreed with the Court's opinion and stated he would attempt to explain it in common sense terms (R. 1015) either that night or early the next morning.

Nonetheless, on the following morning, it was announced that Mr. Gilliam only wanted the jury instructed on first degree and second degree murder. (R. 1020). The following is the only attempt made by the Court to ascertain whether this pro se defendant with less than a high school education was making a knowing and intelligent waiver of a fundamental right:

Mr. Adelstein: Let me just advise the Court as to what lessers I believe Mr. Gilliam wishes to waive at this time. On the count which charges first degree murder, it is my understanding that Mr. Gilliam is only requesting first degree murder and second degree murder.

The Court: Is that correct, Mr. Gilliam?

The Defendant: Yes.

The Court: All right. You have talked -- and I have to ask you these questions. You have talked to Standby Counsel about these instructions, correct?

The Defendant: Yes.

The Court: They have explained to you and your understand you have the right to have all lesser included offenses read to the jury?

The Defendant: Yes, sir.

The Court: And you are asking that only first and second degree murder be read?

The Defendant: Yes.

The Court: Has anybody forced you or threatened you to make that decision? Is it freely and voluntarily made?

The Defendant: Yes.

The Court: So the Court finds that third murder, we don't have to worry about.

Mr. Adelstein: Nor do you have to worry about manslaughter, Your Honor.

The Court: Okay.

R. 1020-1021.

Shortly thereafter, standby counsel renewed his continuing request for psychiatric evaluation of Mr. Gilliam. (R. 1026-

1027). The request was denied.[19] (R. 1027).

In Jones v. State, ____ So.2d ____, 11 F.L.W. 60, Case No. 66,335 (Fla. Feb. 13, 1986), this Court explained its reasoning of the fundamentality of the right to such instruction in the capital context, stating:

> The Harris holding was, in part, based on the United States Supreme Court's decision of Beck v. Alabama, 447 U.S. 625 (1980). In Beck, the Court struck down as violative of due process an Alabama statute prohibiting a judge in a capital case from instructing the jury on lesser included offenses. Citing the "significant constitutional difference between the death penalty and lesser punishments.," 447 U.S. at 637, the Court reasoned that the failure to give the jury the "third option" -- of convicting on an appropriate lesser included offense, as opposed to either conviction or acquittal, impermissibly enhanced the risk of an unwarranted conviction.
>
> In the absence of a "third option" a conviction might signal a jury's belief that the defendant had committed some serious crime deserving of punishment, while an acquittal could reflect a hesitancy to impose the ultimate sanction of death. Such possibilities, the Court held, "introduce a level of uncertainty and unreliability into the factfinding process that cannot be

---

[19]The above inquiry was wholly insufficient to determine whether the waiver was being made knowingly and intelligently. To the contrary, it is readily apparent that Mr. Gilliam did not have an appreciation of the significance and ramifications of the important rights which were being excluded. This issue should be considered in light of the facts and arguments set forth in issues I and II, supra, regarding Mr. Gilliam's incompetence to stand trial and inability to waive the assistance of counsel.

> tolerated in a capital case." 447 U.S. at 643.

Jones, 11 F.L.W. at 61.

Reversal of Mr. Gilliam's conviction is automatically required here under Harris v. State, because of the absence of clear evidence in the record that Mr. Gilliam made a personal statement of a knowing and intelligent waiver of his right to have the jury instructed on lesser included offenses, and that he was competent to waive that right.

X

BECAUSE OF ACTIONS AND INACTIONS BY THE PROSECUTORS AND BY THE TRIAL COURT, FUNDAMENTAL ERRORS OF CONSTITUTIONAL SIGNIFICANCE OCCURRED DURING MR. GILLIAM'S TRIAL, AND THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERRORS DENIED MR. GILLIAM HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

A. CUMULATIVE ERRORS TAINTED THE TRIAL.

The prosecutors took undue advantage of Mr. Gilliam's predicament of defending himself pro se. First, the prosecutor obstinately refused to provide Mr. Gilliam with a list of its witnesses. Although the Court repeatedly directed the prosecutors to provide Mr. Gilliam with its witness list, the prosecutor resorted to all kinds of gimmicks to avoid so advising Mr. Gilliam, until the Court reprimanded the prosecutor. On the third day of the five-day jury trial, standby counsel requested that the prosecutor at least advise Mr. Gilliam as to who the next four or five witnesses would be so that he could prepare over the lunch break. When the judge returned to the bench, he immediately asked whether or not his order had been carried out:

> The Court: I trust my instructions were carried out so that the next four or five witnesses he knows who they are and so that I don't have to stop after every witness.
>
> * * *
>
> The Prosecutor: ... I have made an attempt ...
>
> The Court: So the order of the Court was not carried out?

> The Prosecutor: No, Your Honor, it was not.
>
> The Court: Okay, well you know, who do you plan to call this afternoon?
>
> * * *
>
> The Court: What exhibits do you intend to introduce?
>
> Mr. Adelstein: ... I specifically asked to give the order of the witnesses which I believe was Your Honor's order.
>
> The Court: That was my order.
>
> * * *
>
> The Court: See, you know, there we go again. There we go again like children. You know, Susan [prosecutor] -- ... Why is it so difficult when I said, please give Mr. Gilliam a list of the people that you are going to call this afternoon? Why is that so hard?
>
> * * *
>
> The Court: If I don't supervise every aspect of this case -- I come back in the courtroom and it is chaos.

(R. 682-689).

The prosecutor finally revealed which witnesses would testify that afternoon. (R. 689). At the end of the afternoon, Mr. Gilliam again requested a complete list of witnesses. (R. 694). And the Court responded, "I am doing the best I can, Mr. Gilliam." (R. 694).

Before the end of the day, Mr. Gilliam again requested a complete list of witnesses and the prosecutor finally admitted that she had no intention to give Mr. Gilliam the addresses of certain witnesses. (R. 725). By the end of the third day of the

five-day jury trial jury, Mr. Gilliam still did not have a complete list of witnesses. (R. 814; 830).

On the first day of trial after the jury was sworn, the Court ordered the prosecutor to write out a list of all witnesses for the trial phase. (R. 567). The Court denied Mr. Gilliam's request for a list of witnesses that would testify at the penalty phase. (R. 567-68). Further, the Court failed to order depositions already taken of material witnesses to be transcribed and provided to Mr. Gilliam prior to the time that the witness testified. In some instances, the Court had promised Mr. Gilliam that transcripts would be available to him, but, for example, the transcript of Armando Rago's deposition (R. 624) was not provided to Mr. Gilliam and therefore he had no way to effectively cross examine this witness. Therefore, Mr. Gilliam, who had not taken or attended the deposition, was forced into the position of conducting cross examination of a witness without knowing what that witness had testified to previously.

The trial court abused its discretion in denying Mr. Gilliam's request for continuance of trial and continuance at the time of the penalty phase. Valle v. State, 394 So.2d 1004 (Fla. 1981). The trial judge knew that Mr. Gilliam's main source of conflict with his attorneys was their refusal to provide him with copies of crucial documents forming the basis of his defense, for example, medical reports and depositions. Nonetheless, the court forced Mr. Gilliam to prepare for trial

within four days without even knowing who the state's witnesses were or what they testified to during deposition. The court abused its discretion in denying Mr. Gilliam's requests for continuance at the trial and at sentencing.

Overreaching on the part of the prosecutor was also patent in another context. The prosecutor put into evidence the reputation of the decedent on direct examination of the State's witness, Kathleen Gordon. (R. 539-553). Standby defense counsel made a timely motion for mistrial on the grounds that it was totally immaterial and irrelevant and designed to persuade the jury to believe that the decedent was just a meek angel of a person. (R. 563). In denying the request for mistrial, the Court took the opportunity to admonish the State:

> The Court: There again you know I have said it before, but it just seems like state attorneys overkill.

(R. 564).

As part of standby counsel's motion for mistrial he cited as part of the cumulative error, the State's attempt to rehabilitate its second witness, Jeff Sherry, by asking whether or not his testimony that he gave today was the same as what he told the police officers at the time of the offense. (R. 556-557). The Court compounded the prosecutor's blunder by stating:

> The Court: ... The bottom line, sir, the testimony that you gave here today, was that the same you told the police?

(R. 557).

By participating in the State's attempt to rehabilitate the witness, the Court made a direct comment on the credibility of that witness. The Court denied the motion for mistrial. (R. 566).

Yet another example of the State's overreaching is evidenced in its presentation of several witnesses. Brad Beloff and Sandy Burroughs testified to matters which could not be linked to Mr. Gilliam. Neither witness could identify Mr. Gilliam as the driver of the truck which they saw at the lake. The Court denied a timely motion to strike their testimony made on the grounds that it was totally irrelevant. (R. 639-640).

Even though the State's next witness, Al Morris, also could not identify Mr. Gilliam as the driver of the truck which he towed from the lake to the Cloverleaf Amoco Station, the prosecutor asked, "Did you have any further conversations with the defendant?" (R. 621). Despite the fact that the tow truck driver had already testified that he did not see the truck driver in the courtroom and was not sure that the photograph of Burley Gilliam was the same person who was at the lake. (R. 622). The State, sought to imply to the jury that Mr. Gilliam was at the lake, when that witness had not testified that Burley Gilliam was the person at the lake.

The Court allowed 24 into evidence, over Mr. Gilliam's objection (R. 647-648) the Cloverleaf Amoco Station work order, State's Exhibit No. 24, for repairs on the truck towed from the

scene of the crime without a proper predicate. The witness was unable to identify the signature on that paper as belonging to Mr. Gilliam. (R. 645-648).

Standby defense counsel moved for mistrial based on the cumulative effect of all of the above trial errors, including the Court's denial of a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971) (discussed in Arguments VII & VIII) and all of the other trial errors which had occurred. (R. 645).

Such actions on the part of the prosecutor and compounded by the judge, are untenable and violated Mr. Gilliam's right to a fair trial. The State, in its zeal, violated Mr. Gilliam's confrontation clause rights guaranteed by the Sixth Amendment. Davis v. Alaska, 415 U.S. 308 (1974).

The State, at first, agreed that reasonable grounds existed to warrant a competency hearing. However, after the trial had commenced, making it impractical to discontinue, the prosecutors argued that Mr. Gilliam was competent. The prosecutors then took full advantage of Mr. Gilliam's clear inability to function within the legal process and, the prosecutors purposefully taunted Mr. Gilliam, for example, by violating the Court's order to disclose its witnesses, in an effort to trick Mr. Gilliam into reacting in an unseemingly manner in front of the jury.

B. CUMULATIVE ERRORS TAINTED THE PENALTY PHASE.

Here, Mr. Gilliam was not only incapable of representing himself at trial based the inadequacies of his own education and

state of mind, but the prosecutor specifcially crippled his ability or the ability of standby counsel to adequately prepare the penalty phase.

During the trial phase when Mr. Gilliam requested a complete list of witnesses and exhibits from the State, the court did not require the State to advise Mr. Gilliam as to the penalty phase. (R. 567-68). At the time of the penalty phase, standby counsel advised the judge that at no time in the case while he was counsel for defendant was he provided copies of the penalty phase discovery material. (R. 1064). Defense counsel had previously filed a Motion to Produce Certified Copies of Defendant's Record of Prior Convictions. (R. 1218-1219).

Even at the time of penalty phase hearing when standby counsel requested that Mr. Gilliam be allowed to look at any exhibits that are going to be introduced (R. 1070), the prosecutor complained that the only exhibit was a certified copy of a previous indictment and cited the inconvenience of producing it because it was upstairs in her office for "safekeeping." (R. 1070-1071). That prompted the following chastisement from the court:

> The Court: I don't care if it's in the National Archives, get it to him and give it to him right now.

(R. 1071).

Mr. Gilliam also requested to know which witnesses the prosecutor would be calling at the penalty phase, to which the

prosecutor responded by reciting her witness list. Mr. Gilliam said that he wanted a mimeograph copy and "if they cannot come prepared, then something is wrong here." (R. 1071). The Court agreed:

> The Court: I agree with you Mr. Gilliam. They should have had all that stuff down here and ready to go.

(R. 1071).

Both Mr. Gilliam and his standby counsel advised the court of the real prejudice caused by the prosecutor's surprise introduction of the Texas convicition. Mr. Gilliam explained to the court that his understanding of the law was that if a defendant does not take the stand, the State cannot bring up prior convictions (R. 1073), thus exhibiting his lack of understanding of a penalty phase proceeding in a capital case. The court explained to him that in the penalty phase, the State does have such a right. (R. 1073).

Standby counsel, on behalf of Mr. Gilliam, objected and moved to strike the State's Exhibit on the ground that neither Mr. Gilliam nor counsel saw the document prior to the noon recess (R. 1080), and therefore the State provided improper notice for the Court to take judicial notice. Under Rule 90.956 of the Evidence Code, timely written notice of intention to use a summary is required, and that summary should be made available for examination by the parties at a reasonable time and place. Standby counsel also objected to the indictment on the ground

that the alleged prior conviction is over ten years old. (R. 1080).

The court denied defense motions and accepted the convictions noting that there was no prejudice to Mr. Gilliam by not receiving the document earlier because it should come to him as no surprise since the court found that he was the individual so convicted and therefore he had knowledge about the prior conviction. (R. 1084).

The cummulative effect of these errors constitutes reversible error in that Mr. Gilliam did not receive a fair trial or sentencing hearing. In Chambers v. Mississippi, 410 U.S. 284 (1972).

In Chambers v. Mississippi, 410 U.S. 284 (1972), the United States Supreme Court expressly acknowledged that while an isolated error committed by a trial court may not render the trial of a criminal defendant fundamentally unfair, the cumulative effect of multiple errors may give rise to such a claim. Id. at 291. In Chambers, the accused asserted "... that he was denied 'fundamental fairness guaranteed by the Fourteenth Amendment' as a result of several evidentiary rulings." Id. at 290, n.3. His claim, the substance of which the court accepted in its opinion rested upon "... the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense." Id. See, also, Washington v. Texas, 388 U.S. 14 (1967).

As in Chambers, certain critical evidentiary rulings by the trial court in combination served to deny appellant's right to a fundamentally fair trial. His conviction and sentence must therefore be reversed.

XI

THE COURT ABUSED ITS DISCRETION IN ARBITRARILY REQUIRING AN ADVISORY JURY SENTENCING RECOMMENDATION, OVER MR. GILLIAM'S OBJECTION.

An individual who has been convicted of a capital offense and faces sentencing has a right to waive the jury recommendation proceeding under §921.141(2), Fla. Stat. Palmes v. State, 397 So.2d 648 (Fla. 1981), certiorari denied 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195. While the right to have a sentencing jury render its opinion on the appropriateness of imposition of the death penalty is an essential right of a defendant, such right may be waived, provided the waiver is voluntary and intelligent. Lamadline v. State, 303 So.2d 17 (Fla. 1974).

In State v. Carr, 336 So.2d 359 (Fla. 1976), this court held that upon a finding of a voluntary and intelligent waiver, the trial court may in his or her discretion either require an advisory jury recommendation or proceed to sentence the defendant without such recommendation. Id. at 359.

Here Mr. Gilliam clearly stated that he did not want an advisory sentencing proceeding to occur and he did not want to be present, or participate, if it did proceed. Without bothering to make any inquiry whether Mr. Gilliam's waiver was voluntary and intelligent, or whether Mr. Gilliam was competent to make such a waiver, the court rejected his waiver.

The sole reason the trial judge proceeded with the advisory sentencing hearing was that the court misunderstood the law. The

appellate prosecutor incorrectly advised the court that Mr. Gilliam did not have the right to waive the advisory recommendation. Lamadline v. State, 303 So.2d 17 (Fla. 1974).

The trial court abused his discretion in requiring an advisory sentencing hearing. In light of the unique circumstances here, and especially considering that Mr. Gilliam was required to appear pro se and without prior knowledge of the exhibits or witnesses to be present.

XII

THE COURT ABUSED ITS DISCRETION IN FAILING TO ORDER A PRESENTENCE INVESTIGATION REPORT PRIOR TO SENTENCING BURLEY GILLIAM TO DIE IN THE ELECTRIC CHAIR.

The decision as to whether to order a presentence investigation report ("P.S.I."), lies within the sound discretion of the trial judge. Harich v. State, 437 So.2d 1082 (Fla. 1983), cert. den. ____ U.S. ____, 104 S.Ct. 1329, 79 L.Ed.2d 324 (1984); State v. Purwin, 405 So.2d 970 (Fla. 1981); Thompson v. State, 389 So.2d 197 (Fla. 1980). Failure to order such a report, even in a capital case, does not constitute reversible error per se. Rose v. State, 461 So.2d 84, 87 (Fla. 1984).

However, under the unique combination of circumstances in this case, it was incumbant upon the court to order a presentence investigation report. This case differs substantially from Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) where the law at the time of Proffitt's trial did not allow such reports to be ordered in capital cases.

Here the decision to order a PSI was authorized and within the sole discretion of the trial judge. It was clear that Mr. Gilliam was unable to adequately prepare or present mitigating factors at his sentencing hearing.

Mr. Gilliam had requested that no advisory sentencing hearing be held. (R. 1065). The court did not conduct any inquiry as to whether Mr. Gilliam voluntarily and competently

waived his right to counsel. Mr. Gilliam was forced to represent himself pro se at a hearing that he had the right to waive.

Therefore, the court should have ordered a PSI which would at least have provided some insight into Mr. Gilliam's family, background, medical and mental health, and allowed the judge to know Mr. Gilliam as an individual. The PSI also would have revealed the circumstances and history of Mr. Gilliam's epilepsy and medication problems. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

The Eighth Amendment does not tolerate the degree of possibility of error present in this penalty phase hearing. Perhaps the most firmly settled and closely enforced Eighth Amendment mandate applicable to capital sentencing is that the process for determining the appropriate punishment be individualized.

Based upon all of the unique circumstances here, the court should have ordered a presentence investigation report before sentencing Mr. Gilliam to die in the electric chair.

CONCLUSION

Based upon the foregoing arguments and citations of law, appellant, Burley Gilliam, Jr., respectfully requests this Court to reverse his conviction and remand for a new trial, or, at a minimum, to reverse his sentence of death and remand for new sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of March, 1986, to: Office of the Attorney General, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128.

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