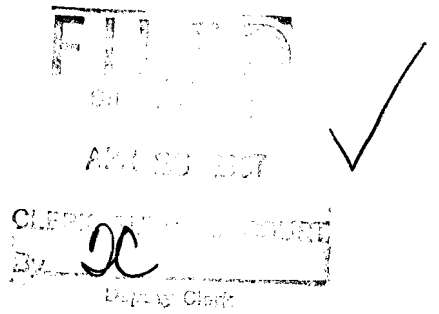
IN THE SUPREME COURT OF FLORIDA

PAUL HILDWIN,	)	
	)	
Defendant/Appellant,	)	Case NO. 69,513
	)	
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff/Appellee.	)	
	)	



APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

PAUL HILDWIN (hereafter Hildwin) was charged by indictment in Hernando County with the first-degree murder of VRONZETTI COX (hereafter Cox)(R1133) [1/]. The Office of the Public Defender of the Fifth Judicial Circuit was initially appointed to represent Hildwin (R1140); that office later withdrew due to a conflict of interest caused by prior representation of potential witnesses (R1182-1183). Daniel Lewan, Esq. was appointed to represent Hildwin (R1184) in accordance with a previously existing contract (R1470-1473).

Trial commenced the week of August 25, 1986 in the Circuit Court for Hernando County, the Honorable L.R. Huffstetler, Jr. presiding. Defense counsel unsuccessfully

1/ (R) refers to the record on appeal in this case, Supreme Court Case No. 69,513.

sought to have the state disclose the prior criminal records of its witnesses (R1243-44). A motion to have Section 921.141, Florida Statutes declared unconstitutional based on discriminatory application of the death penalty and lack of due process caused by improper treatment of aggravating circumstances was also denied (R190-191,1245-1247).

After the jury was accepted but before it was sworn defense counsel attempted to excuse prospective juror Potts because Potts had, during the overnight recess, observed Hildwin in handcuffs being led by deputies from the sheriff's van into the Hernando Courthouse (R203-210). Defense counsel had at that time used 8 of 10 peremptory challenges. The challenge to Potts was denied (R210).

Several Richardson [2/] inquiries were had concerning discovery violations. One such inquiry concerned photographs not viewed by defense counsel prior to their introduction at trial (R231-232,242,253-262); another concerned the testimony of an F.B.I. serologist who performed blood analysis comparisons on several articles of evidence (R592-608); a third hearing concerned the testimony of a witness not included on the state's witness list (R613-619). The court found at most inadvertent discovery violations, and defense counsel was given a three-day recess to consider the matters of which he was previously unaware (R607-608).

2/ State v. Richardson, 246 So.2d 771 (Fla.1971)

At the conclusion of the state's case defense counsel moved for a judgment of acquittal, claiming insufficient proof of premeditation (R723-726). The motion was denied (R726). Hildwin testified (R752-768), as did several other defense witnesses. In rebuttal the state presented over objection the testimony of Jane Phifer, an investigator for the state attorney's office, concerning a statement allegedly made by the defendant (R858-867). Over objection, she was allowed to read into evidence notes that had been made without any showing of admissibility (R866). Following virtually objection-free closing arguments [3/] (R929-989) the jury was instructed on the law of the case. The court refused defense counsel's request for an instruction concerning the maximum and minimum penalties (R919).

After retiring to deliberate, the jury issued the following question in writing: "The distance from his home to where the car was found." Written on the same sheet of paper is the answer, "You must rely on your memory of the testimony." (R1382). The jury was not brought back into the courtroom for the question to be answered in compliance with Fla.R.Crim.P.

3/ The only objection was made by defense counsel on the basis of argument outside the evidence; the objection was overruled (R938). Interestingly, the state's initial closing argument required eleven pages to transcribe, and the defense attorney's closing argument required fourteen pages to transcribe (R940--953). The court then recessed at 11:41 for dinner without objection (R955). When the proceedings reconvened at 1:15 the state's "rebuttal" argument required thirty-five pages to transcribe, and the subject matter of the argument covered physical exhibits and issues not addressed in the defense closing argument. (R955-989). See State v. Pettibone, 164 So.2d 801 (Fla. 1964). No objection was made.

3.410 and the record fails to show that notice of the question was given counsel for the parties (R1010). Following an hour and a half of deliberations, Hildwin was found guilty of first-degree murder (R1010-1011,1383).

The jury was allowed to go home overnight without objection and they returned the next day for the penalty phase. The state presented the testimony of five witnesses and introduced certified copies of Hildwin's prior New York convictions of first-degree rape (R1028) and attempted first-degree sodomy (R1029-1030). Testimony from Hildwin's Florida parole office established that at the time of Cox's murder Hildwin was on active parole from New York (R1022). [redacted] the victim of the New York rape, testified about the facts of that incident (R1039-1047).

Defense counsel presented the testimony of the defendant (R1090-1095) and the defendant's girlfriend (R1048-1050), father (R1050-1056) and foster parents (R1095-1101). The state declined to cross-examine any of those witnesses. Thereafter, over objection, the state was allowed to present "rebuttal" testimony of a witness recounting the specifics of an assault and sexual battery allegedly committed on her by Hildwin that was never subject to prosecution (R1103-1113). Defense counsel requested instructions on two mitigating circumstances, those being the age of the defendant and any other aspect of the defendant's character (R1075-1076). The age instruction was disallowed (R1077). The jury deliberated for fifty minutes and

unanimously recommended that a sentence of death be imposed (R1126,1387).

Paul Hildwin was adjudicated guilty of first-degree murder and sentenced to death (R1403-1407). Judge Huffstetler entered a written order setting forth his findings of fact as required by Section 921.141(3), Florida Statutes. The court found four aggravating circumstances, to wit: 1) defendant previously convicted of felony involving threat of violence to a person; 2) the capital felony was committed by a person under sentence of imprisonment; 3) the capital felony was committed for pecuniary gain, and; 4) the capital felony was especially wicked, evil, atrocious or cruel. No mitigating circumstances were found to exist (R1394-1396).

The trial judge failed to address the mitigating evidence contained in records which the state requested be judicially noticed (1257-1314). The mitigating evidence presented by trial counsel concerned Hildwin's disrupted childhood (R1048-1099). A timely notice of appeal [4/] was filed October 16, 1986 (R1425), and the Office of the Public Defender was appointed to represent Hildwin for the purpose of his appeal (R1427).

4/ An amended notice of appeal was filed October 27, 1986 (R1429).

STATEMENT OF THE FACTS

On the evening of September 8, 1985 Paul Hildwin, Helen Lucash, Billy Oehling and Cindy Wriston went in Hildwin's blue Chevrolet to a drive-in movie (R509-510). All of the group's money was spent for admission and snacks (R511). After the movie Hildwin took Bill Oehling home (R521,525). On the way to the girls' home the car ran out of gas in front of the Lone Star Bar; it was almost midnight (R511).

Several attempts were made to start the vehicle. Hildwin initially caught a ride to the "J.P. Mart" with a friend and exchanged some pop bottles for gas (R511). The small amount of gas he obtained was insufficient to start the engine (R512). They eventually gave up trying and slept in the car until morning (R522). Ms. Lucash awoke around 9:00 o'clock a.m.; Hildwin was absent (R512). He returned between 9:30 and 10:00 o'clock; he was cleaned up and had eaten; he stated he had been to his father's house (R513-514). He went to the Lone Star Bar to get assistance in starting his car. While there he purchased some sodas for the girls (R513). He told the bar's owner that he had a check to cash and would be back later to buy something; he also offered to sell the owner a radio (R530-532). After waiting for a supply man to arrive the bar owner took Hildwin to a store where Hildwin purchased $2.00 worth of gas; it was 10:44 o'clock a.m. (R534-536). They returned to Hildwin's car and got it started; the girls were taken home (R514).

Four days later, on September 13, 1985, two men riding motorcycles through the woods discovered a 1984 brown Chevrolet

stuck in the mud at the edge of a lake (R235-241). The Hernando County Sheriff's Office was notified, and the nude body of Vronzettie Cox was found in the vehicle's trunk (R248-250). A knit tee-shirt was tied tightly around Cox's neck (R280-281,295). A forensic pathologist determined that death had been caused by strangulation (R298). He opined that the rate of decomposition of the body was consistent with death having occurred on September 9, 1985 (R299). The doctor did not express an opinion as to how long it took Cox to lose consciousness or die; he testified that those two things depend on how tightly and how quickly a ligature around the neck is tightened, and that "it would be a fair range of minutes, depending on the pressure that was applied." (R297). The only injury to Cox was a broken bone in the larnyx, an injury consistent with strangulation, and superficial tearing of the skin under the ligature (R301-302).

Cox owned a brown, four-door 1984 Chevrolet Cavalier with a sun roof (R307). Her boyfriend (William Haverty) claimed to have last seen Cox between 8:30 and 9:00 o'clock a.m. on September 9, 1985 when she left in that car to do the laundry and cash a check (R306-308). A laundry bag found in the car contained, at the very top, a pair of cut-off blue jeans and, inside the blue jeans, ladies underpants (R684-685). Tests performed on the underpants disclosed semen from a person with secretor characteristics and A positive blood (R695-696). Hildwin and 11% of the white male population possess such traits (R695-696); Cox's boyfriend does not (R692). A hair found

inside Cox's automobile was consistent with Hildwin's hair (R642).

A teller at the First Savings Bank in Spring Hill identified Hildwin as the person who drove through the drive-in window between 12:30 and 1:00 o'clock on September 9, 1985 and cashed a check on Cox's account (R400-403). Information taken from Hildwin's driver's license was placed on the back of the check by the teller when it was cashed (R406). The car Hildwin was driving was described as being a brown Chevrolet with tail--lights similar to those of Cox's car (R407). Another witness recalled that the car driven by Hildwin at the bank had a sun roof (R423-424). Hildwin's car has no sun roof (R545).

Deputies contacted Hildwin because the check he cashed was the last transaction on Cox's account. Hildwin initially stated that his car had broken down on U.S. 19 and that Cox had picked him up just north of the J.P. Mart. He explained his situation and when he asked Cox for a loan she wrote him a check, giving him two weeks to pay the loan back (R388). Later during questioning he admitted that he forged the check, stating that Cox picked him up in the same manner but that they stopped at the J.P. Mart. Hildwin claimed that a white male known only as "Jeff" got into Cox's car as Hildwin exited; Cox went into the store. Hildwin asked Jeff for a loan and Jeff tore two blank checks out of Cox's checkbook, handed one to Hildwin and kept one for himself (R389-390,399). The last time Hildwin saw Cox she was driving off with Jeff (R391).

During questioning by the police Hildwin admitted having Cox's radio in his house, stating that Cox had given it to him to listen to while working on his car (R391). The radio was found in Hildwin's bedroom (R491). A pearl ring identified as Cox's was found in Hildwin's bedroom on the nightstand next to his bed (R489-490). Cox's purse, which contained a bra, was found in the woods a quarter mile from Hildwin's residence; Cox's shoes were found 500 feet from the purse in a direct line to Hildwin's home (R537-542).

Hildwin testified in his own behalf at trial. He admitted stealing the checks and ring from Cox's purse after she had picked him up near the J.P. Mart, and further admitted forging the check (R761). He stated that he had lied before because he did not want to be violated on parole (R768). Hildwin testified that Cox's boyfriend ("Haverty") was in the car with Cox when she picked him up, and that Cox and Haverty were fighting because she had been seeing other men (R757-759). Cox pulled off the main road onto a side road when Haverty tried to slap Cox; Hildwin, who was sitting in the rear, asked to be let out of the car. Cox stopped the car and Haverty ran around and pulled Cox out of the car and commenced beating her (R760). Hildwin started to intervene and Haverty swung at him (R761).

Hildwin walked on to his father's house. At that time Haverty was on top of Cox, holding her throat with one hand and hitting her with the other (R761-762).

SUMMARY OF ARGUMENT

Point I: A prospective juror observed Hildwin in handcuffs being dropped off at the courthouse by Hernando County deputies the day after that prospective juror had been selected to sit on the jury but before he had been sworn. Following a hearing, which produced evasive answers to questions about the incident, defense counsel challenged the juror. The challenge was disallowed. That ruling was error, in that a peremptory challenge can be exercised at any time prior to a jury being sworn. The ruling deprived the defendant of twelve impartial jurors, thereby circumventing his Constitutional right to a jury trial; for that reason the error cannot be considered harmless, and in any event it was not harmless. A new trial is required.

Point II: During the penalty phase the prosecutor, over objection, presented the testimony of a young woman claiming that Hildwin had previously raped her. Hildwin was never charged with that crime. The state presented the testimony ostensibly to rebut testimony concerning Hildwin's non-violent character. The testimony was inadmissible because it did not pertain to any statutory aggravating circumstance and it otherwise constituted improper rebuttal, since it is improper to present evidence of a specific incident to rebut the character trait of non-violence; proper rebuttal must be done through evidence concerning the defendant's reputation in the community for violence. The testimony was so prejudicial that a new penalty proceeding with a new jury is necessary.

Point III: During deliberations the jury asked in writing a question pertaining to the evidence presented at trial. The question was answered by the trial judge on the same piece of paper. The record does not show compliance with Fla.R.Crim.P. 3.410 insofar as notice to the attorneys and open-court response. Further, the record does not show that the defendant was present or, conversely, that he knowingly waived his presence. The defendant was denied due process by such cavalier treatment of the jury inquiry. A new trial is required.

Point IV: Due process requires that the jury unanimously determine the defendant's guilt of the crime for the sentence imposed. If, in returning its verdict, the jury does not consider all of the statutory elements necessary to impose a particular sentence, that sentence cannot be imposed. A death penalty cannot be imposed without the existence of at least one statutory aggravating circumstance. Because the jury did not unanimously determine the presence of any aggravating circumstance, the death sentence must be vacated and a sentence of life imprisonment imposed.

Point V: The trial court refused to give the timely requested instruction on the maximum and minimum penalties. The instruction was mandated pursuant to Fla.R.Crim.P. 3.390(a) and Section 918.10(1) Fla.Stat. (1985). Reversal is required.

Point VI: Over timely objection a state witness was permitted to read notes into evidence under the guise of direct examination. The witness' recollection was not shown to need refreshing, and the notes did not otherwise qualify for admission into evidence. The defendant was prejudiced due to the critical content of the notes and the falsely bolstered credibility of the witness' testimony that occurred from the improper procedure. Reversal of the conviction and retrial is necessary.

Point VII: The evidence of guilt in this case is wholly circumstantial. The proof fails to exclude reasonable hypotheses of innocence, and it is therefore legally insufficient. The conviction must accordingly be reversed. Alternatively, because the verdict form failed to specify whether the jury convicted Hildwin under a felony murder or a premeditated murder basis and because the jury was instructed on both theories, if the evidence is insufficient under either theory, the conviction must be reversed and the matter remanded for retrial.

Point VIII: There is insufficient evidence to prove that the murder was committed in an especially heinous, atrocious or cruel manner. The only thing the evidence shows is that the victim was strangled with a knit shirt. This, alone, does not legally support finding the aggravating circumstance.

Point IX: There is insufficient evidence to prove that the murder was committed for pecuniary gain. The testimony does not

establish when the victim died in relationship to the taking of her property. Speculation alone cannot support finding an aggravating circumstance.

Point X: Fundamental error occurred when the jury received instructions that reasonably misled them in performing their role in weighing factors used to recommend the appropriate sanction, in that the instruction was worded in a manner indicating that they were limited to only one mitigating circumstance to weigh against the aggravating circumstances. The role of the jury to recommend the appropriate sanction was undermined contrary to the Eighth Amendment. A new penalty proceeding with a new jury is required.

Point XI: Hildwin claimed that he last saw the victim in the company of William Haverty, thereby implying that Haverty committed the crime. In rebuttal, over objection, the state established that Haverty has no prior convictions and only four arrests for minor offenses. That testimony was used by the prosecutor during closing to improperly argue that Haverty was non-violent; Haverty's "good record" also improperly bolstered his credibility. The testimony and argument were prejudicial because they reasonably affected the jurys weighing of Haverty's character and credibility. Reversal and retrial is necessary.

Point XII: A defendant is entitled to information concerning the prior criminal convictions of state witnesses. The trial judge

refused to require the state to provide the defendant with the requested information. The defendant was prejudiced because he could not meaningfully impeach the representations of the witnesses concerning their prior criminal record. Reversal and retrial is required.

POINT XIII: The trial court failed to consider mitigating evidence that was contained in the court file when the defendant was sentenced to death. The court's findings do not reflect that the evidence was considered. Instead it appears that the evidence was clearly overlooked. The sentence accordingly must be reversed and the matter remanded for resentencing.

POINT I

REVERSIBLE ERROR OCCURRED WHERE THE TRIAL COURT REFUSED TO ALLOW DEFENSE COUNSEL, WITH TWO PEREMPTORY CHALLENGES REMAINING, TO CHALLENGE A JUROR PRIOR TO THAT JUROR BEING SWORN.

At the conclusion of the first day of trial twelve jurors and two alternates had been selected. They were told to return to the courthouse the next morning at ten o'clock and were given cautionary instructions. The next morning it was learned that prospective juror Potts had arrived early at the courthouse and observed the handcuffed defendant exiting a Hernando County Sheriff's transportation van. Potts was brought into the judge's chambers and questioned by the court and the attorneys with the defendant present. Potts admitted seeing the sheriff's deputies unload the defendant and lead him into the courthouse. He explained, "I was walking up from the parking lot when I saw them unloading. I turned around and walked back to the parking lot so I wouldn't be seen." He indicated that he had said nothing to the other prospective jurors, that he wasn't surprised to see the defendant so handled and that it did not indicate anything in particular to him (R204-209).

When Potts was excused from the judge's chambers defense counsel stated the following:

> MR. LEWAN: Judge, at this time I would object to him continuing to be on the jury or being seated on the jury. It's well known that the van that he was brought over here in has the sheriff's markings on it. The state has already said that he was in handcuffs. I think that it clearly shows that he is incarcerated for this crime. I think it

> would bias Mr. Potts, could only bias Mr. Potts and make him unable to reach a fair and impartial verdict in this case. I would move to challenge him.

(R208-209). That motion was denied (R209). The panel was brought into the courtroom and sworn as the jury.

This Court has consistently held that a defendant has an absolute right to challenge any juror peremptorily before the juror is sworn. In Jackson v. State, 464 So.2d 1181 (Fla. 1985) this Court "again emphasize[d] that a party may challenge any juror at any time before the jurors are sworn." Jackson at 1183 The fact that the panel was initially accepted by defense counsel is of no significance.

> [I]f the prisoner, at any time before juror or jurors were sworn, had retracted his election of such juror or jurors and expressed his desire to challenge him or them, it was his right to do so until the whole of his peremptory challenges were exhausted.

O'Connor v. State, 9 Fla. 215 (1860).

A procedure preventing backstriking jurors can be harmless error. The harmless error analysis presupposes a trial, at which the defendant, effectively represented by counsel, may present evidence and argument before an impartial judge and jury. Rose v. Clark, __U.S.__, 106 S.Ct.__, 92 L.Ed.2d 460, 470 (1986). Assuming that a harmless error analysis is appropriate, the error cannot be considered harmless in this case. The reliability of Mr. Pott's impartiality was suspect after he saw the defendant in handcuffs. Reliable impartiality was non-existent after the inquiry. See Ingraham v. State, 12 FLW 549 (Fla. 3d DCA Feb. 17,

1987). It is apparent from Potts' evasive responses during his questioning that he knew he should not have observed the handcuffed defendant in the sheriff's custody. The fact that he admitted turning around and walking back to the parking lot "so [he] wouldn't be seen" (R207) indicates not only that he was aware he had done something improper, but more importantly that afterward he tried to conceal it. The fact that he was now being confronted with self-perceived misconduct would reasonably instill bias.

The cases where this Court has held that a trial court's refusal to allow backstriking jurors can be harmless error are substantially different from the instant case. In Jones v. State, 332 Fla. 615 (Fla. 1976) this Court held that it was harmless error for the trial court to use a procedure that prevented either side from backstriking jurors. The same holding obtained in Rivers v. State, 458 So.2d 762 (Fla. 1984). Significantly, those holdings involved a procedure that applied equally, albeit erroneously, to both parties [5/] . Those cases did not involve the scenario involving an attempt to backstrike a prospective juror following a separate hearing concerning that juror's tainted impartiality. Thus there are at least two objective distinguishing characteristics in this case, those being bona fide concern of taint to the presumption of innocence

5/ The trial judge in the instant case initially informed the attorneys, "You can backstrike if you want to." (R85)

based on the actual observance of the handcuffed defendant in custody and; 2) the great potential for prejudice and alienation of the juror caused by conducting an inquiry of this particular juror. An improper procedure is not the issue here; rather, it is the improper denial of a valid challenge exercised against a particular juror whose impartiality is suspect.

"The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, (citation omitted), and [it] promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdale, __U.S.__, 106 S.Ct. 1432, 89 L.Ed.2d 674 (1986). It is respectfully submitted that when the basic fairness of a particular juror is suspect the harmless error rule is inapplicable.

Van Arsdale dealt with constitutional error in the context of the Confrontation Clause found in the Sixth Amendment, a matter concerning introduction of evidence. Selection of impartial jurors, however, directly involves the Due Process Clause guarantee of a fair jury trial before an impartial jury found in the Sixth and Fourteenth Amendments. The inquiry thus does not focus on the procedure of introduction of evidence but instead on whether the jury was composed of reliably impartial jurors. Irvin v. Dowd, 366 U.S. 720 (1961). This case does not concern a procedure equally affecting both party's statutory right to ten peremptory challenges; it is instead the arbitrary

deprivation of the statutory right to eliminate a prospective juror who had observed the defendant handcuffed and in custody; a prospective juror who had been subjected to examination on what he had seen and who had been evasive in his answers to the trial court and the attorneys after indicating initially that he had tried to conceal what he had observed. 6/

Potts admitted that he had not yet discussed with the other jurors what he had seen, and he obviously had not yet talked to them about the inquiry in the judge's chambers. Thus, his timely extraction through the prudent exercise of the peremptory challenge would have preserved the integrity of the jury. Two alternate jurors were available, and no delay would have resulted. It was reversible error to deny the defendant's challenge to Potts' which was made prior to the jury being sworn. A new trial is required because due process does not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused." Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed 749 (1927). The defendant in a capital case is entitled to a jury composed of twelve impartial jurors; a jury diluted by one partial influence cannot render a fair verdict, and the error of inclusion of such a juror over objection cannot be considered harmless. "Where

6/ See Estelle v. Williams, 425 U.S. 501 96 S.Ct. 1691, 48 L.Ed.2d126 (1976); Ingraham v. State, 12 FLW 549 (Fla. 3d DCA Feb. 17, 1987).

[the right to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." Rose, 92 L.Ed.2d at 471.

This Court has previously noted the importance to a fair trial that the free exercise of peremptory challenges has;

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982).

"The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." State v. Neil, 457 So.2d 481, 486 (Fla. 1984). In Neil this Court recognized that the improper exercise of a single peremptory challenge to accomplish a racially discriminatory purpose mandates reversal, with not the slightest suggestion that such error could be

considered harmless. Thus, though an improper procedure equally affecting both parties in the exercise of peremptory challenges may be subject to harmless error analysis, a particular erroneous ruling rejecting the proper exercise of a specific peremptory challenge is not. Where, as here, the fairness and impartiality of the challenged juror is demonstrably suspect, the fairness of the entire proceeding is thwarted, especially in light of the heightened degree of reliability required where a death sentence has been imposed.

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution are violated where a biased juror is permitted, over timely objection, to determine the guilt or innocence of the accused. The error cannot be considered harmless.

> Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the states] grant peremptory challenges," (citation omitted), nonetheless the challenge is "one of the most important of the rights secured to the accused." (citation omitted). The denial or impairment of the right is reversible error without a showing of prejudice. (citations omitted).

Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)(emphasis added). In any event, the error was not harmless. The conviction must be reversed and the matter remanded for retrial.

POINT II

THE TRIAL COURT ERRED DURING THE PENALTY PHASE IN PERMITTING THE STATE TO PRESENT OVER TIMELY OBJECTION THE TESTIMONY OF A WOMAN CLAIMING TO HAVE BEEN RAPED BY THE DEFENDANT.

This issue is controlled by Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986), Robinson v. State, 487 So.2d 1040 (Fla. 1986), and Dougan v. State, 470 So.2d 697 (Fla. 1985). In Fitzpatrick, supra, this Court held that appellate counsel was ineffective in failing to raise in the direct appeal of a murder conviction and death sentence an issue concerning the trial court's error in allowing the state to present evidence rebutting the existence of a statutory mitigating circumstance before the defense had presented any evidence of a lack of prior criminal record and in the face of defense counsel's stated intention not to rely on or present evidence concerning that statutory mitigating circumstance. "The error enabled the state to undercut [the] defense by depicting the defendant as an experienced criminal in a way not sanctioned by our capital felony sentencing law." Fitzpatrick at 940.

In Robinson, supra, this Court vacated a death penalty where the state, in cross-examining several defense witnesses during the penalty phase, asked such questions as: "Are you aware . . . the defendant went back to jail and committed yet another rape?" Robinson at 1042. Defense counsel objected, and the state responded that the questions were permissible to explore the witnesses' credibility. The objection was overruled. In vacating the death penalty, this Court stated:

> In arguing to the court and then in closing argument the state gave lip service to its inability to rely on these other crimes to prove the aggravating factor of previous conviction of violent felony. §921.141(5)(b), Fla.Stat. (1983); Dougan v. State, 470 So.2d 697 (Fla. 1985). Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

Robinson at 1042.

In Dougan, supra, the state presented and argued to the jury evidence that the defendant had been indicted for a second crime at the time of the sentencing proceeding. This Court reversed, holding "The plain language of [§921.141(5)(b)] precludes considering mere arrests or accusations as aggravating factors; only convictions of violent felonies may be used. (citations omitted)." Dougan at 701.

In this case the prosecutor called as a witness [redacted] a girl Hildwin allegedly attacked in April of 1985:

> Prosecutor: We have one rebuttal witness, Judge. He's put on testimony from Jeannie Fredere, including these last two witnesses that he's not a violent person, he is a peaceful person, he's a nice adult, and we have a witness that's been listed since the beginning of the trial that he has attacked in April of '85. I think it's relevant.
>
> Defense Attorney: Judge, our position is that while we've asked the questions

> like what type of person he was, we didn't ask if he was a violent person.
>
> The Court: You asked that in your closing.
>
> Defense Attorney: I think they're trying to bring in some collateral crimes of which he's not been convicted of. I don't think they're proper on that basis.
>
> Prosecutor: Judge, he put the man's character for peacefulness or violence at issue, asking Jeannie Fredere Lucash if he was violent. She said, "No". This was during the same time period that she said she met him, in May of '85. This witness was attacked in April of '85.

(R1102-1103). The court allowed the witness to testify. She related in detail an episode where she claimed Hildwin invited her to a lounge for a drink, after which they retired to a secluded wooded area and smoked marijuana. Thereafter, though she virtuously resisted in an attempt to remain faithful to her boyfriend, Hildwin choked her into unconsciousness and thereafter forcefully made her perform oral sex on him. She did not report this tragic incident because she was undergoing counseling and her feelings about herself at that time were particularly low. She only came forward at Hildwin's trial because the police contacted her. (R1103-1112).

This was the last witness presented during the penalty phase, and the testimony was immediately followed by the prosecutor's exhortation for the jury to recommend the death penalty.

> The Prosecutor: . . . I'm asking each and every one of you -- each and every one of you -- to recommend to this judge that he impose the death penalty in this case. This is a very dangerous man.

> You've heard about -- you've heard [redacted]. You heard this last witness. Also the other criminal records from New York of an unrelated violent sodomy in New York where there was no witness except for Investigator Brenzel testifying about it.
>
> There's a repeated history of violent felonies against women. . . .

(R114-115). The prosecutor's concluding argument included, "This is a very, very dangerous, cold-blooded murderer. This case calls for the death penalty, ladies and gentlemen. He needs to be on Death Row, and you all said you could do it if it was the right case, and this is the case. Thank you." (R1118).

The testimony was wholly inadmissible. It is firmly established that proof of specific acts of misconduct cannot be used to rebut the representation that the defendant is non-violent; rather, such rebuttal must be presented through testimony concerning the defendant's reputation in the community for peace or violence. [See, Point XI, infra.]

The detailed testimony in this case is far more damning than the bare questions that implied the occurrence of another crime found fatally objectionable by this Court in Robinson. The prosecutor in this case did not even pay lip-service to the fundamental proscription against using bare allegations to support the aggravating circumstance of prior conviction for a felony involving violence to another person, as did the prosecutor in Robinson. Rather, the state used the testimony in such a manner that would lead the jury to reasonably conclude that the testimony could be used not only in weighing that particular aggravating circumstance, but also to sentence Hildwin to death

because he is a dangerous person and has a "repeated history of violent felonies against women." Those are not statutory aggravating circumstances recognized by the legislature. Such arguments cannot properly be used to importune a jury to recommend a death sentence.

The testimony of [redacted] was inadmissible; Hildwin was prejudiced both by its erroneous introduction over objection and the prosecutorial argument that followed. Accordingly, this Court must vacate the sentence and remand for a new sentencing hearing with a new jury.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RESPONDING TO AN INQUIRY FROM THE JURY IN THE ABSENCE OF THE DEFENDANT WITHOUT COMPLYING WITH THE NOTICE AND OPEN COURT REQUIREMENTS SPECIFIED IN FLA.R.CRIM.P. 3410.

The transcript reflects that the jury retired for deliberations at 3:49 p.m., and returned the verdict at 5:16 p.m., with no proceedings occurring in open court in the interim (R1010). The record, however, contains an inquiry from the jury asking, "The distance from his home to where the car was found?" Written on the same sheet of paper is the instruction, "You must rely on your memory of the testimony." (R1382). Judge Huffstetler's initials, the date of September 4, 1986, and the time of 4:15 p.m. also appear on the inquiry.

Fla.R.Crim.P. 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

(emphasis added). The rule contains both mandatory and discretionary language. When the court receives an inquiry, the jury "shall" be conducted into the courtroom. This provision is mandatory, whether the judge reads testimony and/or additional instructions or not. If such instructions are read, the trial judge must first provide notice to the respective parties.

A critical stage of trial exists when the jury issues a question and receives instructions concerning the evidence and/or the law by which a defendant is to be found guilty or acquitted. A defendant has a constitutional right to be present during critical stages of his trial. Francis v. State, 413 So.2d 1175 (1982). When the jury issues a question, it is to be conducted into the courtroom, as mandated by Fla.R.Crim.P. 3.410. The defendant's presence is thus required by Fla.R.Crim.P. 3.180-(a)(5), which provides, "In all prosecutions for crime the defendant shall be present at all proceedings before the court when the jury is present." Thus, these two mandatory rules of procedure work in conjunction to satisfy the minimum due process requirements of the Sixth and Fourteenth Amendments to the United States Constitution.

This Court has recently explained the interplay between Rules 3.410 and 3.180(b). In Meek v. State, 487 So.2d 1058 (Fla. 1986), a jury question was answered in open court with participation of counsel; the defendant was not present. This Court held that the mandatory notice to counsel and open court requirements of Rule 3.410 were adequately demonstrated in that record [7/]. In dealing with the defendant's absence, this Court held that the record clearly established that trial counsel informed the

7/ A violation of the notice requirement of Rule 3.410 is per se reversible error. Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977). In Curtis, this Court noted, "the failure to respond in open court is alone sufficient to find error." Curtis at 1278, fn 2.

defendant of the jury's questions and the court's answer before the jury finished its deliberation and the failure of the defendant to timely object ratified his trial counsel's waiver of his presence.

Meek is clearly distinguishable from the instant case. In Meek, the record demonstrated compliance with the notice and open court treatment requirement of Rule 3.410; here the record is silent. In Meek, the record showed the defendant was provided actual notice of the inquiry and answer during jury deliberations and he chose not to object; here the record is silent. In Meek the death penalty was not imposed; here it was [8/].

It is not here conceded that a defendant convicted of a capital crime can voluntarily waive his presence at critical stages of his capital trial. Rather, it is respectfully maintained that a defendant cannot constitutionally do so. Hopt v. Utah, 110 U.S. 574 (1884). However, in recognition of the fact that this Court has ruled that counsel can waive a defendant's presence during critical stages of a capital trial if the defendant acquiesces in the waiver after actual or constructive notice, it is submitted that even those few requirements for an effective waiver are not present here.

> A capital defendant is free to waive his presence at a crucial stage of trial. Peede v. State, 474 So.2d 808 (Fla. 1985). Waiver must be knowing,

8/ The significance of the death penalty being imposed is, of course, that a higher standard of minimal requirements of due process is present.

> intelligent, and voluntary. Francis v. State, 413 So.2d 1175 (Fla. 1982). Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by actual or constructive knowledge of the waiver. See State v. Melendez, 244 So.2d 137 (Fla. 1971).

Amazon v. State, 487 So.2d 8, 11 (Fla. 1986).

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, (citation omitted), and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or a privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed.2d 1461, 1666, 58 S.Ct. 1019, 146 ALR 357." Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314, 317 (1966). A valid waiver of a personal constitutional right cannot be found to exist from a silent record or by inference or innuendo.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 634 (1886).

The violations of Rules 3.180 and 3.410 in this case constituted a denial of due process guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Reversal of the conviction is required because the silent record fails to show that notice was provided the parties prior to the judge issuing a response to a jury inquiry that concerned the testimony presented, and further because the silent record fails to demonstrate an adequate waiver by the defendant of his constitutional right to be present and participate during that critical stage of trial.

POINT IV

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JURY TRIAL GUARANTEED BY THE CONSTITUTIONS OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

This Court has expressly stated "[T]he aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) . . . to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This Court has further held "that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 147, 149 (Fla. 1982).

> . . . . The aggravating and mitigating circumstances enumerated in section 921.141 are substantive law. (citations omitted). "The aggravating circumstances of Fla.Stat. § 921.141(6) F.S.A., [sic] actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04-(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." [State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)]. To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. (citation omitted).

Morgan v. State, 415 So.2d 6, 11 (Fla. 1982).

Thus, the Florida death penalty statutes necessarily and unequivocally establish a constitutional right to jury determination of the presence of statutory aggravating circumstances. The recognition by this Court that the statutory aggravating circumstances are substantive elements "that define those capital felonies which . . . deserve the death penalty", Vaught, supra, at 149, acknowledges that without proving these elements the state has not proved a crime that is punishable by death. See Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). The "beyond a reasonable doubt" standard of proof connotes the importance of aggravating circumstances as substantive elements of the crime. See In re Winship, 397 U.S. 358 (1970).

A defendant convicted of first-degree murder in Florida has not had a jury determine facts comprising substantive elements that are required by statute to be proved beyond a reasonable doubt before imposition of the death penalty. When the verdict is rendered by the jury a defendant cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed. He has been convicted of murder, but he has not been convicted of a crime that is necessarily punishable by death. Only after additional statutory elements are proved beyond a reasonable doubt may the state obtain the death penalty against the defendant.

The state of Oklahoma has a death penalty statute that contains substantially the same aggravating circumstances as

those found in Florida's death penalty statute. Compare Section 921.141, Florida Statute to 21 Okla. Stat. Section 701.12. Significantly, however, the procedure in Oklahoma requires unanimous jury determination of aggravating circumstances.

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases, the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

21 Okla. Stat. Section 701.11. It is not herein submitted that a unanimous jury recommendation must exist in Florida prior to imposition of the death penalty by a judge in Florida. However, it is submitted that the jury must unanimously determine the presence of at least one or more aggravating circumstances as a fundamental principle of Due Process before a death sentence can be imposed.

By way of analogy, this Court is respectfully asked to consider the following hypothetical procedure: A defendant is charged with theft. A jury is instructed that if the defendant

knowingly takes or endeavors to take property belonging to another with the intent to deprive him thereof, he has committed theft. The jury returns a verdict of guilty. In a subsequent proceeding the jury is instructed that if a majority of them find that the stolen property was worth $100.00 or more, was a horse or cow, was a firearm, was a fire extinguisher, or was a will or codicil, etc. pursuant to Section 812.014(2)(b),1 - 8 Fla. Stat. (1985), it may recommend that the defendant be sentenced for a third-degree felony. A majority recommendation is made and the judge sentences the defendant to five years imprisonment. The defendant's right to jury determination of substantive elements of the crime has been circumvented. This is precisely what is happening in the death penalty context.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984) this Court stated the following:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in such cases as this where the defendant was charged with but not convicted of a crime involving a fire-arm.

Overfelt at 1387 (emphasis added). Statutory aggravating circumstances set forth in section 921.141 involve "matters concerning

the criminal episode". Examples include whether the defendant knowingly created a great risk of death to many persons, whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody, or was committed for pecuniary gain, whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, whether the capital felony was especially heinous, atrocious or cruel, or whether the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In McMillan v. Pennsylvania, 477 U.S.__, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the United States Supreme Court held that the Due Process clause of the United States Constitution does not require the state to prove visible possession of a firearm beyond a reasonable doubt since the statute neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty, but operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it. McMillan, 91 L.Ed.2d at 77. In the context of the death penalty, however, the sanction of the death penalty is not available to the state following conviction for a capital offense; it cannot be obtained unless and until an aggravating circumstance is subsequently found to exist beyond a reasonable doubt. Thus, determination of the presence of an aggravating circumstance "ups the ante" for the defendant by raising the available punishment from that of

life imprisonment to that of the death penalty. Imposition of the death penalty is not a limitation on the trial court's discretion. Rather, it is an extension of its power. This fact effectively distinguishes McMillan.

In Florida an offense can be labeled a "capital offense" even though the death penalty is wholly unattainable following conviction for the offense. See State v. Hogan, 451 So.2d 844 (Fla. 1984). A capital offense for which the death penalty may be imposed is an offense that is sui generis.

It is respectfully submitted that because the jury did not determine the presence of the statutory aggravating circumstance that are substantive elements defining the capital offenses for which the death penalty may be imposed, the imposition of the death penalty violated the defendant's rights to due process and a jury trial guaranteed under the Florida and Federal Constitutions. Accordingly, the sentence of death must be reversed.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MAXIMUM AND MINIMUM PENALTIES AFTER TIMELY REQUEST.

The trial court refused defense counsel's timely request for a jury instruction covering the maximum and minimum penalties for the capital offense with which the defendant was charged (R919). Fla.R.Crim.P. 3.390(a) provides:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

By specifically excepting capital cases from the proscription against such instructions it is clear that, when timely requested, the instruction at the conclusion of closing argument is mandated. Tascano v. State, 393 So.2d 540 (Fla. 1981). The instruction was also required by Section 918.10(1), Florida Statutes (1985):

> At the conclusion of argument of counsel, the court shall charge the jury. The charge shall be only on the law of the case and must include the penalty for the offense for which the accused is being charged.

The statute is couched in mandatory terms. But see Simmons v. State, 160 Fla. 626, 36 So.2d 207 (Fla. 1948). The instruction should have been given in this capital case following a specific, timely request. See Ortegas v. State, 12 FLW 239, 240 (Fla. 1st DCA Jan. 6, 1987). Accordingly, The conviction must be reversed and the matter remanded for retrial.

POINT VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO IMPROPERLY PRESENT THE TESTIMONY OF JANE PHIFER OVER OBJECTION.

Over objection, Jane Phifer was permitted to read from notes while testifying on direct examination concerning her interview with the defendant. When Phifer began reading the notes, the following occurred at the bench:

> DEFENSE COUNSEL: Judge, I'm going to object to the witness just reading this. She's supposed to remember this from her recollection, not just a simple reading of some notes she's made.
>
> THE PROSECUTOR: I asked her if she took notes. She had given you a copy of those notes. She's using those to refresh her memory. I don't see any problem with that.
>
> THE COURT: I don't either. Overruled.

(R865-866). At no time did Phifer indicate that her memory needed refreshing; neither did she indicate that she was testifying from her present recollection rather than simply reading the notes.

In Garrett v. Morris Kirschman & Co., Inc., 336 So.2d 566 (Fla. 1976) this Court noted the following:

> Respondents maintain that the witness read from the forms at trial, which they assert to be equivalent to the introduction of the forms themselves into evidence. Petitioners, who do not specifically deny that the witness read his answers from the forms, argue that the record is insufficient to show that the witness did not testify on the basis of an independent recollection, revived by the forms. Petitioners take the position that this ambiguity in the

> record ought to be resolved against the party seeking to overturn the judgment. We need not resolve the question, in light of the fact that the forms themselves were admitted into evidence, later in the trial.

Id at 458 (footnote 3). In the instant case it is clear that Phifer was simply reading her notes and not testifying from present recall. In this case, the notes were not physically introduced, but reading them constituted formal introduction of their content.

This Court in Garrett went on to state, "If a writing is admissible independently, its use to spur a witness' memory does not disqualify it, but it cannot come into evidence on the coattails of the testimonial recollection it sparks." Garrett at 569. After holding that introduction of the writing was error, this Court went on to conclude that the harmless error rule was inapplicable. "In order to hold that it was harmless error to admit the forms themselves into evidence, because the forms were cumulative to testimony they evoked, we would necessarily carve a broad exception to the hearsay rule, as a practical matter." Garrett at 570.

Allowing a witness to simply read from notes previously made similarly carves a broad, unmanageable exception to the hearsay rule by permitting the content of the notes to come into evidence without having established the predicate necessary for introduction of past recollection recorded as set forth in Section 90.803(5), Florida Statutes (1985). The procedure improperly bolsters the testimony of the witness, in that the jury is obviously aware that the content of the testimony was

recorded and, therefore, presumably more reliable than the mere independent recollection of the witness. Before past recollection recorded can be placed into evidence, however, it is essential that a predicate be established showing that the material was correctly recorded. See Section 90.803(5) Fla.Stat. (1985).

Further, allowing the procedure divests opposing counsel from a proper avenue of impeachment. A witness testifying from independent recollection may omit or misstate certain facts contained on a memorandum. Such an omission is an indication of faulty recollection or perhaps fabrication. In either instance it properly bears on the credibility and weight of that witness' testimony. Allowing over timely objection a witness to simply read notes, with no predicate being laid for introduction of the notes' contents, constitutes introduction of the note itself into evidence, for its contents are published to the jury. The procedure is improper and it effectively eviscerates the basic hearsay evidence rule.

Basic rules of evidence apply equally to both parties. This time a state witness was permitted, over objection, to violate long-established procedure. The next time a defense witness may be allowed to disregard proper procedure. Each time a basic rule is violated it loses viability. If this Court will indulge a slight digression, any system of justice can be likened to a great machine, where a raw material is fed in one end and a "just" product is emitted from the other. Each segment of this machine is closely regulated by rules which act as highly-toleranced bearings, permitting precise revolution around a

specific axis. Each bearing [rule] is centered around a concern that is directly proportionate to that society's final concept of justice. If a particular bearing [rule] becomes wallowed, the quality of the product [justice] will suffer, perhaps imperceptibly at first, but any flaw will become more and more apparent as the bearing degenerates. When a bearing is designed into a machine, it is placed there for a specific , indiscriminate purpose and its continued functioning should either be preserved through routine maintenance or it should be removed. If enough bearings of any machine fail, the machine itself will ultimately fail.

A basic rule of evidence and procedure in this case was clearly violated where an objection to having a witness read the content of a memorandum into evidence was overruled. The erroneous ruling cannot be considered harmless error in this case because Jane Phifer's testimony was critical. The trial judge relied on the specifics of her testimony to find aggravating circumstances (R1395). Phifer's testimony formed the basis for having Hildwin display the tattoo on his back, providing the implication that Hildwin was the person who strangled Cox (R863-868). The prosecutor repeatedly referred to Phifer's testimony during his closing argument, arguing that what Hildwin told Phifer was inconsistent with his courtroom testimony and the other statements he had given, and that it established the details of how Cox was killed (R966,972,977,978,979,980,981, 982,988).

The state cannot meet its burden of demonstrating that the erroneous ruling by the trial court did not contribute to the first-degree murder conviction. The trial court committed reversible error in permitting Phifer to simply read notes into evidence without establishing a proper predicate, that is, either that the witness' present recollection was in fact refreshed to the extent that the testimony being given was based on actual recollection of what transpired, or that the notes qualified as past recollection recorded or were otherwise admissible.

Accordingly, the conviction should be reversed and the matter remanded for retrial.

POINT VII

THE CONVICTION FOR FIRST-DEGREE MURDER MUST BE REVERSED BECAUSE IT IS UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The evidence of Hildwin's guilt of first-degree murder in this case is entirely circumstantial and while such evidence can be legally sufficient to sustain a conviction it must exclude all reasonable hypotheses of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Williams v. State, 437 So.2d 133 (Fla. 1983).

The state sought and received jury instructions on first-degree murder based on premeditation and felony murder. There was legally insufficient evidence under either theory but, assuming that the evidence was sufficient under one theory but not the other, the conviction must be reversed because it cannot be determined beyond a reasonable doubt that the jury did not base its verdict on the erroneous theory. Franklin v. State, 403 So.2d 975 (Fla. 1981). The verdict form in this case failed to specify whether premeditated murder or felony murder was the basis for the conviction (R1383). To allow the conviction to stand when it reasonably could have been returned by the jury based on a theory unsupported by the evidence violates due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

The felony relied on by the state as the underlying enumerated felony to support the felony murder theory in this case was robbery (R993-994). There is insufficient proof that a robbery occurred. At various times Hildwin stated that Cox gave him the radio and checks; at other times he claimed to have been given them by another person who took them from Cox. He has also contended that he stole the items from Cox's purse after she had given him a ride (R770-774). At no time, however, did he admit using force to take the property, and he in fact disclaimed harming anyone or doing anything other than stealing (R779). The circumstantial proof does not establish that force was used to take the property and that a robbery occurred.

Cox had but a single injury; that being a broken hyaline bone in the larnyx that apparently was crushed when she was strangled (R301). No bruises or other injuries were found by the medical examiner. There is no evidence that she resisted having her property taken, or that she was in fear contemporaneously with the taking. The evidence establishes only that the property was taken; proof of force or violence in the taking is non-existent. For aught that appears in the record, assuming that Hildwin was present when Cox was killed, the property was taken solely as an afterthought. Pursuant to Parker v. State, 458 So.2d 750 (Fla. 1984) and Eutzy v. State, 458 So.2d 755 (Fla. 1984), the evidence is legally insufficient to support a felony murder conviction based on robbery as the underlying charge.

There is no proof of a premeditated murder in this case. There is no competent proof establishing when Cox was

killed. The medical examiner testified that the facts were consistent with her having died on October 9. Assuming that Hildwin was in Cox's car when he cashed the check on October 9, as testified to by the teller and other witnesses, it nonetheless does not establish that Cox was at that time dead. It is only through the indulgence in sheerest speculation can it be said that Cox was at that time killed. The state's theory was stated to be as follows:

> It was 9:00 a.m. when Mrs. Cox left home; 9:15, he got a ride along U.S. 19 with the victim; 9:25, they arrive at the pine forest, the bra is ripped off, Mrs. Cox is strangled to death and put in the trunk of the car. The bra is placed in the purse. He takes the money and the checkbook, walks toward his house and hides the purse in a straight line towards his home, which is here (indicating), hides the purse and goes home.
>
> He arrived home at about 9:47, gets cigarettes and a snack, leaves for the Lone Star walking, gets a ride on Centralia Road, gives Jeannie a generic cigarette. He knocks on the door at the Lone Star Bar. About 10:15 he buys -- since he's got money he buys $1.80 worth of sodas and goes to Camp-a-Wyle with Chuck Schelawski, the bartender. He buys $2.80 worth of gas. Here's the receipts. They were paid in dollar bills, according to Mrs. Lucier from the store.
>
> He drops Jeannie and Cindy at home, picks up the vehicle with the sun roof, goes to the bank, cashes the forged check with Mrs. Cox's body in the trunk of that car with that sun roof that's been identified to you by Mrs. Harrington.

(R983-984). The time frame advanced by that argument is untenable, because a state witness testified that Hildwin was cleaned

up and had eaten when he returned to the car around 9:30 (R513-514, see R566-569).

The closest thing to support a finding of premeditation in this case is the manner in which Cox was killed, that is, the fact that she was strangled. The circumstances surrounding that act, however, have in no way been established, and to conclude that the act of strangling, considered alone, constitutes sufficient proof to sustain a conviction of premeditated first-degree murder violates due process guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

> Premeditation can be shown by circumstantial evidence. Spinkellink v. State, 303 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA), cert. denied, 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA) cert. denied, 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provacation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958).

Sireci v. State, 399 So.2d 964, 967 (Fla. 1981).

Appellant respectfully submits that the evidence is legally insufficient to support a conviction for first-degree premeditated murder and first-degree felony murder based on an underlying felony of robbery. Accordingly, the conviction must be reversed. Assuming that the evidence is sufficient under one basis but insufficient under the other, a new trial is required.

POINT VIII

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL WHERE SAID FINDING IS SPECULATIVE AND UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

To support the finding that the murder was especially heinous, atrocious or cruel the trial court referred to the testimony of the medical examiner, certain physical evidence, and a statement allegedly made by the defendant. Careful review shows that neither the cited material nor the record as a whole support the finding.

Specifically, the trial judge found that the medical examiner testified "that the victim took several minutes to loose (sic) consciousness and die due to a wide band on the ligiture (sic) that was used to strangle her to death. According to Dr. Techman the victim would have been conscious and aware of the fact that she was slowly dying at the hands of the defendant." (R1395). Dr. Techman did not so testify. When asked by the prosecutor how long it would have taken for the victim to lose conciousness and die, the doctor responded as follows:

> Those two things would have to be depending on how tight the shirt was or how tight the ligature was tightened around the neck or how quickly it was tightened. It's a wide ligature type material as opposed to a narrow wire or belt. And, so it would take more pressure to squeeze over a wider area. And if the squeezing were done more slowly, then it would take longer, so it would be a fair range of minutes, depending on the pressure that was applied.

(R297). The doctor did not express any opinion about how much force was applied to the ligature, or how quickly it was applied. He is stating that the rate a person loses consciousness depends on how much pressure is used. There is absolutely no testimony establishing how quickly Cox lost consciousness or how much pressure was exerted or how quickly it was exerted. Any finding to that effect is sheer speculation.

The facts do not establish that the murder was heinous, atrocious or cruel, for they are entirely consistent with a scenario for consensual sexual intercourse at least up to the point where the ligature was applied. The "isolated area" is consistent with consensual sex. The damaged bra found in Cox's purse provides an inference that a "brutal attack" occurred, but it does not necessarily establish it. First, it must be assumed that Cox was wearing the bra when it became damaged. Next it must be assumed that the damage occurred as part of a "brutal act" instead of an act of frustration or accident. Finally, assuming the bra was ripped from her, it must be assumed that Cox was unwilling and conscious when that occurred. There is insufficient proof to support that conclusion beyond a reasonable doubt, especially where there is no evidence of defensive wounds.

The last reference made by the trial judge to support this aggravating circumstance is to the "vivid description by Paul Hildwin to Investigator Phifer, [where] the defendant described the victim begging for mercy and begging for help as she was being slowly strangled to death and her face turning blue." (R1395)(See Point IV, supra). Phifer testified that

Hildwin related three different stories (R861). The last version included references to Hildwin being picked up by Cox and another man. The couple got in a fight, and Hildwin sat on the hood of the car as the man grabbed her by the hair, threw her on the ground and choked her "with his hands around her throat." (R865-866). The "statement" was factually inaccurate in every other respect, and embellishments about how Cox died taken out of context cannot wear an independent cloak of credibility so as to support this aggravating circumstance. "Falsus in uno, falsus in omnibus."

The state bears the burden of proving the applicability of an aggravating circumstance beyond a reasonable doubt. Clark v. State, 443 So.2d 973 (Fla. 1983). Events occurring after death, no matter how revealing of depravity and cruelty, are not relevant to the atrocity of the homicide. Pope v. State, 441 So.2d 1073 (Fla. 1983). The factor is to be applied "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, 910 n. 3 (Fla. 1975). The correct disposition of this issue is controlled by Herzog v. State, 439 So.2d 1372 (Fla. 1983), in that the facts fail to sufficiently demonstrate the applicability of this statutory aggravating circumstance. Accordingly, this aggravating circumstance must be vacated and the matter remanded for resentencing.

POINT IX

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN WHERE SAID FINDING IS SPECULATIVE AND UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The third aggravating circumstance found to exist by the trial court was that the murder was committed for pecuniary gain. The order states:

> The evidence at Trial clearly establishes that the defendant stole, forged, and cashed a $75.00 check belonging to the victim. The defendant also stole from the victim a pearl ring, and a radio, these items being taken at the time of the murder. The evidence also showed that the defendant had no money before the murder and that immediately following the murder at the next available opportunity, he cashed the victim's check. This evidence establishes that the defendant committed this murder for pecuniary gain.

(R1395)

Possession of recently stolen property gives rise to an inference that the defendant stole the property; it does not prove beyond a reasonable doubt that Hildwin committed the murder or that the murder was committed for pecuniary gain. Proof of pecuniary motivation for the murder itself beyond a reasonable doubt is required to support this aggravating circumstance, and "[s]uch proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). See also Parker v. State, 458 So.2d 750, 754 (Fla. 1984). It is

unreasonable to conclude from the evidence that Cox was killed only or primarily to take her radio, ring, and a check that required forging.

This aggravating factor must be set aside and the matter remanded for resentencing, because it is unsupported by substantial competent evidence.

POINT X

THE DEATH PENALTY WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT WHERE A BIAS IN FAVOR OF IMPOSITION OF THE DEATH PENALTY WAS CREATED BY MISLEADING INSTRUCTIONS TO THE JURY CONCERNING THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

"The trial court has an obligation to give full instructions on applicable principles of law. See Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982). Implicit is the requirement that instructions be coherent and comprehensible." Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985).

> It is an inherent and indispensable requisite to a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of "harmless error". See Henderson v. State, 155 Fla. 487, 20 So.2d 649; Motley v. State, 155 Fla. 545, 20 So.2d 798; Croft v. State, 117 Fla. 832, 158 So. 454 and others.

Gerds v. State, 64 So.2d 915 (Fla. 1953).

The instructions in this case covered four aggravating circumstances, viz; capital felony committed while defendant under sentence of imprisonment; defendant previously convicted of felony involving the use of violence to some person; capital felony committed for pecuniary gain, and; capital felony was especially wicked, evil, atrocious or cruel. (R1121, 1384). In

reference to the aggravating circumstance of the defendant being previously convicted of a felony involving the use of violence to some person, the trial court instructed the jury "A. The crime of rape is a felony involving the use of violence to another person, and; B. The crime of sodomy is a felony involving the use of violence to another person." (R1121).

The court went on to instruct the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. The mitigating circumstance you may consider, if established by the evidence, is: any aspect of the defendant's character or record, and any other circumstance of the offense.

(R1384-1385). The instruction is reasonably viewed as limiting the jury to only one mitigating circumstance to weigh against four aggravating circumstances. A finding of at least one aggravating circumstance was virtually assured following an instruction that two felonies of which Hildwin had been convicted involved the use of violence to another person. The misleading jury instruction fatally tainted the reliability of the correctness of the jury recommendation and it diminished the role of the jury. Hildwin has been denied due process of law and a fair trial guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The sentence must be reversed and the matter remanded for a new penalty phase.

POINT XI

THE TRIAL COURT ERRED IN ALLOWING A CRITICAL STATE WITNESS TO TESTIFY THAT HE HAD NO PRIOR CRIMINAL CONVICTIONS.

During rebuttal, over objection, the state was permitted to establish that its witness (Haverty) had no prior convictions; that he had only been arrested three times for driving with a suspended licence and once for disorderly intoxication.

> Q. (Prosecutor) State your name, please, sir.
>
> A. William David Haverty.
>
> Q. Have you ever had any problems with the law?
>
> A. Yes, sir. I've been arrested three times for driving with a suspended license.
>
> Q. Have you ever had any felonies?
>
> A. Not that I know, sir.
>
> Q. All right. So the only time you've ever had any problem with the law you --
>
> DEFENSE COUNSEL: Objection, judge. What is this meant to contradict?
>
> PROSECUTOR: I'm not contradicting anything. It's contradicting your trying to place the blame on Mr. Haverty.
>
> DEFENSE ATTORNEY: Judge, I would submit that this is outside the scope of proper rebuttal.
>
> PROSECUTOR: I don't believe it is, judge. His character has been put in issue in this particular matter by Mr. Lewan.
>
> THE COURT: All right. Objection overruled.

PROSECUTOR: Thank you, Your Honor.

Q. So you've had problems with the law with driving on a suspended license. A. Yes, sir.

Q. Any other time?

A. Disorderly intoxication one time about two years ago.

(R837-838). Introduction of this testimony constituted reversible error. It is improper for a prosecutor to elicit testimony from a state witness on direct examination that he has never been convicted of a crime and to comment on that testimony in closing argument. Mohorn v. State, 462 So.2d 81 (Fla. 4th DCA 1985); Wrobel v. State, 410 So.2d 950 (Fla. 5th DCA 1982), pet. for review den. 419 So.2d 1201 (Fla. 1982).

This prosecutor argued that the evidence was relevant to contradict blame being put on Haverty (R837-838), and he used the evidence to argue to the jury that "Haverty, whatever else he is, is not a violent person. He has a prior conviction for no valid drivers license." (R937-938). Hildwin does not concede that he placed Haverty's character in issue but, assuming it was, to establish any of Haverty's character traits by such testimony was reversible error.

The testimony was not legally relevant as bearing on Haverty's truth or veracity, in that he claimed to have been arrested, as opposed to convicted, and those arrests were claimed to be for misdemeanors not involving dishonesty or false statements. See State v. Page, 449 So.2d 813 (Fla. 1984); Section 90.610(1) Fla.Stat. (1985).

The testimony was not admissible to show Haverty's character trait for lack of violence.

> When character for peacefulness or turbulence is put in issue in such cases, the general rule is that the proof thereof must be made by evidence of the general reputation of the party in the community for such character, and not by evidence of specific acts or conduct on particular occasions, (citation omitted) and, when such character is put in issue, the proof interposed in rebuttal must be confined also to general reputation, and not allowed to go into specific acts or conduct on particular occasions.

Nelson v. State, 32 Fla. 244, 13 So. 361 (1893). Haverty's character for peacefulness was not placed in issue by Hildwin's allegation that it was Haverty who committed this crime. Assuming that it was, it was wholly improper for the state to point to Haverty's lack of criminal conviction as relevant evidence showing Haverty's non-violent character; that character trait may be proved by reputation evidence only, not by testimony concerning specific acts of conduct to show that he acted in conformity with those acts. See Section 90.404(2)(a) Fla. Stat. (1985).

> Section 90.405(2) recognizes the traditional rule that specific acts of an individual are generally inadmissible to prove the individual's character. Evidence of specific actions may not be offered as the basis of an inference that because a person acted in that manner in the past, he acted in the same manner on the occasion in question. Evidence of specific acts of an individual is excluded because it may be given too much weight by the jury. . . . A defendant may not prove his good character by proof of specific acts, nor may the prosecution prove his bad character with that proof. Section 90.405(1) specifically permits only

> reputation testimony as a method of [proving] character; by omission it excludes opinion testimony and specific instances of misconduct.
>
> Section 90.404(2) permits specific instances to be used to prove facts other than character; e.g., identity or intent. Section 90.405 does not speak to evidence offered for a purpose other than proving character.

Ehrhardt, Florida Evidence, 2d Edition p.152-153 (footnotes omitted).

Haverty's testimony was highly improper; it did not constitute proper rebuttal. The prosecutor improperly bolstered the credibility of Haverty with this testimony, and the argument that Haverty's non-violent character was proved by his lack of criminal record was highly prejudicial. The unfairness of the state not disclosing to defense counsel Haverty's actual record magnifies the prejudice suffered by Hildwin from this improper prosecutorial tactic. Haverty's Sixth and Fourteenth Amendment rights to a fair trial were violated by introduction and use of inadmissible evidence. Reversal and retrial is required.

POINT XII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCLOSE THE CRIMINAL RECORDS OF THE STATE'S WITNESSES.

Defense counsel moved in writing for the state to produce the criminal records of its witnesses, asserting that "such information is essential in the preparation of the defense in that the credibility of some state witnesses is a major issue to be decided." (R1243-1244). Defense counsel argued, "It is our position that we need this evidence under the right to a fair trial. As you know, judge, I'm a private attorney here as a special assistant public defender and I do not have access to these records as the state does. The state is able to get these FBI rap sheets. We would request that under these circumstances, for the cases cited in the motion, that the state provide the criminal records of the state witnesses." (R189). Following further argument, the court ruled as follows, "I think you have adequate means either through the discovery process or by questioning the witness on the stand to determine [that. Based] on the state's representation that they do not have any criminal history records and that they do not think that most of the witnesses have any criminal history I'll deny it. If they do come in possession of some later, I'll direct that they make them available to defense counsel." (R191).

In State v. Coney, 294 So.2d 82 (Fla. 1974), this Court, holding that a defendant is entitled to the production of such records that are in the actual or constructive possession of

the state, clarified that such criminal records are in the actual or constructive possession of the state if:

> (1) The records are in the physical possession of any state prosecutorial or law enforcement office; or (2) the fingerprints of the witness are already within the physical possession of any such office and this fact is known to the office of the state attorney, thus giving the state access to the information by way of state and federal compacts through a system based on fingerprints; or (3) the state is able to obtain the fingerprints of the witness by his own voluntary cooperation.

Coney at 87. The record clearly establishes that the state under these definitions was in the actual or constructive possession of the criminal records of the two critical state witnesses who admitted having prior criminal histories.

Specifically, Robert Worgess was an inmate who claimed to have discussed with Hildwin the killing of Cox, and he testified that Hildwin essentially confessed to stabbing and strangling Cox (R708-709). On direct examination, the state brought out that Worgess was currently in jail on a violation of probation based on an underlying offense of grand theft, and that was his one prior conviction (R706-707). Without the appropriate criminal history of the witness, the defense attorney could not effectively challenge that representation.

The other key state witnesses was Cox's boyfriend, William Haverty. It was Hildwin's contention that Haverty committed the murder, and his credibility versus the credibility of Hildwin was the pivotal question at trial. Haverty voluntarily gave blood for comparison purposes at the request of the

Hernando County Sheriff's Office (R318), so clearly the prosecutor had the witness' cooperation to also provide fingerprint exemplars. During the guilt phase, in "rebuttal", the following direct examination of Haverty occurred:

> Q. (Prosecutor) State your name, please, sir.
>
> A. William David Haverty.
>
> Q. Have you ever had any problems with the law?
>
> A. Yes, sir. I've been arrested three times for driving with a suspended license.
>
> Q. Have you ever had any felonies?
>
> A. Not that I know, sir.
>
> Q. All right. So the only time you've ever had any problem with the law you --
>
> DEFENSE COUNSEL: Objection, judge. What is this meant to contradict?
>
> PROSECUTOR: I'm not contradicting anything. It's contradicting your trying to place the blame on Mr. Haverty.
>
> DEFENSE ATTORNEY: Judge, I would submit that this is outside the scope of proper rebuttal.
>
> PROSECUTOR: I don't believe it is, judge. His character has been put in issue in this particular matter by Mr. Lewan.
>
> THE COURT: All right. Objection overruled.
>
> PROSECUTOR: Thank you, Your Honor.
>
> Q. So you've had problems with the law with driving on a suspended license. A. Yes, sir.
>
> Q. Any other time?

A. Disorderly intoxication one time about two years ago.

(R837-838). As to Haverty's representation that he had no prior criminal history, the defense counsel was at the mercy of the witness' representations; Haverty could not effectively be impeached. The error was driven home by the prosecutor during closing argument when he argued: "The only evidence in this case against Mr. Haverty came from the defendant, and that is his fifth version of what happened last September 9. Mr. Haverty, whatever else he is, is not a violent person. He has a prior conviction for no valid drivers license. He had no reason to kill Vronzette Cox, let alone then start hiding evidence all around the area in the woods up there. He had no reason to hide the car or hide the purse. He lived with the woman." (R937-938).

The purpose of discovery in Florida is to promote fairness in a trial. The State of Florida has an unfair advantage over the defendants, in that the criminal histories of witnesses are not available to the defendant; they are to the state attorney. By denying the defendant's motion to have the state disclose the prior criminal records of Worgess and Haverty, the trial court denied the defendant due process of law and a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Pursuant to Martinez v. Wainwright, 621 F.2d 184 (Ca5 1980), Giglio v. United States, 405 U.S. 150 (1972), and Brady v. Maryland, 373 U.S. 83 (1963) a new trial is required. This Court is asked to reverse the defendant's conviction and remand the matter for a new trial.

POINT XIII

THE TRIAL COURT ERRED IN FAILING TO CONSIDER MITIGATING EVIDENCE CONTAINED IN THE COURT FILE WHEN THE DEATH SENTENCE WAS IMPOSED.

The findings of fact made by the trial court specify:

> The Court has considered all the mitigating circumstances that could have been established on behalf of this defendant and finds that none of the mitigating circumstances were found to exist. The defendant requested that the mitigating factor of his age be put before the jury, however the Court finds that the defendant was 25 years of age at the time of the homicide and that there was no evidence of mental or emotional problems that the defendant had at the time of the homicide that would cause the Court to consider anything other than his chronological age.
>
> The defendant requested no other enumerated mitigating circumstance.
>
> The Court did consider all the testimony concerning the defendant's childhood, his relationship with his father, and his relationship with Mr. & Mrs. Hyott. The Court finds that while the defendant may have had a less than perfect childhood that none of these arise to the level of a mitigating circumstance.

(R1396). The court further specifically based his findings "upon the evidence presented in the records of both the trial and the sentencing proceedings. . . ." (R1396). When the sentence was orally pronounced, the trial court referred only to the statutory mitigating circumstance concerning age of the defendant (R1485).

It is clear that the trial court did not consider mitigating evidence contained in the court file. For example, the state had the court take judicial notice of Hildwin's prior

prison records (R1257). Those records contain mitigating evidence, such as Hildwin's amenability to rehabilitation and imprisonment and a significant prior history of psychiatric disturbance (R1310-1313). Skipper v. South Carolina, 476 U.S.__ 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Findings of a trial judge should be made with unmistakable clarity to afford meaningful appellate review. Mann v. State, 420 So.2d 578 (Fla. 1982). This is especially important due to the great deference the trial court's findings enjoy. Lucas v. State, 490 So.2d 943 (Fla. 1986). A general statement such as "The Court has considered all the evidence" is by far too all-encompassing to warrant recognition as credible evidence that specific evidence was in fact considered but rejected; it does not afford meaningful appellate review.

Because the trial court in this case failed to consider mitigating evidence that was contained in the court file but was not affirmatively presented as evidence during the trial or sentencing proceedings, the death sentence must be reversed and the matter remanded for resentencing.

CONCLUSION

Based on the argument and authorities previously set forth, this Court is asked for the following relief:

Points I, III, V, VI, XI, XII, to reverse the conviction and to remand the matter for retrial.

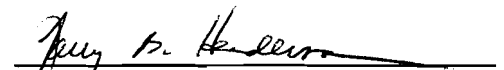
Points II, IV, X to vacate the penalty and to remand for a new sentencing hearing with a new jury, or for imposition of a life sentence.

Points VIII, IX, XIII, to vacate the death penalty and to remand for a new sentencing proceeding.

Point VII, to reverse the conviction or, alternatively, to reverse the conviction and to remand for retrial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Florida 32014 and to Mr. Paul Hildwin, #923196, P.O. Box 747, Starke, Fla. 32091 on this 27th day of April 1987.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER