IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 69,513

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Fla. 32014
(904)252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT.)

OTHER AUTHORITIES:

TABLE OF CITATIONS (CONT.)

IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 69,513

REPLY BRIEF OF APPELLANT

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.

The state argues that defense counsel was challenging prospective juror Potts for cause rather than challenging Potts peremptorily. Nowhere does defense counsel state that the challenge was for cause, and the state would have this Court read that qualification into the record. Such an argument asks this Court to myopically place form over substance. The record clearly shows a challenge, and it should have been honored.

Prior to Potts being sworn defense counsel stated: "There is one thing that I would like to bring up before the jury is brought in this morning and that is that my client informed me that this morning Mr. Potts, one of the jurors, was outside the courthouse when he was brought over here in shackles. At this

time we feel that this would taint the jury. Mr. Potts may have related this information to them and we would object to the jury at this time." (R204). This passage shows that Hildwin personally informed his defense counsel that Potts, by name, was unacceptable as a juror and that cause may exist for the entire jury panel to be disqualified. Questioning revealed no basis to disqualify the jury panel because Potts had not yet related what he had observed to the other prospective jurors, and counsel abandoned the disqualification claim. However, counsel made a separate objection to Potts. Counsel argued the following after it was determined that the other prospective jurors had not yet been tainted: "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." (R209, See Appendix "A").

Significantly, trial counsel did not ask the critical question that must be asked whenever a juror is to be excused for cause, that being, "notwithstanding anything else, can you be fair and impartial?" The obvious reason that question was not asked is because defense counsel had a challenge left and was using it, stating that I think the exposure to Hildwin in custody

was prejudicial, that I think it would bias Potts, and that I challenge Potts. Defense counsel made absolutely no effort to lay the predicate necessary for excusing Potts for cause, and he was obviously more concerned with learning what damage had been done to the jury panel by Potts than in trying to lay a predicate that was simply unnecessary to challenge Potts.

The state's citations to the numerous cases involving a juror's observance of a defendant in custody and/or shackles are factually inapposite, in that those cases concern prejudice occurring after a juror is sworn. The circumstances of this case are that a prospective juror became tainted prior to his being sworn and an immediate challenge to that prospective juror was disallowed. The prejudice is compounded by the fact that Potts was questioned by the court and counsel concerning his disobedience of court instructions to arrive at the courthouse at 10:00 o'clock and to be very careful to come back without exposure to anything involving the case (R171-172). The inquiry of Potts provides a separate source of bias. In Thomas v. State, 403 So.2d 371, 376 (Fla. 1981) this Court recognized that a great risk of animosity toward a defendant is created by multiple efforts to have a juror excused. That same taint exists here.

The state's argument is otherwise self-defeating, because if defense counsel was not exercising an available peremptory challenge to prospective juror Potts in the face of Hildwin's renunciation (obviously well-founded) of acceptance of Potts as a juror, Hildwin most assuredly will ultimately prevail

in the post-conviction proceedings which will follow the affirmance of this point on appeal. There could have been no tactical or strategical reason to seat Potts on the jury after Potts observed the defendant in custody and after Potts underwent the inquiry concerning disobedience of court instructions. Though the issue of ineffectiveness of counsel is not ordinarily cognizable on appeal, where the facts giving rise to the claim are apparent on the face of the record, the issue may be addressed. See Stewart v. State, 420 So.2d 862 (Fla. 1982); Whitaker v. State, 433 So.2d 1352 (Fla. 3d DCA 1983); Borden v. State, 469 So.2d 795 (Fla. 4th DCA 1985).

An observation made by Judge Cobb of the Fifth District Court of Appeal in reference to this situation is apt. In Collier v. State, 471 So.2d 84 (Fla. 5th DCA 1985), defense counsel allowed the mother of the state attorney who filed the information to sit on the jury. Finding that assertion in a motion for post-conviction relief to require an evidentiary hearing, Judge Cobb stated ". . . it seems to us that if the truth of this allegation is established, the state will be faced with the unenviable burden to show that leaving the prosecutor's mother on the trial jury is an acceptable 'matter of trial strategy'. It is difficult to imagine such a bizarre scenario this side of a Mel Brooks movie." Collier at 85. The instant scenario could well be the sequel. The peremptory challenges were available: Hildwin submits that such a challenge was being exercised, but if this Court would rather address the clear error

in the context of ineffectiveness of trial counsel as advanced by the state the end result is the same; a new trial is required.

The record affirmatively shows that two peremptory challenges remained available to Hildwin's defense counsel after Hildwin told his counsel that Potts, by name, had observed him (Hildwin), in shackles. The only logical inference to be drawn from the record is that Hildwin told his defense counsel that Potts was no longer acceptable to him as a juror, which is precisely what will be borne out in a post-conviction proceeding should one be necessary. Counsel cannot under these facts override a defendant's personal objection to a juror under the guise of a "tactical" decision without violation of the constitutional rights to effective assistance of counsel, due process and a fair trial guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. There is no perceivable or imaginable "tactical" reason for allowing Potts to become a juror in this case over the defendant's objection. Reversible error has occurred, and a new trial is required.

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.

Hildwin does NOT concede, as "perceived" by the state (A.B. p. 35) [1], that Hildwin placed his non-violent character in issue by questioning Hildwin's father and girlfriend. In reply to that contention, Hildwin respectfully submits that the issue concerning Hildwin's character for violence was placed in issue by the state through presentation of certified copies of judgments for prior violent felonies of which Hildwin had been convicted. Hildwin acknowledges that presentation of the judgments was proper to support the statutory aggravating circumstance set forth in §921.141(5)(b) Fla.Stat. (1985) ("defendant previously convicted of . . . a felony involving the use or threat of violence to the person"). The testimony of witnesses concerning the specifics of those prior convictions was properly presented in conjunction with the judgments in order to fully develop the applicability of that statutory aggravating circumstance and to assist the jury and sentencer to determine what weight to be given that aggravating circumstance. Such evidence is clearly the only specific-incident evidence authorized by statute to prove a defendant's violent character, and Hildwin's character for violence was put in issue by the state when it sought to establish that aggravating circumstance.

1/ (A.B.) refers to the state's Answer Brief.

Nonetheless, the state asserts that defense counsel's subsequent questions to Hildwin's girlfriend and father "opened the door" to any type evidence the state thereafter deigned to present under the guise of rebuttal of a non-statutory mitigating circumstance (non-violent character). Hildwin disagrees, as must this Court. The pertinent questions and answers pointed to by the state as "opening the door" to Hildwin's character trait for non-violence are as follows:

> Q. (defense counsel): What kind of person would you describe Paul as?
>
> A. (Hildwin's girlfriend): He was always good to me, never harmed me in any way.
>
> Q. What about other people around him?
>
> A. All my friends he always treated nice and never hurt them.

(R1048-1049).

> Q. (defense counsel): Did you ever know your son to be violent?
>
> A. (Hildwin's father): No, not when he was in his right mind, not on dope or drink.
>
> Q. When he was on dope or drugs, did you ever know him to be violent?
>
> A. Well, he hollered at me, but that's all I can say.

(R1056). These questions and answers do nothing more than address Hildwin's relationship with his father and girlfriend. If defense counsel was attempting to establish Hildwin's character trait for non-violence, the questions would have had to have addressed Hildwin's reputation for non-violence. They did not. If anything, the prosecutor should have objected to the

above-quoted questions if he felt that defense counsel was trying to establish a character trait for non-violence. The state cannot now, in the face of defense counsel's proper objection, point to its own failure to timely object to such questions and argue that a door has been opened, and that if the defendant can do something improperly without objection then the state can do it properly over objection. Significantly, the state not only did not object to any of the questions asked of these witnesses by defense counsel, the prosecutor did not even cross-examine them. Instead, in what is patently a premeditated ploy, the prosecutor sat back, all the while planning to conclude with the testimony of Ms. [redacted] to inflame the emotions of the jury.

The state's reliance on Dragovich v. State, 492 So.2d 350, 354-355 (Fla. 1986) (A.B. at 36) is misguided. Dragovich concerned the statutory mitigating circumstance of prior criminal activity. By its very terms, showing specific acts of criminal activity nullifies that statutory mitigating circumstance, and personal knowledge of criminal activity (as opposed to knowledge of reputation of activity, i.e. "everyone I talked to says he did this") is essential. The criminal activity itself is what rebuts the statutory factor. This is made clear in the portion of the opinion omitted by the state when quoting Dragovich. The complete passage states:

> The state is entitled to rebut defendant's evidence of no prior criminal activity by evidence of criminal activity. However, testimony that defendant had a reputation as an arsonist and was called "The Torch," without any evidence of actual involvement in such criminal activity, does not

> rise to the level of evidence of criminal activity, and denies defendant the fairness in the weighing process that the statute contemplates and that justice mandates.
>
> We have previously held that the state may not use mere arrests or accusations as factors in aggravation. (citation omitted). Nor have we allowed pending charges, or mere arrests not resulting in convictions, to be used as aggravating factors. (citations omitted). The evidence here is reputational only; appellant was never arrested or charged with any of these arsons. None of the witnesses offered firsthand knowledge of appellant's participation in these crimes. (citations omitted). Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence will be the same; improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

Dragovich at 354-355 (underlining indicates portions omitted by state, A.B. at p.36). The state is simply comparing apples to oranges when it analogizes the type evidence required to prove criminal activity to that either establishing or rebutting a character trait for non-violence.

The state contends that, even assuming that error has been committed, it was but harmless overkill. ". . . [T]he state had already established the existence of not one, but two previous convictions for violent felonies by the time the subject testimony was admitted. Appellant's jury subsequently unanimously recommended a sentence of death . . . . [T]he trial court ultimately found four aggravating circumstances and no circumstances in mitigation. . . . In light of those facts, the instant

error, if any, can only fairly be characterized as prosecutorial overkill. . . ." [2]/ (A.B. at pp.37-38). Protestations of harmless overkill ring hollow. To begin with, recommendation and imposition of a death sentence is not simply a matter of counting the number of aggravating circumstances, but instead a process of conscientious weighing of the content of each statutory aggravating circumstance to determine if the ultimate penalty is warranted in a particular case. The fact that the jury unanimously recommended the death penalty is not an indication of how "harmless" this error was, but instead a showing of how prejudicial the testimony was. Viewing the context of the testimony (it was the last thing heard before the jury retired to deliberate its recommendation), the content of the testimony (Appendix "B"), and the way it was used by the prosecutor in the closing argument (R1115), it cannot reasonably be found beyond and to the exclusion of every reasonable doubt that the overkill by the prosecutor did not affect the recommendation of the jury.

The death penalty must be reversed and the matter remanded for a new penalty phase before a new jury because introduction of the testimony over objection deprived Hildwin of a fair jury recommendation by an impartial jury, in contravention of rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2/ The undersigned respectfully submits it can be fairly characterized as stupid prosecutorial overkill.

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. 3.410

The state points to the supplemental record to argue that it should prevail on this point on appeal; Hildwin disagrees. The supplemental record establishes that defense counsel was present and agreed to have the judge, via written communication, instruct the jury, "You must rely on your own memory of the testimony." The supplemental record also establishes, however, that Hildwin was not present at that conference and that the instruction was not given in open court so as to provide Hildwin with actual or constructive notice of the inquiry. The state cannot meet its burden of demonstrating an adequate waiver by Hildwin of the right to be present, to notice, and to participate in formulating the instruction given the jury in response to their inquiry concerning the evidence and testimony that had been presented at trial. See Amazon v. State, 487 So.2d 8 (Fla. 1986); Carter v. State, 12 FLW 2157 (Fla. 3d DCA Sept. 8, 1987). The failure of the trial judge to respond in open court is itself sufficient to support a reversal. Pursuant to Bradley v. State, 12 FLW 487 (Fla. Sept. 24, 1987), Curtis v. State, 480 So.2d 1277 (Fla. 1985) and Ivory v. State, 351 So.2d 26 (Fla. 1977), per se reversible error has occurred.

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.

The state initially responds by arguing that this issue has not been preserved for appeal. In reply, Hildwin submits that the fundamental right to a jury trial requires a knowing, voluntary and intentional waiver by the defendant. In Florida the waiver of a jury trial must be in writing. Fla.R.Crim.P. 3.260. There is no such waiver here. The state's claim that the issue is not preserved is without merit.

The state further contends, "While the elements required to be proved to support a conviction for first-degree murder remain the same, separate sentencing criteria define those instances where imposition of a sentence of death is appropriate." (A.B. at p.47). What is the distinction between "sentencing criteria" and "elements" of an offense? These are but convenient labels; one must look at the substance of each. Each depends on facts that must exist prior to imposition of a particular sanction. Where, as here, the greater punishment necessarily attends the presence of specific statutory considerations, those statutory considerations substantively define the offense, and as such the factual basis must be determined by the jury.

The state correctly points out that this argument was presented to this Court in Remeta v. State, Case No. 69,040.

Variations of this argument have also been presented by the undersigned counsel in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), Peede v. State, 474 So.2d 808 (Fla. 1985), and Wright v. State, 473 So.2d 1277 (Fla. 1985). In Wright, this Court did not elaborate on its reasoning in disposing of the issue, but simply stated, "We have previously considered and expressly rejected the latter two arguments. See, e.g., Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), aff'g 315 So.2d 461 (Fla. 1975)." Wright at 1281. These citations do not address the instant argument.

In Johnson, the defendant argued that imposition of the death sentence after a jury recommendation of life imprisonment violated his Fifth Amendment protection against double jeopardy. Those are not the grounds on which the instant constitutional attack is based. Rather, the grounds at issue concern the Sixth Amendment right to jury determination of the facts on which a particular sanction attends. Similarly, the argument does not contest the function of the jury insofar as rendition of a non-unanimous recommendation, and it is herein conceded that the jury recommendation process is essential to constitutional application of the death penalty. Indeed, that is the precise holding of Proffitt. What is instead advanced is that the Sixth Amendment requires more of the jury than is presently being accorded by rendition of a recommendation, and that this contention has not previously been adequately addressed by this

Court's decisions or by the decisions of the United States Supreme Court.

This issue was neither identified nor discussed by this Court in the opinion deciding Peede, supra. However, in Provenzano this Court said:

> Appellant's contention that the sixth amendment right to a jury trial is violated by Florida's death penalty procedure because the trial court determines the facts anew after the jury issues its recommendation is without merit. The United States Supreme Court recently recognized the validity of the trial judge's power to impose the death sentence. Spaziano v. State, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Further, the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating circumstances. These reasons are taken from all the evidence in the case and any further evidence presented at the time of sentencing. Moreover, the sentence of death is not unconstitutional as applied.

Provenzano at 1185. Though identifying the basic issue, this Court's discussion is couched in terms of the Fifth Amendment proscription against double jeopardy. The citation to Spaziano supports the conclusion that the trial judge has the power to impose a death sentence over a jury recommendation of life and that jury sentencing is not constitutionally required, but Hildwin does not here contest the trial judge's power to impose the death penalty over a jury recommendation of life; neither does he contend that the jury must sentence the defendant. Rather, it is respectfully submitted that the protections afforded the defendant by a jury trial are such that the defendant has

a Sixth Amendment right to jury determination of the presence of statutory aggravating circumstances. Significantly, the United States Supreme Court in Spaziano expressly noted that such grounds were not being argued by counsel in that case; Spaziano at 458.

The same fundamental reasoning used by this Court in State v. Overfelt, 457 So.2d 1385 (Fla. 1984) should apply here. Each statute on its face does not require that the jury determine the factual basis required to impose the more severe sanction but, as acknowledged by this Court in Overfelt, the constitution requires that such facts be determined by the jury: ". . . it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." Overfelt at 1387. Procedural due process is not a static concept, but instead a dynamic process of evolution.

> For all its consequence "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted). Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).

In light of the far ranging consequences that this holding entails, this Court may wish to limit recognition of this right to those cases in the "direct appeal" posture pursuant to Griffin v. Kentucky, __U.S.__, 40 Cr.L. 3169 (1987). However, the sheer force of logic and precedent mandates that such recognition is necessary.

POINT V

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

Relying on Welty v. State, 402 So.2d 1159 (Fla. 1981), Walsh v. State, 418 So.2d 1000 (Fla. 1982) and McCampbell v. State, 421 So.2d 1072 (Fla. 1982), the state argues that reversible error has not occurred in the instant case because prior to commencement of voir dire the trial court informed the prospective jurors about the guilt and penalty phases of a capital trial, and that the process was reiterated by the prosecutor during his preliminary statements to the venire (A.B. at 51-52). Hildwin respectfully disagrees; the portions of the record cited by the state to support its premise (R14-18,34) are set forth hereto as appendix "C".

Significantly, the judge only instructed the jury concerning the bifurcated procedure where a recommendation could be rendered by the jury. That is not the same as informing the jury that only two sanctions can possibly be imposed. Nowhere prior to rendering its verdict is the jury apprised that only two sanctions are possible and that, if the death penalty was not imposed, the court would be required to impose a sentence of life imprisonment with no possibility of parole for twenty-five years. To be sure the jury here knew that death was a possible penalty. The benefit of the instruction, however, is not just that the jury learns that death is a possible penalty, but also that they learn that the only other sanction is life imprisonment, with no possibility of parole for twenty-five years.

Also troubling is the senseless refusal by the trial judge to give the timely requested instruction in the face of Fla.R.Crim.P. 3.390(a), a rule which is clear and unequivocal. Trial judges may feel that the precedent relied on presently by the state has eviscerated the holding of this Court in Tascano v. State, 393 So.2d 540 (Fla. 1981) and that they can therefor arbitrarily refuse to give the instruction in a capital case despite a timely request; such reliance is dangerous and misguided, as the instant facts prove. Of what use is a rule of procedure if it may be arbitrarily ignored with impunity? The jury was not adequately apprised of the consequences of their verdict and of the only two sanctions available following rendition of a guilty verdict. Reversal 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.

Mirroring the trial court's findings of fact, the state contends "Due to the width of the ligature utilized by the appellant to effectuate the strangulation of his victim, Dr. Techman surmised that the victim's loss of consciousness and eventual death would have required 'a fair range of minutes'" (R297). This finding is erroneous and not factually supported. Dr. Techman testified as follows:

> Q. (Prosecutor): Dr., based on your experience and reasonable medical certainty, give the jury some indication how long -- assuming the victim was still alive when this knot or this think (sic) was put around her neck -- how long would it take to die? I understand you can't be certain, but just para-maters.
>
> A. (Dr. Techman): 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 <u>if</u> squeezing were done more slowly, <u>then</u> it would take longer. <u>So it would be a fair range of minutes, depending on the pressure that was applied</u>.

(R297)(emphasis added).

Clearly, the medical examiner is <u>NOT</u> saying that the death required a fair range of minutes to occur, as advanced by the state and found by the trial court, but rather that the

medical examiner does not know how long it took for death or unconsciousness to occur because these things depended on how much pressure was applied to the ligature and on how quickly it was tightened. To base the aggravating circumstance on this testimony is to base it on speculation only.

The state acknowledges that the precise duration of the victim's suffering in the final moments prior to her death was not established below, but argues that the circumstance is proper based solely upon the act of strangulation itself. (A.B. at p.64). Such an analysis renders the extremely heinous, atrocious and cruel circumstance an automatic aggravating factor for every death by strangulation irrespective of the defendant's actual intent or the actual suffering endured by the victim. Where, as here, the record fails to show beyond a reasonable doubt that the murder was <u>especially</u> heinous, atrocious and cruel, the aggravating circumstance must be disallowed.

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 state argues that the jury was orally informed by the judge that mitigating circumstances could be considered and that the issue of misleading jury instructions was not sufficiently preserved by an adequate, contemporaneous objection. In reply, Hildwin respectfully calls this Court's attention to and relies on Riley v. Wainwright, 12 FLW 457 (Fla. Sept. 3, 1987) and Floyd v. State, 497 So.2d 1211 (Fla. 1986), where this Court held that a new advisory jury is constitutionally required where the original jury's recommendation was tainted by jury instructions that possibly misled the jury about how to perform its advisory function. The failure by trial counsel to object to a defect in instructions that reasonably affected the jury in performing its constitutional role of recommending the correct sanction cannot insulate the error from meaningful appellate review. The uniqueness of the death penalty and the constitutional safeguards that are otherwise strictly applied to ensure the proper application of the death penalty require that erroneous instructions concerning the proper role of the jury be cognizable on appeal even in the complete absence of an objection.

CONCLUSION

Based on the argument and authorities herein and those previously set forth in the Initial Brief of Appellant, 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

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Fla. 32014, in his basket at the Fifth District Court of Appeal and mailed to Mr. Paul C. Hildwin, #923196, P.O. Box 747, Starke, Fla. 32091 on this 2d day of October 1987.

Larry B. Henderson

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER