IN THE SUPREME COURT OF FLORIDA

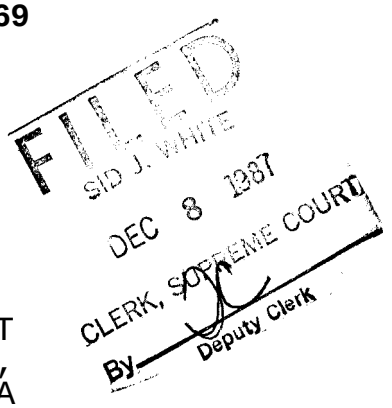
GROVER REED,

Appellant,

v. CASE NO. **70,069**

STATE OF FLORIDA,

Appellee.



ON APPEA FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DWAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Grover B. Reed, will be referred to by name throughout this brief. References to the circuit court's record of pleadings will be designated with the prefix "R." References to the transcripts of hearings and the trial will be designated with "Tr." The appendix to this brief will be designated with "A."

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On April 21, 1986, the State filed an information charging Grover Reed with second degree murder and sexual battery upon Betty Oermann. (R 9) A Duval County grand jury returned an indictment on July 10, 1986, charging Reed with the first degree murder of Betty Oermann, sexual battery and armed robbery.(R 20) The State entered a nolle prosequi to the information, and Reed pleaded not guilty to the indictment on July 11, 1986.(Tr 10-12) Reed proceeded to a jury trial. On November 20, 1986, the jury found him guilty as charged.(R 276-278, Tr 837- 838)

The court conducted the penalty phase of the trial on November 26, 1986.(Tr 846) After hearing additional arguments and instructions, the jury recommended a death sentence for the murder.(R 308, Tr 909) Circuit Judge John D. Southwood delayed sentencing and ordered a presentence investigation.(Tr 904-905, 923) On January 9, 1986, Judge Southwood adjudged Reed guilty and sentenced him to death for the murder, 22 years for the sexual battery and nine years for the robbery.(R 382-388, Tr 926- 941) In support of the death sentence, the court found six aggravating circumstances: (1) previous conviction for a violent felony based on the contemporaneous convictions for sexual battery and armed robbery; (2) the homicide was committed during the commission of a sexual battery; (3) the homicide was committed for the purpose of avoiding arrest; (4) the

homicide was committed for pecuniary gain; (5) the homicide was especially heinous, atrocious or cruel; and (6) the homicide was cold, calculated and premeditated. (R 389-391, Tr 934-937) (A 1-4) The court found no mitigating circumstances. (R 391-393, Tr 938-940) (A 4-6)

Reed timely filed his notice of appeal to this Court on February 2, 1987. (R 397)

Facts--Guilt Phase

Irvin Oermann left his home around 5:45 p.m. on Thursday, February 27, 1986. (Tr 385) He was the pastor of Grace Lutheran Church in Jacksonville, and he regularly taught a youth class at the church on Thursday evenings. (Tr 384-385) On this particular evening, he also had a meeting to attend after the class. (Tr 385) His wife, Betty Oermann, remained home alone. (Tr 385) Upon his return home around ten o'clock, Oermann noticed that the porch light was not burning and the door was locked. (Tr 386) Normally, his wife turned the light on and unlocked the door when she heard his car arrive. (Tr 386) Other than the television playing louder that usual, Oermann initially perceived nothing out of the ordinary inside the home. (Tr 386) As he placed his briefcase beside the chair where he usually sat, he saw a red and white baseball cap underneath the table. (Tr 398-400) He had never seen the cap before. (Tr 398) Reaching down to pick up the cap, Oermann then saw his wife lying dead on the living room floor. (Tr 387) She was nude from the breasts down (Tr 387), had been strangled and

her throat had been cut.(Tr **440-458)** Oermann immediately telephoned for the police.(Tr **387)**

Investigators processed the crime scene that night.(Tr **416-439, 520-525)** They found no point of forceable entry and no ransacking of the house.(Tr **432-433)** The only item missing was Betty Oermann's wallet which she kept in her purse on a dresser in the bedroom.(Tr **409-410, 433-434)** Blank checks on the Oermann's joint account were located in the backyard near a chain-link fence which separated the Oermann's yard from their neighbor's.(Tr **435-438)** Detective Warren testified that a person could go through the neighbor's backyard, across another fence, through a small wooded area and arrive at the Timguana Road.(Tr **438)** Approximately five months after the homicide, Oermann's neighbor, Lamona Smith, found Betty Oermann's wallet in the canal which runs behind the two houses.(Tr **538-543)** Photographs of the scene were taken including several depicting the condition of the body.(Tr **416-438)** The victim's clothing which was found under her body, the baseball cap and checks were taken as possible evidence.(Tr **428-439)**

Dr. Peter Lipkovic, chief medical examiner, performed the autopsy.(Tr **443)** From his examination, Lipkovic concluded that the victim died from a combination of manual strangulation (Tr **457-458,461-462)** and external bleeding from the throat lacera-tion.(Tr **452-457, 461-462)** The wound to the throat started as a stab wound then changed to a cut which ultimately severed the jugular vein, the carotid artery and the trachea.(Tr **453)** Based on the number of superficial cuts near the major wound,

Lipkovic thought the weapon used was probably a serrated blade of some type.(Tr **452-453)** Several attempts to cut through the neck were made because of the limitations of that blade.(Tr **452-554)** Lipkovic also found bruises over the left arm, left rib cage, right thigh and above the left ankle.(Tr **444-445)** These were cause by blunt trauma.(Tr **444-445)** Finally, fresh, live spermatozoa was found in the vagina evidencing recent sexual intercourse.(Tr **458-459)**

In an attempt to solve the crime, Detective Warren decided to present a television crime watch segment publicizing some of the details of the crime and asking for leads from the public.(Tr **547-548)** Among the details presented was the discovery of the red and white Dr. Pepper cap.(Tr **548)** Mark Reiney saw the segment and recognized the cap.(Tr **476-482)** He had obtained the cap when it was left in a truck he bought from a man who worked for the Dr. Pepper Company.(Tr **479)** Near the end of January **1986,** Reiney gave the cap to Grover Reed.(Tr **478-479)** Reiney remembered the cap because of a mold stain and an oil stain.(Tr **480)** He was also present when Reed bent the bill of the cap in particular way.(Tr **480-481)**

Three people who knew Reed identified the red and white Dr. Pepper cap and said they saw Reed wearing it on the day of the murder.(Tr **487,490, 499,503, 511)** One of Reed's friends, Michael Shelburne, said he was with Reed most of the day. (Tr **486-493)** Shelburne worked at the car wash where Reed worked for a time.(Tr **484-485)** He had the day off and decided spend some time drinking beer with Reed.(Tr **485-486)** Around **9:00**

a.m., Shelburne bought beer and went to Reed's trailer.(Tr **486)** The two men drank several beers and became intoxicated that morning.(Tr **486-488)** Shelburne went home and went to sleep.(Tr **488)** That afternoon, Reed came to Shelburne's residence.(Tr **488)** Reed had borrowed Debra Hipp's car, and the men went to buy more beer and to visit a friend of Shelburne's.(Tr **488-489)** On the drive back to the trailer park, the car broke down.(Tr **490)** Reed tried without success to fix the car.(Tr **490)** Shelburne took some of the beer and started walking home.(Tr **490)** When he left, Reed was still wearing the Dr. Pepper cap he had worn all that day.(Tr **487, 490)** Shelburne did not see Reed again until later that night. He was not wearing the cap.(Tr **492-493)** Debra Hipp, Reed's neighbor, testified that Reed was wearing the cap at 1:00 p.m. when he borrowed her car.(Tr **498-500)** Since he was to have returned the car at **1:30,** she anxiously met him in the roadway as he jogged into the trailer park after **7:30.(Tr 500-503)** He appeared dishev-eled and was not wearing the cap.(Tr **502-504)** He offered no explanation for his delay.(Tr **503)** Hipp admitted that she did not like Reed because of she believed he mistreated his girl friend, Chris.(Tr **504)** Another neighbor, Lisa Smith was present at this time and also did not see the cap.(Tr **511)** She had seen the cap several times while visiting at Reed's trail-er.(Tr **511-512)** Smith was also allowed to testify, over objection, that Reed told her he and Chris were asked to leave the Oermann's house because because he had drug

paraphernalia.(Tr **512-519)** Smith testified that Reed said that was not fair and he would get even.(Tr **519)**

Grover Reed and the Oermann's were not strangers. In December **1985,** Reed, his girl friend, Chris Miznick, and their two children were destitute and homeless. On December 11, **1985,** Traveler's Aid contacted Irvin Oermann about Reed's problems, and the Oermann's opened their home to them.(Tr **372)** Reed was given a key to the house, and he stayed with the Oermann's until December **22, 1985.(Tr 373)** At that time, Reed moved into a place in Ware's Trailer Park which was a mile away.(Tr **373-374)** After Reed and his family moved out, the Oermann's continued to help with food, money and providing transportation.(Tr **374-375)** At the end of January, Oermann stopped loaning Reed money because he felt Reed was being irresponsible in its use and in his frequent job changes.(Tr **375-376)** Near the middle of February, Oermann also stopped helping Reed with transportation.(Tr **376-377)** Oermann testified that Reed expressed no animosity or hostility toward him or his wife.(Tr **413-415)**

Detectives interviewed Reed on two separate occasions. Early in the investigation, Detective Warren talked to Reed because Reed had lived in the Oermann's house.(Tr **546)** Reed said the last time he had been in the victim's house was over a month before the murder.(Tr **547)** He told Warren that he had never owned a baseball cap and that he had spent the day of the homicide in his trailer.(Tr **547-548)** After Reiney linked Reed to the baseball cap, Warren asked Reed to provide blood and

hair samples at the police station.(Tr **548-553)** Warren said Reed agreed and the samples were taken.(Tr **549-553)** At that time, Warren conducted a second interview.(Tr **553)** Reed reiterated that the last time he was inside the Oermann's home was over a month prior to the murder.(Tr **565)** He admitted that he and his girl friend did owe Oermann money.(Tr **565)** He denied owning any type of cap or hat at the time of the murder.(Tr **565)** He did say that he had once owned a black baseball cap from BDD Drilling Company.(Tr **566)** Warren showed Reed the Dr. Pepper cap and Reed denied ownership.(Tr **566-567)** Warren arrested Reed for the murder.(R 1-2)

While in jail awaiting trial, Reed allegedly admitted committing the murder to a cell mate, Nigel Hackshaw.(Tr **589, 594-604)** Hackshaw was arrested for murder and placed in the same cell with Reed.(Tr **594)** After a few days, the two began talking about their charges.(Tr **594-595)** According to Hackshaw, Reed showed him newspaper clippings about his case (Tr **595)** and related details about the crime.(Tr **596-604)** Reed first told about living with the Oermann's for a period of time when he first arrived in Jacksonville.(Tr **595)** On the day of the crime, Reed allegedly went to the victim's house and knocked on the door.(Tr **596)** Since no one answered, Reed assumed the Oermann's were not home.(Tr **596)** He went inside the house through a window and found the victim present.(Tr **596)** Reed demanded money from her and she said that she did not have any.(Tr **596)** Reed then slapped her, tied her up and searched the house.(Tr **596)** When he returned from his search,

Reed untied the victim.(Tr **596)** She said that she would not tell anyone that he was there if he untied her and left.(Tr **596-597)** According to Hackshaw, Reed then slapped her again and cut her throat with a knife.(Tr **597)** Reed said he cut her throat to keep her from talking.(Tr **597)** Hackshaw understood from Reed that he did not intend to kill the victim.(Tr **599-601)** Reed did not mention a sexual battery.(Tr **597)** At the time he testified, Hackshaw had pleaded guilty to manslaughter and had received a sentence of seven years.(Tr **590-591)** In exchange for Hackshaw's testimony, the State Attorney agreed to write letters in an effort to influence which prison Hackshaw would serve his sentence.(Tr **591-592)**

The State presented evidence of blood, hair and fingerprint comparison. Forensic serologist Paul Doleman examined the blood and other body fluid samples taken from Reed and the victim.(Tr **627-639)** Both Reed and the victim have blood type O.(Tr **631, 634)** The victim was a secretor and Reed is a non-secretor.(Tr **631. 634)** Doleman found evidence of blood type **Θ** in the sample of fluid from the vaginal swabs taken from the victim.(Tr **634-638)** From this, Doleman concluded that either an non-secretor or a secretor of type **Θ** blood had intercourse with the victim. Reed was within the **56** to **57** percent of the male population in that category who could have had intercourse with the victim.(Tr **631-639)** **Two** head hairs found in the cap proved to be consistent with Reed's head hair.(Tr **665-666)** One head hair found in the debris from the victim's clothing was consistent with Reed's hair.(Tr **667-668)**

The pubic hair combing from the victim revealed one pubic hair which was consistent with Reed's pubic hair.(Tr **668-670)** A single latent fingerprint of comparable quality was found on a check found in the Oermann's backyard.(Tr **677--692)** Based on chemical reactions, the fingerprint examiner, Bruce Scott, concluded that the print was fresh and probably made by someone who was perspiring.(Tr **685-692)** The print proved to match Reed's right thumb.(Tr **693-696)**

Jury Selection

At the close of jury selection, Reed moved for a mistrial on the ground that the prosecutor had used his peremptory challenges in a discriminatory manner against blacks.(Tr **305-315)** In selecting the the **12** primary jurors and two alternates, the State used ten peremptory challenges, eight to excuse blacks.(Tr **305-307)** Two blacks remained on the jury.(Tr **306)** The prosecutor stated his reasons for excusing each of the black prospective jurors challenged.(Tr **309-314)** Initially, he stated that he wanted jurors **25** years old or older who had not been arrested.(Tr **309)** He excused four black jurors because of their youth.(Tr **310-312)** One black juror was excused because the prosecutor claimed she had an arrest record.(Tr **312-313)** The other three jurors were excused based on employment, lack of employment or "uneasy chemistry."(Tr **311, 313-314)** Based on the prosecutor's stated reasons for exercising these challenges, the court denied Reed's motion for mistrial.(Tr **315)**

Jury Instructions--Guilt Phase

Prior to the jury instruction charge conference, Grover Reed personally waived his right to be present. (Tr **604-607)** During the conference, defense counsel waived instructions on all lesser included offenses for the robbery with a deadly weapon and sexual battery charges. (Tr **610-618)** Later, defense counsel did request an instruction on theft as a lesser of robbery.(Tr **798)** The court instructed the jury on two lesser offenses of the robbery count: simple robbery and theft.(Tr **809-813)** No instruction was given on the lesser offense of robbery with a weapon which is not a deadly weapon or any of the permissive lessers listed in Category **2** of the Schedule of Lesser Included Offenses. (TR **809-813)** On the sexual battery count, the only instruction given was for the charged offense of sexual battery while using actual physical force or using or threatening to use a deadly weapon.(Tr **809)** The felony murder jury instruction given alleged both the robbery and sexual battery as possible underlying felonies.(Tr **805-806)** A general verdict for first degree murder was returned.(R **276)**

Penalty Phase and Sentencing

Neither the State nor the defense presented additional evidence at penalty phase.(Tr **846-858)** The prosecutor and defense counsel made arguments (Tr **859, 878),** and the court instructed the jury.(Tr **897)** Over objection, the court refused to instruct on the statutory mitigating circumstance that the

defendant's capacity to appreciate the criminality of his acts was substantially impaired.(Tr **893-894,898-899)** Sec. **921.141(6)(f)** Fla. Stat. The court also instructed the jury that the final decision regarding the imposition of penalty rested solely with the court.(Tr **858, 897)** In addition **to** the the standard jury instructions (Tr **858, 897),** the court and counsel also emphasized this point several times during jury selection (Tr **111-112, 183-185, 277)** and argument.(Tr **860, 879)** After the jury's recommendation but before sentencing, Reed submitted medical records to the court in mitigation. (R **313-378,** Tr **921)** These indicated that Reed had been a drug abuser and suffered physical and mental problems as a result. At one time, he had been hospitalized for seizures related to lead poisoning because of his prolonged practice of inhaling gasoline fumes. (R **313-378)** The trial court also considered a presentence investigation report which contained a section on victim impact and the victim's husband's opinion that a death sentence should be imposed.

SUMMARY OF ARGUMENT

1. The prosecutor's discriminatory use of peremptory challenges violated Article I Section 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Of the ten peremptory challenges the prosecutor used, eight were on black prospective jurors. A jury of ten whites and two blacks was ultimately selected to hear the case. Pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984), the trial court required the prosecutor to state reasons justifying the challenges. However, these stated reasons were not racially neutral and were insufficient to rebut the presumption of discrimination. Reed is entitled to a new trial.

2. Grover Reed waived his right to be present at the jury instruction charge conference. During Reed's absence, defense counsel waived lesser included offenses for the robbery and sexual battery charges. Although defense counsel may waive lesser offenses in noncapital trials, a defendant must personally waive lesser offenses in capital cases. Harris v. State, 438 So.2d 787 (Fla. 1983). The personal waiver requirement is applicable here, even though the waived lesser offenses were for the noncapital charges. This was a capital trial and the robbery and sexual battery were the underlying felonies for the felony murder theory of the prosecution. The offenses were an integral part of the capital case and must be treated as capital for the waiver requirements.

3. The trial court and the prosecutor made comments to the jury which minimized the jury's role in the sentencing process. These remarks went uncorrected, since the court's only official instruction on the point was the standard penalty phase instruction which tells the jury that sentencing is solely within the judge's domain. The jury was never told of the special significance of a life recommendation. This violated the mandate of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

4. Grover Reed's death sentence should be reversed because the trial judge improperly found and considered in sentencing four aggravating circumstances. First, the court improperly relied upon Reed's contemporaneous convictions for sexual battery and robbery to find a previous conviction for a violent felony. Second, the evidence failed to support the court's finding that the homicide was committed to avoid arrest since the murder was a spontaneous act during the commission of the robbery and not done primarily to eliminate a witness. Third, the court used the irrelevant factor of the victim's good character to find that the homicide was especially heinous, atrocious or cruel. And, fourth, the court should not have found the murder to be cold, calculated and premeditated. The evidence did not prove the heightened form of premeditation necessary for this factor to apply.

5. Reed requested a jury instruction on the statutory mitigating circumstance concerning a defendant's substantially impaired capacity at the time of the crime. Over objection,

the court denied the request. There was sufficient evidence of Reed's being under the influence of alcohol on the day of the homicide to justify the instruction. Denying the instruction deprived Reed of the right to have the jury consider all the existing mitigation before making a sentencing recommendation.

6. The trial court ordered a presentence investigation at defense's counsel's request. The report included a section on victim impact and comments from the victim's husband expressing his opinion that death was the proper penalty. In considering a PSI containing this type of information, the court violated Booth v. Maryland, **482 U.S.___, 107** S.Ct. **2529,** 96 L.Ed.2d **440 (1987).**

ARGUMENT

ISSUE I

THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY DENIED REED HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Both the United States and Florida Constitutions prohibit the the discriminatory use of peremptory challenges when selecting a jury in a criminal case. The Sixth and Fourteenth Amendments to the United States Constitution forbids a prosecutor to exercise peremptory challenges solely on the basis of race. Batson v. Kentucky, 476 U.S. ___, 106 S.Ct.___, 90 L.Ed.2d 69 (1986). This Court condemned purposeful racial discrimination in the selection or exclusion of prospective jurors in State v. Neil, 457 So.2d 481 (Fla. 1984) as a violation of a defendant's right to an impartial jury under Article I, Section 16, of the Florida Constitution. The prosecutor offended these principles in using eight of his ten peremptory challenges to excuse blacks from from serving on Reed's jury.(Tr305-307)

In Neil, this court held that when a trial judge perceives a systematic exclusion of blacks from the jury pool, he must require the prosecutor to justify that his peremptory challenges were exercised for nonracial reasons. The prosecutor's challenges must be based on the particulars of the case, the parties, the witnesses, or race-neutral characteristics of the

challenged person. In abandoning the test established in Swain v. Alabama, 380 U.S. 202, **85** S.Ct. 824, 13 L.Ed.2d **759 (1965)** for determining whether racial discrimination occurred in jury selection, Neil established the following standard:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

457 So.2d at **486-487** (footnote omitted).

In Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), review granted, State v. Slappy, case no. 70,331 (Fla. July **6,**

1987), the Third District Court of Appeal interpreted Neil as requiring the trial court to evaluate the prosecutor's race-neutral explanations and to reject those which are not bona fide. The court provided standards to determine the reasonableness of any race-neutral explanation:

> The following will weigh heavily against the legitimacy of any race-neutral explanation: 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror: 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason given for the challenge is unrelated to the facts of the case: and 5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.

503 So.2d at 355.

In selecting the 12 primary jurors and the two alternates, the prosecutor used ten peremptory challenges--eight on blacks.(Tr 305-307) Two blacks served on the jury.(Tr 306) Defense counsel objected and moved for a mistrial before the court swore the jury.(Tr 305-315) The prosecutor gave his reasons for challenging the black jurors, and the court denied the motion for mistrial.(Tr 309-315) The eight black prospective jurors the State excused peremptorily and the prosecutor's stated reasons for excusing them were as follows:

Eddie A. Wesley

Eddie Wesley was 22 years old and had lived in the Jacksonville all of her life.(Tr 140-141) She was employed as a nursing assistant at Christian Health Center. Her husband worked as a fork lift operator, and they had three children all living at home. (Tr 117) Her parents and brothers lived in Jacksonville. (Tr 141-142) Her father retired from the construction business and her mother used to work for a department store.(Tr 141-142) Her older brother worked as a carpenter.(Tr 142) She said that her sister had once been the victim of a robbery or burglary.(Tr 198-199) Wesley attended Austin Temple, Church of God and Christ.(Tr 205) The prosecutor challenged her because of her youth.(Tr 310) He told the court he did not want jurors under 25 years of age.(Tr309-310)

Octavia Madison

Octavia Madison was 20 years old and single.(Tr 117, 143) She lived at home with her parents and worked as a hair operator.(Tr 117, 143) Her father worked for Maxwell House Coffee and her mother worked for Southern Bell as a telephone operator.(Tr 144-145) She attended church regularly at the Valley of Hope Church.(Tr 205) The prosecutor said he excused her primarily because of her age and secondarily because she worked as a hair operator and there would be hair evidence presented at trial.(Tr 310)

ggy ries

Peggy Humphries had lived in the area for 13 years. She was married and had an eight year old child living at home. Her husband worked as a tile setter.(Tr 124) She was a

physical therapy technician but was on workman's compensation at that time.(Tr 169) She had not worked for just over one year.(Tr 169) She attended the Tabernacle Baptist Church.(Tr **207)** Stating his reasons for excusing her, the prosecutor said,

> ...she was excused essentially because she was totally unemployed. I was concerned about--she said she unemployed for about a year, over a year, and I know a number of physical therapists or physical therapist assistants and I'm aware that there's a real demand.

(Tr **311)** The court reminded the prosecutor that Humphries was on workman's compensation rather that simply unemployed.(Tr **311)** In response the prosecutor said,

> It would just seem to me someone who has remained unemployed for a period of a year when from my own experience I'm aware there's a need for services that she can render just struck me as an aspect of her character that I did not particularly like.

(Tr **311)**

Bennie Campbell

Bennie Campbell was 18 years old and worked at Sam's Wholesale.(Tr **125)** He lived with his parents who had been in the Jacksonville area for about six years. (Tr **170)** His father worked as an electrician.(Tr **170)** The prosecutor said Campbell's youth and lack of maturity were the reasons for the peremptory challenge.(Tr **311-312)**

Bruce Seldon

Bruce Seldon had lived in Jacksonville for 51 years, and he had lived at the same address since he left the Marines **40**

years earlier.(Tr **229, 249) 249)** He retired as a maintenance supervisor for City HUD of Jacksonville.(Tr **229, 250)** His wife was a retired school teacher.(Tr **229, 250-251)** Seldon served on a civil jury **25** years ago.(Tr **239)** He said he regularly attended St. Pius Catholic Church.(Tr **251)** Seldon also served as a Boy Scouts' leader.(Tr **272)** One of his former scouts was a police officer.(Tr **290)** Another of his former scouts had been convicted of murder and was on death row.(Tr **272)** Seldon testified as a character witness pursuant to State Attorney Ed Austin's request.(Tr **272)** He was also then reviewing his scouting records, since the case was to be reopened.(Tr **272-274)** Seldon said that these experiences with former scouts would not affect his ability to fairly try the case.(Tr **273-274)** The prosecutor excused Seldon because of his being a character witness in another murder case.(Tr **312)**

Georgia Robinson

Georgia Robinson had lived in Jacksonville for **33** years.(Tr **233)** She worked as a certified nurse's assistant at River Garden Hebrew Home for the aged.(Tr **233)** Her four grown children lived away from home.(Tr **233)** She regularly attended Missionary Baptist Church.(Tr **259)** As a reason to excuse her, the prosecutor claimed she had an arrest record.(Tr **312-313)**

Carl Strickland

Carl Strickland was **30** years old and single.(Tr **234)** He had lived in Jacksonville most of his life.(Tr **234, 260)** For the past five years, he had worked as a messenger at St. Luke's Hospital.(Tr **234, 261)** The prosecutor excused him from service

as an alternate juror stating Strickland's employment as a messenger for a number of years "just struck me as a bit unusual...it comments on his intelligence, motivation, maybe even maturity."(Tr **313)**

Gregory Adams

Gregory Adams was **34** years old and had lived in Jacksonville for five years.(Tr **235, 263)** He was married and had three children living at home.(Tr **235)** He worked as a pipefitter and was a member of the local union.(Tr **235)** His wife worked as a cosmetologist.(Tr **235)** In explaining his reasons for challenging Adams as an alternate juror, the prosecutor said,

> ...it's hard to [put] into words. I just sensed an uneasy chemistry between Mr. Adams as I was interrogation him. A member of the plumber's union. I have had experiences with individuals that are in that union in the past as a prosecutor, individuals that are involved in illegal activities from that union. His wife also being a cosmetologist. I just got an impression from questioning him that he did not like me. It's hard to really put that into rational words. It was a rational decision, but it was kind of a gut level impression. I would just state had I received those impressions from a white man as opposed to a black man, I would exercise that challenge on Mr. Adams, but that was the basis of my challenge of Mr. Adams.

(Tr 313-314)

The reasons offered for excusing these black prospective jurors did not meet the race-neutral test mandated in Neil. The prosecutor excused three black jurors because they were under **25** years old.(Tr **309-312)** When explaining his reasons

for the challenges, the assistant state attorney said he was trying to avoid youthful jurors because he believed those under 25 often lacked the maturity to make hard decisions. (Tr 309-310) Besides his own bias, the prosecutor stated no basis for concluding that jurors under 25 would be unable to make hard decisions.(Tr 309-312) He impermissibly substituted one group bias for another. Slappy, 503 So.2d 350. Youth is not a legitimate race-neutral reason for exercising a peremptory challenge. See, Floyd v. State, 12 FLW 2105, 2106 (Fla. 3d DCA 1987)("A 'superstition' against young students generally does not satisfy the constitutional requirement that the removal of black jurors be for legitimate reasons.")

Two jurors were challenged allegedly because of their employment history. Peggy Humphries was a physical therapist assistant who was on workman's compensation and had not been employed for about a year.(Tr 169, 311) Although never inquiring about the reasons for her inability to work, the prosecutor excused her stating she was "totally unemployed."(Tr 311) Two other jurors, Juanita Davis and Laura Kates, who were acceptable to the State had not worked within the last five years. (Tr 116, 229) However, the prosecutor never questioned their reasons or motives for unemployment. Carl Strickland was excused from jury service because he had been consistently employed for five years as a messenger at St. Lukes Hospital.(Tr 234, 261, 313) The prosecutor believed that indicated a lack of intelligence, motivation and maturity.(Tr 313) These conclusions about the jurors' character based on employment or

lack of employment were unfounded and were inadequate race-neutral reasons for using a peremptory challenge. Similar employment biased reasons for excusing black jurors have been rejected. See, Slappy, 503 So.2d 350 (jurors challenged because they were teacher aides): Floyd, 12 FLW 2105 (juror challenged because she was a young college student); People v. Turner, 42 Cal.3d 711, 230 Cal. Rptr. 656, 726 P.2d 102 (1986) (one juror challenged because he was truck driver and another for "something in her work").

Finally, the State challenged Gregory Adams because the prosecutor sensed a "uneasy chemistry" and because Adams belonged to a union.(Tr 313-314) Neither of these reasons were valid. First, the prosecutor was not concerned enough about union membership to ask any questions concerning it during jury selection. (Tr 115- 326) Adams happened to mention his membership when answering employment questions.(Tr 235) Although the prosecutor said he knew some members of the union were involved in criminal activity (Tr 314), he did not ask Adams if he knew these people or if he harbored animosity toward the State.(Tr 235, 263) Second, the "uneasy chemistry" is vague and no reason at all. The failure to act in a certain way to questioning is not a legitimate reason. Floyd, 12 FLW at 2106.

If any one of the eight blacks challenged peremptorily was excused solely on the basis of race, a new trial is required. Floyd v. State, 12 FLW at 2106: United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987). The fact that two blacks served on the jury does not change that result. Ibid. The

State failed in its burden to demonstrate race-neutral reasons for its peremptory challenges, and this Court must reverse Grover Reed's judgment and remand the case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING REED'S TRIAL COUNSEL TO WAIVE INSTRUCTIONS TO LESSER INCLUDED OFFENSES OF THE ROBBERY AND SEXUAL BATTERY COUNTS IN REED'S ABSENCE AND WITHOUT HIS PERSONAL WAIVER OR RATIFICATION OF HIS LAWYER'S ACTIONS.

Before the jury instruction charge conference, Grover Reed expressly and personally waived his presence.(Tr 604-605) During the conference, Reed's lawyer waived jury instructions on any lesser included offenses to the robbery with a deadly weapon and sexual battery charges.(Tr 610-618) Later, defense counsel changed his position and requested an instruction on theft as a lesser of robbery.(Tr 798) The court ultimately instructed the jury on two lesser offenses of the robbery count: simple robbery and theft.(Tr 809-813) No instruction was given on the lesser offense of robbery with a weapon which is not a deadly weapon **Sec.812.13(2)(b)** Fla. Stat. (1985); Growden v. State, 372 So.2d 930 (Fla. 1979), or any of the permissive lessers listed in Category 2 of the Schedule of Lesser Included Offenses. (TR 809-813) As to the sexual battery count, the only instruction given was for the charged offense of sexual battery while using actual physical force or using or threatening to use a deadly weapon.(Tr 809) Sec. 794.011(3) Fla. Stat. (1985). The felony murder jury instruction given alleged both the robbery and sexual battery as possible underlying felonies.(Tr 805-806) A general verdict for first degree murder was returned.(R 276)

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that a defendant in a death penalty case may waive jury instructions on necessarily included lesser offenses. However, the defendant must expressly and personally make the waiver.

> But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

Ibid., at 797. (emphasis deleted) Later, in Jones v. State, 484 So.2d **577** (Fla. 1986), this Court chose not to extend the personal waiver requirement to noncapital trials. Although the lesser offense instructions waived in this case were for the noncapital offenses charged, the personal waiver requirement of Harris is applicable. This was a capital offense prosecution and the noncapital offenses were an inseparable part. Reed did not personally waive instructions on the lesser included offenses and a new trial is required.

The decision in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, **65** L.Ed.2d 392 (1980) contributed significantly to the rationale behind Harris. In Beck, the United States Supreme Court held unconstitutional an Alabama statute which prohibited a trial court from instructing on lesser included offenses in a capital case. The Court reasoned that depriving a jury of the option to convict of an offense less than capital would inject an intolerable degree of uncertainty and unreliability into the

fact finding process. Discussing Harris and Beck in Jones, this Court said,

> In the absence of a "third option" a conviction might signal a jury's belief that the defendant had committed some serious crime deserving of punishment, while an acquittal could reflect a hesitancy to impose the ultimate sanction of death. Such possibilities, the Court held, "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." 447 U.S. at 643, 100 S.Ct. at 2392.

The jury was deprived of this critical "third option" in this case as well. Since the sexual battery and the robbery were the underlying felonies for the felony murder theory of the prosecution, they were part of the capital charge. A conviction on an offense less than the robbery or sexual battery would have eliminated the predicate felony for first degree felony murder. See, Sec. 782.04(1)(a)(2) Fla. Stat. (1985). Consequently, the waiver of lesser included offenses for the underlying felony of a felony murder is no less important than the waiver of the lesser homicide offenses of second degree murder and manslaughter. The personal waiver requirement of Harris applies.

Even if the sexual battery and robbery were not the predicate offenses for the felony murder, a personal waiver of lesser offenses should still be the standard. Noncapital charges tried with a capital charge acquire many of the procedural appurtenances of the capital case. The offenses are frequently charged via indictment. A twelve person jury decides guilt or innocence. Written jury instructions are used

pursuant to Fla. R. Crim. P. 3.390(b). And, finally, this Court obtains appellate jurisdiction to review the judgments. In the interest of insuring uniform procedures in a capital trial, the required higher standards should be employed for all offenses which are being tried with the capital ones.

Grover Reed did not expressly and personally waive the jury instructions on the lesser included offenses of the sexual battery and robbery. Since those charges were an integral part of the capital trial, a personal waiver was necessary pursuant to Harris v. State. The trial court erred in not giving the instructions on the lesser offenses, and this Court must reverse this case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN MISLEADING THE JURY AS TO THE IMPORTANCE OF ITS SENTENCING RECOMMENDATION BY MAKING IMPROPER COMMENTS AND GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH, ALONG WITH THE JUDGE'S AND PROSECUTOR'S MISLEADING REMARKS, DIMINISHED THE ROLE OF THE JURY'S SENTENCING RECOMMENDATION.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. **See,** Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir. 1987). The Eleventh Circuit Court of Appeals reversed denials of habeas corpus relief in Adams and

Mann, where judicial and prosecutorial remarks stating that the sentencing decision was ultimately and solely the judge's responsibility went uncorrected. The same error occurred in this case. The judge and prosecutor made comments, which, coupled with the standard penalty phase instruction, mislead the jury as to the importance of its sentencing recommendation.

The trial judge told the prospective jurors during jury selection that the jury's recommendation was meaningless:

> The advisory sentence is just that under Florida law. The jury is required to make a recommendation to the Court as the which of the two penalties should be imposed. ...That opinion or advisory opinion, as I indicated, is merely that. The Florida law provides the jury does not make a determination of the sentence imposed in such a case, but render an advisory opinion which the Court may or may not follow, so that the ultimate decision in the case as the imposition of any penalty, if convicted, rests with the Court and not with the jury in the case.

(Tr 111-112) After these misleading judicial statements concerning the jury's function, the standard jury instruction was but an echo on the same theme. The trial court read the standard penalty phase jury instructions to the jury which did nothing to correct the erroneous impression. In part, those instructions stated:

> The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> * * *
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge...

(Tr ***858***, 897) Although not a misstatement of Florida law, the instruction is incomplete and misleading. It fails to advise the jury of the importance of its recommendation. There is no mention of the requirement that the sentencing judge give the recommendation great weight. Additionally, there is no mention of the special significance of a life recommendation under Tedder.

Comments the prosecutor made emphasizing that the jury's role was merely advisory further compounded the error. During jury selection he said,

> The first part you consider guilt or innocence, the second part you make a recommendation, only a recommendation to the Judge as to what the sentence will be....So the jury makes a recommendation, it does not actually sentence. It merely recommends to the Judge what the sentence ought to be.
>
> * * * *
>
> ...if you return a verdict of guilty of first degree murder that that defendant may be subject to electrocution no matter what you recommend, no matter what the jury recommendations [sic] later on.... It's the Judge who finally decides what the sentence will be.

(Tr 183-185) While making his penalty phase argument, the prosecutor continued on this point as follows:

> Our purpose here today is to -- for you to consider what sentence you will recommend to judge Southwood, what sentence the defendant should get for executing Betty Oermann. The final decision as to what that sentence will be is not yours. That rests with Judge Southwood.
>
> Now, the process, the process that you all will go through is not a very difficult process, the process in helping you in arriving at that recommendation. You make a recommendation and Judge Southwood will

> make the final decision as to what the final sentence will be.

(Tr 860) These remarks forced defense counsel to address the matter during his argument.

> I mean ultimately that decision rests with the Judge. This is just, quote/unquote, advisory, but in a sense our whole system is to try to make this a little bit easier on everybody and it's not a question that we should allow to be an easy question.
>
> ...we have an advisory opinion and instead of having that advisory opinion be unanimous so that each person on that jury realizes that they carry the burden in making this decision about whether or not there's going to be a recommendation for death of another human being, we dilute that a little bit and then we make it just a majority ....

(Tr 879) Defense counsel continued and urged each juror to make an individual decision and not to "look at this as just an advisory opinion and just a portion of a majority vote." (R 880) These comments, along with the judge's and the jury instruction, gave the jury the clear impression that its role in making a recommendation was a minor part of the sentencing process.

Reed realizes that this Court has recently ruled in Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987), that the standard jury instruction, standing alone, does not violate Caldwell. However, the extraneous and misleading comments the court and prosecutor made distinguish this case from Aldridge. Adams v. Wainwright and Mann v. Dugger are directly analogous. Precisely the same error has occurred here, and this Court must reverse Reed's death sentence.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING GROVER REED TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPERLY FOUND AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A.

The Trial Court Improperly Found That Reed Had A Prior Conviction For A Violent Felony On The Basis Of His Contemporaneous Convictions For Robbery And Sexual Battery.

The trial court found as an aggravating circumstance that Reed had a previous conviction for a violent felony. (R 389-390)(A 2) Sec. 921.141(5)(b) Fla. Stat. In his sentencing order, the judge said,

> 1. The defendant was previously convicted of other felonies involving violence to the person. F.S. 921.141(5)(b):
> The defendant stands convicted of Sexual Battery and Armed Robbery in the instant case.

(R 389-390) (A 2)

Grover Reed had never been convicted of a felony involving violence before the trial of this case.(R 392)(A 5) The trial court found the aggravating circumstance solely because of the contemporaneous convictions for sexual battery and robbery. Both of these offenses were committed on the homicide victim during the same criminal episode as the murder. This finding directly contradicts this Court's teachings in Wasko v. State, 505 So.2d 1314 (Fla. 1987). Distinguishing this situation from contemporary convictions for violent felonies committed upon someone other than the murder victim, this Court held that a contemporaneous conviction for a violent felony committed on

the murder victim could not be used to support this aggravating circumstance. Ibid. at 1317-1318. This improper finding skewed the sentencing weighing process and Reed's death sentence must be reversed.

B.

The Trial Court Improperly Found That The Homicide Was Committed To Avoid Arrest.

Finding that Reed committed the murder to avoid or prevent a lawful arrest, Sec. 921.141(5)(e) Fla. Stat., the trial judge wrote,

> Uncontradicted trial testimony was established to show that the defendant told Mr. Hackshaw that he killed the victim so that she wouldn't be able to talk. The defendant killed the only witness to the sexual battery and robbery, hoping to escape detection.

(R 390)(A 2) The court was wrong because the evidence failed to prove that eliminating a witness in order to avoid arrest was the dominant motive for the homicide. Only three facts arguably supporting this finding were present: (1) the victim knew Reed; (2) the victim was the only witness to the sexual battery and robbery; and (3) Reed allegedly told a cell mate that he cut the victim to keep her from talking. However, these facts were insufficient to prove this aggravating circumstance beyond a reasonable doubt.

Since the victim was not a police officer, the aggravating circumstance of avoiding arrest is not properly found unless

the evidence clearly proves that Reed's primary motive for the homicide was the elimination of witnesses. E.g., Floyd v. State, 497 So.2d 1211, 1215, (Fla. 1986); Bates v. State, 465 So.2d 490, 492 (Fla. 1985); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978). The fact that the homicide victim was the only witness to the other felonies does not meet this proof requirement. Jackson v. State, 502 So.2d 409 (Fla. 1986); Rembert v. State, 445 So.2d 337 (Fla. 1984); Foster v. State, **436** So.2d 56 (Fla. 1983). Moreover, the fact that the victim recognized Reed and "might have been able to identify [him] is insufficient to prove this aggravating factor beyond a reasonable doubt.'' Floyd, 497 So.2d at 1214-1215; accord, Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Bates, 465 So.2d 490; Caruthers v. State, 465 So.2d 496 (Fla. 1985).

Finally, the alleged statement to Hackshaw about cutting the victim to prevent her from talking is also insufficient proof of this aggravating circumstance. First, Hackshaw's testimony revealed that Reed never intended to kill the victim for any purpose.(Tr 600) According to Hackshaw, Reed said he entered the victim's residence thinking no one was home.(Tr 596) Finding Betty Oermann home, Reed struck her and tied her up.(Tr 596) After obtaining valuables, Reed then untied the victim and cut her in the throat "[so] that she wouldn't talk." (Tr 597) Hackshaw testified that Reed gave him the clear understanding that he did not intend to kill.(Tr 600) An unintentional killing cannot be predominately motivated by a

desire to eliminate a witness. The evidence established that the killing was a reaction to a confrontation with victim during the course of the robbery and sexual battery. Such homicides do not qualify for this aggravating circumstance. Second, even if this evidence shows that elimination of the victim as a witness was a motive, it did not prove beyond a reasonable doubt that this was the predominate motive for the homicide.

The State did not prove this aggravating circumstance beyond a reasonable doubt. It should not have been used in the sentencing decision, and Reed urges this Court to reverse his death sentence.

C.

The Trial Court Improperly Found That The Homicide Was Especially Heinous, Atrocious Or Cruel.

The trial court considered the character of the victim in finding that the homicide was especially heinous, atrocious or cruel.(R 390-391)(A 3) Sec. 921.141(5)(h) Fla. Stat. This was an irrelevant sentencing factor, and its consideration constitutes the use of a nonstatutory aggravating circumstance. Jackson v. State, 498 So.2d 906, 910 (Fla. 1986). The Eighth and Fourteenth Amendments do not countenance the use of the victim's character and background or the crime's impact upon the victim's particular situation in life in the death penalty sentencing decision. Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

In his findings of fact, the trial judge stated his reasons as follows:

> Betty Oerman, the victim in this case, was a 57 year old female who had been married to Reverend Oermann for 35 years and was the mother of three grown children. The evidence showed that she was a religious, caring, loving woman who had taken the defendant into her home at an earlier time when the defendant was unable to provide for himself. On the date of the murder, the defendant invaded the sanctity of her home and brutally attacked her while she was alone. The evidence clearly indicates that she was beaten, robbed, sexually battered, murdered and left dead. The manner of the death was by choking and slashing of her throat. The evidence clearly established that twelve separate slash marks were made on the neck of the victim. Any doubts as to the heinous, atrocious, and cruel manner in which the victim was killed may be resolved by a viewing of the photographs of the victim at the scene of the crime and at the medical examiner's office. One may only speculate as to the fear and terror that may have existed in the mind of the victim immediately preceding her death, but considering the character of the victim, it would be difficult to imagine an equivalent punishment for the perpetrator of this crime.

(R 390-391)(A 3) The use of the victim's character as a basis for finding the aggravating circumstance is precisely the same mistake this Court condemned in Jackson.

Jackson is on point and controlling. The trial court in Jackson, as did the court here, found the homicide to be heinous, atrocious or cruel based in part upon the character of the victim and the loss to the community as a result of the death. Noting that the trial judge had considered these "patently improper'' factors, this Court said,

> Moreover, the trial court justified its finding that the murder was especially cruel by reference to a plurality of patently improper factors. These factors included the fact that the victim was married; ran the store alone; had led an honest and good life; would be missed by the community; was an immigrant who had made a good life; and was a kind and likeable man. The trial court erred by considering these factors. The lifestyle, character traits, and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous, atrocious, or cruel.

498 So.2d at 910. The consideration of these irrelevant factors tainted sentencing decision in this case. This Court must reverse Reed's death sentence.

D

The Trial Court Improperly Found That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The trial judge found as an aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 391)(A 4) He stated his findings as follows:

> The evidence clearly indicates that the defendant executed the victim, Betty Oermann, in order to cover up his commission of armed robbery and sexual battery. A number of factors contribute to the unalterable conclusion that the defendant clearly contemplated the killing of the victim. Those factors include but are not limited to
>
> 1. the defendant told another that he killed the victim to keep her from talking.
> 2. The manner of the killing - twelve separate slash marks were made on the victim before the defendant accomplished

> the ultimate death of the victim. This was done in conjunction with or after the victim was choked.
> 3. The evidence, i.e. pictures of the victim, clearly show the intensity of the attack which almost decapitated the victim.

(R 391)(A 4) These facts do not support the premeditation aggravating circumstance.

As this Court has frequently said, this aggravating circumstance requires a heightened form of premeditation; the premeditation for first degree murder, alone, is insufficient. E.g., Hill v. State, No. 68, 706 (Fla. September 17, 1987); Neibert v. State, 508 So.2d 1, 4 (Fla. 1987); Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). The evidence must prove that the murder was planned and coldly calculated. Hardwick, at 81. A review of the facts reveals that the State has not met its burden of proof. First, the evidence does not prove that the homicide was committed to eliminate the victim as a witness and to cover up the crime. This point has been addressed in Issue IV, B, supra., and that argument is incorporated by reference here. Second, the court's statement that the homicide was committed to cover up the robbery and sexual battery is inconsistent with other evidence. The fact that other incriminating evidence, such as the baseball cap, was left at the scene does

not show a particular concern for covering up the crime. Finally, the intensity of the attack does not in any way imply a heightened degree of premeditation. **See,** Nelbert, 508 So.2d 1, (victim stabbed seventeen times); Hardwick, 461 So.2d 79, (victim beaten, raped and strangled); Preston v. State, 444 So.2d 939 (Fla. 1984)(witness to robbery nearly decapitated and stabbed several times); Cannady v. State, 427 So.2d 723 (Fla. 1983)(victim shot five times). Rather than a cold, calculated and premeditated homicide, the intensity of the attack simply shows "a robbery that got out of hand." Hansbrough, 509 So.2d at 1086.

This court has rejected this aggravating circumstance in some quite similar cases involving robberies or burglaries committed in the victim's home. For example, in Hardwick, the defendant, like Reed, knew the victim. During the course of a robbery and burglary, Hardwick beat, raped and strangled the her. Concluding that the circumstance was not proved, this Court noted that the fact that the robbery was planned and that choking the victim required several minutes to produce death were irrelevant considerations. 461 So.2d at 81. In Floyd, the victim may have known and recognized the defendant. Floyd stabbed his victim several times when confronted during a burglary of her residence. Disapproving the premeditation aggravating circumstance, this Court held that the fact a robber or burglar kills instead of merely fleeing does not establish the factor. 497 So.2d at 1214. Reed has done nothing more than Hardwick or Floyd which would tend to prove

the heightened form of premeditation. He killed a victim, whom he knew, when confronted during the commission of other felonies.

The trial court erred in sentencing Reed to death based in part upon a finding of the premeditation aggravating factor. This Court must reverse Reed's sentence.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCE CONCERNING REED'S IMPAIRED CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT.

At the jury instruction charge conference during penalty phase, Reed requested the standard instruction on the mitigating circumstance of substantially impaired capacity. Sec. 921.141(6)(f) Fla. Stat. (R 893-894) The judge denied the request, over counsel's objection, stating that there was no evidence to support the instruction. (R 893-894) This ruling was incorrect since there was evidence Reed had been drinking beer all day to the point of intoxication. (R 486-491) While the court had the discretion reject this mitigating circumstance, it did not have the right to deprive Reed of a jury's consideration of this mitigating factor. Floyd v. State, 497 So.2d 1211, 1215-1216 (Fla. 1986); Robinson v. State, 487 So.2d 1040 (Fla. 1986). Reed has been denied his right to have a jury's advisory opinion rendered after full consideration of all mitigating circumstances. Ibid. His death sentence is tainted and violates the constitutional mandate that a sentencing jury consider all evidence in mitigation. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

A trial judge is not permitted to restrict the jury's consideration of mitigating evidence via limiting instructions on statutory mitigating circumstances to those which he thinks the evidence establishes. Floyd.; Robinson. If *any* evidence exists to support the instruction, the constitution requires

that it be given. Ibid. More than enough evidence of Reed's alcohol use was presented during the guilt phase of the trial to support the instruction on substantially impaired capacity. Indeed, the the evidence was sufficient to justify an instruction on the intoxication defense had he chosen to request one. See, State v. Heathcoat, **442 So.2d. 955** (Fla. **1983).** Michael Shelburne testified that on the day of the homicide he and Reed drank beer together almost all day.(R **486-494)** They began drinking around **9:00** a.m.(R **486, 493)** Their drinking initially revolved around a game called "quarters" which involves bouncing a quarter into a glass. If the player is successful, his opponent must take a drink of beer. Consequently, the less successful player drinks more beer. (R **486)** Shelburne was winning the game but still drank seven or eight beers and became intoxicated. (R **487-488)** Reed would have consumed even more beer. Early in the afternoon, Reed borrowed Debra Hipp's car, and he and Shelburne purchased more beer, two 12 packs.(R **488-489, 491)** When the car broke down, Shelburne left Reed with the car and one of the 12 packs of beer. (R **491)** Reed was under the influence of alcohol at the time of the murder.

Reed was entitled to the jury's considered opinion on whether his alcohol consumption impaired his capacity to appreciate the criminality of his acts. The trial judge was not free to usurp the jury's role by refusing to instruct on the circumstance, even though his own view of the evidence was that it was not mitigating. This Court must reverse Reed's

death sentence and remand the case for a new sentencing proceeding with a new jury.

ISSUE VI

THE TRIAL COURT ERRED IN CONSIDERING A PRESENTENCE INVESTIGATION WHICH CONTAINED VICTIM IMPACT INFORMATION AND OPINIONS ON SENTENCING FROM THE VICTIM'S SPOUSE.

At defense counsel's request, the trial court ordered a presentence investigation report. (R 904-905) Counsel specifically asked that the report be considered for any additional mitigation it might contain.(R 904) Included in the PSI was a section on victim impact and comments from the victim's husband expressing his opinion that death was the appropriate sentence. The report quoted Ervin Oermann as follows:

> 'I feel that the only way [Reed] will face up to himself is to be faced with death. I feel that just a prison term would not do it, he will try to beat the system while in prison. In a way it seems a shame or a paradox to say I wish he would lead a constructive life and contribute to society. I just think it will take a whole lot for him to face up to himself. I don't like to see anyone die but I think that he needs to face up to himself.'

(PSI, page 2) This material should not have been included in the report and should not have been considered in sentencing. Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987); Patterson v. State, No. 67,830 (Fla. Oct. 15, 1987).

In Booth v. Maryland, the United States Supreme Court addressed the propriety of the sentencing authority in a capital case receiving and considering information about the impact of the crime on the victims. Maryland's practice was to present the sentencing jury with a presentence investigation which included a victim impact statement. The statement

included information about the character of the victim, the emotional impact of the crime on relatives and family members' views about the crime and the defendants. Concluding that this information was irrelevant to the capital sentencing decision and likely to improperly shift the focus of the sentencer to arbitrary considerations, the Court held that the introduction of these statements violated the Eighth Amendment. In Patterson, this Court relied on Booth to condemn the practice of a sentencing judge in a capital case hearing testimony from relatives of the victim concerning the crime's impact. Although the information in the PSI in this case was not as detailed as the information provided in the Maryland procedures, the same constitutional error has occurred. Furthermore, the fact that the victim's statement came through the PSI rather than from the witness stand does not distinguish this case from Patterson. The trial court, as the sentencing authority, improperly received irrelevant sentencing material.

Reed's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments. He asks this Court to reverse his sentence for a new sentencing proceeding.

CONCLUSION

Upon the foregoing reasons and authorities, Grover Reed asks this Court to reverse his convictions and remand his case for a new trial. In the alternative, Reed asks this Court to reverse his death sentence and remand for imposition a sentence of life imprisonment.

Respectfully Submitted,

MICHAEL E. ALLEN
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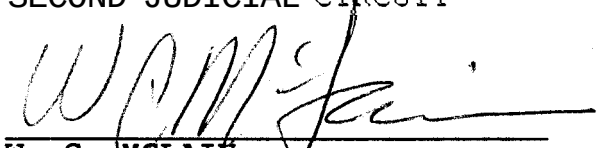

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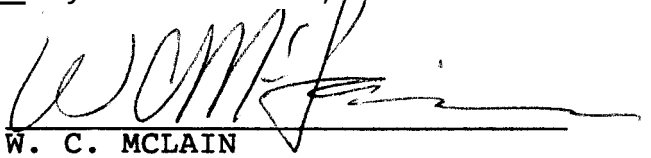
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General of Florida, The Capitol, Tallahassee, Florida on this 8 day of December, 1987.



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