IN THE SUPREME COURT OF FLORIDA

GEORGE ALEXANDER HILL, :

Appellant, :

vs. Case No. 70,441

STATE OF FLORIDA, :

Appel1ee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
BAR NO. 0143265

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PRELIMINARY STATEMENT

Appellant, GEORGE ALEXANDER HILL, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution, and will be referred to as the state. The record on appeal (Volume VII, consisting of documents, motions, orders, etc.) will be referred to by use of the symbol "R". The supplemental record will be referred to by use of the symbol "SR". The trial transcript (Volumes I through VI) will be referred to by use of the symbol "T". The transcript of the sentencing hearing held on April 8, 1987 will be referred to by use of the symbol "ST". The police transcript of appellant's in-custody statement to Detective Vargas will be referred to by use of the symbol "PT". [This transcript was made part of the record for appellate purposes (see T.800) as Court Exhibit L, and has been transmitted to the clerk's office of this Court (as has the micro-cassette tape itself, which is State's Exhibit 102)]. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On November 19, 1985, Marianne Lile was found murdered in her office in Naples (see **R.1065).** On December **13, 1985,** George Hill was arrested and charged with the crime **(R.1065-70).** The Public Defender for the Twentieth Circuit was appointed as counsel **(R.1080).** On January **30, 1986** an indictment for first degree murder was returned **(R.1083).**

Prior to trial, appellant filed a pro se motion to discharge the Public Defender and appoint private counsel, on the ground that the Public Defender's excessive caseload prevented him from devoting the necessary time to properly prepare the defense **(R.1091, SR.1168-69).** At a hearing on December **8, 1986,** the trial court advised appellant to "relax and let Mr. Osteen do it because he knows what he is doing''. **(SR.1169).** The trial court continued the trial until the week of February **3, 1987 (SR.1170).**

On January **28, 1987,** the trial court, on the ex parte oral motion of the State Attorney's office, found that Ernest Demonbruen, an inmate in the Pinellas County Jail, was a material witness whose presence and testimony would be required at trial (R.1096). Consequently, he ordered that Demonbruen be placed in the temporary custody of the Sheriff of Collier County **(R.1096).**

The case proceeded to trial on February **3-11, 1987** before Judge Charles T. Carlton and a jury. During the trial, the court sustained the state's hearsay objection and excluded testimony of Ernest Demonbruen, which was proffered by the defense to show that another individual (John Jones) had made statements against

interest that he had murdered Mrs. Lile (T.454-55, 861-76). Demonbruen was subsequently called by the state, as a rebuttal witness, to testify regarding statements which he said were made by appellant (T.1047-48). Also, during the trial, the state introduced a tape recorded statement made by appellant to Detective Victor Vargas (PT.1-11, T.802-05). Over defense objection, the state was permitted to give each juror a police transcript of the tape recording to follow along with as they listened to the tape (T.796-805)[1]. Because the pages of the transcript were out of order, the playing of the tape was interrupted three times, and on one occasion the jury had to leave the courtroom while the transcripts were recollated (PT.1-11, T.802-05).[2]

During its deliberations, the jury submitted several questions. In response to their request for a definition of premeditated murder, the trial court re-instructed them on first degree premeditated murder (R.1102, T.1120-22). The court declined to answer the jury's question as to what was the penalty for second degree murder (R.1102, T.1122). The jury also asked, "The palm print on the mirror, did the evidence say they were

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[1] The transcript was not admitted into evidence, pursuant to the First District Court of Appeal's opinion in Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983) (see T.896-97, 799-800).

[2] The transcript (Court Exhibit L) which is located in the Clerk's office of this Court is apparently paginated in the same manner as were the transcripts given to the jurors originally, before they were recollated. To synchronize the transcript with the tape, the pages should be in the following order: 1-2-3-4-5-9-7-8-6-10-11.

similar to George Hill's or they were George Hill's'' (T.1122). Defense counsel and the prosecutor stipulated that the testimony of Douglas Barrow (an FDLE crime laboratory analyst) was that the palm print found on the mirror was that of George Hill, and that answer was sent back to the jury (T.1122-24).

The jury returned a verdict finding appellant guilty as charged of first degree murder (R.1101, T.1125).

The penalty phase of the trial commenced on the same afternoon the verdict was returned (T.1125). The state presented no additional evidence (T.1127), and the defense called one witness, Henrietta Hill, appellant's mother (T.1127-31). In the state's closing argument, the prosecutor argued what he termed appellant's lack of remorse for the death of Marianne Lile as an aggravating factor before the jury (T.1143). The trial court overruled defense counsel's objection (T.1143).

The jury returned a recommendation of death, by an **8-4** vote (R.1103, T.1159-60). The trial court adjudicated appellant guilty of first degree murder, and deferred imposition of sentence pending a pre-sentence investigation (T.1161-62).

The sentencing hearing was held on April 8, 1987. The trial court stated that he had read the PSI (R.1146-56), and the sentencing memoranda submitted by the state and by the defense (R.1122-26, 1104-lo), and said "[T]his is a most difficult decision for this Court to make and it is a very close decision in the Court's mind" (ST.1161). However, the trial court found

three aggravating circumstances[3], and concluded that they outweighed the mitigating circumstance that appellant has no significant history of criminal activity **(ST.1162, R.1127-29).** Accordingly, the trial court imposed a sentence of death **(ST.1162, R.1127-29).**

Notice of appeal was filed on April **23, 1987** (R.1140).

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[3] The aggravating factors found by the trial court were **(1)** "especially heinous, atrocious or cruel"; **(2)** homicide committed while engaged in the commission of or attempt to commit sexual battery or robbery; and **(3)** homicide committed for financial gain **(ST.1127-29).**

STATEMENT OF THE FACTS

On November 19, 1985, Robert Lile discovered the body of his wife Marianne, partially unclothed, on the floor at their place of business (T.409-11). Mr. and Mrs. Lile ran a temporary employment service, known as Availability, in Naples (T.381-83). Mr. Lile called 911, the emergency number (T.411). The first police officer to arrive at the scene, Detective Diane Gamble, went inside and determined that Mrs. Lile was dead (T.445).

Mr. Lile testified that his wife kept her billfold in her purse (T.419-20). He did not know how much money she had on November 19, but there would have been some, because "she wouldn't have walked around broke" (T.420). [When crime scene investigator Lamar Conley processed the scene, he found Mrs. Lile's purse lying on a chair, but there was no billfold in it (T.572-74)].

When Robert Lile was interviewed by the police, he told them he had an idea who had done it - an individual named Steve Beauregard, who had threatened Mrs. Lile and who had some sort of sexual fixation on her (T.433-34). Mr. Lile also mentioned to the police as likely suspects "that Ernest and those Johns"[4] who worked for Availability (T.434-35). [According to Detective Victor Vargas, the day after the crime the police interviewed Ernest Demonbruen, and also interviewed a person named John

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[4] In light of the later testimony and proffered testimony, Mr. Lile was presumably referring to Ernest Demonbruen, John Jones, and John Stacy.

Jones, who was brought to them by one Charles Hall, aka/Blue (T.817)].

Appellant, among other employees at the construction site behind Availability, was interviewed the day after the crime by Detectives Vargas and Mosher (T.778-79). He stated that he did not know anything about the murder of Mrs. Lile (T.779). Subsequently, on December 12, 1985, based on information obtained from one Michael Hall, a pair of shoes was recovered from a pickup truck near the River Park Apartments (T.681-83, 792-93, see R.1065-66). The following day, Detective Vargas obtained a warrant for appellant's arrest, and took him into custody at his mother's residence (T.780-82).

At trial, the state's case against appellant was based on physical evidence (fingerprint, shoeprint, fiber, and hair comparison) and on appellant's in-custody statement to Vargas. The theory of the defense - based in part on appellant's testimony and his statement to Det. Vargas - was that someone else had committed the murder after appellant left (see T.373-74, 1077-78, 1085-90). Appellant acknowledged that he had argued with and fought with Mrs. Lile, and had hurt her when he threw a coffee pot at her, but he maintained that he did not kill her, did not take off her clothing, did not attempt to commit a sexual battery, and did not take her billfold (see T.902-14, PT.1-11).

According to the medical examiner, Dr. Heinrich Schmidt, the cause of Mrs. Lile's death was compression of the voice box and upper airway, by an object being placed against the neck and

force being exerted **(T.659, 663).** Contributing causes of death were multiple blunt and jabbing injuries to the head, neck, and chest **(T.663-64,** see T.638-52), and also possibly internal air blockage caused by the thrusting of a mirror handle, which was found in Mrs. Lile's throat **(T.652-55, 663).** Dr. Schmidt testified that a number of the injuries could have been inflicted by a broom handle and by a coffee pot which were found inside the Availability office **(T.640-44, 646-48, 650, 662, 667).** An injury pattern which appeared to have been made by the sole of a shoe was on Mrs. Lile's forehead **(T.649-50).** Dr. Schmidt testified that his examination revealed no evidence of sexual assault **(T.670,** 674-75).

When crime scene investigator Lamar Conley processed the Availability office after the homicide was reported, he had collected as evidence pieces of the coffee urn and broom, and the broken mirror (without handle) **(T.565, 571,** see **T.489, 493,** 498, **505, 507-14, 524-26, 539-40, 545-47).** These items were processed for latent prints **(T.525-34, 539-40, 565-66, 571, 604-05).** FDLE print examiner Douglas Barrow testified that a print on the broom matched appellant's left palmprint **(T.694-99,** 712), a print on the coffee urn matched appellant's right middle finger **(T.700-02, 704-06,** 712), and a print on the mirror (partially obscured by a shoe impression, see **T.531)** matched appellant's right palmprint **(T.706-07, 711-12).** Barrow (who was also a shoe track analyst) further testified that the shoe impressions on the mirror and on Mrs. Lile's forehead, and some of the shoe impressions on the

linoleum floor of the office[5], were of similar tread design to appellant's shoes which had been recovered from the pickup truck near the River Park Apartments **(T.712, 715-20).** However, Barrow emphasized that he was able to discern only class characteristics, not individual characteristics, and he was unable to make a positive identification from the shoe impressions **(T.716, 720, 725).**

Nayola Darby, an FDLE microanalyst specializing in fiber analysis, testified that certain red and purple fibers found in Mrs. Lile's clothing and in the sheet which was used to transport her were consistent with a shirt (State's Exhibit 10) obtained by the police from appellant's mother's residence[6] **(T.740-42,** see **T.733-47,** 537). James Luten, also an FDLE microanalyst, trained in fragment matching and hair analysis, testified that the hand mirror which was found in the Availability office, and the mirror handle which was removed from Mrs. Lile's throat at the autopsy, were at one time one piece **(T.756-57).** He also testified that

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[5] Of the shoe impressions on the office floor, some had a wavy line pattern and some had a straight line pattern (see **T.499-502, 507-08, 517-19, 544-45, 553-54, 578, 593-94).** The impressions which, according to Barrow, matched appellant's shoes were the straight line impressions. For the purpose of accounting for the wavy line shoe impressions, the state introduced the shoes worn by Robert Lile (see **T.553-55).**

[6] The police had obtained this particular shirt based on appellant's statement to Det. Vargas that he had on a purple shirt on the day in question (PT.lO, **T.806-08).** In his trial testimony, appellant stated that he had actually been referring to his purple pullover jacket, and that the shirt Ms. Darby had compared with the fibers was not the shirt he had been wearing on the day of Mrs. Lile's death (T.958-60).

two hairs (one a head hair and one a pubic hair) found on Mrs. Lile's body were similar to appellant's hair **(T.758-63, 766-70).** Luten acknowledged that hair analysis is not a positive means of identification **(T.762, 767-69).**

Arlene Lukosky, a secretary with H.R.S., testified that in mid-January, **1986,** a woman turned in a wallet **(T.821-23).** The cards inside indicated that the wallet belonged to Marianne Lile **(T.823-24).** Ms. Lukosky was **80 %** sure that there was no money in it **(T.825).** The wallet was subsequently turned over to the police (**T.825,** see **T.574-77).** The i.d. cards and credit cards in the billfold were processed for latent prints, but none were obtained **(T.552, 576).**

The state introduced, and played to the jury, a tape recording of appellant's statement to Detective Vargas, made on December **13, 1985** after his arrest **(T.802-05, PT.1-11).** Appellant told Vargas that on the morning of November 19, **1985** he had been drinking with some people at a bar known as Pattie's Place **(PT.1-2, 5,** 9). When he came back to the Availability office, he got in an argument with Mrs. Lile over when he could go back to work (PT.1-2, **9, 7).** Mrs. Lile was acting like she was angry at appellant, like she hated him or something **(PT.2, 7).** She told him to get out of the office, and she shoved him **(PT.2, 7).** Appellant was also very angry and upset **(PT.7).** Mrs. Lile shut the door, and threw something at him **(PT.7).** Appellant grabbed her around the neck, threw her to the floor, and began hitting her **(PT.2-3, 7).** Appellant was enraged, and the blood

rushed to his head (PT.7-8). In response to Detective Vargas' questioning, appellant acknowledged that he tried to choke Mrs. Lile "or something like that", and that he probably used his feet on her (PT.8). However, appellant maintained that he did not want to have sex with Mrs. Lile, and he did not do anything to her trousers (PT.3, 11). Appellant also insisted, in response to Vargas' interrogation, that he did not take anything from the office, and did not take anything out of a ladies' handbag (PT.7-8, 10-11).

After leaving the office, appellant went to the residence of his friend Michael Hall, and told him that he might have hurt somebody really bad (PT.6, 10). After talking with Hall, appellant put his shoes in a pickup truck which was parked at the River Park Apartments (PT.10).

After the state rested, appellant testified in his own behalf. He stated that he was working at the French Quarters construction site located behind Availability (T.884, 889). At around 8:00 a.m. on November 19, 1985, the workers were told to knock off because of an approaching hurricane (T.891). Appellant, Ernest Demonbruen, John Stacy, John Jones, a person named Wayne, and a Mexican fellow left together (T.892-94). They stopped at Availability to pick up their paychecks, although appellant (who was being paid directly by the French Quarters) did not go inside at that time (T.891, 893-94). Someone opened the door and yelled out that Mrs. Lile needed two people to work (T.894-95). Appellant at first agreed to work, but changed his

mind and decided to go with the others to the bar, Pattie's Place **(T.895-96).**

Wayne and the Mexican guy did not come with them; it was appellant, the two Johns, Ernest, and a fellow called Charles or Blue **(T.897).** Ernest said something derogatory about Mrs. Lile which upset appellant, and they got into a little argument about it **(T.897-98).** Appellant testified that he had problems at work with Ernest Demonbruen, and the two of them did not get along **(T.893).** At Pattie's, appellant drank beer until around 10:30 a.m., and got in another argument with Demonbruen over the latter's not buying another pitcher of beer **(T.899-900).** An announcement came on the television that the storm had passed, *so* appellant went back to Availability to see if he could still get some work **(T.900-02).** When he asked Mrs. Lile about this, she acted like she was upset with him; he had never seen her react like that before **(T.903-5, 972).** She told appellant to get out, and she pushed him **(T.904-06,** 972-73**).** Appellant got mad and grabbed her; he slung her to the ground and she fell **(T.906-08, 973, 976-77).** She got up, picked up a broom and tried to hit him with it **(T.908-09, 975, 977-78). He** grabbed the broom away **(T.910, 919, 983).** Appellant wanted to get out of the place **(T.911);** he had been drinking and he thought Mrs. Lile might be trying to hurt him **(T.910).** As he went to leave, she seemed to have an object in her hand, and he was afraid it might be a gun **(T.911, 986).** He picked up the coffee pot, threw it, and it hit her with it **(T.910-13, 986).** She fell backwards, hitting her

head (T.913, 987). Appellant left out the back door (T.914).

Appellant testified that when he left the office Mrs. Lile was not in the condition depicted in the crime scene photos (T.914, 997). He stated that he did not take her clothes off; he did not strangle her or put a mirror down her throat; he did not recall hitting her, other than with the coffee pot and when he grabbed away the broom; and he did not recall using his feet on her (T.914, 930, 980-81, 991, 993-95, 997-98).

After he left, appellant went to see Michael Hall, told him what happened, and threw the shoes in the truck (T.919-22, 995-96). Appellant asked Hall to go and check whether Mrs. Lile was okay (T.923). When Michael Hall came back and met appe lant at Sabrina Davis' house, appellant asked Hall what was the outcome (T.931).

The other witnesses called by the defense were Ernest Demonbruen (on proffer), Mary Alice Kirksey, and character witnesses Rosetta Hooks, Ronnie Parker, and James Matthews. The latter three testified that appellant did not have a reputation as a violent man in the communities of Immokalee and Naples (T.1002-03, 1004-05, 1019). In addition, Ronnie Parker gave proffered testimony, outside the presence of the jury, that subsequent to Mrs. Lile's murder he had occasion one night to give Michael Hall a ride home (T.1002). Hall started discussing the murder: he told Parker that at the time he had gone inside the office to see how Mrs. Lile was doing (T.1007). Hall told Parker he found Mrs. Lile in a pool of blood, and he put his

hands under her nose to see if she was still breathing (T.1007-08). The trial court sustained the state's hearsay objection to this testimony (T.1006, 1008).

Ernest Demonbruen testified, outside the presence of the jury, that on the day Mrs. Lile was killed, he was working out of the Availability Employment Service at the French Quarters construction site (T.862). Among the other individuals who worked there - and who slept at the construction site - were the two Johns (Stacy and Jones) and Blue (T.862, 864). Demonbruen had first met John Jones about a week earlier at a truck stop in Savannah, Georgia (T.862-63). Jones was travelling on a tram bus with fruit pickers who were coming from North Carolina, where they had been planting tobacco (T.863). Demonbruen soon ran into Jones again in Immokalee; Jones was by then working out of Availability (T.863).

A couple of nights after Mrs. Lile was killed, Demonbruen heard John Jones crying in his sleep at the construction site (T.864). Demonbruen woke him up and asked him what he was crying about (T.864). Jones said "Well, a man can cry if he wants to" (T.864). The next day, John Stacy came and told Demonbruen that Jones had said he had killed ten or twelve women in various states (T.864). Blue (Charles Hall) told Demonbruen that John Jones had come to him and confessed killing Mrs. Lile (T.864). Demonbruen told Blue that he should go to the police with what he knew about it (T.865). Demonbruen accompanied Blue to the police station, but he did not go inside while Blue was talking with

Detective Vargas (T.865).

Earlier that morning, before they went to the police station, Demonbruen had seen John Jones at the jobsite (T.865-66). Demonbruen did not know if Jones knew they were going to the police, but by the time they got back, Jones was gone, and that was the last time Demonbruen ever saw him (T.866, 868). As for John Stacy and Blue, both men were migratory laborers who moved around the country (T.867). Demonbruen ran into Stacy at a soup kitchen in Immokalee in August, 1986 (T.867). Stacy wanted to leave the state, and traveled with Demonbruen as far as Tampa, where they started working at a temporary labor service (T.867). That was the last time he saw Stacy (T.867). Demonbruen saw Blue only one more time, on the street in Fort Lauderdale in the summer of 1986 (T.867-68).

The state objected to Demonbruen's testimony as double hearsay, and argued that it should not come in as a statement against interest because it lacked indicia of reliability (T.869-73). Defense counsel stated that his investigator was available if necessary to testify regarding the efforts which had been made (unsuccessfully) to locate these people "who drift around the country"[7] (T.869, 873). Defense counsel argued that there were corroborating circumstances (including the fact that Demonbruen and Blue had gone to the police with their information, and including the timing of John Jones' disappearance or flight from

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[7] Subsequent to the trial court's adverse ruling, the investigator was not called by defense counsel.

the jobsite) which supported the admission of Jones' third-party confession as a statement against interest (T.873-75). The trial court agreed with the state's position and sustained the objection, and therefore the jury never heard Demonbruen's testimony offered by the defense.[8] [In the prosecutor's closing argument, referring to the theory of the defense that Mrs. Lile was killed by someone other than appellant, he argued, "There has not been one scintilla of any evidence that anybody did that but the defendant right over there. There is not one scintilla of evidence to the contrary" (T.1073)].

Mary Alice Kirksey testified that she was sitting on some steps, at the far end of the building where she lived in the River Park Apartments, a little past noon on November 19, 1985 (T.835-36). From that vantage point she could see across the street to 5th Avenue North, where Availability is located (T.835-36). A big older car, containing three white males, pulled up behind the building (T.337-38). The man in the passenger side got out of the car and went in the office (T.338). He came back out in a hurry, got back in the car; the car moved out real fast

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[8] Demonbruen was subsequently called by the state as a rebuttal witness. He testified that on the morning of November 19, 1985, when he went to get his paycheck at the Availability office (after knocking off work because of the approaching storm), appellant had made a comment to him that Mrs. Lile acted like she was afraid of getting raped (t.1047). According to Demonbruen, appellant also said that if he got the chance, he might rape her and beat her, too (T.1047). Demonbruen denied that the real reason he and appellant had gotten into an argument at that time was because he [Demonbruen] had said he wanted to have sex with that woman (T.1048).

and went toward and Goodlette (T.839). An older white man then came out of the office as if he were chasing them, which made Ms. Kirksey think it might be a robbery or something (T.839). The police came almost immediately (T.839). A lady cop was the first to arrive; she was flagged down by the man who came out of the office (T.840, 859).

In its case on rebuttal, the state called Detective Vargas and Officer Conley to impeach Ms. Kirksey's ability to observe the rear door of Availability from where she was sitting (T.1030-35, 1037-38, 1039-44).

The only penalty phase witness was appellant's mother, Henrietta Hill. She testified that appellant has always been a good, obedient son, who would work and bring most of his money home to help her pay the bills (T.1128). Mrs. Hill has five other sons, but appellant ha5 been the best one as far as helping to provide for her (T.1129). She always wanted him to get an education, and he did get his high school diploma (T.1128). On cross-examination, the prosecutor began to question Mrs. Hill about the impact of the crime on the family of Mrs. Lile:

> MR. BROCK [prosecutor]: Mr. Lile is by himself now, isn't he?
>
> MRS. HILL: Beg pardon?
>
> Q. Mr. Lile is by himself now. Mrs. Lile had children. They don't have a mother now, do they?
>
> A. That's right. I can understand that, too, and I know if he loves his wife like I do George, then I know how he feel. I'm sure he feel just like I do.

> Q. You probably tried to do a good job in raising your children as Mrs. Lile did in raising hers, didn't you?
>
> A. I did my best.
>
> (T.1130-31)

In the prosecutor's penalty phase closing argument to the jury, he said:

> Now, I know from an emotional standpoint you have seen the defendant. You have seen him during the course of this trial. You have seen his demeanor a few moments ago. Now we can all identify with that. That's a human response; however, the response of the victim in this particular case --
>
> MR. **OSTEEN** [defense counsel]: Your Honor, I object to that. That's not an aggravating factor. The State should concern themselves with aggravating factors as enumerated aggravating factors. They're enumerated and laid out.
>
> MR. D.J. EROCK [prosecutor]: Your Honor, I'm not doing anything other than asking the predicate question that the jury follow the direction of the Court.
>
> THE COTJRT: That's the intent of your argument. Go ahead.
>
> MR. EROCK: We all cry in a moment of crisis. Whenever that moment is upon us, there is an outpouring of emotion, and you have seen that from the witness stand from the witness; whereas after a period of time and all the crying is over, bitterness sets in.
>
> (T.1133-34)

Later in his closing argument, in seeking to persuade the jury to find the "cold, calculated, and premeditated" aggravating factor (see **T.1139, 1144**), the prosecutor argued:

> ... you'll recall that the defendant, whenever he gave the first statement, which was on November the 20th, which

was the day after the murder of Mrs. Lile, the defendant showed no emotion about her death. He denied any knowledge, and as a matter of fact, during the conversation, you'll recall the officer's testimony, that he even laughed at it, at least at one point during that interview. Whenever the defendant was arrested on December the 13th, you know, he says, "Why are you harassing me? I didn't have nothing to do with it. You got the wrong person--".

MR. OSTEEN: I object. That's not going into any of the aggravating factors. That has already been presented to the jury. The jury considered that in their verdict.

MR. **D.J.** BROCK: One of the circumstances under this particular aggravating factor which I'm arguing is a lack of emotion, or lack of remorse in regard to the death of Mrs. Marianne Lile, and the Florida Supreme Court held that that's a proper consideration, and my argument goes to that particular point.

THE COURT: I'll overrule the objection.

MR. SROCK: It was only after the defendant was confronted with those shoes that he showed any emotion.

Now that tape has been introduced. You may have listened to it. I know you have listened to it. You heard the defendant crying at various points during that. He was showing emotion.

Now, was that emotion over the fact that he had been caught, or is that emotion over the fact that Mrs. Marianne Lile was dead?

I submit to you, ladies and gentlemen, the only emotion the defendant had is over his predicament. He never demonstrated except at a time when it was to his advantage, premeditated. -- no moral or legal justification.

(T.1143-44)

SUMMARY OF ARGUMENT

The trial court excluded as hearsay the testimony of Ernest Demonbruen, proffered by the defense to show that a third party, John Jones, had made a statement in which he admitted killing Mrs. Lile. [Appellant's defense at trial was that Mrs. Lile was alive when he left the Availability office, and that someone else committed the murder]. Appellant contends in this brief that the trial court's exclusion of this critical evidence was reversible error for three related but independent reasons: (1) The totality of the circumstances surrounding John Jones' third party confession carried sufficient indicia of reliability to make it admissible as a declaration against interest of an unavailable witness pursuant to Fla. Stat. Section 90.804(2)(c). (2) Assuming arsuendo that this Court finds that there were not sufficient indicia of reliability, appellant contends that Section 90.804(2)(c) violates due process, and violates the constitutional principle of Chambers v. Mississippi, infra regarding the accused's right to present his defense, in that it places a greater impediment on a criminal defendant to introduce exculpatory evidence than it places on a civil litigant. See Peninsular Fire Insurance Co. v. Wells, infra. (3) Apart from the matter of admissibility under Section 90.804(2)(c), appellant had a Sixth Amendment right to have John Jones' third-party confession heard and considered by the jury in this capital trial. The principle set forth in Chambers - that "the hearsay rule may not be applied mechanistically to defeat the ends of

justice" - applies here with force; the jury was free to believe or to disbelieve Ernest Demonbruen, but they should not have been deprived of the opportunity to hear that another man had confessed to this crime. [Issue I].

Appellant further contends that the trial court committed reversible error when, on the authority of Golden v. State, infra, he allowed the state to distribute to each member of the jury a copy of a police prepared transcript, to follow along with as they listened to the tape recorded statement made by appellant to Detective Vargas. As was recognized in Duggan v. State, infra, the use of a transcript in this manner violates the best evidence rule, as well as the rule against undue repetition and improper emphasis. While the Golden decision purports to distinguish Dusaan on the theory that Duggan merely prohibits the introduction of the transcript as an evidentiary exhibit, but does not prohibit its use by the jury as an "aid-to-understanding", this distinction is forced, logically unsound, and inconsistent with the reasoning which underlies the Dusaan holding. See also the later decisions of Taylor v. State, infra (expressly disapproving Golden); Stanley v. State, (implicitly disapproving Golden). The error in the instant case was harmful,, in that appellant's statement to Vargas was a key item of evidence in the state's case, which the prosector relied on heavily to impeach appellant's trial testimony. The error was compounded when, because of the prosecution's snafu in handing out the transcripts with the pages out of order, the playing of

the tape was interrupted three times, in order to re-collate the transcript. [Issue II].

In the penalty phase of the trial the assistant state attorney argued to the jury that appellant showed no emotion about the death of Mrs. Lile. In response to defense counsel's objection that that argument was not relevant to any statutory aggravating circumstance, the prosecutor - in front of the jury - blatantly (and incorrectly) retorted:

> One of the circumstances under this particular aggravating factor which I'm arguing is a lack of emotion, or lack of remorse in regard to the death of Mrs. Lile, and the Florida Supreme Court held that that's a proper consideration, and my argument goes to that particular point.

The prosecutor's use of "lack of remorse" as an aggravating factor, or as a component of the aggravating factor of "cold, calculated, and premeditated", was clearly improper and prejudicial. Pope v. State, infra; Patterson v. State; infra; Robinson v. State, infra. The error was compounded by the fact that defense counsel's objection was actually overruled by the trial court, which placed the court's stamp of approval on the prosecutor's argument and conveyed to the jury that it could consider appellant's supposed lack of remorse as evidence of an aggravating factor. See Caldwell v. Mississippi, infra; Edwards v. State, infra. The error plainly cannot be written off as harmless [see State v. DiGuilio, infra], in light of the closeness of the jury's vote to recommend death over life **(8-4)**;

in light of the existence of a significant statutory mitigating circumstance (appellant's lack of a history of criminal activity); and in light of the trial judge's statement at the time of sentencing that the penalty decision in this case was a very close one. [Issue III].

For the same reasons, the trial court's invalid finding of the aggravating circumstance that the crime was committed for financial gain is harmful error which requires resentencing. DiGuilio; see also Elledge v. State, infra. [Issue IV].

The trial court's statement to the jury during voir dire, and again in his instructions prior to the commencement of the penalty phase, diminished the importance of the jury's penalty recommendation, and strongly suggested that the responsibility for a death sentence rested elsewhere. These comments were very much in the nature of those condemned in Caldwell v. Mississippi; and Adams v. Wainwrisht, infra, and require that appellant be afforded a new penalty hearing before a newly impaneled jury. [Issue V]. The trial court also erred in failing to give any mitigating weight to the unrebutted evidence that appellant was a good and obedient son who worked to provide for his mother. Roaers v. State, infra; Lockett v. Ohio, infra; Eddings v. Oklahoma, infra. "Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation". Rogers. [Issue VI].

Finally, the trial judge erred in failing to conduct an

adequate inquiry in response to appellant's pre-trial motion to discharge his appointed attorney. See Scull v. State, infra; Jones v. State, infra; Hardwick v. State, infra. [Issue VII].

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF ERNEST DEMONBRUEN, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A DEFENSE.

"[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, ___So.2d___ (Fla. 3d DCA 1988) (case no. 86-2235, opinion filed August 23, 1988) (13 FLW 1976, 1977), citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washinston v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Boykins v. Wainwright, 737 F.2d 1519 (11th Cir. 1984), rehearing denied, 744 F.2d 97 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985). As the United States Supreme Court stated in Washington v. Texas, supra, 384 U.S. at 19:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may

> decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

A person accused of a crime has a basic right to introduce evidence in his defense to show that the crime was committed by someone else.[9] Chambers v. Mississippi, supra; Pettiiohn v. Hall, 599 F.2d 476 (1st Cir. 1979); Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); Siemon v. Stoushton, 440 A.2d 210 (Conn. 1981); State v. Harman, 270 S.E.2d 146, 150-51 (W. Va. 1980); State v. Hawkins, 260 N.W.2d 15, 158-59 (Minn. 1977). "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of the defendant'' State v. Hawkins, supra, 260 N.W.2d at 158-59).

> In such a situation, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another had a

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[9] For the same principle of law, see also United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980); United States v. Robinson, 544 F.2d 110, 112-13 (2nd Cir. 1976); Laureano v. Harris, 500 F.Supp. 668, 672-73 (S.D.N.Y. 1980); State v. Belt, 631 P.2d 674 (Kans. App. 1981); State v. Gold, 431 A.2d 501 (Conn. 1980); State v. LeClair, 425 A.2d 182, 185-87 (Maine 1981); Commonwealth v. Graziano, 331 N.E.2d 808, 811 (Mass. 1975); State v. Schecter, 352 N.E.2d 617 (Ohio 1974); Beal v. State, 520 S.W.2d 907 (Tex.Cir.App. 1975); Commonwealth v. Boyle, 368 A.2d 661, 669 (Pa. 1977).

> motive or an opportunity or prior record of criminal behavior, the inference is too slight to be probative, and such evidence is therefore inadmissible [citations omitted]. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error. [Citations omitted].
>
> State v. Harman, supra 270 S.E.2d at 150.

The testimony need not be absolutely conclusive of third party's guilt; it need only be probative of it. Pettijohn v. Hall, supra; State v. Harman, supra; Siemon v. Stoushton, supra.

Probably the most "direct link" of a third-party to the crime that can be presented is that of a "third-party confession". Where a third party has made an out-of-court statement admitting his own guilt of the crime for which the defendant is on trial, such a statement is obviously of crucial importance to the accused's defense that he did not commit the crime. Chambers v. Mississippi, supra. In this situation (and especially where the defendant is on trial for his life), the constitutional right to present one's defense must take precedence over the exclusionary rules of evidence. Chambers. See also Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Pettijohn v. Hall, supra. It is, therefore, appellant's position that (1) the totality of the circumstances surrounding John Jones' third-party confession carried sufficient indicia of reliability to make it admissible as a declaration against interest of an unavailable witness pursuant to Fla. Stat. Section 90.804(2)(c). (2) Assuming arsuendo that this Court

finds that there were not sufficient indicia of reliability, appellant contends that Section 90.804(2)(c) violates due process, and violates the constitutional principle of Chambers regarding the accused's right to present his defense, in that it places a greater impediment on a criminal defendant to introduce exculpatory evidence than it places on a civil litigant to introduce the same evidence. See Peninsular Fire Insurance Co. v. Wells, 438 So.2d 46, 55 (Fla. 4th DCA 1983) (on Motion for Rehearing). (3) Apart from the matter of admissibility under Section 90.804(2)(c), appellant had a Sixth Amendment right to have John Jones' third-party confession heard and considered by the jury in this capital trial. The principle set forth in Chambers - that "the hearsay rule may not be applied mechanistically to defeat the ends of justice" - applies here with force; the jury was free to believe or to disbelieve Ernest Demonbruen,[10] but they should not have been deprived of the opportunity to hear that another man had confessed to this crime.

Fla. Stat. Section 90.804(2)(c), which recognizes statements against interest as a hearsay exception, defines the exception as:

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim

[10] Just as they were free to believe or disbelieve that portion of Demonbruen's testimony (presented by the state on rebuttal) which was harmful to appellant.

> by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroboratins circumstances show the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

Florida courts have held that statements against the declarant's penal interest are encompassed within this hearsay exception. Baker v. State, **336** So.2d **364** (Fla. **1976**); Brinson v. State, **382** So.2d 322, **324** (Fla. 2d DCA **1979**); Peninsular Fire Insurance Co. v. Wells, supra, at **53-54**; Lambert v. Doe, **453** So.2d **844, 849** (Fla. 1st DCA **1984**). The two requirements of this exception are (1) the out-of-court declarant must be unavailable to testify, and (2) the declaration must be contrary to the "interests" of the declarant. Brinson v. State, supra, at **324**. In addition, Section 90.804(2)(c) imposes an additional requirement, but only in criminal cases and only when offered to exculpate the accused; this is the requirement that corroborating circumstances show the trustworthiness of the statement.[11]

In the present case, John Jones' admission to Blue (aka/Charles Hall) that he murdered Mrs. Lile was plainly against his penal interest. When Blue told Demonbruen about Jones'

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[11] Appellant contends that this requirement was satisfied in the present case. Alternatively, as will be discussed infra, he maintains that insofar as this additional burden is placed only on criminal defendants, it is constitutionally invalid.

statement, Demonbruen (who had already been told by John Stacy that Jones had claimed to have killed ten or twelve women in various states) suggested that they go to the police **(T.864-65).** Demonbruen accompanied Blue to the police station, and waited outside while Blue spoke with Detective Vargas[12] **(T.865).** In addition to the fact that Demonbruen and Blue acted upon the information which Blue had learned from John Jones, by bringing Jones to the attention of the police at a time before appellant became a prime suspect[13], there were other circumstances which tend to support the trustworthiness of Jones' third-party confession. Foremost among them was Jones' disappearance form the jobsite. According to Demonbruen, when he and Blue returned to the construction site after talking to the police, Jones (who had been there that morning) was gone, and that was the last time Demonbruen ever saw him **(T.865-66, 868).** Even for a transient laborer, this was a rather precipitous departure, and it coincided with his admissions to John Stacy (that he had killed ten or twelve women) and to Blue (that he had killed Mrs. Lile). It also coincided with Blue's and Demonbruen's trip to the police station, though Demonbruen was not sure if Jones knew they were

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[12] According to Vargas, the police actually interviewed John Jones the day after the crime, after Jones was brought to them by Blue **(T.817).**

[13] And thus there could have been no motive at that time to exculpate appellant (even if he and Demonbruen were on friendly terms, which they were not).

going there[14] (T.866). This Court and the District Courts of Appeal have long recognized that flight raises an inference of consciousness of guilt. See e.g. Bundy v. State, 455 So.2d 330, 348 (Fla. 1984); Straisht v. State, 397 So.2d 903, 908 (Fla. 1981); Daniels v. State, 108 So.2d 755, 760 (Fla. 1959); Blackwell v. State, 79 Fla. 709, 86 So. 224, 226 (1920); Bradley v. State, 468 So.2d 378, 379 (Fla. 1st DCA 1985); Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972). If this theory applies, asainst a criminal defendant, to allow the prosecution a jury instruction to the effect that guilty knowledge may be inferred from flight [Bundy; Williams], then basic fairness demands that it also apply as a corroborating circumstance to allow the defendant to introduce a third-party confession under Section 90.804(2)(c).

In addition to Jones' convenient disappearance, and in addition to the fact that Blue (at Demonhruen's urging) reported Jones' statement to the police, several other corroborating circumstances exist. Demonbruen did not receive his information from only one source. From Blue, he learned that Jones had confessed to killing Mrs. Lile (T.864). From John Stacy, he learned that Jones claimed to have murdered nearly a dozen women around the country (T.864). And Demonbruen himself had heard Jones crying in his sleep at the construction site after Mrs.

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[14] Going by Det. Vargas' testimony that Blue actually brought John Jones to the police to be interviewed, Jones' timely disappearance takes on even greater significance.

Lile was killed (T.864). When Demonbruen woke him up and asked him why he was crying, Jones replied "Well, a man can cry if he wants to" (T.864). These additional occurrences tend to corroborate Jones' third-party confession. In addition, it is important to note, in considering the reliability of the proffered testimony, that not only did Demonbruen have no motive to exculpate appellant by giving false testimony, in fact he was actually a witness for the prosecution. It was the state which, ex parte, obtained a pre-trial order from the trial judge finding Demonbruen (who was incarcerated in the Pinellas County Jail) to be a material witness whose presence and testimony were required at trial (R.1096). After Demonbruen's testimony, proffered by the defense to show John Jones' third-party confession, was excluded, the state recalled Demonbruen as a rebuttal witness, and he gave testimony which was extremely harmful to appellant. It can safely be assumed that, if Demonbruen had been inclined to fabricate a confession by John Jones in order to help George Hill, he would not have then turned around and testified that George Hill told him outside the Availability office that if he got the chance he might rape and beat Mrs. Lile (see T.1047). Moreover, appellant and Demonbruen were not the best of friends; it appears, in fact, that there was considerable friction between them, and they had gotten into several arguments on the morning of Mrs. Lile's murder (see T.893, 897, 900, 1048).

Only one factor arguably weighs in the other direction, and that is the fact that Blue, like John Jones, was unavailable to

testify at trial. This is not surprising, in light of the fact that most of the people involved in this case are transient laborers; in fact, that was Availability's business. Notwithstanding the unavailability of Blue, however, there were enough surrounding circumstances to corroborate the testimony of Ernest Demonbruen, so that appellant should have been allowed to present John Jones' third-party confession to the jury for its consideration, as a statement against penal interest pursuant to Section 90.804(2)(c). Baker v. State, supra; Brinson v. State, supra. Contrast Card v. State, 453 So.2d 17, 21 (Fla. 1984) (emphasizing that the proffered testimony in that case "does not involve a [third-party] confession to the specific crime", and that there were no corroborating circumstances or indicia of reliability); Ards v. State, 458 So.2d 379, 380 (Fla. 5th DCA 1984) (surrounding circumstances were "ambiguous, unreliable, and untrustworthy").

Assuming arauendo that this Court finds insufficient indicia of reliability to permit the introduction of Jones' confession via Section 90.804(2)(c), appellant alternatively submits that the portion of the statute which prohibits the accused from introducing evidence of a third-party confession, unless he meets a burden of showing "corroborating circumstances [which] show the trustworthiness of the statement", cannot constitutionally be applied in this death penalty case. The Sixth Amendment (as applied to the states through the Fourteenth) is designed to protect those whom the state has accused of a crime; not civil

litigants. The right to offer the testimony of witnesses "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies". Washinston v. Texas, supra, 388 U.S. at 19. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law". Washinston v. Texas, supra, 388 U.S. at 19. See also Chambers v. Mississippi, supra.

Plainly, then, it cannot be constitutionally acceptable to place an obstacle in the path of the accused in a criminal trial who seeks to exculpate himself by showing that another person has confessed to the crime, when no such obstacle would be placed in the path of a civil litigant who sought to introduce the same evidence. Yet Section 90.804(2)(c), by its express terms, requires a showing of corroborating circumstances only where it is "offered to exculpate the accused". In Peninsular Fire Insurance Co. v. Wells, 438 So.2d 46, 55 (Fla. 1st DCA 1983) (on Motion for Rehearing), the appellate court said:

> Appellant's motion for rehearing suggests that we failed to properly apply Section 90.804(2)(c), Florida Statutes, regarding declarations against interest. Specifically, appellant says that we misapprehended the significance of the following portion of that section:
>
> "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused

> is inadmissible, unless corroborating circumstances show the trustworthiness of the statement".
>
> On the contrary, that portion of the statute has no applicability whatsoever to the type situation as that involved sub judice. The above provision contemplates the entirely different situation where a person accused of a crime seeks to exculpate himself by offering statement of a declarant in which the declarant admits the crime.[15]

Appellant submits that to require a criminal defendant to

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[15] Peninsular arose from a civil trial involving the disappearance and theft of a shrimping vessel. A State Attorney's investigator had obtained an unsworn statement from the vessel's captain, Singleton, who, in purporting to exculpate himself from the theft charge, made admissions implicating himself in a drug smuggling conspiracy masterminded by the vessel's owner. Singleton, claiming the Fifth Amendment privilege, refused to be deposed or to testify in the civil trial, thus making him "unavailable" within the meaning of Section 90.804(2)(c). Peninsular proffered the testimony of the State Attorney's investigator, seeking to have Singleton's statement admitted as a declaration against interest. The trial judge excluded the testimony.

The First DCA affirmed on the ground that Singleton's statement was not really "against his interest" (the second prong of the test set forth in Brinson v. State, supra, 382 So.2 at 324), since, at the time he made it, his "immediate and overriding concern" was the theft charge. 438 So.2d at 54. The appellate court suggested a motive for Singleton to fabricate: "Why not attempt to distract attention from himself by fabricating a drug smuggling conspiracy with the theft victim as the mastermind?" 438 So.2d at 54. Thus the basic rationale for the admissibility of declarations against interest - the declarant's lack of motivation to fabricate - was absent in Peninsular.

In the present case, in contrast, John Jones' admission to killing Mrs. Lile was a classic declaration against interest; he had no apparent reason to fabricate. Nor, for that matter, did Ernest Demonbruen have any reason to fabricate, given his hostility to appellant and the damaging testimony he gave for the prosecution aaainst appellant.

show corroborating circumstances before he can present a confession by a third party to the crime for which he is on trial, while a civil litigant who wishes to present a declaration against interest faces no such impediment, violates the fundamental protection of the Sixth Amendment [see Chambers v. Mississippi, supra], and creates a constitutionally intolerable double standard [cf. O'Connell v. State, **480** So.2d **1284, 1287** (Fla. 1985)]. Therefore, in this death penalty case, appellant's right to present his defense, so the jury can determine where the truth lies [Washinston v. Texas, supra], must override the mechanistic application of the exclusionary rules of hearsay. Chambers.

Appellant's conviction and death sentence must be reversed, and the case remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED, WHEN THE TAPE RECORDING OF APPELLANT'S STATEMENT TO DETECTIVE VARGAS WAS PLAYED TO THE JURY, IN ALLOWING THE STATE TO DISTRIBUTE TO EACH JUROR A POLICE TRANSCRIPT OF THE STATEMENT; THE ERROR WAS COMPOUNDED WHEN, ON THREE SEPARATE OCCASIONS, THE PLAYING OF THE TAPE HAD TO BE INTERRUPTED BECAUSE THE PAGES OF THE TRANSCRIPT WERE OUT OF ORDER.

Prior to playing the tape recording of appellant's in-custody statement to Detective Vargas, the prosecutor had a police prepared transcript of the statement marked as Court Exhibit L (T.796).[16] He said "I'm not going to offer the thing into evidence. It will only be a court exhibit for record purposes" (T.796):

> MR. OSTEEN [defense counsel]: You're not going to give it to the jury, a copy of it?
>
> MR. D.J. BROCK [prosecutor] We're going to ask that each one of the jurors he given a copy of this to follow along. We're not going to offer it into evidence pursuant to the Golden case.[17]
>
> (T.796-97)

Defense counsel objected to the procedure suggested by the state, on the ground that the tape itself was the best evidence of its contents (T.797-98, 800). The prosecutor, claiming that portions of the tape were inaudible, or, because of the thickness

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[16] This exhibit, which is apparently paginated in the same manner as were the transcripts given the jurors, has been transmitted to the clerk's office of this Court (as has the micro-cassette tape itself, labeled State's Exhibit 102).

[17] Golden v. State, 429 So.2d **45** (Fla. 1st DCA 1983).

of the voices, difficult to understand (T.798), argued that the Golden decision authorized him to distribute the transcript to each of the jurors, so long as he did not introduce it into evidence (T.798-99). The trial court said, "I think the Golden case does give the Court authority to allow this procedure, so I have to overrule the prior objection" (T.800).

The prosecutor proceeded to "authenticate" the tape in the manner outlined in Golden, by eliciting testimony from Det. Vargas that the tape accurately reflected his conversation with appellant, and that (in his opinion) the transcript accurately reflected the spoken words on the tape. The following then occurred:

> MR. D.J. BROCK: Your Honor, at this time we'd ask that the Court permit us to pass these out to the jury.
>
> (Transcript distributed to members of the jury.)
>
> MR. D.J. BROCK: Your Honor, at this time we ask permission to play the tape to the members of the jury.)
>
> THE COURT: All right. Go right ahead.
>
> (Tape commenced being played to the jury.)
>
> JUROR: We don't have that page.
>
> MR. D.J. BROCK: Stop it for just a minute. Your Honor, may we stop the tape for a moment?
>
> THE COURT: All right. sir.
>
> JUROR SKINNER: We don't have that page.
>
> THE COURT: I believe that page is omitted from my copy, too. Mr. Brock, do you have that page readily available?
>
> MR. D.J. BROCK: Yes, your Honor. I believe we

do.

THE COURT: All right. They may be out of order, the way these are stamped. I think they can follow along with the third from the last page; is that correct?

MR. D.J. BROCK: That's correct, your Honor. It was just out of place.

THE COURT: Has everybody found the third to the last page now?
Go right ahead, Mr. Brock.

(Tape resumed being played.)

THE COURT: Mr. Brock, apparently -- go ahead and shut that off. Are you having problems, ladies and gentlemen?

(Jury replied in affirmative.)

THE COURT: Apparently all the pages are out of order. Mr. Brock, why don't you take them up and get them straightened out?

MR. D.J. BROCK: Okay, your Honor. I apologize. Your Honor, may we approach the bench?

(Bench conference held outside the hearing of the jury.)

MR. D.J. BROCK: Can we run the tape back to that point where it went out of order?

THE COURT: Yes. Back to where it was out of order.

(Bench conference concluded; tape being rewound.)

MR. D.J. BROCK: That's it. Stop right there. Bottom of Page 5. Bottom of Page 5.

THE COURT: Ladies and gentlemen, would you turn to Page 5, the bottom. We'll try to keep up with the tape.

(Tape resumed being played.)

THE COURT: Mr. Brock, I don't think we're up with

you.

Ladies and gentlemen, why don't you go back to the jury room while we try to get this mess straightened out. If you just leave your papers there on your seat, perhaps we'll get things fixed.

(Jury left the courtroom; tape being replayed; transcripts being recollated.)

THE COURT: If you gentlemen let me know when. you're ready --

MR. D.E. BROCK: We're fixing to be ready.

MR. D.J. BROCK: This is the last time I tell one of the secretaries to put something together without checking it.

THE COURT: Where are we at?

MR. D.J. BROCK: Your Honor, we're starting at the bottom of Page 5. It will be at about, "George, we're going back. We are going to go back to the beginning."

THE COURT: All right. Call the jury.

(Jury returned to the courtroom.)

THE COURT: Ladies and gentlemen, we're going to resume the playing of the tape, and please turn to Page 5, and go to bottom of the page, and the tape will start out by, "George, we're going to go back."

Is everybody up with us now?

All right. Go ahead.

(Tape resumed being played and played to the conclusion.)

THE COURT: Ladies and gentlemen, would you please return the transcripts to Mr. Brock.

(Transcripts collected form jury.)

THE COURT: Go ahead with your examination, Mr. Brock.

MR. D.J. BROCK: Thank you, your Honor.

(T.802-05)

The lone decision relied on by the state, Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983), is a First DCA opinion which, attempting to distinguish such prior decisions as Brady v. State, 178 So.2d 121 (Fla. 2d DCA 1965) and Duggan v. State, 189 So.2d 890 (Fla. 1st DCA 1966), concluded that it is permissible for the state to give the jurors transcripts[18] to follow along with as they listened to a tape recorded statement or conversation, so long as the transcript was not itself made an evidentiary exhibit. See also Loren v. State, 518 So.2d 342, 347 (Fla. 1st DCA 1987). The Golden decision, however, has been criticized by other courts, and most notably by the very judge who presided over the trial in Golden itself, Judge Barfield (see 429 So.2d at 45). Judge Barfield was subsequently appointed to the First DCA, and in Taylor v. State, 508 So.2d 1265, 1266 (Fla. 1st DCA 1987) wrote:

> Part of the state's evidence consisted of tape recorded conversations involving the defendant. The original tapes were admitted into evidence. During the trial, over defendant's objection, the complete transcripts of the taped conversations were displayed by means of an overhead projector and screen, while the jury listened to the tape recordings. The state's authority for such a tactic is Golden v. State, 429 So.2d 45

[18] Or, as was done in the Golden trial, to show the transcription to the jury by means of an overhead projector. See Taylor v. State, 508 So.2d 1265 (Fla. 1st DCA 1987).

(Fla. 1st DCA 1983).

> This is becoming a familiar theme based upon an improper application of Golden, which partly derives from the absence of a full accounting in the Golden opinion of what appears in the record. Unfortunately, that opinion omits that part of the record wherein the trial judge stopped the use of the overhead projection shortly after its commencement because it was readily apparent that the projection was becoming the focal point of the jurors' attention. All Golden holds is that. a momentary visual display of transcript fragments did not overemphasize the evidence otherwise to be understood in the context of the recorded conversation. The Golden decision must be limited to its facts and not be used as authority to present to the jury a transcript of a tape recording by any means when the original tape is in evidence, absent the consent of the defendant.
>
> I condemn this practice and suggest it not be used upon retrial of this case.

Judge Smith (concurring in part and dissenting in part) felt constrained by the principle of stare decisis:

> ... I would not agree with Judge Barfield's sweeping condemnation of the use of a transcript of a tape recording in evidence absent consent of the defendant. AS to the manner in which a transcript is displayed to the jury, I agree with Judge Joanos' view that this court's decision in Golden speaks contrary to the views expressed by Judge Barfield. We are not at liberty, it seems to me, to in effect nullify the express holdings of a prior decision based upon our own assessment of how the

> controlling facts of record should have been viewed by a prior panel.
>
> Taylor v. State, supra, at 1265

Judge Joanos, dissenting, would have affirmed, based on Golden, "so long as the displayed transcript is accurate. Taylor v. State, supra, at 1265.

Another decision which is implicitly at odds with Golden is Stanley v. State, 451 So.2d 897, 898 (Fla. 4th **DCA** 1984), in which the court said:

> We caution trial courts in the future, however, not to allow the use of transcripts when tape recordings are admitted into evidence, especially where the contents of the tape recordings are in dispute, as was the case here. RAther, it should be left to the jury to determine what is contained in the tapes without the intervention of a transcriber.

This Court, of course, is not bound by the faulty precedent of Golden, and is free to overrule it or disapprove it. See e.g. Hoffman v. Jones, 280 So.2d 431, 433-34 (Fla. 1973); Griffin v. State, 202 So.2d 602 (Fla. 1st **DCA** 1967); Roberts v. State, 199 So.2d 340 (Fla. 2d **DCA** 1967). Appellant submits that the reasoning of Dusqan v. State, supra, 189 So.2d at 891-92, is sound, and applies with equal force regardless of whether the transcript is admitted as an evidentiary exhibit, or whether it is "merely" distributed (or shown by projection) to the jurors to influence their understanding of the tape recording.

> It is our opinion that the written transcripts of the three tape recordings were inadmissible

evidence under several established rules of evidence: permitting the transcripts to be furnished to the jury violated the best evidence rule, since the tape recordings themselves were the best evidence; the court reporter who made the transcripts was not present when the recordings were made, and hence his transcripts constituted Pure hearsay and were inadmissible under the hearsay rule; and the jury's use of the transcripts violated the rules against undue repetition and improper emphasis. In addition, the transcript of the recording of February **23, 1964,** concerning the critical question of the "pay-off" and containing the "inaudible" portions of the recording, was clearly inadmissible as violative of other fundamental precepts in the law of evidence, as we shall discuss later in this opinion.

While there are innumerable decisions in this and other jurisdictions recognizing and applying the aforementioned rules of evidence, the case involving a situation that seems most nearly analogous to that in the case at bar is Bonicelli v. State, **339** P.2d **1063 (1959),** in which the Court of Criminal Appeals of Oklahoma held as follows:

> "The * * * contention that the admission of the transcripts of the tape recorded confession of defendant * * * was reversible error, is highly meritorious. * * * Assuming * * * the recording was otherwise admissible, it would not be improper to play it for the jury. But, to permit written transcripts thereof to be furnished to the jury violated the best evidence rule, since the recording was the best evidence. It is also contrary to the rules against repetition, improper emphasis and hearsay. The reporter

> who identified the transcripts was not present when the recording was made and her transcript was pure hearsay."
>
> Wit reference to the danger of repetition and over-emphasis presented by the admission of the transcripts, the Oklahoma court said:
>
> > "* * * [a]s defense counsel urges, the (trial) court might as well have said: "Here is something good, we want Yo to have a double dose of it so You won't overlook it. We think its importance deserves extra special treatment. Hence, we do not only present the recording but in transcripted form so You won't possibly forget it and hence we place the judicial finger of approval on it by way of emphasis'. This too, was reversible error."
>
> Duggan v. State, supra, 189 So.2d at 891-92

Appellant further submits that the Golden court's attempt to distinguish Duggan [see 429 So.2d at 51-53], is forced and poorly reasoned. The fact remains that a written script is easier to follow than a tape recording, especially when (as the assistant state attorney in this case acknowledged}, the voices on the tape are thick and difficult to understand (T.798). By handing to the jurors a transcript prepared by a police stenographer and "authenticated" by Detective Vargas, the state improperly colored the jurors' understanding of the tape so that' they would hear it the way the officers heard it. In addition, as discussed in Dugsan, the distribution to each juror of a copy of the transcript had the inherent effect of overemphasizing appellant's statement to Vargas, in comparison with all of the

other evidence in the case. This was particularly harmful in the present case, where the prosecutor, in his cross-examination of appellant and in his closing argument to the jury, emphasized that appellant's statement to Vargas was much more inculpatory than what he admitted to on the stand (see **T.958-63, 974-1001, 1069-72).** The tape recorded statement was a critical item of evidence for the state, and the unfair overemphasis created by allowing the state to distribute the transcripts was prejudicial to appellant, and could have influenced the jury in its guilt and penalty verdicts. See State v. DiGuilio, **491** So.2d **1129** (Fla. **1986).** Obviously the prosecutor felt that reading the transcripts would have some impact on the jury; otherwise he would not have gone to the trouble to prepare them, and to insist on their being given to the jurors over defense counsel's objection. See Gunn v. State, **78** Fla. **599, 83 So. 511, 512** (Fla. **1919).**

The harm in the instant case was compounded by the fact that the transcript was handed to to the jurors with the pages out of order. As a result, the playing of the tape was interrupted three times (T.803, **804, 805).** At one point the jury was sent back to the jury room, while (in the judge's words) "we try to get this mess straightened out" **(T.804).** The prosecutor, assuming full responsibility for the snafu, said "This is the last time I tell one of the secretaries to put something together without checking it" **(T.804).** Even assuming arguendo that the Golden decision were correct, and that the prosecution may

deliver to the jury transcripts of a tape recorded statement, then the prosecution must also bear the responsibility of not bollixing it up. See Judge Joanos' dissenting opinion in Taylor v. State, supra, at **1267,** stating that he would affirm based on Golden "so long as the displayed transcript is accurate".

The jury in this case should have been allowed to listen to the tape recording of appellant's statement to Detective Vargas without the interference of the police prepared transcripts. Duggan; Stanley; Taylor. Appellant's conviction and death sentence should be reversed, and the case remanded for a new trial.[19]

An additional reason why the use of the transcripts was improper (although no objection on this ground was made, see Robinson v. State, infra), is that, under Florida law, a transcript of a defendant's oral confession may not be admitted into evidence (or published to the jury, see Haines v. State, **158** Fla. 9, 27 So.2d **414 (1946))** unless that transcript has been signed, or read and adopted, by the defendant. See Middleton v. State, **426** So.2d **548, 550** (Fla. **1982);** Robinson v. State, **487 So.2d 1040, 1041-42** (Fla. **1986)** Williams v. State, **185** So.2d **718, 719** (Fla. **3d** DCA **1966);** Marshall v. State, **539** So.2d **723** (Fla. 1st DCA 1976).

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE LACK OF REMORSE AS AN AGGRAVATING CONSIDERATION IN THE PENALTY PHASE.

This Court has made it clear that lack of remorse is an improper consideration in the penalty phase of a capital trial. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988).

> ...[L]ack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.
>
> Pope v. State, supra, at 1078; Patterson v. State, supra, at 1263; Robinson v. State, supra, at 6.

In the penalty phase of the instant case, the assistant state attorney blatantly argued lack of remorse to the jury, and, in so doing, may well have persuaded them to recommend death based on a wholly inappropriate aggravating factor - that the crime was committed in a cold, calculated, and premeditated

manner.[20] The prosecutor's use of appellant's purported lack of remorse to urge the jury to recommend death was compounded by his response (in the presence of the jury) to defense counsel's objection. Specifically, when the defense attorney objected that the prosecutor's argument was not directed to any of the statutory aggravating factors, the latter replied:

> One of the circumstances under this particular aggravating factor ["cold, calculated, and premeditated"] which I'm arguing is a lack of emotion, or lack of remorse in regard to the death of Mrs. Marianne Lile, and the Florida Supreme Court held that that's a proper consideration, and my argument goes to that particular point.

(T.1143)

The assistant state attorney's statement of law - heard by the jury - was completely wrong; in fact, directly opposite to what this Court has actually held. Pope; Patterson; Robinson. Yet the trial court, in overruling defense counsel's objection,

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[20] The prosecutor argued the "cold, calculated, and premeditated" factor to the jury (T.1139-44), basing much of his argument on lack of remorse. However, in his sentencing memorandum submitted to the trial judge - after the jury had recommended death - the prosecutor eliminated "cold, calculated, and premeditated" from the list of aggravating factors he was arguing (see R. 1122-26). The trial judge, correctly, did not find the "cold, calculated, and premeditated" aggravating circumstance (see R.1127-29, ST.1161-62). See e.g. Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987) Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) (killing committed in rage or frenzy is inconsistent with cold calculation); Rosers v. State, 511 So.2d 526, 533 (Fla. 1987); Mitchell v. State, supra, at 182 ("cold, calculated, and premeditated" aggravating factor requires proof of a careful plan or prearranged design to kill victim).

placed his stamp of approval on the prosecutor's misstatement, and, in fact, conveyed to the jury that lack of remorse was a proper consideration in deciding what penalty to recommend: the Florida Supreme Court said so. See Caldwell v. Mississippi, **472** U.S. 320, **339, 105** S.Ct. 2633, **86** L.Ed.2d **231, 246 (1985),** in which the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them: he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct". See also Edwards v. State, **428** So.2d **357, 359** (Fla. 3d **DCA 1983)** ("Here a timely objection to the [prosecutor's] argument was immediately overruled by the court without comment, which ruling stamped approval on the argument, thereby aggravating the prejudicial effect".) (emphasis in opinion).

After the trial court overruled defense counsel's objection, the prosecutor resumed his train of thought, arguing to the jury that, in his taped statement, appellant was only showing emotion over the fact that he had been caught, and not over the fact that Marianne Lile was dead **(T.1144).** He continued:

> I submit to you, ladies and gentlemen, the only emotion the defendant had was over his predicament. He never demonstrated, except at a time when it was to his advantage, premeditated -- no moral or legal justification.
>
> **(T.1144)**

The assistant state attorney's improper and prejudicial argument cannot be defended on theories of "invited error" or "fair rebuttal". Contrast Darden v. Wainwriaht, 477 U.S. 168, 182, 106 S.Ct. 2464, 91 L.Ed.2d 144, 158 (1986). Here, the prosecutor argued first. Moreover, when it was defense counsel's turn to argue for a life sentence, the mitigating circumstances he relied on were (1) appellant has no significant history of criminal activity (T.1151); (2) his family background (T.1152); (3) his youthful age (T.1152); and (4) his drinking on the morning of the crime (T.1152-53). Defense counsel never attempted to argue remorse as a mitigating factor [see Pope v. State, supra, at 10781, so the state cannot attempt to justify the prosecutor's improper argument as "rebuttal" of a proffered mitigating circumstance. As for the possible suggestion that the prosecutor was rebutting an implicit claim of a mitigating circumstance arising from the emotional distress which is evident in appellant's voice in the taped statement to Detective Vargas, it must be remembered that it was the state which introduced the tape in the first place. The prosecutor was not rebutting a mitigating factor; to the contrary, he was (as he freely acknowledged, in his mistaken assumption that the law allowed him to do so) using lack of remorse as an aggravating factor, or as an enhancement of an aggravating factor ("cold, calculated, and premeditated") (see T.1143). See Pope; Patterson; Robinson. Under these circumstances, the trial court's overruling of defense counsel's objection was clearly error; and the error was

compounded by the fact that the aggravating circumstance which the jury may well have been persuaded by the prosecutor's improper argument to find was one which was otherwise totally unsupported by the evidence. Hansborough v. State, supra; Mitchell v. State, supra; Rogers v. State, supra. See footnote 20 on page 49 of this brief.

The harmfulness of the error is demonstrated by the relative closeness of the jury's vote to recommend death **(8-4).** A change of two votes would have resulted in a life recommendation. Had the jury recommended life, the trial court likely would have followed the recommendation, as there were mitigating factors (including appellant's lack of a significant criminal history) to support it. See Tedder v. State, 322 So.2d **908** (Fla. **1975)** and its progeny. Even with the death recommendation, the trial judge stated that "it [was] a very close decision in the Court's mind" to follow the recommendation and impose a death sentence **(ST.1161).** Therefore, the state cannot meet its burden of proving beyond a reasonable doubt that the prosecutor's improper use of "lack of remorse" as an aggravating factor played no part in the jury's weighing of the aggravating and mitigating circumstances, or in its decision to recommend death. See State v. DiGuilio, **491** So.2d **1191** (Fla. **1986).** Nor can the state prove beyond a reasonable doubt that the trial judge's "very close decision" to impose death was not influenced by the jury's recommendation. State v. DiGuilio, supra. [Indeed, the trial court was required by law to accord great weight to the jury's

death recommendation. See e.g. Grossman v. State, 525 So.2d 833, 846 (Fla. 1988)]. Consequently, the error cannot be written off as "harmless". DiGuilio. The prosecutor's improper argument regarding lack of remorse, compounded by his false and misleading statement of law in front of the jury, compounded by the trial judge's overruling of the defense objection (which conveyed to the jury that the prosecutor was right), may well have persuaded the jury to find an aggravating circumstance - "cold, calculated, and premeditated" - which was otherwise entirely unsupported by the evidence, and may well have tipped the balance in their 8-4 vote for death. The reliability of the penalty proceeding was irreparably compromised, and the death sentence imposed pursuant to this jury's recommendation cannot withstand Eighth Amendment scrutiny. See Caldwell v. Mississippi, supra. Appellant's death sentence must be reversed and the case remanded for a new penalty trial before a newly impaneled jury.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED FOR FINANCIAL GAIN

In its sentencing memorandum, the state urged the trial court to find as aggravating factors both that the homicide was committed in the course of a felony (robbery or sexual battery) and that the homicide was committed for financial gain (R.1124). While recognizing that finding separate aggravating factors based on "financial gain" and "in the course of a robbery" would be an improper doubling, as both factors arise from the same aspect of the crime [see e.g. Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Palmes v. State, 397 So.2d 648, 656 (Fla. 1981)], the state contended that the felony-murder aggravating factor could be based on attempted sexual battery, and that therefore a separate finding of "for financial gain" would not be an improper doubling (R.1124). See e.g. Routley v. State, 440 So.2d 1257, 1264 (Fla. 1983). Accordingly, the trial court found both aggravating factors (R.1128-29).

Appellant agrees that, under present caselaw, this was not an improper doubling. Routley. However, it is appellant's position that - regardless of the doubling question - the evidence simply does not support a finding that Mrs. Lile was killed for financial gain. The law is clear that an aggravating circumstance cannot be considered in the decision to impose death or life imprisonment unless it has been proven beyond a

reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Williams v. State, 386 So.2d 538, 542 (Fla. 1980); Clark v. State, 443 So.2d 973, 976 (Fla. 1983). In the present case, the trial court found that the murder was committed for financial gain based on the fact "Mrs. Lile's wallet was removed from the premises and later located at another area. The wallet did not contain her money that she usually carried upon her person" (R.1128, see R.1129). The removal of Mrs. Lile's wallet from the office does not establish the aggravating circumstance for two independent reasons. First of all, in view of appellant's testimony that he had asked Michael Hall to go check on Mrs. Lile to see if she was okay (T.923, 931), and in view of the proffered testimony (excluded from the guilt phase as hearsay) of Ronnie Parker that Hall told him he had gone to the Availability office to check on Mrs. Lile (T.1007-08), there is a reasonable hypothesis that it was Hall, not appellant, who took the wallet. Secondly, even assuming arsuendo that the evidence was legally sufficient to prove that it was appellant who took the wallet, it still fails to show beyond a reasonable doubt that the motive for the killing of Mrs. Lile was pecuniary gain. See e.g. Scull v. State, ___So.2d___ (Fla. 1988) (case no. 68,919, opinion filed September 8, 1988) (13 FLW 545); Simmons v. State, 419 So.2d 316, 318 (Fla. 1982).

First, as to the question of whether appellant was the one who took the billfold, it should be noted that the police were unable to lift any fingerprints from the wallet or from the cards

inside it, and there was no evidence connecting appellant to any money or cards from the wallet (see T.552, **576).** It should also be remembered that, in his statement to Detective Vargas (in which he admitted that he became enraged and beat and choked Mrs. Lile), appellant steadfastly denied taking anything out of a ladies' purse or taking anything from the office **(PT.7-8, 10-11).** See McArthur v. State, 351 So.2d **972** (Fla. **1977).** The only thing connecting appellant to the theft of the wallet is the circumstantial inference that, since he committed the murder[21], he must have also taken the wallet. The force of this inference, however, is dissipated by the evidence that at least one other person - Michael Hall - **was** inside the Availability office after appellant left and before the police arrived. Even without regard to the hearsay testimony of Ronnie Parker, there was testimony by appellant in the guilt phase that he asked Michael Hall to *go* and see if Mrs. Lile was okay (T.923). When Hall returned to Sabrina Davis' house, appellant asked him what **was** the outcome, what did he see? **(T.931).** Therefore, there was admissible evidence from which it could reasonably be inferred that Michael Hall did *go* to the Availability office to check on Mrs. Lile. **As** for the testimony of Ronnie Parker that Hall later told him that he did in fact go into the office to check on Mrs. Lile **(T.1007-08),** that testimony (unlike the testimony of Ernest

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[21] For purposes of the penalty issues in this brief, undersigned counsel will assume arguendo that appellant committed the murder, as found by the jury. This should not be construed as an admission in fact.

Demonbruen, see Issue III, infra) did not involve either a statement against interest as defined by Fla.Stat. 90.804(2)(c), or a Chambers v. Mississippi[22] constitutional issue regarding the admissibility of a third party confession and the accused's right to present his defense. Therefore, appellant is not challenging on appeal the exclusion on hearsay grounds of Parker's testimony from the guilt phase. However, this does not mean that the trial judge could not consider it in regard to penalty, since, in that phase of the proceedings, any probative evidence may be received regardless of its admissibility under the exclusionary rules of evidence, such as the hearsay rule. See Fla.Stat. Section 921.141 (1). In any event, with or without Parker's testimony, the circumstantial evidence is as consistent with Michael Hall's having stolen the wallet as it is with appellant's having taken

[22] 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

it.[23] McArthur. See also Simmons v. State, supra, at 318 (proof beyond a reasonable doubt of a pecuniary motive for the murder "cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance"). Therefore, there is no proof beyond a reasonable doubt that the murder of Mrs. Lile was committed for financial gain.

Even assuming arguendo that the evidence was sufficient to prove that appellant - not Hall - took the wallet, the "financial gain" aggravating circumstance still cannot be upheld. The aggravating factor set forth in Fla.Stat. Section 921.141(5)(f) states "[t]he capital felony was committed for pecuniary gain" (e.s.), and requires proof a financial motive for the killing. See Scull v. State, supra, **13** FLW **547** ("While it is true that

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[23] This failure of proof is illustrated by an incident that came up in regard to the trial court's consideration of the PSI. Detective Vargas was quoted in the PSI as saying that "Hall, although not charged, also committed theft in the taking of money and other personal items from the victim's business" (R.1153). At the April **8, 1987** sentencing hearing, defense counsel raised this point, noting the testimony that appellant had asked Michael Hall to go and check on Mrs. Lile, and that Hall left and came back (ST.1160). Defense counsel argued that "obviously, this guy, Hall, did go over there and took the money" (ST.1161). A week later, at the request of Assistant State Attorney Erock, an amended page of the PSI was submitted to the Court to correct a typographical error in Vargas' statement, making it now read "Hill, although not charged, also committed theft in the taking of money and other personal items form the victim's business" (R.1156, see R.1155).

Undersigned counsel has no reason to doubt that the discrepancy in the PSI was merely a typo, and that Vargas meant to say that Hill took the wallet. But the fact remains that both Hill and Hall were inside the office prior to the arrival of the police, and the evidence simply fails to show which one of them took the wallet.

Scull took Villegas' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain"); Simmons v. State, supra, at 318 ("There was not ... sufficient evidence to Prove a pecuniary motivation for the murder itself beyond a reasonable doubt"); Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) ("[We] have permitted this aggravating factor only where the murder is an integral step in obtaining some sought-after specific gain").

In the present case, there was absolutely no evidence that the taking of Mrs. Lile's billfold played any part in appellant's motivation for killing her. In appellant's statement to Vargas, he said that he became enraged when Mrs. Lile acted like she was mad at him, pushed him, and tried to hit him with a broom. Whether or not Mrs. Lile actually did these things, the physical facts are certainly consistent with a homicide committed in a rage or frenzy. See Mitchell v. State, supra; Hansborough v. State, supra. Even the testimony of Ernest Demonbruen (presented by the state on rebuttal, after Demonbruen's testimony proffered by the defense was excluded as hearsay) belies the theory that this murder was motivated by financial gain. Demonbruen (who was no friend of appellant's) claimed that earlier that morning, appellant had made a comment to him that Mrs. Lile acted like she was afraid of getting raped, and if he got the chance he might rape and beat her, too (T.1047). Demonbruen's testimony, if believed, would establish a sexual, not a financial, motivation for the crime. There is simply no evidence that the taking of

Mrs. Lile's billfold from her purse (even assuming that appellant was the one who took it) was anything other than an afterthought. The trial court's finding of the "for financial gain" aggravating circumstance was invalid. Scull; Simmons; Hardwick. Just as, in cull, the "record simply does not support the conclusion that Villegas was murdered for her car" (13 FLW at 547), the record in the present case does not support the conclusion that Mrs. Lile was murdered for her billfold.

Appellant further submits that the narrowing construction of the (5)(f) aggravating circumstance which this Court has adopted in Scull, Simmons, and Hardwick, requiring proof that an intent to obtain financial gain was a primary or substantial motivation for the murder itself (and not merely an afterthought, or an incidental consequence), is constitutionally indispensable to prevent the overbroad application of the aggravating factor. Cf. Maynard v. Cartwriaht, 486 U.S. ___, 108 S.Ct. __, 100 L.Ed.2d 372 (1988) (striking down Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor as unconstitutionally overbroad, where state Court of Criminal Appeals had not adopted or applied a narrowing construction of the aggravating factor).

Just as the prosecutor's improper argument to the jury in the penalty phase cannot he written of as "harmless error" [see Issue 111, supra], neither can the trial court's invalid consideration of the "pecuniary gain'' aggravating circumstance. See State v. DiGuilio, supra; Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). In view of the fact that the trial judge found

as a mitigating circumstance that appellant has no significant criminal history (R.1129), and in view of the judge's express statement that his weighing of the aggravating and mitigating circumstances in favor of death was a "very close decision" in his mind (ST.1161-62), the state clearly cannot show that the trial court's consideration of the invalid aggravating circumstance did not affect the weighing process to appellant's detriment. Elledge; DiGiulio. Contrast Hardwick v. State, supra, at 1076-77. Appellant's death sentence must be reversed, and the case remanded for resentencing.

ISSUE V

THE JURY'S RECOMMENDATION OF DEATH WAS TAINTED BY THE TRIAL COURT'S STATEMENT DURING VOIR DIRE THAT HE WAS "STUCK WITH THE WHOLE THING" CONCERNING THE DECISION WHETHER TO IMPOSE LIFE OR DEATH.

During the questioning of prospective juror Edwards (who had stated that she was "mostly" opposed, but not "completely [and] unalterably" opposed, to the death penalty, and had expressed doubt about her ability to recommend it (T.148-150)), the trial court made the following comment in the presence of the panel of prospective jurors:

> Okay. Let me go one step further. Maybe I can clear something up.
>
> In these types of trials, first of all there is a trial as to the guilt or innocence. If you find the defendant guilty as charged, the next phase of the trial will be a recommendation to the Court of what you think the penalty would be.
>
> The penalty would be either death, or it could be life imprisonment.with 25 years to parole, without parole, is what I mean, and you'd have to base that decision on the certain law that I'll give you, or guidelines that are called aggravating and mitigating circumstances.
>
> Then the jury -- it doesn't have to be unanimous this time. A simple majority comes back in and makes these recommendations to me.
>
> Then the ball passes to me, and I'm stuck with the whole thing. I have to decide whether or not to take your recommendation. I mean, the whole thins is UP to me and I have certain suidelines to go to to see -- even though you may recommend death or life, I can do whatever I feel would be appropriate under the law.
>
> I think what we're getting at here is in the second phase of a trial, if there's a finding of

> guilt, the fact that I may sometime down the road have to impose the death penalty, would you automatically vote for life, not knowing that I might have not to agree with you.
>
> Does that make everything more difficult?
>
> (T.150-151)

At the beginning of the penalty phase, the trial court re-emphasized the theme that the responsibility for a death sentence (or life imprisonment) rested elsewhere than with the jurors, by instructing them:

> 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.
>
> (T.1126, see T.1155)

These comments are very much in the nature of those condemned in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Adams v. Wainwriaht, 804 F.2d 1526, amended on rehearing, 816 F.2d 1493, rev. granted sub nom Dugger v. Adams, U.S. Supreme Court case no. 87-121 (42 Cr.L 4181), both of which found reversible error in comments denigrating the importance of the jury's role in capital sentencing. Appellant's death sentence must be reversed, and the case remanded for a new penalty hearing before a newly impaneled jury.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO WEIGH AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE EVIDENCE THAT APPELLANT WAS A GOOD SON, WHO WORKED TO PROVIDE FOR HIS MOTHER.

In Rosers v. State, 511 So.2d 526, 534-35 (Fla. 1987), this Court discussed the principle of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978); Eddinss v. Oklahoma, 455 U.S. 104, 102 S.Ct. 896, 71 L.Ed.2d 1 (1982), and Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), as it relates to the trial court's consideration of non-statutory mitigating circumstances. This Court said:

> Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.
>
> Rosers v. State, supra, at 534

Based on this analysis, this Court rejected four of the five non-statutory mitigating factors proffered by Roqers, for lack of

evidentiary support or lack of relevance. As to the fifth factor, however, this Court held that "in light of the admonition that judges may not refuse to consider relevant mitigating evidence", being a good husband, father, and provider is a factor to be weighed in mitigation. Rogers, supra, at **535**. "Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation" Rogers, at **535**.

Consequently, this Court found that the trial court erred in failing to find and weigh as a non-statutory mitigating circumstance the evidence that Rogers was a good husband, father, and provider. However, in light of the fact that there were no other mitigating circumstances - statutory or non-statutory - this Court found beyond a reasonable doubt that the error could not have affected the trial court's decision to impose a death sentence, and declared the error harmless under the test of State v. DiGuilio, 491 So.2d 1129, **1138** (Fla. **1986**). Rogers, supra, at **535**.

In the instant case, the same error was committed. Here, however, in light of the existence of a significant statutory mitigating circumstance (that appellant has no significant criminal history), and in light of the trial court's statement at the time of sentencing that the choice in this case between life and death was "a very close decision in [his] mind", this Court cannot find any error which could have affected the weighing of the aggravating and mitigating circumstances to be harmless

beyond a reasonable doubt. DiGuilio.

Appellant's mother, Henrietta Hill, testified that George has been a good and obedient son **(T.1128).** She continued:

> Sometimes George be working making odd jobs to help ends meet, because, see, I work for the City of Naples and I don't make that much money.
>
> George would bring most of his money home and help me pay the bills. Sometimes I didn't know how I was going to eat, but George do everything in his power to help me.
>
> Now that he have a kid, I going to have to take him. I have to pay **$45** for daycare. When George was working, he would help me pay for the babysitter and that, baby clothes, and he was mostly apply backbone and just like George take care of me.
>
> Q. [by Mr. Osteen]: You have other children, do you not?
>
> MRS. HILL: I do. I have five more sons besides George, but George is the best kid I ever had about helping do anything.
>
> He has never been a problem. All his life he done everything he can to provide for me.
>
> **(T.1128-29)**

This testimony was clearly relevant to show that appellant has been a good son and a good provider, who has willingly contributed to his family. As such, it is evidence of good character traits to be weighed in mitigation. Rogers. The state did not contest or attempt to rebut this mitigating evidence. See Rogers, supra, at **535.** [Instead, on cross-examination of Mrs. Hill, the prosecutor launched into a line of cross-examination grossly violative of Booth v. Maryland, 482 U.S.____, **107** S.Ct. **2529,** 96 L.Ed.2d **440 (1987),** in which he asked such

rhetorical questions as "Mr. Lile is by himself now, isn't he?", "Mrs. Lile had children. They don't have a mother now, do they?", and "You probably tried to do just [as] good a job in raising your children as Mrs. Lile did in raising hers. didn't you? (T.1130-31)]. The trial court's failure to find and weigh this non-statutory mitigating factor is error of constitutional dimension [Lockett; Eddings; Skipper; Rogers] which cannot be discounted as harmless [DiGuilio].

ISSUE VII

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY WHEN APPELLANT MOVED PRE-TRIAL TO DISCHARGE THE PUBLIC DEFENDER

On November 13, 1986, appellant filed a pro se motion to discharge the Public Defender assigned to his case, and to appoint a private attorney to represent him (R.1091). As grounds for the request, appellant stated that, due to their caseload, there was no way the Public Defender's office could devote the amount of time and preparation necessary to properly defend him (R.1091). At a hearing on the motion held on December 8, 1986, the following took place:

> THE COURT: Do you want to say anything about your motion, Mr. Hill?
>
> THE DEFENDANT: Other than the Public Defender's Office is overloaded with cases and can't devote enough time to represent me as Public Defender like he should. He is okay, but, Your Honor, he just can't devote enough time because he has a lot of cases.
>
> My case is a capital crime and I need help.
>
> THE COURT: Any comment?
>
> MR. OSTEEN: [defense counsel]: Your Honor, I can understand Mr. Hill, and I can go along okay if a person doesn't want me. We don't have any problems.
>
> THE DEFENDANT: Yes.
>
> MR. OSTEEN: He is just scared to death. It is a capital case and the facts are rather strange and he is concerned the closer we get to trial; and, I can understand that, but as far as I am concerned I feel like I am doing all that is necessary in this case, and I don't know how to allay his fears. And I have tried to, but I just don't know.

THE COURT: Mr. Hill, I want you to allay your fears because I have known Mr. Osteen for sometime, and he has been Public Defender in this Court and he is one of the best I have seen.

If I were you I would relax and let Mr. Osteen do it because he knows what he is doing.

THE DEFENDANT: I understand that. Mr. Osteen is going to represent my case?

THE COURT: Right.

THE DEFENDANT: I am in God's hands: right?

THE COURT: You have to worry about being found --

THE DEFENDANT: Mr. Osteen, I have nothing against him, but I was asking for somebody to represent me. How he going to represent me; how he going to devote enough time?

THE COURT: I understand that.

The prosecutor then brought up the fact that a witness from the FDLE would be unavailable during the week of January 13, 1987, and that defense counsel had agreed to the state's request for a continuance until February 3 (SR.1170). Defense counsel remarked "That will give me more time to adequately represent Mr. Hill" (SR.1170). The hearing then concluded.

This Court has held that when a defendant is dissatisfied with his court-appointed counsel, and seeks to have new counsel appointed, such defendant "[i]s presumed to be exercising [his] right to self-representation. He should be so advised, and the trial court should forthwith proceed to a Faretta inquiry"[24]

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[24] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)

Jones v. State, 449 So.2d 253, 258 (Fla. 1984); see Hardwick v. State, 521 So.2 1071, 1074 (Fla. 1988); Smith v. State, 444 So.2d 542, 545 (Fla. 1st DCA 1984). As stated in Hardwick:

> We recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. Jones v. State, 449 So.2d 253, 258 (Fla.), cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so. Faretta, 422 U.S. at 835, 95 S.Ct. at 2541; Smith v. State 444 So.2d 542 (Fla. 1st DCA 1984). This particularly is true where, as here, the accused indicates that his actual desire is to obtain different court-appointed counsel, which is not his constitutional right. Donald v. State, 166 So.2d 453 (Fla. 2d DCR 1964).
>
> (emphasis in opinion, 521 So.2d at 1074)

In the present case, the trial judge did not advise appellant of his right to self-representation, nor did he conduct even a rudimentary Faretta inquiry. See Jones; Hardwick. Nor did he make an adequate inquiry into the reasons for appellant's belief that he was not being afforded effective assistance of counsel in the preparation of his defense. See Scull v. State, ___So.2d___ (Fla. 1988) (case no. 68,919, opinion filed September 8, 1988) (13 FLW 545, 546). Unlike the Scull case (in which this Court found the trial court's error in failing to conduct an

adequate inquiry to be harmless, in light of Scull's subsequent expressions toward the end of the trial that he had always wanted **Mr.** von Zamft as his attorney, and that he was very happy with the way Von Zamft conducted his defense), here appellant never indicated that he had changed his mind about **Mr.** Osteen's inability to properly defend him. Appellant did say that he had nothing against Osteen personally, but, when advised by the trial judge to "relax and let Mr. Osteen do it because he knows what he is doing", appellant asked "Mr. Osteen is going to represent my case?" and "I am in God's hands, right?" **(SR.1169).** Appellant's last words on the subject were "Mr. Osteen, I have nothing against him, but I was asking for somebody to represent me; how is he going to devote enough time?" **(SR.1169).** Thus, in contrast to Scull, appellant's dissatisfaction with his appointed counsel cannot be said to have "dissipated"; he merely acquiesced to the trial court's decision. The trial court's failure to conduct an adequate inquiry was reversible error [Scull] of constitutional dimension [Faretta]. See also McKaskle v. Wiggins, **465** U.S. **168, 104** S.Ct. **944, 79** L.Ed.2d **122 (1984).**