IN THE

SUPREME COURT OF FLORIDA

MAC RAY WRIGHT, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 71,534

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant would rely on his statement of the case as found in the Initial Brief except to make the following clarification. After Appellant objected to the state's improper use of peremptory challenges based on race (R 594), the trial court found that based on existing case law an inquiry into the reasons for the challenges of black jurors was required (R 596). In response the prosecutor stated that he was challenging Mr. Salter because he was black and could identify with Appellant and that he felt "uncomfortable" with Mr. Salter due to lack of eye contact (R 597).

STATEMENT OF THE FACTS

Appellant would note that the statement of the facts in Appellant's Initial Brief contains the facts relevant to this case. Appellee has not disputed Appellant's version of the facts. However, Appellee has provided its own version. This version contains irrelevant material and is unnecessarily argumentative.[1] Since Appellee has repeated the relevant facts in the argument portion of its brief, the disputes[2] as to material facts will be addressed in the argument portion of this brief.

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[1] For example, Appellee discusses Deputy Lee Morris' testimony that Appellant stated he had a gun and was going to shoot Morris. Appellee's brief at 28. However, Appellee fails to mention that Appellant then told Morris that he did not have a gun (R 1098). Nor did Appellee mention that Morris thought nothing about Appellant's remarks (R 1098), except that the remarks were consistent with Appellant being drunk and spaced out (R 1104).

[2] For example, Appellee alleges that Dr. Ebalo's "entire diagnosis" was based on omissions and that she "receded" from her original diagnosis. Appellee's brief at 44, 46. However, the record shows that Ebalo had a second diagnosis after reviewing all the materials, and after reviewing all the information had not abandoned her diagnosis of extreme mental and emotional disturbance (R 1766).

Appellant would rely on the statement of the facts as reported in his Initial Brief.[3]

ARGUMENT[4]

GUILT PHASE

POINT I

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO USE PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY.

In its Answer Brief, Appellee claims that none of the prosecutor's peremptory challenges were due to race. This claim is without merit. Clearly, there can be no legitimate claim that Gary Salter was challenged for racially neutral reasons where he was challenged because he was a black male who could identify with Appellant (R 597). The prosecutor's claim to the trial court that he could exclude due to race as long as he did not do it systematically is wrong (R 601).[5]

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[3] Appellant would make the following clarification to the statement of the facts in page 5 of his Initial Brief.

Marion Matthews lives next door to Dorothy Walker, her aunt (R 869). Matthews testified that in the late evening hours of June 10, 1986, he heard some shots, but did not do anything because it was normal to hear shots from that area (R 870). Matthews saw Appellant's car back out of the yard and take off (R 870-871).

Dedilia Gayle, who goes by the name of "Dee Dee Morgan", testified that on the evening of June 10, 1986, Appellant was at her home after work in the afternoon (R 875-876). Appellant drank beer at Gayle's house (R 888). Gayle thought Appellant drank about 3, 4, maybe a whole six pack (R 888). Gayle testified that Appellant complained about his head hurting on a regular basis (R 886). Gayle thought it was due to his drinking (R 886). Appellant told Gayle that he was going to the bar and then left (R 876).

[4] Appellant will rely on his Initial Brief for argument on Points VII, XIII, XV, and XVII.

[5] See Thompson v. State, 548 So.2d 198 (Fla. 1989) (In answer to claim that Neil comes into play only where there is "systematic" exclusion, this Court notes in footnote 4 that improper use of peremptory not required to be systematic); State v. Slappy, 522 So.2d 18, 21 (Fla. 1988), (issue is if discrimination used to excuse any juror).

The prosecutor also claimed that he felt "uncomfortable" with Salter due to lack of eye contact. In State v. Slappy, 522 So.2d 18, 20 (Fla. 1988) this Court outlined the reprehensible appearance of discrimination in our judicial system and indicated that peremptory challenges based on "bare looks and gestures" are apt to "unaccountable prejudices" and are inconsistent with our constitutions. Such reasons present the danger:

> ... that an attorney may lie to himself in an effort to convince himself that his motives are legal." ... A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically.

Slappy, 522 So.2d at 22-23. This reason cannot be used to justify Salter's exclusion.

Finally, Appellee notes that Salter had indicated he would not be paid by his employer for jury service (R 189-190). Clearly, this is not the reason given by the prosecutor and does not justify Salter's exclusion. See Stokes v. State, 548 So.2d 188, 196 (Fla. 1989) (it is the prosecutor's reasons rather than reasons offered by the state on appeal which must be evaluated). The discriminatory exclusion of Salter, because he was a black man who could identify with Appellant, alone is sufficient for reversal. See Slappy, 518 So.2d at 21.

As to the excusal of black juror Alma McFolley, Appellee does not address the prosecutor's claim that McFolley failed to understand the involuntary intoxication and insanity defenses.[6]

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[6] As explained in the Initial Brief at page 28, there was no showing that McFolley failed to understand the defenses and such a reason was merely a pretext. Mr. Hays' hesitations regarding sentencing factors were not the prosecutor's reasons for exclusion.

Instead, Appellee diverges from the issue by claiming the prosecutor was never concerned about McFolley's lack of an advanced education. However, the prosecutor, Mr. Walsh, apparently believing it was the basis for a perceived lack of understanding, did explain his exclusion of McFolley and Hays due to the lack of advanced education:

> MR. WALSH: ... Both [Miss McFolley and Mr. Hays] individuals indicated they were doing the type of work where they apparently have not had the benefit of advanced education.

(R 596-97). As explained in the Initial Brief, this reason was a pretext. The prosecutor did not advance legitimate racially neutral reasons for excluding McFolley.

As to Mr. Hays, Appellee does not discuss the prosecutor's reasons for excluding Hays, but instead diverges into such things as Mr. Hays feelings about the death penalty and his former drinking habits. These were not the trial prosecutor's reasons for excluding Hays. See Stokes, supra. As to the prosecutor "feeling" uncomfortable with Hays [and McFolley], this is not a legitimate racially neutral reason. Foster v. State, 557 So.2d 634 (Fla. 3d DCA 1990) (not having a "good feeling" about juror not satisfactory neutral reason).

Appellee also claims that Appellant did not properly preserve the instant issue for appeal and there was no need for a Neil inquiry. Such claims are totally without merit. Appellant properly preserved the instant issue.[7] Contrary to Appellee's claim, the

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[7] Specifically, Appellant's counsel objected as follows:

> MR. FINNEY: Yes, sir, Judge. Judge, for the record, I think the State exercised five preemptory challenges and what we have noticed is a pattern utilized by the

trial court did find that based on existing case law[8] an inquiry into the reasons for the challenges of black jurors was required:

> THE COURT: I believe, based upon existing case law, at this point the state would be compelled to make a showing that there is not an improper prejudice for excluding.

(R 596). It was after this that the prosecutor gave its reasons. There is justification for the trial court's conclusion that an inquiry was required. The prosecutor had been excluding black jurors whose answers during voir dire did not indicate that they would be anything but fair and impartial. Combined with the fact that Appellant was black, the trial court justified in requiring an explanation from the state.[9] Any doubt should be resolved in the

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> State to exclude black jurors, particularly Juror 122, Eddie Hays, 124 Gary Salter and 117, Alma McFolley.
> I think in light of the present case law, and I particularly cite the State versus Neil, 557 Southern 2d 481. I think we, at this time, would challenge the State and raise an objection to the State's systematic exclusion of blacks from the jury and require the Court to compel the State to advise the Court as to what reasons of nonbias the State has utilized to exclude black jurors.

(R 594). In fact, Defense counsel made numerous objections that the state was excluding jurors due to race (R 597-600).

[8] This case occurred before State v. Slappy, 522 So.2d 18 (Fla. 1988) wherein this Court explained that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.

[9] The fact that Appellant was black is significant in determining whether there is an improper exclusion of blacks due to race. Appellee's reliance on Reed v. State, 560 So.2d 203 (Fla. 1990) in this case is misplaced. In Reed this Court analyzed a situation in which a white defendant's complaints regarding the exclusion of black jurors were more closely scrutinized than those complaints of a black defendant:

> Thus, a defendant of a different race than the jurors being challenged may have more difficulty convincing the trial court that "there is a strong likelihood that they have been challenged only because of their race." Moreover, in those cases in which the inquiry has

complaining parties favor. Slappy. Moreover, assuming arguendo, that a defendant has not met the initial burden, once the reasons are offered they cannot be ignored, but must be analyzed. Garrett v. Morris, 815 F.2d 509, 511 (8th Cir. 1987) (once prosecutor's reasons are part of record it is duty to review whether reasons pretext for discrimination regardless how the reasons were placed on the record); Hale v. State, 480 So.2d 115, 116 n.1 (Fla. 2d DCA 1985) (reasons given must be reviewed regardless of how on record); Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA 1987); Parker v. State, 475 So.2d 134 (Fla. 1985). The error in permitting the exclusion of black jurors violates Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Slappy, 522 So.2d 18 (Fla. 1988) and the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 16 of the Florida Constitution.

> been directed to the challenging party, the respective races of the challenged jurors and the defendant may also be relevant in the determination of whether the challenging party has met the burden of showing that the challenges were made for reasons not solely related to race.
>
> * * *
>
> Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused his discretion ...

560 So.2d at 206 (emphasis added). Of course, excusals of jurors due to race is much more likely due to race in the case where a defendant is black. Consequently, the more vigorous standard noted in Reed, and the greater reliance on a trial court's discretion, while applicable to cases involving white defendants is not also applicable to black defendants [the propriety of different standard is especially significant in a case such as this where the prosecutor is excluding blacks for no apparent reason and then due to the inquiry admits to excluding a black juror because he is the same race as the defendant].

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING THE LEASE AGREEMENT INTO EVIDENCE WITHOUT CONDUCTING AN ADEQUATE RICHARDSON INQUIRY FOLLOWING THE STATE'S DISCOVERY VIOLATION.

Appellee first claims that Appellant merely objected on the grounds of a Brady violation and did not object on the grounds of a discovery violation. However, the record is abundantly clear that the context of Appellant's objection was that the state failed to disclose a tangible document in its possession (the lease) (R 747-749).[10] The objection was sufficient for the trial court and prosecutor to recognize it as an objection as to a discovery violation. For example, after Appellant objected, the trial read Rule 3.220-(b)(1)(xi) which refers to the failure to disclose tangible papers, (R 750, 751), and not to the portion of the rule referring to Brady material.[11] In response, the prosecutor referred to (g) "tangible papers" of the answer to demand for discovery [at 42 of record] rather than to anything regarding Brady material (R 750). The trial court did not rule on the basis of a Brady objection, but did rule on the basis of a discovery violation. The present issue was preserved.

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[10] At one point Appellant's counsel did mention Brady v. Maryland in an incomplete sentence (R 748). However, this was not the objection. It was never claimed the evidence was exculpatory. Certainly, if the trial court and parties had perceived the objection as a Brady objection, the objection would have been dealt with by simply observing that the material was inculpatory rather than exculpatory.

[11] Likewise, in the Answer Brief, Appellee concedes the objection was based on the failure to disclose under Rule 3.220(b)(1)-(xi) rather than the rule dealing with disclosure of Brady material Rule 3.220(b)(2).

Appellee claims as did the prosecutor, that the failure to disclose the lease until Bessie Webster testified was not a discovery violation because the state did not know of the existence of the lease agreement. Such a claim is incredible. At the very least the prosecutor had the lease prior to opening statements and Webster's testimony.[12] The failure to notify Appellant of the lease agreement until Webster took the stand certainly would be a violation of the continuing duty to disclose and a violation of the discovery rules.[13]

Finally, Appellee claims there was an adequate inquiry and the contents of the lease agreement show that Appellant was not prejudiced. Appellee obviously misunderstands the function of a Richardson hearing as far as discovering prejudice. The inquiry as to procedural prejudice is what the inquiry is designed to ferret out. Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980) (although inquiry made as to late notification of witness' name and the substance of his testimony, reversal required where no inquiry and finding as to the effect of the breach on the preparation of the defendant's case). Here, there was no inquiry into the procedural prejudice regarding

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[12] Prior to both Webster's testimony and the opening statements, which had occurred immediately prior to her testimony without interruption of a recess, the lease agreement had already been in the state's possession by evidence that it had been already marked as state's exhibit N.

[13] In addition, as explained on page 31 of Appellant's Initial Brief, there were indications that the prosecutor intended long before trial to utilize the lease. In response, Appellee has alleged that the prosecutor was merely illustrating that Appellant could have discovered the lease through deposing Webster. This would not relieve the state from its continuing duty to disclose. Blatch v. State, 495 So.2d 1203 (Fla. 4th DCA 1986).

the affect of the violation on Appellant's ability to prepare for trial. If there had been a proper inquiry, it may, or may not, have been determined that Appellant would have prepared his opening statement different rather than claiming that the couple were legally cotenants.

POINT III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR SEVERANCE.

Appellee claims that the killing and the battery on law enforcement officers six days later were episodically related. However, Appellee has not remotely suggested how the two incidents were episodically related. As noted in Garcia v. State, 15 FLW S445, S446 (Fla. September 6, 1990) offenses are not episodically related where the offenses merely involve the same defendant. In the instant case the shooting incident on June 10, which Appellee claims is premeditated, and the batteries on law enforcement officers on June 16, which Appellee notes was unprovoked, were separate incidents, on different days, involving different types of crimes done in a different manner, and were not a series of transactions.

The offenses were not so inextricably intertwined so that one could not be tried without the other as Appellee claims. Six days after the shooting Appellant turned himself and was arrested.[14] As

[14] Appellee has implied that Appellant intentionally gave a false name and thus was reluctant to turn himself in. However, an officer indicated she heard Appellant to say his name was "Mike Wright" (R 1085). This is not much different, especially phonetically, than Appellant's name "Mac Wright". Certainly it does not show an intention not to turn himself in. After all, it was Appellant who called his sister and decided to turn himself in (R 1201).

noted in Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981), circumstances of an arrest are not relevant to proving the crime charged:

> Although it does not appear that Postell objected to the testimony on the grounds of relevancy, we are compelled to point out that the arrest of the defendant is not an element of the crime to be proved, and proof concerning the fact that it occurred, the circumstances of it, and the reasons for it is ordinarily irrelevant. We recognize that it could be argued that the time and place of Postell's arrest, for example, would tend to disprove any contention that Postell was in Philadelphia within an hour of the crime. However, in the present case, Postell's defense was that he was at home in Miami. *See State v. Bankston, supra; People v. Wilkins, 408 Mich. 69, 288 N.W.2d 583 (1980).*

398 So.2d at 855 ft.7 (emphasis added).

Finally, Appellee claims that the error was harmless due to the great weight of evidence of Appellant shooting Sandra Ashe.[15] Whether Appellant shot Ashe was never truly in issue. What was a close issue was whether there was a first degree murder or a second degree murder. As more fully explained in Appellant's Initial Brief at page 36, the evidence of Appellant's violent propensities on June 16 may have tipped the scales and prompted the jurors to impose the harshest verdict, rather than one of second degree murder. The failure to sever denied Appellant due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I, § 9, Florida Constitution.

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[15] Appellee misunderstands the nature of the harmless error test. In State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986) this Court made it clear that the test is not whether there was substantial evidence or "even an overwhelming evidence test." Rather, the focus of the test is on the possible effect of the improper evidence. It is the state's burden to prove beyond a reasonable doubt that the improper evidence could not have influenced the jury. DiGuilio, supra at 1139. State v. Lee, 531 So.2d 133, 137 (Fla. 1986).

POINT IV

THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING APPELLANT'S HEARSAY OBJECTION.

Appellee claims that the present issue was not preserved for appellate review because Appellant did not object to each individual question asked of Bessie Webster regarding the out-of-court statements. However, Appellee overlooks that after Appellant made his objection to the first hearsay statements the prosecutor immediately represented that the "next series of questions" would involve the same type of answers (R 740). From the context of the colloquy, the trial court was ruling on the "series" of questions and statements and in fact gave a so-called cautionary instruction on the "statements" the jury was about to hear. This "series" included the hearsay statement that Sandra Ashe did not want Appellant in the house. Thus, the issue of a series of statements was ruled on by the trial court and preserved for appellate review.[16]

Appellee also claims that the trial court's instruction to the jury that they were allowed to "consider statements of persons who are not present" in court "to prove something was said" (R 741), cured any error of admitting the hearsay statements.[17] However,

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[16] The objection was also contemporaneous even though it was made after a portion of the unsolicited answer was given. See Roban v. State, 384 So.2d 683, 685 (Fla. 4th DCA 1980) (objection three questions after unsolicited answer deemed contemporaneous).

[17] Appellee also claims that the out-of-court statement that Appellant "was not supposed to be in the house" was admissible to prove that she did not want Appellant in the house. This clearly is hearsay. Also, assuming arguendo it was relevant to show the fact that statements were made, the contents of the statements were not admissible. Harris v. State, 544 So.2d 322, 324 (Fla. 4th DCA 1989); Collins v. State, 65 So.2d 61 (Fla. 1953).

telling the jury to consider the statements to prove that something was said does not sufficiently guide the jury.[18] This is why some cautionary instructions cannot "cure" error. See Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982). This is especially true where the instruction fails to give any guidance. Consequently, the instruction does not make the admission of the statements harmless.

The improper admission of the hearsay statements was error and violated Appellant's right to confrontation and cross-examination. Sixth and Fourteenth Amendments, United States Constitution.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO QUESTION PROSPECTIVE JURORS ABOUT WHETHER THEY BELIEVED THAT POLICE OFFICERS COULD EVER BE MISTAKEN IN THEIR TESTIMONY.

Appellee claims that Appellant's prohibited question regarding whether police could be mistaken in their testimony was repetitious because Appellant asked other questions such as: whether the jurors had relatives in law enforcement; whether the jurors disagreed with speeding tickets; whether officers treat people of different backgrounds differently. Appellee's claim is without merit. Appellant's prohibited question regarding whether officers can be mistaken in their testimony is not repetitious of the above line of questioning. None of these questions deals with a bias toward an officer's testimony.

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[18] Any reasonable person would know that the mere fact that something was said to Ms. Webster was not relevant. If it was relevant, they would only hear testimony that something was said and not the contents of what was said. Without any guidance as to why the fact that something was said is relevant, such as to show the listener's reaction if relevant, the jury upon hearing the statements is left to focus on the contents of the statements.

Appellee also represents that there was a line of questioning regarding the jurors attitude toward an officer's testimony. This is not true.[19] The record shows that Defense counsel was permitted to ask <u>one</u> question regarding the bias of juror's toward a police <u>officer's testimony</u> and some of the jurors did <u>not</u> respond:

> Q. Now, since we were talking about police officers let me just jump to police officers. There will be some testimony in this case coming from law enforcement officers, the mere fact that they will take the stand and testify, will anyone give their testimony on their face any greater weight than any other witness that may testify just because they work with law enforcement?
>
> (Some prospective jurors say no. <u>Some don't respond</u>.)

(R 377) (emphasis added).[20] Due to the fact that some jurors never responded to the question of whether an officer's testimony would be given greater weight than the testimony of other witnesses, it is not repetitious or frivolous to later ask the jurors attitudes to whether police could be mistaken in their testimony. It was error to restrict voir dire. Article I, § 22, Florida Constitution; Sixth and Fourteenth Amendments, United States Constitution.

Finally, Appellee faults defense counsel for not arguing with the trial court after it had sustained the objection. Defense counsel cannot be faulted for refraining from contemptuous behavior

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[19] Again, general questions regarding an officer's field duty is not the same as questions regarding biases toward their testimony.

[20] Appellee mentions that the jury was earlier instructed that police officers testimony was not to be accorded greater weight than other witnesses. However, no such specific instruction as to <u>police officers</u> was given. More importantly, the later failure to respond by some jurors showed a need to delve into the area of jurors attitudes toward police officer testimony.

of quibbling with the trial court's ruling. Defense counsel previously had argued that his question was appropriate.[21]

POINT VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE FLIGHT INSTRUCTION WHERE THERE WAS NOT SUFFICIENT EVIDENCE THAT APPELLANT FLED TO AVOID PROSECUTION.

Appellee claims that Appellant's leaving the scene and turning himself in was sufficient to justify a flight instruction. However, merely leaving the scene does not show flight to avoid prosecution. This is especially true where Appellant turned himself in. Appellee denigrates this fact by claiming that Appellant tried to escape prosecution by deliberately giving a false name when turning himself in. Such a claim is specious.[22]

POINT VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE BURGLARY CHARGE.

In its brief Appellee claims the instant issue is controlled by Cladd v. State, 398 So.2d 442 (Fla. 1981). However, in Cladd the husband had never lived in, nor had any connection with, the premises. Whereas here, the landlord testified that Appellant lived at the residence and that on "several occasions" he paid the rent for the residence. Due to this, and Appellant's common law marriage

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[21] Defense counsel agreed it was repetitious. However, it was only repetitious to the earlier question, regarding the weight to give an officer's testimony, which some jurors did not answer. Thus, it was not truly repetitious.

[22] The evidence does not show that Appellant deliberately lied to escape prosecution by giving a false name. An officer heard Appellant say his name was "Mike Wright" (R 1085). This is not much different phonetically than "Mac Wright" and could be the result innocent mispronunciation by a person who had been drinking (R 888).

to Sandra Ashe,[23] there was a residential tenancy which can only be terminated pursuant to 83.56 and 83.59, Florida Statutes. Since the tenancy was not terminated in such a fashion, there was no burglary.

POINT IX

THE TRIAL COURT ERRED IN DIRECTING A VERDICT BY INSTRUCTING THE JURY THAT PEGGY GAHN AND GARY FARLESS ARE LAW ENFORCEMENT OFFICERS.

Contrary to Appellee's assertions, the trial court did direct a finding as to the second element of battery on a law enforcement officer by his instruction that as a matter of law that Gahn and Farless were law enforcement officers. As explained in the Initial Brief at 53-54, directing a verdict as to an element is fundamental error. Furthermore, such error is per se reversible. United States v. Mentz, 840 F.2d 315, 324 (6th Cir. 1988) ("... the state cannot contend the deprivation was harmless because ... the wrong entity judged the defendant ..."); see also Dion v. State, 564 So.2d 618 (Fla. 4th DCA 1990). Finally, it should be noted that the record does not reflect that the jury's question [exhibit J2] (SR 280) was ever answered.[24]

POINT X

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHERE THE TRIAL JUDGE PRESIDING OVER HIS CAPITAL TRIAL BECAME BIASED DUE TO PRE-TRIAL INFLAMMATORY ACCUSATIONS AGAINST APPELLANT.

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[23] Appellant and Ashe lived together, with their children, and held themselves out to be married. Appellee has in essence recognized this marriage by continuously inferring that Appellant had been unfaithful to Ashe by keeping a mistress.

[24] The notations on exhibits J1 and J2 show that the trial court did answer exhibit J1, but not J2 (SR 279, 280).

The state argues that this issue has been waived because there was no objection made by the defense. In making this argument the state ignores the fact that neither Mr. Wright nor his attorney were present at the time the remarks were made.[25] The court appointed Lorenzo Williams, not his firm nor his associates, to represent Mr. Wright in this capital case.[26] In fact, Mr. Finney had not filed a notice of appearance as required by Rule 2.060(j) of the Florida Rules of Judicial Administration at this time. Since neither Mr. Wright nor his attorney were present at the hearing, they could not have objected nor have moved to recuse the judge. Regardless, the record shows that during the pretrial period Mr. Williams, Mr. Wright's appointed lawyer, was himself less than completely focused on advancing the cause of his client. On June 8, 1987, he deliberately arranged to have his client absent from a hearing at which he bad-mouthed his client (R42-43).[27]

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[25] To attribute to Mr. Wright the silence of the interloping Mr. Finney, would be to rewrite the law of attorney-client relationships. The law is that the relationship between an attorney and his client is personal, and the rights and duties inherent in that relationship may not generally be assigned or delegated without the consent of the client, especially where the assignment or delegation renders the performance less valuable. In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 90 (5th Cir. 1986).

[26] Otherwise, Mr. Finney would not have had to have been appointed later in the case, as he was (R 52).

[27] "Under our law there is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client. The relationship has its very foundation in the trust and confidence the client reposes in an attorney selected to represent him. The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity." Gerlach v. Donnelly, 98 So.2d 493, 498 (Fla. 1957). In this cause these principles were violated and the state cannot now raise, as a procedural bar to the prosecutor's and judge's improper behavior, the silence of the interloping Mr. Finney or the subse-

Since the state makes no argument on the merits of this issue, it must be presumed that it concedes that the judge was biased in this cause.[28] Needless trial by a biased tribunal is a sheer denial of constitutional rights. See Rose v. Clark, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). This Court should order a new trial.

PENALTY ISSUES

POINT XI

THE TRIAL COURT ERRED BY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

In its Answer Brief Appellee claims that the instant case was merely a planned killing and did not involve a domestic dispute. However, the evidence shows that the killing was the result of a domestic dispute. Appellant and Sandra Ashe lived together with their children. The dispute began when Ashe believed that Appellant was having an affair with Dee Dee Morgan. Ashe cried when she saw Appellant's car at Morgan's house (R 780). Ashe surveilled the house and when Appellant exited, she chased him all through town (R 803). Later that day Ashe and Appellant argued and fought. The next day Ashe changed the locks to the house so that Appellant could not enter. As a result of being locked out, after imploring Ashe to let him in, (R 792), Appellant shot Ashe. This certainly was a domestic confrontation. See Farinas v. State, 15 FLW S555, 557 (Fla. Oct. 11, 1990) (defendant shot estranged wife who was no

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quent silence of the conflicted Mr. Williams.

[28] The waiver doctrine applies to the government with the same force that it applies to the indigent Mr. Wright. Rivera v. Director, Dept. of Corrections, 915 F.2d 280, 283 (7th Cir. 1990) ("if the state waives its best arguments it must live with the consequences") (state bound by arguments made in its brief).

longer with him); Cheshire v. State, 15 FLW S504, 505 (Fla. Sept. 27, 1990) (shooting the result of longstanding lover's quarrel with estranged wife). Death is not appropriate in this case. Id.

As to the jury override issue, Appellee analyzes the non-statutory mitigating circumstances and claims there is no evidence in the record which could form a basis for a life recommendation. Appellee reaches such a conclusion because it was the defense that offered the mitigating evidence and that evidence in some instances was inconsistent with other evidence. Appellee's analysis misses the mark. In determining its recommendation, it is the jury's function to weigh the evidence. In determining whether a jury override is appropriate, the issue is whether there was evidence in the record for a basis of a life recommendation, and not which party presented the evidence or whether such evidence was totally uncontroverted. See Cheshire, supra 15 FLW at S505. Below are the seven (7) non-statutory mitigating factors found by the trial court along with the record support which could form a reasonable basis for a life recommendation[29]:

> (1) Remorse -- Appellant testified that he was sorry that he shot Ashe and he realized what he did was wrong (R 1646). There was also evidence that Appellant was suicidal when first incarcerated due to remorse and grief (R 1763).
>
> (2) Recent history of being a good worker -- his employer testified that if it were not for the criminal proceeding he would still employ Appellant (R 1605-1606).[30]

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[29] The caselaw establishing each of these factors as evidence which could form a basis for a life recommendation is presented at pages 58-59 of Appellant's Initial Brief.

[30] Contrary to Appellee's assertion, Tammy Edge did not testify that Appellant drank on the job. Edge testified that she had never seen Appellant intoxicated at work (R 1240). However, Appellant did have a drinking problem after work (R 1240). Apparently, Appellant

(3) History of mental illness in family; two aunts confined in mental institutions -- Appellant's mother testified to this (R 1598).[31]

(4) Appellant provided for Ashe and the children -- Rose Ray testified to this (R 1582) in addition to the fact he helped take care of Rose who had terminal cancer (R 1582-83). Marie Wright and Odessa Ingram also similarly testified (R1600, 1611).[32]

(5) Appellant's older brother died in a shooting accident -- Marie Wright testified to this (R 1597).

(6) Appellant's father left home when Appellant was ten years old leaving him with mother and seven children -- Marie Wright and Appellant testified to this (R 1598, 1639).

(7) Appellant has a history of alcohol and other substance abuse -- (R 1689).[33] In addition, there was evidence from Appellant (R 1642-43), and others (R 888, 1180), that Appellant had been drinking heavily, was having headaches (R 888), and was drunk (R 1181), on the night in question.

Appellee also claims that facts don't support the other non-statutory mitigating circumstances. Contrary to Appellee's claim, there was evidence that Ashe and Appellant's relationship was being broken off and that Ashe changed the locks to fully terminate the

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did have an accident <u>after</u> work in her father's truck (R 1241).

[31] Appellee's argument that for this to be considered it has to be corroborated by psychiatric testimony is specious. The jury is entitled to weigh the credibility of the witnesses and evaluate the testimony in order to recommend the appropriate sentence - in this case life.

[32] Appellee essentially claims these witnesses were lying. Again, it is the jury's function to evaluate the credibility of the witnesses.

[33] Appellee has conceded that this factor was shown, but argues that it did not affect his behavior on night in question. Again, this a matter for the jury to decide. Although the jury may have believed that the drinking, and past drinking, did not alter the legal responsibility, the jury may have believed that it somehow contributed in Appellant's actions that night. Or that his past history of alcohol abuse was mitigation as to his character. Despite Appellee's beliefs, it could be used by the jury as a basis for recommending life.

relationship. Appellant was diagnosed to be in a "depressed mood" (R 1691). This is a valid mitigating factor. See Farinas v. State, supra; Cheshire, supra; Cochran v. State, 547 So.2d 928, 932 (Fla. 1989) ("depression" due to breaking off relationship and preventing contact with child).

Also, Appellee claims there was no evidence to support childhood problems nor any history of mental or emotional problems. Such a claim is specious.[34] The childhood years are the formative years and any mental or emotional problems during childhood may influence how that person develops years later. Thus, the background of a defendant may be a valid mitigating factor. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1986); Freeman v. State, 547 So.2d 125 (Fla. 1989); Cochran v. State, 547 So.2d 928 (Fla. 1989).

Appellee also claims that there is absolutely no evidence which the jury could utilize to find the statutory mitigating circumstance that Appellant was acting under the influence of an extreme mental and emotional disturbance. Contrary, to Appellee's assertion, Dr. Ebalo testified that it was a reasonable degree of

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[34] Evidence was presented that as a small child Appellant always complained of headaches and said he felt like water or something would be running in his ears (R1598). Appellant was a very nervous child (R 1598). There was mental illness in Appellant's father's family: he had one aunt die in a state institution and he has a second aunt in such an institution now (R 1598). Wright would take Appellant to the mental health clinic; Appellant would say that his head would bother him (R 1599). Appellant's sisters, Sara and Rose, would always talk to him and try to calm him down when he had nervous attacks (R 1599). Appellant would start shaking from his nerves and they would always talk with him (R 1599-1600). There was also evidence that due to Appellant's enrollment in special education classes, he was constantly ostracized by the other children (R 1595). Again, despite Appellee's belief that defense witnesses are never credible, the jury could believe otherwise and could reasonably rely on Appellant's childhood mental and emotional problems to recommend a sentence of life.

medical probability, rather than merely a possibility, that Appellant was acting under the influence of an extreme mental and emotional disturbance:

> Q: When I ask you that question I'm not asking you about mental illness or anything like that, I'm just -- extreme mental and emotional disturbance. Could you tell me with a reasonable degree of medical probability whether or not that -- he was acting under that influence?
> A [Dr. Ebalo]: Yes, it is because of the argument he has with his --

(R 1697).[35] Appellee claims that Dr. Ebalo's testimony was unreliable due to lack of availability of certain information. However, the weight to give Dr. Ebalo's testimony is for the jury to decide, and not for Appellee to decide.[36] The same applies to the jury's evaluation of Appellant's testimony.

Also, the jury may have rejected the aggravating circumstances of CCP[37] and HAC[38], or give them very little weight.

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[35] Of course, the argument was due to Ashe's belief Appellant had a mistress and her act of locking Appellant out of the house. In addition, there was evidence that Appellant was drinking and having headaches on the night of the shooting (R 888, 1180, 1181). This could also constitute a valid mitigating circumstance. Cheshire, supra 15 FLW at S505.

[36] Appellee's evaluation is based on the allegation that Dr. Ebalo's opinion was based on omissions. However, the record shows that Ebalo had a second diagnosis after reviewing all the materials, including a report by James Stevens (R 1759, 1762), and after hearing all the information had not abandoned her diagnosis of extreme mental and emotional disturbance (R 1766). Appellee also claims that Appellant lied as to his ability to remember specifics of the shooting as shown by James Stevens report. However, Steven's report does not show that Appellant related specifics. Instead, the report, as it was read into evidence, merely indicated that Appellant was depressed due to the killing and had consumed alcohol and drugs prior to the killing (R 1762-63).

[37] Appellee claims that the jury could not reject CCP because of the evidence presented. Appellee particularly points to the allegation that Appellant told Ashe after shooting her that this would teach her not to open the door and shot her two more times [Despite this statement, it appears that the shots were fired in rapid succession]. If anything, this demonstrates the lack of

In light of the view the jury may have had of the mitigating and aggravating circumstances, it cannot be said that the facts are so clear and convincing that no reasonable person could differ as to whether the death sentence is appropriate. The override the jury's life recommendation was error in this case and violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution prohibiting disproportionate, arbitrary, and capricious application of the death penalty.[39]

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heightened premeditation by Appellant's shooting Ashe in anger after she had failed to open the door rather than a calculated execution. In fact, the jury had trouble finding regular premeditation (SR 274). An intra-family quarrel resulting in the shooting over anger of being locked out does not qualify for CCP. See Farinas, supra at S557 (No CCP where defendant shot victim, then unjammed gun three times before firing fatal shots); Garron v. State, 528 So.2d 353, 361 (Fla. 1988).

[38] Appellee's implied claim that the jury could not have given little if no weight to the aggravating factor that the killing was heinous, atrocious, or cruel is also without merit. Appellee merely cites to the trial court's conclusion to support this factor, and not to the evidence presented. The jury could have reasonably found that the shooting was in the heat of passion over being locked out and was not designed to inflict a high degree of pain and therefore HAC would not apply. Cheshire, supra 15 FLW at S505 (HAC reserved for torturous murders, since crime consistent with crime of passion HAC not apply); Porter v. State, 564 So.2d 1060 (Fla. 1990) (evidence consistent with hypothesis of heat of passion and that crime not meant to be deliberately and extraordinarily painful, thus HAC did not apply).

[39] Should this Court reverse for a new trial, the most severe sentence Appellant could receive, should he be convicted again, would be life in prison. As explained above, the maximum sentence Appellant should have received was life. To permit the imposition of the death penalty after an improper life override would violate the Double Jeopardy Clause. Although double jeopardy usually does not bar resentencing, capital sentencing proceedings are sufficiently trial-like to implicate double jeopardy. See Arizona v. Rumsey, 467 U.S. 203, 209-210, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); Brown v. State, 521 So.2d 110, 112 (Fla. 1988). In Rumsey where the trial court, acting as sentencer, failed to make correct fact finding a remand for further fact finding would violate the double jeopardy clause. This court followed Rumsey in Brown. Here, where the trial court erred in overriding the jury recommendation of life, thus making life in prison the appropriate sentence, it

POINT XII

THE TRIAL COURT ERRED IN CONSIDERING NON-STATUTORY AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

Appellee argues that his issue was not preserved for appeal. However, the record reflects that Appellant voiced his objection by stating that it was "inappropriate" for the trial court to consider the non-statutory aggravating circumstances (R 1819-21). The trial court recognized the issue and indicated that it could consider these matters (R 1821-22, 1825). Because no particular words are necessary to preserve an issue, the issue is deemed to be preserved as long as the court recognizes the issue raised. Williams v. State, 414 So.2d 509 (Fla. 1982) ("magic words" not needed to make an objection). Thus, the present issue is properly before this Court.[40]

POINT XIV

APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT CRITICAL PROCEEDINGS AT WHICH NONSTATUTORY AGGRAVATING EVIDENCE WAS PRESENTED TO THE TRIAL COURT AND AT WHICH HIS RIGHT TO BE SILENT WAS WAIVED BY HIS TRIAL ATTORNEY.

The state argues in its brief that the hearings at which Mr. Wright was absent were "concerned administrative or procedural issues and legal argument, all matters in which, even if he were

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would violate the double jeopardy clause to be subjected to the death penalty upon remand. Rumsey, supra. Thus, when remanding for a new trial, this court should direct that the maximum sentence that can be imposed would be a life sentence.

[40] Appellee also claims that the trial court did not rely on any of the evidence of which Appellant complains. However, the trial court's sentencing order shows that the trial court specifically relied on the non-violent felony of conspiracy of larceny of an automobile (R2054). Moreover, the trial court specified that it would consider the improper evidence (R 1821-22, 1825). Appellee does not even dispute that it was improper to present the other non-statutory aggravating circumstances (See pages 67-70 of Initial Brief).

present, the defendant could not participate." Answer Brief, page 108. An attorney's claim that his client is dangerous and a prosecutor's claim that the defendant is a problem in the jail are "legal argument"? To what "administrative or procedural issues" do they apply? Waiver of the defendant's right to remain silent and agreeing that state psychiatrists can question him is an insignificant stage of the case in which the defendant cannot participate? These were prejudicial matters, and it was improper for these proceedings to occur without Mr. Wright's presence and participation.[41] This Court should order a new trial.

POINT XVI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant would rely on his Initial Brief for argument on this point with the exception of noting that the United States Supreme Court has very recently held in Shell v. Mississippi, 111 S.Ct. 313 (1990), instruction on the heinous, atrocious or cruel aggravating factor, essentially identical to Florida's is unconstitutional.

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[41] There was no waiver of the right to be present. The record shows that Mr. Wright did leave March 26, 1987 hearing when his court-appointed attorney did not attend. Since the trial court conducted no hearing or inquiry on the matter similar to that conducted in Nixon v. State, 15 FLW S630 (Fla. 1990), there was not a valid waiver of his presence, much less of his right to have counsel present at the hearing.

With respect to the April 23, 1987, there is no evidence that Mr. Wright's absence was voluntary. Counsel's waiver of Mr. Wright's presence cannot be valid, especially in view of counsel's actions during the hearing. Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985) (improper to apply contemporaneous objection rule where defense counsel arranged to have defendant removed from courtroom). In general, counsel cannot waive the defendant's right to be present at proceedings involving more than mere legal argument. Larson v. Tansy, 911 F.2d 392 (10th Cir. 1990). Mr. Wright did not waive his right to be present at the pre-trial conference in writing as required by Rule 3.180(a)(3), Florida Rules of Criminal Procedure.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant other relief as it deems appropriate.

Respectfully submitted,

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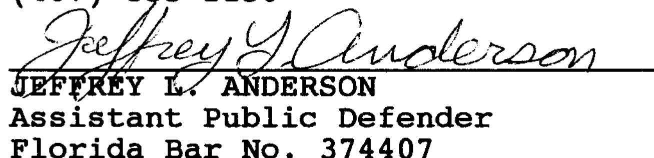

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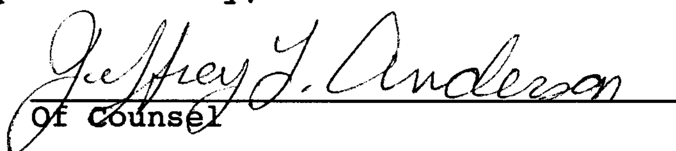
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GISELLE D. LYLEN, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, Suite N921, Miami, Florida 33128 by U.S. Mail this 5th day of February, 1991.



Of Counsel