IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,144

BURLEY GILLIAM,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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INTRODUCTION

The Appellant was the defendant in the trial court below. The Appellee, the State of Florida was the prosecution. In this brief, the Appellant will be identified as the "Defendant." Appellee will be identified as the "State." The symbol "T" will be used to designate the transcript of the lower court proceedings. The symbol "R" will be used to designate the record on appeal. The symbol "ST" will be used to desginate the Defendant's Supplemental transcript of the lower court proceedings. The symbol "SR" will be used to designate the Defendant's Supplemental record on appeal. The symbol "SSR" will be used to designate the State's Supplemental record on appeal. The symbol "p" will be used to designate a page of the Defendant's brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

The State's rendition of the Case will be addressed as it relates to Defendant's issues on appeal.

STATEMENT OF THE FACTS

I. GUILT PHASE

Detective Merrit was the lead homicide investigator. (ST.216-217). On June 16, 1982 at approximately 11:00 a.m., Detective Merrit came in contact with Defendant in the Terrant County (Forth Worth/Dallas area in Texas) Jail interview room. (ST.221-222). Detective Merrit advised Defendant why he was present and of the charges pending against him, and read him his Miranda rights from a card. (ST.222-224). After being read his rights, Defendant advised Detective Merrit he had contacted counsel. (ST.224). Detective Merrit indicated he would talk to him later and began to leave. (ST.224-225). Defendant then stated he would talk to him. (ST.224-225).

Defendant's first account of his activities the day of Joyce's murder, was that he was in Fort Lauderdale in a lounge, the name of which he didn't know. (ST.225-226). It was a topless place, and he did alot of drinking while he was there. (ST.226). The next day he brought a ticket for a bus heading to Memphis, Tennessee. (ST.226). Initially, he had indicated to Detective Merrit that he had rented a room in Oklahoma City, and after he provided his first version of events, he executed a Texan consent to search form. (R.299-300; T.225-226).

After the consent to search form had been executed by the Defendant, he provided his second version of his activities on the day of the murder. (ST.226-229). He stated he had been in a

"titty bar" with nude dancers in Fort Lauderdale. (ST.229). He smoked Malboro cigarettes and drank Budweiser between 4:00 and 6:00. (ST.229). The barmaid was a short, stocky lady that looked like an Indian. (ST.229). There were all topless dancers in the lounge, who kept coming by all the time looking for tips. (ST.229). He brought them several drinks, and gave heavy tip money while he was there. (ST.229).

He spoke to one female who was about nineteen (19) years old. (ST.229). He told her he wasn't from Florida, but from up north and that he was looking for work. (ST.229-30). She related that she hadn't eaten. (ST.230). He told her he would take her to dinner and a movie. (ST.230). The young girl had long brown hair, but he couldn't remember her name. (ST.230). He drove her in a 1961 Chevy dual wheel pickup, brown in color with Tri-State Motors, Joslin, Missouri on the side. (ST.230).

They drove south to a truck stop and brought two six-packs. (ST.230). The girl told him she was from Georgia and really needed money. (ST.230). They drove around for a while and ended up at a lake in Opa Locka. (ST.230). He didn't know what he was driving through, got stuck in the sand, and they stayed there drinking a few beers. (ST.230).

Eventually, the girl said she wanted to go swimming. (ST.230). She went down to the water, took off all her clothing. (ST.230). She wanted him to go swimming too, so he went into the water wearing cutoff blue jeans and a t-shirt.

(ST.230). It was deep water, and she started ducking [sic] him in the water. (ST.230-31). He started ducking [sic] her back, even though she couldn't swim too well. (ST.231). He grabbed her by the shoulders, and apparently held her under too long, because she stopped moving. (ST.231). He then realized she was dead. (ST.231).

He dragged Joyce out of the water, pushed her up on the bank, and attempted to push the water out of her by pressing on her chest. (ST.231). He didn't have sex with her, because he couldn't when he had been drinking. (ST.231).

He went back up to the truck, and attempted two or three times to get it unstuck. (ST.231). Eventually, some people came by and they drove him to a gas station. (ST.231). He went to retrieve the truck with a wrecker, but it was unable to pull it out of the sand. (ST.231). A guy returned with a four-wheel drive vehicle, with blue metal flake paint, and charged him $20.00 for pulling him out of the sand. (ST.231).

He drove his truck down the road, when the battery went dead. (ST.231). A male police officer drove up behind him and set up flares. (ST.231). Thirty minutes later, a police woman in a blue uniform arrived with another wrecker. (ST.231-232). His vehicle was towed to an Amoco gas station, that was located behind a 7-11 type store open 24 hours. (ST.232). He signed the work order for the vehicle to be repaired. (ST.232).

The deceased he said was a beautiful person and he panicked. (ST.232). He called a cab, went to the Trailways Bus Station, and caught a bus to Orlando. (ST.232). He then caught a bus from Orlando to Memphis, Tennessee. (ST.232). Between Orlando and Memphis he actually considered turning himself in, that he woke up during the night thinking about it. (ST.232). The next day, in Memphis, he caught a ride with a truck driver to Little Rock Arkansas. (ST.232). He finally ended up in Oklahoma City, where he got a room. (ST.232). At this point he provided Detective Merrit with the address of his room in Oklahoma City. (ST.232). He went on to Fort Worth, Texas, and subsequently was arrested. (ST.232).

Detective Raymond Sharp, of the Fort Worth, Texas Police Department, testified prior to Detective Merrit. (T.1529-1549). He witnessed Detective Merrit reading Defendant his Miranda rights. (T.1540). He also heard Defendant's second account of Joyce's alleged demise:

> **A.** I heard Mr. Gilliam tell Detective Merrit that he and the girl were swimming in the lake and he ducked her under too long and apparently held her under too long and that when he pulled her out of the water, he attempted to perform CPR but was unsuccessful.
>
> (T.1545).

Interestingly, when he arrived at the Lake Worth Police Department after Defendant's arrest, he found Defendant "lying on his back in the back parking lot of the police department." (T.1538). Detective Sharp walked up to Defendant "and said he might want to get up, there was a tarantula crawling towards

him." (T.1538). Defendant got up and walked into the Lake Worth Police Department. (T.1538). Defendant had no difficulty moving in any fashion or talking. (T.1539).

Detective Joseph Poe, was working for the Dallas Police Department in 1969, when Defendant committed statutory rape upon 15 year old Vida Lester. (T.2425-26). His testimony refuted the impression conveyed by Defendant, when he took the stand, that he had consensual sex with Vida. (T.1919-20, 1940-42, 2425-28). When Detective Poe accompanied Vida to the back lot where she was raped, he observed: "She had some bruise marks on her neck and she had a black eye." (T.2427-28).

Any additional facts relating to the Guilt Phase shall be related as they pertain to Defendant's issues on appeal.

II. PENALTY PHASE

The trial court's findings in reaching its decision that the death penalty is the appropriate sentence in this case were as follows:

> The Court has considered all the evidence and arguments which have been presented in this case in reaching its decision that the death penalty is the appropriate sentence in this case.
>
> In support of this determination, the Court makes the following findings of fact consistent with section 921.141 paragraph five.
>
> A: The defendant was previously convicted of a felony involving the use or threat of violence to the person; in that he was convicted of rape in 1969 in the state of Texas. Case number C69-1521-LK.
>
> B: The capital felony was committed while the defendant was engaged in the commission of a sexual battery, specifically, he penetrated the anus of the victim prior to her death with his sexual organ or an object.
>
> C: The capital felony was especially heinous and cruel. The victim, Joyce Marlow, was tortured by the defendant. The evidence establishes that she was annally raped prior to her death in a manner which, in effect, tore her apart. The tremendous pain and suffering incurred by virtue of this was attested to by Doctor Valerie Rao, forensic pathologist, and common understanding. In addition, the defendant inflicted multiple bite wounds on the victim while she was alive, one of which nearly severed the nipple of her breast. The pain and suffering inflicted by these wounds was extreme. The defendant also injured the head of the victim and finally caused her demise by strangulation, which permitted realization by the victim of her impending death.
>
> In reaching the conclusion that the murder of Joyce Marlow was especially, heinous, atrocious and cruel, this Court has considered the testimony of Doctor Ronald Reeves, a defense witness. The Court finds that the testimony of Doctor Reeves is deserving of very little weight and does not place into doubt the testimony of Doctor Valerie Rao which supports the Court's finding.

The Court finds that these three aggravating circumstances have been proven beyond a reasonable doubt. The evidence does not support a finding of any of the other aggravating circumstances.

As to mitigating circumstances, the Court finds that none of the statutory mitigating circumstances have been sufficiently proven.

As to non-statutory mitigating circumstances, the Court makes the following findings:

A: The defendant was brought up in a broken home and was subjected to physical abuse.

B: The defendant's current wife, his mother and other family members love him and desire that his life be spared.

The Court specifically rejects as mitigation the defendant's assertion that he is a non-violent person and a loving parent to his son. To the contrary, the Court is convinced that the defendant is an extremely violent person and that his son has been a victim of his violence.

The court has considered but rejects all other alleged mitigating circumstances.

In conclusion, the Court finds that there are sufficient aggravating circumstances to impose the death penalty, as the aggravating circumstances outweigh the mitigating circumstances. Accordingly, the crime in this case warrants and justifies the imposition of the death penalty.

It is hereby the Order and Judgment of this Court that defendant, Burley Gilliam, be, and is hereby sentenced to death.

(T.2996-98).

Any additonal facts relating to the Penalty Phase shall be related as they pertain to Defendant's issues on appeal.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO RECUSE?

A. Whether the Motion was Untimely?

B. Whether the Motion was Legally Insufficient?

C. Whether the Trial Court's Comment on the Truth of the Allegation Regarding an Improper Ex Parte Communication which Came Long After It Ruled that the Allegations in the Motion, Even if True, Were Legally Insufficient, was Mere Surplusage, which in any Event was the Product of Deliberate and Repeated Goading by Defense Counsel?

II.

WHETHER THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF EXPOSURE TO A JUROR OF A POTENTIALLY PREJUDICIAL NEWSPAPER ARTICLE, WHERE THE LETTER WRITTEN BY THE JUROR TO THE TRIAL COURT CAME AFTER SHE HAD RENDERED HER VERDICT OF GUILT, HER ADVISORY RECOMMENDATION AS TO THE DEATH PENALTY, AND BEEN DISMISSED FROM THIS CAUSE AS A JUROR AND SHE DID NOT LEARN OF THE ARTICLES EXISTENCE COMPOSING HER LETTER?

III.

WHETHER THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING STATUTE WAS CORRECT BASED UPON THE FACTS OF THIS CASE?

A. Whether the Trial Court Properly Found the Aggravating Circumstance of Heinous, Atrocious or Cruel?

B. Whether the Trial Court's Sentencing Order Imposing the Death Penalty Reflects Reasoned Judgment?

C. Whether the Trial Court Correctly Exercised its Discretion in Allowing into Evidence a Certified Copy of a Texas Incident Report and a Letter from Defendant's Former Wife, to Rebut His Assertions that He was a Nonviolent Person and a Loving Parent, in Compilation with §921.141(1) Florida Statutes?

IV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A CONSECUTIVE SENTENCE OF LIFE FOR DEFENDANT'S SEXUAL BATTERY CONVICTION, WHERE THE RECORD FROM DEFENDANT'S FIRST TRIAL DEMONSTRATES THAT IT FELT IT HAD TO IMPOSE A CONCURRENT SENTENCE?

SUMMARY OF ARGUMENT

I.

The trial court correctly exercised its discretion in denying the Defendant's motion to recuse.

A.

The motion, coming on the sixth day of trial, the third day after the jurors had been sworn, was untimely. Defendant's co-counsel alleged in their supporting affidavits that the trial court's demeanor, as early as voir dire, demonstrated prejudice against them thereby rendering them ineffective.

B.

The motion was legally insufficient. First, one of the allegations, as to an ex parte communication between the trial court and the State is unequivocably refuted by the record. Second, the affidavits were not properly sworn to. Finally, all other allegations were legally insufficient based on cited authorities. In short, the affidavits do not demonstrate a well-grounded fear on the part of the defendant that he was not receiving a fair trial at the hands of the presiding judge.

C.

The trial court commented on an allegation that the record clearly demonstrates was false. Given the untimeliness of the motion, and the legal insufficiency of its supporting affidavits; the trial judge's remarking that a false allegation is false raises the invited error doctrine.

II.

The Defendant failed to establish a prima facie case of exposure to a juror of a potentially prejudicial newspaper article. By Defendant's own rendition of the facts, the letter written by the juror to the trial court, demonstrates that she was not exposed to the article until after she had been dismissed as a juror. The motion for order to conduct post-trial interviews was not accompanied by any affidavits. The motion itself exhibits no personal knowledge of juror misconduct, but mere speculation as to whether the juror in question was influenced by the article.

III.

The application of Florida's capital sentencing statute was correct based upon the facts of this case.

A.

The trial court properly found the aggravating circumstance of heinous, atrocious or cruel based upon the authorities cited, and the facts proven by the State as to the victim's demise.

B.

The trial court's sentencing order reflects the reasoned judgment required in imposing the death sentence. It found three aggravating circumstances, no statutory mitigating circumstances, and two nonstatutory mitigating circumstances. It concluded that the three aggravating circumstances outweighed

the two nonstatutory mitigating circumstances. Its conclusions of fact are clothed with a presumption of correctness. Beyond that, the jury recommended the death penalty by a vote of 10 to 2.

C.

The trial court correctly exercised its wide discretion in matters of evidence, by allowing into evidence a certified copy of a Texas Incident Report relating Defendant's treatment of his former wife and his son, and a letter from his former wife, to rebut his assertions during the sentencing phase of his trial, that he was a nonviolent person and a loving parent.

IV.

The consecutive life sentence imposed on Defendant for his sexual battery conviction was not a retaliatory measure for his being given a second trial. The standard enunciated by the United States Supreme Court was satisfied.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO RECUSE.

The procedural requirements of, and policy behind, Rule 3.230 F.R.Crim.P. have been ennunciated by this Court as follows:

> When a party believes he cannot obtain a fair and impartial trial before the assigned trial judge, he must present the issue of disqualification to the court in accordance with the process designed to resolve this sensitive issue. The requirements set forth in section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the procceeding. The same basic requirements are contained in each of these three processes. First, there must be a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification. Second, the application must be timely made. Third, the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Sections 38.10 and Florida Rule of Ciminal Procedure 3.230 also require two affidavits stating that the party making the motion for disqualification will not be able to receive a fair trial before the judge with respect to whom the motion is made, as well as a certificate of good faith signed by counsel for the party making the motion.
>
> Section 38.10 requires that these affidavits be from persons unrelated to the parties or counsel. No affidavits are required under Florida rule of Civil Procedure 1.432.

A. The Motion was Untimely.

Defendant filed his motion to recuse the Honorable Theodore G. Mastos on June 13, 1989, technically the sixth (6th) day of trial. Defendant in his brief correctly states that "it was filed on the morning of the third day after the jurors had been sworn." (pp.12-13). He then reiterates paragraph 3 of his Motion to Recuse as grounds for his failure to file in comportion with Rule 3.230(c) F.R.Crim.P.:

> 3. As good cause for the failure to so file within such time the defendant submits that the acts manifesting bias and prejudice against the defendant occurred at the commencement of the trial.
>
> (R.338; pp.12-13).

Yet, the supporting affidavits of Defendant's co-counsel, Edward M. Koch and Kenneth L. Marvin, in and of themselves demonstrate the untimeliness of the motion. In paragraph 7 of Mr. Koch's affidavit, the demeanor of the trial court, during voir dire, is discussed. (R.340-341). Similarly, Mr. Marvin discussed the demeanor of the trial court during voir dire, in paragraph 4 of his affidavit. (R.343). Mr. Koch also placed in issue, the trial court's demeanor during the examination of Officer Dorothy Ballard, in paragraph 8, which transpired early on June 9, 1988, the fourth day of trial. (R.341; T.1192).

Another factor which demonstrates the untimeliness of the motion to recuse, is that none of the supporting affidavits to the motion contained the requisite certificate of good faith

signed by Defendant's co-counsel.[1] (R.340-346; SR.37-40). Livingston v. State, 441 So.2d 1083 (Fla. 1983). When the motion was first raised, the State argued that this rendered the motion legally insufficeint. (T.1595-1596, 1602). It proffered that this could perhaps be remedied by having the affiants swear under oath in open court as to the allegations raised. (T.1602). This Defendant's co-counsel failed to do. When the motion was revisited a second time (the next morning) the State again suggested the affiants be placed under oath so that the affidavits might properly be sworn to. (T.1768). Again, co-counsel for the defense declined to so swear. (T.1769). It was only after the State had rested, and the motion to recuse was raised a third time, that the affiants swore under oath that the allegations were true and correct. (T.1801-1803).

This Court has addressed the timeliness of a motion to recuse accordingly:

> Appellant contends that the trial judge erred in refusing to disqualify himself from participation in the sentencing phase of the trial. Appellant filed his motion, based on the judge having previously sentenced him to death, at the beginning of the sentencing hearing, after the judge had presided over the guilt phase of the trial.
>
> Florida Rule of Criminal Procedure 3.230(c) provides: "A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time." Appellant's motion was untimely since no good cause was shown for not having filed it ten days before the trial.

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[1] The State would refer this Court to paragraph 4 of the Motion to Recuse which states: "This motion is filed in good faith." (R.338; SR.37).

> Sentencing in capital felony cases is based on facts established at the guilt phase of the trial as well as those brought out at the sentencing phase. §921.141(3), Fla.Stat. (1977). It is therefore highly desirable that the same judge preside over both. The sentencing judge should be aware of all the relevant facts and circumstances. A motion to disqualify a judge on the ground of prejudice that may affect sentencing should be filed before commencement of the guilt phase of the trial so that a new judge, if one is to be designated, may preside over the trial from start to finish and participate in sentencing. Since the motion in this case was not based on anything that happened during the trial, there was no reason for it not to have been filed ten days before the trial began. Moreover, appellant's motion merely stated conclusions and therefore lacked legal sufficiency. We therefore hold that the denial of the motion was not error.
>
> Jones v. State, 411 So.2d 165, 167 (Fla. 1982); cert. den. 103 S.Ct. 189.

Generally, a party waives any grounds for disqualification of a judge or justice, when the suggestion is not filed within a reasonable period of time after having knowledge of such grounds. Schwartz v. Schwartz, 431 So.2d 716 (Fla. 3d DCA 1983). A motion to disqualify a judge should be denied for untimeliness only when its allowance will delay the orderly progress of the case, or it is being used as a disruptive tactic. Deren v. Williams, 521 So.2d 150 (Fla. 5th DCA 1988).

It is obvious from their affidavits, that Mr. Koch and Mr. Marvin had misgivings about the trial court as early as voir dire. (R.340-346; SR.37-40; T.1593). Yet, they waited until the State had proceeded through more than two days of its case-in-chief to file Defendant's motion to recuse. (R.340-346; SR.37-40; T.1593). They did not swear as to the allegations contained

in the affidavits until the next day, after the State had rested its case-in-chief. (T.1798, 1801-1803). Interestingly, the motion came after the testimony of Detective Merrit, the lead homicide investigator, who related the most damaging evidence against Defendant to that point in the trial, his own confession. (ST.229-232). He confessed to Detective Merrit, with specificity, the chronology of events before and after the victim's gruesome demise. (ST.229-232). As to her death, he related that was a consequence of accidentally ducking the victim until she drowned. (ST.229-232).

If defense co-counsel were truly concerned as to the Defendant receiving a fair trial, good cause for the untimeliness of their motin could have been demonstrated by filing a proper motion with supporting affidavits, containing a certificate of good faith of at least one of Defendant's counsel, prior to the State's commencing its case. That way, another trial judge could have been assigned to try the case, wihtout unduly delaying the orderly progress of the case. Jones v. State, supra; Deren v. Williams, supra.

Instead, they waited until the State had elicited testimony for more than two days. (T.1162-1593; ST.229-271). The State submits that the policy behind the issue of a motion to recuse filed in the middle of trial, should be the same as that exhibited for motions for mistrial. As this Court established, the requirements set forth in Rule 3.230 F.R.Crim.P.:

> ... were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding.
>
> Livingston v. State, supra, at 1086.

The defense, in any criminal proceeding, as a matter of policy, should not be allowed to assume a position of: "Let's wait and see how things go with the State's case, and then we'll decide whether to file our motion for recusal ." That appears, from the record, to be exactly the posture assumed by the defense in the instant cause. The State submits that the motion to recuse was a disruptive tactic, geared to invite error for appellate review and to delay the orderly progress of the trial, and as such was untimely. Livingston v. State, supra; Jones v. State, supra; Deren v. Williams, supra. "In other words, 'gotcha!' maneuvers will not be permitted to succeed in criminal, any more than in civil litigation." State v. Belien, 379 So.2d 446, 447 (Fla. 3d DCA 1980).

B. The Motion was Legally Insufficient.

The following allegation made by Mr. Marvin, in paragraph 3 of his affidavit, is clearly refuted by the record:

> Subsequently, after an ex parte meeting with an Assistant State Attorney and a representative of the Attorney General's office the Judge came back into the courtroom, changed his prior ruling and allowed the defense to recall Mr. Sherrie.
>
> (R.342-343; T.1373-1421).

Such an ex parte meeting could not have occurred prior to the trial court's reversal of its earlier ruling pertaining to refreshing witness Sherrie's recollection, because the record demonstrates the trial judge never left the bench. (T.1373-1421).

After Mr. Sherrie completed his testimony, the State resumed its case with Witness Frank Norwich.[2] (T.1373-1421). Once Mr. Norwich had completed his testimony, the issue of refreshing Mr. Sherrie's recollection was revisited in open court with all parties present. (T.1373-1421). Argument focused on the defense's desire to declare Mr. Sherrie adverse, thereby allowing him to be impeached with prior statements. (T.1373-1421). He was voir dired outside the presence of the jury, the tiral court heard further argument, and then reversed its prior ruling as to refreshing his recollection. (T.1373-1421). Without leaving the bench, the trial court reversed itself in open court with all parties present. (T.1373-1421).

As previously delineated, when the motion to recuse was first raised, the State argued that it was untimely and legally insufficient in that the supporting affidavits were not properly sworn to. (1595-1596). A motion to disqualify a trial judge has been held to be legally insufficient, because there was no certificate of counsel that the motion was made in good faith, so that it was technically deficient, and because the facts set

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[2] Mr. Sherrie was called out of turn as a witness for the defense. (T.1373-1421).

out in the motion and affidavits were insufficient to establish prejudice on the part of the judge against the defendant. Dempsey v. State, 415 So.2d 1351 (Fla. 1st DCA 1982); See also Heiney v. State, 447 So.2d 210 (Fla. 1984); cert. den. 105 S.Ct. 303.

This Court has delineated the proper test of the sufficiency of an affidavit for disqualification of a trial judge for prejudice:

> Tafero also feels that the trial judge, an ex-highway patrolman, should have recused himself. He urges that the test for recusal is the accused's fear of unfairness, not whether the judge is actually capable of conducting a fair trial. The test of the sufficiency of an affidavit for disqualification for prejudice is whether or not the sworn statement shows that the movant has a well-grounded fear of not receiving a fair trial at the hands of the presiding judge. *State ex rel. Brown v. Dewell,* 131 Fla. 566, 179 So. 695 (1938). The facts and reasons given in the sworn affidavit must tend to show personal bias or prejudice. This rule is not intended as a vehicle to oust a judge who has made adverse pretrial rulings. *Suarez v. State,* 95 Fla. 42, 115 So. 519 (1928).
>
> Tafero v. State, 403 So.2d 355, 361 (Fla. 1981); cert. den. 102 S.Ct. 1492

A review of the affidavits themselves, demonstrates that they fail the test of sufficiency. (R.340-346; SR.37-40; T.1798, 1801-1803). Finally, the following authorities demonstrate that the remainder of the allegations were insufficient as well.

The fact that a judge has shown anger or displeasure toward either the defendant or his counsel, has been held to be insufficient grounds to demonstrate a trial judge's personal

bias or prejudice. Dempsey v. State, supra; Stanley Communications Inc. v. Powell d/b/a Powell's Dozer Service, 526 So.2d 1034 (Fla. 1st DCA 1988). Adverse judicial rulings are not a basis for disqualification of a judge for bias or prejudice. Payton Health Care v. Estate of Campbell, 497 So.2d 1233 (Fla. 2d DCA 1986); Claughton v. Claughton, 425 So.2d 1073 (Fla. 3d DCA 1984). A judge is not required to abstain from forming mental impressions and opinions during the course of presentation of evidence. Mobil v. Trask, 463 So.2d 389, 391 (Fla. 1st DCA 1985). Under Florida law, bare allegations of bias are insufficient for judicial disqualification. Schultz v. Wainwright, 701 F.2d 900 (11th Cir. 1983).

Based upon these authorities, the affidavits were legally insufficient. They fail to demonstrate that the Defendant had a "well-grounded fear of not receiving a fair trial at the hands of the presiding judge." Tafero v. State, supra. As to Defendant's affidavit, the final paragraph reads as follows: "I do not think I am getting a fair trial. The Judge was better in my first trial." (R.345-346). Interestingly enough, the trial Judge in his first trial in this State, for murder in the first degree, was the Honorable Theodore Mastos. Gilliam v. State, 514 So.2d 1098 (Fla. 1987).

C. The Trial Court's Comment on the Truth of an Allegation, Regarding an Improper Ex Parte Communication, Came Long After It Ruled that the Allegations in the Motion, Even if True, Were Legally Insufficient, and Hence It's Comment was Mere Surplusage, which in any Event was the Product of Deliberate and Repeated Goading by Defense Counsel.

Initially, when the motion to recuse was first raised, and the trial court entertained argument from opposing counsel, it simply denied the motion. (T.1604). However, the motion was revisited a second time, the next day, June 14, 1988, technically the seventh (7th) day of trial. (T.1754-1778).

> **THE COURT:** Well, Mr. Koch, the Court, you know, has had an opportunity to reread the motion and the affidavits, and what is particularly distressing to the Court is that many many of the things said here are simply not true.
>
> There is nothing in that record that would indicate that this Court has --
>
> (Discussion off the record not related to this case)
>
> **THE COURT:** Many of the statements made in here are, in my opinion, false. But the problems that the Court has is that the rules say that the Court is not allowed to comment and the Court hasn't commented, you know, point for point.
>
> The issue is whether these affidavits, on their face, put the Court in a position of having no choice but to step aside, and that is why I am attempting to look into this. Because the Court has never had a vested interest either way. The Court's job is to try the case and to try it fairly and allow a jury to render a decision.
>
> (T.1760-1761).

Mr. Koch then addressed the lower tribunal, and it responded as follows:

> **THE COURT:** I understand.

> So many of these allegations are purely evidentiary questions that the Court made rulings on. This Court gave you the opportunities to argue sidebar, to supplement the record, and, again, even -- you know, again, I have a great number of questions about those allegations. And I think any trial judge would.
>
> But that is not really the question. I am not here to debate these allegations. I am here to try to reassess the situation, and the case law seems clear that the trial judge is not allowed to go behind those allegations.
>
> (T.1763-1764).

Argument continued, which was concluded by the trial court as follows:

> **THE COURT:** All right, again, the Court in trying to apply the law was relying on 794.022 Rules of Evidence, which does deal with that question.
>
> All right, the Court has ruled.
>
> The trial will continue.
>
> The Court is satisfied that the affidavits are insufficient. And this Court has been presented with a motion for mistrial based upon everything thus far, and this Court at this time will deny the motion for mistrial and order the trial to resume.
>
> (T.1778).

The motion to recuse was revisited a third time, after the State had rested. (T.1801-1815). Mr. Koch argued that Defendant was "being denied effective assistance of counsel." (T.1809). This third sojourn into the motion to recluse was concluded by the trial court as follows:

> **THE COURT:** All right.
>
> Starting from the top, the first thing, of course, Mr. Koch renewed was the motion to recuse.

> Obviously, if the motion was well taken, the Court would have to recuse itself and couldn't proceed to go any further.
>
> However, this Court is of the opinion that the swearing, waiting until after the State has rested, to attach the language that the facts are true and correct and to swear before this Court is in fact untimely.
>
> Therefore, the affidavits continue to be legally insufficient under the Rule 3.230.
>
> (T.1814-1815).

After the jury had retired to deliberate, the defense renewed numerous motions it had made during the trial, including the motion to recuse. (T.2461). This was the fourth time it had been addressed. The transcript reflects the following:

> **THE COURT:** Well, the record will reflect in the event of a conviction, and the appeal record for the Supreme Court, if the Supreme Court is willing to read this transcript from word one to the final word, I am confident that they will say that this judge labored under a most difficult case, that he labored under some of the most bitter, bitter animosity that has ever existed between two trial lawyers in this building existed.
>
> I believe they will conclude that the motion for recusal was a sham. I think they will conclude, as this Court did, that it was not legally sufficient at the time it was filed.
>
> There is a great deal of difference between an affidavit that contains statements from a transcript and innuendos from the motion of a hand or a look or a frown.
>
> Those affidavits, in the opinion of this Court, and I believe the Supreme Court would find the same way, were legally insufficient.
>
> Furthermore, the parties did not swear to the affidavits until after the State rested. If they were untimely in the beginning, not comporting with the rule, ten days before the time the case is called for trial, that is the appropriate time to recuse a judge, unless good cause is shown, I submit

that those what purported to be affidavits in no way stated a good cause and the fact that they waited until after the State rested to renew their motion for recusal and at that time the so-called five affiants then came forward and said the facts are true and correct, I find that to be untimely. And the Court will continue to deny the motion for recusal.

MR. MENDELSON: Judge, could I make a couple of comments as to the motion to recuse.

When I argued the motion to recuse, I conceded at that point in time that they must be accepted as true.

In retrospect, Judge, I would rely upon motions to recuse in identical situations which are filed before trial.

I am not sure that is correct. I believe the State will research that question further and I believe on appeal you might find cases to say nunc pro tunc --

THE COURT: Again, I urge, I urge all the members of the Supreme Court, in the event of a conviction here, that they read this transcript from start to finish, read those affidavits, what purport to be affidavits, and let an Appellate Court draw their own conclusion.

For us to sit here and argue about it will accomplish nothing.

MR. MENDELSON: Judge, one other point on the motion to recuse, and it is on a personal note, I made mention about perjury regarding that.

Believe me, it is not the State's wish to charge any attorney with perjury or to investigate that. And I implore Mr. Marvin -- you have made the statement that there was as ex parte meeting with the judge before his honor changed his ruling on Jeff Sherrie. Now the transcript will reveal that is not true. Likewise, the transcript has been ordered. Nobody wants to investigate any perjury in this case and I would just ask the honorable thing be done at this point.

That is not true. The conversation with Mr. Novick occurred well after your Honor had already changed his ruling, it is in black and white.

A repudiation of that statement after this case is over will not have the regarded effect on the

Florida Supreme Court, and it is demonstrably not true and all I'm asking Mr. Marvin and Mr. Koch is to do the honorable thing.

I'm not contesting anything else. Those could be subject to different opinions. But the statement on an ex parte meeting prior to Your Honor changing his ruling regarding Mr. Sherrie, that is demonstrably untrue.

THE COURT: The record should reflect the following: That the Court did have a conversation with Mr. Novick, who is not an attorney connected with the trial of this case, and, frankly, it worked to the benefit of the defendant, that I did have that conversation --

MR. MENDELSON: Your Honor --

THE COURT: Because I came in, I reversed myself and I allowed this witness to be refreshed with this testimony.

MR. MENDELSON: But your Honor, I point out your conversation with Mr. Novick occurred after Your Honor had already changed its ruling.

If you recall --

THE COURT: I -- again, after two weeks of being beaten and battered in here I don't remember right now the exact sequence. But I am saying on this record that I had no ex parte conversation with anybody in this case.

(T.2466-2470).

The renewed motion for recusal was denied. (T.2470).

The motion to recuse was raised for a fifth time in Defendant's motion for new trial. (T.2732-2740). Mr. Koch alleged ". . . the final comments by the Court that day was [sic] a direct attempt to refute the allegations contained in paragraph three of Mr. Marvin's affidavit." (T.2737). The State rejoindered with the following:

> **MR. MENDELSON:** Just very briefly. I really don't want to go into any detailed argument on the allegations in the affidavit, and this is my statement, Judge, just because my name is mentioned in the allegation, in the affidavit. The only allegation in the affidavit you made a ruling about at that time was, there was an ex parte meeting between the state attorney and the assistant attorney general, which has been abandoned, but the allegation -- at which point you Honor came back into the courtroom and changed its ruling. Obviously they alleged in their affidavit that this ex parte meeting occurred before your honor changed its ruling. I have consistently maintained and am maintaining today that it is absolutely true your honor changed your ruling before this conversation with Jay Novick, which occurred maybe six hours later which did not involve an assistant attorney general, involved Mr. Novick as your Honor stated on the record.
>
> (T.2738-2739).

The trial court denied the motion for new trial, addressing the motion to recuse as follows:

> With regard to the motion to recuse, in the number of years I have had on the bench nothing has ever been quite as troubling as to have something like that filed six days into trial. You know, win, lose or draw at the end of these cases all we really have is our reputation as professionals. The ability to come in and do a job, that frankly is a tough one, and anybody who thinks that sitting on a first degree murder case where death is the possible sentence -- this is an awfully lonely seat and there aren't too many people that feel comfortable sitting in this seat in this type of a case.
>
> (T.2740).

As the above record indicates, the trial court initially denied the motion without comment. When it was revisited a second tme, the trial court acknowledged that it should not delve into the truth of the specific allegations, and that "[t]he issue is whether those affidavits, on their face, put the

Court in a position of having no choice but to step aside... ." (T.1761). Further on the trial court stated: "...[T]he trial judge is not allowed to go behind those allegations." (T.1764). It concluded its discussion of the recusal motion by stating: "The Court is satisfied that the affidavits are insufficient." (T.1778).

The fourth time the motion was visited, the trial court in discussing the allegations stated: "there is a great deal of difference between an affidavit that contains statements from a transcript and innuendos from the motion of a hand or a look or a frown." (T.2466-2467). It then went on to hold that the affidavits were technically deficient as well. (T.2466-2467). The point here however, is that the trial court was well aware that its ruling should be based purely on the legal sufficiency of the allegations, not their truth, and that it issued its ruling accordingly.

The comments of the trial court concerning the truth of the ex parte allegation, came only after repeated goading by defense counsel. Defense counsel repeatedly raised the recusal issue in a deliberate attempt to elicit from the trial court a comment on the merits of the allegation. Numerous cases have addressed this identical scenario.

In Sanders v. Yawn, 519 So.2d 28, 29 (Fla. 1st DCA 1987), an action was brought for a writ of prohibition after the trial court had denied a recusal motion. The First District ruled as follows:

> In finding petitioner's motion to recuse to be legally insufficient, respondent analyzed the meaning and construction of the objected to remarks and preliminary rulings made by him during a prehearing conference. Petitioner argues that in doing so, respondent ruled on the truth of the allegations and refuted the charges of partiality. Therefore, according to *Bundy v. Rudd,* 366 So.2d 440 (Fla. 1978), petitioner contends she is entitled to the writ regrdless of the legal sufficiency of her motion.
>
> However, we find the motion was facially insufficient to show a reasonable fear of bias, and respondent's discussion of the allegations though perhaps broader than was wise or necessary, did not dispute that the objectionable words and actions occurred. Instead, we construe the order denying the motion for recusal solely as a determination that those words and actions were not such as to cause a reasonable fear of bias or prejudice. *See Mobil v. Trask,* 463 So.2d 389 (Fla. 1st DCA 1985).

Similarly, the Fourth District ruled accordingly:

> [A]ppellant filed a motion for disqualification of Judge Tyson with supporting affidavits. The grounds for disqualification were that the affiants had a well grounded fear that Judge Tyson was prejudiced against appellant. The ground for the alleged fear of prejudice was that the judge was prejudiced against counsel for his failure to appear on the trial date and the judge's action in increasing appellant's bond based on evidence of appellant's threats against a State witness. The trial judge found the motion was legally insufficient and we agree. The record does not justify the alleged fear of prejudice expressed in the affidavits. Nor do we believe the trial judge overstepped his bounds in commenting on the motion and affidavits. It is axiomatic that a trial judge may not pass upon the truth of the facts alleged nor adjudicate the question of disqualification. *Bundy v. Rudd,* 366 So.2d 440 (Fla. 1978); *Management Corp. of America, Inc. v. Grossman,* 396 So.2d 1169 (Fla. 3d DCA 1981). That rule was not violated here; the trial judge passed on the sufficiency of the motion for disqualification--he did not pass on its merits.
>
> Yesbick v. State, 408 So.2d 1083 (Fla. 4th DCA 1982).

Another opinion by the Fourth District renders the following ruling as to recusal, which is highly pertinent to this issue:

> Finally, as to recusal, Mr. Weinstein attempts to bootstrap by using his own wrongful contumacious conduct which was justifiably addressed by the trial court as a substantive basis for engineering a change in judges. This should not be countenanced.
>
> Cardinal v. Wendy's of South Florida, 529 So.2d 335, 340 (Fla. 4th DCA 1988).

It would be intellectually dishonest to attempt to refute that the trial court, after the fourth time the motion to recuse was raised, passed on the truth of Mr. Marvin's allegation as to the alleged ex parte communication. (T.2469-2470). However, as this Court has held: "A lawyer cannot disagree with the court and deliberately provoke an incident rendering the court disqualified to proceed further." State v. Himes, 36 So.2d 433, 483-439 (Fla. 1948). In the instant cause, defense co-counsel did exactly that, repeatedly resurrecting the recusal motion in a deliberate and calculated effort to evoke comments on the merits of the allegation by the trial court. It cannot be stressed enought that the allegation concerning the ex parte communication is positively refuted by the record, and defense counsel should not be rewarded for submitting a false allegation, and then provoking the trial court into commenting thereon.

As previously submitted by the State, the motion to recuse in the instant cause was clearly a disruptive tactic, the sole purpose of which was to create an issue on appeal. Id.; Fischer

v. Knuck, 497 So.2d 240 (Fla. 1986); State v. Himes, supra; Deren v. Williams, supra. The motion was a "gotcha!" maneuver, and as such clearly constitutes invited error. State v. Belein, supra. A defendant should not be allowed, midway through a trial, to utilize a motion to recuse as a device to manipulate the criminal justice system, thereby undermining public confidence in its integrity. Livingston v. State, supra.

It would be a travesty of justice to sanction such behavior as was exhibited in Defendant's motion to recuse. Is it error for a trial court, on a motion to recuse, submitted in the middle of trial, to comment on an allegation which the record demonstrates is clearly false, where it has already ruled that the allegation, even if true, is legally insufficient? The State submits that under these circumstances, that such comments should be viewed as mere surplusage. Should this Court disagree, the State further submits that when the motion to recuse is utilized as a disruptive tactic to create error, the trial judge's comment that a false allegation is false, is harmless error. State v. DiGuilo, 491 So.2d 1129 (Fla. 1986). The evidence, including Defendant's own confession, was overwhelming that he heinously sexually assaulted and murdered Joyce Marlow.

II.

THE DEFENDANT CLEARLY FAILED TO ESTABLISH A PRIMA FACIE CASE OF EXPOSURE TO A JUROR OF A POTENTIALLY PREJUDICIAL NEWSPAPER ARTICLE, WHERE THE LETTER WRITTEN BY THE JUROR TO THE TRIAL COURT CAME AFTER SHE HAD RENDERED HER VERDICT OF GUILT, HER ADVISORY RECOMMENDATION AS TO THE DEATH PENALTY, AND BEEN DISMISSED FROM THIS CAUSE AS A JUROR, AND SHE DID NOT LEARN OF THE ARTICLES EXISTENCE UNTIL AFTER COMPOSING HER LETTER.

This Court has held:

> [T]he trial court's conclusions of fact come to us clothed with a presumption of correctness, and, in testing the accuracy of these conclusions, we must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. (Citations omitted).
>
> Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980). See also Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78, 81 (1982).

Although potentially harmful misconduct by a juror is presumptively prejudicial, the Defendant has the initial burden of establishing a prima facie case that the conduct is potentially prejudicial. Amazon v. State, 487 So.2d 8 (Fla. 1986).

> ... [I]t should be clearly understood that not all [misconduct] will vitiate a verdict, even though such conduct may be improper. It is necessary either to show that prejudice resulted or that the [misconduct was] of such character as to raise a presumption of prejudice.
>
> Id. at 11; citing Russ v. State, 95 So.2d 594 600-601 (Fla. 1957).

In Russ v. State, supra, this Court cited the following language from a prior Missouri case:

> * * * We have no hesitancy in saying that, in order to warrant such course, [granting of motion for new trial] the affidavit should be full and explicit, indicating fully as to whether or not he was an eyewitness-that is, witnessed personally the misconduct-or, if not, as to the persons from whom he obtained the information, and further indicating at least some sort of a reason why he is unable to secure the affidavit of any other witnesses aside from himself to support his motion to a new trial.
>
> Id. at 599; State v. Page, 212 Mo. 224, 110 S.W. 1057 (1908).

The District Court of Appeal of Florida, Fifth District, ruled accordingly, as to an individual seeking certiorari review of an order scheduling a post-trial interview of jurors:

> Petitioners seek certiorari review of an order scheduling a post-trial interview of jurors. Respondents motion to permit interview of jurors is not supported by affidavit, and the allegations are speculative, conclusory, or concern matters that inhere in the verdict itself. *See Marks v. State Road Dept.*, 69 So.2d 771 (Fla. 1954); *Clark v. Merritt*, 480 So.2d 649 (Fla. 5th DCA 1985); *Kirkland v. Robbins*, 385 So.2d 694 (Fla. 5th DCA 1980), *rev. den.* 397 So.2d 779 (Fla. 5th DCA 1981); *National Indemnity Co. v. Andrews*, 354 So.2d 454 (Fla. 2d DCA 1978), *cert. den.* 359 So.2d 1210 (Fla. 1978); *Brassell v. Brethauer*, 305 So.2d 217 (Fla. 4th DCA 1974). Unless there are sufficient allegations of juror misconduct relating to matters which are extrinsic to the verdict, inquiry into the deliberations of a jury is prohibited. This long-standing rule protects jurors who have performed their duty in a lawful manner from harassment, and protects the verdict itself from unfounded challenges which only hamper the efficient administration of justice. As respondents' motion to permit interview of jurors was legally insufficient, the trial court departed from the essential requirements of law in scheduling the interview. Therefore, we grant the petition, issue the writ, and quash the order scheduling a post-trial interview of jurors.
>
> Orange County v. Fuller, 502 So.2d 1364 (Fla. 5th DCA 1987).

Finally, a hearsay affidavit made by counsel for defendant, which set forth alleged statements made by a juror and conclusions of what influenced jurors in arriving at their verdict, did not constitute a ground for new trial in a robbery prosecution. Branch v. State, 212 So.2d 29 (Fla. 2d DCA 1968).

Defendant's own rendition of the chronology of events pertaining to Juror Terracall's letter, as put forth in his brief, demonstrates that he failed to make a prima facie case of prejudice:

> The motion set forth this chronology: the jury was sworn on June 8, 1988; the defendnt filed his motion to recuse on June 13; the Miami Herald published an article that date regarding the motion to recuse; the jury convicted the defendant on June 17 and, on June 20, recommended the death penalty for Burley Gilliam; and, on June 23, 1988 one of the jurors wrote a letter to the judge. The article and the juror's letter were attached to the motion.
>
> (SR; R. 425-428, p.18).

He then adds that the letter, dated June 23, 1988, contained the following handwritten post-postscript:

> P.P.S. After this letter was typed I was given the Herald article chronicling Defense's complaints about you. A case of grasping at straws I would say.
>
> (R.229, 425-428, p.19).

Despite the fact that the letter's post-postscript clearly demonstrates that Juror Terracall reviewed the Herald Article after she was dismissed as a juror, Defendant argues in his brief the following:

> The contents of the letter-particularly the sentence in paragraph 1, "You maintained your equanimity in the face of anger and unwarranted criticism directed toward yourself"--reflect that either the letter was written in response to the article or the juror received information extrinsic to the facts introduced at trial.
>
> (p.19).

First, and foremost, the State submits that this allegation is purely speculative and conclusory. Orange County v. Fuller, supra. The same speculation is demonstrated in Defendant's motion to conduct post-trial interviews of jurors. (R.433-437). Second, there were no affidavits attached to the motion which demonstrate personal knowledge of misconduct by Juror Terracall, or any of the jurors for that matter. (R.433-437). Russ v. State, supra at 599.

The Defendant's motion for an order authorizing defense counsel to conduct post-trial interviews was legally insufficient. It did not contain affidavits demonstrating personal knowledge of misconduct by Juror Terracall, or of any of the jurors. The allegations that "the letter was written in response to the article or the juror received information extrinsic to the facts introduced at trial," is purely speculative and conclusory. Finally, the letter itself demonstrates that Juror Terracall did not see the allegedly prejudicial article until after she had been dismissed as a juror.

As to Juror Terracall's commenting Judge Mastos maintained his "equanimity in the face of anger," the State would refer this Court to the following observation by the trial court:

> **THE COURT:** Well, the record will reflect in the event of a conviction, and the appeal record for the Supreme Court, if the Supreme Court is willing to read this transcript from word one to the final word, I am confident that they will say that this judge labored under a most difficult case, that he labored under some of the most bitter, bitter animosity that has ever existed between two trial lawyers in this building existed.
>
> (T.2466).

This observation was made outside the jury's presence. (T.2440). Juror Terracall obviously observed the same animosity, but her personal observation of the manner in which the trial proceeded, made after she had been dismissed as a juror, is not sufficient to support Defendant's speculation that she "received information extrinsic to the facts introduced at trial." The trial court's denial of post-trial interviews of the juror was correct, and comes to this Court clothed with a presumption of correctness.

III.

THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING STATUTE WAS CORRECT BASED UPON THE FACTS OF THIS CASE.

When one or more aggravating factors are properly found in a murder sentencing proceeding, death is presumed to be the proper sentence, unless it, or they, are overridden by one or more mitigating circumstances. Alford v. State, 307 So.2d 433 (Fla. 1975), cert. den., 482 U.S. 912; Foster v. State, 369 So.2d 928 (Fla. 1979) cert. den., 444 U.S. 885; White v. State, 403 So.2d 331 (Fla. 1981) cert. den., 103 S.Ct. 3571. In the instant cause, the trial court found that the following three aggravating circumstances had been proven beyond a reasonable doubt:

> a. The defendant was previously convicted of a felony involving the use or threat of violence to the person; in that he was convicted of rape in the State of Texas. Case No. C69-1521-LK.
>
> b. The capital felony was committed while the defendant was engaged in the commission of a sexual battery, specifically, he penetrated the anus of the victim, prior to her death, with his sexual organ or an object.
>
> c. The capital felony was especially heinous, atrocious and cruel. The victim, Joyce Marlow, was tortured by the defendant. The evidence establishes that she was anally raped, prior to her death, in a manner which, in effect, tore her apart. The tremendous pain and suffering incurred by virtue of this was attested to by Dr. Valerie Rao, a forensic pathologist, and common understanding. In addition, the defendant inflicted multiple bite wounds on the victim, while she was alive, one of which nearly severed the nipple of her breast. The pain and suffering inflicted by these wounds was extreme . The defendant also injured the head of the victim and finally caused her demise by strangulation, which permitted realization by the victim of her impending death. In reaching the conclusion that

> the murder of Joyce Marlow was especially heinous, atrocious and cruel, this Court has considered the testimony of Dr. Ronald Reeves, a defense witness. The Court finds that the testimony of Dr. Reeves is deserving of very little weight and does not place into doubt the testimony of Dr. Valerie Rao which supports the Court's finding.
>
> (R.495-496).

As to mitigating circumstances, it found that none of the statutory mitigating circumstances had been sufficiently proven. (R.496). It found the following two non-statutory mitigating circumstances:

> a. The defendant was brought up in a broken home and was subjected to physical abuse.
>
> b. The defendant's current wife, his Mother and other family members love him and desire that his life be spared.
>
> (R.496-497).

It specifically rejected as mitigation, the Defendant's assertion that he is a nonviolent person, and a loving parent to his son. (R.497; T.2970), 2998). It considered, but rejected, all other alleged mitigating circumstances. (R.497). In conclusion, the trial court found that there were "sufficient aggravating circumstances to impose the death penalty, as the aggravating circumstances outweigh[ed] the mitigating circumstances." (R.497).

A. The Trial Court Properly Found the Aggravating Circumstance of Heinous, Atrocious, or Cruel.

The meaning of the terms heinous, atrocious or cruel has been clearly delineated by this Court as follows:

> Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.
>
> Alford v. State, supra at 444; See also, State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. den., 416 U.S. 943; and Maggard v. State, 399 So.2d 973 (Fla. 1981) cert. den., 454 U.S. 1059.

The following facts demonstrate, as a matter of common knowledge, that the murder of Joyce Marlow was shockingly evil, outrageously wicked and vile, and designed to inflict a high degree of pain with utter indifference to, or even enjoyment of her suffering.

In the late evening hours of June 8, 1989, Sandy Burroughs was fishing with a friend in the area known as Twin Lakes when: "We heard some screams sounded like a woman screaming ... ." (T.1294). Although he testified that sometimes, while fishing, they would hear kids screaming, the screaming they heard on this particular night sounded different than kids playing. (T.1292-1294, 1300-01).

Dr. Valerie Rao, Medical Examiner, examined the victim on the scene and performed the autopsy. (T.1610-1655). On the

scene, Dr. Rao's initial impression was that Joyce had died by strangulation. (T.1618). After performing the autopsy, she determined the cause of death to be strangulation. (R.255, 267, 269, 303; T.1628-1635, 1649, 1655).

The victim's body contained numerous bruises beyond those which caused her death. (R.246-256, 266-271, 302-306; T.1619-1646). Bruises on her right shin, right upper arm above the elbow and to her left wrist were caused by her being grabbed. (T.1620-1624).

Bruises near her left ear, on her chin and and on her left breast were caused by bites. (T.1627-1628). The bite on her left breast was so severe, that the left nipple was "almost torn off." (T.1628). The three bite mark areas demonstrated vital reaction which means Joyce had to survive at least four hours after the bites were inflicted if she had not been strangled to death. (T.1635-36).

Joyce also exhibited injury "to her anal area ... the anal rectal area and the vagina." (T.1637). There was vital reaction in those areas. (T.1637, 1643-1646). The injury to her anus could have been "caused by any blunt object being forced into that area." (T.1645).

Dr. Rao did not find the presence of trauma, fracture or injury to Joyce' skull, although she did have some injuries on her scalp. (T.1650-57). Nor did Dr. Rao find the presence of

injury or hemorrhaging on the brain. (T.1651-52). However, she could not determine whether Joyce was conscious or unconscious at the time the multiple injuries were inflicted on her. (T.1690).

Dr. Richard Souviron, an expert in Forensic Odontology, testified that a determination can be made as to whether a victim was alive or dead at the time a bite was made. (T.1710-1720). The victim experienced three (3) bites as previously delineated. (T.1722-26). In order of severity, they were the bite near the left ear, the chin, and finally the severed left nipple. (T.1727). Scrape marks near the torn left nipple denoted that there was:

> ... movement taking place at the time, there was a struggle, because it is not like this bite which shows no movement, this bite is just a clamping and grabbing type of a bite. Actually there was movement on the part, more than likely of the victim, again, showing that instead of just biting in hard, there is a scraping down as the bite was made.
>
> (T.1728).

The victim was alive when the bite was inflicted near her left ear. (T.1736). The evidence of struggle, as to the left breast demonstrated that, in Dr. Souviron's opinion, the victim was moving at the time and would have been alive. (T.1743). Defendant administered the bites to the victim. (T.1783-84). Dr. Souviron couldn't determine whether Joyce was conscious or unconscious when she experienced this savage attack. (T.1793).

The following decisions rendered by this Court, relevant to the facts in the instant cause, demonstrate an appropriate finding of the aggravating circumstance of heinous atrocious or cruel. Thompson v. State, 389 So.2d 197 (Fla. 1980) (Imposition of death penalty upon defendant convicted of first-degree murder, kidnapping and involuntary sexual battery was appropriate, in view of extremely violent and heinous nature of torture murder perpetrated by defendant.) Clark v. State, 443 So.2d 973 (Fla. 1983) cert. den., 104 S.Ct. 2400 and Lemon v. State, 456 So.2d 885 (Fla. 1984) cert. den., 105 S.Ct. 1233. (Helpless anticipation of impending death while victim being strangled may serve as basis for aggravating factor that capital felony was especially heinous, atrocious or cruel.) Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. den., 104 S.Ct. 1330 (Evidence was sufficient to support finding as aggravating circumstance that murder was especially heinous, atrocious or cruel where murder and events leading up to its consummation were unnecessarily torturous of victim.) Delap v. State, 440 So.2d 1242 (Fla. 1983) cert. den., 104 S.Ct. 3559. (Evidence of victim's kidnapping, her struggle, her pleas for help, and extremely cruel beating and strangulation.) Waterhouse v. State, 429 So.2d 301 (Fla. 1983) cert. den., 104 S.Ct. 415 (Evidence that victim suffered numerous bruises and lacerations inflicted with hard, sharp weapon, that there were defense wounds showing that victim was alive and conscious when attacked, and that victim was left in water where she drowned.) Washington v. State, 363 So.2d 658 (Fla. 1978) cert. den. 441 U.S. 937. (Confession of defendant's accomplice that victim was

struggling, wiggling and trying to cry out.) Bundy v. State, 455 So.2d 330 (1984) (Female victims were bludgeoned, sexually battered, and strangled.)

The only one who knows whether Joyce was conscious or unconscious while suffering under Defendant's brutal and outrageously atrocious attack, is the Defendant himself.[3] Obviously, he is not about to tell this Court what actually transpired that night. The evidence does demonstrate that Joyce screamed. (T.1292-94, 1300-1301). She struggled. (T.1620-1624, 1728, 1736, 1743). She was hideously violated. (R.246-256, 266-271, 302-306, 455-470; T.1619-1646, 1722-1728, 1736, 1743). She was strangled to death. (R.225, 267, 269, 303; T.1618, 1628-1635, 1649, 1655). Based upon these facts and the authorities cited supra, the trial court correctly found that Joyce Marlow's demise was especially heinous, atrocious and cruel.

Beyond that, the defense requested and received, a special supplemental instruction to the standard on heinous, atrocious or cruel:

> ... such additional acts as to set the crime apart from the norm of conscientiousless or pitiless crimes which is unnecessary [sic] tortuous to the victim.
> (T.2700-2701).

Given the standard and supplemental instruction, the jury voted 10-2 in advising the trial court to impose the death penalty.

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[3] The defense requested and received a special instruction as to the decedent being conscious or unconscious. (T.2668).

(R.336; T.2708). This Court has held that a jury sentencing recommendation is to receive great weight. Herzog v. State, 439 So.2d 1372, 1381 (Fla. 1983).

B. The Trial Court's Sentencing Order Imposing the Death Penalty Reflects Reasoned Judgment.

The trial court's conclusions of fact come to this Court clothed with a presumption of correctness. Shapiro v. State, supra. In reviewing Defendant's argument on this issue, consider this Court's reasoning in a prior death penalty case:

> In this petition, Johnson argues that the trial judge failed to consider the nonstatutory mitigating evidence proffered by Johnson during the sentencing phase. It is undisputed that the judge instructed the jury properly under *Hitchcock,* and *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Clearly the instruction permitted the jury to consider evidence of nonstatutory mitigating circumstances. Johnson alleges, however, that the order sentencing him to death demonstrates that the judge nevertheless declined to consider nonstatutory mitigating factors. In so arguing, Johnson points out that the trial judge made no specific reference in his sentencing order to the nonstatutory mitigating factors introduced by Johnson. Essentially, he alleges that there is nothing in the record to indicate that the judge considered the nonstatutory mitigating evidence.
>
> The state argues that the jury instructions constitute ample evidence that the judge knew what he was required to consider, and in fact did consider those circumstances. We agree. We must presume that the judge followed his own instructions to the jury on the consideration of nonstatutory mitigating evidence.
>
> There is nothing in the record to indicate that the judge failed to consider nonstatutory mitigating evidence. On the other hand it is clear that he instructed the jury according to the teachings of *Lockett* and *Hitchcock.* When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence

> presented. Accordingly, we deny the petition for habeas corpus and deny the motion for stay of execution.
>
> Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988).

As to Defendant's contention that "[t]he court did not specifically list the statutory mitigating circumstances which it may or may not have considered," (p.23) refer to the following holding by this Court:

> Appellant next contends that the trial court did not give adequate consideration to the evidence of nonstatutory mitigation circumstances. With respect to nonstatutory mitigating circumstnces, the trial court stated that it found "NONE," notwithstanding testimony to the effect that the defendant was a good family member and good employee." We conclude that the judge did consider the evidence but found that it did not rise to a sufficient level to be weighed as a mitigating circumstance. *See Woods v. State,* 490 So.2d 24 (Fla. 1986).
>
> Thompkins v. State, 502 So.2d 415 (Fla. 1986) cert. den. 107 S.Ct. 3277.

Defendant alleges that the trial court "ignored the 'impairment' language of its jury instruction on intoxication." (p.24). Interestingly, the jury considered and rejected any alleged impairment of Defendant by intoxication when he brutally murdered Joyce, as its verdict reflects. (R.226; T.2703). Herzog v. State, supra. As to Defendant's medication for seizures, the State would refer this Court to Buford v. State, 403 So.2d 943 (Fla. 1981), cert. den., 454 U.S. 1163. (In imposing death penalty on defendant convicted of murder, trial court did not err in rejecting mitigating circumstances of extreme mental or emotional disturbance or impaired mental

capacity and in discounting the effects of defendant's consumption of alcohol, drugs, and marijuana in light of fact that defendant was able to give a detailed account of the crime.)

Recall Defendant's detailed account of the night of the murder, including his alleged accidental drowning of the victim, as testified to by Detective Merrit. (ST.225-232). This account also included his circuitous flight from Florida, which demonstrates consciousness of guilt. Straight v. State, 397 So.2d 903 (Fla. 1981); Bundy v. State, 471 So.2d 9 (Fla. 1985).

Defendant further alleges that "the trial court gave no reasons for ignoring the detailed expert testimony of Dr. Syvil Marquit." (T.2842-90). The State would refer this Court to the testimony of its expert witnesses in rebuttal during the guilt phase of the trial. (T.2182-2197, 2225-2324, 2325-2383).

In rebuttal, the State first called Dr. Charles Mutter, an expert in Forensic Psychiatry, who examined Defendant pursuant to court order. (T.2182-2184). His opinion was that Defendant was consciously suppressing information when he interviewed him. (T.2189-2190). Dr. Mutter explained numerous reasons why he reached this conclusion, one of which was that Defendant first told him that he did not want to talk to him "because his lawyer told him not to talk to anybody." (T.2190).

The State next called Dr. Hendrick Dinkla, an expert in neurology, who refuted Defendant's theory of defense, that he committed the brutal murder while experiencing an epileptic seizure. (T.2240-2245). Dr. Dinkla testified: "...[I]t has never been recorded that a patient had the ability to perform complex goal-directed motor activities during a seizure." (T.2267). He further testified: "In no seizure anywhere in the literature, no seizure has those manifestations which could conceivably result in rape and murder." (T.2278).

As to Dr. Marquit's testimony, see Johnson v. State, 442 So.2d 185 (Fla. 1983) cert. den. 104 S.Ct. 2182. (Trial court did not err in not finding defendant's emotional and mental state to be a mitigating circumstance in sentencing defendant convicted of murder and armed robbery to death, despite testimony of two psychologists.); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) cert. den. 104 S.Ct. 1328. (Evidence supported finding that defendant was not suffering from mental problems, thereby supporting conclusion not to find mitigating circumstances of extreme or emotional disturbance.); Lara v. State, 464 So.2d 1173 (Fla. 1985). (Evidence supported conclusion that defendant's actions were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstances, despite history of abuse suffered by defendant as a child and difficulty of his childhood.)

As previously delineated, the trial court found three aggravating circumstances proven beyond a reasonable doubt, no

statutory mitigating circumstances, and two nonstatutory mitigating circumstances. (R.495-496). It then concluded that the three aggravating circumstances outweighed the two nonstatutory mitigating circumstances. (R.495-496). This conclusion is supported by the record. Johnson v. Dugger, supra; Thompkins v. State, supra. That the trial court gave adequate consideration to mitigating circumstances, and that it exhibited reasoned judgment in imposing the death sentence, is further demonstrated by its allowance for a defense requested continuance, so that additional evidence in mitigation could be presented on behalf of Defendant. (T.2726-2729, 2744, 2752-2991). Based upon the jury advisory verdict of 10-2, advising the trial court to impose the death sentence; and the trial court's adequate consideration and reasoned judgment in imposing said sentence, the death sentence should be affirmed.

C. The Trial Court Correctly Exercised Its Discretion in Allowing into Evidence a Certified Copy of a Texas Incident Report and a Letter from Defendant's Former Wife, to Rebut His Assertions that He Was a Nonviolent Person and a Loving Parent.

§921.141(1), Florida Statutes reads in pertinent part:

> **(1) Separate proceedings on issue of penalty.-** Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition fo the penalty. If the trial jury

> has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

After the jury had rendered its advisory sentence of death, the Defendant moved for a continuance, so that he could offer further mitigating evidence on his behalf, which was granted by the trial court.[4] (T.2708, 2726, 2752). At this additional hearing, of which the Defendant obviously waived the jury, one of the key witnesses was Dr. Syvil Marquit, who provided a psychological profile of the Defendant. (T.2841-2870).

The only problem with this profile, was that critical information as to Defendant's past had been kept from Dr. Marquit. (T.2865-2870). For example, he was not told that the Defendant had lied during trial as to his conviction for statutory rape in Texas. (T.2866). He was not aware of police reports relating to Defendant's abusing his wife and son, nor that at the time of Joyce's murder, his wife was hiding in a

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[4] In support of Defendant's motion for continuance, Mr. Koch proffered that family members would testify as to Defendant's character. One James Fancher "would testify ... Burley was a father figure to him. How Burley was very helpful to him in many of life's situations for a teenager growing up without a father." (T.2727-2729).

shelter with her son in Oklahoma. (T.2867-68). He wasn't aware that Defendant had choked his son. (T.2868).

Dr. Marquit testified that the first time he interviewed Defendant was on February 2, 1988. (T.2868). He admitted that if he had been made aware of this information, it might have affected his opinion. (T.2869). Dr. Marquit also testified that he was well aware of the fact that Defendant can lie. (T.2866).

After Dr. Marquit, several of Defendant's relations, many of whom had testified during the guilt phase of the trial, except Defendant's present wife, Cindy Kruger Gilliam, testified as to Defendant's nonviolent and loving nature. (T.1833-1901, 2873-2935). The present Mrs. Gilliam did not know that Defendant had choked his son and almost killed him. (T.2935).

At the conclusion of Cindy Gilliam's testimony, the defense rested. (T.2938). At this juncture, the State offered into evidence a certified copy, from the Texas Department of Human Resources, of an incident report involving Defendant, his former wife, and his son. (R.476-486; T.2938-2943). It also offered into evidence a letter written to the prosecutor, from Defendant's former wife, that was written subsequent to letters introduced by Defendant. (R.471-475-490; T.2943-2944).

Defendant, in his brief, alleged: "The defendant did not assert that he is a non-violent [sic] person ... ." (p.27). One need only review the testimony of his character witnesses at the

additional hearing to understand that he is clearly in error. (T.2873-2935). But, more importantly, the record demonstrates that Mr. Koch read into the record a long list of nonstatutory mitigating circumstances that Defendant wanted the trial court to consider, of which two are as follows:

> Mitigating circumstance Number 6, that the Defendant was not a physically violent or an aggressive person throughout his lifetime, except for this part of the incident which occurred in August of 1982, is corroborated by the first-phase testimony or established by the first- phase testimony of John Beagle, Katie Campbell, Kay Salem, Fay Beagle and Laudine Wilkins.
>
> Mitigating circumstance Number 7 is that Burley was a caring and loving parent to his son to the extent that he was permitted to be a parent to his son.
>
> There was testimony to the effect that he cared for the child, that he baghed [sic] the child, and he' fed the child, and that Burley loved his child and that the child loved him.
>
> (T.2970).

The report and the letter rebutted these assertions, and that is why the State offered them into evidence. It also explains why the trial court reached the following conclusion of fact:

> The Court specifically rejects as mitigation the defendant's assertion that he is a non-violent [sic] person and a loving parent to his son. To the contrary, the Court is convinced that the defendant is an extremely violent person, and that his son has been a victim of his violence. The Court has considered but rejects all other alleged mitigating circumstances.
>
> (R.497).

As to Defendant's opportunity to rebut any hearsay statements pursuant to §921.141(1) Florida Statutes, one need only review the chronology of events. Recall that the sentencing phase was conducted before the jury, after it had rendered its verdict of guilt. (T.2621-2623). Before the jury, the defense represented it had no additional testimony to present, and relied on the testimony of Kay Salem, John Beagle, Fay Beagle and Dean Wilkins given during the guilt phase. (T.2661). The hearing was conducted Monday afternoon, June 20, 1988, after the jury had rendered its verdict. (T.2629-2723). At the commencement of that preceding the following transpired:

> **MR. MENDELSON:** We have one matter to take up first: This morning the State was furnished with a list of defense witnesses and a report from a Dr. Marquit, the witness being listed as Dr. Syvil Marquit. We received it this morning.
>
> Previously, the State learned that Dr. Marquit had examined the defendant, the defense said in open Court that Dr. Marquit would not be called to testify in this case. Relying upon that representation in open Court, the State made no effort to depose Dr. Marquit, nor, to have witnesses available today to rebut --
>
> **THE COURT:** That was the representation made, as far as the case in chief?
>
> **MR. KOCH:** Yes.
>
> It was made with respect to the first phase.
>
> We did not provide the name of that witness prior to the jury's verdict. And that action, is consistent with our operating under 3.220.
>
> (T.2631).

Mr. Koch's argument before the jury was simply that life imprisonment, with a minimum mandatory sentence of 25 years, was

the appropriate penalty, as opposed to death. (T.2690-2695). Again, the jury, by a vote of 10 to 2, recommended the death penalty. (T.2708-2710).

On July 6, 1988, sixteen days after the jury had given its recommendation, Mr. Koch, on behalf of Defendant, requested a continuance, for purposes of calling certain family members, who as the trial court pointed out "were here" for the guilt phase. (T.2726). Mr. Koch admitted that he had sent them home "as a matter of economics." (T.2726-2727). The trial court judicially granted the continuance. (2730-2731). The additional hearing was set for July 27, 1988, and indeed held on that date, although, the defense filed another motion for continuance, so that it could conduct post-trial interviews as previously discussed. (T.2752-2755).

The defense first called Dr. Reeves, in an attempt to prove that Joyce was unconscious when she was sexually assaulted and then murdered, thereby negating a possible finding by the trial court of heinous, atrocious and cruel. (T.2749-2840). The trial court, after considering Dr. Reeves' testimony, found "that the testimony of Dr. Reeves is deserving of very little weight and does not place into doubt the testimony of Dr. Valerie Rao which supports the Court's finding." (R.496).

Dr. Marquit and Defendant's family members were then called for purposes of attempting to prove that Defendant was a nonviolent person, and loving parent. (T.2841-2938). After the

defense rested, the State introduced into evidence the Texas incident report, and the letter from Defendant's former wife, written subsequent to the letters introduced by the defense, to rebut the assertions supra. (T.2938-2943).

This issue could well be one of first impression before this Court. The State has found two cases relating to this issue, which are not controlling on the facts of the instant cause. Maggard v. State, supra. (Mitigating factors are for defendant's benefit, and state should not be allowed to present damaging evidence against defendant to rebut a mitigating circumstance that defendant expressly conceded does not exist, nor should jury be advised of defendant's waiver.); Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986) appeal after remand, 527 So.2d 809 (State's evidene in sentencing phase of capital murder prosecution that anticipatorily rebutted existence of mitigating circumstance before petitioner had presented any evidence of factor and after petitioner's stated intention not to rely on or present evidence on mitigating factor in question was inadmissible.)

Defendant presented nonstatutory mitigating evidence that he was a nonviolent person and a loving parent, after the jury had recommended the death penalty and been dismissed. The State's evidence in rebuttal of these assertions came after Defendant had presented his mitigating evidence. The trial court's allowance of the State's rebuttal evidence exhibits a correct exercise of its discretion. Booker v. State, 397 So.2d

910 (Fla. 1981); Wilson v. State, 436 So.2d 908 (Fla. 1983). Its specific rejection of Defendant's assertions, of which the State proved were patently untrue, comes to this Court as a conclusion of fact presumed to be correct, and not as a nonstatutory aggravating circumstance as asserted by Defendant in his brief. Shapiro v. State, supra.

In concluding this brief, the State would refer this Court to what Defendant asserts are "two warm and loving letters to the defendant from his ex-wife (Linda) written a year before trial" (p.26) which the State pointed out were entered into evidence on his behalf at the additional hearing for mitigation purposes. (R.471-474; T.2938-2943). It does not take a handwriting expert to see that the letter dated April 9, 1987, was not writen in the same hand as the undated letter. (R.471-474). A comparison of the April 9th letter, with the subsequent letter addressed to the prosecutor, Susan Dannelly, dated April 18, 1988, are letters written by Defendant's ex-wife, Linda. (R.471-472, 487-490). The undated letter allegedly also written by Linda, is remarkably similar in handwriting to the signature exhibits of the Defendant entered into evidence by the State during the guilt phase. (R.292-301, 473-474).

IV.

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN IMPOSING A CONSECUTIVE SENTENCE OF LIFE FOR DEFENDANT'S SEXUAL BATTERY CONVICTION, WHERE THE RECORD FROM DEFENDANT'S FIRST TRIAL DEMONSTRATES THAT IT FELT IT HAD TO IMPOSE A CONCURRENT SENTENCE.

The following oral pronouncement of sentence by the trial court in Defendant's first trial demonstrates that the standard ennunciated in North Carolina v. Pearce, 395 U.S. 711, 725-726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) has been satisfied:

> **THE COURT:** Well, the sentence and judgement of this Court is that you be sentenced to death in the electric chair. That is the sentence and judgment of this Court.
>
> The Court adopts the finding and finds and adjudicates you guilty as sentenced on the crime of sexual battery, that being a life felony.
>
> The Court sentences you to a hundered and thirty-four years in the state penitentiary concurrent, I guess it has to be concurrent because if the first sentence is carried out the second sentence is academic.
>
> **MR. SCHIFFRIN:** Judge, I believe the statutory maximum on life --it is life or --
>
> **THE COURT:** It is life --
>
> **MR. SCHIFFRIN:** It is life or forty years.
>
> **THE COURT:** All right. Then I will sentence him to life.
>
> (SSR.3-4).

Clearly, the trial court in Defendant's first trial felt that current case law at that time compelled him to impose a concurrent sentence on Defendant's sexual battery conviction.

On retrial, the trial court's oral pronouncement of sentence as to the sexual battery conviction was as follows:

> As to Count II of the Indictment, sexual battery, the state has submitted scoresheet under category two of the sentencing guidelines, sexual battery, and submitted same to the defendant, which totals 505 points, for a recommended guideline sentence of 22 to 27 years in prison.
>
> The first degree murder conviction cannot be scored on the scoresheet, which constitutes clear and convincing reason for departure upward from the recommended guideline sentence on Count II of the indictment.
>
> Hansbrough v. State. Weems v. State. Garcia v. State. Bryson v. State and Norris v. State. You can get these sites off the written order.
>
> The Court finds this clear and convincing reason to be proved beyond and to the exclusion of every reasonable doubt and supports departure from the recommended guideline sentence on the one additional count for which the defendant has been adjudicated guilty in case number 82-14766.
>
> Therefore, it is Ordered and Adjudged as to Count II of the Indictment, sexual battery, the defendant, Burley Gilliam, be sentenced to life in imprisonment, said sentence to be imposed and shall run consecutive to the sentence announced and imposed in Count I or the Indictment.
>
> (T.3008-3009).

As to the sentence on Count II, the trial court's written order coincides with its oral pronouncement:

> As to Count II of the Indictment, Sexual Battery, the State has submitted a scoresheet under category two of the sentencing guidelines, Sexual Battery, and submitted same to the defendant, which totals 505 points, for a recommended guideline sentence of 22 to 27 years in prison.
>
> The First Degree Murder conviction cannot be scored on the scoresheet which constitutes a clear and convincing reason for a departure upward from the recommended guideline sentence on Count II of the Indictment.

> Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), Weems v. State, 469 So.2d 128 (Fla. 1985), Garcia v. State, 501 So.2d 106 (Fla. 3d DCA 1987), Bryson v. State, 506 So.2d 1117 (Fla. 1st DCA 1987), Norris v. State, 503 So.2d 911 (Fla. 5th DCA 1987).
>
> The Court finds this clear and convincing reason to be proved beyond and to the exclusion of every reasonable doubt and supports a departure from the recommended guideline sentence on the one additional count for which the defendant has been adjudicated guilty in case number 82-14766.
>
> (R.497).

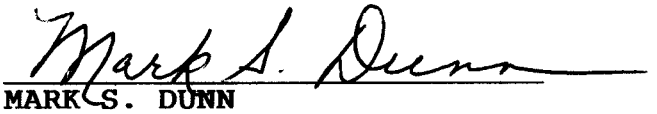
The standard in North Carolina v. Pearce is satisfied. Defendant's consecutive life sentence for his sexual battery conviction was not retaliatory, and should be affirmed.

CONCLUSION

Based on the foregoing facts, authorities and reasoning the State respectfully submits this Court affirm Defendant's Judgment and Sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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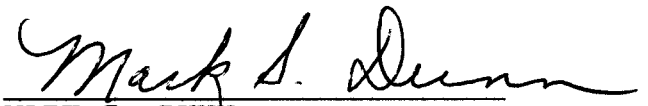
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **LAW OFFICES OF GREENE AND GREENE, P.A.**, Counsel for Appellant, 100 North Biscayne Blvd., Suite 601, Miami, Florida 33132 on this 29 day of January, 1990.



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