IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,144

BURLEY GILLIAM,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a conviction of first degree murder and sentence of death. Appellant Burley Gilliam was the defendant and in this brief, he will be referred to by name or as he stood below.

The symbol "R." refers to the record on appeal; the symbol "T." refers to the separately bound transcripts of proceedings before the trial court; the symbol "S." refers to the supplemental record, two of the five affidavits attached to the motion to recuse filed in the trial court but from the record on appeal; the symbol "SR." refers to the supplemental record, the exhibits attached to Gilliam's motion to conduct post trial interviews which were omitted from the record; and the symbol "SC." refers to the supplemental record, the clerk's insert sheets of the closed court file in this case.

STATEMENT OF THE CASE

Burley Gilliam was charged by indictment returned on July 8, 1982 with first degree murder (Count I), sexual battery (Count II), and grand theft (Count III). (R.1-3A). After a trial in which he proceeded *pro se* with standby counsel, Gillliam was convicted of first degree murder and sexual battery, and the court imposed the jury recommended sentence of death. On direct appeal, this Court reversed the judgment and sentence and remanded for a new trial. *Gilliam v. State,* 514 So.2d 1098 (Fla. 1987).

Gilliam's second trial by jury commenced on June 6, 1988, and the jury found him guilty as charged on June 17, 1988. (R. 4, 394-396). The court discharged the alternate jurors. (R. 30).

On several occasions during trial, the defendant moved for mistrial and renewed previous motions for mistrial, all of which were denied. The grounds raised included prosecutorial misconduct, juror misconduct, and judicial misconduct and disqualification. (T. 1480-85, 1765-73, 1809-11, 1814-15, 2434-35, 2454-61, 2470).

The defendant filed a motion to recuse the trial judge on June 13, 1988. Attached to the motion were affidavits of the defendant, his trial counsel, and two assistant public defenders who had observed portions of the trial. (R. 338-46; S.). The motion was denied after a hearing and each time it was renewed. (T. 1593-1604, 1755-59, 1706-07, 1809-14, 2467-70)

Sentencing phase proceedings were had before the twelve jurors on June 20, 1988. The state's case for death consisted of a certified copy of Gilliam's previous conviction and sentence for rape in Texas and reliance on the testimony of its experts. (R. 397-402).

The defense relied on its own expert testimony without presenting any evidence, but it received permission to present additional mitigating evidence, beyond that which had been introduced during the guilt phase, in a separate hearing before the trial judge. (R. 32-33). The jury voted 10-2 in advising the court to impose the death penalty. (R. 336).

On June 29, 1988, the defendant filed a motion for new trial, raising as error, *inter alia*, the trial court's denial of his motion to recuse and motions for mistrial and the trial court's refusal to allow testimony on his theory of defense. (R. 422-24). The motion was denied. (T. 2734-41).

On July 6, the defendant filed a motion for continuance of sentencing hearing based on his attached motion for order authorizing defense counsel to conduct post trial interviews. (R. 431-32; 433-37). That motion, in turn, was based on an article published in the Miami Herald on June 13, 1988 and a letter to the trial judge from juror Elizabeth Terracall dated June 23, 1989. (SR; R. 425-28). The court refused to allow defense counsel to conduct the interviews, and the sentencing hearing continued before the trial court on July 27, 1988.

On August 16, the defendant was adjudicated guilty as charged. The court sentenced Gilliam to death on Count I and imposed a consecutive term of life imprisonment as to Count II. (R. 491-503).

The court found in aggravation that the defendant was previously convicted of a felony involving violence; the capital felony was commited during a sexual battery; and the capital felony was especially heinous, atrocious or cruel. (R. 495-96). The court

found two nonstatutory mitigating circumstances: the defendant was brought up in a broken home where he was subjected to physical abuse and the defendant has a loving family who desire that his life be spared. (R. 497).

Notice of appeal was filed on September 19, 1988. This appeal follows.

STATEMENT OF THE FACTS

In the late evening hours of June 8, 1989, Sandy Burroughs, owner of a paint and body shop in the area known as Twin Lakes, was fishing in the lake with a friend. People used to hang out in that area in the evenings, and sometimes they would hear kids screaming. This time, they heard what sounded like a woman screaming. (T. 1292-94, 1300-01). When Burroughs and his friend pulled the boat up on shore about a half hour later, they saw a commotion; a man's truck was stuck in the sand. The truck was a brown one-ton Chevrolet with white and yellow lettering on it. (T.1294-95,1303). Burroughs and his friend attached Burroughs' snatch rope to the man's truck and pulled it out. The man's truck would not start, so they towed him down the road a ways. (T. 1295, 1298).

The man was "very, very nervous." He kept saying, "I got to get out of here." The man, however, did not smell of urine or have mucous coming out of his nose or have a vacant stare. The man was perspiring, but he did not reek of alcohol or stumble over his words. (T. 1296-97). Burroughs told the man he would get him a wrecker. (T. 1298).

Alfred Morris was a tow truck operator in 1982 and on June 8, he responded to the Twin Lakes area where he found a man, a dark colored truck and a police officer. (T. 1162-63). The man wanted to take it to a place where it could be worked on that night. Morris suggested Cloverleaf Amoco and towed the truck there. (T. 1164). Morris did not notice anything unusual about the man. The man did not have sand all over him. (T. 1165). He went to the restroom to change clothes and paid for the tow. Morris never saw the man again. (T. 1166).

Armando Rego of Cloverleaf Amoco recalled that the man filled out a work order after his efforts to fix the truck were unsuccessful and left the truck there until the following day. The man slept for a while in his truck and then asked Rego to get him a taxi. (T.1284-86, 1290-91).

The next day, Rego gave the police the work order that he and the man had signed, State's Exhibit 25. (T. 1286). The work order was analyzed by an expert document examiner. The expert compared Gilliam's signature standard with the signature on the work order and opined that Burley Gilliam authored both signatures. (T. 1403). The expert reached his conclusion by looking at the standard and the other signature and seeing if they look alike. (T. 1411).

Other expert testimony was presented by the medical examiner and a forensic odontologist (*see* Issue III A. *infra*), and medical doctors, whose testimony challenged the expert testimony of the defense regarding Gilliam's epilepsy and behavior while having seizures. (T. 2182-98, 2147, 2216-2383). The state and defense experts considered the numerous hospitalization records of the

defendant in reaching their conclusions. (T. 1973, 1984-85, 2314-15, 2342-43).

The defendant apparently gave various versions of his involvement in this case to the officer who arrested him (T. 1553-1574).* One thing witnesses with knowledge agreed upon: the bar where the defendent met the victim in this case was a topless dancer's lounge, and he had had a lot to drink and spent more than the usual amount of money for men who frequent those places. (T. 1374-77, 1381, 1424-27, 1459-60, 1471). The bar makes money on the champagne the dancers solicit from the customers. (T. 1465-66, 1478, 1497-99).

The defendant left the bar with the victim on the night of the homicide; Joyce Marlowe, a dancer there, had had too much to drink and needed something to eat, so the bar's manager gave the defendant permission to take her out. (T. 1474-76). The object of Joyce Marlowe's dancing job was to arouse sexual feelings while incorporating an "air of fantasy." (T. 1495-96).

The defendant testified on his own behalf.

At the time of trial, he was thirty-nine years old and married to Cindy Gilliam, his second wife. His son by a previous marriage was eight years old. (T. 1918). He had been arrested several times and in 1970, he was convicted on a charge of statutory rape. He was 21, the girl was 15, and he thought he loved her. (T. 1918-19). He

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* The cross-examination of the arresting officer was omitted from counsel's copy of the transcript. The record will be supplemented as soon as it is received from the court reporter; the defendant is unable to present his claim of restriction of the right to confront the officer, raised in his motion to recuse (R. 344), and other allegations of prosecutorial misconduct without the transcript.

pleaded guilty because he was guilty and served a seven-year sentence in Texas. (T. 1920).

Gilliam began having seizures in late 1970. While he was in prison, he was beaten about the head with axe handles and baseball bats by inmate guards; one of the inmates had tried to rape him, and he fought back. He was placed in solitary confinement, where he was given some medication, pheonbarbital and dilantin; he had begun to have seizures. (T. 1920-22).

Gilliam cannot describe his seizures because he does not know what they are like. (T. 1922).

After his release from prison, Gilliam supported himself by driving a truck. He lied on his license application, denying that he had a seizure disorder. (T. 1923).

In June of 1982, he was driving a truck for Tri-State Motor Transport of Joplin, Missouri. On June 8, he drove his truck to the Oasis Truck Stop in Broward County to await a new load. He was there for about three hours. He serviced the truck and drank about a third of a fifth of Jack Daniels and a six pack of Budweiser. (T. 1924-25).

He left the truck stop and went to a bar up the street. He was high, but he had taken his seizure medication that day. The bar was a strip joint. He ordered a beer from the female bartender. He was sure he talked to some of the patrons there. (T. 1926-27).

Three or four women were dancing. He eventually got to talk with all of them. After they danced, they would come around and hold their G-strings out for tips. (T. 1927). He probably bought the women champagne, and he recalled that he left with one particular

women who had spent a lot of time with him. (T. 1928). They made some small talk; she told him that her name was June Collins or something, that she had just started working there from out of state, and that she lived with her biker boyfriend. (T. 1928-29). She asked him if he wanted a massage in the back room. (T. 1929-30).

Gilliam was pretty drunk. He had no idea how long he stayed at the bar before the two of them left together. He did not remember where they were headed, or if they stopped somewhere to eat or buy beer, or what they discussed on the way to the Twin Lakes area, or how he got to the lake. (T. 1931-33). He did not remember anything about the rest of the evening but waking up in the sand, thinking he had a seizure because his muscles ached, snot was running done his nose, and he had urinated on himself. (T. 1932-33).

He did not remember seeing the woman again, or injuring her in any way, or getting his truck stuck in the sand, or going to the service station, or buying a bus ticket. The next thing he recalled was waking up on a bus outside Orlando and holding a ticket for Nashville, Tennessee. (T. 1933-34). He did not know why he was going to Nashville.

Gilliam did not get off the bus and return to South Florida because he knew he was in trouble; he had lost his employer's truck and spent all of his employer's money at the bar. (T. 1935). He did not know the woman was dead, and he could not deny killing her because he did not remember. (T. 1935).

Gilliam was arrested in the Dallas area a few days later. He called his mother-in-law from jail, where he was given seizure medication, to find out about his son. She accused him of murdering

someone in Florida. He told her he didn't know if he had. (T. 1935-47).

The defendant denied telling Detective Merritt that the two of them had gone swimming in the lake; he can't swim. (T. 1938-39).

On cross-examination, the defendant denied that he had raped the girl in Texas without consent, leaving her unconscious and with a black eye and choke marks. He may have used another name then. (T. 1940-42).

Gilliam had been to Oklahoma City prior to June, 1982. He had worked there. On his way there enroute to Texas after the incident, Gilliam had shaved off his mustache. (T. 1952-54). He denied telling his mother-in-law (who did not testify) that he "sure did" kill the victim. (T. 1958).

SUMMARY OF ARGUMENT

When a defendant raises the prejudice of a judge as a bar to trial and accompanies his motion with detailed affidavits setting forth the facts, predicated on reasonable grounds, upon which he relies, the judge against whom the bar is raised should be prompt to recuse himself. The motion of the defendant in this case was accompanied by affidavits of trial counsel and counsel who observed the proceedings. It was filed as soon as the trial judge's course of conduct became obvious. The affidavits specify particular acts of misconduct on the part of the trial judge. It was reversible error to deny it. Additional, automatic reversible error occurred when the trial court passed on the truth of the allegations.

A criminal defendant who claims that an improperly influenced jury returned a verdict (and death recommendation) against him must be afforded the opportunity to prove that claim. The defendant in this case sought leave to conduct post verdict interviews of the jurors. His motion was based both on an article printed in the Miami Herald the day his motion to recuse the trial judge was filed and on an apparently responsive, highly complimentary letter written to the judge by one of the jurors after the jury was discharged. The article contained details of the allegations of disqualification, emphasizing the fact that defense counsel had termed the judge's conduct "derisive" and repeated the fact, printed in an earlier article, that the defendant was on trial for the same offenses of which he had previously been convicted. Because the defendant met his burden of

showing the potential for harm, the trial court deprived him of a fair trial by an impartial jury in failing to conduct any inquiry of the jurors at all.

The capital murder in this case was reprehensible, but the evidence was insufficient to establish the aggravating factor of especially heinous, atrocious, or cruel. The experts relied upon by the state could not opine whether the victim was conscious when she sustained terrible injuries to her breast and genitalia. In light of the finding of two nonstatutory mitigating factors; the cursory treatment of other, substantial mitigating factors purportedly considered by the court; the lack of reasoned judgment on the face of the sentencing order; and the trial court's reliance on impermissible hearsay as to the defendant's history of violence, the sentence of death imposed on the defendant must be vacated.

A defendant may not receive a more severe penalty upon his reconviction following a successful appeal unless reasons therefor affirmatively appear in the record. This record does not contain any basis upon which the trial court could have imposed a consecutive sentence of life imprisonment following Gilliam's reconviction for sexual battery instead of the concurrent term of life imposed upon his first conviction for the same offense. The imposition of such consecutive sentence violated the defendant's right to due process of law.

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO RECUSE WHERE (A) THE MOTION WAS TIMELY; (B) THE MOTION WAS LEGALLY SUFFICIENT; AND (C) THE TRIAL COURT PASSED UPON THE TRUTH OF THE ALLEGATIONS, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

> 'Every litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge.' It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.

Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983), *quoting State ex rel. Mickle v. Rowe,* 100 Fla. 1382, 1385, 131 So. 331, 332 (1930).

The trial judge in this case ignored his basic duty and deprived the defendant of his right to a fair trial.

A. <u>The Motion to Recuse was Timely and Legally Sufficient.</u>

The defendant filed his motion to recuse the Honorable Theodore G. Mastos on June 13, 1989. The motion was made in good faith, and it was accompanied by five affidavits setting forth facts relied upon to show that the judge was prejudiced against the defendant and in favor of the state. Counsel explained, in the motion, why it was filed on the morning of the third day after the

jurors had been sworn: "As good cause for the failure to so file within such time [ten days before the time this case was called for trial] the defendant submits that the acts manifesting bias and prejudice against the defendant occurred at the commencement of the trial." (R. 338-46; S.).

The affidavits attached to the motion specified the various actions of the trial judge which caused the defendant to fear he would not receive a fair trial:

The affidavit of lead counsel Edward M. Koch detailed the judge's "derisive and belittling tone of voice" when interrupting co-counsel during his voir dire of prospective juror Joanna; the judge's disdainful look towards counsel; and the fact that "the Court made no ruling upon the propriety of these questions, but simply from its position of authority, by word and demeanor, ridiculed counsel and implied that counsel was wasting the time of the Court and those citizens called for jury service." The affidavit also alleged that when defense counsel asked to be heard during the examination of state's witness Ballard regarding the admissibility of evidence, the court denied each request in a "disdainful and impatient manner; as if counsel was simply trying to waste the time of the Court and the jury." Counsel complained about the irritable manner in which the court conducted sidebar conferences and the denial of a full and timely opportunity to be heard.

The affidavit of co-counsel Kenneth Marvin points, among other things, to the court's failure to grant a sidebar conference when a defense witness (called out of turn) surprised him on the stand. Counsel noted the judge's comment to him later that day, that the

look of shock on counsel's face was the most apparent the judge had ever seen. Counsel also claimed error in the court's failure to allow him to refresh the witness's recollection, to impeach the witness, or to discuss the applicable law.

More egregious was the conduct alleged on the part of the judge in having an ex parte meeting with a prosecutor who had made an appearance in this case (SC. 11). The judge announced that the prosecutor had changed the judge's mind about the rulings he had made as to the "surprise" witness's testimony.

Co-counsel was also concerned with the trial court's limitation of his cross-examination of Detective Merritt. (*See* fn. *).

The affidavits of two assistant public defenders who had observed portions of the trial set forth an incident which occurred during the cross-examination of a state's witness where, in the absence of any objection from the state to a question posed by defense counsel, the judge turned his chair toward the state in full view of the jurors and signalled with his left hand as if to encourage the state to object. (S.)

"Prejudice of a judge is a delicate question to raise," *Livingston,* 441 So.2d at 1085-86, and under the circumstances of this case, the defense could not have raised it sooner. "No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned." *Id.* The allegations set forth in the affidavits, which must be taken as true, are sufficient to lead any "normal" capital defendant to fear that he would not receive a fair trial. *Dickenson v. Parks,* 104 Fla. 577, 582, 140 So. 459, 462 (1932).

B. A Trial Judge May Not Pass On the Truth of the Allegations.

The judge with respect to whom a motion to disqualify is made is not allowed to pass on the truth of the allegations. *Bundy v. Rudd,* 366 So.2d 440 (Fla. 1983); *Livingston, supra* at 1086.

In this case not only did the trial court lose its cloak of impartiality by conducting a hearing to refute the allegations, which resulted in the state's repeated threats to charge co-counsel with perjury (T.1593-1604,1755-1759), *see Clark Auto Leasing & Rentals, Inc. v. Lupo,* 14 FLW 1972 (Fla. 4th DCA August 16, 1989), but the court actually passed on the truth of the allegations:

> THE COURT: Well, Mr. Koch, the Court, you know, has had an opportunity to re-read 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--
>
> THE COURT: Many of the statements made in here are, in my opinion, false. But the problem 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. ...

(T. 1760-61).

Not content to let matters rest, the state again threatened defense counsel with perjury charges when the motion for recusal (and motion for mistrial on that basis) was renewed. The court responded to the state's request of defense counsel to repudiate their allegations regarding the ex parte meeting with the prosecutor:

> 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,[1] and, frankly, it worked to the benefit of the defendant, that I did have that conversation--
>
> * * *
>
> 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 this on the record that I had no ex parte conversation with anybody in this case.
>
> * * *

Even if the allegations were legally insufficient, this Court has "repeatedly held" that a judge shall not pass on the truth of the facts alleged:

> When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry *and on that basis alone* established grounds for his disqualification.

Bundy v. Rudd, 366 So.2d 440 at442 (Fla. 1978) (emphasis supplied).

The statements by the trial court in attempting to refute the allegations and justify its actions requires reversal.

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[1] *But see* SC. 11.

II

WHERE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF EXPOSURE TO A JUROR OF A PREJUDICIAL NEWSPAPER ARTICLE, THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY IN FAILING TO ALLOW DEFENSE COUNSEL TO CONDUCT POST VERDICT INTERVIEWS.

The United States Supreme Court has long held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.. . . 'Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'" *Smith v. Phillips*, 455 U.S. 209, 215-16, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), *quoting Dennis v. United States,* 339 U.S. 162, 171-72, 70 S.Ct. 519, 94 L.Ed.2d 734 (1950).

> . . .Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurences when they happen.

Id., 455 U.S. at 217.

In this case, the trial court did not afford Burley Gilliam even a modicum of due process when it summarily denied his motion for order authorizing defense counsel to conduct post trial interviews.

The motion was based on a newspaper article and a juror

Elizabeth Terracall's apparently responsive letter to the trial court. (R. 433-37; SR.).

The motion set forth this chronology: the jury was sworn on June 8, 1988; the defendant 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. 425-28).

The article is headlined in large bold typeface: "Defense asks judge to quit murder trial". The sub-headline is in smaller and lighter bold typeface: "Lawyers: Mastos behavior 'derisive'". The first paragraph states:

> A Dade judge was asked to recuse himself in the middle of a first-degree murder case Monday after defense attorneys accused him of favoritism, irritability, impatience and contempt.

The article details the allegations in the affidavits attached to the motion and contains the comments of one of the prosecutors in the case--"This is truly one of the more outrageous things I have ever seen"--as well as the trial judge--"At this point in time it would be totally inappropriate for the trial judge to make any comment . . . The point has been preserved for appellate review." The article also repeats the fact, published by the paper on June 8, 1988 (R. 229), that a jury had previously convicted the defendant in this same case.

Juror Terracall's letter begins:

> As a juror on the recent Burley Gilliam trial, I feel compelled to express my regard for your conduct during this case with respect to the following[.]

The introduction is followed by four numbered paragraphs complimenting the trial judge on the way he handled various aspects of the trial. The letter was typed on a word processor. It ends with a handwritten 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!

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.

When the suggestion of juror bias is not frivolous, the court should make an "adequate inquiry" into whether the bias existed and whether it was prejudicial. *United States v. Ramsey,* 726 F.2d 601, 604 (10th Cir. 1984).

> 'A party claiming that an improperly influenced jury returned a verdict against him must be given an opportunity to prove that claim.' In response to such an allegation, the trual judge 'must conduct a *full investigation* to ascertain whether the alleged jury misconduct occured; if it occurred, he must determine whether or not it was prejudicial.'

United States v. Brantley, 733 F.2d 1429, 1439 (11th Cir. 1984) (citations omitted; emphasis in original).

The defendant here met his burden of showing that the article or other information possessed by the juror regarding the allegations in the defendant's motion to recuse was "of such character as to raise a presumption of prejudice." *Russ v. State,* 95 So.2d 594, 600-01 (Fla. 1957); *Amazon v. State,* 487 So.2d 8,11 (Fla. 1986). This is so because of (a) the dominant position a judge holds in the trial of a case before a jury, *Hamilton v. State,* 109 So.2d 422,424 (Fla. 3d DCA 1959), and the potential animosity which jurors might feel when the trial judge is criticized; (b) the fact that this was a capital case and the risk of prejudice was especially serious in view of the finality of the death sentence, *see Turner v. Murray,* 106 S.Ct. 1683 (1986); and (c) the view of the courts which have confronted the issue that ". . .the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the jurors' ritualistic assurances that they have not been affected by the information can overcome it." *Weber v. State,* 501 So.2d 1379, 1382 (Fla. 3d DCA 1987); *see also United States v. Williams,* 568 F.2d 464, 469 (5th Cir. 1978).

The trial court deprived Burley Gilliam of a fair capital trial by an impartial jury in denying him the opportunity to interview the jurors. (T. 2956-64).

III

THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING STATUTE TO BURLEY GILLIAM UNDER THE FACTS OF THIS CASE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In Florida, no defendant can be sentenced to death unless the aggravating factors outweigh the mitigating factors. *Alvord v. State,* 322 So.2d 533, 540 (Fla. 1975). Since the aggravating factors set forth in Section 921.141(6), Florida Statutes actually define those capital crimes to which the death penalty is applicable, they must be proven beyond a reasonable doubt before being considered by judge or jury. *State v. Dixon,* 283 So.2d 1, 8-9 (Fla. 1973).

In imposing the death penalty in this case, the trial court violated these principles by relying on an aggravating circumstance not established by the evidence, by considering impermissible hearsay evidence of acts of violence, and by dismissing, without reasoned consideration the mitigating circumstances that were established by the evidence. Because the trial court also found the existence of two mitigating circumstances, the defendant's death sentence must be vacated for a new sentencing hearing. *Elledge v. State,* 346 So. 2d 998 (Fla. 1977).

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

The capital murder of Joyce Marlowe was reprehensible. She was semi-clothed when the medical examiner, Dr. Valerie Rao, arrived at the scene. (T. 1618). She had injuries on her face, breast,

head, shin, and arms, and she had been strangled to death; there was bleeding into the muscles of both sides of the neck. Her left nipple was almost torn off by a bite. [2] The bleeding into the soft tissues of the various injured areas indicated vital reaction. (T. 1619, 1628, 1635-36). In addition, Joyce Marlowe had injuries to her anal-genital area. There were lacerations and contusions of the vagina and tears that extended through the anus and into the rectal region. These injuries also showed vital reaction.

The injury to the anus could have been cause by any blunt object. (T. 1638, 1643, 1645). Cause of death was strangulation. (T. 1649).

Nevertheless, the medical examiner was unable to determine whether the decedent was conscious or unconscious at the time the various injuries were inflicted. (T. 1690).

Since the state was unable to prove beyond a reasonable doubt that the victim was conscious when the injuries to her breast and genitalia were inflicted, the trial court erred in finding that this capital murder was especially heinous, atrocious, or cruel. *Herzog v. State,* 439 So.2d 1372, 1379-80 (Fla. 1983) (factor not applicable to victim who was strangled, beaten and suffocated but under the heavy influence of methaqualone and probably semi-conscious during the murder); *accord Jackson v. State,* 451 So.2d 458, 463 (Fla. 1984)

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[2] Dr. Souviron, an expert in forensic odontology, opined that Burley Gilliam inflicted the bitemarks to the victim's breast and chin. (T. 1783). Dr. Souviron also opined that the bitemark on the breast indicated that there was a struggle; the victim was moving. (T. 1728, 1743). On cross-examination, however, the doctor acknowledged that he could not tell if the victim, herself, was struggling. And although he would think that anybody who had sustained a bite mark injury like the one to the victim's breast would be struggling, like Dr. Rao, Dr. Souviron could not tell whether she was conscious or unconscious at the time she was so injured. (T. 1791-93).

("When the victim becomes unconscious, the circumstances of further acts contributing to [her] death cannot support a finding of heinousness).[3]

B. The Trial Court's Sentencing Order Does Not Reflect The Reasoned Judgment Required in Imposing Death.

A trial court must justify its sentence of death in writing in order to provide the opportunity for meaningful appellate review by this Court:

> . . .Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of roles provided by the statute.

State v. Dixon, 283 So.2d at 8.

Here, the trial court's findings with regard to mitigation fail to meet the standard of reasoned judgment. The trial court found that "none of the statutory mitigating circumstances have been sufficiently proven." The court did not specifically list the statutory mitigating circumstances which it may or may not have considered. *See Magill v. State,* 386 So.2d 1188 (Fla. 1980). The court rejected the defendant's assertions that he had acted under extreme mental or emotional disturbance, §921.141(6)(b), and his

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[3] The trial court's written finding in support of this aggravating circumstance--"The tremendous pain and suffering incurred by virtue of this [anal rape] was attested to by Dr. Valerie Rao, a forensic pathologist, and common understanding. ...(t)he pain and suffering inflicted by these [bitemark] wounds was extreme" (R. 496)--is not supported by Dr. Rao's testimony.

capacity to appreciate the crimianality of his conduct or to conform his conduct to the requirements of law was substantially impaired, §921.141(6)(f). Yet, the trial court forgot its charge conference statement, "You know, the record is full of testimony that he was drinking" (T. 2476); ignored the "impairment" language of its jury instruction on intoxication (T. 2602); and overlooked the uncontroverted evidence that the defendant, up to and including the time of trial, had been prescribed medication for seizures for much of his adult life. (T. 2094, 2100). In addition, the trial court gave no reasons for ignoring the detailed expert testimony of Dr. Syvil Marquit,[4] who explained the defendant's psychological makeup in light of reports of other mental health experts, interviews with the defendant and family members, and testing. (T. 2842-690).

The trial court found, nevertheless, the existing of two nonstatutory 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. 497).

These findings, albeit helpful to the defendant, are a far cry from the reasoned judgment this Court requires in imposing a sentence of death by electrocution. The evidence underlying these

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[4] At trial, there was extensive evidence adduced by both sides regarding the defendant's claim of epileptic seizure at the time of the homicide. The jury rejected the testimony of defendant's expert, Dr. Arthur Stillman.

findings came from the testimony of family members. They told of Burley Gilliam being beaten by his drunken father two or three times a week from the time the defendant was one year old. The defendant was knocked unconscious at age three. He had the role in his family of protecting his six younger siblings and their from the violence of his stepfather, Robert King, who was his mother's third husband. (T. 1834-41). The defendant had to sleep with a croquet mallet in order to protect himself and the children and their mother. (T. 1843, 1870). The stepfather would hit Burley Gilliam on the head with clubs, and parts of a water hose, and he would kick him. The defendant was hit in the head by this man "lots of times." (T. 1869). He was the one who bore the brunt of all frustrations in the family; as the oldest child, the defendant was held responsible if any of the children got into trouble. (T. 1879-80).

The defendant was a sickly child who did not do well in school. (T. 1845). He had a heart murmur, and when he was about eight years old he started complaining about headaches. The glasses he wore as a result helped for only a month. The family could not afford medical doctors or tests. (T. 1846,48).

His family told about his bad temper, too, and his seizures, and a violent act he committed while having one. (T. 1855,1858, 1864-66, 1888-89, 1896-98).

The cursory findings by the trial court, in the face of much evidence in mitigation, are not sufficient. The sentence of death must be vacated. *Magill v. State,* 386 So.2d 1188 (Fla. 1980).

C. The Court Relied on Impermissible Hearsay Evidence and Used it as a Nonstatutory Aggravating Circumstance.

In the capital sentencing hearing, any evidence relevant to the character of the defendant may be presented if it relates to the enumerated aggravating or mitigating circumstances and "provided the defendant is accorded a fair opportunity to rebut any hearsay statements." §921.141(1). The requirements of due procee apply to the sentencing proceeding, and so does the sixth amendment right of an accused to confront the witnesses against him. *Engle v. State,* 438 So.2d 803, 813-14 (Fla. 1984); *accord Walton v. State,* 481 So.2d 1197, 1200 (Fla. 1986).

The trial court deprived the defendant of a fair capital sentencing proceeding and his right to confrontation by admitting in evidence, over hearsay objections (T. 2952-54), a State of Texas Offense Incident Report of a "Class 'C' Assault; Injury to Child & Inv[vestigation] of Insanity" (R. 476-82) and a letter from the defendant's ex-wife to the prosecutor.. (R. 488-90).

The report details an incident of violence involving the defendant's attack on his young son and his ex-wife. The letter, dated April 18, 1988, speaks about the incident, and other acts of violence, and states, in part, "My son and I will be the first victims that Burley Gilliam will murder if released."

The necessity for confrontation was clear; the record also contains two warm and loving letters to the defendant from his ex-wife written a year before trial. The defendant was given no opportunity to explore the reasons for his ex-wife's complete change of heart or to rebut the prejudicial hearsay within the hearsay of the offense incident report.

The trial court relied on this impermissible hearsay in sentencing the defendant to death:

> 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. ...

(R. 497).

The defendant did not assert that he is a non-violent person and, ironically, the court overlooked the statements in the reports regarding the defendant's seizures, violence, and hospitalization during the investigation of the incident. (R. 477, 478 -79). Indeed, the defendant's ex-wife allegedly reported that he had severe seizures which were very violent and which usually put him to sleep.

The trial court's reliance on this hearsay in sentencing the defendant to death constituted a finding of a non-statutory aggravating circumstance--previous acts of violence for which the defendant was not on trial--and a violation of the defendant's constitutional rights. Reversal is mandated.

IV

THE TRIAL COURT ERRED IN IMPOSING A MORE SEVERE SENTENCE UPON THE DEFENDANT'S RECONVICTION FOR SEXUAL BATTERY WHERE NO REASONS FOR DOING SO AFFIRMATIVELY APPEAR IN THE RECORD, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

The Due Process Clause of the Fourteenth Amendment requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives upon reconviction and that the defendant must be freed of the apprehension of retaliatiory motivation on the part of the sentencing judge. *North Carolina v. Pearce*, 395 U.S. 711, 725-26, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In order to assure the absence of such a motivation, the Supreme Court has concluded that:

> . . .(W)henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

395 U.S. at 726.

In 1985, the defendant in this case was convicted of first degree murder and sexual battery. The court imposed the death penalty and a concurrent life sentence for sexual battery. (SC. 2).

On appeal, this Court reversed and remanded for a new trial and the defendant was reconvicted for the same offenses. The trial court again imposed the death penalty but as to the sexual battery conviction, the court sentenced the defendant to a consecutive, rather than a concurrent, term of life imprisonment. Because no reasons affirmatively appear for the more severe penalty following Gilliam's successful appeal and reconviction, the sentence imposed for sexual battery must be reversed. *North Carolina v. Pearce; Roberson v. State,* 258 So.2d 257 (Fla. 1972).

CONCLUSION

For the reasons given and upon the authorities cited, the appellant requests this Court to reverse the judgment and sentence of the lower court and to remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE CERTIFY that a copy of this Initial Brief of Appellant was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 9th day of October, 1989.

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