IN THE SUPREME COURT OF FLORIDA

GREGORY CAPEHART, :

Appellant, :

vs. : Case No. 74,231

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

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

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On February 24, 1988, a Pasco County grand jury returned a two-count indictment against Appellant, Gregory Capehart. (R842-843) The first count charged Appellant with the premeditated murder of Marlene Reaves[1] by suffocating her with a pillow. (R842) Count II charged burglary of Reaves' dwelling, during which Appellant made a battery upon her. (R842) The offenses allegedly occurred between February 3 and 4, 1988. (R842)

Appellant filed a motion on September 27, 1988, seeking to suppress a confession he allegedly made to Tom Muck and Gene Caruso of the Pasco County Sheriff's Office on April 12, 1988. (R932-933) By order dated February 13, 1989, the Honorable Maynard F. Swanson granted the motion and suppressed Appellant's "confession, including any testimony, writing or tape recording regarding same and any other evidence against [Appellant] obtained as an indirect or direct result" thereof. (R935)

This cause proceeded to a jury trial on February 20-23, 1989, with Judge Swanson presiding. (R1-792) Appellant unsuccessfully moved for a judgment of acquittal at the conclusion of the State's case. (R513-516) On February 22, 1989, the jury returned a verdict finding Appellant guilty of murder in the first degree as charged by the indictment. (R649, 906) As to Count II, the jury found Appellant guilty of the lesser included crime of burglary of

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[1] The name of the victim herein is spelled two different ways in the record on appeal: "Reaves" and "Reeves." Appellant will employ the "Reaves" spelling in his brief.

a residence "without the intent to commit an assault therein." (R649, 907)

Penalty phase, at which both the State and Appellant presented additional evidence, was held on February 23, 1989. (R654-792) By a vote of seven to five the jury recommended that the court sentence Appellant to death. (R783, 871) The court ordered a presentence investigation. (R791-792, 872)

Appellant filed a motion for new trial (R908-909), which Judge Swanson heard on April 4, 1989, and denied. (R807-819, 910)

On April 11, 1989, the court adjudicated Appellant guilty of murder in the first degree and sentenced him to death. (R838, 911, 917-919) He sentenced Appellant to 15 years in prison on the burglary count. (R839, 911, 920-921)

In his written findings pertaining to the sentence of death, the court found the following aggravating circumstances: (1) Appellant was previously convicted of another capital felony or of a felony involving violence to a person, to-wit: aggravated assault and armed robbery. (R912) (2) Appellant was engaged in a sexual battery or burglary when he committed the homicide. (R912-913) (3) Appellant's commission of the homicide was especially heinous, atrocious or cruel. (R913) (4) The homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R914) The court did not find any mitigating circumstances. (R914-916)

Appellant timely filed his notice of appeal to this Court on April 24, 1989. (R923-924)

On July 28, 1989, the State filed a notice of cross appeal of the "Pre-trial ruling granting the Defendant's Motion to Suppress Defendant's confession." (R954)

STATEMENT OF THE FACTS

Marlene Reaves was 62 years old. (R407) She lived alone at 903 Claude Street in Dade City in duplex apartment Number 6. (R286, 301-302, 412, 479-480) She was completely illiterate. (R287, 406) She could not tell time or make change. (R406) She did not know how to use the telephone. (R409) Reaves had a definite speech impediment. (R287, 411) When she got very excited it was hard for her to communicate. (R411) People took advantage of Reaves. (R408) She was once charged three dollars for a Coke. (R409-410) Her friend, Edith Snow, put a lock on Reaves' telephone because people in the neighborhood began using it to make long distance calls. (R409) Reaves kept many stuffed animals in her apartment. (R340) She always had her clock radio on. (R412) When Edith Snow and her husband made their daily visits to Reaves' residence, they made sure the clock was set right. (R412-413) Reaves was always clean and kept her house clean. (R407, 410) She suffered from Von Recklinghausen's disease, the same disease the Elephant Man had, which causes multiple tumors to develop on the skin and internal organs. (R391)

On February 3, 1988 Marlene Reaves ate supper with Edith Snow at Snow's residence. (R413) Snow invited Reaves to spend the night with her, but Reaves refused. (R413) Snow took her home about 5:30 to 6:00. (R413)

Reaves kept two sticks in each window of her apartment so that the windows could not be raised. (R414-416) When Snow left

Reaves that evening, every stick was in place. (R415-416) All the windows and doors were locked. (R414)

There were curtains on Reaves' bedroom window, but the middle part always stayed open, and one could see clearly into the bedroom from outside. (R416)

Robert Caruthers lived right next door to Marlene Reaves. (R302) He was in his kitchen drinking coffee between 4:40 and 6:00 on the morning of February 4, 1988 when he saw a person that appeared to be a man go by his windows in the direction of Reaves' apartment. (R303-304) This person was wearing an orangish-yellow detective coat or trench coat and a light brown fedora. (R305, 308) The man was about a head shorter than Caruthers, who was five feet, nine and one-half inches tall. (R310) He was not fat. (R310) Caruthers did not see the person's face because it was too dark outside, and had no idea whether he was black or white. (R304) Caruthers had some idea Marlene Reaves was hurt, as he heard a noise of some kind coming from that direction between 3:30 and 5:30. (R312)

Rebecca Henry was another neighbor of Marlene Reaves. (R286) She lived in apartment number 3. (R286) On the morning of February 4, 1988, Henry had what she described as the "most terrible experience of [her] life." (R288) She was awakened from a sound sleep around 5:00 by someone mashing a cushion down tightly on her face. (R288) It was dark outside, but in the apartment it was semi-dark and semi-light. (R292) The TV was on in the adjoining living room. (R292) The first thing the person who

entered Henry's apartment said to her was: "I want your money." (R289) He was a black man, a little taller than Henry's five foot eight, and a little heavier than her 150 pounds. (R290) He had something, apparently one of Henry's pillowcases, tied around his face, just under his nose. (R289-290) Henry told him she did not have any money, but he said, "'Yes, you have'." (R290-291) Henry explained that all her money was in the bank and offered to write a check for $50.00, but the man was not interested. (R291) Ultimately, Henry lied and told the man her money was in her trunk, which was in the living room part of the apartment, right outside the bedroom door. (R291) The man went to the trunk and "pilfered around" in it a little. (R292) Henry had gotten close to him because she had in mind to get around him and head for her front door. (R293) But the man took her arm and said, "You're not going anywhere." (R293) He took out a big switchblade from his pocket and touched her with it on the arm and right leg. (R294) The man took Henry back into the bedroom and had her on the bed and was choking her with his hands. (R294-296) She closed her eyes and held her breath. (R296) She was "out" momentarily. (R297) That was when the man left. (R296) Henry got up and went to the doorway between the bedroom and the living room. (R297) She thought she saw the man's feet and legs under her chair in the living room, and was really frightened, but it was just her mind or her eyes playing tricks on her; he was gone. (R297) Henry did not know how the man left or how he had come in. (R297) She went to the front door and called for Robert Caruthers. (R297-298) He

came and Henry called the sheriff's department. (R297-298) A deputy arrived in less then half an hour. (R300)

Pasco County Deputy Sheriff Jeffrey Clark arrived at Rebecca Henry's residence at approximately 7:30 on the morning of February 4, 1988 in response to her claim that someone had broken into her home and forcibly taken money from her. (R313-314) He spoke with Robert Caruthers, and then conducted a neighborhood check to see if any other residents in the area might have seen someone enter Henry's apartment. (R314) In the course of his neighborhood check Clark went to Marlene Reaves' residence. (R314) He knocked, but received no response. (R314, 321) The door was shut. (R315) Clark looked through the window, but could not see anything because of the drapes. (R315) He went around to the side and noticed that a screen had been taken off the window and laid up against the side of the house. (R315, 321) The window was "partially open a little bit," as it had not come down evenly. (R321)[2] The glass was not broken. (R321) Clark looked in the window and saw a white female body lying on the bed. (R315) He went around to the front door and tried it. (R316) The door knob would not turn, but the door pushed open a little. (R316, 323) Clark encountered resistance to opening the door because of items such as pillowcases that had come out of the closet and were lying on the floor against the door. (R316) He entered the residence

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[2] Another State witness, Crime Scene Technician Brian McMillan of the Pasco County Sheriff's Office, testified that the window was "open fully" as shown on a videotape of the crime scene, and that Deputy Clark had told him the window was open when Clark arrived at the scene. (R355-356)

very carefully and went to the bedroom, where he had the same problem opening the door because of items behind it. (R316-317) The whole house seemed ransacked. (R318) There were things thrown about. (R318) Clark had seen things strewn around Rebecca Henry's residence as well, but the ransacking there was not as extensive. (R318, 323)

In the bedroom Clark saw the face part of the body covered with a pillow. (R317) Clark testified at Appellant's trial that Reaves' underwear was pulled halfway down the legs, approximately to the knees, and there was no other clothing on the body (R317-318), but other evidence indicated that Reaves' underwear was completely off her left leg (R343), and that she was also wearing a nightgown and a brassiere that had been pushed up over her breasts. (R353, 388) Clark found no signs of life. (R317) He exited the house and secured the area. (R318)

A videotape of the scene showed shoe impressions outside the front door to Reaves' apartment (R338), and sand and what appeared to be a footprint under her bedroom window. (R342) An unplugged clock/radio showed a time of approximately 4:17 a.m. (R342)

A partial palm print lifted from Marlene Reaves' window screen matched Appellant's right palm print. (R346, 480-482, 485)[3] Other prints were obtained at Reaves' residence and Rebecca

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[3] On redirect examination of the State's fingerprint expert, Pasco County Sheriff's Deputy William Ferguson, the prosecutor asked if it was not a fact that the Florida Department of Law Enforcement told Ferguson the print on the screen matched (continued...)

Henry's residence, but none of them was identified as matching Appellant's prints. (R349, 488-490)

Microscopic evidence, hair and lint, was removed from Reaves' body. (R504) Three unidentified hair samples were sent to the laboratory. (R505) Of all microscopic evidence submitted to the Florida Department of Law Enforcement, no Negroid hairs were found. (R505) In fact, FDLE found no hairs dissimilar from the hair of Reaves. (R512)

Human blood was found on Reaves' panties, but the blood could not be further typed because it was of insufficient quantity. (R369-371) Fingernail scrapings from Reaves' hands failed to give chemical indications for the presence of blood. (R372-373)

Reaves' nightgown and swabs from her labia, anal area, vaginal area and mouth failed to give chemical indications for the presence of semen. (R371-373)

The forensic pathologist who performed the autopsy on Marlene Reaves, Dr. John C. Gallagher, died prior to Appellant's trial. (R379-383) Therefore, Dr. Joan Wood, Chief Medical Examiner for the Sixth Judicial Circuit, testified concerning the results of the autopsy. (R376-403) Her testimony was admitted over defense objections that there was no proper predicate therefore without Dr. Gallagher's autopsy report also being admitted. (R384-385, 399-400)

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[3](...continued)
Appellant's prints. (R491) Over defense objection Ferguson testified, "They confirmed it was a positive match." (R491-492)

The autopsy revealed that there were pinpoint hemorrhages in Marlene Reaves' left upper eyelid and the lining of her left eye. (R385-386) Her right nostril was flattened and the right side of her nose appeared pale. (R386) There was a very tiny area on her neck where the skin was rubbed off, and some small areas on the chest where the skin was rubbed off, which could have been created by the pulling upward of her brassiere. (R386-388) Reaves also had injuries to her sexual organs, the infliction of which Dr. Wood opined would have been painful. (R386-390) Dr. Wood concluded that the cause of the injuries to Reaves' genitalia was a sexual assault that occurred in the period of a few minutes before her death. (R390-391, 397) The blood on Reaves' underwear probably resulted from a finger or hand being inserted into her vaginal area before the underwear was removed from one leg. (R401-403) The internal examination did not reveal significant trauma. (R392-393) The cause of Marlene Reaves' death was asphyxiation due to smothering. (R394) If constant pressure was applied, it might have taken five minutes or a little longer, but less then ten minutes, for Reaves to die, but she would have remained conscious for only one to two minutes. (R396-397, 400) Reaves' vitreous potassium level indicated that she died between 11:41 p.m. and 4:41 a.m. (R398-399)

Diane Harrison knew of Appellant, but he was not a social friend of hers. (R420) On February 4, 1988, Harrison went by the little duplex apartment complex on Claude Street and saw some people exiting that area. (R421-423) There were three people in

one group who were young, like school kids, and another person by himself wearing a long black trench coat and a hat. (R423-424) Harrison recognized the lone individual as Appellant. (R424) On deposition Harrison said she did not know for a fact that the person she saw was Appellant and could not say for sure it was him, but she knew it looked like him. (R430) The court sustained several State objections to defense attempts to question Harrison regarding the difference between her deposition testimony and her trial testimony. (R431)

Carol McPhail also knew Appellant. (R436) She saw him on approximately February 5, 6, or 7, 1988, on the street and asked, "Why you do that to that woman?" (R435-437) Appellant looked at her and asked, "'What you talking about?'" (R437) McPhail replied, "You know what I'm talking about." (R437) Appellant said, "'Well, they ain't going to catch me.'" (R437) McPhail walked on and did not see or talk to Appellant after that. (R437)

Walter Harrison, Diane Harrison's cousin, had known Appellant all his life. (R442-443)[4] Harrison was with Appellant on Friday afternoon, the day after Marlene Reaves' body was found. (R444) They went from Dade City to Brooksville together. (R444-445) During the ride they discussed the murder. (R445) Harrison had heard that the police were looking for a man with a black trench coat. (R445) Harrison had given Appellant his black trench

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[4] At the time of Appellant's trial, Harrison was an inmate at Lancaster Correctional Institution. (R441) He had been in prison for about a month. (R441-442)

coat for Appellant to use. (R445) Harrison asked Appellant "did he do it[?]" (R445) Appellant "said he did it but he didn't mean to do it." (R445) Appellant explained that he broke into the house through a window to get money. (R446-447) He was intending to just take something out of the house without hurting the lady, but she woke up. (R446) Appellant said he tried to knock her out with a pillow over her face, but he accidentally killed her. (R446) Appellant did not seem to be serious, and Harrison did not believe him. (R446-447) That same night Harrison asked Appellant about it again, and "he said he was just kidding. He said he didn't. He was just bull jiving with [Harrison]." (R448-449) Appellant just wanted to see what Harrison was going to say. (R448)

In the early morning hours of April 12, 1988, David McKinnon, a patrol officer for the City of Orlando, stopped a car driven by Appellant for a civil traffic infraction. (R464-465) When McKinnon ran Appellant's name through the Florida and national crime computer, he was advised that there was a warrant out of Pasco County for Appellant's arrest for first-degree murder. (R465-466) Pursuant to that warrant, McKinnon arrested Appellant and placed him in his cruiser. (R466) Appellant began making statements without being questioned. (R466) He said he was with some "dudes" who were "going to rob this old lady." (R466) Appellant was on the porch. (R466) When the others did not come out for awhile, Appellant went inside. (R466) That is when he "saw the one dude sitting on top of the lady, strangling her."

(R466) Appellant said he did not know how they got him, he must have left his fingerprints on the bedroom door. (R466) Appellant also said words to the effect of "'Man, I didn't know they were going to kill her.'" (R468)

On April 12, Tom Muck and Gene Caruso of the Pasco County Sheriff's Office transported Appellant from Orlando to the Pasco County Jail. (R461-462, 498)

Muck was getting gas at the Pasco County detention facility on October 7, 1988, when he heard Appellant hollering, "Tom Muck. Tom Muck. Tom Muck." (R499) Appellant said to Muck, "'Remember me? I'm the guy you brought back from Orlando.'" (R500) Muck said, "Greg Capehart." (R500) Appellant said, "'Yeah. You messed me up.'" (R500) Muck said, "I don't know what you're talking about." (R500) Appellant said, "'You know, I just wanted that girl's pussy.'" (R500) That scared Muck and a shock wave went up his spine. (R500) He jumped in his car and went directly to the office. (R500)

The prosecutor was permitted over objection to ask Muck whether, based upon his review of the file and his knowledge of this case, there was anything that would tend to corroborate Appellant's statements that there was somebody else with him at Marlene Reaves' residence when she was raped, robbed and killed. (R501-503) Muck replied, "Absolutely none. As a matter of fact, he flat out lied to the officer from Orlando." (R503)

The defense presented no testimony or evidence at the guilt phase. (R517)

Appellant's Letter to the Court

Prior to the commencement of the penalty phase of Appellant's trial, Judge Swanson announced that he had received a letter from Appellant. (R657) The judge read the letter to himself in open court and said generally what was referred to in the letter, but did not read it into the record. (R658-659)

Among other things Appellant's letter complained about the all-white makeup of his jury, and said that Appellant's trial attorney "did not put up a very good defense." (R952) Appellant alleged that during closing argument his lawyer "spoke as if he was trying to prosecute" Appellant. (R952) Appellant concluded that he had been "misrepresented," and that this had a great impact on his case. (R952) The letter therefore asked the court to relieve his lawyer of his duties and appoint another lawyer to represent Appellant. (R953)[5]

After asking Appellant if he had anything to add to the request made in the letter and receiving a negative response, the court addressed the matters raised in the letter, and denied Appellant's request for new counsel. (R659-661)

Penalty Phase

Through the testimony of Deputy Sheriff William Ferguson, the State put into evidence a judgment and sentence showing Appellant's conviction for robbery, grand theft and aggravated

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[5] The letter indicated that a friend had helped Appellant by putting it "in the words [Appellant] had in mind to say." (R952)

assault in 1986 (R664-665, 939-951), and a photograph of Marlene Reaves as she was found. (R666) The State then rested. (R667)

Appellant's mother, Shirley Capehart, was the first defense witness. (R668-669) Appellant was born in August, 1967. (R670) He had two siblings. (R669-670) Shirley Capehart divorced Appellant's father in 1968 or 1969. (R669-670)

Mrs. Capehart had always worked, leaving a neighbor or babysitter to take care of appellant. (R674)

Shirley's husband was always drinking. (R671) He did not pay attention to Appellant when he was a child. (R670) He committed acts of violence on Appellant, hurting him once. (R670)

Appellant's father threw Appellant out the door when he was three days old, during a fight with Shirley. (R675) A neighbor kept Appellant for one to three weeks before returning him to his mother. (R675)

When he was eight or nine years old, Appellant moved to Orlando with his maternal grandmother. (R677)

Appellant went to live with his father when he was about 16. (R672) Prior to that time, Appellant had not given his mother any problems, nor had he been in trouble with the law. (R671-673)

Appellant did all right in school until he became 15 or 16. (R671-672) He dropped out in seventh, eighth or ninth grade. (R672)

Joel Epstein was a clinical psychologist who conducted a psychological examination of Appellant for about two and one-half hours on September 22, 1988. (R682-684) At the time Espstein saw

Appellant, he was sufficiently under control to present a decent appearance, function within the jail setting, go through trial, and cooperate with his attorney. (R688) His ability to relate to Epstein was good, however, Appellant's ability to explain himself verbally was very poor. (R689, 710)

Epstein took a history from Appellant and administered a number of standardized psychological tests. (R684) Appellant appeared to present his history in a rational and as honest as possible fashion. (R688-689) It revealed that Appellant had had a troubled life. (R686) His father was a severe alcoholic who used to beat him regularly with electrical cords. (R686) Appellant had always had difficulties in school and may have been in special education classes. (R686-687) He dropped out at about the tenth grade. (R687) Appellant had been in trouble with the law on numerous occasions, and had been in and out of jail for things like auto theft, burglary, and retail store theft. (R687) He had no significant work history. (R687) He had suffered a number of blows to his head, and had been in a number of fights where he had been unconscious, twice in 1981 and once in 1984. (R687) After one of those incidents Appellant was reportedly hospitalized for a long period. (R687) Appellant had a long history of abusing alcohol and marijuana. (R687)

Epstein found a great deal of variability in the scores on the tests he administered to Appellant, which indicated that Appellant may have had a history of a learning disability, or the effects of drugs and alcohol and head trauma had produced some

organic sort of changes, and his brain was not completely intact. (R690)

Appellant's reading level was very poor, below third grade level. (R690) He was basically illiterate. (R690) He was not retarded, but his memory intellect was probably in the borderline sort of range, although his memory was not too bad. (R689-690)

Appellant was not psychotic, but his hold on reality was very, very marginal. (R690) Under stress or the influence of alcohol or drugs Appellant had the potential for losing touch with what was going on and his behavior becoming random and non-purposeful. (R690) Under the influence of alcohol and drugs Appellant would lose sight of his objective and very well might become violent; he could panic easily. (R691) Epstein diagnosed Appellant as having an ongoing alcohol abuse problem, a schizoid personality disorder, an avoidant personality disorder, and a dependent personality disorder. (R705) If Appellant was not under the influence of alcohol and drugs when Marlene Reaves was killed, Epstein would not have expected him to be psychotic. (R706) Epstein could not give opinions as to whether Appellant was under the influence of any mental or emotional disturbance or whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the offense. (R706)

In his account to Epstein of the incident in question, Appellant said he was involved with another individual in a

burglary, but denied committing the murder. (R708-709) Appellant told Epstein he was high on alcohol and marijuana, as he had been consuming these substances for a number of days. (R688, 709) Appellant said "Walter Harris" was holding his drugs at a place in Dade City called "The Hole," which was where a number of people went to drink and do drugs. (R688, 692-693) Appellant had been smoking, and when he woke up a person named Angela Carter and another girl had "ripped him off," and he needed to get some money back. (R692-693) Someone named Anthony Hall told Appellant where to go to get money. (R693) He went to the old folks' place behind Winn-Dixie, went in a window, opened the door, searched the place, heard a noise and ran. (R693) The next day he heard the news that a woman was dead. (R693)

Sidney Merin was called by the State as its first rebuttal witness. (R711) He was a clinical psychologist and neuropsychologist who spent about eight hours testing and evaluating Appellant on February 17, 1989. (R711, 716-717)

With regard to the incident in question, Appellant told Merin he met someone named B.A., whose last name Appellant did not know, whom Appellant referred to as his partner. (R717-718) B.A. said he needed some money, and they were going to B.A.'s apartment to get some. (R718) After they walked the three or four miles to B.A.'s residence, he feigned looking in his pockets for a key, indicating to Appellant that he must have left it some place or lost it or something of that nature, and it was necessary to break into the apartment. (R718) They went around back where Appellant

saw a window partially open. (R718) He lifted out the screen and set it aside. (R718) He stayed outside while B.A. went in. (R718) After a few moments Appellant heard someone who sounded like a female scream. (R718) He looked inside and saw B.A. sitting on the woman's abdomen, pushing a pillow down over her face. (R718) One of her legs was dangling over the side. (R718-719) No lights were on except a lamp that was on either a table or dresser, and the size and shape of which Appellant described and drew a picture. (R719) When the woman stopped kicking, Appellant went to his uncle's house several blocks away. (R719) It was about 4:00 a.m. (R719) Appellant told his uncle he had just seen somebody killed and had probably left his fingerprints on the screen. (R719-720) His uncle had been smoking crack cocaine, but was sharp enough to tell Appellant that he could be held as an accessory to murder. (R720) He suggested that Appellant leave the area and possibly go to Orlando to visit a grandmother. (R720) Appellant sat around until about 6:00, then went to his other grandmother's home for some clothes, and his brother drove him to Orlando. (R720) Appellant knew the woman had been raped because his attorney had shown him some pictures and told him she had been raped, and it was clear to Appellant from the pictures that she had been raped. (R720)

Appellant told Merin he had observed the episode involving B.A. and the woman for about two seconds. (R719) Merin questioned in his own mind whether anyone could make all those observations and someone could die by being smothered in just those

two seconds. (R719) His opinion was that when Appellant was talking about B.A., he was talking about himself. (R720-721)

Appellant told Merin he had had two six-packs over a seven-hour period prior to the incident, but Merin concluded he was not intoxicated. (R733, 736)

The tests Merin conducted revealed that Appellant had a combined IQ of 73. (R724-725) However, he had a much greater street type of intellect. (R725) Appellant's grasp of words was relatively poor. (R725-726) He was not a particularly reflective sort of person. (R729)

As a result of his testing Merin adopted the hypothesis that Appellant was malingering, making up stories to fit whatever he wanted Merin to know. (R728)

Merin felt Appellant was competent to stand trial, and was sane at the time of the crime. (R728-729) He did not find Appellant to be schizoid, avoidant, but rather an antisocial personality. (R728, 730) Merin's opinion was that at the time of the murder, Appellant was not under the influence of a mental or emotional disturbance, nor was his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law impaired. (R729-730)

The second rebuttal witness called by the State, and the final witness at penalty phase, was Daniel Sprehe, a physician specializing in psychiatry. (R737-738) He performed a psychiatric examination of Appellant on February 16, 1989. (R739)

Appellant told Sprehe several stories about the offense. (R740) He kept chaning his story as Sprehe confronted him with various things he had on his records. (R740) In one scenario Appellant said he was outside the building and never went inside. (R740) In another he stated he was inside and observed someone else choking the lady. (R740) In a third scenario Appellant claimed there were several people involved. (R740) Later he claimed there was only one other person named B.A. involved, and he did not want to tell everything he saw because he did not want to get B.A. in trouble. (R740) Appellant claimed that he drank nine beers and had a nickel bag of pot over several hours on the day prior to the crime and was intoxicated, but Sprehe determined that Appellant was not so intoxicated that he would not have been able to tell right from wrong. (R740-742) In all of Appellant's stories he admitted he was aware he was engaged in a burglary and robbery of a woman along with an accomplice, but he denied any sexual contact with the woman. (R740)

Appellant's past history did include a rape charge, and on another occasion when he was 13 years old he was beaten up by some friends because he had sexually molested a man's sister. (R740) Appellant admitted to a lot of fighting as a child and trouble in school. (R740) Appellant denied he was ever hospitalized after a fight, but one of the records Sprehe saw indicated that Appellant had been hospitalized for four months after being rendered unconscious in a fight. (R740) Appellant denied being an alcoholic, but admitted to a lot of episodes in his life when he

got into trouble while under the influence of alcohol. (R740) Appellant's work history was very sketchy and his social stability history was very poor. (R740)

Sprehe opined that Appellant was not suffering from any mental illness, but did have an antisocial personality disorder. (R742) It was Sprehe's opinion that at the time of the offense Appellant was not under the influence of a mental or emotional disturbance of any kind, and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was not impaired in any way. (R743)

SUMMARY OF THE ARGUMENT

I. The State's evidence was insufficient to establish that Appellant was the person who killed Marlene Reaves while burglarizing her apartment. The partial palm print found on the screen outside Reaves' window could have been put on there at any time, and did not place Appellant inside Reaves' residence. Diane Harrison's testimony was somewhat equivocal in identifying Appellant as the person she saw coming from the area of the apartment complex where Reaves lived. Furthermore, she saw other people in the vicinity at the same time. The coat she saw Appellant wearing was a completely different color than the coat of the man Robert Caruthers saw walking toward Reaves' apartment. And Harrison supposedly saw Appellant approximately two hours after the latest possible time Reaves was killed. With regard to the statements possibly inculpatory Appellant made to the State's witnesses, it is not all clear from them that he was admitting to perpetrating the homicide of Marlene Reaves. He could have been referring to the Rebecca Henry incident, or something else entirely in these statements. There was a dearth of other evidence to link Appellant with the Reaves killing. Taken as a whole the circumstances fell short of leading to a reasonable and moral certainty that Gregory Capehart and no one else committed the offenses charged.

II. The testimony of the State's fingerprint comparison expert, William Ferguson, on redirect examination that the Florida Department of Law Enforcement confirmed his findings constituted

inadmissible hearsay. Appellant's cross-examination of Ferguson in no way opened the door for this testimony, and none of the exceptions to the hearsay rule can be applied. The palm print evidence was crucial to the State's case and the prosecutor emphasized the hearsay in question during his closing argument to the jury; its admission cannot be deemed harmless.

III. Detective Tom Muck's testimony that he found no corroboration for Appellant's statement to Orlando Patrol Officer McKinnon that someone else was with Appellant when he was at Marlene Reaves' residence, and that Appellant "flat out lied to the officer from Orlando" should not have been admitted. It invaded the province of the jury to determine the credibility of witnesses and draw conclusions from the evidence, and improperly cast Appellant in a bad light before the jury.

IV. By preventing defense counsel from asking Diane Harrison several questions pertaining to the testimony she gave on deposition, the trial court unduly hampered Appellant's right to fully cross-examine this important State witness. The questions counsel sought to ask were germane to how certain Harrison was that Appellant was the person she saw coming out of the area of the duplex apartments on Claude Street on the morning Marlene Reaves' body was found.

V. The testimony of Dr. Joan Wood regarding the results of the autopsy Dr. John Gallagher performed on Marlene Reaves should have been excluded from Appellant's trial. Dr. Wood should not have been permitted to tell the jury what Dr. Gallagher found,

as his autopsy report was itself the best evidence of his findings. And without the autopsy report in evidence, Dr. Wood's own conclusions lacked a factual basis.

VI. Appellant's burglary conviction must be vacated because the jury's verdict on this count is ambiguous and will not support it. It appears that the jury may have returned a verdict for a non-existent offense, or one with which Appellant was not charged, and which was neither a proper lesser included offense, nor a lesser degree of the charged offense. Examination of other portions of the record in conjunction with the verdict sheds no light on the jury's intent. Appellant's death sentence was also influenced by the improper burglary verdict, and it too must be vacated.

VII. The jury and the court received much irrelevant and prejudicial information concerning the sad existence of the deceased, Marlene Reaves. The prosecutor capitalized upon this evidence in his penalty phase argument to the jury, and the court relied upon it in his findings in aggravation. Although not objected-to, the strong victim impact testimony and argument presented herein so permeated the proceedings as to undermine the reliability of the jury's findings of guilt and recommendation as to penalty, as well as the court's sentencing order.

VIII. The court below failed to conduct an adequate inquiry into Appellant's request that his court-appointed lawyer be relieved of his duties and other counsel be appointed to represent Appellant. The court summarily rejected Appellant's allegations

that his attorney was not representing him well and denied Appellant's request after asking but one question of Appellant, and none of his attorney. Furthermore, the court should have advised Appellant that his lawyer could be discharged, but the court would not be required to appoint substitute counsel, and that Appellant had the right to represent himself.

IX. The State acted improperly in supplying its two mental health experts with Appellant's confession that was ordered suppressed due to a violation of Appellant's right to counsel. The confession was considered by Drs. Sprehe and Merin in formulating the opinions they expressed at the penalty phase of Appellant's trial. The State's action violated the broad suppression order signed by the court, which was designed to fully vindicate Appellant's right to counsel.

X. The trial judge's non-standard guilt phase instruction to Appellant's jury that he and he alone would determine the proper sentence if Appellant was convicted was erroneous and misled the jury regarding its important place in Florida's capital sentencing scheme. The court's non-standard penalty phase instruction that the jury's recommendation of death was entitled to great weight likewise was improper; a jury recommendation of life is also entitled to great weight. The court's instruction suggested that death is the punishment preferred by the courts.

XI.A. In finding that Appellant had previously been convicted of another felony involving the use or threat of violence, the sentencing court improperly relied upon the presen-

tence investigation report and referred to an armed robbery for which Appellant was not convicted.

B. The jury's ambiguous verdict on the burglary count of the indictment herein renders unreliable the trial court's finding that Appellant was engaged in a sexual battery or burglary when he committed the instant homicide.

C. The instructions the trial court gave Appellant's jury at penalty phase did not adequately define and narrow the aggravating circumstance of especially heinous, atrocious, or cruel. The court's finding on this aggravator improperly relied on victim impact evidence, and contained factual inaccuracy.

D. The instructions the trial court gave Appellant's jury at penalty phase did not adequately define and narrow the aggravating circumstance of cold, calculated, and premeditated. The court's finding on this aggravator improperly relied on victim impact evidence. Furthermore, this factor is not supported by the facts. The evidence did not show Marlene Reaves' homicide to be carefully planned or prearranged; it may well have resulted from a burglary or sexual battery that got out of hand. This aggravator was not established merely by the fact that the perpetrator had to press the pillow down on Reaves' face for several minutes before she expired.

E. Although included in the section of his findings in which the court discussed mitigation, the court improperly considered against Appellant several factors which are not among the aggravating circumstances listed in the Florida Statutes, to-

wit: Appellant's bad criminal and scholastic record, and his antisocial personality disorder which made Appellant a "danger to the community."

The court also failed to properly fulfill his duty to find and consider all mitigating circumstances established by the evidence. Among the factors he did not address at all in his sentencing order were Appellant's low intelligence and learning difficulties, Appellant's chronic alcohol and marijuana abuse problem, the possibility that Appellant suffered from organic brain damage, and Appellant's troubled early home life that included neglect and beatings at the hands of his father.

XII. Appellant should have been sentenced under the guidelines for his conviction on the noncapital felony of burglary.

ARGUMENT

ISSUE I

INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO ESTABLISH THAT IT WAS APPELLANT WHO PERPETRATED THE OFFENSES AGAINST MARLENE REAVES.

The evidence presented at Appellant's trial to link Appellant with the killing of Marlene Reaves was circumstantial and tenuous at best. It consisted essential of the partial palm print found on the window screen outside Reaves' residence, the testimony of a witness who supposedly saw Appellant in the area of the apartments where Reaves lived on the morning her body was found, and some equivocal statements made by Appellant. His motion for judgment of acquittal should have been granted.

Perhaps the State's strongest piece of evidence was the partial palm print found on the window screen on the ground outside Marlene Reaves' apartment, which William Ferguson of the Pasco County Sheriff's Office testified matched Appellant's prints. (R480-482) (Please see Issue II. herein.) This showed that Appellant had touched the screen at some point in time. However, it did not establish that Appellant ever went <u>inside</u> Marlene Reaves' residence, which is where the offense was perpetrated. None of the prints from inside Reaves' apartment matched Appellant's prints. (R349, 488-490) Furthermore, Ferguson could not say when the print was put on the screen. (R487-488) In order to establish identity by the use of a fingerprint, the State must show that the print of the accused could only have been made at the

time the crime was committed. State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976); Williams v. State, 308 So.2d 595 (Fla. 1st DCA 1975). This the State failed to do at Appellant's trial. The screen was outside, readily accessible to anyone who happened to pass by. The fact that Appellant's palm print was found on the screen did not prove that he committed the offense.

Diane Harrison's testimony that she saw Appellant coming out of the area of the duplex apartment complex on Claude Street somewhere around 6:30 to 7:00 on the morning of February 4, 1988 (R422-424), likewise did not establish Appellant's guilt. Harrison's identification of Appellant was somewhat equivocal. (Please see Issue IV. herein.) Furthermore, Appellant was not the only person Harrison saw emerging from that area; she saw a group of three young people as well. (R423) And the clothing Appellant was wearing did not match that of the person whom Robert Caruthers had seen earlier walking toward Marlene Reaves' apartment. Appellant had on a black coat. (R423-424) The man Caruthers saw had on an orangish-yellow coat. (R305) The colors thus were not even similar. Finally, the time Harrison supposedly saw Appellant was approximately two hours after the latest possible time Reaves could have died, according to the medical examiner, 4:41 a.m. (R398-399) It defies belief that one would linger in the vicinity of a homicide he had committed, risking detection, for two hours or more after the crime was completed.

As for the statements Appellant made to Carol McPhail, Walter Harrison, David McKinnon, and Tom Muck, Appellant could have

been referring to an incident other than the Marlene Reaves offense, such as the episode involving Rebecca Henry. It must be remembered that there were two offenses committed at the apartment complex on Claude Street on the morning of February 4, 1988. It is unknown if the same person perpetrated both offenses. In Appellant's statements he mentioned only one break-in, not two. Appellant's statement to Carol McPhail that, "Well, they ain't going to catch me" obviously did not point to his guilt of the killing of Marlene Reaves. He could have been referring to the Rebecca Henry burglary, or anything else for that matter. Walter Harrison said that Appellant told him he broke into a house through a window intending to take something out without hurting the lady, but she woke up. (R446-447) Appellant tried to knock her out with a pillow over her face, but he accidentally killed her. (R446) Again this could have been a reference to the Henry break-in. A cushion was placed over Henry's face initially. (R288) Although Henry was not killed, she was rendered unconscious (albeit by choking) (R294-297), and Appellant may have left when he thought he had killed her. Furthermore, Harrison did not believe Appellant when he said these things, as Appellant did not seem to be serious. (R446-447) And that same night Appellant recanted his statements, saying he was only "bull jiving" to see what Harrison would say. (R448-449) Appellant's statements to the Orlando officer who arrested him, David McKinnon, that he was with some "dudes" who went to rob an old lady and that Appellant saw one "dude" sitting on top of the lady, strangling her (R446), did not fit the killing

of Marlene Reaves. She was not strangled, but smothered. It was Rebecca Henry who was choked. Finally, Appellant's statement to Tom Muck that he "just wanted that girl's pussy," did not necessarily relate to the Marlene Reaves incident. Appellant in no way indicated that the 62 year old Reaves was the "girl" to whom he was referring. Again, the reference may have been to Rebecca Henry. Although Reaves, not Henry, was sexually assaulted, this does not foreclose the possibility that the perpetrator intended to commit a sexual battery upon Henry, which he did not complete for unknown reasons.

It is also significant to note what evidence was not found. Although the sheriff's deputies found shoe impressions outside Reaves' front door and in her bedroom, there was no evidence that these were made by Appellant. (R338, 342) No Negroid hairs were found among the hair samples obtained from Reaves' body. (R504-505) The human blood found on Reaves' underwear could not be typed to link it to Appellant or anyone else. (R369-371) No semen was found. (R371-373)

Where, as here, proof of guilt is circumstantial, the conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Heiney v . State, 447 So.2d 210 (Fla. 1984); McArthur v. State, 351 So.2d 972 (Fla. 1977).

> Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense." Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that

> create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. [Citations omitted.]

Cox v. State, 555 So.2d 352, 353 (Fla. 1989). The following passage form Moberly v. State, 562 So.2d 773, 775 (Fla. 2d DCA 1990) is equally applicable to Appellant's cause:

> Although the circumstantial evidence furnished a suspicion of guilt, it fell far short of circumstances of "a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged." Owens v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983) (emphasis in original).

In Cox this Court held the evidence insufficient to support the conviction of the appellant, who had been sentenced to death for first-degree murder, and ordered his acquittal. The evidence against Gregory Capehart was similarly inconclusive. Here, as in Cox, the State's evidence, taken as a whole, could have created only a suspicion, rather than proving beyond a reasonable doubt, that Capehart, and only Capehart, murdered the victim. No matter how strongly the evidence might suggest guilt, it is the duty of this Court to reverse where that evidence has not eliminated a reasonable hypothesis that Appellant is innocent. Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988); Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987).

ISSUE II

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT INADMISSIBLE HEARSAY TO BOLSTER THE OPINION OF THE STATE'S EXPERT ON FINGERPRINT IDENTIFICATION.

On direct examination William Ferguson of the identification bureau of the Pasco County Sheriff's Department testified that the palm print lifted from the window screen that was found on the ground outside Marlene Reaves' residence matched the known prints of Appellant. (R476, 480-482) He was absolutely certain of the match; there was "no doubt in [his] mind." (R482)

On cross-examination defense counsel naturally sought to cast some doubt on Ferguson's identification. For example, he elicited the fact that the print on the screen was only a partial palm print. (R485) He brought out that there is an unlimited number of possible points of comparison between latent prints and known prints, and that Ferguson had stopped at ten. (R486) The last question counsel asked was whether any of the fingerprints recovered from the scene were ever sent to the Florida Department of Law Enforcement, to which Ferguson responded in the affirmative. (R490-491)

On redirect the State elicited that the known prints of Appellant and the print taken from the screen were sent to the Florida Department of Law Enforcement for examination. (R491) The prosecutor then asked, "And isn't it a fact that they told you it was a match? Didn't they?" (R491) Defense counsel lodged an objection. but Ferguson answered, "They confirmed it was a positive

match." (R491) Defense counsel moved to strike the question and answer, but the trial court "denied" the objection, agreeing with the prosecutor that counsel had somehow opened the door to the objectionable testimony. (R491-492)

Ferguson's testimony regarding what FDLE said clearly was hearsay as defined in subsection 90.801(1)(c) of the Florida Statutes.

Hearsay generally is inadmissible (section 90.802, Florida Statutes) for three reasons: (1) The declarant does not testify under oath. (2) The trier of fact cannot observe the declarant's demeanor. (3) The declarant is not subject to cross-examination. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Furthermore, the rule excluding hearsay

> prevents the fabrication of testimony and evidence. This is accomplished by requiring the maker of a statement to testify in person and be subject to cross-examination so that the trier of fact, be it judge or jury, will have the opportunity of judging the veracity of the statements. The cases holding such evidence [hearsay] inadmissible are legion. [Citations omitted.]

Cirack v. State, 201 So.2d 706, 709 (Fla. 1967). Hearsay of the type admitted here, where one expert testifies regarding the opinion of another, has been specifically held inadmissible in cases such as Everett v. State, 97 So.2d 241 (Fla. 1957) and State v. Towne, 142 Vt. 241, 453 A.2d 1133 (Vt. 1982), which was cited with approval in Bunyak v. Clyde J. Yancey and Sons Dairy, 438 So.2d 891 (Fla. 2d DCA 1983).

Although there are, of course, a number of exceptions to the hearsay rule, which are codified in sections 90.803 and 90.804 of the Florida Statutes, the testimony elicited by the State does not come within any of the exceptions. And, contrary to the lower court's ruling, nothing about Appellant's cross-examination of Ferguson opened the door for this kind of inadmissible hearsay to come in.

The court's erroneous ruling cannot be deemed harmless error. The single matching print was the only evidence the State had to show that Appellant had definitely been at (or at least outside) Marlene Reaves' residence at some point in time. See Quick v. State, 450 So.2d 880 (Fla. 4th DCA 1984) (reversible error found where inadmissible hearsay formed "keystone" in State's case). To have the Pasco County Sheriff's Deputy who had never testified before as an expert in a first-degree murder case (R479) tell the jury that the statewide crime department agreed with his findings obviously was most hurtful to any defense attempt to call those findings into question.

Additionally, the prosecutor was not content merely to elicit hearsay in his redirect examination of Ferguson; he chose to emphasize this testimony in his final argument to the jury when he said, "He [defense counsel] talks about Bill Ferguson, a rookie who made the fingerprint comparison. Ferguson told you that the FDLE backed him up and said he's right." (R606 -- emphasis supplied) In Williams v. State, 510 So.2d 656 (Fla. 2d DCA 1987) the court refused to find error in the admission of hearsay harmless, in part

because the State made reference to the hearsay testimony in its closing and rebuttal arguments.

Because of the State's use against Appellant of prejudicial hearsay testimony, Appellant's trial did not pass constitutional muster under the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 16 of the Constitution of the State of Florida. He must be tried again.[6]

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[6] In addition to calling for hearsay, the prosecutor's questioning of Ferguson clearly was leading.

ISSUE III

THE TRIAL COURT ERRED IN PERMITTING STATE WITNESS TOM MUCK TO OFFER OPINIONS REGARDING THE EVIDENCE IN THIS CASE AND APPELLANT'S VERACITY WHICH INVADED THE PROVINCE OF THE JURY.

On direct examination of Detective Tom Muck of the Pasco County Sheriff's Department, the prosecutor was permitted to ask, over objection, whether Muck had found any corroboration in his review of this case for Appellant's statement to Orlando Patrol Officer David McKinnon that someone else was with him at Marlene Reaves' residence when she was "raped, robbed and killed." (R501-503) Muck responded, "Absolutely none. As a matter of fact, he flat out lied to the officer from Orlando." (R503)

In his objection defense counsel correctly noted that the prosecutor's question called for an answer that would invade the province of the jury. (R502)

The jury is the sole arbiter of the credibility of the witnesses, including the defendant. Barnes v. State, 93 So.2d 863 (Fla. 1957); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984). It thus constitutes an invasion of the jury's exclusive province for one witness to offer his opinion on the credibility of another. Tingle v. State, 536 So.2d 202 (Fla. 1988); Weatherford v. State, 15 F.L.W. D1251 (Fla. 1st DCA May 7, 1990); Boatwright. Although Appellant did not himself testify at trial, statements he allegedly made were put into evidence. Appellant therefore was indirectly a witness, whose credibility was something for the jury

to determine, unfettered by Muck's personal views on whether Appellant lied to Officer McKinnon.

Additionally, Muck's branding of Appellant as a liar could only have cast Appellant in a negative light to the jury and caused them to be prejudiced against him.

Muck's conclusion that there was no corroboration for Appellant's statements to Officer McKinnon similarly ventured into an area best left to the jury's determination. They could view the evidence that was presented to them to decide whether what Appellant said was supported by other evidence without the benefit of Muck's personal opinion on this matter.

Furthermore, Appellant would note that Muck was neither offered nor received as an expert witness, and thus was not entitled to express opinions pursuant to section 90.702 of the Florida Statutes.

Finally, the prosecutor emphasized Muck's conclusions that the evidence did not support Appellant's statements to McKinnon and that Appellant had lied at least twice in his guilt phase argument to the jury. The first time he said:

> Now, I want you to assume and I'm asking you to stretch this a bit, but I want you to assume that what Greg Capehart told McKinnon in Orlando was true. Contrary to all the other evidence there is in this case, but let's just assume for a moment that what Greg Capehart told McKinnon was true. He said that, "Me and these other dudes went to that lady's house to rob her. They were inside too long. I went in and saw one of them strangling her." Does that sound familiar to you?

> Sort of like a murder committed in the course of a burglary and a robbery? So, let's assume that what Greg Capehart said was true. That's a first degree murder, folks. But it's like Tom Muck said. He lied to McKinnon.

(612 -- emphasis supplied) At first the end of his argument to the jury, the prosecutor had this to say:

> Walter Harrison -- Walter Capehart -- Walter Harrison -- I'll get it straight. Walter Harrison: Said he didn't mean to do it . Officer McKinnon: Said somebody else did it. I just watched. He lied. He lied. It's like Tom Muck said, there's no evidence to support either of those theories. He lied. Greg Capehart is a murderer, a burglar, a thief, a rapist, and a liar. Do you know why? Because the evidence proves it.
>
> Thank you.

(R616-617 -- emphasis supplied) See Riley v. State, 15 F.L.W. D997 (Fla. 3d DCA April 17, 1990) (conviction reversed due to a number of overzealous comments of prosecutor in closing argument, including repeated comments about the defendant lying and coming across like a liar).

The improper testimony of Tom Muck deprived Appellant of a fair trial. Amends. VI, XIV, U.S. Const.; Art. I, §§ 9, and 16, Fla. Const. He must receive a new one.

ISSUE IV

THE TRIAL COURT ERRED IN UNDULY RESTRICTING APPELLANT'S CROSS-EXAMINATION OF STATE WITNESS DIANE HARRISON.

On direct examination prosecution witness Diane Harrison testified that she saw Appellant emerging from the area of the little duplex apartment complex on Claude Street on the morning of February 4, 1988, which was the morning Marlene Reaves' body was found. (R421-424) On cross-examination of Harrison, defense counsel read from her deposition as follows (R430):

> Q. (By Mr. Ivie) "Question: But you didn't get a good look at his face?
>
> "Answer: Not really. I just glanced like that and that was it.
>
> "Question: You don't know for a fact that it was Gregory Capehart?
>
> "Answer: No. I know it looked like.
>
> "Question: It looked like him?
>
> "Answer: Yeah.
>
> "Question: But today under oath you're saying that you can't say for sure that it was Gregory Capehart?
>
> "Answer: No."

Counsel then asked Harrison if she remembered those questions and answers, to which she responded, "Yeah." (R430-431) Counsel next asked, "Having heard those questions and answers do you wish to change your testimony at this time?" (R431) The court sustained (or "granted") a State objection that this was "improper." (R431) When Appellant's attorney asked Harrison whether the answers she

gave on deposition were true, another State objection that this was "also improper" was "granted." (R431) Finally, defense counsel tried this question: "Are your answers today different from your answers given at the deposition?" (R431) The court "granted" a general State objection. (R431)

The defendant in a criminal case has an absolute right to full and fair cross-examination of the witnesses against him. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Coco v. State, 62 So.2d 892 (Fla. 1953). In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, 927 (1965), the Supreme Court of the United States declared the right to confrontation and cross-examination to be "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Deprivation of this right is a denial of due process. Pointer.

A criminal defendant "is normally accorded a wide range in the cross-examination of prosecution witnesses," Lutherman v. State, 348 So.2d 624, 625 (Fla. 3d DCA 1977), see also Bryan v. State, 533 So.2d 744 (Fla. 1988), and the courts will be particularly zealous in guarding the defendant's cross-examination rights in a capital case. Williams v. State, 386 So.2d 25 (Fla. 2d DCA 1980).

The court below unduly restricted Appellant in his attempt fully to cross-examine Diane Harrison and test the believability of her testimony. Florida's Evidence Code clearly permits impeachment of a witness by confronting her with her prior

inconsistent statements, section 90.614, Fleming v. State, 457 So.2d 499 (Fla. 2d DCA 1984), Tobey v. State, 486 So.2d 54 (Fla. 2d DCA 1986), and counsel was entitled to challenge the certainty of Harrison's identification of Appellant as the person she saw that morning. Had Harrison testified in response to counsel's questions that she did wish to change her in-court testimony in light of the deposition testimony that counsel had just read, or that her deposition testimony, rather than her trial testimony, was the truth, or had Harrison acknowledged that her in-court answers to the attorney's questions were indeed different from the answers she gave on deposition, this could have gone a long way toward discrediting the witness in the eyes of the jury. But, unfortunately, Harrison was not allowed to respond to defense counsel's questioning.

Rulings which limit defense cross-examination of necessary State witnesses such as Diane Harrison are subject to close appellate scrutiny. Slater v. State, 382 So.2d 892 (Fla. 4th DCA 1980). An abuse of discretion by the trial judge in curtailing cross-examination of a key prosecution witness regarding matters germane to the witness's testimony may "easily constitute error," especially in a capital case. Coxwell, 361 So.2d at 152. Accord: Pait v. State, 112 So.2d 380 (Fla. 1959) (error in capital case must be carefully scrutinized before being written off as harmless). Diane Harrison's testimony was vital to the prosecution. She was the only witness to say that she saw Appellant in the vicinity of the homicide near the time it occurred. The other

evidence linking Appellant to the killing was tenuous at best. (Please see Issue I herein). It was critical that Appellant be permitted to explore fully the degree of confidence Harrison had in her identification of Gregory Capehart as the person she saw near the duplex apartments. The court's refusal to give Appellant adequate latitude to delve into this area unconstitutionally deprived Appellant of his right to confront and cross-examine the witnesses against him. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9, 16, and 22, Fla. Const. As a result, Appellant must receive a new trial.

ISSUE V

THE COURT BELOW ERRED IN ALLOWING STATE WITNESS DR. JOAN WOOD TO TESTIFY REGARDING THE RESULTS OF THE AUTOPSY THAT DR. JOHN GALLAGHER PERFORMED ON MARLENE REAVES WITHOUT THE AUTOPSY REPORT BEING ADMITTED INTO EVIDENCE.

The forensic pathologist who performed the autopsy on Marlene Reaves, Dr. John Gallagher, died prior to Appellant's trial. (R379-383) Dr. Joan Wood, Chief Medical Examiner for the Sixth Judicial Circuit, therefore testified in his stead concerning the results of the autopsy. (R376-403)

It is not absolutely clear from the prosecutor's questioning of Dr. Wood whether he was asking her to state her own opinions, arrived at through reviewing Dr. Gallagher's autopsy report and other materials, or whether he was asking her merely to inform the jury as to what Dr. Gallagher found. For example, after ascertaining that Dr. Wood had reviewed the autopsy report, as well as the toxicology report, evidence receipts, photographs taken of the body at the scene and at the office, and all of the paperwork that was in the file, the prosecutor asked Dr. Wood if she was able to form any opinions or come to any conclusions. (R383) However, the prosecutor shortly thereafter asked the following question (R384):

> And as a result of your review of Dr. Gallagher's report, were you able to determine what if anything or what results Dr. Gallagher found concerning the external examination of the body of Marlene Reeves?

This pattern continued throughout the questioning of Dr. Wood, with the prosecutor at times asking for her opinion, and at other times asking her to relate Dr. Gallagher's findings and conclusions. (R386, 388-392, 394-398)

Dr. Wood's testimony was admitted over defense objections that there was no proper predicate for her to testify without the autopsy report being in evidence. (R384-385) When the State completed its direct examination of Dr. Wood, counsel moved to strike her testimony until such time as the State moved the autopsy report into evidence, which the court denied. (R399-400)

To the extent that Dr. Wood was relating to the jury Dr. Gallagher's findings from the autopsy report he prepared, her testimony violated the best evidence rule, which "provides that in proving the terms of a writing, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent. [Citations omitted.]" Williams v. State, 386 So.2d 538, 540 (Fla. 1980).[7] The purpose of the rule "is to ensure the accurate transmittal of critical facts contained in a writing. [Citation omitted.]" Id. at 540. Obviously, the autopsy report itself was the best evidence of the facts contained therein, and Dr. Wood's recitation of the report's contents was therefore inadmissible. See Angel v. State, 305 So.2d 283 (Fla. 1st DCA 1974).

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[7] The best evidence rule is codified in section 90.952 of the Florida Statutes. Justus v. State, 438 So.2d 358 (Fla. 1983).

To the extent that Dr. Wood was testifying to her own opinions and conclusions (which were based on various materials she had reviewed, but primarily upon Dr. Gallagher's autopsy report), there was not a proper predicate for her testimony to come in. In Spradley v. State, 442 So.2d 1043 (Fla. 2d DCA 1983) the court stated that a medical examiner should not be permitted to testify as an expert concerning a factual issue unless a sufficient predicate has first been laid. Similarly, in Lang Pools v. McIntosh, 415 So.2d 842 (Fla. 1st DCA 1982) the court noted that a medical expert's opinion does not eliminate the necessity of proving the essential foundation facts in support thereof. The court wrote in R.P. Hewitt & Associates of Florida, Inc. v. McKimie, 416 So.2d 1230 (Fla. 1st DCA 1982):

> An expert opinion based on facts not supported by the record cannot constitute proof of the facts necessary to support the opinion, and is not competent substantial evidence. [Citation omitted.]

416 So.2d at 1232, footnote 1. Here there was no indication that Dr. Wood had herself examined Marlene Reaves' body, or had any direct personal knowledge of the case. Instead she was relying upon information developed by others, especially Dr. Gallagher's report. Without this report in evidence there is no record support for Dr. Wood's conclusions; the essential foundation facts have not been proven.

Florida's Evidence Code provides that an expert's opinion "is admissible only if it can be applied to evidence at trial."

§ 90.702, Fla. Stat. (1989). The competent evidence adduced at Appellant's trial did not provide the basis for Dr. Wood's opinions, and her testimony should have been excluded. Its admission denied Appellant his right to a fair trial consistent with the United States and Florida Constitutions. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. He must receive a new trial.

ISSUE VI

THE VERDICT OF THE JURY FINDING APPELLANT GUILTY OF BURGLARY IS TOO AMBIGUOUS TO SUPPORT HIS CONVICTION ON THIS COUNT.

Count II of the indictment returned against Appellant charged that he did enter or remain in the dwelling of Marlene Reaves "with the intent to commit an offense therein, and during the course thereof make a battery upon Marlene Reaves by touching ..." (R842)

The verdict form submitted to Appellant's jury on Count II permitted them to find Appellant not guilty, or: (1) Guilty of burglary of a residence with an intent to commit an assault therein as charged by the indictment; (2) Guilty of the lesser included crime of burglary of a residence without the intent to commit an assault therein; or (3) Guilty of the lesser included crime of burglary. (R907) The jury chose the second option and returned a verdict finding Appellant guilty of the lesser included crime of burglary of a residence without the intent to commit an assault therein (R649, 907), and the court subsequently sentenced Appellant to 15 years in prison on this count. (R839, 920-921)

The first problem with the verdict as returned is that the burglary statute does not address itself to "burglary of a residence," nor did the indictment allege burglary of a residence. Rather the burglary statute speaks in terms of burglary of a dwelling, as did the indictment, which is a second degree felony. § 810.02(3), Fla. Stat. (1989). The term "residence" is not contained within the statutory definition of the term "dwelling."

§ 810.011(2), Fla. Stat. (1989). If there is no such crime as burglary of a residence, then it was fundamental error for Appellant to be convicted of such an offense. McAbee v. State, 391 So.2d 373 (Fla. 2d DCA 1980).

Perhaps even more perplexing is how and why the jury returned a verdict finding Appellant guilty of the so-called leser included crime of burglary of a residence without the intent to commit an assault therein, and why such a verdict form was even submitted. Whether one intended to commit an assault is not an element of the crime of burglary, but intent to commit an offense in the structure or conveyance is. § 810.02(1), Fla. Stat. (1989). The indictment filed herein did not allege that Appellant intended to commit any specific offense in Marlene Reaves' residence, only that he had the "intent to commit an offense therein." Does the jury verdict mean that they found that Appellant had no criminal intent when he entered or remained in Reaves' residence? If so, then Appellant clearly could not be guilty of burglary, because the essential element of intent to commit an offense was lacking.

The burglary statute makes the offense a felony of the first degree punishable by life if the offender makes an assault or battery upon any person, or is armed, or arms himself with explosives or a dangerous weapon. § 810.02(2), Fla. Stat. (1989). Otherwise, burglary of a dwelling is a felony of the second degree, and simple burglary of a structure is a felony of the third degree. § 810.02(3), Fla. Stat. (1989). Was the jury saying by its verdict that Appellant did not commit an assault upon Marlene Reaves, even

though the verdict is couched in terms of the lack of intent to commit an assault? It should be noted that the indictment did not charge that Appellant committed an assault upon Marlene Reaves, but rather that he committed a battery upon her. (R842)

If, as appears to be the case, the jury found Appellant guilty of a crime with which he was not charged, and which was neither a proper lesser included offense, nor a lesser degree of the crime charged, then the verdict is a nullity. Moore v. State, 496 So.2d 255 (Fla. 5th DCA 1986); Priester v. State, 294 So.2d 421 (Fla. 4th DCA 1974). A verdict finding the defendant guilty of an offense that is not a proper leser is, in legal effect, an acquittal on the charged offense, entitling the accused to discharge. Johnson v. State, 226 So.2d 884 (Fla. 2d DCA 1969).

The court's lengthy and rather confusing instruction to the jury on the burglary count does not furnish any additional insight into what was intended by the verdict:

> Now, before you can find the defendant guilty on the second count which is that of burglary, the State must prove three elements beyond a reasonable doubt. They are:
>
> One. Gregory Capehart entered a structure owned by or in the possession of Marlene Reeves.
>
> And Gregory Capehart did not have the permission or consent of Marlene Reeves, or anyone authorized to act for her, to enter or remain in this structure at that time.
>
> And at the time of entering or remaining in the structure, Gregory Capehart had a fully-formed and

conscious intent to commit an offense therein.

Now, proof of entering of a structure stealthily and without the consent of the owner or occupant may justify a finding that the entering was with the intent to commit a crime if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.

Now, the intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

Even though an unlawful entering or remaining in a structure is proved, if the evidence does not establish that it was done with intent to commit a crime, then the defendant must be found not guilty.

Now, by structure we mean any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.

The punishment provided by law for the crime of burglary is greater if the burglary was committed under certain aggravating circumstances. Therefore, if you find that the defendant is guilty of burglary, you must then consider whether the State has further proven these circumstances.

If you find that in the course of committing the burglary the defendant made an assault upon any person, then you should find him guilty of burglary during which an assault has been committed. An assault, again, is defined as any

> intentional or unlawful threat, either by word or act, to do violence to another at a time when the defendant appeared to have the ability to carry out the threat and his act created a well-founded fear in the other person that the violence was about to take place.
>
> If you find that while the defendant made no assault and was unarmed, the structure entered was a dwelling, you should then find him guilty of burglary of a dwelling.
>
> An act is committed in the course of committing if it occurs in the attempt to commit the offense or in flight after the attempt or commission.
>
> A dwelling is a house of any kind or house trailer set in a foundation or any apartment or room actually used as a dwelling, home or place of abode, permanently or temporarily.
>
> Therefore, if you find the defendant guilty of burglary, it will be necessary for you to state in your verdict whether the defendant committed the burglary with an assault, committed the burglary while the dwelling was occupied by a human being, or committed a burglary without an assault and without a human being being present in the dwelling.

(R634-637)

The court elected not to read the verdict forms to the jury, because they were "self-explanatory." (R643)

In Chavers v. State, 45 So.2d 180, 181 (Fla. 1950) this Court addressed the need for certainty in jury verdicts thusly:

> While verdicts in criminal cases should be certain and import a defi-

> nite meaning free from ambiguity, yet they should be considered with reference to the indictment and the entire record, and any words which convey beyond a reasonable doubt the meaning and intention of the jury are sufficient, and all fair intendments will be made to support the verdict. [Citation omitted.]

In Cotton v. State, 395 So.2d 1287 (Fla. 1st DCA 1981) the court noted that a verdict is not necessarily invalid for uncertainty, but it must be considered with respect to the indictment or information and the entire record. And in Barnhill v. State, 41 So.2d 329, 331 (Fla. 1949) this Court wrote:

> ...[W]ith respect to jury verdicts in criminal cases generally the rule appears to be that while a verdict must be certain and impart a definite meaning free from ambiguity, all fair intendments should be made to sustain it. Hence, any words that convey beyond a reasonable doubt the meaning and intention of the jury are sufficient; even though it may be necessary in a given case to construe the verdict in the light of the information to determine such meaning and intention. [Citations omitted.] In such cases the verdict should be regarded from the standpoint of the jury's intention and when this can be ascertained such effect should be allowed to the findings, if not inconsistent with legal principles, as will clearly conform to their verdict. [Citations omitted.]

Unfortunately, here the indictment, jury instructions and record as a whole fail to clarify the jury's intent. Appellant's conviction for burglary must be vacated. Vacation of the burglary sentence must also lead to a new penalty proceeding for Appellant. The jury

was instructed at penalty phase that they could consider in aggravation that the crime for which Appellant was to be sentenced was committed while he was engaged in the commission of or the attempt to commit the crimes of robbery, sexual battery, or burglary (R778), and the court found that Appellant was engaged in a sexual battery or burglary when he committed the murder. (R912-913)

ISSUE VII

EVIDENCE CONCERNING THE PERSONAL CHARACTERISTICS OF MARLENE REAVES SHOULD NOT HAVE BEEN HEARD BY THE JURY, ARGUED BY THE PROSECUTOR, OR RELIED UPON BY THE TRIAL COURT IN HIS SENTENCING ORDER.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that the introduction of a victim impact statement containing information about the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crimes and the defendant violated the Eighth Amendment to the United States Constitution. The Court ruled that such information is irrelevant to the capital sentencing decision, and its admission creates an unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. 482 U.S. at 502-503, 96 L.Ed.2d at 448. The Court reasoned that there is no justification for the capital sentencing decision to depend upon information about the victim of which the defendant may be unaware, the ability of the family members to express their grief, or the perception that the victim was a sterling member of the community rather than someone of questionable character. 482 U.S. at 505-506, 96 L.Ed.2d at 450.

In South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court applied the principles of Booth to prohibit prosecutorial remarks about the victim's character. The Court affirmed the reversal of the death sentence because the prosecutor violated the Eighth Amendment by making

extensive remarks about the victim's character, i.e., that he was religious and a registered voter, during closing argument.

The principles of Booth and Gathers were violated throughout the proceedings below. The jury that found Appellant guilty of first-degree murder and recommended that he die in the electric chair received a great deal of irrelevant information about the victim, Marlene Reaves, largely through the guilt-phase testimony of Reaves' friend and helper, Edith Snow. From the State's witnesses Appellant's jury learned that even though Marlene Reaves was 62 years old, she always managed to keep her house clean. (R407, 410) Reaves lived alone in a duplex apartment, in which she kept many stuffed animals, and always had her clock radio playing her music. (R286, 301-302, 340, 412) She was completely illiterate, and did not know how to tell time or make change, or even how to use the telephone. (R287, 406, 409) Reaves had a definite speech impediment, and when she got very excited it was hard for her to communicate. (R287, 411) People took advantage of Reaves. (R408) Edith Snow recounted one incident where Reaves was charged three dollars for a Coke. (R409-410) People in Reaves' neighborhood began using her telephone to make long distance calls, and so Snow had to put a lock on the phone. (R409) Finally, the jury heard from Dr. Wood, the medical examiner, that Reaves suffered from the same ailment as the Elephant Man, Von Recklinghausen's disease. (R391)

"Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (1989). The

testimony referred to above did not tend to prove or disprove any material fact involved with Appellant's guilt or the punishment he should receive. It served only to portray Marlene Reaves as a pitiable creature, an image upon which the prosecutor capitalized in his penalty phase argument to the jury when he said (R758-759):

> Marlene Reeves, you've seen very little of her. You know who she was, the type of person that she was, the limitations under which she lived, the physical limitations, von Recklinghausen's disease that deformed her in life, her inability to read, to write, to tell time, make change, go to the store, those things that limited her in life. Her inability to speak clearly, her inability to even use her own phone. Those things that limit her ability to communicate. She lived alone, with the assistance of Edith Snow and sometimes with Rebecca Henry.
>
> You saw on the video her cane on the bed. She was helpless. She was indeed a victim. Not only a victim of this murder but a victim of her own limitations.

Later in his argument the prosecutor continued in the same vein (R768):

> The death of Marlene Reeves is truly useless, a waste. The woman is childlike almost. She's got her dolls in the house. She can't communicate well. She can't read. She can't write. She can't hurt anybody. She's truly a victim.

Clearly, the prosecutor was arguing that which is prohibited by Booth/Gathers: that Appellant should die because of who his victim was and what she was like.

Victim impact statements also appear in the presentence investigation report that was prepared herein. The "Comments of Others" section includes remarks by Edith Snow that constitute one extended Booth violation (R969-970):

> Edith Snow has been identified as a long time friend and companion who assisted the victim, Marlene Reaves. Ms. Snow indicated that she took care of the victim due to the fact that the victim could not read or write, and she was in need of someone to help her. She indicated that the victim was able to maintain her own home, however, that due to her inabilities intellectually, people often took advantage of her and deliberately overcharged her for things at the store, for example. She indicated that the victim's family who reside out of state did not want anything to do with her, and did not offer any kind of help or support to her in any way. She described the victim as a "good old lady who never bothered anybody. Mrs. Snow indicated that the victim's only source of income was a $350.00 per month Social Security benefit, and that she, being illiterate, was unable to handle the payment of her monthly bills and therefore she would pay her bills for her and help her with her grocery shopping. She stated that she didn't deserve to be murdered over nothing, because she was just a poor old lady who had nothing to take of any value. Mrs. Snow concluded by stating that the burial expenses were covered by a small life insurance policy Mrs. Reaves had, and that her family did not help out in any way.

In the section of the PSI recommending that Appellant be sentenced to death, the writer referred to Reaves as an "elderly woman out-

matched by apparent size and strength," thus emphasizing her personal characteristics of advanced age and weakness as part of the reason why Appellant should die in the electric chair. (R973) Similarly, in a "memorandum" accompanying the PSI, Assistant State Attorney W. Jack Jordan wrote that one of the reasons Appellant should be sentenced to death was that he "selected an elderly person..." (R974)

Moreover, the trial court relied upon victim impact evidence, including information contained in the PSI, in formulating his findings in aggravation. In finding that Appellant's commission of the murder was especially heinous, atrocious or cruel, the court wrote (R913):

> The victim was an elderly female in poor health, barely able to communicate with people, who was living on $350 monthly Social Security in a very small apartment. Defendant is a twenty-year old in good health and able to be gainfully employed. There is no indication of any struggle by the victim, which is not unusual considering her age and poor physical condition, so Defendant's act of sexual battery on her did not require him to murder her. [Emphasis supplied].

The court went on to note that Reaves was "obviously of limited financial means," emphasizing her impoverished condition both in his finding of especially heinous, atrocious or cruel and cold, calculated and premeditated. (R914)

Although Booth and Gathers dealt with the unconstitutionality of injecting irrelevant elements into a criminal proceeding that may increase the risk that a sentence of death will be imposed

in an arbitrary and capricious manner, the Supreme Court of the United States also requires heightened reliability in the guilt determination in capital cases. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). That reliability is not achieved where, as here, the guilt phase is infected with extensive irrelevant testimony concerning the pathetic nature of the victim that could only inflame the jury and engender sympathy for the deceased.

Appellant is aware that this Court has held that Booth violations must be preserved by objection in order to be considered on appeal, Grossman v. State, 525 So.2d 833 (Fla. 1988), and there was no objection to the testimony, remarks, or findings referred to herein. However, Appellant respectfully submits that this Court should review his issue under the circumstances of this case, because the highly prejudicial victim impact evidence and argument so permeated the proceedings both at the guilt and penalty phases as to undermine confidence in the reliability of the jury's determinations on guilt and penalty and the court's findings in aggravation and render the error fundamental. Appellant should receive a new trial pursuant to the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. In the alternative, he should receive a new penalty proceeding before a new jury.

ISSUE VIII

THE COURT BELOW FAILED TO CONDUCT AN ADEQUATE HEARING CONCERNING APPELLANT'S REQUEST THAT HIS COURT-APPOINTED ATTORNEY BE DISCHARGED.

Appellant's trial counsel, Alfred J. Ivie, Jr., was appointed by the court to represent Appellant. (R860)

Following his conviction at the guilt phase of his trial, Appellant wrote a letter to the trial judge. (R952-953) In this letter Appellant said that his trial attorney "did not put up a very good defense." (R952) During closing argument, Appellant alleged, his counsel "spoke as if he was trying to prosecute" Appellant. (R952) Appellant concluded that he was "misrepresented," and that the "misrepresentation" by his attorney had "even a greater impact on the case than all the witnesses." (R952) The letter therefore asked Judge Swanson to relieve Appellant's attorney of his duties and appoint another lawyer to represent Appellant at sentencing and on appeal. (R953)[8]

Judge Swanson addressed the letter prior to commencement of penalty phase. (R657-661) He read the letter to himself in open court, but did not read it into the record. (R658-659) Judge Swanson then asked Appellant if there was anything further he wanted to add to the request made in the letter, to which Appellant replied, "No, sir." (R659) The court then stated that he did not find incompetency or misrepresentation on the part of defense

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[8] In his letter Appellant also asserted his innocence and complained about the all-white makeup of the jury, among other things. (R952)

counsel, and did not find that counsel's final arguments constituted a second prosecutor's argument, and denied Appellant's request for Ivie to be dismissed and new counsel appointed. (R659-661)

In Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) the court dealt with what the trial court must do when an indigent defendant seeks to discharge his court-appointed counsel. The court first noted that "the right of an indigent to appointed counsel includes the right to effective representation by such counsel." 274 So.2d at 258. Accord: Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984) ("It is well established that the right of an indigent to appointed counsel includes the right to effective representation by such counsel. [Citation and footnote omitted.]" 454 So.2d at 726.) The Nelson court then stated that where, as here, the defendant

> makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a

> finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. See Wilder v. State, Fla. App. 1963, 156 So.2d 395, 397. If the defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel. See Cappetta v. State, Fla. App. 1967, 204 So.2d 913 for principles that should guide the court in the exercise of such discretion.

274 So.2d at 258-259. In Hardwick v. State, 521 So.2d 1071 (Fla. 1988) this Court specifically approved the procedure adopted by the Fourth District in Nelson.

The perfunctory inquiry conducted by the court below failed to fulfill the requirements of Nelson. It was very much like the inquiry the court found inadequate in Brooks v. State, 555 So.2d 929 (Fla. 3d DCA 1990). In Brooks the trial court had asked the defendant one question at a pretrial hearing on his motion to dismiss his court-appointed counsel, had not questioned counsel, and had not ruled on the motion. Here the court asked Appellant only one very broad question, namely, whether he had anything to add to the request made in his letter, and did not question counsel at all. The court did rule on Appellant's motion, but he had no basis for doing so in light of his failure to conduct a hearing that would have sufficiently developed Appellant's reasons for wanting a different attorney to represent him.

Furthermore, even if the lower court had made a sufficient inquiry prior to finding that defense counsel was rendering effective assistance in the case, this would not have ended the court's obligation. In Taylor v. State, 557 So.2d 138, 143 (Fla. 1st DCA 1990) the court reversed Taylor's first-degree murder conviction even though "the trial court made a sufficient inquiry into the reason Taylor desired to discharge his counsel and found that the attorney was rendering effective assistance in the case [footnote omitted]," because

> a determination of competency of counsel does not fully satisfy the duties imposed on the trial court. The trial judge erred in failing to advise Taylor that his attorney could be discharged but the state would not be required to appoint substitute counsel and that Taylor had the right to represent himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

557 So.2d at 143. See also Chiles and Hardwick (when defendant "attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. [Citation omitted.]" 521 So.2d at 1074). The court below failed to give Appellant any advice whatsoever regarding his right to proceed pro se upon discharging his court-appointed attorney, as required by Taylor.

The action of the court below in failing to conduct a sufficient hearing into Appellant's request that his court-appointed counsel be relieved of his duties resulted in Appellant being deprived of his rights to counsel and due process of law at

his penalty phase, and subjected him to cruel and unusual punishment. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17, Fla. Const. Gregory Capehart must receive a new penalty trial before a new jury impaneled for that purpose.

ISSUE IX

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE THE PROSECUTOR BELOW FURNISHED APPELLANT'S SUPPRESSED CONFESSION TO THE MENTAL HEALTH PROFESSIONALS WHO TESTIFIED AGAINST APPELLANT AT THE PENALTY PHASE OF HIS TRIAL.

On September 27, 1988 Appellant filed a motion seeking to suppress a confession he allegedly made to Tom Muck and Gene Caruso of the Pasco County Sheriff's Office on April 12, 1988. (R932-933) By order dated February 13, 1989 Judge Swanson granted the motion because the confession was obtained after Appellant had been appointed an attorney at his initial appearance in Orange County. (R935) The order suppressed Appellant's "confession, including any testimony, writing or tape recording regarding same and any other evidence against the Defendant obtained as an indirect or direct result hereof." (R935)

In paragraph seven of his motion for new trial Appellant alleged:

> 7. That the State Attorney was guilty of misconduct during the penalty phase of the trial in that the State Attorney provided to it's two expert witnesses, Dr. Merin and Dr. Sprehe, information concerning the details of defendant's confession on April 12, 1988 which indirectly influenced opinion evidence based in part on a confession previously suppressed by this Court.

(R908) At the hearing on Appellant's motion for new trial the prosecutor effectively admitted that he had given Appellant's confession to Drs. Merin and Sprehe. (R814-815) Furthermore, the

written reports of the doctors themselves demonstrate that they did receive Appellant's confession.[9] Dr. Sprehe's report, dated February 17, 1989, which was after suppression was granted, says that he had available "the report of the Pasco County Sheriff's Office that included an interview with Mr. Capehart dated 4/12/88." (A1) Dr. Merin's report, dated February 18, 1989, indicates that he received a narrative report from the Pasco County Sheriff's Office containing Appellant's confession. (A5) Appellant's confession obviously formed part of the basis for the opinions these two doctors expressed when they tesfified for the prosecution at the penalty phase of Appellant's trial.

Clearly, the State's supplying of Appellant's confession to Drs. Sprehe and Merin was a violation of the court's broad suppression order. This violation assisted the State in developing evidence (the testimony of the two doctors) to use against Appellant at his penalty trial. As a result, Appellant's constitutional right to counsel was not fully vindicated as the court intended when he signed the suppression order.

This is not a case such as Washington v. State, 432 So.2d 33 (Fla. 1983) where a possibly suppressible confession was used as

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[9] The doctors' written reports do not appear in the record on appeal. Undersigned counsel has attached them to Appellant's brief as an appendix. Pages of the Appendix will be referred to by the letter "A" followed by the page number. On August 7, 1990 undersigned counsel served a Motion to Require Clerk to Prepare Supplemental Record Containing Written Reports Prepared by Drs. Sidney J. Merin and Daniel J. Sprehe or, in the Alternative, Motion for Leave to Attach Copies of Said Reports as an Appendix to Appellant's Initial Brief, but this Court had not yet ruled on the Motion at the time undersigned counsel wrote this brief.

an inconsistent statement to impeach a defendant who had testified in his own defense. Here the prosecution actively used the suppressed confession in their quest for testimony to use against Appellant, and that was used in rebuttal at penalty phase, in violation of Appellant's rights to counsel and to due process of law. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. He must receive a new penalty trial before a new jury.

ISSUE X

THE TRIAL COURT ERRED IN GIVING APPELLANT'S JURY INSTRUCTIONS WHICH UNCONSTITUTIONALLY DIMINISHED THE JURORS' RESPONSIBILITY AND SUGGESTED THAT DEATH IS THE PENALTY FAVORED BY THE COURTS.

During the guilt phase of Appellant's trial, while giving the jurors general instructions for their deliberations, the court charged as follows (R641):

> Your duty is to decide whether the defendant is guilty or not guilty in accordance with the law. And my job and my job alone is to determine what the appropriate sentence would be if the defendant is guilty within the parameters prescribed by statute. [Emphasis supplied.]

The instruction the court gave is not the standard jury instruction, which reads:

> Your duty is to determine if the defendant is guilty or not guilty, in accord with the law. It is the judge's job to determine what a proper sentence would be if the defendant is guilty.

Fla. Std. Jury Instr. (Crim.) 2.05.

The standard jury instructions generally should be adhered to. Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978). Florida Rule of Criminal Procedure 3.985 indicates that the standard charges should be used unless the trial judge indicates on the record or in a separate order why the applicable form of instruction is erroneous or inadequate. Here the court did not express why he felt a need to modify the standards.

In Smith v. Mogelvang, 432 So.2d 119, 124 (Fla. 2d DCA 1983) the court noted that "deviation from the standard jury instructions risks error." The court went on to explain:

> Unnecessary departures from the standard jury instructions may undermine the unquestionably beneficial effect of those forms on the Florida trial system as a whole. That system depends in large part for its fairness and effective functioning upon reasonably predictable rules and rulings in the conduct of trials. Those instructions "state as accurately as a group of experienced lawyers and judges could state the law of Florida in simple understandable language." In re: Use by the Trial Courts of the Standard Jury Instructions, 198 So.2d 319, 319 (Fla. 1967).

432 So.2d at 125. (Although Mogelvang was a civil case, the court quoted the above paragraph from that case with approval in the criminal case of Hurtado v. State, 546 So.2d 1176 (Fla. 2d DCA 1989).)

The problem with the non-standard instruction given here is that by emphasizing that his job and his job alone was to decide Appellant's sentence, the court diminished the jury's vital role in the sentencing process in violation of the constitutional principles expressed in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Although in Caldwell it was a Mississippi sentencing jury that was misled as to its responsibility for imposing sentence, while in Florida the jury is not the actual sentencer, Caldwell is nevertheless applicable because of the key role the jury's recommendation plays in Florida's capital

sentencing scheme. While the Florida jury's verdict on sentence is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). The jury acts as the conscience of the community, and its penalty recommendation must be accorded great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975).[10]

A related, but different, problem exists with regard to the trial court's penalty phase charge to the jury. The court began his instructions to the jury as follows (R777, 873):

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge, that is me. However, your recommendation of death is entitled to great weight.

Again, this was a non-standard charge. The standard instructions contain no advice to the jury concerning the weight that their penalty recommendation will receive. Fla. Std. Jury Instr. (Crim.), pp. 77-83. The instruction was extremely misleading because it implied that only a death recommendation would be given great weight by the court, thus suggesting that death is the

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[10] Appellant is aware that in Combs v. State, 525 So.2d 853 (Fla. 1988) this Court rejected arguments that Caldwell was violated where the trial court gave the jury the standard penalty phase instruction that the final decision as to punishment rested solely with the court. However, the instant case is distinguishable from Combs because the lower court here gave a non-standard instruction at guilt phase which went further in de-emphasizing the jury's participation in the sentencing process than did the instruction in Combs.

punishment preferred by the courts.[11] However, a life recommendation is equally entitled to great weight by the sentencing court. Tedder; Hallman v. State, 560 So.2d 223 (Fla. 1990). If the court was going to deviate from the standards to inform the jury as to the weight that would be given a death recommendation, then he should have accurately stated the law and told the jury that a life recommendation would likewise be entitled to great weight.

The importance of suitable jury instructions was emphasized by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L.Ed.2d at 885-886. Appellant's jury was misguided, rather than carefully and adequately guided, in their penalty phase deliberations by the court's erroneous instructions. Particularly in view

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[11] Although defense counsel did not object to the instruction in question, he did request the court to readvise the jury that nothing the court said "should be interpreted by them as expressing an opinion by the Court," which was denied. (R781-782)

of the closeness of the seven to five vote for death, the jury's recommendation cannot be considered reliable. See Preston v. State, 15 F.L.W. S337 (Fla. June 7, 1990); Alvin v. State, 548 So.2d 1112 (Fla. 1989). Appellant's death sentence, predicated in part on the unreliable recommendation, cannot stand, as it was imposed in violation of the requirements of due process of law, and subjects Appellant to cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, Sections 9 and 17, Fla. Const.

ISSUE XI

THE TRIAL COURT ERRED IN SENTENCING GREGORY CAPEHART TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court improperly applied section 921.141 of the Florida Statutes in sentencing Gregory Capehart to death. This misapplication of Florida's death penalty sentencing procedures renders Appellant's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed in the remainder of this argument.

A. The trial court erroneously found in aggravation that Appellant had previously been convicted of armed robbery and relied upon the PSI for his finding.

In the trial court's written findings in aggravation, Judge Swanson specifically found that:

> B. Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person to-wit:
>
> Aggravated Assault and Armed Robbery -- Orange County, Florida, August 27, 1986 -- Case # CR86-5293. Defendant pointed a handgun at an employee of a business, put the

> employee into a refrigerator unit and exited the business with some property. Defendant's reason for putting the employee into the refrigerator unit does not appear from the record available to this Court, but it certainly seems unnecessary to effectuate the robbery and shows a callous disregard for human life.

(R912) This finding was incorrect. The documents the State introduced into evidence at Appellant's penalty phase showed that, while Appellant had been charged with robbery with a pistol, he had entered a plea of guilty to the lesser included crime of simple robbery. (R939, 949) Only convictions, not mere arrests or accusations, can be considered in aggravation. Provence v. State, 337 So.2d 783 (Fla. 1976). The court below was wrong in considering a crime (armed robbery) for which Appellant had not been convicted.[12]

The court apparently obtained the details of what allegedly happened in the Orange County incident from the PSI (R964), as they do not appear elsewhere in the record. However, information contained in the presentence investigation could not supply proof beyond a reasonable doubt of this aggravating circumstance. Barclay v. State, 470 So.2d 691 (Fla. 1985); Williams v. State, 386 So.2d 538 (Fla. 1980).

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[12] The court also instructed Appellant's penalty phase jury that the crime of armed robbery was a felony involving the use of violence to another person. (R777-778)

B. The jury's ambiguous burglary verdict calls into question the accuracy of the trial court's finding that Appellant was engaged in a sexual battery or burglary when he committed the homicide.

As discussed in Issue VI. in this brief, it is impossible to ascertain what the jury intended when it returned a verdict on Count II of the indictment finding Appellant guilty of the lesser included crime of burglary of a residence "without the intent to commit an assault therein." The uncertainty in this verdict undermines the degree of confidence that can be found in the reliability of the sentencing court's finding that Appellant was committing a burglary or sexual battery when he killed Marlene Reaves.

C. The trial court erred in his instructions to the jury on the aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel, and in his findings as to this aggravating factor.

The court below instructed Appellant's jury at penalty phase on the aggravating factor set forth in section 921.141(5)(h) of the Florida Statutes in the following language (R778):

> Three. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

The jury was not informed of the limiting constructions this Court has given to this aggravating factor in cases such as State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), in which the Court stated:

> 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 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 torturous to the victim.

Appellant's jury was simply given a vague instruction which could be thought applicable to any murder. It was not an adequate definition of the section 921.141(5)(h) aggravating circumstance.

In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious, or cruel" was unconstitutionally vague under the Eighth Amendment, United States Constitution because this language gave the sentencing jury no guidance as to which first degree murders met these criteria. Consequently, the sentencer's discretion was not channeled to avoid the risk of arbitrary imposition of the death penalty.

The jury instruction given by the court below provided no more guidance to Appellant's jury than the Oklahoma statute in Cartwright. A reasonable juror might well have concluded from the instruction that the heinous, atrocious, or cruel aggravator applied to all murders.

The Cartwright decision cannot, however, be cavalierly applied to the Florida capital sentencing scheme. In Oklahoma, capital juries are the sentencers and they must make written findings of which aggravating factors they found. In Florida, on the other hand, the jury's recommendation is advisory and no findings with regard to the aggravating factors weighed by the jury are made. We simply do not know in the case at bar whether all of the jurors found Appellant's crime especially heinous, atrocious, or cruel, whether none of them did, or whether the jury split on the applicability of this aggravator. What can be said is that there is a reasonable probability that some of the jurors found this circumstance proved and joined in the recommendation of death. Had the jury been properly instructed concerning the limiting construction given to this aggravating factor, there is a reasonable possibility that fewer jurors would have found it applicable, and a life recommendation might have been the result. After all, there was only a one-vote margin favoring death.

For this reason, Appellant's death sentence is unreliable under the Eighth Amendment, United States Constitution. Although a Florida jury's sentence recommendation is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974). In Valle v. State, 502 So.2d 1225 (Fla. 1987), this Court held that a defendant must be allowed to present all relevant mitigating evidence to the jury in his effort to secure a life recommendation because of the great weight the sentence recommenda-

tion would be given. The corollary to this proposition is that the jury must not be misled into thinking that an aggravating circumstance applies because that circumstance was not properly defined to them. In either case, there is a likelihood of an erroneous death recommendation.

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court of the United States noted:

> If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. [Citations omitted.]

82 L.Ed.2d at 352. In the Florida scheme of attaching great importance to the jury's penalty recommendation, it is critical that the jury be given adequate guidance so that its recommendation is rational and can appropriately be given the great weight to which it is entitled. If, as here, the jury is not given adequate instructions to define and narrow the aggravating circumstances, its penalty verdict may be based on caprice or emotion at worst, or an incomplete understanding of applicable law at best. The resulting sentence which leans heavily upon the jury's recommendation for support will then lack the rational basis mandated by the United States Constitution. See Amends. VIII and XIV.

Appellant is aware that this Court rejected arguments similar to those set forth herein in Smalley v. State, 546 So.2d

720 (Fla. 1989) but asks the Court to reconsider these important constitutional issues.

In finding this aggravating circumstance, the court below wrote (R913-914):

> The victim was an elderly female in poor health, barely able to communicate with people, who was living on $350 monthly Social Security in a very small apartment. Defendant is a twenty-year old in good health and able to be gainfully employed. There is no indication of any struggle by the victim, which is not unusual considering her age and poor physical condition, so Defendant's act of sexual battery on her did not require him to murder her. To take a human life when it is totally unnecessary for any other purpose, even if that other purpose is criminal, is certainly cruel and heinous.
>
> Defendant smothered the victim to death with a pillow. She lost consciousness in two to three minutes and died after five minutes. Murder is never pleasant, but to suffer the agony of no air for two to three minutes must be seen as cruel and atrocious.
>
> If Defendant had shot or stabbed the victim, her death would have been quick and humane, compared with her slow death by suffocation. What is more cruel?
>
> There is no evidence of any prior contact, between the victim and Defendant so Defendant's only motivation in murdering her must have been the thrill of killing. This is not a case of revenge, or a lover's quarrel or murder for hire or even pecuniary gain. The victim was obviously of limited financial means and could not have been viewed as a source of funds for Defendant.

> Heinous is hateful, odious, abominable and totally reprehensible, and killing for no reason other than the thrill of killing certainly is heinous.

As discussed in Issue VII. of this brief, the court improperly relied upon victim impact evidence in making his findings.

Furthermore, the findings contain at least one significant factual inaccuracy. The court wrote that Marlene Reaves "lost consciousness in two or three minutes and died after five minutes." (R913) Actually, the medical examiner's testimony was that Reaves would have remained conscious for only one to two minutes, and it might have taken as long as five minutes or a little longer for her to die. (R396-397, 400) Thus any suffering she endured was of shorter duration than the court indicated.

> D. The trial court erred in instructing the jury on, and in finding the existence of, the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The court below instructed Appellant's jury on the aggravating circumstance set forth in section 921.141(5)(i) of the Florida Statutes in the following language (R778):

> Four. The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

This instruction was as brief and uninformative as the instruction the court gave on the especially heinous, atrocious, or cruel

aggravating circumstance. The court did not inform the jury of the limiting construction this Court has given to the aggravating factor in question in a number of cases, many of which will be discussed below. The jury could well have believed this aggravator applicable to all cases of premeditated murder. The instruction the jury received on cold, calculated, and premeditated did not adequately define the section 921.141(5)(i) aggravating circumstance, and Appellant's discussion of Maynard v. Cartwright in subsection XI. C. above is applicable to this factor as well.

Appellant is aware that this Court rejected arguments similar to those set forth herein in Brown v. State, 15 F.L.W. S165 (Fla. March 22, 1990) but asks the Court to reconsider these important constitutional issues.

In his finding of the cold, calculated, and premeditated aggravating circumstance, the court wrote (R914):

> The victim was unconscious after three minutes, so for at least two minutes Defendant was pressing the pillow down on the face of an unconscious woman. For two minutes Defendant's act could have had no other purpose than to kill and two minutes is ample time to form the intention to kill.
>
> The victim was a total stranger to Defendant and was obviously of very limited financial means. Defendant's professed need for quick cash could not form a moral justification for this killing -- even Robin Hood stole only from the rich, and Defendant was no Robin Hood. Defendant was not seeking revenge on the victim for anything she had done to him and the victim

> was not threatening Defendant in any fashion.

As discussed in Issue VII in this brief, this finding, like that on cold, calculated, and premeditated, improperly relied in part on victim impact evidence.

Moreover, the facts here do not support a finding of cold, calculated, and premeditated. Florida's legislature did not intend this aggravator to apply to all premeditated killings. Harris v. State, 438 So.2d 787 (Fla. 1983). Rather, it requires proof beyond a reasonable doubt of a careful plan or prearranged design, a heightened premeditation beyond that required to establish premeditated murder. Schafer v. State, 537 So.2d 988 (Fla. 1989); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); Mills v. State, 462 So.2d 1075 (Fla. 1985); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Card v. State, 453 So.2d 17 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The trial court's finding indicates that he erroneously believed this aggravator applicable to any case involving a clear intention to kill. This Court's recent opinion in Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990) is instructive on this issue. In Campbell the defendant originally attacked one person, then attacked another, then resumed his attack on the first person, who died. This Court held that because Campbell's actions involved one continuous period of physical assault, he had no respite during which he could reflect upon what he was doing, and the cold, calculated, and premeditated aggravator was inapplicable. As far

as the evidence shows in Appellant's case, there was but one continuous period of assault on Marlene Reaves, with no respite. Merely because one makes a determined effort to kill another does not qualify his actions for the application of this aggravating circumstance.

The fact that Appellant did not bring a weapon with him, but rather allegedly used a pillow that he found on the premises to smother Reaves, is also significant. In Harris v. State, 438 So.2d 787 (Fla. 1983) this Court invalidated the trial court's finding of cold, calculated, and premeditated where "the instruments of death were all from the victim's premises." 438 So.2d at 798. See also the following cases, in which this Court upheld a finding of cold, calculated, and premeditated at least in part because the perpetrator procured his weapon in advance: Huff v. State, 495 So.2d 145 (Fla. 1986); Davis v. State, 461 So.2d 67 (Fla. 1984); Eutzy v. State, 458 So.2d 755 (Fla. 1984).

The cold, calculated, and premeditated aggravating circumstance ordinarily applies in those murder which are characterized as executions or contract murders, such as underworld or organized crime killings, which the instant homicide clearly was not, although these descriptions are not all-inclusive. Garron v. State, 528 So.2d 353 (Fla. 1988); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

One place this aggravator does not apply is where a killing results from a crime that gets out of hand. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). See also Peavy v. State, 442

So.2d 200 (Fla. 1983). Appellant's statement to Walter Harrison that he entered the house intending to take some money without hurting the lady, but that she woke up, and he accidentally killed her while trying to knock her out by putting a pillow over her face (R446-447), suggests precisely such a scenario.

> E. In imposing a sentence of death the court below improperly considered nonstatutory aggravating circumstances and failed to give proper consideration to all evidence Appellant offered in mitigation.

In his discussion of mitigating circumstances the court below listed and rejected all statutory mitigating factors. (R914-915) Then, in section H. of his discussion, he dealt with all other potential mitigation as follows (R915-916):

> H. The circumstances of the offense are atrocious, Defendant's criminal and scholastic record is bad, and his character is that of an "antisocial personality disorder" (Dr. Sprehe) who is "a danger to the community" (Dr. Merin) so this is not a mitigating circumstance.
>
> The only possible mitigating circumstance is a social explanation, i.e. Defendant is a poor black man exploding in anger over his frustration due to the ills of a discriminatory society heaped upon him. Defendant alludes to this in a handwritten letter to this Court, sent after his conviction, in which he complains that there were no blacks on the jury.
>
> However, Defendant's race was never a factor in this case, was never mentioned by the Assistant State Attorney in any argument, and could not explain any of the circumstances of the offense. Raping the victim

> while killing her is consistent with self-gratification and inconsistent with the frustrated rage of an aggrieved black man -- hence, Defendant's race in light of all the circumstances in the case is not a mitigating circumstance.
>
> The all-white make-up of the Jury of itself is not a mitigating circumstance, for there was no evidence of any kind whatsoever, aside from Defendant's assertion in his letter, that the racial make-up of the Jury played a part in this case. In any event during the selection of the Jury, not one black person was in the panel, the State never excused any prospective black jurors, and the Defendant never raised the issue until after he was convicted.

In the first paragraph above it appears that, rather than discussing mitigation, the court was actually holding against Appellant as aggravation his bad criminal and scholastic record and his anti-social personality disorder which made him a danger to the community. The aggravating circumstances set forth in section 921.141(5) of the Florida Statutes are exclusive; no others may be considered in aggravation by the jury or the court. Drake v. State, 441 So.2d 1079 (Fla. 1983); Miller v. State, 373 So.2d 882 (Fla. 1979); Elledge v. State, 346 So.2d 998 (Fla. 1977); Purdy v. State, 343 So.2d 4 (Fla. 1977); State v. Dixon, 283 So.2d 1 (Fla. 1973). None of the factors the court discussed appears in section 921.141(5), and it was error for the court to consider these nonstatutory elements in the sentencing weighing process.

Furthermore, the court failed to give the mitigating evidence that was presented the full consideration to which it was entitled.

In Magill v. State, 386 So.2d 1188 (Fla. 1980) this Court noted that the sentencing judge in a capital case is charged with the responsibility of articulating the mitigating circumstances he considered "so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." 386 So.2d at 1191. In Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court further described the duties of the trial judge when considering evidence in mitigation:

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

511 So.2d at 534. The judge may not refuse to consider any relevant mitigating evidence presented. Stevens v. State, 552 So.2d 1082 (Fla. 1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

"[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, Case No. 71,980 (Fla. July 26, 1990), slip opinion at p. 7. Here, contrary to the court's written findings, a "social explanation" linked to race was not the "only possible mitigating circumstance." A reasonable quantum of competent, uncontroverted evidence was adduced at penalty phase to establish several other mitigating factors that the court was legally obligated to find, but which he did not even mention. For example, the State's own expert psychologist testified at penalty phase that Appellant had a subnormal intelligence quotient of 73. (R724-725) This corroborated the testimony of Appellant's expert psychologist, who stated that Appellant's memory intellect was probably in the borderline sort of range, Appellant was basically illiterate, and he may have suffered from a learning disability. (R689-690) This is the type of evidence which this Court has recognized may constitute legitimate mitigation. See Brown v. State, 526 So.2d 903 (Fla. 1988). How ironic that the sentencing court held Appellant's poor scholastic record against him when that record undoubtedly resulted in large part from Appellant's low IQ and, possibly, a learning disability, factors over which Appellant had absolutely no control!

Similarly, the court failed to deal with the uncontroverted evidence that Appellant had a chronic alcohol and drug abuse problem, may have suffered from an organic brain defect

as a result of the substance abuse or the many head injuries he received, and was afflicted with at least some type of mental or emotional disorder.[13] Again, this kind of evidence has been viewed as mitigating, and the court was required to examine it. See Nibert, and especially Carter v. State, 560 So.2d 1166 (Fla. 1990).

Finally, the court failed to come to grips with the testimony of Appellant's mother, which was confirmed in part by the history Appellant gave to Joel Epstein, and was not contradicted by the State's witnesses, that Appellant was the product of a broken home, and had been subjected to beatings and emotional abuse by his father. It is well-established that such evidence must be considered by the sentencer. See Eddings, Stevens; Brown; Nibert; McCampbell v. State, 421 So.2d 1076 (Fla. 1982); Perry v. State, 395 So.2d 170 (Fla. 1980). The court below inexplicably failed to give it so much as a passing mention.

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[13] As noted above, the court did briefly discuss Appellant's antisocial personality disorder, but seemed to feel this was somehow aggravating, rather than mitigating.

ISSUE XII

THE COURT BELOW ERRED IN SENTENCING APPELLANT FOR THE NONCAPITAL FELONY OF BURGLARY WITHOUT REGARD TO A SENTENCING GUIDELINES SCORESHEET.

The court below sentenced Appellant to 15 years in prison for the burglary of which he was convicted. (R839, 920-921)

Although there was some discussion at the end of Appellant's penalty phase of the need for the State to advise the court of the sentencing guidelines range for the burglary (R792), nothing in the record indicates that this was ever done. No sentencing guidelines scoresheet was filed in the court file. (R975), and there was no mention of the guidelines at Appellant's sentencing hearing. (R836-840)

While the guidelines are not applicable to capital felonies, a guideline scoresheet must be prepared and used in sentencing for any noncapital felonies. Taylor v. State, 15 F.L.W. D1776 (Fla. 2d DCA July 6, 1990); Newsome v. State, 546 So.2d 1079 (Fla. 2d DCA 1989); Jackson v. State, 528 So.2d 1306 (Fla. 2d DCA 1988); Disinger v. State, 526 So.2d 213 (Fla. 5th DCA 1988); Worthington v. State, 501 So.2d 75 (Fla. 5th DCA 1987); Coleman v. State, 483 So.2d 539 (Fla. 2d DCA 1986). Because Appellant was not sentenced pursuant to the guidelines on the burglary count, his sentence for this offense must be vacated.

CONCLUSION

Gregory Capehart's rights under the Florida and United States Constitutions were violated by the manner in which the proceedings below were conducted. He prays this Honorable Court to vacate his convictions and sentences for first-degree murder and burglary and remand this cause to the trial court with directions that he be discharged. In the alternative, Appellant asks the Court to reverse his convictions and sentence and remand for a new trial. If neither of these forms of relief is forthcoming, Appellant asks the Court to vacate his death sentences and remand for imposition of a life sentence, or, in the alternative, a new penalty proceeding, and for resentencing on his burglary conviction.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 20th day of August, 1990.

Respectfully submitted,

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