IN THE SUPREME COURT OF FLORIDA

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| PERRY ALEXANDER TAYLOR, | : | |
| Appellant, | : | |
| vs. | : | Case No. 74,260 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| _____ | : | |

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

# INITIAL BRIEF OF APPELLANT

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

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

## TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

## TABLE OF CITATIONS

## TABLE OF CITATIONS (continued)

## TABLE OF CITATIONS (continued)

## TABLE OF CITATIONS (continued)

## PRELIMINARY STATEMENT

Appellant, PERRY ALEXANDER TAYLOR, was the defendant in the trial court, and will be referred to in this brief as appellant or by name. Appellee, the State of Florida, was the prosecution, and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R." All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

Perry Taylor was charged by indictment filed November 16, 1988 with first degree murder and sexual battery of Geraldine Birch. (R1057-58) The case proceeded to trial on May 8-11, 1989 before Circuit Judge M. William Graybill and a jury.

### A. Jury Selection

During jury selection,[1] appellant - a black man - objected to the prosecutor's use of a peremptory challenge to strike prospective juror Farragut. (R1000) The prosecutor replied:

> If the Court is aware of the threshold in that line of cases, the Court would note that I am not systematically excusing blacks. It's obvious that I am not by striking Mr. Farragut, Ms. Marneese Mitchell is now one of the 12 members of the jury, and Ms. Marneese Mitchell is also black. So there's no showing of a systematic exclusion on the part of the State.
>
> THE COURT: The State's position is that if you excuse peremptorily William Farragut that the very next juror is also a black?
>
> MR. BENITO [prosecutor]: That's correct.

(R1000-01)

The trial judge stated that he "cannot make a finding the State is at this time systematically excluding blacks from the jury." (R1001)

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[1] There were fifty prospective jurors for this trial, only four of whom were black. (see R795, 1000-05) All of the prospective jurors were examined on voir dire (R838-989), prior to the single conference in which the state and defense exercised their peremptory challenges and challenges for cause. (R989-1008)

Defense counsel promptly used a peremptory challenge on Marneese Mitchell (whose husband is a member of the Tampa Police Department).[2] (R1002, see R1004, 855-56, 795) Soon afterward, Jacqueline Boyd, a black woman, was placed in the box, and was immediately struck by the state. (R1003-04) Defense counsel stated "We are going to interpose the same objection as we did before", noting that the state had previously excluded Mr. Farragut, and now they were excusing the only other black person who remained.[3] The trial court said:

> I will require the State to give a valid reason for exercising a peremptory challenge as to Jacqueline Boyd since there is no other black left on this panel other than Charlie Robinson, who unequivocally stated that he could never vote to recommend death. I now find the State may well be systematically removing blacks from this jury panel.

(R1004)

The prosecutor offered the following explanation:

> My concern with Ms. Boyd would be the fact that she has two children in my reading of her questionnaire seemed to indicate that she lived in the area where this offense took place.
>
> THE COURT: What was your first reason, Mr. Benito? The second one, merely because she lives in the area, I don't find is any reason peremptorily or not to challenge somebody. What was the first reason?
>
> MR. BENITO: The fact that she has two children.
>
> THE COURT: The Defense want Jacqueline Boyd on their jury?
>
> MR. SINARDI: May I have a moment?
>
> THE COURT: Or does the Defense and the State want to excuse her, and then I don't have to worry about whether the State is systematically excluding blacks.

(R1004-05)

At that point, the prosecutor suddenly noticed that he was incorrect about where Ms. Boyd resided, and he withdrew his peremptory challenge, saying

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[2] Four of the five prosecution witnesses in this trial were also Tampa police officers.

[3] Defense counsel explained that he had struck Ms. Mitchell because her husband was a local law enforcement officer. (R1004)

he would "leave it up to the Defense" whether they wanted Ms. Boyd or the next juror up. (R1005) Defense counsel did not challenge Ms. Boyd, so she was selected to serve on the jury. (R1005-06, 1015, 1136)

The next morning, before the trial began, the prosecutor made a statement for the record:

> Yesterday during jury selection, I believe when I struck Miss Boyd, the second black juror that I struck, the Court made a finding that was systematically excluding blacks and asked for a reason.
>
> When I checked I thought Miss Boyd lived in that area, had two children that may have come in contact with some of the people on the defense witness list.
>
> When I checked and realized I was mistaken as to where she lived, I withdrew my peremptory challenge to Miss Boyd and allowed her to remain on the jury if the defense wanted her on the jury.
>
> I'm concerned that I think the Court at that time rescinded its finding, even made one, that I was systematically excluding blacks, and I want that to be clear on the record.
>
> Obviously, Mr. Sinardi's objection for my first strike of Mr. Farragut will stand, but as to my second strike of Miss Boyd, I don't think the Court should be finding that I was systematically excluding blacks when, in fact I withdrew my objection and she sat on the jury.
>
> So I wanted my objection clear on that in case Mr. Simms or Mr. Sinardi wanted to say something about that.
>
> THE COURT: My recollection was that I stated that you may possibly be now systematically excluding. I don't believe I made a finding.
>
> But it's now moot because you withdrew your peremptory challenge as to Miss Boyd.
>
> MR. BENITO: Fine, Judge.

(R5-6)

B. Trial - State's Case

On the morning of October 24, 1988, the body of 38 year old Geraldine Birch was found in the third base dugout of the Belmont Heights Little League field in Tampa, near an area known as "the cut." (R26-28, 32-34, 138-40, 192, 941-42) A dental plate and a wig were near the body. (R61, 91-92, 169-70) As police officers secured the scene, some shoe prints were visible in or near the

dugout, and were photographed by a crime scene technician. (R42, 69, 140) There were marks on the dirt surface leading toward the victim's heels, making it appear to Detective McNamara that she had been dragged. (R140)

Detective George McNamara, the lead investigator in the case, interviewed appellant at the police station the next day. (R137-38, 141-42, 168-69) According to McNamara, appellant was at that point considered a witness rather than a suspect. (R142) Appellant told McNamara that on the early morning of October 24, he and some friends had been at the Manila Bar. (R144) At about 3:00 or 3:30 a.m., he returned to the area of "the cut", where he was dropped off by Reggie Marcus.[4] (R144) Appellant remembered he had left a photograph in Marcus' car, so he went across the street to retrieve it. (R144) He then returned to the cut, spoke for 15-20 minutes with a person known as Blue, and then went home. (R144-45) The cut is in the same general vicinity as the Little League field; in response to McNamara's question, appellant said he had not been in the area of the field for over six weeks. (R145) McNamara asked appellant what he was wearing on the night of October 23-24, and appellant told him a pair of blue jeans, a black sweatshirt with Steelers written across it, and Adidas tennis shoes. (R146) Appellant agreed to give these articles of clothing to the police. (R146-47, 173-74) They brought him back to his residence, where he got the jeans and tennis shoes and gave them to the detectives. (R146-47, 173-74)

Two days later, Detective McNamara interviewed appellant again. (R148, 150) In the interim, McNamara had learned that an FDLE agent had matched appellant's shoes to the shoe prints found at the scene. (R137, 148-49) After being advised of his rights (R150-54), appellant was again asked by McNamara if he had been to the Little League field within the last six weeks. (R161) Appellant said that early in the morning of October 24, he had gone into the southernmost portion of the ballpark, the grassy area, and had sex with a black female. (R161-62) McNamara then asked him how it was that his tennis shoes

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[4] References in the transcript to Reggie Marcus, Benjamin Marcus, and Kenny Marcus all appear to refer to the same person, or possibly siblings.

were matched to the shoe impressions at the scene. (R162-63) Appellant said nothing at first, and McNamara repeated the question. (R163) Appellant said it was an accident; he didn't mean for it to happen. (R163) When McNamara asked him to explain, appellant said he had been in the area of the cut at about 4:00 a.m., and he walked from there to the Little League field with the woman, whom he had just met. (R163-66) Upon reaching the dugout, she agreed to have sex with him. (R164) He lowered his pants and she began to rub his penis with her hands. She then took it into her mouth. (R164) He noticed that she was causing a slight irritation to his penis, but he did not object right away. Then she began to bite down slightly and he asked her to stop. As he attempted to remove his penis from her mouth, she bit down harder. (R164) Appellant began to choke her with both hands. (R164) After two or three minutes, he struck her several times in the face with his right fist. (R165) When she fell to the ground, he dragged her to the other end of the dugout and dropped her. (R165) He kicked and stomped on her about half a dozen times in the upper chest area. (R165) He then left the ballpark and went home. (R165) McNamara asked appellant if he had had vaginal sex with the woman; appellant said he had not. (R165) Toward the end of the interview, appellant was crying and could barely speak. (R179, 185-87, 195) He told McNamara he didn't mean for it to happen. (R187, 195) When the statement was completed, McNamara turned appellant over to Detective Melvin Duran. McNamara gave Duran a brief scenario of the interview, and asked him to obtain the hair and saliva samples which appellant had consented to provide. (R167-68, 197-98, 206-08)

In the process of obtaining the samples, Duran developed a good rapport with appellant, because he was cooperative and respectful. (R200, 209) Duran decided to ask appellant about what had transpired at the scene. (R199-200, 201) Appellant said he entered the dugout with the woman, pulled down his pants, and sat on the bench. (R200-201) She sat on top of him, facing away, and he put his penis into her vagina. (R201) He did not put it in very far, and after about a minute she said to stop, she didn't want to do it anymore. (R201, 217) Appellant stood up, and she turned around, got on her knees, and began performing fellatio. (R201, 217) She was scratching and irritating his

penis with her teeth, and, after saying nothing at first, he asked her several times to stop. (R202, 211) Instead, she bit down on the head of his penis. (R211) Appellant put his hands around her neck and chocked her for two or three minutes. (R202) He struck her three or four times with his left hand, and when she fell to the ground kicked or stomped on her two or three times. (R202)

Detective Duran examined appellant's penis, and had an ID technician photograph it. (R203, 206) He did not observe any abrasion or laceration, but there was a small white dot which stood out on the black skin. (R203-04, 214-16) Appellant indicated that this was the location of the injury, and that for the past few days it was so sore that he could not wash it. (R213-14)

During cross-examination of the lead detective, McNamara, he stated that during his investigation he had interviewed Otis Allen, who had been with appellant at the cut at the time they encountered Geraldine Birch. (R171, 188-91) Allen told McNamara that the appellant was going to "catch a trick" with her. (R188-91) This was the term used in the area for an act of prostitution - sex for money or drugs. (R191, see R217-18)

The associate medical examiner, Dr. Lee Miller, performed an autopsy on the body of Geraldine Birch. (R48-50) She was five feet two and 110 pounds. (R50) The cause of death was massive blunt injuries of the head, neck, chest, and abdomen. (R50-51, 89-90) There was extensive damage to the brain and to the internal organs. (R58-64, 71-74) The injuries were consistent with a beating with hands or feet. (R51) In Dr. Miller's opinion, it would have taken at least ten blows to produce the injuries, all of which occurred at or near the time of death. (R74-75, 87-89) The blows to the head probably did not cause instantaneous death, but they may (or may not) have rendered her unconscious. (R89-90, 94) On her left forearm was a bruise which appeared to Dr. Miller to be a bite mark. (R76-78) There were three small lacerations or tears on the exterior of the vagina and about ten similar but "smaller, shallower, and less extensive" injuries on the interior of the vagina. (R79-81) In Dr. Miller's opinion, these injuries could have been caused by an object or a hand, but not by a penis. (R82, 88, 90, 97, 119-20) In deposition and

cross-examination, he acknowledged that he could not completely exclude the possibility that the injuries were caused by a penis, if, for example, there was no lubrication and the man's penis had dirt or sand on it. (R97-98, 119-20) Dr. Miller further testified that the external vaginal injuries were not consistent with her having been kicked in that area (R87), but he later acknowledged that he could not rule out that they were caused by a kick or blow; that was "certainly possible." (R99-101)

No spermatozoa or acid phosphatase was detected in the examination of body fluids. (R103-04) From an examination of the ocular fluid, Dr. Miller concluded that Ms. Birch was under the influence of alcohol at the time of her death. (R105-06)

At the close of the state's case, the defense moved for judgment of acquittal, which was denied by the trial court. (R221-25, see R271-300, 537-38, 547-51)

C. Trial - Defense Case and Proffered Testimony

The defense acknowledged that appellant was the person who killed Geraldine Birch, but contended that the crime was second degree murder, not first degree. Specifically, the defense contended that the sexual contact between appellant and Ms. Birch was consensual, in that she had offered him sex in exchange for rock cocaine or money, and that the beating from which she died was done in a rage and with a depraved mind, but without reflection or a premeditated design to cause her death. (see R333-39, 343, 576-77, 593, 600, 609-13) The defense introduced the testimony of Otis Allen and appellant, both of whom stated that Ms. Birch approached them, spoke to appellant, and suggested sex for crack cocaine or money; whereupon she and appellant walked off toward the Little League field. However, the defense was precluded from introducing the testimony of three of Geraldine Birch's sisters which would have corroborated that she was in fact a user of crack cocaine. (see R252-62, 318-25, 360-85)

The subject was first discussed the day before the defense began its case, but after the state rested. The prosecutor indicated at that point that

he would object to any testimony concerning Ms. Birch's use of cocaine if the defense failed to lay a predicate:

> MR. BENITO [prosecutor]: The Court does realize that the State is seeking the death penalty for Mr. Taylor, and very clear the State wants Mr. Taylor to receive a fair trial, especially when we are talking about the possible consequences as a result of this trial.
>
> There has been no evidence to this point through his statement to the detectives that this woman offered to have sex for either money or drugs.
>
> I've told Mr. Sinardi as to those witnesses he just described to this point if they were to take the stand at the beginning of his case that I would have an objection to that type of testimony.
>
> I need to think a little bit about whether or not I would want to object if, in fact, the Defendant took the witness stand and testified that this woman came up and offered to have sex with him for drugs.
>
> If he did testify to that I need to kick around the idea as to whether or not I can object to family members of the victim then coming in subsequent to his testimony and testifying she did, in fact, have a cocaine habit.
>
> THE COURT: To corroborate the Defendant's testimony.
>
> MR. BENITO: Correct. And in an abundance of caution, obviously in a case of this nature when the State is seeking the death penalty, I want to make sure every I is dotted and every T is crossed.
>
> So I guess I can kick that around the office this afternoon and see what I want to do.
>
> So my suggestion to Mr. Sinardi at this time since we are stopping for the evening, these witnesses he talked to today to have them here tomorrow in case - it's going to be the State's position that if his client does testify and says she came up and wanted sex for drugs I don't know, maybe I'm going to acquiesce to their testimony and allow it.
>
> However, my position would be if she came up there, what he has told the detectives right now, they walked down together. And if the Defendant does testify -- I'm sure his attorneys have discussed this with him -- he made no mention whatsoever to either detective regarding sex for drugs. He's going to be impeached with that type of testimony when or if he does testify.
>
> That's neither here nor there. The fact is I have to think about that. And I'm sure the Court is aware of the ramifications of this trial, and I want to make sure the man gets a fair trial.

So the witnesses should be still on standby tomorrow as far as the State is concerned.

I can't ask Mr. Sinardi not to call these witnesses and get up there and say who's to say she was using crack? The only statement you have is the statement of Mr. Taylor, self-serving statement she came in and said she wanted to use -- wanted some crack for some sex when Mr. Sinardi could possibly call four or five of her own members of her family that would testify she had a crack problem.

THE COURT: Mr. Sinardi, is the defense in a position to state at this time whether or not Mr. Taylor is or is not going to testify as a witness in the case?

I'm not trying to force you --

MR. SINARDI: I understand, Judge.

THE COURT: -- to disclose your hand, but Mr. Benito has indicated that if Mr. Taylor does take the stand and gives certain type of testimony that he may not object to your calling a witness to corroborate what Mr. Taylor is saying. But until your client does so testify then he's saying that, generally, I'm objecting.

MR. SINARDI: I anticipate that Mr. Taylor will take the stand, Your Honor. And, of course, that is an anticipation and it's subject to change.

And I anticipate that Mr. Taylor will testify that the victim came up to a group of individuals at that location and specifically agreed to exchange sex for a five dollar rock of crack cocaine or for ten dollars cash, ten dollars in money. It's my understanding that she was agreeable to do either one in exchange -- to have sex for either one.

MR. BENITO: If that's going to be the defense's position and again, I'm not going to force Mr. Sinardi into anything on the record, but if that's going to be his position I have to think about whether or not I can object to these five witnesses he just proffered.

So Mr. Sinardi should have these people here tomorrow. Obviously, if his client isn't going to testify and there's no mention of sex for drugs, I would be objecting to any statement of family members as to her cocaine habit.

But I have to rethink the situation with regards to those five witnesses if the Defendant does, in fact, testify and alleges she wanted sex for drugs.

(R253-57)

The discussion then turned to the order of proof. Defense counsel took the position that he could put on the family members' testimony first, subject to later establishing its relevancy by presenting evidence of Ms. Birch's

statements when she approached appellant and his friends at the cut. (R259-60) The prosecutor disagreed:

> MR. BENITO: Judge, you can make a ruling as to the relevancy of any witness at any time.
>
> I'm telling you if he calls one of these witnesses before he calls the Defendant and he asks that witness does your client -- does your family member have a cocaine habit? I'm going to say objection, irrelevant. And --
>
> THE COURT: And let's assume it is not relevant. Then I sustain the objection on the grounds it's not yet relevant. You can make it relevant by calling the Defendant as a witness and then recall the witness.
>
> MR. BENITO: Correct. That's my position.

(R260)

The trial court then told defense counsel that he would not be able to call a witness for the sole purpose of establishing that Ms. Birch was a crack user, unless he first established the relevancy of such testimony. (R261) "And if the only way you can establish the relevancy is by calling your client to the stand, albeit the Defendant in the case, so be it." (R261)

The prosecutor then observed that there was another witness who could possibly lay the predicate to make the sisters' testimony relevant:

> MR. BENITO: Let me put it another way, too, Nick. You realize Otis Allen in his deposition -- there is a witness that was present at the scene when this lady came walking up to Mr. Taylor, Otis Allen and Benjamin Marcus.
>
> He said in his deposition the other day she came up and said she wanted some rock for some sex. That's what he said in deposition.
>
> If he calls Mr. Allen and Mr. Allen testifies to that I may be in a position not to be able to object even if the Defendant does not testify.
>
> But I will be in a position to impeach Mr. Allen obviously because he didn't tell Detective McNamara that when he made the statement.
>
> So I have to just do some research as to whether or not -- even if he calls Otis Allen, Judge, Allen is going to say she walked up and said I want some rock and I'll perform some sex for it. And then she walked off and he followed her to the dugout.
>
> That testimony comes in it may become relevant she's a cocaine user.

(R261-62)

The next morning, before the trial resumed, defense counsel asked the court if he could proffer the testimony of Otis Allen "to establish the predicate that the Court ... alluded to yesterday prior to the introduction of any testimony relative to the drug usage of the victim." (R318) Allen would testify that Ms. Birch walked up to the group and solicited money and crack cocaine for sex. (R318-19) The trial court noted that there was no dispute as to the admissibility of Allen's testimony, but declined to make a ruling in limine as to the family members' testimony that the victim used crack cocaine. (R319-20) The court emphasized that he was not going to pre-judge the relevancy question (R323-25):

> Now, whenever your witness is on the stand and you get ready to attempt to go into that matter, in order to protect your record we'll have the jury excused and I will then let you make your proffer. And Mr. Benito may not object at that time. But I am not going to now go through each of your witnesses with reference to proffers.

(R321)

The first defense witness was Otis Allen, Jr. Allen testified that on the morning in question he was in the area known as "the cut" or "the hole", sitting on a car talking with appellant and another man. (R345-46, 354) Geraldine Birch came from across the street and approached the men. (R346-47) They recognized her from the neighborhood. (R347, 353) She said to appellant that she wanted to have sex for rocks or money. (R347-48) Allen understood "rocks" to mean crack cocaine. (R348) As Allen was leaving, going back to his house, he saw appellant and Ms. Birch walking off together toward Buffalo Ave. and the Little League park. (R348-50) Allen did not see any fighting or argument between them, nor any attempt to forcibly remove her from the area; they were just walking. (R349)

Allen was not sure whether he had told Detective McNamara about the statements he heard made by Geraldine Birch; he may or may not have.[5] (R352,

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[5] McNamara had earlier testified that he had interviewed Allen on November 1, 1988, and Allen had told him that appellant was going to "catch a trick" (continued...)

357-58) Another person named Adrian Mitchell was not in the group at the car when the woman came up, but "when we left he probably came." (R354) The prosecutor asked Allen on cross whether he was a friend of appellant's; Allen answered that he was. (R354-55)

The defense then called Joyce Robinson, one of Geraldine Birch's sisters. (R359-60) At this point, the prosecutor, having apparently decided overnight that he would object to the family members' testimony about Ms. Birch's crack cocaine use notwithstanding Otis Allen's testimony about her offer to appellant to trade sex for crack, asked for a bench conference. (R360) This time the state asked for a proffer and a ruling in limine, contending that the testimony was inadmissible character evidence. (R361-62) When the court said "Mr. Benito, I have already stated on the record I'm not going to pre-try this case", the prosecutor complained:

> Judge, that's not fair to the State. If she's asked did she have a drug habit and I stand up and object it looks like I'm trying to keep something from the jury. And he shouldn't be able to ask the question.
>
> The question is just as damaging as the answer, Judge, especially when I object because if he asks her did she have a drug habit and I object, the jury is going to know she had a drug habit.

(R361-62)

Defense counsel argued:

> Judge, I think now the issue of consent is before the jury. That is, Mr. Allen has come in here and testified that he observed the victim Geraldine Birch ask Mr. Taylor and a group of individuals would they exchange money and crack cocaine for sex.
>
> That raises undoubtedly the issue of consent. And now I think I'm allowed once that issue has been submitted to the jury, or that least it's before the jury, to show specific acts consistent with --
>
> THE COURT: Where are they?
>
> MR. SINARDI: She is a crack cocaine user.
>
> THE COURT: Oh, no. Negative.

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[5](...continued)
with the woman. (R188-91) A "trick" is the term used in the area for an act of prostitution. (R191, see R217-18)

MR. SINARDI: Sorry?

THE COURT: That is a general reputation.

(R363)

Defense counsel clarified that the witnesses were not going to say that Ms. Birch had a reputation as a cocaine user, but rather that they had seen her buy or use crack cocaine. (R363-64) Nevertheless, the trial court ruled that the evidence was irrelevant "to your theory of consensual sex that night between Mr. Taylor and the victim." (R367-68) Defense counsel then asked to proffer the witnesses' testimony. (R368-69) The trial judge initially refused to allow a question-and-answer proffer (R368-72), despite defense counsel's urging, "Judge, I believe that Mr. Taylor may be incarcerated or put to death as a result of whether or not this evidence is admissible or inadmissible. I think the Court taking five minutes to allow me to proffer that testimony is miniscule when compared to the consequences of Mr. Taylor." (R370) The judge eventually relented and allowed defense counsel to proffer the testimony of Geraldine Birch's three sisters outside the presence of the jury. (R372)

Joyce Robinson testified on proffer that she had seen her sister Geraldine in the area known as "the hole."[6] (R372) Asked what "the hole" is, she answered "Where they sell crack." (R372) Once, about a year before the trial (which would be 5 1/2 months before the victim's death), Joyce Robinson saw her sister buy crack cocaine. (R372-73) A second sister, Alice Rose, saw Geraldine use crack cocaine one time about ten months before trial ( 3 1/2 months before her death). (R378) Ms. Rose stated that Geraldine used crack cocaine, but "half the time she couldn't get it." (R379) A third sister, Yvonne Robinson, testified that she saw Geraldine doing crack cocaine in the utility room of their mother's house, about a month before her death. (R382) A couple of times before that, Yvonne Robinson had also "ran up on" her sister while she was doing crack. (R382)

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[6] "The hole", according to Otis Allen's earlier testimony, is another name for "the cut" (R345), where Ms. Birch approached appellant and his friends on the morning of October 24.

On cross-examination, the prosecutor asked the sisters if they had ever seen Geraldine offer her body for crack cocaine, and they replied that they had not. (R373, 378, 383)

The trial judge ruled that the sisters' testimony was irrelevant and too remote, and refused to allow the defense to present it to the jury. (R373, 379, 385)

When the trial resumed in front of the jury, the defense called Adrian Mitchell, who was in the area of the cut at around 4:00 or 4:30 on the morning of October 24. (R424-25) Mitchell was with a group of guys who were coming out of a bar. (R425) Mitchell saw a woman in a red dress walk up to another group of guys 30-40 feet away. (R425-26, 429) That group included appellant, Otis Allen, and Benjamin Marcus. ( R429) The lady talked to appellant, but Mitchell was not close enough to hear any of the conversation. (R426-27, 429) The lady and appellant then left together. (R427, 430)

On cross-examination, the prosecutor asked Mitchell:

Q. [by Mr. Benito]: And isn't it a fact that what you saw is that she walked off and then you saw Perry sort of following her; is that right?

A. Yes.

Q. Excuse me?

A. Yes.

Q. They didn't walk off together? You saw Perry following her?

A. They walked off together seemed like to me.

Q. Seems like to you? Now, wait a minute. You just said you saw Perry following her.

A. Like she said come on.

Q. Pardon?

A. She was like saying come on, follow me.

Q. I thought you said you couldn't hear her?

A. I said she was like walking away, like saying come on.

Q. How do you walk away saying come on?

A. She was like walking away, like saying follow me. I didn't say she said that.

(R429-30)

Mitchell explained that what he meant by "followed" was that the woman was walking in front and appellant was not too far behind. (R431) On redirect, defense counsel asked:

> Q. Mr. Mitchell, I understood you to say it appeared that the black female was motioning to Mr. Taylor to follow him, is that -- follow her; is that correct?
>
> A. Yes.
>
> Q. Is that what you think was happening? Is that what you saw?
>
> A. Yes.
>
> MR. SINARDI: Thank you. No further questions.
>
> BY MR. BENITO:
>
> Q. I'm confused. You said you saw her signal him to come on. Did you tell the jury that?
>
> A. It seemed like they were -- it was like walking together, you know, talking to the girl, said -- they just walked away with eath other.
>
> Q. You didn't tell the jury they were walking away together, you said Mr. Taylor was following her.
>
> A. They were walking with each other together. Following as a what? I don't know.

(R431-32)

Next, a stipulation was read to the jury to the effect that FDLE hair analyst K. Dawn Rainwater would render an opinion that approximately thirty caucasian head hairs and several caucasian body hairs and hair fragments were found in the debris from the victim's dress and bra. (R433, see R183-85) [Appellant is black, as was Ms. Birch].

Appellant, Perry Taylor, testified that he first went to the cut at around 10:30 or 11:00 p.m. (R435) He then went to the Manila Bar with some friends, and stayed until closing time. (R436-37) Appellant only had a couple of drinks, because he is health conscious. (R436-37) [He was 22 years old, 6'2-1/2 and 225-230 pounds, and an accomplished powerlifter; he does not use drugs and does not drink heavily. (R434, 437, 442-43, 454-57)]. It was about 3:45 or 4:00 a.m. when they got back. (R437-38) Appellant remembered that he'd left a photograph in Kenny Marcus' car, and went to retrieve it; then came

back to the cut. (R438-40) A few people were there, shooting the bull. (R439) After just a few minutes, a black woman in a red dress came from across the street and approached the group. (R440-41) Appellant did not know her. (R441) She talked with appellant and Marcus for a little while. (R441) After Marcus had left, she said to appellant that she was trying to get to Sulphur Springs. (R442) Appellant said he couldn't help her on that because he didn't have a vehicle. (R442) She then asked him if he would give her a nickel hit. (R442-43) That was the street terminology for a five dollar "rock" of crack cocaine. (R443) She wanted to turn a trick for a nickel hit and ten dollars. (R443-44) When appellant told her he couldn't help her with the drug part, she said it was okay, ten dollars would do. (R444) Appellant agreed to give her ten dollars in exchange for sex, and they began walking (at her suggestion) toward Buffalo Ave. and the Belmont Heights Little League field. (R444-45)

They went to the third base dugout, for privacy. (R445-46) Appellant pulled his pants down to his knees, and sat on the bench. (R447-48) The woman straddled his lap with her back turned to him. (R449) After no more than 15-30 seconds of intercourse, she got back up and said she didn't want it that way. (R449-50) She said she would give him head instead. (R450) Appellant went along with that; he stood up, and she got on her knees and began performing oral sex. (R450-51) Soon her teeth began scraping and irritating his penis. (R451-52) He did not know then that she wore dentures. (R452) At first he didn't say anything, but then he told her that her teeth were irritating him. (R452) About the fifth time she did it, he went to pull his penis out of her mouth, and she bit down on it. (R452-53) In pain, he grabbed her around the neck and chocked her. (R453-54, 457) After he succeeded in getting her to release his penis, he held her neck with one hand and struck her several times in anger; he could not count how many times. (R457-59) She fell to the ground. (R459) Still enraged, he kicked her maybe three or four times. (R460-61) The whole thing happened very fast; appellant was not consciously thinking between each blow that he was going to hit her or he was going to kick her - he just reacted. (R462) Appellant testified that he did not mean to

kill her, and when he left the dugout he did not think that she was dead. (R462, 466, 486)

Appellant testified that other than his penis, he never put anything into the victim's vagina. (R464-65) He did not recall biting her or dragging her. (R463-54, 494-95)

When appellant woke up in the afternoon, he heard on the street that a body had been found in the dugout. (R466) Appellant was scared, and he became more and more sure that it was the same one he had been with. (R467) He didn't know what to do, so he just kept it to himself. (R468) The first time he was interviewed by the police, he denied involvement. (R468-69) The detectives asked him if they could have his pants and tennis shoes, and he consented. (R469-70) Two days later, after the police told him his shoes matched the shoe prints at the scene, appellant confessed. (R471-78) He told them it was an accident and that he didn't mean to kill her. (R475-76) After he had calmed down a little, he "told them what had happened and started to tell them where it happened and the reason why it happened, that she bit my penis." (R476) The focus of the questioning was on what occurred in the dugout. (R523, see R476-77, 503-06) Appellant told the detective that he and the victim had agreed to have sex. (R476, 504, 522-23) He did not specifically mention that the agreement was sex for money or drugs, because he was not asked anything about that. (R476-77, 504-05, 523) He acknowledged that he did not tell Detective McNamara about the initial phase of the sexual encounter when the victim sat on his penis, but he did not recall saying specifically that he had not had vaginal sex with her. (R477-78, 503)[7]

After appellant finished testifying, defense counsel renewed his request to introduce the testimony of Geraldine Birch's sisters concerning her use of crack cocaine:

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[7] Detective McNamara had testified that he had asked appellant if he had had vaginal sex in the dugout and appellant said he hadn't. (R165) Immediately after that interview, appellant was turned over to Detective Duran for the taking of hair and saliva samples, and when Duran asked him what had happened, appellant told him that, prior to the oral sex, they had had penis-to-vagina intercourse for about a minute until she abruptly stopped. (R201)

> Now that the Court has had the opportunity to hear the testimony of the Defendant Perry Taylor and also his testimony reference the offers of sex for drugs or money, we would ask the Court to reconsider its ruling reference the testimony of Joyce Robinson, Alice Rose, and Yvonne Robinson.
>
> We would like to recall those witnesses in light of the testimony offered by Mr. Taylor specifically as to the defense of consent to the sexual battery charges.
>
> THE COURT: You mean to ask the same questions that you previously asked when I allowed you to make a proffer via question and answer?
>
> MR. SINARDI: Correct.
>
> THE COURT: Same ruling.
>
> MR. SINARDI: Thank you, Judge.
>
> THE COURT: Doesn't change anything. The witnesses that you put on the stand said in essence the same thing with reference to what Mr. Taylor said concerning money and drugs.
>
> I will make the same rulings that I made with reference to those other witnesses' testimony. It was not specific instances of sex for money or drugs. Not relevant.

(R528-29)

The defense rested and the state called Detective McNamara, as a rebuttal witness. He repeated two things he had already said in the state's case-in-chief; (1) that in their October 27, 1988 interview, appellant told him that, after striking the victim and knocking her to the ground, he had dragged her from the east to the west end of the dugout (R532, see R165), and (2) that in that interview he had asked appellant if he'd had vaginal sex with the victim, and appellant said he hadn't. (R532-33, see R165) McNamara also testified on rebuttal that he had interviewed Otis Allen on November 1, 1988, and that Allen had told him that the victim had asked for a ride, but that Allen did not tell him that she had offered sex for drugs or money. (R534-35) McNamara further stated that Allen told him that when the woman walked off, appellant was following her. (R535)

At the close of all the evidence, the defense renewed its motion for judgment of acquittal of first degree murder and sexual battery, on the grounds, inter alia, that the circumstantial evidence was insufficient to ex-

clude the reasonable hypotheses that the sexual contact between appellant and Ms. Birch was consensual, and that the blows and kicks which caused her death, while inflicted in a rage and with a depraved mind, were not done upon reflection or with a premeditated design to kill her. (R537-38, 547-51)

In his closing argument to the jury, the prosecutor contended that appellant's testimony that Ms. Birch had offered him sex for drugs or money was a lie. (R622-23, 627):

> And that's what it is. It's a lie.
> She wants to get to Sulphur Springs. How is a nickel rock going to get her to Sulphur Springs?
> Remember his statement was she said for a nickel hit or ten bucks. No, excuse me. Nickel hit and ten bucks. Why did she need a nickel hit to get to Sulphur Springs. How is a nickel hit going to get her to Sulphur Springs?

(R622-23)

The prosecutor argued that the only thing Ms. Birch asked for was a ride, and that appellant then followed her as she walked away to the Belmont Heights Little League dugout. (R564, 623) The offer of sex for crack cocaine and money, according to the prosecutor, never happened (R562-64, 622-23):

> While simply because this guy [appellant] gets up and tells you that she consented to some of these sex acts doesn't mean that's true. You don't have to believe one word this guy told you yesterday when he was on that witness stand. You don't have to believe one word of it.

(R562)

The prosecutor further argued that Otis Allen was also lying when he testified that Ms. Birch offered appellant sex for crack cocaine or money. (R562-64) To provide the jury with a possible motive for Allen to lie, the prosecutor said:

> It's obvious. Perry Taylor is Mr. Allen's friend. Geraldine Birch is not Mr. Allen's friend. Perry Taylor is Mr. Allen's friend.

(R564, see R354-55)

After hearing the arguments of counsel and the trial court's instructions, the jury returned a verdict finding appellant guilty as charged of first degree murder and sexual battery. (R663, 1173)[8]

D. Penalty Phase and Sentencing

In the May 11, 1989 penalty phase of the trial, the state introduced, through Detective George Hill of the Hillsborough County Sheriff's Department, appellant's 1982 conviction of sexual battery of twelve year old Tracie Barchie. (R685-90) Appellant, who had just turned sixteen, pled no contest and was sentenced as a youthful offender. (R688-89)

The defense introduced the testimony of Deputy Noel Borjas and Lieutenants Clifford Brown and William Deaton, corrections officers at the Hillsborough County Jail. They testified that appellant is a model prisoner and an excellent worker. (R692-99) According to Lt. Brown, appellant has caused no problems in the jail, and treats everybody with respect. (R696)

Dr. Gerald Mussenden, a clinical psychologist, first evaluated appellant for placement purposes in February, 1982, when he was in the custody of H.R.S. (R706-09) Dr. Mussenden was impressed with appellant's intelligence and with his athletic ability. (R710-11, 720) He saw in appellant the potential for a college degree, and also the potential to become an outstanding college athlete in whatever sport he chose. (R711, 720) Dr. Mussenden found appellant's IQ of 91 to be extremely impressive in light of his socioeconomic background. (R710) However, by the time of the trial in 1989, his IQ had dropped to 83; a nearly ten percent loss. (R710) Mussenden testified, "He had a lot more potential in 1982 had it been used." (R710)

Appellant was first placed with H.R.S. at the age of seven. (R712) He was emotionally disturbed, and was said to be ungovernable. (R712) He was placed in foster care, and at the same time was placed in the Mendez Program, which "is for children who are severely emotionally disturbed." (R712) Howev-

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[8] The verdict form, as to first degree murder, was a general one; it did not specify whether the jury was finding premeditated murder, felony murder, or both. (R663, 1173)

er, appellant never received any psychotherapy, although in Mussenden's opinion, it was needed. (R712-13, 718) Appellant remained in the foster home, where he was physically and emotionally abused, from age seven to fourteen. (R713-14) According to Dr. Mussenden, appellant's developmental years were "very traumatic." (R713) He had a severe bedwetting problem, for which he was harshly punished, and he was so terrified of the foster mother "to the point if he had to pass by her to go to the bathroom he would go someplace in the house or outside the home." (R714)

At the age of fourteen, appellant returned home, to a family consisting of his mother and six siblings. (R713, 715) He was "in absolute ecstasy" to be coming home, but this feeling was soon undermined by the presence of "another male figure in the home which made him to into a rage." (R716)

> With this he became ungovernable again. And for that he was then returned to HRS voluntarily by the family meaning he has now re-experienced a trauma of being rejected by family, being abandoned, and basically it's the ultimate insult, your own mother doesn't want you, and returned him to HRS.

(R716)

Dr. Mussenden testified that appellant never had any bonding with a parent or surrogate parent, "which meant that he basically was having to fend for himself." (R717) Because of his experience, he had a build-up of rage and anger, but he was not able to articulate or understand his feelings of rejection and abandoment. (R716-19) "He would just say he doesn't like to get upset because he has a hard time controlling it when someone really gets him upset. And again, he has no idea." (R717)

On cross-examination, Dr. Mussenden expressed the opinion that if appellant had received the psychological help he needed as a child and adolescent, the killing for which he was on trial would not have occurred. (R721-22) In response to the prosecutor's question, Mussenden acknowledged that he was not aware of appellant's 1982 sexual battery conviction, as that incident occurred subsequent to his placement evaluation. (R722)

During its penalty phase deliberations, the jury submitted a written question: "If a life sentence is given for two separate counts would the sen-

tences automatically run concurrently or run consecutively (50 years before 50 parole) or would the judge have option to set parole possibility." (R1174, 757-58) With the assent of both counsel, the trial court wrote "The final decision as to what punishment shall be imposed is the responsibility of the judge", and had the bailiff deliver the question and response back to the jury. (R1174, 758-65) The jury subsequently returned a recommendation of death by a 12-0 vote. (R766, 1179)

On May 12, 1989, the trial judge imposed the death penalty, finding three aggravating circumstances,[9] and concluding "that the evidence fails to establish any statutory or non-statutory mitigating circumstances." (R786-87, 1180-81) The judge went on to state that even if appellant's age (22) or any aspect of his character or record or the circumstances of the offense "could possibly be considered mitigating circumstances", the aggravating factors would outweigh them. (R787, 1180) On the sexual battery count, the trial judge, departing from the sentencing guidelines, imposed a sentence of life imprisonment, to run consecutively. (R787-88, 1181, 1187)

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[9] The aggravating factors found were previous conviction of a felony involving the use or threat of violence; homicide committed in the course of a sexual battery; and "especially heinous, atrocious, or cruel." (R786-87, 1180)

## SUMMARY OF THE ARGUMENT

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court recognized that racial discrimination in jury selection violates article I, section 16 of the Florida Constitution. To effectuate the constitutional guarantee, the Court, in Neil and subsequent decisions, established procedures that were intended to abolish the discriminatory exercise of peremptory challenges. The United States Supreme Court reached a similar conclusion in Batson v. Kentucky, 476 U.S. 79 (1986), holding that use of peremptory challenges to exclude jurors solely on the basis of race violates the Fourteenth Amendment to the U.S. Constitution. "...[U]nder Batson, the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987).

In State v. Slappy, 522 So.2d 18, 21 (Fla. 1988) and other decisions, this Court held that when the accused has made a prima facie showing that there is a strong likelihood that one or more jurors have been excused because of race, the burden shifts to the prosecutor to rebut the inference of discrimination by giving a reasonable, race-neutral explanation for each strike. The trial court cannot accept the prosecutor's explanation at face value, but must critically evaluate its credibility, to ensure that it is not merely a pretext for discrimination. Roundtree v. State, 546 So.2d 1042, 1045 (Fla. 1989). Any doubt as to whether a "likelihood" of discrimination has been shown must be resolved in favor of a Neil inquiry. Slappy; Tillman v. State, 522 So.2d 14, 16 (Fla. 1988). "Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question. ... If we are to err at all, it must be in the way least likely to allow discrimination." Slappy, 522 So.2d at 22. In order for the burden to shift to the state to show the absence of discrimination, it is clearly not necessary to establish that the state is "systematically" excluding black people. Thompson v. State, 548 So.2d at 202. ["Systematic exclusion" was the standard set forth in Swain v.

Alabama, 380 U.S. 202 (1965); a decision which was rejected by this Court on state law grounds in Neil, and overruled by the U.S. Supreme Court on federal constitutional grounds in Batson. See Thompson, at 202]. As this Court made clear in Slappy:

> We know ... that number [of challenged peremptory strikes] alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. [citations omitted]. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.[10]

Therefore, if at any point in the jury selection process the judge finds that there is a likelihood that the state is exercising its peremptory challenges in a racially discriminatory manner, he must require the prosecutor to explain each and every peremptory strike he has exercised - or subsequently seeks to exercise - against minority jurors. Thompson v. State, 548 So.2d 198, 202 (Fla. 1989) (emphasis in opinion); Tillman v. State, 522 So.2d at 16; Hargrove v.State, 530 So.2d 441, 442 (Fla. 4th DCA 1988); Johnson v. State, 537 So.2d 117, 122 (Fla. 1st DCA 1988).

In the instant case, the prosecutor and the trial judge were same ones as in the Thompson case, and they committed the same errors, based on the same misapprehensions of law. Of the fifty potential jurors in this case, only four were black, and only two had a realistic chance of serving as jurors.[11] When the defense objected to the state's excusal of William Farragut, the prosecutor responded with the same misstatement of law that he did in the Thompson trial:

> If the Court is aware of the threshold in that line of cases, the Court would note that I am not systematically excusing blacks. It's obvious that I am not by

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[10] For this reason, the state cannot justify a strike, or avoid a Neil inquiry, merely by pointing out that the panel still contains a black juror, Mack v. State, 545 So.2d 489, 490 (Fla. 2d DCA 1989), or two black jurors, Williams v. State, 547 So.2d 179, 180 (Fla. 4th DCA 1989), or that the next juror up is also black, Stubbs v. State, 540 So.2d at 256-57.

[11] The third black juror was married to a Tampa police officer, and four of the five state witnesses in this trial were also City of Tampa police officers. The fourth black juror was "Witherspoon - excludable", as he could not recommend death under any circumstances.

> striking Mr. Farragut, Ms. Marneese Mitchell is now one of the 12 members of the jury, and Ms. Marneese Mitchell is also black. So, there is no showing of a systematic exclusion on the part of the State.
>
> THE COURT: The State's position is that if you excuse peremptorily William Farragut that the very next juror is also a black?
>
> MR. BENITO: That's correct.

(R1000-01)

The trial judge thereupon stated that he "cannot make a finding the State is at this time systematically excluding blacks from the jury." (R1001) Based on their mutual misunderstanding of the law governing claims of racial discrimination in jury selection, the state never gave, and the trial judge never required, any reason for the excusal of juror Farragut. See Thompson, 548 So.2d at 202 (trial court erroneously declined to conduct inquiry based on misconception that Neil only comes into play if there is a "systematic" exclusion of blacks). The trial court's misapprehensions of law prevented him from fairly considering whether there was a strong likelihood that Mr. Farragut was peremptorily excused because of his race, and from resolving any doubt on that question in favor of a Neil inquiry. See Stubbs v. State, 540 So.2d 255, 257 (Fla. 2d DCA 1989):

> We recognize that a trial judge is best able to determine whether the prosecutor's use of peremptory challenges constitutes a prima facie case of racial discrimination. See Batson, 106 S.Ct. at 1723. Here, however, the trial judge misapprehended the law. She mistakenly believed that no discrimination could be shown, because there was a black man on the jury. Batson, however, recognized that the state is prohibited from exercising a peremptory challenge "to strike any black juror because of his race." Batson, 106 S.Ct. at 1724 n.22. The fact that a black person has been seated as a juror or alternate is not dispositive. Slappy, 522 So.2d at 21.

See also Williams v. State, 551 So.2d 492, 496 (Fla. 1st DCA 1989) ("[T]he trial court's comments suggest a concern with whether any blacks would be available in the venire to serve on the jury rather than whether any particular juror was improperly excused solely on the basis of race, contrary to the Supreme Court's admonition in Slappy").

If the judge had used the proper standard, he would (or at least should) have found that the defense objection "was proper and not frivolous ... and should have conducted an inquiry into the state's basis for excusing" Mr. Farragut. See Sampson v. State, 542 So.2d 434, 435 (Fla. 4th DCA 1989); Slappy, 522 So.2d at 22.

The trial court's error in failing to conduct a Neil inquiry at the time Mr. Farragut was excused was compounded by developments which occurred moments later. Jacqueline Boyd was placed in the box and was immediately struck by the state. This time the trial court found that "the State may well be systematically removing blacks from this jury panel." While the prosecutor ultimately withdrew his challenge to Ms. Boyd (after the judge had already rejected his proffered explanation), he was never required to explain his excusal of Farragut. Again, this Court's decision in Thompson is dispositive. In Thompson, as here, the judge failed to question the state as to its excusal of the first black juror [there Brooks, here Farragut], because of his twin misapprehensions of law (1) that a Neil inquiry is required only if there is a "systematic" exclusion of blacks, and (2) that no discrimination can be shown as long as another black person remains on the potential jury panel. 548 So.2d 201-02. In Thompson, as here, the state's use of its peremptories eventually convinced the court that the state very likely was engaging in systematic racial discrimination, and from that point forward, he ordered the prosecutor to give reasons. However, as this Court noted in reversing for a new trial:

> [A]t no time did the state give, or the trial court require, reasons for the excusal of Juror Brooks.
>
> The record reflects that the trial court below clearly entertained serious doubts as to whether the state was improperly exercising its peremptory challenges. Accordingly, the court should have resolved this doubt in favor of the defense and conducted an inquiry as to the state's reasons for all the challenged excusals. Slappy, 522 So.2d at 21-22. These reasons must be supplied by the prosecutor. Here, the trial court conducted an improper inquiry because it failed to question the state as to each and every peremptory challenge exercised against blacks once it became clear that the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse.

Accord, Tillman; Hargrove; Johnson.

The trial court's belief that the Neil problem was rendered moot by the state's belated acceptance of Ms. Boyd (R6) is refuted by the entire body of caselaw on racial discrimination in jury selection. "...[T]he issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other." Slappy; Tillman; Thompson; Johnson; Stubbs; Sampson. The serious and compound violations of the constitutional guarantee against racial discrimination, and the protective procedures established in Batson, Neil, Slappy, and their progeny, require reversal for a new trial [Issue I].

While the Neil issue is dispositive, the trial court also erred in excluding critical corroborative evidence that the victim was a user of crack cocaine. In light of the testimony of appellant and Otis Allen that the victim approached them at the cut and offered sex for crack cocaine and money (testimony which the prosecutor contended to the jury was a lie), the testimony of unbiased witnesses to show that she was, in fact, a crack user was relevant and crucial [Issue II]. In addition, the trial court erred in denying appellant's motions for judgment of acquittal of first degree murder and sexual battery [Issue III]; and in allowing the prosecutor to make improper and inflammatory argument to the jury in the penalty phase [Issue IV]. The prosecutor's misconduct was especially egregious because it strongly appears that he intentionally misled the trial court to believe that the Florida Supreme Court had approved such argument, when in fact the Supreme Court has disapproved it.

## ARGUMENT

### ISSUE I

**THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE PROSECUTOR TO GIVE A REASONABLE, RACIALLY NEUTRAL EXPLANATION FOR HIS EXCUSAL OF PROSPECTIVE JUROR FARRAGUT.**

### A. The Constitutional Guarantee

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court recognized that racial discrimination in jury selection violates article I, section 16 of the Florida Constitution. To effectuate the constitutional guarantee, the Court, in Neil and subsequent decisions, established procedures that were intended to abolish the discriminatory exercise of peremptory challenges. The United States Supreme Court reached a similar conclusion in Batson v. Kentucky, 476 U.S. 79 (1986), holding that use of peremptory challenges to exclude jurors solely on the basis of race violates the Fourteenth Amendment to the U.S. Constitution. "...[U]nder Batson, the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." United States v. Gordon, 817 F.2d 1538, 1541 (Fla. 1987); see United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Thompson v. State, 548 So.2d 198, 202 (Fla. 1989). This Court in State v. Slappy, 522 So.2d 18, 20-21 (Fla. 1988), cited Batson and wrote:

> ... the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being - to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.
>
> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws.
>
> Unfortunately, the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives. ...
>
> ... ...

> In interpreting our own Constitution this Court in State v. Neil, 457 So.2d 481 (Fla. 1984), clarified sub nom, State v. Castillo, 486 So.2d 505 (1986), recognized a protection against improper bias in the selection of juries that preceded, foreshadowed and exceeds the current federal guarantees. We today reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. See Art. I, § 16, Fla. Const.

B. The Applicable Law

To invoke the protection of the procedures outlined in Neil and Slappy, the complaining party[12] must initially make a prima facie showing that there is a strong likelihood that a juror or jurors have been peremptorily challenged because of race. Neil, Slappy; Roundtree v. State, 546 So.2d 1042 (Fla. 1989). It is clearly not necessary to establish that the opposing party is "systematically" excluding black jurors. Thompson v. State, 548 So.2d 198, 202 (Fla. 1989); see also Stubbs v. State, 540 So.2d 255, 257 (Fla. 2d DCA 1989); [Gordon] Williams v. State, 551 So.2d 492, 494-96 (Fla. 1st DCA 1989). As this Court observed in Slappy, in determining whether there is a "likelihood" of racial discrimination:

> We know --- that number [of challenged peremptory strikes] alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. [citations omitted]. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.

522 So.2d at 21 (emphasis in opinion).

See, e.g., Tillman v. State, 522 So.2d 14, 17 (Fla. 1988); Thompson v. State, 548 So.2d 198, 202 (Fla. 1989); Johnson v. State, 537 So.2d 117, 121-22 (Fla. 1st DCA 1988); Stubbs v. State, 540 So.2d 257; Sampson v. State, 542 So.2d 434, 435 (Fla. 4th DCA 1989); [Gordon] Williams v. State, 551 So.2d at

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[12] The complaining party is usually, but not always, the defense; Neil specifically recognizes that the state also has standing to object to racial discrimination in the use of peremptory challenges. 457 So.2d at 487. However, all of the cases cited in this Point on Appeal involve defense objections to the prosecutor's use of his peremptory strikes. In this section, for convenience, "the defense" will be used synonymously with the complaining party, and "the state" or "the prosecutor" will be used synonymously with the party exercising the peremptory challenge.

494-96. The state cannot justify a strike, or avoid a Neil inquiry, merely by pointing out that the panel still contains a black juror, Mack v. State, 545 So.2d 489, 490 (Fla. 2d DCA 1989), or two black jurors, [Daniel] Williams v. State, 547 So.2d 179, 180 (Fla. 4th DCA 1989), or that the next juror up is also black, Stubbs v. State, 540 So.2d at 256-57. See, generally, Thompson v. State, 548 So.2d at 201-02; Mayes v. State, 550 So.2d 496, 497-98 (Fla. 4th DCA 1989); [Gordon] Williams v. State, 551 So.2d at 495-96.

This Court reaffirmed in Slappy that:

> [T]he spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question. Recognizing, as did Batson, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," 476 U.S. at 96, 106 S.Ct. at 1723, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

The principle that any doubt as to whether there is a likelihood of discrimination must be resolved in favor of a Neil inquiry has been repeatedly recognized by this Court and the District Courts of Appeal. Tillman, 522 So.2d at 16; McCloud v. State, 530 So.2d 56, 57 (Fla. 1988); Roundtree, 546 So.2d at 1044; Thompson, 548 So.2d at 200; Bryant v. State, ____ So.2d ____ (Fla. 1990) (15 FLW S178); Pickett v. State, 537 So.2d 115, 116 (Fla. 1st DCA 1988); Johnson v. State, 537 So.2d at 121; Stubbs v. State, 540 So.2d at 257; Parrish v. State, 540 So.2d 870, 871 (Fla. 3d DCA 1989); Sampson v. State, 542 So.2d at 435; Mack v. State, 545 So.2d at 489; Hill v. State, 547 So.2d 175, 176 (Fla. 4th DCA 1989); [Daniel] Williams v. State, 547 So.2d at 180; [Gordon] Williams v. State, 551 So.2d at 495-496; Norwood v. State, ___ So.2d ____ (Fla. 3d DCA 1990) (15 FLW D990).

In Jennings v. State, 545 So.2d 945, 946 (Fla. 1st DCA 1989), for example, it was stated:

> Where there is any doubt as to whether the complaining party has met its initial burden, the doubt should be resolved in that party's favor, and the other party given an opportunity to explain the use of its peremp-

> tory challenge. State v. Slappy, supra; Pickett v. State, 537 So.2d 115 (Fla. 1st DCA 1988).
>
> The trial court in this case concluded that, since the State had peremptorily challenged only one black juror, the defendant had not met its initial burden and, therefore, that no Neil inquiry was required. The court's conclusion directly conflicts with the Supreme Court's holding in Slappy...

(emphasis in opinion)

The appellate court went on to hold that the defendant had met his initial burden, and, since the issue is whether any juror has been excused because of his race, "the trial court erred in failing to conduct a full Neil inquiry." Jennings, 545 So.2d at 946. See also Stubbs v. State, 540 So.2d at 256-57.

While standing to make a Neil objection is not limited to black defendants, it is a factor which tends to support the prima facie showing of a likelihood of discrimination when the defendant is of the same race as the challenged juror or jurors. See Kibler v. State, 546 So.2d 710, 712 (Fla. 1989); Reed v. State, ____ So.2d ____ (Fla. 1990) (15 FLW S115, 116). Another factor which strongly supports a prima facie showing is when a minority juror who has indicated no partiality in his voir dire examination, or whose answers were not substantially different from the majority of the white venirepersons, is nevertheless peremptorily excused. See Slappy, 522 So.2d at 23; Thompson, 548 So.2d at 200; State v. Jones, 485 So.2d 1283, 1284 (Fla. 1986); Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988); Stubbs, 540 So.2d at 257; Parrish, 540 So.2d at 871; [Gordon] Williams, 551 So.2d at 496; Norwood, 15 FLW at D990. For example in Sampson v. State, 542 So.2d at 435, the challenged juror, Ms. Francis, had

> related that she was single, employed as a customer service representative, had never served as a juror, had never been involved in a lawsuit, and had never been the victim of a crime. The state exercised its second peremptory challenge in excusing her.[13]

On appeal, the court held that the trial court's failure to conduct a Neil inquiry was reversible error:

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[13] The first black juror excused in Sampson, in contrast, had had one family member who had served a prison term, another who had been arrested, and a third who had been a victim of several crimes.

> The appellant made a timely objection and demonstrated on the record that the challenged persons were members of a distinct racial group and that there was a strong likelihood that they have been challenged solely because of their race. See State v. Neil, 457 So.2d 481 (Fla. 1984), clarified sub nom. state v. Castillo, 486 So.2d 565 (Fla. 1986). Any doubt as to whether the complaining party has met its initial burden of showing a constitutionally impermissible exercise of peremptory challenges should be resolved in the complaining party's favor. Slappy, 522 So.2d at 22.
>
> The trial judge should have been satisfied that the appellant's objection as to the peremptory challenge of Ms. Francis was proper and not frivolous. He should have conducted an inquiry into the state's basis for excusing her. The state should have been required to rebut the inference created when the appellant met his initial burden of persuasion.

Sampson v. State, 542 So.2d at 435.

Once the threshold requirement has been met, the burden then shifts to the state to rebut the inference that its use of the peremptory challenge or challenges is racially motivated. Slappy; Roundtree. Moreover, once the trial court is, or should be, satisfied that the complaining party's objection is proper and not frivolous - or if he even has begun to entertain some doubt as to whether there is a racial motivation for the peremptory challenges[14] - he is required to question the prosecutor as to each and every peremptory strike he has previously exercised (or seeks subsequently to exercise) against black jurors. Thompson v. State, 548 So.2d at 202 (emphasis in opinion); Tillman v. State, 522 So.2d at 16. See also Hargrove v. State, 530 So.2d 441, 442 (Fla. 4th DCA 1988) ("We conclude --- that a more serious inquiry into the state's reasons for challenging said jurors was required. Instead an explanation as to only one juror [out of three] was made and it was inadequate"); Johnson v. State, 537 So.2d at 122 (trial court's inquiry "may not be considered adequate if its examination is limited to ascertaining the prosecutor's intentions in striking only one of several black jurors" [emphasis in opinion]); Mack v. State, 545 So.2d at 490.

When the prima facie showing is made, it is the obligation of the party seeking to excuse the minority juror or jurors to rebut the presumption of

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[14] Thompson, 548 So.2d at 201-02; [Gordon] Williams, 551 So.2d at 496.

discrimination by stating "clear and reasonably specific ... legitimate reasons" related to the particular case to be tried. Slappy, 522 So.2d at 22; [Daniel] Williams, 547 So.2d at 180. The explanation must be critically evaluated by the trial court to ensure the absence of subterfuge or pretext. Roundtree v. State, 546 So.2d at 1045; Mitchell v. State, 548 So.2d 823, 824 (Fla. 1st DCA 1989); Slappy; Thompson. In other words, the trial judge " cannot merely accept the proffered reasons at face value, but must evaluate those reasons as he or she would weigh any disputed fact." Roundtree v. State, 546 So.2d at 1044; see Slappy; Tillman; Parrish; Mitchell.

In Slappy and Roundtree, this Court observed that "...the legitimacy of the state's race-neutral explanations would be questioned if certain factors were present that would tend to show the reasons were not actually supported by the record or were an impermissible pretext." 546 So.2d at 1044.

> The five factors mentioned in Slappy are: (1) alleged group bias not shown to be shared by the juror in question; (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel questioned the juror; (3) singling the juror out for special questioning designed to evoke a certain response; (4) the prosecutor's reason is unrelated to the facts of the case; and (5) a challenge based on reasons equally applicable to jurors who were not challenged.

Roundtree v. State, 546 So.2d at 1044.

### C. The State's Peremptory Excusal of Prospective Juror Farragut

There were fifty prospective jurors for this trial, only four of whom were black. All of the prospective jurors were examined on voir dire prior to the conference in which the state and defense exercised their challenges. When the prosecutor peremptorily excused juror William Farragut, defense counsel objected, saying:

> Judge, Mr. Farragut is ... at this point in time, the only black that is on the panel, and I would submit that he is striking -- has struck him simply because of his race, and not for any legitimate reasons for his ability to render a fair and impartial trial.

(R1000)

Assistant State Attorney Benito (who was also the prosecutor in Thompson v. State) responded with the same misstatement of the law that he did in the Thompson trial:

> If the Court is aware of the threshold in that line of cases, the Court would note that I am not systematically excusing blacks. It's obvious that I am not by striking Mr. Farragut, Ms. Marneese Mitchell is now one of the 12 members of the jury, and Ms. Marneese Mitchell is also black. So, there is no showing of a systematic exclusion on the part of the State.
>
> THE COURT: The State's position is that if you excuse peremptorily William Farragut that the very next juror is also a black?
>
> MR. BENITO: That's correct.

(R1000-01)

The trial judge (who was also the judge in the Thompson case) thereupon stated that he "cannot make a finding the State is at this time systematically excluding blacks from the jury." (R1001) Based on their mutual misunderstanding of the Neil principle - as in Thompson - the state did not give, and the trial court did not require, any reasons for the excusal of juror Farragut.

In Thompson, the prosecutor first excused a black juror named Brooks. The trial judge refused to inquire into the reasons, if any, because he found that there was no showing that the state was systematically striking blacks. 548 So.2d at 201. The judge continued to rule that way on the next several peremptory strikes until, on a challenge to a juror named Bell, he expressed concern that "we are about to run out of all black persons in this panel." The judge was about to order the prosecutor to explain his reasons, but the prosecutor succeeded in persuading him again that he was not systematically excluding blacks. 548 So.2d at 201. Eventually, on a challenge to a juror Tyler, the trial court found that the prosecutor was systematically excluding blacks, and ordered an explanation as to that juror's excusal,[15] and for any subse-

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[15] The explanation which the prosecutor offered was to the effect that Tyler had been in jail in the 1950s when "they were hanging black people ... for spitting on the sidewalk." On appeal, this Court (548 So.2d at 202) observed:

(continued...)

quent strikes against blacks. "However, at no time did the state give, or the trial court require, reasons for the excusal of [the first black juror] Brooks" 548 So.2d at 202.

On appeal, this Court reversed Thompson's capital convictions for a new trial, noting that "the trial court conducted an improper inquiry because it failed to question the state as to each and every peremptory challenge exercised against blacks once it became clear that the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse" 548 So.2d at 202 (emphasis in opinion). Moreover, the Court said:

> ... [T]he entire course of voir dire recounted here reflects a serious misunderstanding of our holdings in Neil and Slappy, as well as the related federal case law. In Slappy we found
>
> > the number [of challenged peremptories] alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.
>
> Slappy, 522 So.2d at 21 (citations omitted). Accord United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986). The present record reflects a grave possibility that the trial court below relied upon the state's erroneous statement that Neil only comes into play if there is a "systematic" exclusion of blacks. This is the only reasonable conclusion based on the record. Indeed, the trial court first began to conduct a Neil inquiry but then reversed itself after hearing the state's erroneous statement of the law. Moreover, every relevant statement by the trial court incorrectly characterized Neil as applying only to "systematic" uses of the peremptory.

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[15](...continued)

While in some circumstances the state might validly challenge a person based on prior incarceration, the phrasing of the answer by the prosecutor here indicates that the state was as much concerned with Juror Tyler's race as with the prior incarceration. This is not permissible. The unsupported speculation that Tyler somehow harbored secret prejudice because of the general circumstances of blacks in the 1950s is not the kind of racially "neutral explanation" required by Slappy. 522 So.2d at 22.

Thompson v. State, 548 So.2d at 202.

In footnote 4, the Thompson Court further explained:

> The term "systematic" is derived from Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), a decision that was rejected on state-law grounds by the Court in Neil and overruled by the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79, 105 S.Ct. 1712, 90 L.Ed.2 69 (1986). Under Neil and Slappy, there is no requirement that the improper use of the peremptory be "systematic."

548 So.2d at 202.

In the instant case, as in Thompson, the trial judge applied the wrong standard of law in refusing to require the prosecutor to give a reasonable, race-neutral explanation for his excusal of Mr. Farragut. In addition, the judge accepted the prosecutor's incorrect representation that no explanation need be given because the next juror up (Marneese Mitchell) was also black. Contrary to that assertion, it is well established that the issue is whether any juror has been excused because of race, independent of any other juror. See e.g. Slappy; Tillman; Mayes. In Stubbs v. State, 540 So.2d at 256:

> The prosecutor exercised a peremptory challenge to the first black person from the jury venire, a Mr. Chambers. Defense counsel objected and requested the trial judge to inquire regarding the prosecutor's reason for excusing Chambers. The trial judge stated she would withhold ruling, because Chambers' exclusion caused a second black person, a Mr. Lawton, to be considered next. Neither party objected to Lawton. Defense counsel renewed his objection, arguing Chambers was excused because he was a black man of similar age as the defendant Stubbs. The trial judge ruled that she would not require the prosecutor to explain his reason for excusing Chambers, because the prosecutor accepted Lawton to sit on the jury.

The Second District Court of Appeal reversed for a new trial:

> We find that Stubbs established a prima facie case of racial discrimination, especially in light of the trial judge's refusal to allow counsel for Stubbs to continue his argument. The trial judge should have considered all relevant circumstances. See Batson, 106 S.Ct. at 1723. For instance, the prosecutor perfunctorily examined Chambers, and Chambers' answers were not substantially different than jurors who were not excused. If there was any doubt whether Stubbs established a prima facie case, the trial judge should have resolved that doubt in favor of Stubbs, see Slappy.
>
> We recognize that a trial judge is best able to determine whether the prosecutor's use of peremptory challenges constitutes a prima facie case of racial

> discrimination. See Batson, 106 S.Ct. at 1723. Here, however, the trial judge misapprehended the law. She mistakenly believed that no discrimination could be shown, because there was a black man on the jury. Batson, however, recognized that the state is prohibited from exercising a peremptory challenge "to strike any black juror because of his race." Batson, 106 S.Ct. at 1724 n. 22. The fact that a black person has been seated as a juror or alternate is not dispositive. Slappy, 522 So.2d at 21.

Stubbs v. State, 540 So.2d at 257.

See also [Gordon] Williams v. State, 551 So.2d at 496 ("[T]he trial court's comments suggest a concern with whether any blacks would be available in the venire to serve on the jury rather than whether any particular juror was improperly excused solely on the basis of race, contrary to the Supreme Court's admonition in Slappy").

As in Thompson and Stubbs, the trial court committed reversible error, because his misapprehension of the law prevented him from considering whether there was a strong likelihood that Mr. Farragut was peremptorily excused because of his race, and from resolving any doubt on that question in favor of a Neil inquiry. If the judge had used the proper standard, he would (or at least should) have found that the defense's objection "was proper and not frivolous ... and should have conducted an inquiry into the state's basis for excusing [the juror]." Sampson v. State, 542 So.2d at 435; see Slappy, 522 So.2d at 22; [Gordon] Williams, 551 So.2d at 496.

### D. The Trial Court's Subsequent Finding that "The State May Well be Systematically Removing Blacks from this Jury Panel"

After the trial judge refused to require the prosecutor to give a race-neutral explanation for his excusal of Mr. Farragut, defense counsel promptly used a peremptory challenge on Marneese Mitchell. The prosecutor did not make a Neil objection, but even if he had, defense counsel could have explained (and subsequently did explain) that juror Mitchell's husband is a ten-year member of the Tampa Police Department. (R1004, see R855-56) Not only was Ms. Mitchell married to a law enforcement officer, his employment was particularly related to this trial, since four of the five prosecution witnesses were also Tampa police officers. Clearly, defense counsel had reason for concern - wholly

apart from her race - whether Ms. Mitchell could be an impartial juror. Soon afterward, Jacqueline Boyd, a black woman, was placed in the box, and was immediately struck by the state. Defense counsel stated "We are going to interpose the same objection as we did before", noting that the state had previously excluded Mr. Farragut, and now they were excusing the only other black person who remained. The trial court said:

> I will require the State to give a valid reason for exercising a peremptory challenge as to Jacqueline Boyd since there is no other black left on this panel other than Charlie Robinson, who unequivocally stated that he could never vote to recommend death. I now find the State may well be systematically removing blacks from this jury panel.

(R1004)

The prosecutor then offered the following explanation:

> My concern with Ms. Boyd would be the fact that she has two children in my reading of her questionnaire seemed to indicate that she lived in the area where this offense took place.
>
> THE COURT: What was your first reason, Mr. Benito? The second one, merely because she lives in the area, I don't find is any reason peremptorily or not to challenge somebody. What was the first reason?
>
> MR. BENITO: The fact that she has two children.
>
> THE COURT: The Defense want Jacqueline Boyd on their jury?
>
> MR. SINARDI: May I have a moment?
>
> THE COURT: Or does the Defense and the State want to excuse her, and then I don't have to worry about whether the State is systematically excluding blacks.

(R1004-05)

Note that the prosecutor's original statement concerning Ms. Boyd's residence was equivocal or even wishy-washy: "[M]y reading of her questionnaire seemed to indicate ---". He had never asked Ms. Boyd on voir dire about where she lived, or whether that would in any way affect her ability to be fair and impartial. He never asked any of the jurors whether they knew anyone on the defense witness list, and he never asked any of them about their children.[16]

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[16] The juror questionnaires are not included in the record on appeal, but it is a safe assumption that many of the 46 white jurors had children too.

When it quickly became clear that the trial judge was not going to accept the Assistant State Attorney's explanation as sufficient to show the absence of pretext or subterfuge or to rebut the presumption of racial discrimination [see Slappy; Roundtree; Mitchell] - a ruling which may well have resulted in dismissing the jury pool and starting voir dire over with a new pool of jurors [Neil, 457 So.2d at 487] - the prosecutor suddenly noticed that he was incorrect about where Ms. Boyd lived, and withdrew his peremptory challenge, saying he would "leave it up to the Defense" whether they wanted Ms. Boyd or the next juror up. Defense counsel did not challenge Ms. Boyd, so she was selected to serve on the jury.

The next morning, before the trial began, the prosecutor made a statement for the record:

> Yesterday during jury selection, I believe when I struck Miss Boyd, the second black juror that I struck, the Court made a finding that was systematically excluding blacks and asked for a reason.
>
> When I checked I thought Miss Boyd lived in that area, had two children that may have come in contact with some of the people on the defense witness list.
>
> When I checked and realized I was mistaken as to where she lived, I withdrew my peremptory challenge to Miss Boyd and allowed her to remain on the jury if the defense wanted her on the jury.
>
> I'm concerned that I think the Court at that time rescinded its finding, even made one, that I was systematically excluding blacks, and I want that to be clear on the record.
>
> Obviously, Mr. Sinardi's objection for my first strike of Mr. Farragut will stand, but as to my second strike of Miss Boyd, I don't think the Court should be finding that I was systematically excluding blacks when, in fact I withdrew my objection and she sat on the jury.
>
> So I wanted my objection clear on that in case Mr. Simms or Mr. Sinardi wanted to say something about that.
>
> THE COURT: My recollection was that I stated that you may possibly be now systematically excluding. I don't believe I made a finding.
>
> But it's now moot because you withdrew your peremptory challenge as to Miss Boyd.
>
> MR. BENITO: Fine, Judge.

(R5-6)

The circumstances of the attempted peremptory strike of Jacqueline Boyd overwhelmingly buttress the already established likelihood that the excusal of William Farragut was racially motivated. As defense counsel pointed out in making his second Neil objection, the state had already "excluded Mr. Farragut, and now they are excusing the only other black" who had a realistic chance of serving as a juror.[17] (R1004) Even assuming arguendo that the trial judge (if he had been applying the right legal standard) might not have been satisfied at the time of the state's first peremptory strike that a prima facie showing had been made, he certainly would and should have found that standard satisfied by the time of second strike. In fact, even using the wrong - and far more difficult to establish - standard of "systematic" exclusion, the court did find that "the State may well be systematically removing blacks from this jury panel." (R1004)

Again, this Court's decision in Thompson v. State, involving the same prosecutor and the same trial judge, is dispositive. In Thompson, as here, the judge failed to question the state as to its excusal of the first black juror [there Brooks, here Farragut], because of his twin misapprehensions of law (1) that a Neil inquiry is required only if there is a "systematic" exclusion of blacks, and (2) that no discrimination can be shown as long as another black person remains on the potential jury panel. 548 So.2d at 201-02. In Thompson, as here, the state's use of its peremptories eventually convinced the court that the state very likely was engaging in systematic racial discrimination, and from that point forward, he ordered the prosecutor to give reasons. However, as this Court noted in reversing for a new trial:

> [A]t no time did the state give, or the trial court require, reasons for the excusal of Juror Brooks.

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[17] As previously discussed, Marneese Mitchell was married to a police officer from the Department involved in this case. Charlie Robinson, the fourth and last black venireperson, who never reached the box, was "Witherspoon excludable", because he would never recommend death under any circumstances, even for a Ted Bundy. (R89, 982, 1004)

> The record reflects that the trial court below clearly entertained serious doubts as to whether the state was improperly exercising its peremptory challenges. Accordingly, the court should have resolved this doubt in favor of the defense and conducted an inquiry as to the state's reasons for all the challenged excusals. Slappy, 522 So.2d at 21-22. These reasons must be supplied by the prosecutor. Here, the trial court conducted an improper inquiry because it failed to question the state as to each and every peremptory challenge exercised against blacks once it became clear that the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse.

Thompson v. State, 548 So.2d at 202.

See also Hargrove v. State, 530 So.2d 441, 442 (Fla. 4th DCA 1988) ("We conclude ... that a more serious inquiry into the state's reasons for challenging said jurors was required. Instead an explanation as to only one juror [out of three] was made and it was inadequate"); Johnson v. State, 537 So.2d at 122 (trial court's inquiry "may not be considered adequate if its examination is limited to ascertaining the prosecutor's intentions in striking only one of several black jurors" [emphasis in opinion]; Mack v. State, 545 So.2d at 490.

In Tillman v. State, 522 So.2d at 16, the state peremptorily struck two black jurors; no objection was made at that point. When a third black juror was excused, and the defense objected, the trial court - instead of inquiring of the prosecutor - expressed his own reasons why he thought the jurors could be excluded, notwithstanding race.

> Upon the challenge to excuse a fourth black juror, defense counsel again moved for a response from the prosecutor stating valid reasons for exclusion. The prosecutor then gave facially valid reasons for excusing the fourth juror. While excusing that juror, the trial judge did not rule as to the motions regarding the excusal of the previous three black jurors.

Tillman v. State, 522 So.2d at 16.

On appeal, this Court held that Tillman had met his initial burden regarding the likelihood of racial discrimination, and that any doubt on that score must be resolved in Tillman's favor. "...[T]he record shows that the trial judge stated his own reasons for allowing the peremptory strikes, rather than requiring the prosecutor to proffer racially neutral reasons. Indeed, had it been the state that proffered the reasons, it would still be the trial

judge's duty to examine them to determine if they are supported by the record." 522 So.2d at 17.

> We believe that the procedure followed by the court below fell far short of the standards set down by this Court in Neil, and more recently in Slappy and Blackshear. The procedure that was followed failed to insure that Tillman's rights to a jury composed of a fair cross section of the community were protected. Instead, Tillman was subjected to a proceeding that was open to racial discrimination by the state, thus violating article I, section 2 of the Florida Constitution, as well as the Equal Protection Clause of fourteenth amendment to the United States Constitution.

Tillman v. State, 522 So.2d at 17.

In the instant case, defense counsel did object to the excusal of Mr. Farragut, contending that the prosecutor "has struck him simply because of his race, and not for any legitimate reasons for his ability to render a fair and impartial trial." (R1000) Minutes later, in objecting to the excusal of Jacqueline Boyd, defense counsel reminded the judge that the state "previously excluded Mr. Farragut and now they are excusing the only other black." (R1004) Yet, even after finding that "the State may well be systematically removing blacks from this jury panel", the judge never required the prosecutor to give a racially neutral explanation for the excusal of Mr. Farragut. See Thompson, 548 So.2d at 202. Thus, there are two related but independent serious errors, each of which requires reversal: (1) the trial court's misapprehension of law that Neil does not come into play unless there is a "systematic" exclusion of blacks, and unless no other black people remain as potential jurors, see Thompson; Stubbs; [Gordon] Williams; [Daniel] Williams; Mack, and (2) the trial court's failure, even upon finding a likelihood of systematic exclusion, to question the state as to each and every black juror it had excused. Thompson (emphasis in opinion); Tillman; Hargrove; Johnson; Mack.

The fact that the prosecutor withdrew his peremptory challenge to Jacqueline Boyd - after it was clear that the trial court considered the state's explanation for her excusal patently insufficient to show the absence of pretext or to rebut the inference of racial discrimination - does not render appellant's objection to the excusal of William Farragut "moot." Even the prosecutor recognized, while trying to cover himself with regard to the

attempted strike of Ms. Boyd, that "[o]bviously Mr. Sinardi's objection to my first strike of Mr. Farragut will stand." (R6) The trial court, in line with his already expressed misconceptions of law, replied:

> My recollection was that I stated that you may possibly be now systematically excluding. I don't believe I made a finding.
>
> But it's now moot because you withdrew your peremptory challenge as to Miss Boyd.

(R6)

The trial court's belief that the Neil issue was rendered moot by the state's belated acceptance of Ms. Boyd is refuted by the entire body of caselaw on racial discrimination in jury selection. In determining whether there is a "likelihood" that a peremptory strike was racially motivated:

> We know --- that number [of challenged peremptory strikes] alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. [citations omitted]. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.

State v. Slappy, 522 So.2d at 21 (emphasis in opinion).

Accord, Tillman; Thompson; Bryant; Johnson; Stubbs; Sampson; [Gordon] Williams; United States v. Gordon; United States v. David. The same body of caselaw makes it equally clear that the wrongful exclusion of one black juror because of the trial judge's failure to comply with the protective procedures mandated by Neil and Slappy is not rendered "harmless" by the seating of another black juror. See, especially State v. Slappy, 522 So.2d at 21 and 24.

### E. The Voir Dire Examination of Jurors Farragut and Boyd

The purpose and intent of Neil was to provide for "a full airing of the reasons behind a peremptory strike." Slappy, 522 So.2d at 21-22; [Gordon] Williams, 551 So.2d at 495. The function of the trial court's inquiry "is to (1) obtain additional information about the challenge from the challenging counsel, and (2) permit the trial judge to evaluate all of the information that he heard during voir dire with the reasons given by challenging counsel." Bryant v. State, 15 FLW at S180. Failure to promptly conduct a Neil inquiry,

where warranted, deprives the trial court of an opportunity to observe and place on the record relevant matters about juror responses and behavior that may be pertinent to whether the challenge was racially motivated. Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988); Pickett v. State, 537 So.2d 115, 117 (Fla. 1st DCA 1988); see Knowles v. State, 543 So.2d 1258, 1259 (Fla. 4th DCA 1989). Since it is the trial court who must evaluate the credibility of the prosecutor's explanation, the court cannot merely state his own reasons why he thinks the juror is properly excludable for reasons other than race. Tillman. Still less can the state comb the record on appeal - in the absence of a Neil inquiry at trial - and offer a retroactive "explanation" for the strike. See Mack v. State, 545 So.2d at 490 ("While, as the state argues on appeal, the record contains evidence of another explanation of the peremptory challenge of this juror which was arguably valid and racially neutral, the state failed to articulate this explanation during the inquiry and thus failed to carry its burden of demonstrating a lack of discrimination").

Thus, the trial court's failure to conduct a Neil inquiry into the excusal of Mr. Farragut would be reversible error even if the state could now discover some arguably valid reason to proffer on appeal. Mack; see Tillman; Blackshear.

Nevertheless, it is worth noting that nothing in the voir dire examination of either Mr. Farragut or Ms. Boyd indicated any unfairness or partiality, or any disability to serve as a juror. See Slappy, 522 So.2d at 23; Thompson, 548 So.2d at 200; Blackshear, 521 So.2d at 1084; State v. Jones, 485 So.2d 1283, 1284 (Fla. 1986); Parrish, 540 So.2d at 871; Sampson, 542 So.2d at 435; Norwood, 15 FLW at D990. The voir dire, as a whole, was brief and even rather superficial for a capital trial. The trial judge initially questioned the jurors as a group concerning their ability to render a fair and impartial verdict based solely on the evidence, and their ability to follow the law as instructed by the court. (R841-44) He found them all generally qualified to sit as jurors. (R844) The prosecutor asked the fifty potential jurors if they had any friends or relatives in law enforcement. (R847) Seventeen jurors did; Mr. Farragut and Ms. Boyd were not among them. (R847-60) He also asked the jurors

if they or any family member had ever been accused of a crime. (R860) Nineteen jurors answered affirmatively; Farragut and Boyd were not among them. (R860-74) Each juror was asked whether, under the proper circumstances, he could recommend that a defendant be sentenced to death. (R891-98) Four jurors (including black juror Charlie Robinson) said they could not recommend death, and a fifth juror said she would have trouble with it. (R893-95, 897-98) Mr. Farragut and Ms. Boyd were among the forty-five jurors who unequivocally stated that they could recommend a death sentence under appropriate circumstances. (R893, 896) Cf. Roundtree v. State, 546 So.2d at 1045. Defense counsel questioned the jurors as a group as to their ability to follow the law (R905-16), and then inquired which jurors had previously served on juries. (R917) Six had; Farragut and Boyd were not among them. (R917-23) He also asked whether any of the jurors had been the victim of a crime; fourteen jurors answered affirmatively. (R923-29) Again, Farragut and Boyd were not among them.

When the jurors were asked if they had heard or read anything about the case, Mr. Farragut recognized the prosecutor's reference to the Belmont Heights Little League Field dugout. (See R875-76, 969) He stated:

> I briefly read an article in the newspaper at the time of the crime.
>
> THE COURT: And do you recall what you read?
>
> MR. FARRAGUT: I only recall really the location, as being familiar with the location as having gone over to the swimming pool as a youth near that particular ballpark. I don't really recall either the victim or the perpetrator, or anything else, just the area.
>
> THE COURT: Do you recall any specifics from that newspaper article?
>
> MR. FARRAGUT: Nothing except for the, as I said, the location and the dugout. And when it was mentioned this morning in the reading that you gave, one of the attorneys gave, that is what reminded me.
>
> THE COURT: When you read this newspaper article, Mr. Farragut, did you form an opinion one way or the other?
>
> MR. FARRAGUT: No, not really. In fact I didn't read the whole article.
>
> THE COURT: You think you can completely put aside that article and be fair and impartial to both the State and Mr. Taylor if selected as a juror?

MR. FARRAGUT: Certainly.

THE COURT: The State wish to inquire?

MR. BENITO: No, Sir.

THE COURT: Defense wish to inquire?

MR. SINARDI: Mr. Farragut, you do recall reading a newspaper article though, is that correct?

MR. FARRAGUT: Yes.

MR. SINARDI: Do you remember the specifics, other than the ballfield, et cetera?

MR. FARRAGUT: No, I don't.

MR. SINARDI: Do you remember anything about the headlines in the article that would draw your attention to it?

MR. FARRAGUT: I don't recall what drew my attention to it. I was just sharing a paper with someone in the barber shop, and I was the next one up. But I do recall the area in particular, because I went to the swimming pool, enjoying that field as a youth.

MR. SINARDI: So you're familiar with the area?

MR. FARRAGUT: Only from that.

MR. SINARDI: Okay. But, did you form any opinions in your own mind based on the article that you read in the newspaper?

MR. FARRAGUT: No, I didn't.

MR. SINARDI: Thank you, Mr. Farragut.

(R968-70)

As previously discussed, the state cannot obviate Neil error by proffering reasons on appeal which the prosecutor failed to proffer to the trial judge. Mack. It is the trial judge who must critically evaluate the credibility of the prosecutor's explanation, to ensure that it is not a pretext for racial discrimination. Slappy; Tillman; Roundtree; Parrish; Knowles; [Daniel] Williams; Mitchell. "The requirements established by Slappy cannot possibly be met unless the hearing is conducted during the voir dire process." Blackshear; Pickett.

The trial court's and defense counsel's examination of Mr. Farragut made it clear that he knew nothing about the facts of the case, aside from remembering the location from his youth. He did not recall either the victim or the

perpetrator, had not formed any opinion as to guilt or innocence, and, when asked by the court if he could be fair and impartial to both the state and appellant, he replied without equivocation "Certainly." (R969) The prosecutor declined to ask Mr. Farragut any questions. (R969) See State v. Slappy, 522 So.2d at 23 (failure to question challenged jurors on grounds alleged for bias "renders the state's explanation immediately suspect"); see also Mayes v. State, 550 So.2d 496, 498 (Fla. 4th DCA 1989).

Thus, even if the prosecutor had attempted to justify his excusal of Mr. Farragut on the basis of his familiarity from his youth with the Belmont Heights swimming pool adjoining the ballpark, it is highly probable that the trial court, in evaluating the validity and credibility of the explanation, would have found it insufficient. This conclusion is buttressed by the fact that when the prosecutor later attempted to strike Ms. Boyd because (he thought) she presently lived in the neighborhood, the trial court found that explanation insufficient to justify her excusal. This prompted the prosecutor to re-check her questionnaire (having failed to ask her any questions about her residence, or whether it would affect her ability to be fair and impartial, on voir dire), and notice that she didn't live in the neighborhood after all (which conveniently enabled him to withdraw his already doomed challenge without having to go back to square one with a new pool of jurors). The next morning, seeking to persuade the judge to "withdraw" his finding of the possibility of systematic exclusion of black jurors, the prosecutor said:

> When I checked I thought Miss Boyd lived in the area, had two children that may have come in contact with some of the people on the defense witness list.

(R5)

During voir dire, however, the prosecutor never asked the jurors as a group, and never asked Ms. Boyd in particular, whether they or she knew any of the people on the defense witness list (all of whom, by the way, were adults). One simple question to Ms. Boyd may well have revealed no cause for the state's supposed concern. Mayes v. State, 550 So.2d at 498. Under the Slappy analysis (see especially 522 So.2d at 23), there is an extremely high probability that his explanation for his attempted excusal of Ms. Boyd was a mere pretext for

racial discrimination, and that his unexplained strike of Mr. Farragut was likewise racially motivated.

In closing, it is worth noting that if the trial judge had not required the prosecutor to explain his excusal of Ms. Boyd, the judge would never have had the opportunity to tell the prosecutor that his reasons were insufficient, the prosecutor would never have re-checked the questionnaire or withdrawn his peremptory challenge, and the state would have succeeded in removing both of the two realistically eligible black jurors for no apparent reason. If the judge - as required by Neil; Slappy; Tillman; Thompson and all of the other relevant law - had conducted a Neil inquiry as to the excusal of Mr. Farragut, it very likely would have revealed that the state had invalid reasons, or incredible reasons, or factually wrong reasons, or no reasons at all, for striking him, apart from his race.

## F. Conclusion

The state's peremptory excusal of juror Farragut, the trial court's initial refusal to conduct a Neil inquiry based on his mistaken belief that a showing of "systematic" exclusion of blacks was required, and his failure - upon his subsequent finding that there was a likelihood of systematic discrimination - to require the prosecutor to explain each and every one of his peremptory strikes against black jurors, violated article I, section 16 of the Florida Constitution, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the spirit and intent of the protections afforded by Neil and Slappy and their progeny. Appellant's convictions and death sentence must be reversed for a new trial.

## ISSUE II

**THE TRIAL COURT ERRED IN EXCLUDING CRITICAL CORROBORATIVE EVIDENCE PROFFERED BY THE DEFENSE.**

The defense acknowledged that appellant was the person who killed Geraldine Birch, but contended that the crime was second degree murder, not first degree. Specifically, the defense contended that the sexual encounter between appellant and Ms. Birch was consensual, in that she had offered him sex in exchange for crack cocaine or money, and that the beating from which she died was done in a rage and with a depraved mind, but without reflection or a premeditated design to cause her death. The defense introduced the testimony of Otis Allen and appellant, both of whom stated that at around 4:00 a.m. Ms. Birch approached them, spoke to appellant, and suggested sex for crack cocaine or money. Appellant testified that he and Ms. Birch began walking - at her suggestion - toward the Belmont Heights Little League field, in order to get some privacy. Otis Allen testified that he saw appellant and Ms. Birch walking off together toward Buffalo Avenue and the Little League park. Another witness, Adrian Mitchell, who was too far away to hear the conversation between Ms. Birch and appellant, testified that it seemed to him that they were walking together, but with the woman a little bit in front, as if she were leading him. (see R427-31) It appeared to Mitchell that the woman was motioning to appellant to follow her. Neither Allen nor Mitchell saw any argument between them or any force being applied.

The prosecutor's contention was that the offer of sex for crack cocaine or money never happened; but that Ms. Birch had merely asked for a ride to Sulphur Springs. When she was unable to get a ride, the state theorized, she walked away and appellant followed her to the Belmont Heights Little League dugout (see R564, 623), where he raped and premeditatedly murdered her. The prosecutor argued to the jury that appellant and Otis Allen were both lying when they testified that Ms. Birch offered appellant sex for crack cocaine or money. (R562-64, 622-23, see especially R622) To provide the jury with a possible motive for Allen to lie, the prosecutor said:

> It's obvious. Perry Taylor is Mr. Allen's friend. Geraldine Birch is not Mr. Allen's friend. Perry Taylor is Mr. Allen's friend.

(R564, see R354-55)

The issue here involves the trial court's refusal to allow the defense to introduce the testimony of three of Geraldine Birch's sisters to show that she was, in fact, a user of crack cocaine. This testimony - from witnesses who were not Perry Taylor's friends - would have tended to corroborate his and Otis Allen's version of what occurred at the "cut", and thus would have provided crucial support for the defense theory of the case.

The day before the defense began its case, the subject of Ms. Birch's use of crack cocaine was discussed among both counsel and the trial judge. The prosecutor, after repeatedly emphasizing the importance of ensuring a fair trial for appellant in this capital case (R253, 254, 255), stated that he would object to any testimony regarding the victim's use of crack cocaine, in the absence of a predicate establishing the relevancy of such testimony. At that point in time, the state had presented its case, but neither appellant nor Otis Allen had yet taken the stand; hence, there was no evidence at that point that Ms. Birch had approached the men at "the cut" and offered appellant sex for crack cocaine or money. Therefore the prosecutor said he would object to the testimony about the victim's use of crack if the victim's sisters were to take the stand at the beginning of the defense's case. He added:

> I need to think a little bit about whether or not I would want to object if, in fact, the Defendant took the witness stand and testified that this woman came up and offered to have sex with him for drugs.
>
> If he did testify to that I need to kick around the idea as to whether or not I can object to family members of the victim then coming in subsequent to his testimony and testifying she did, in fact, have a cocaine habit.
>
> THE COURT: To corroborate the Defendant's testimony.
>
> MR. BENITO: Correct.

(R254, see R253-57)

Along the same line, the prosecutor recognized:

> I can't ask Mr. Sinardi not to call these witnesses and get up there and say who's to say she was using crack? The only statement you have is the statement of Mr. Taylor, self-serving statement she came in and said she wanted to use --- wanted some crack for some sex when Mr. Sinardi could possibly call four or five of her own members of her family that would testify she had a crack problem.

(R256)

When the discussion turned to order of proof, defense counsel took the position that he could put on the family members' testimony first, subject to later establishing its relevancy by presenting evidence of Ms. Birch's statements when she approached appellant and his friends at the cut. The prosecutor disagreed:

> Judge, you can make a ruling as to the relevancy of any witness at any time.
>
> I'm telling you if he calls one of these witnesses before he calls the Defendant and he asks that witness does your client -- does your family member have a cocaine habit? I'm going to say objection, irrelevant. And --
>
> THE COURT: And let's assume it is not relevant. Then I sustain the objection on the grounds it's not yet relevant. You [defense counsel] can make it relevant by calling the Defendant as a witness and then recall the witness.
>
> MR. BENITO [prosecutor]: Correct. That's my position.

(R260)

The trial court then told defense counsel that he would not be allowed to call a witness for the sole purpose of establishing Ms. Birch's use of crack cocaine, unless he first established the relevancy of such testimony. "And if the only way you can establish the relevancy is by calling your client to the stand, albeit the defendant in the case, so be it." (R261) The prosecutor then noted that there was another witness - Otis Allen - who could possibly lay the predicate to make the victim's sisters' testimony relevant:

> MR. BENITO: Let me put it another way, too, Nick. You realize Otis Allen in his deposition -- there is a witness that was present at the scene when this lady came walking up to Mr. Taylor, Otis Allen and Benjamin Marcus.

> He said in his deposition the other day she came up and said she wanted some rock for some sex. That's what he said in deposition.
>
> If he calls Mr. Allen and Mr. Allen testifies to that I may be in a position not to be able to object even if the Defendant does not testify.
>
> But I will be in a position to impeach Mr. Allen obviously because he didn't tell Detective McNamara that when he made the statement.
>
> So I have to just do some research as to whether or not -- even if he calls Otis Allen, Judge, Allen is going to say she walked up and said I want some rock and I'll perform some sex for it. And then she walked off and he followed her to the dugout.
>
> That testimony comes in it may become relevant she's a cocaine user.

(R261-62)

The next day, however, after having had the opportunity to "kick around" the idea, the prosecutor came to the conclusion that Ms. Birch's use of crack cocaine was not relevant after all; not even to corroborate appellant's and Otis Allen's testimony regarding the conversation at "the cut." Immediately after Allen testified, the defense called Joyce Robinson, one of Ms. Birch's sisters. The prosecutor asked for a ruling in limine, now contending that the testimony was inadmissible character evidence. When the court said "Mr. Benito, I have already stated on the record I'm not going to pre-try this case", the prosecutor complained:

> Judge, that's not fair to the State. If she's asked did she have a drug habit and I stand up and object it looks like I'm trying to keep something from the jury. And he shouldn't be able to ask the question.
>
> The question is just as damaging as the answer, Judge, especially when I object because if he asks her did she have a drug habit and I object, the jury is going to know she had a drug habit.

(R361-62)

Defense counsel argued that the issue of consent was now before the jury, through Otis Allen's testimony that Ms. Birch offered to exchange sex for crack cocaine or money:

> That raises undoubtedly the issue of consent. And now I think I'm allowed once that issue has been submitted to the jury, or that least it's before the jury, to show specific acts consistent with --

THE COURT: Where are they?

MR. SINARDI: She is a crack cocaine user.

THE COURT: Oh, no. Negative.

MR. SINARDI: Sorry?

THE COURT: That is a general reputation.

(R363)

Defense counsel clarified that the witnesses were not going to say that Ms. Birch had a reputation as a cocaine user, but rather that they had seen her buy or use crack cocaine. Nevertheless, the trial court ruled that the evidence was irrelevant "to your theory of consensual sex that night between Mr. Taylor and the victim." Defense counsel then asked to proffer the witnesses' testimony. The trial judge initially refused to allow a question-and-answer proffer, despite defense counsel's urging, "Judge, I believe that Mr. Taylor may be incarcerated or put to death as a result of whether or not this evidence is admissible or inadmissible. I think the Court taking five minutes to allow me to proffer that testimony is miniscule when compared to the consequences of Mr. Taylor." The judge eventually relented and allowed defense counsel to proffer the testimony of Geraldine Birch's three sisters outside the presence of the jury.

Joyce Robinson testified on proffer that she had seen her sister Geraldine in the area known as "the hole."[18] Asked what "the hole" is, she answered "Where they sell crack." Once, about a year before the trial (which would be 5 1/2 months before the victim's death), Joyce Robinson saw her sister buy crack cocaine. A second sister, Alice Rose, saw Geraldine use crack one time about ten months before trial (3 1/2 months before her death). Ms. Rose stated that Geraldine used crack cocaine, but "half the time she couldn't get it." A third sister, Yvonne Robinson, testified that she saw Geraldine doing crack cocaine in the utility room of their mother's house, about a month before

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[18] "The hole", according to Otis Allen's earlier testimony, is another name for "the cut", where Ms. Birch approached appellant and his friends at 4:00 in the morning on October 24.

her death. A couple of times before that, Yvonne Robinson had also "ran up on" her sister while she was doing crack.

On cross-examination, the prosecutor asked the sisters if they had ever seen Geraldine offer her body for crack cocaine, and they replied that they had not.

The trial judge ruled that the sisters' testimony was irrelevant and too remote, and refused to allow the defense to present it to the jury. Subsequently, appellant testified in his own behalf. Immediately thereafter, defense counsel renewed his request to present the excluded testimony, to corroborate appellant's version of what occurred at "the cut", and to support the defense of consent to the charges of sexual battery and felony murder. The trial court adhered to his prior ruling. As a result, while the jury heard appellant and Otis Allen testify that Geraldine Birch offered appellant sex in exchange for crack cocaine or money - testimony which the prosecutor contended was a lie - the jury never heard any evidence that Ms. Birch was, in fact, a user of crack cocaine.

The trial court's refusal to allow the defense to introduce this crucial corroborative evidence was reversible error of constitutional dimension. It is a basic principle of law that any fact relevant to the issues being tried is admissible into evidence unless precluded by a specific rule of exclusion. Fla.Stat. § 90.402; Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d DCA 1982). The trier of fact is entitled to hear relevant evidence from available and competent witnesses. State v. Michaels, 454 So.2d 560, 562 (Fla. 1984). "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court." Henderson v. State, 463 So.2d 196, 200 (Fla. 1985). Conversely, the accused is entitled to present to the trier of fact any relevant evidence in support of his defense; "Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission." Moreno v. State, 418 So.2d at 1225; see Gardner v. State, 530 So.2d 404, 405 (Fla. 3d DCA 1988) (right of a defendant in a criminal trial to present evidence in his own behalf "is a fundamental right basic to our adversary system of ... justice"); see also Chambers v. Mississippi, 410 U.S. 284 (1973).

In the present case, the central disputed fact was what occurred when Geraldine Birch approached appellant and his friends at the cut.[19] According to appellant and Otis Allen, she offered to have sex for crack cocaine or money. According to appellant, Allen, and Adrian Mitchell, appellant and Ms. Birch left together, with her leading the way. Appellant said that they went to the Little League field dugout for privacy, which makes sense. Nobody saw any argument between them or any force being applied. According to the prosecutor's hypothesis - not supported by any of the witnesses who were at the scene - the woman merely asked for a ride to Sulphur Springs. When appellant said he had no vehicle, she walked away, and appellant followed her to the dugout. (see R564, 623)[20] The State's entire theory of the case rests upon its insistence that the offer of sex for crack cocaine or money never happened.

"Whatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant, and, when to admit it, does not override other formal rules of evidence, it should be received." McBrayer v. State, 150 So 736, 737 (Fla. 1933); Prior v. Oglesby, 39 So 593 (Fla. 1905).

Florida's Evidence Code specifically permits the accused in a criminal trial to introduce evidence of a character trait of the victim, when it is pertinent to the issues being tried. Fla.Stat. § 90.404(1)(b)1.[21] As ex-

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[19] The prosecutor also contended that Ms. Birch may not have bitten appellant's penis; but if she did, it was during an act of forcible - not consensual - oral sex. (R624-25)

[20] Why she would have been walking to a Little League field dugout at 4:00 in the morning, if not to have consensual sex, was not explained by the prosecutor.

[21] The exception to this provision, Fla. Stat. § 794.022 (the Rape Shield Law), does not apply here, since the proffered testimony of Ms. Birch's sisters does not involve her prior sexual activity. Incidentally, this Court recognized in Roberts v. State, 510 So.2d 885, 892 (Fla. 1987) that even in cases where § 794.022 does apply, it may be overridden by the accused's constitutional right to present a full and fair consent defense (citing Chambers v. Mississippi).

plained by Professor Ehrhardt in Florida Evidence (Vol. 1, Second Ed.), § 404.6:

> If a defendant alleges a defense which rests upon the conduct of the victim, the defendant may offer evidence of the victim's character to prove that conduct. Under Section 90.404(1)(b), evidence of a pertinent character trait of the victim is admissible when it is offered by the accused to prove that the victim acted in conformity to his or her character. The prosecution may offer evidence to rebut evidence of the victim's character offered by the accused, but the evidence is not admissible unless is if for rebuttal.

Fla.Stat. § 90.405(2) provides that "[w]hen character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct."

In the present case, the evidence that Geraldine Birch was a user of crack cocaine was extremely relevant to appellant's consent defense, in that it tended to corroborate his and Otis Allen's version of what happened at the cut. The evidence was recent and reliable. The prosecutor here accused Otis Allen of lying because he is appellant's friend. The excluded corroborative testimony came from unbiased witnesses,[22] three sisters of the victim who each - on separate occasions - personally observed her buying or using crack cocaine. Joyce Robinson saw Geraldine buy crack cocaine 5 1/2 months before her death. She saw her in the area known as "the hole" (or "the cut"), "[w]here they sell crack."[23] Alice Rose saw Geraldine use crack cocaine about 3 1/2 months before her death. Ms. Rose also stated that her sister used crack, but "half the time she couldn't get it." The third sister, Yvonne Robinson, saw Geraldine using crack in the utility room of their mother's house, only about a month before her death. Yvonne had also "ran up on" Geraldine while she was doing crack a couple of times before that.

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[22] Or, if biased, biased in favor of the victim and against appellant.

[23] This is the same location where Ms. Birch approached appellant and his friends at 4:00 a.m. on the night of her death, and the conversation occurred in which she did (according to the defense) or did not (according to the state) offer appellant sex for crack cocaine or money.

Each of the sisters' testimony underscores the reliability of the others. Taken in tandem, they establish a pattern of crack cocaine use by the victim, during the period of time preceding her death. 5 1/2 months, 3 1/2 months, and 1 month can hardly be considered "too remote" to have probative value, especially in light of the fact that crack cocaine is a powerfully addictive substance. The jury was entitled to hear all of the relevant evidence bearing on the issue of consent; and it can hardly be gainsaid that a user of crack cocaine would be much more likely than would a non-user to approach a group of men at 4:00 a.m., at a location known for the sale of crack, and offer sex for a five dollar rock and ten dollars. The excluded evidence would have assisted the jury in knowing which party spoke the truth concerning what happened at "the cut." This is especially important, considering the fact that no witness who was present at the scene contradicted appellant's version; but the prosecutor relied on circumstantial evidence, impeachment, and his view of "common sense" to persuade the jury that the consent defense was fabricated. According to the prosecutor, appellant was lying, Otis Allen was lying, and Adrian Mitchell was - if not lying - then at least misinterpreting what he saw when he said it seemed to him that the woman was motioning to appellant to follow him. Appellant was entitled, under the rules of evidence and under the Sixth Amendment, to introduce the victim's sisters' testimony to corroborate his own and Otis Allen's version of the incident, and to support his defense of consent. Chambers v. Mississippi; Gardner; Moreno; McBrayer; Fla.Stat. § 90.404(1)(b)1.; 90.405(2); Ehrhardt, Florida Evidence (Vol. 1, Second Ed.), § 404.6.

In closing, appellant would note the telling contrast between two of the prosecutor's statements on this issue. The day before the defense began its case, the prosecutor repeatedly emphasized (or at least paid lip service to) appellant's right to a fair trial, and made numerous statements to the effect that he might not object to the sisters' testimony concerning the victim's use of crack cocaine, if the defense first established a predicate by calling appellant or Otis Allen to testify as to her statements at the cut. (R253-57, 260-62) The prosecutor appeared at that point (as did the judge) to understand

that the sisters' testimony would be relevant to corroborate appellant's testimony (R254, 260), and/or Allen's. (R262) The prosecutor said:

> I can't ask Mr. Sinardi not to call these witnesses and get up there and say who's to say she was using crack? The only statement you have is the statement of Mr. Taylor, self-serving statement she came in and said she wanted to use -- wanted some crack for some sex when Mr. Sinardi could possibly call four or five of her own members of her family that would testify she had a crack problem.

(R256)

By the next day, however, after defense counsel had presented Otis Allen's testimony as to what he heard at the cut,[24] the prosecutor saw it differently. He now contended that the victim's use of crack cocaine was inadmissible character evidence under the Evidence Code; and when the judge initially declined to make an in limine ruling, the prosecutor complained:

> Judge, that's not fair to the State. If she's asked did she have a drug habit and I stand up and object it looks like I'm trying to keep something from the jury. And he shouldn't be able to ask the question.
>
> The question is just as damaging as the answer, Judge, especially when I object because if he asks her did she have a drug habit and I object, the jury is going to know she had a drug habit.

(R361-62)

The prosecutor's concern was well founded. Something was kept from the jury in this case - relevant evidence which would have added credibility to the theory of defense and which would have assisted the jury in determining which party spoke the truth about the critical conversation at the cut. Appellant is entitled to a new trial, and an opportunity to fully and fairly present his defense.

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[24] Defense counsel also renewed his request to introduce the sisters' testimony after appellant finished testifying in his own behalf.

## ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, MADE AT THE CLOSE OF THE STATE'S CASE AND RENEWED AT THE CLOSE OF ALL THE EVIDENCE, BECAUSE THE STATE FAILED TO PROVE THAT THE KILLING WAS PREMEDITATED [AS TO THE ALLEGATION OF PREMEDITATED MURDER], AND ALSO FAILED TO PROVE THE ELEMENT OF LACK OF CONSENT [AS TO THE CHARGE OF SEXUAL BATTERY AND THE ALLEGATION OF FELONY MURDER].

The state relied entirely on circumstantial evidence to support the charge of first degree murder. The only direct evidence of the conversation between Geraldine Birch and appellant at "the cut", and the manner in which they walked away toward the Little League field dugout, came from defense witness Otis Allen, Adrian Mitchell, and appellant; and their testimony supported the defense that the sexual encounter was consensual. The only direct evidence of what occurred in the dugout was appellant's testimony. The question, therefore, is whether the circumstantial evidence introduced by the state was sufficient to prove the elements of premeditation (as to the allegation of premeditated murder) and absence of consent (as to the charge of sexual battery and the allegation of felony murder).

The simpler of the two questions is whether the state proved premeditation; since the record is devoid of any evidence which would support a finding of the required mental state. Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), quoting McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957). See also Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986); Tien Wang v. State, 426 So.2d 1004, 1005 (Fla. 3d DCA 1983). Reflection is an integral requirement for premeditation. Waters v. State, 486 So.2d 614, 615 (Fla. 5th DCA 1986). "Where ... premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference." Wilson, 493 So.2d at 1022; see Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981); Tien Wang, 426 So.2d at 1006-08.

In the instant case, there was no direct evidence of premeditation, and the physical and circumstantial evidence - including the manner in which the homicide was committed, the nature of the injuries inflicted, and the fact that no weapon was used other then appellant's hands and feet[25] - is at least as consistent with an unpremeditated rage killing as it is with a murder committed after reflection and deliberation. Cf. Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) ("A rage is inconsistent with the premeditated intent to kill someone, and there was no other evidence of premeditation"). A beating death is not necessarily inconsistent with second degree murder. See e.g. Storey v. State, 13 So.2d 912 (Fla. 1943); Smith v. State, 314 So.2d 226 (Fla. 4th DCA 1975); State v. McMahon, 485 So.2d 884 (Fla. 2d DCA 1986). Any suggestion by the state that appellant deliberately killed Ms. Birch because she resisted a sexual battery, or in order to eliminate a witness, would be sheer speculation. Even assuming arguendo that some or all of the sexual activity was non-consensual (which appellant does not concede), the only evidence which would then indicate that she resisted would be the biting of appellant's penis.[26] But if the beating was inflicted in reaction to the bite, it is as consistent or more so with a rage killing committed in pain and anger as with premeditated murder. If the beating was not inflicted in reaction to the bite - if the bite never happened - then there is no evidence that Ms. Birch resisted, and hence no evidence that she was killed for that reason. As for a "witness elimination" motive, that was never even suggested at trial, and there is no evidence to support it.

In Hall v. State, 403 So.2d at 1320-21, this Court recognized that where the state's circumstantial evidence leaves open conflicting interpretations as to the accused's homicidal intent at the time of the killing, and one or more of these are consistent with an unpremeditated killing, then the evidence is

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[25] See Spinkellink, 313 So.2d at 670; Larry v. State, 104 So.2d 352, 354 (Fla. 1958).

[26] The prosecutor contended alternatively that Ms. Birch did not bite appellant's penis, or, if she did, it was during an act of coerced - not consensual - oral sex. (R624-25)

legally insufficient to prove premeditation. Appellant's motion for judgment of acquittal as to the allegation of premeditated murder should have been granted.

In addition, the circumstantial evidence presented by the state was legally insufficient to prove beyond a reasonable doubt that the sexual encounter between appellant and Ms. Birch was non-consensual. The only direct evidence as to what occurred at the cut was that Ms. Birch approached appellant and offered him sex for some crack cocaine and ten dollars; and when he agreed to the money part, they walked off together - with her leading the way - to the Little League field dugout for privacy. None of the state's evidence refutes this sequence of events. The prosecutor hypothesized that Ms. Birch merely asked for a ride to Sulphur Springs and, when none was forthcoming, turned and walked away. Appellant, according to the prosecutor, followed her to the dugout (R564, 623), where he sexually battered her and deliberately murdered her. Not only is the prosecutor's theory unsupported by evidence, but it also raises the question of why - if there was no agreement to have sex - would Ms. Birch have walked at 4:00 a.m. to the dugout of a Little League baseball field, especially if a strange man was "following" her. To paraphrase the Assistant State Attorney, "How is that going to get her to Sulphur Springs?" (see R623) None of the witnesses at the scene saw any argument, any struggle, or any force being applied between appellant and the woman; to the contrary, it seemed like they were together or even that she was motioning him to follow her. The state produced no evidence - direct or circumstantial - which would contradict even in the slightest that Ms. Birch went to the dugout voluntarily.

The state did introduce the testimony of the associate medical examiner to the effect that the injuries to the interior and exterior of the victim's vagina could have been caused by an object or a hand, but not by a penis. (R82, 88, 90, 97, 119-20) However, on cross-examination, he acknowledged that he could not entirely rule out the possibility that the internal injuries could have been caused by a penis (R97-98, 119-20), nor could he rule out that the external injuries were caused by a kick or a blow; that was "certainly possible." (R99-101) Moreover, under the peculiar facts of this case, even assum-

ing arguendo that the injuries were caused by insertion of a hand, the circumstantial evidence does not exclude the possibility that that occurred during consensual sex.

The state's evidence in this case was insufficient to exclude the reasonable hypotheses that the sexual encounter between appellant and Ms. Birch was consensual, and that the blows and kicks which caused her death, while inflicted in a rage and with a depraved mind, were not done upon reflection or with a premeditated design to kill her. Appellant's conviction of sexual battery should be vacated, and his conviction of first degree murder reduced to second degree murder. See Fla.Stat. § 924.34.

## ISSUE IV

THE TRIAL JUDGE ERRED IN ALLOWING THE PROSECUTOR TO MAKE IMPROPER AND INFLAMMATORY ARGUMENT TO THE JURY IN THE PENALTY PHASE; THE MISCONDUCT WAS ESPECIALLY EGREGIOUS BECAUSE THE PROSECUTOR INTENTIONALLY MISLED THE TRIAL JUDGE TO BELIEVE THAT THE FLORIDA SUPREME COURT HAD APPROVED SUCH ARGUMENT, WHEN IN FACT THE SUPREME COURT HAS DISAPPROVED IT.

There is a penalty phase closing argument technique of which the Hillsborough County State Attorney's Office is particularly fond. It involves the denigration of life imprisonment as a sentencing alternative - not based on the aggravating and mitigating factors, the circumstances of the crime, or the character of the offender - but rather on the concept of an eye for an eye. In the instant case, the prosecutor used it as the climax of his argument to the jury, and it went like this:

> You have two choices: You recommend life or you recommend death.
>
> How can this man commit this savage crime and expect to live if convicted? He cannot.
>
> Now, Mr. Simms may get up here and tell you life imprisonment is sufficient, that he be sentenced to jail for life on the murder. He could get additional years on the Sexual Battery, Judge Graybill in his sentencing could possibly make it that this man would never get out of jail again and that life imprisonment is sufficient. All right?
>
> Mr. Simms may tell you that life imprisonment is torture and it's a living hell. But what about life imprisonment? Mr. Simms makes that argument. What about life imprisonment? What about life in jail?
>
> I suggest to you I wouldn't want to spend one day in jail myself, but what about life in jail? What can one do in jail? You can laugh, you can cry, you can eat, you can read, you can watch tv, you can participate in sports, you can make friends.
>
> In short, you live to find out about the wonders of the future. In short, it is living. People want to live.
>
> If Geraldine Birch had the choice of life in prison or being in that dugout with every one her organs damaged, her vagina damaged, what choice would Geraldine Birch have made? People want to live.
>
> See, Geraldine Birch didn't have that choice because this man right here, Perry Taylor, decided for himself that Geraldine Birch should die. And for making that decision he too deserves to die.

(R741-43)

In February, 1988, over a year before this trial, the Florida Supreme Court held in another Hillsborough County capital case that this sort of argument is improper:

> We agree with Jackson's argument that the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations.

Jackson v. State, 522 So.2d 802, 809 (Fla. 1988).

Quoting Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), the Jackson Court said:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

The Court characterized the prosecutor's argument as "misconduct", and stated that the trial judge should have sustained defense counsel's objection and given a curative instruction. However, the Court declined to reverse the death sentence in Jackson, concluding that the misconduct was not so outrageous as to taint the validity of the jury's recommendation.

In the instant case, prior to closing statements, defense counsel made it known to the prosecutor that he intended to object to that argument. To forestall an objection in the presence of the jury, the prosecutor decided to ask the judge for an in limine ruling allowing him to make the argument:

> THE COURT: Now, one other potential argument that Mr. Benito had brought to the Court's attention -- Mr. Simms has brought to the Court's attention with reference to the Hudson case, Mr. Benito. That's concerning how you plan to argue to the jury about somebody in jail can still watch television and watch tv and --
>
> MR. BENITO [prosecutor]: That's right, Judge. It's an argument I've used before and that I will use again today. It's an argument I'm sure Mr. Simms has heard several times because we have done battle before.
>
> The last time we tried a case with Mr. Simms, the second phase, he objected during the middle of my clos-

ing argument as to certain aspects of my closing argument in which I advised the jury that they may think that life imprisonment is a living hell, but in essence the defendant has a right to read a book, watch tv, and so forth.

Mr. Simms at the last trial objected during my closing argument. We discussed that today. I believe he still wants to lodge an objection if I make the same type of argument. I plan on making the same type of argument, and the reason I still make the argument, and I think the argument is valid, is because the argument I'm going to make I made in the Hudson case which is a Timothy Curtis Hudson v. State of Florida, and I just have the Supreme Court of Florida opinion. I don't have the cite on that at this time, Judge.

But in that case I have the briefs filed by the public defender's office. That was also a death penalty case.

In their briefs to the Supreme Court of Florida, and I showed this to Mr. Simms, they have put down verbatim my closing argument in the second phase in that particular case which I plan on using the same type wording today.

The public defender alleged that that was improper argument and asked for a new penalty phase hearing, and I have to look to the Supreme Court for guidance.

And that Hudson opinion, footnote number 6, the Supreme Court says Hudson also argues that he should receive a new penalty hearing because the prosecutor's closing argument and the trial court's refusal to give instructions requested by the defense deprived him of a fair trial.

The Supreme Court states: We have considered these arguments but find that they are not supported by the record and that no reversible error occurred.

So with that guidance I do plan on using this type of argument, continuing to use that type of argument, and I appreciate Mr. Simms lodging his objection to protect the record prior to my closing argument.

THE COURT: So you object to that line of argument at this time rather than in the middle of Mr. Benito's argument?

MR. SIMMS [defense counsel]: That is correct, Your Honor. Mr. Benito suggested that he would like to have his argument uninterrupted. I don't object. But for the record I do object to his statements concerning the Defendant has the ability to read, see the sun, watch tv. The victim doesn't have that opportunity.

I submit he's in effect arguing an additional aggravating circumstance, and the rules are very precise you can only argue the aggravating circumstances listed by statute and nothing else.

> THE COURT: Mr. Benito may look to the Florida Supreme Court for guidance.
>
> This Court does not look to the Florida Supreme Court for guidance. This Court is bound by the Florida Supreme Court. And since the Florida Supreme Court has said that is a valid type argument and is not reversible error, he will be allowed to make it.
>
> You've objected; your record is protected. You need not object at the time that he is making that type of argument.
>
> MR. SIMMS: Yes, sir.
>
> THE COURT: Keep in mind now, Mr. Simms, that if he makes any argument to this jury that goes beyond the argument that Mr. Benito has said has been typed and is in the bosom of the Florida Supreme Court in the Hudson case you must make an objection.
>
> MR. SIMMS: Yes, sir.

(R728-32)

Undersigned counsel does not lightly accuse an attorney of intentional misconduct, or of deliberately deceiving the trial judge into making a wrong ruling, thereby securing an unfair advantage in a death penalty trial. Unfortunately, the circumstances here warrant such an accusation. At the very least, the Assistant State Attorney's actions in persuading the trial judge that Hudson was the controlling precedent, and that the Supreme Court had approved the argument technique which was in fact condemned in Jackson, were so grossly negligent as to be tantamount to intentional misconduct.

Footnote 6 of Hudson v. State, 538 So.2d 829, 832 (Fla. 1989) is the equivalent of a PCA, because it does not even indicate what the challenged arguments or the requested jury instructions were. See Cruz v. State, 437 So.2d 692, 697 (Fla. 1st DCA 1983), discussing the summary affirmance in Gilley v. State, 422 So.2d 358 (Fla. 1st DCA 1982). It establishes no precedent, and it is improper to rely on it as precedent, since there are any number of grounds on which the decision could have been based. See Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983); Cruz v. State, 437 So.2d at 697; Cummings v. State, 514 So.2d 406, 407-08 (Fla. 4th DCA 1987). For example, the Court could have declined to reverse in Hudson based on the contemporaneous objection rule, since there the defense had failed to object at trial to the argument which was held improper in Jackson. See

Appendix A, p. 68, n.24. Or the Court could have found, consistently with Jackson, that the argument, while clearly improper, was not so outrageous as to taint the jury's recommendation. Either of these possible explanations for the footnote in Hudson is much more plausible than to suggest that the Court intended to approve Mr. Benito's closing argument device by overruling Jackson sub silentio (and in a way in which only those lawyers and judges who had access to a copy of the appellant's brief in Hudson would be aware of the "change" in the law).[27]

Looking at Hudson's footnote 6 in its face, it does not stand for any proposition of law. The Assistant State Attorney, in arguing it to the trial court, represented that he had special knowledge of what the footnote meant, because he had a copy of the Public Defender's brief in that appeal. If that is true, and unless Mr. Benito was making representations about the content of a four-page section of argument in that brief without having read it, then he had to have been aware of the Jackson decision at the time he was persuading the trial court that the Hudson footnote was binding authority. Even assuming arguendo that he had previously been ignorant of a year old decision - in a case out of his own office - holding that his favorite penalty argument is improper, even a quick perusal of that portion of the Hudson brief would have made him aware of Jackson. The Hudson brief was written by undersigned counsel, and the issue dealing with penalty phase closing argument is attached to this brief as Appendix A. The entire point on appeal is less than four pages long. On

page 68, immediately before quoting Mr. Benito's argument verbatim, undersigned counsel wrote:

> Engaging in exactly the same argument device which this Court found improper and inflammatory in Jackson v. State, ___ So.2d ___ (Fla. 1988) (case no. 68,07, opinion filed February 18, 1988) (13 FLW 146) - a device which was especially prejudicial in the instant case

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[27] In addition, it is not plausible that the Court intended to approve the prosecutor's closing argument device on the merits, because it is so patently obvious that it is designed to inflame the jurors' emotions, and that it does not relate to any legitimate aggravating circumstance.

> given the considerable evidence in mitigation - the prosecutor exhorted the jury:

On the next page, after the end of the quotation, Jackson is cited again. Appendix A, p. 69. Under these circumstances, it is virtually inconceivable that Mr. Benito could have been unaware of Jackson at the time he was using the Hudson brief to convince the trial judge that the Supreme Court has approved an argument which in fact it has held improper.

Because of the prosecutor's deception, the trial judge stated that he is bound by the Florida Supreme Court ,"[a]nd since the Florida Supreme Court has said that is a valid type argument", the prosecutor would be allowed to make it. (R731) The court noted that defense counsel's objection was preserved, and he would not be required to repeat it. (R731-32)

Rule 4-3.3 of the Rules Regulating the Florida Bar requires an attorney, in presenting a matter to a tribunal, to disclose legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client. See Newberger v. Newberger, 311 So.2d 176, n.1 (Fla. 4th DCA 1975). Here, the prosecutor misleadingly represented a footnote in Hudson (which amounted to a PCA) as being controlling authority in his favor, when he knew, or certainly had reason to know, that the actual controlling authority is Jackson, which clearly states that the argument device is improper and a defense objection thereto should be granted.

In Garron v. State, 528 So.2d 353, 359 (Fla. 1988), this Court addressed the issue of prosecutorial misconduct in capital cases:

> This is certainly not the first time prosecutorial misconduct has been brought to our attention. In State v. Murray, 443 So.2d 955 (Fla. 1984), and again in Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court expressed its displeasure with similar instances of prosecutorial misconduct. Such violations of the prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this Court. ABA Standards for Criminal Justice 3-5.8 (1980); 476 So.2d at 133. In Bertolotti we stated out concern:
>
> > Nonetheless, we are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety, and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases .... As a

> Court, we are constitutionally charged not only with appellate review but also "to regulate ... the discipline of persons admitted" to the practice of law. Art. V, § 15, Fla. Const. This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office. [Emphasis in opinion].

The Garron Court went on to say that because of the egregious nature of the misconduct in that case, and because its admonitions in Bertolotti had gone unheeded, the appropriate remedy was a mistrial.

Similarly, the only appropriate remedy and the only meaningful sanction in the instant case is reversal of the death sentence improperly "won" by the prosecutor. The misconduct was deliberate and egregious. When this Court, in a particular case, finds an argument to be improper but "harmless error", certain prosecutors interpret that as "The Court says we can keep on doing it." See especially Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984). Mr. Benito obviously believes that his argument is effective in convincing jurors to recommend death, since he uses it in every case, changing only the names. In the instant case, he used it as the climax of his closing statements. See State v. DiGiulio, 491 So.2d 1129 (Fla. 1988). The argument is designed to divert the jury from its task of fairly weighing the aggravating and mitigating factors, and instead to inflame their emotions with "eye for an eye" rhetoric and "victim impact" sympathy. See Booth v. Maryland, 482 U.S. 496 (1987). The state, having deliberately misled the trial court into permitting the argument, should not now be heard to claim " harmless error." See Gunn v. State, 83 So. 511, 512 (Fla. 1919).

## ISSUE V

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

In the penalty phase of his trial, the defense introduced evidence that appellant has been emotionally disturbed since early childhood. (R712) He was placed in foster care at the age of seven, and at the same time was placed in the Mendez program, which "is for children who are severely emotionally disturbed." (R712) Despite this, appellant never received any psychotherapy, although in Dr. Mussenden's opinion it was needed. (R712-13, 718, 721-22) Appellant's developmental years were "very traumatic." (R713) He remained in the foster home, where he was physically and emotionally abused, from age seven to fourteen. (R713-14) He had a severe bedwetting problem, for which he was harshly punished, and he was so terrified of the foster mother "to the point if he had to pass by her to go to the bathroom he would go someplace in the house or outside the home." (R714)

At the age of fourteen, appellant returned home, to a family consisting of his mother and six siblings. (R713, 715) He was "in absolute ecstasy" to be coming home, but this feeling was soon undermined by the presence of "another male figure in the home which made him to into a rage." (R716)

> With this he became ungovernable again. And for that he was then returned to HRS voluntarily by the family meaning he has now re-experienced a trauma of being rejected by family, being abandoned, and basically it's the ultimate insult, your own mother doesn't want you, and returned him to HRS.

(R716)

Dr. Mussenden testified that, based on his childhood experiences, appellant had a build-up of rage, but he was not able to articulate his feelings of rejection and abandonment. (R716-19)

The effect of a traumatic childhood has been recognized as a valid non-statutory mitigating circumstance. See e.g. Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Appellant also introduced the testimony of three correctional officers at the Hillsborough County Jail that he has been a model prisoner and a hard worker. This also is a valid non-statutory mitigating factor, as it bears upon the

defendant's potential for rehabilitation. See e.g. Skipper v. South Carolina, 476 U.S. 1 (1986); Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987); Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988).

The trial court's alternative statements in his sentencing order that the evidence failed to establish any statutory or non-statutory mitigating circumstances, and that even if any aspect of appellant's character or record or any circumstance of the offense could possibly be considered mitigating factors, "such possible mitigating circumstances" would be clearly outweighed by the aggravating circumstances (R1180), does not comply with the requirements of Rogers v. State, 511 So.2d 526, 534-35 (Fla. 1987) and Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988). See Lockett v. Ohio, 438 U.S. 586 (1978). The sentencing order leaves open the possibility that the trial court erroneously rejected valid mitigating evidence as a matter of law. The death sentence is therefore constitutionally invalid, under the principle of Lockett.

## ISSUE VI

**THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED DURING A SEXUAL BATTERY.**

For the reasons discussed in Issue III, supra, appellant submits that the circumstantial evidence presented by the state was legally insufficient to prove an essential element of sexual battery; i.e., that the sexual encounter between appellant and Geraldine Birch was non-consensual. Therefore, this aggravating factor must also fall. However, if this Court agrees with appellant's other contention in Issue III, that the evidence also failed to prove premeditation, then appellant's first degree murder conviction must be reduced to second degree, and this Point on Appeal would become moot.

## CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

> Reduce the conviction of first degree murder to second degree murder, and vacate the conviction of sexual battery [Issues III and VI].
>
> Reverse the convictions and death sentence and remand for a new trial [Issues I and II].
>
> Reverse the death sentence and remand for a new penalty trial before a newly impaneled jury [Issue IV].
>
> Reverse the death sentence and remand for resentencing [Issue V].

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 22nd day of May, 1990.

Respectfully submitted,

Steven L Bolotin

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

STEVEN L. BOLOTIN
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

SLB/an