IN THE SUPREME COURT OF FLORIDA

WARFIELD RAYMOND WIKE, JR.,

Appellant,

v. CASE NO. 74,722

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT
COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On October 12, 1988, a Santa Rosa County grand jury indicted Warfield Raymond Wike for murder, attempted murder sexual battery and kidnapping. (R 1450-1452) Counts I and II charged premeditated and felony murder, respectively, for the death of Sara Rivazfar. (R 1450) Counts III and IV charged the kidnapping of Sara Rivazfar and her sister Sayeh Rivazfar. (R 1450-1451) Count V charged sexual battery on Sayeh Rivazfar. (R 1451) Counts VI and VII charged attempted premeditated murder and attempted felony murder on Sayeh Rivazfar. (R 1451-1452) Wike moved to dismiss one of the two counts of murder and one of the two counts of attempted murder as duplicitous. (R 1498, 1700-1704) The court ruled the State could proceed on all seven charges. (R 1703-1704) Wike pleaded not guilty and proceeded to a jury trial. (R 1568-1569)

The jury found Wike guilty of all seven counts as charged. (R 1528-1529) At the conclusion of the penalty phase, the jury recommended a death sentence for the murder of Sara Rivazfar. (R 1530) On July 13, 1989, Circuit Judge Ben Gordon adjudged Wike guilty of five of the seven counts; he merged the duplicitous counts of murder (Count II) and attempted murder (Count VII) for purposes of adjudication and sentencing. (R 1545, 1547, 1734-1793) Wike received death for the premeditated murder (Count I); twenty-two years on each of the two counts of kidnapping (Counts III and IV); life on the sexual battery

(Count V); and twenty-two years on the attempted murder (Count VI). (R 1547-1554)

In support of the death sentence, the court found five aggravating circumstances: (1) Wike had a 1974 conviction for robbery; (2) the homicide occurred during a kidnapping and sexual battery; (3) the homicide was committed to avoid arrest; (4) the homicide was especially heinous, atrocious or cruel; and (5) the homicide was committed in a cold, calculated and premeditated manner. The court found that one statutory mitigating circumstance was partially established -- Wike's impaired capacity at the time of the offense due to the use of alcohol and marijuana. (R 1541-1545)

Wike filed his notice of appeal to this Court on August 14, 1989. (R 1555)

Facts -- Guilt Phase

Between 6:00 and 6:45 a.m. on September 22, 1990, Ronnie and Teresa Wright found Sayeh Rivazfar as they drove along a rural road in Santa Rosa County. (R 572, 575-577, 580, 585-587, 591) Sayeh was waving one hand and held the other one to her throat. (R 575-576) When the Wrights stopped, Sayeh asked for help. (R 576) She was pale and appeared to be in shock. (R 577, 592) The Wrights saw Sayeh's cut throat when they asked her to move her hand, and they immediately drove her to a store about seven miles away to call for help. (R 576-577, 587) During the drive, Sayeh told the Wrights a man named "Ray" had cut her and that he drove a large green car with a dented

fender. (R 579-580, 588-589) She also said that her sister was with her, but she was already dead. (R 580, 587) Once at the store, Teresa telephoned the police and also called Sayeh's mother. (R 588-590) At the hospital, physicians determined that Sayeh had suffered a cut throat and two lacerations to her vagina which were consistent with forced penetration. (R 623-627) She required surgery to her throat and vagina. (R 624-627, 634-636)

Ronnie Wright and some other men returned to the area where Sayeh was found to look for her sister. (R 581) Jesse Ream helped in the search, and he found Sara's body in the woods, about 75 feet from the dirt road where footprints were first found. (R 611-614) Her hands were tied behind her back and her throat had been cut. (R 615) Later, the medical examiner pronounce her dead at the scene and determined the cause of death to be multiple slash wounds to the throat. (R 1009-1015) He found at least six cuts which severed the larynx and the main artery supplying the brain. (R 1015)

Crime scene technicians recovered several items of evidence from three separate locations in the area where the body was found. (R 659-660) From the wooded area where the body was discovered, some pieces of shirt material and some pine needles which appeared to have blood on them were gathered. (R 665-670) One piece of material had a blood stain and another had the pocket of the shirt which contained some metal shavings. (R 665-666) The other two locations were on the dirt road which ran by the woods. (R 659-660) One was just east of the body

and investigators photographed a spot on the ground which had signs of a scuffle. (R 677-679) Some soil with suspected blood was removed and plaster casts of tire tracks were made. (R 678-680) At the second location on the road, additional tire tracks were visible, but no casts were made. (R 731-734) Fresh cigarette packages were there and a stain on the ground which appeared to be urine. (R 731-734)

Investigator Larry Bryant spoke to Sayeh and her mother, Patricia Rivazfar, at the hospital. (R 598, 600-601) He developed Wike as suspect from the information they provided. (R 602) Patricia Rivazfar testified at trial that she and her children had known Ray Wike for a little over a year. (R 1058-1059) Officers arrested Wike at the home of his mother and stepfather. His car, an older model, green Dodge Monaco, and several items of evidence from it and the residence were seized. Since Wike lived in his car, there were numerous items of clothing and personal items found. (R 714-715, 747) Suspected blood stains were found on the car seats and on the exterior of the trunk. (R 718-720) Several latent finger and palm prints were developed. (R 718-722) Two areas on the trunk lid appeared to have latent prints in blood. (R 722-724) Two cigarette packages with suspected blood stains were retrieved from the front seat and rear floor of the car. (R 726-727) A torn, pink bathing suit from the rear floor of the car was also collected. (R 727-728, 748-749) A ring of keys resting on the bumper of the car was obtained; they proved not to unlock the car. (R 756-759) Finally, a small telephone directory, which

had been taped together and contained Wike's drivers licence, was discovered behind an armrest in the middle of the front seat. (R 948-953) From the carport of the Obers' house, officers seized a blue blanket and a pair of beige and blue tennis shoes. (R 786-791)

Keven Noppinger, a serologist, testified about his findings on the blood and semen stains found on various items. Wike has type A blood and did not contribute any of the identifiable type blood stains found on the physical evidence recovered in the case. (R 919) Wike is also a type A secretor and could have contributed the semen stains found. (R 899) None of the semen stains contained sperm cells which indicates the contributor had a medical condition effecting the production of sperm or a vasectomy. (R 900-901) Although Wike was found to have a low sperm count, he did produce sperm cells. (R 1017-1021) The semen stains from a type A secretor were found on the torn pink bathing suit (R 900); a child's sock, which also had a blood stain of type O, matching Sayeh's type (R 885-886); on the car seat material, again mixed with type O blood (R 890); and on panties which Sayeh wore which were also blood stained. (R 895-896) Other blood stains matching Sayeh's type O were found on the pine needles obtained from the scene where Sara's body was located (R 873-874); a piece of clothing material found at the same location (R 878); and on the tennis shoes and blue blanket seized from the carport (R 881-882). Further DNA testing on the blue blanket identified the type O blood found there as positively coming from Sayeh. (R 920-940)

Linda Ann Hensley, and FDLE hair analyst, testified to her conclusions about the hairs found on various items. (R 1167-1169) Her testimony was presented via a videotaped deposition to perpetuate testimony. (Exhibit No. 76) (R 1167-1169) On a piece of the torn material found at the scene, she found two head hairs which were consistent with Wike's hair. (Dep. 19) From the blanket seized, two pubic hairs which were consistent with Wike's were recovered. (Dep. 22-25) Hensley also found head hairs, one consistent with the hair of Sara and the other consistent with the hair of Sayeh. (Dep. 25-26) An examination of the clothing from Sara revealed a pubic hair consistent with Wike's on a sock. (Dep. 29) A head hair consistent with Wike's was found on both Sara'a and Sayeh's panties. (Dep. 30-34, 49-50) Hensley testified that she had no way to determining whether the hair was deposited on these items by direct transfer from the individual or through secondary transfer. (Dep. 35-39) She also found hairs which were not consistent with either Wike's, Sara's or Sayeh's. (Dep. 40) Hair and fibers found in Sara's hand contained a dyed head hair which was inconsistent with any of the three. (Dep. 42, 50) A dyed head hair was also found on the blanket, but Hensley did not compare the two dyed hairs to determine if they were similar. (Dep. 51-52)

A total of 29 latent prints were lifted from various places during the investigation of this case. (R 806) Three fingerprints and nine palm prints were developed on the car which had sufficient quality for comparison. (R 803) None

matched Sara's prints. (R 803-804) One fingerprint and five palmprints did not match Sara, Sayeh or Wike. (R 804, 808) On the trunk lid of Wike's car, two palm prints matching Sayeh's palms were found. (R 794-801) One of these prints was made in blood or a substance of high protein content. (R 800) Two palm prints matching Wike's were located on the edge of the trunk. (R 800-803) These prints were also made in a substance of high protein content which could have been blood or some other body fluid. (R 801-803)

Paul Norkus, an FDLE expert in tire track comparisons, examined the plaster casts and photographs of the tire tracks found at the scene and compared them to the tires from Wike's car. (R 766-776) He found that three of four tires were visible in the tracks left at the scene. (R 782) One track positively matched the left rear tire of Wike's car. (R 780) This tire had unique marks and abnormalities which were reflected in the track. (R 780-782) Norkus found that the tracks left by the left front and right rear tires were also consistent with the tires in that position on Wike's car. (R 783) The make, design and wear patterns were similar, but there were no specific marks from which to make positive identification. (R 783)

Ray's stepfather, Dallas Ober, testified that he saw Ray on the evening of September 21, 1988. (R 1029) He left, and Ober did not see him again until around 6:00 the next morning. (R 1030) Ray lived in his car most of the time and would frequently park in front of the Ober's residence overnight. (R

1029) Ober saw Ray walk by his window and heard the water running from the garden hose. (R 1030) He paid little attention since this was not an unusual routine for Ray to use the hose to wash. (R 1031) Ray came inside the house. (R 1031) He wore the same dark, pull-over shirt and Levi's he had on the previous evening. (R 1029, 1032) Ray went to sleep on the floor in the living room. (R 1032) Ober had a meeting to attend that morning and Ray asked him to awaken him when he left. (R 1033) His stepfather did so, but Ray said he was sick. (R 1033) Ober did not see Ray again and later learned of his arrest later in the day. (R 1033)

Frank Freeman was Ray's friend and co-worker. (R 954-955) Ray's mother and stepfather also cared for Freeman's six-year-old son after school. (R 955-956) Freeman was also a machinist. (R 956-957) He said it was not unusual to come home with metal shavings in your pockets and shoes. (R 957) On September 21st, Ray went to Freeman's house sometime between 6:00 and 8:00 p.m. (R 957-958) Ray left about 10:00. (R 958) Freeman knew that Ray lived out of his car, because sometimes Ray parked in front of his house for the night. (R 959) When Freeman awoke the next morning, Ray's car was not in the yard. (R 960) Freeman went to work at 7:30, but left at 9:00 to get his son from school because he was sick. (R 960-961) He drove to the Ober's house to see if they could watch his son that day. (R 961) Ray's car was there. (R 961-962) No one answered the door when he knocked, so he opened the unlocked door and yelled. (R 962) He heard noises and then saw Ray lying on the

floor. (R 962) Ray said he was sick with a virus. (R 963) After they talked for a few minutes, Freeman left. (R 963) Freeman said he knew that Ray owned two knives and kept one at his work station on the job. (R 970) He saw Ray's knife at the station that morning. (R 970) He said the other knife is of average size and has finger grips on it. (R 970)

Moes Bauldree testified about his observations along the dirt road in the crime scene area as he drove to work on the morning of September 22, 1988. (R 833-861) He left his home around 5:00 a.m. and drove an alternate route that day because a bridge was closed. (R 838) As he drove down a little dirt road about 30 miles-per-hour, he came upon a car parked in the road. (R 839-840) The car faced him. (R 840) Someone was leaning into the car through the opened driver's door. (R 841-842) When Bauldree stopped, he left his truck light shining toward the car. (R 842) The man leaning into the car stood up and walked to within four or five feet of Bauldree's truck. (R 842-845) According to Bauldree, the man was about five-feet eight-inches tall, 150 pounds, with a longer, brown hair, a mustache and a patchy beard. (R 843) He wore white or light blue, cut-off shorts. (R 843) He did not wear a shirt and Bauldree did not see any scars or tattoos. (R 855-856) Bauldree saw what appeared to be blood on the front of the shorts. (R 844) The man said he was having trouble starting his car, which Bauldree described as a pale green, 1973 to a 1975, Dodge Monaco with a damaged left front and rear door. (R 846-847) The man asked about the time and said he had been

there since 2:00 a.m. (R 845) Bauldree told him it was 5:40 at that time. (R 845) During the conversation, Bauldree said he felt scared. (R 846) After the brief exchange, the man returned to his car and was able to crank it. (R 845) Since the road was one lane wide, Bauldree pulled over and the man pulled his car by him. (R 845-846) About 4:30 p.m. on the same day, Bauldree talked to Officer Larry Bryant about what he had seen. (R 820-832, 834-385) Bryant showed Bauldree a photo line-up and he picked Wike's photograph, which had been taken after his arrest, as the man he saw. (R 829-832, 850-853) When asked if he could identify the man in court, Bauldree identified defense counsel. (R 853-854)

Sayeh Rivazfar testified about her experiences. (R 1070) She said that she and Sara went to bed the night before September 22, 1988, around 8:00. (R 1076) They both wore their clothes to bed since they were sometimes late for the bus in the mornings. (R 1077) She also had her ring of play keys in her pocket. (R 1091) Sayeh woke up in a car parked in front of her house. (R 1077-1078) Someone picked her up and placed her in the car. (R 1078) She recognized the man's voice as her mother's friend, Ray. (R 1079) She was not fully awake and she went back to sleep. (R 1081) The man then put Sara in the back seat of the car. (R 1081) Sayeh said she opened her eyes some but drifted back to sleep. (R 1081) She asked for her mother and she said Ray told her that her mother was coming. (R 1081) She woke up while the car was traveling on a paved road and then turned onto a dirt road. (R 1082) Ray was driving the

car. (R 1083) He had long hair and a mustache. (R 1083) He stopped the car at one point for Sayeh and Sara to go the bathroom. (R 1087-1089) Sayeh then sat on the trunk of the car. (R 1090) According to her testimony, Ray then took her jeans off, took his pants down and penetrated her with his penis. (R 1092-1096) Sayeh said Ray wore white shorts when this occurred. (R 1096) They got back into the car, and Sayeh remembered Ray talking to someone in a truck. (R 1098-1099) Sara hands had been bound with tape. (R 1097-1100) She said they stopped again and walked in the woods. (R 1100-1101) Ray then pulled a knife which Sayeh said had finger grips on it. (R 1101-1102) He told Sayeh to say a prayer and then cut her throat with the knife. (R 1103) Sara was screaming. (R 1105) Ray then cut her throat and left. (R 1105) Sayeh went to Sara and then went to the dirt road where a man and a woman helped her. (R 1107) Sayeh could not identify anyone in court as Ray. (R 1084-1085)

Investigator Larry Bryant and Crime Scene Technician Jan Johnson testified that Ray's appearance in court was different than the date of his arrest. (R 820-822, 945-947) Ray had gained weight, cut his hair, his complexion was paler, and he was wearing his reading glasses. (R 947)

Ray Wike testified in his own defense and explained many of the circumstances presented. (R 1134) He denied involvement in the crimes committed against the girls. (R 1135) Although Sayeh denied calling Ray by a nickname, he testified that she usually called him "Wolfie". (R 1136) Ray also displayed his

large tattoos on his left forearm. (R 1137) These would have been visible if Ray were seen without a shirt. (R 1138-1139) He also testified to his reasons for changing his appearance. (R 1141) On the first day of jury selection, one prospective juror candidly admitted that he was prejudiced against people with longer hair. (R 1141) Ray said he has worn reading glasses for over nine years. (R 1140)

When asked how his car could have been involved in the offenses, Ray explained that he frequently loans his car. (R 1142) In fact, the girl's mother, Pat Rivazfar, frequently borrowed it. (R 1142) Ray did not know if someone used his car that night because he had been drinking and smoking marijuana. (R 1143) Since having a DUI, Ray said he always calls a friend, Angie, to pick him up when he has had too much to drink. (R 1143) Later, she'll take him to pick-up his car. (R 1143-1144)

Since he lived in his car, Ray carried a lot of personal items in the car. He said the torn shirt with the metal shavings, the blue blanket, and the tennis shoes were all items which could have come from his car. (R 1145-1157) Ray said he used to own a black handled knife with pistol grips, but he lost it in a pool game a month before the crime. (R 1150) He explained that his fingerprint could have been placed on the trunk lid when he took laundry out of the trunk at his mother's. (R 1157)

On cross-examination, the prosecutor asked Ray who committed the crimes. (R 1163) Ray said he had no proof, but he

believed Pat Rivazfar's ex-boyfriend, Gene Milow, was responsible. (R 1163-1164)

Jury Selection

During jury selection, the defense challenged several prospective jurors for cause because of their beliefs in favor of imposition of a death sentence. The trial judge denied several of those challenges. Among them was Prospective Juror Miller (R 437), who stated that the defense would have to make an extra-ordinary showing to convince him to recommend life for a premeditated murder of a child. (R 434) Defense counsel used a peremptory challenge to excuse Miller. (R 438) Counsel exhausted his peremptory challenges and requested additional ones. (R 471) The court denied the request. (R 471) At that time, defense counsel said there were three seated jurors whom he would have excused with a peremptory challenge if they had been available to him. (R 471)

Motion to Suppress

Before trial, Wike filed a motion to suppress evidence obtained after his arrest. (R 1503-1506) Physical evidence from his car, his parents residence and Wike's person were seized. The testimony at the hearing revealed the following circumstances surrounding his arrest and the seizures:

Investigator Larry Bryant developed Wike as a suspect after his interviews with Sayeh and her mother at the hospital. (R 1601-1605) Sayeh had given a description of the

perpetrator, his car and the name "Ray." (R 1602) Bryant also obtained the address of the residence belonging to Ray's mother and stepfather, Dallas Ober. (R 1605-1607) Bryant and several officers went to that location, arriving about 9:25 a.m. (R 1606) From a neighbor, officers learned that an elderly couple, a young child and a man in his 30's lived in the house. (R 1607-1611) They also learned that the elderly couple had a van and the man was in a wheelchair. (R 1611-1612) Ray's older-model, green, Dodge Monaco was parked in the street in front of the residence. (R 1607-1608) The van was not present, and the neighbor said that vehicle had left earlier in the morning. (R 1611) Officers saw what appeared to be a blood stain on the seat of the car. (R 1608) They also found a ring of keys resting on the bumper, which lead the investigators to speculate that they had been dropped and Wike may have left in the van. (R 1608)

An officer approached the front door of the house and rang the doorbell. (R 1612) No one answered, but the officer reported hearing some movement inside. (R 1612) Investigator Bryant speculated that someone might be hurt inside. (R 1612) He had the dispatcher telephone into the house. (R 1613) Wike answered. (R 1613, 1675) He, at first, thought it was a prank call and hung up. (R 1643, 1676) The dispatcher called again, assured Ray it was no prank. (R 1643, 1676) Ray identified himself and said there was no one else in the residence. (R 1614, 1683-1684) The dispatcher told him to go outside with his hands on his head. (R 1614, 1676-1677) Ray looked outside,

saw the numerous officers outside and in the yard and complied. (R 1643, 1677) He testified that he was afraid he would be shot if he did not cooperate. (R 1677) When Ray walked outside into the carport, he was immediately arrested. (R 1615-1617, 1677) There were eleven officers present stationed at various points around the house and in the yard to insure there could be no escape. (R 1635-1636, 1643) Bryant had made the decision to go into the house, without a warrant, if he had not been successful in getting Wike to come outside. (R 1617-1619) Officers made a sweep of the house after Wike's arrest and found no one else present. (R 1617)

After Wike's arrest, he was booked, photographed and questioned. (R 1621-1627, 1667) Investigators also obtained warrants to search the house and to secure body samples from Wike. (R 1628-1634) Wike's car was seized and later searched. Several items of physical evidence were obtained from the car and carport. Wike's booking photograph was used in the photo line-up which resulted in Bauldree's identifying Wike as the person he saw in the crime scene area. (R 829-830, 851)

Wike argued that his arrest was an illegal, warrantless arrest inside his parents' home and the fruit of that arrest should be suppressed. (R 1685-1693) The court denied the motion, ruling: (1) that the officers had probable cause to arrest without a warrant; (2) that Wike was arrested outside of the house and had not been compelled to exit the house, making the warrantless arrest proper; and (3) alternatively, the

officers had sufficient exigent circumstances to justify a warrantless entry and arrest. (R 1694-1697)

Penalty Phase and Sentencing

The trial court scheduled the penalty phase of the trial for the morning of the day following the rendition of the guilty verdicts. (R 1307) On that morning, the court held a hearing on a defense request for a one week continuance and on the question of whether Wike should be shackled for the penalty phase. (R 1307-1340)

Wike's defense counsel asked for a continuance for the purpose of procuring some additional mitigation witnesses. (R 1307-1311) Counsel explained that Ray and his family were quite distressed over the jury's verdicts. (R 1307-1308) His mother was on the verge of a nervous breakdown. She had been hospitalized in the past for a similar problem. (R 1308) The defense intended to call Ray's mother as a witness, but at that time, testifying could jeopardize her health. (R 1308) A cousin was due to arrive in town that night and would also be available to testify. (R 1308) Defense counsel had also just located Ray's ex-wife who could provide important family background information, particularly about Ray's alcohol and drug abuse. (R 1308) Counsel said that Ray had been reluctant to assist in preparing for penalty phase, since he did not believe he would be convicted. (R 1309-1310) Finally, Ray was upset and angry about the verdicts, and counsel believed a brief continuance would help calm him for penalty phase. (R 1326)

After the State agreed to stipulate to the testimony of Wike's mother without her having to testify, the court denied the motion for a continuance. (R 1345-1347)

The trial court also conducted a hearing to determine if Wike should be shackled during the proceedings. (R 1307-1341) Paul Campbell, a corrections officer in the jail, testified to some angry comments Wike made in the jail after the jury's guilty verdicts. (R 1320-1324) Wike allegedly said he was upset with the prosecutor, Kim A. Skievaski, and believed he had lied to the jury in order secure the conviction. (R 1320) According to Campbell, Wike also said he was going to "take Mr. Skievaski out." Campbell understood that Wike meant he would try to kill him since Wike allegedly told Campbell that "if he was going to hell that he was going to take Mr. Skievaski with him." (R 1320-1321) Campbell said he had seen defendants upset and angry in most cases after a conviction. (R 1322) He said Wike had never presented any violence problems while in custody awaiting trial. (R 1323) After the Campbell's testimony, the prosecutor told the judge that he did not feel that he was in danger. (R 1324) He realized that Wike's remarks were made in anger and that he had no way to carry out his threats in any event. (R 1325) The prosecutor suggested that Wike not be shackled. (R 1324-1325)

Rejecting the prosecutor's suggestion, the trial judge ordered Wike shackled and handcuffed. (R 1330) Both counsel tables were covered with blankets to hide the shackles and the handcuffs were moved from behind Wike's back to the front.

(R 1330-1331, 1752-1756) Wike testified from counsel table, and at one point, his handcuffs were displayed to the jury when Wike adjusted his glasses. (R 1755) Defense counsel's objections to the shackling were overruled, and the court also denied a motion for new trial on this ground. (R 1330-1331, 1752-1756)

The State and the defense presented additional physical evidence. (R 1358-1388) First, the prosecutor introduced Wike's 1974 conviction for robbery in Pennsylvania and an additional crime scene photograph of the victim's body. (R 1358-1364) Next, the defense introduced the results of a drug screen performed on Wike the day after the offense which showed the presence of marijuana in his blood system. (R 1364-1369)

Wike's mother was unable to testify and a stipulation was used to present the substance of her testimony about Ray's family background to the jury. (R 1371-1373) Ray was born in 1956. (R 1371) His father was considerably older than his mother, and he died when Ray was eight-years-old. (R 1372) Ray's mother had a nervous breakdown. (R 1372) As a single parent, Ray's mother had difficulty disciplining him; his father had provided all the discipline while he was alive. (R 1372) Ray attended a school designed for children of single parents, however, he regularly ran away from the school. (R 1372) Later, Ray began working, was married and divorced. (R 1372) He lived with a woman for a time and had a child. (R 1372) When they separated, Ray's mother and stepfather adopted the the child. (R 1372) Ray lived with his mother and

stepfather until they had a dispute over his monetary contribution to help maintain the household. (R 1373)

Ray testified in his own behalf. (R 1373) He said he grew up without a father. (R 1374) The school he attended was an honorary one, requiring an A/B average for admission. (R 1374) He played brass instruments in the band and earned a scholarship in ice hockey. (R 1374) He later earned his GED when he was 28 years-old. (R 1381) Ray said he was married twice, once for four and a half years and a common law marriage of six years. (R 1375) His first marriage ended because of his alcohol and drug abuse. (R 1375) At age 14, Ray began using alcohol and soon started with drugs. (R 1377) He said he had used almost every type of drug, except heroin. (R 1378) However, for the three years prior to his arrest, he use nothing but alcohol and marijuana. (R 1378) Ray entered the Navy in 1973, but received an honorable medical discharge six months later. (R 1376) He suffers from a degenerative disease of the spinal column which effects the production of bone marrow. (R 1376-1377) Later, he worked in construction and became a machinist. (R 1378-1379) He said he was upset by the guilty verdict and could not accept it in heart or mind. (R 1379) He was numb, particularly since the offenses were committed against someone he knew and cared about. (R 1376)

On cross-examination, the prosecutor suggested, via questioning, that Ray showed no remorse when told of the nature of the crimes committed against the girls whom he had known for about a year. (R 1382-1383) At this point, defense counsel

objected, moved for a mistrial and a cautionary instruction. (R 1383-1384) The court overruled the objection and denied the requests for a mistrial and an instruction. (R 1383-1384) The prosecutor continued his questioning on the subject. (R 1384)

SUMMARY OF ARGUMENT

1. Wike's motion to suppress evidence was improperly denied since he was arrested inside his parents' home without a warrant. The officers did not have exigent circumstances justifying the warrantless intrusion. Investigators only speculated that Wike might destroy evidence or endanger his parents life. Such speculation was insufficient to overcome the presumption of the illegality of the entry without a warrant.

2. The defense challenged prospective juror Miller for cause because of his attitudes toward the death penalty. Miller's beliefs in favor of imposing death for premeditated murder of a child would have interfered with his ability to fairly consider a life recommendation. The trial court committed reversible error in denying the challenge.

3. The State failed to prove that the two kidnapping offenses occurred in Santa Rosa County as alleged in the indictment. Defense counsel's motion for judgement of acquittal should have been granted.

4. The trial court ordered Wike shackled for penalty phase without sufficient reasons. Although Wike made some angry comments about the prosecutor after the verdicts, he had never presented a security risk in the past. Even the prosecutor suggested that he not be shackled. Even if the court had some concerns, shackling and handcuffing Wike was not the least restrictive means available to insure courtroom security.

5. Wike's motion for a one week continuance of penalty phase should have been granted. His mother was too emotionally distraught to testify in mitigation. Additionally, counsel expected to secure the presence of a cousin and Wike's ex-wife as witnesses within that one-week time frame. The court abused its discretion in denying this reasonable time delay for purposes of serving mitigation witnesses.

6. During Wike's penalty phase testimony, the prosecutor questioned him about whether he showed remorse upon learning of the crimes. Since lack of remorse has no relevance in penalty phase, the questions were improper. The trial court should have sustained defense counsels objections and prohibited the inquiry.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF THE WARRANTLESS ARREST OF WIKE IN HIS PARENT'S HOME.

Wike moved to suppress all evidence obtained after his illegal arrest. (R 1503-1506) This included physical evidence from his car, his parents residence and his person. After the arrest, he was booked, photographed and questioned. (R 1621-1627, 1667) Investigators also obtained warrants to search the house and to secure body samples from Wike's body. (R 1628-1634) His car was seized and later searched. Several items of physical evidence were obtained from the car and carport. Wike's booking photograph was used in the photo line-up which resulted in Bauldree's identifying Wike as the person he saw in the crime scene area. (R 829-830, 851) The testimony at the hearing developed the following facts:

After his interviews with Sayeh and her mother at the hospital, Investigator Larry Bryant developed Wike as a suspect (R 1601-1605) Sayeh had given a description of the perpetrator, his car and the name "Ray." (R 1602) Bryant also obtained the address of the residence belonging to Ray's mother and stepfather, Dallas Ober. (R 1605-1607) Bryant and several officers went to that location, leaving the hospital about 9:25 a.m. (R 1606) From a neighbor, officers learned that an elderly couple, a young child and a man in his 30's lived in the house. (R 1607-1611) They also learned that the elderly

couple had a van and the man was in a wheelchair. (R 1611-1612) Ray's older-model, green, Dodge Monaco was parked in the street in front of the residence. (R 1607-1608) Officers ran a licence check on the vehicle between 9:47 and 9:57. (R 1609-1610) The van was not present, and the neighbor said that vehicle had left earlier in the morning. (R 1611) Officers saw what appeared to be a blood stain on the seat of the car. (R 1608) They also found a ring of keys resting on the bumper, which lead the investigators to speculate that they had been dropped and Wike may have left in the van. (R 1608)

An officer approached the front door of the house and rang the doorbell. (R 1612) No one answered, but the officer reported hearing some movement inside. (R 1612) Investigator Bryant speculated that someone might be hurt inside. (R 1612) He had the dispatcher telephone into the house at 10:12 a.m. (R 1613-1614) Wike answered. (R 1613, 1675) He, at first, thought it was a prank call and hung up. (R 1643, 1676) The dispatcher called again, assured Ray it was no prank. (R 1643, 1676) Ray identified himself and said there was no one else in the residence. (R 1614, 1683-1684) The dispatcher told him to go outside with his hands on his head. (R 1614, 1676-1677) Ray looked outside, saw the numerous officers outside and in the yard and complied. (R 1643, 1677) He testified that he was afraid he would be shot if he did not cooperate. (R 1677) When Ray walked outside into the carport, he was immediately arrested. (R 1615-1617, 1677) There were eleven officers present stationed at various points around the house and in the yard to

insure there could be no escape. (R 1635-1636, 1643) Bryant had made the decision to go into the house, without a warrant, if he had not been successful in getting Wike to come outside. (R 1617-1619) Officers made a sweep of the house after Wike's arrest and found no one else present. (R 1617)

Wike argued that his arrest was an illegal, warrantless arrest inside his parents' home and the fruit of that arrest should be suppressed. The court denied the motion.

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) prohibits a non-consensual, warrantless entry into a home to make a routine arrest, absent exigent circumstances. The trial judge's ruling denying the motion to suppress was premised on the fact that Wike was formally arrested outside the residence in the carport, and therefore, Payton was not applicable. (R 1694-1697) As an alternative reason, the court found that the officers had sufficient exigent circumstances to make a warrantless entry and arrest, even if Wike had remained inside. (R 1694-1697) Neither of these reasons are correct. Wike was illegally arrested without a warrant because he was compelled to leave the protection of his home in violation of the Fourth and Fourteenth Amendments. His exit from the home was not voluntary and fails to remove this case from the mandate of Payton. Furthermore, the officers reasons for believing exigent circumstances were present were speculative and simply not supported. Wike urges this Court to reverse the trial judge's decision on the motion to suppress and remand his case for a new trial.

A.
Wike Was Compelled To Leave His Home And, Therefore, The Arrest Commenced While He Was Inside The Residence.

Wike's arrest began at the moment he was compelled to leave the residence. He left the home in response to the officers' show of force and the dispatcher's direction. While the warrant requirements of Payton are inapplicable if a defendant voluntarily leave his home, State v. Dominguez, 521 So.2d 340 (Fla. 2d DCA 1988), or consents to the officers entry, Byrd v. State, 481 So.2d 468 (Fla. 1985), that simply is not the circumstances of this case. There were eleven police officers stationed a various places around Wike's home. When Wike initially questioned the sincerity of the dispatcher's call, he was told to look outside at the show of force. He was told to leave the house with his hands in view. Wike testified that he feared for his life if he did not cooperate. His leaving the confines of the home was not a voluntary act. He did not willingly place himself outside the residence for the purpose of being arrested.

The First District Court addressed a similar situation in Brown v. State, 392 So.2d 281 (Fla. 1st DCA 1980). The police had the defendant's house under surveillance as a possible source of marijuana which had been purchase in a controlled buy in another location. Believing that they had probable cause for a search, the police, without a warrant, drove through a gate on the defendant's property in the early morning hours. The defendant came out of the back door of his house and stood

on his porch. Officers arrested him at that location. Search warrants were later obtained for the house. The appellate court held that the arrest violated Payton.

United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984) is also on point. The police officers in this case believed they had evidence of an automatic weapons violation. They proceeded to the defendants home without a warrant. A car was parked in the front yard and the house was flooded with spotlights. Other officers surrounded the house. An officer used a bull-horn to summons the defendant out of his mother's home. The defendant appeared at the front door armed with a pistol. Upon a second order to come out, the defendant complied and was formally arrested. Rejecting an argument that Payton did not apply because the arrest was effected outside of the residence, the court wrote:

> Applying this rule here, it is undisputed that Morgan was peacefully residing in his mother's home until he was aroused by the police activities occurring outside. Morgan was then compelled to leave the house. Thus, as in Johnson, supra, "it cannot be said that [Morgan] voluntarily exposed himself to a warrantless arrest" by appearing at the door. On the contrary, Morgan appeared at the door only because of the coercive police behavior taking place outside of the house. See Johnson v. United States, 333 U.S. at 13, 68 S.Ct. at 368 (police entry to defendant's living quarters "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"). Viewed in these terms, the arrest of Morgan occurred while he was present inside a private home. Although there was no direct police entry into the Morgan home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely,

> the arrest of Morgan. Thus, the warrantless arrest of Morgan, as he stood within the door of a private home, after emerging in response to coercive police conduct, violated Morgan's fourth amendment rights. A contrary rule would undermine the constitutional precepts emphasized in Payton.

Ibid, at 1166. Wike was likewise compelled to leave his mother's home, thereby involuntarily exposing himself to a warrantless arrest.

Just as the defendants in Brown and Morgan, Wike was forced to leave his home and submit to an arrest due the coercive actions of law enforcement. The mandate of Payton cannot be so easily avoided. Absent exigent circumstances, Wike warrantless arrested violated the Fourth and Fourteenth Amendments and require a revesal of his convictions.

B.
The Police Officers Did Not Have Exigent Circumstances Justifying A Warrantless Arrest Inside The Home.

Investigator Bryant testified to the facts which he believed provided exigent circumstances for a warrantless arrest. First, Wike was the suspected perpetrator of a serious offense. (R 1618) Second, his investigation had quickly lead to Wike as a suspect. (R 1618) Third, Bryant said he was concerned for the safety of others who might be in the house even though he knew they were Wike's parents. (R 1619) And, fourth, Bryant thought there might be bloody clothes or a knife which might be destroyed. (R 1619) None of these reasons were sufficient to justify the warrantless arrest under the exigent circumstances exception to the requirements of Payton.

Factors such as the seriousness of the offense, "hot pursuit" of the suspect, safety of others and the destruction of evidence can satisfy the exigent circumstances exception to the warrant requirement. See, Welch v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Hornblower v. State, 351 So.2d 716 (Fla. 1977); Johnson v. State, 386 So.2d 302 (Fla. 1st DCA 1980); Webster v. State, 201 So.2d 789 (Fla. 4th DCA 1967). However, the facts here do not meet the test. Seriousness of the offense, alone, is inadequate. Although the investigation lead to Wike rapidly, this is not a "hot pursuit" situation which involves the commencement of the arrest process before the suspect enters the home. See, United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976). Furthermore, officers had the house surrounded, and Wike's escape was, at that point, impossible. Next, the officers' mere speculation lead to the idea that Wike might harm his own parents. This was not a situation where a known victim was missing and whose life might be endangered. See, Bottoson v. State, 443 So.2d 962 (Fla. 1983). Their vehicle was missing and no one answered the door when the officer rang the bell. These facts lead just as easily to the conclusion that the Obers simply were not home as the conclusion that their lives were in danger at the hands of their own son. Moreover, when the dispatcher telephoned and learned that Ray was alone in the house, this justification became even more speculative. The officers then knew that Ray had not fled in

his parents' van. There was simply no well founded reason to believe that Wike's parents were in any danger. See, Webster, 201 So.2d at 792. Finally, the destruction of evidence idea is also tenuous, at best. Unlike items such as drugs, a knife or bloody clothes cannot be disposed of easily. Urgent action was not necessary for its preservation. Hornblower, 351 So.2d at 718-719.

The officers had no reason to act without a warrant. Speculation on mere possibilities is nothing more than the police improperly creating their own exigent circumstances. Ibid. Wike's warrantless arrest violated the Fourth and Fourteenth Amendments.

ISSUE II

THE TRIAL COURT ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR WHOSE BELIEFS IN FAVOR OF THE DEATH PENALTY FOR PREMEDITATED MURDER WOULD HAVE PREVENTED OR SUBSTANTIALLY IMPAIRED HIS ABILITY TO SERVE AS AN IMPARTIAL JUROR.

During jury selection, the defense challenged several prospective jurors for cause because of their beliefs in favor of imposition of a death sentence. The trial judge erroneously denied one of those challenges. (R 437) Prospective Juror Miller should have been excused for cause since his beliefs in favor of the death penalty would interfere with his ability to fairly consider a life recommendation in this case. See, O'Connell v. State, 480 So.2d 1284 (Fla. 1986); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). Defense counsel exhausted his peremptory challenges and requested additional ones. (R 471) The court denied the request. (R 471) At that time, defense counsel said there were three seated jurors whom he would have excused with a peremptory challenge if they had been available to him. (R 471)

The applicable standard for excusing a juror who is biased in favor of a death recommendation is the same one used to excuse jurors who oppose the imposition of the death penalty. Ross v. Oklahoma, 487 U.S. ___ , 108 S.Ct. ___, 101 L.Ed.2d 80, 88 (1988); Fitzpatrick v. State, 437 So.2d 1072, 1075-1076 (Fla. 1983). In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in

evaluating the excusal for cause of death scruples jurors and reinterpreted the standard originally announced in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The prior interpretation of Witherspoon had required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and restated the standard:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, 469 U.S. at 424. Therefore, the question is whether Juror Miller's beliefs in favor of the imposition of the death penalty, in a case such as this one, created a reasonable doubt about whether those beliefs would prevent or substantially impair his ability to fairly consider a life recommendation. Questioning during voir dire revealed the following:

> [Prosecutor]: Are you in favor of or opposed to the death penalty?
>
> [Juror]: Favor.
>
> [Prosecutor]: Do you have at this point in time any fixed opinion or idea as to

whether or not you think the death penalty should be imposed on Mr. Wike if he's found guilty?

[Juror]: I do not.

[Prosecutor]: And you're not leaning one way or the other?

[Juror]: No.

(R 429-430)

* * * *

[Defense Counsel]: When you say that you favor the death penalty do you have any preset idea of what kind of case warrants a death penalty in your mind?

[Juror]: I just believe that there are certain instances where the death penalty should be used and certainly in capital cases, murder cases. But there are always extenuating circumstances that would -- would effect the decision.

(R 432)

* * * *

[Defense Counsel]: How about what kind of punishment should be inflicted if the person that did it was found?

[Juror]: The first reaction was that they should be seriously punished; anything from life to the death penalty.

[Defense Counsel]: Did you have a preference one way or the other of what it should be?

[Juror]: Not necessarily because I did not know all of the facts of the crime.

(R 433)

* * * *

[Defense Counsel]: ... <u>Can you conceive of -- having decided that someone was guilty of say premeditated killing of a child that</u>

you can recommend a life sentence for someone like that?

[Juror]: Depending on the circumstances involved in the case. Sitting here I would probably say no.

[Defense Counsel]: Would there have to be any kind of extraordinary showing to you to justify your recommending life for someone that you had decided had done that?

[Juror]: I would think so, yes.

[Defense Counsel]: Do you have any idea what it would take to convince you to recommend life under those circumstances?

[Juror]: No.

(R 434)

Although Juror Miller initially said he could consider a life or death sentence, further questioning revealed his fixed opinion that a death sentence should be imposed for a premeditated murder of a child. Miller freely admitted his bias and told defense counsel that he would have to make an extraordinary showing to justify a life recommendation. Wike was entitled to jurors without such preset positions on the penalty issue. The challenge for cause should have been granted.

ISSUE III

THE TRIAL COURT ERRED IN DENYING A MOTION FOR JUDGEMENT OF ACQUITTAL TO THE KIDNAPPING COUNTS AND THE FELONY MURDER THEORY OF THE PROSECUTION BASED IN PART ON THE KIDNAPPING.

A criminal defendant has a constitutional right to be tried in the county where the crime occurred. Amend. VI, XIV U.S. Const.; Art. I Sec. 16, Fla. Const. Venue is a material allegation which the State must prove at trial. See, E.g., State v. Black, 385 So.2d 1372 (Fla. 1980); Smith v. State, 29 Fla. 408, 10 So. 894 (1892); Pennick v. State, 453 So.2d 542 (Fla. 3d DCA 1984). Unlike an essential element of the crime, venue need not be proved beyond a reasonable doubt, but the evidence must be sufficient to establish that the crime was committed in the alleged county. E.g., Collingsworth v. State, 93 Fla. 1110, 113 So. 561 (1927); Pennick v. State, 453 So.2d 542. Mere allegations or evidence that certain conduct surrounding the investigation occurred in the county is insufficient. Pennick, 453 So.2d at 544-545. The State failed to prove that the two kidnapping counts occurred in Santa Rosa County as alleged in the indictment. (R 1450-1452) Wike's motion for judgment of acquittal on the kidnapping charges and the felony murder theory relying on those offenses should have been granted. (R 1131-1133)

In a kidnapping case, the prosecution may be initiated "in any county in which [the] victim has been taken or confined during the course of the offense." Sec. 910.14 Fla. Stat. Here, however, the crime of kidnapping was completed in Escambia

County -- no part was committed in Santa Rosa. The evidence at trial showed that the victims were abducted from their home in Escambia County and driven to a remote area in Santa Rosa County. Since the kidnapping was completed at the point of abduction, the offense was completed in Escambia County. The subsequent confinement in Santa Rosa County was, therefore, not during the course of the kidnapping.

The First District Court of Appeal recently addressed when the crime of kidnapping is completed in a similar factual situation. In Carver v. State, No. 89-977 (Fla. 1st DCA, March 26, 1990), the defendant stopped a truck in which his former girl friend was riding with her friends. He abducted his former girl friend at gunpoint, forced her into his car and drove her to another location. There, the defendant repeatedly pointed the gun at her and threatened to kill her and himself. The State charged the defendant with both armed kidnapping and aggravated assault on his former girl friend. Counsel moved to dismiss the aggravated assault as a lesser offense of the armed kidnapping. The argument was that aggravated assaults which occurred during the confinement at the location apart from the point of abduction was a part of an ongoing kidnapping. The appellate court disagreed, holding that the kidnapping was completed at the point of abduction and the subsequent confinement was not part of that offense.

> Carver first alleges that he cannot properly be convicted of both kidnapping and aggravated assault with regard to Amy, in that any aggravated assault committed against her during the subsequent

> confinement was an inherent part of the on going kidnapping. We disagree. Aggravated assault is not a necessarily lesser included offense of kidnapping, State v. DeGarmo, 454 So.2d 600. 601 (Fla. 5th DCA 1984), but it is a Category 2 lesser included offense thereof, i.e., it may or may not be included in the offense, depending on the evidence.
>
> Kidnapping is defined as "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with the intent to ... inflict bodily harm upon or to terrorize the victim ...." sec. 787.01(1)(a)3, Fla. Stat. (1987) (emphasis supplied). Here, the evidence showed that Carver forced Amy into his car at gunpoint and drove off with her, at which point the kidnapping offense was complete, without the necessity for the subsequent confinement.

Carver, slip opinion at pages 4-5; but, see, Robinson v. State 462 So.2d 471 (Fla. 1st DCA 1985). Just as in Carver, the subsequent confinement of the girls after their abduction from their home was not part of the kidnapping offense.

Since only the confinement subsequent to the kidnapping was proven in Santa Rosa County, the judgment of acquittal should have been granted. Wike now asks this Court to reverse the trial judge's ruling.

ISSUE IV

THE TRIAL COURT ERRED IN ORDERING THAT WIKE BE SHACKLED DURING THE PENALTY PHASE OF THE TRIAL.

The morning the penalty phase began, the trial court conducted a hearing to determine if Wike should be shackled during the proceedings. (R 1307-1341) Paul Campbell, a corrections officer in the jail, testified to some angry comments Wike made in the jail after the jury's guilty verdicts. (R 1320-1324) Wike allegedly said he was upset with the prosecutor, Kim A. Skievaski, and believed he had lied to the jury in order secure the conviction. (R 1320) According to Campbell, Wike also said he was going to "take Mr. Skievaski out." Campbell understood that Wike meant he would try to kill him since Wike allegedly told Campbell that "if he was going to hell that he was going to take Mr. Skievaski with him." (R 1320-1321) Campbell said he had seen defendants upset and angry in most cases after a conviction. (R 1322) He said Wike had never presented any violence problems while in custody awaiting trial. (R 1323) After the Campbell's testimony, the prosecutor told the judge that he did not feel that he was in danger. (R 1324) He realized that Wike's remarks were made in anger and that he had no way to carry out his threats in any event. (R 1325) The prosecutor suggested that Wike not be shackled. (R 1324-1325)

The trial judge decided not to follow the prosecutor's suggestion and ordered Wike shackled and handcuffed. (R 1330) Both counsel tables were covered with blankets to hide the shackles and the handcuffs were moved from behind Wike's back

to the front. (R 1330-1331, 1752-1756) Wike testified from counsel table, and at one point, his handcuffs were displayed to the jury when Wike adjusted his glasses. (R 1755) Defense counsel's objections to the shackling were overruled, and the court also denied a motion for new trial. (R 1330-1331, 1752-1756)

Shackling a criminal defendant is "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct.1057, 1061, 25 L.Ed.2d 353 (1970). A criminal defendant may not be compelled to stand trial wearing shackles, see, Estelle v. Williams, 425 U.S. 501, (1976); Shultz v. State, 131 Fla. 757, 179 So. 764 (1938), unless there is a bona fide need to insure security or prevent disruption of the proceedings. See, Jones v. State, 449 So.2d 253 (Fla. 1984); Zygadlo v. State, 341 So.2d 1053 (Fla. 1977). Even where a genuine security need exists, shackles should rarely be used to meet that need. Illinois v. Allen. Such an infringement cannot be based on the mere suggestion of law enforcement or on speculation. Specific evidence supporting the need must be articulated on the record at a hearing before the court is permitted to order the shackles. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on rehearing, 833 F.2d 250 (11th Cir. 1987); Zygaldo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983); Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970). Furthermore, shackles can be used only when no other less restrictive security measure will suffice. See, Illinois v. Allen; Holbrook v.

Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). These requirements apply equally to the guilt and penalty phases of a capital trial. Elledge v. Dugger, 823 F.2d at 1450-1452. The trial court failed to follow these guidelines and should not have ordered Wike shackled.

Elledge v. Dugger is on point. Before Elledge's penalty phase, the trial judge ordered him to be placed in shackles. The judge said that a law enforcement official told him that Elledge had threatened to assault a bailiff and that while in jail, Elledge had become proficient in karate. The court held no hearing and received no evidence on the allegations and the need for such security measures. Defense counsel's objections were overruled. The Eleventh Circuit Court of Appeals reversed a denial of habeas corpus relief holding that the shackling decision denied Elledge due process in his sentencing proceeding. Two flaws were noted: (1) the trial court failed to hold a hearing to test the allegations submitted as a reason to require shackles; and (2) the State failed to make a showing of a legitimate security need which could not be met with a less restrictive alternative. 823 F.2d at 1451-1452. While the court held a hearing in this case, the evidence failed to support the need for shackles. Even the prosecutor, who was the person allegedly threatened, did not believe shackles were necessary. Wike spoke in anger, and the testimony of the correctional officer was that Wike had never presented a violence problem while in custody. Wike had been emotional, but not violent. The court could have also followed defense

counsel's suggestion of a brief continuance which would have given time for emotions to calm. Alternatives to shackling were readily available. Wike, like Elledge, is entitled to a new penalty phase proceeding before a new jury.

Wike's right to due process and a fair penalty phase trial was violated. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Sec. 9, 16 Fla. Const. He should not have been placed in shackles because the evidence presented failed to establish the need for such restrictions. This Court must reverse with directions that a new penalty phase trial be conducted.

ISSUE V

THE TRIAL COURT ERRED IN DENYING WIKE'S REQUEST FOR A CONTINUANCE OF THE PENALTY PHASE OF THE TRIAL.

The trial court scheduled the penalty phase of the trial for the morning of the day following the rendition of the guilty verdicts. (R 1307) On that morning, defense counsel asked for a one week continuance for the purpose of procuring some additional mitigation witnesses. (R 1307-1311) Counsel explained that Ray and his family were quite distressed over the jury's verdicts. (R 1307-1308) His mother was on the verge of a nervous breakdown. She had been hospitalized in the past for a similar problem. (R 1308) The defense intended to call Ray's mother as witness, but at that time, testifying could jeopardize her health. (R 1308) A cousin was due to arrive in town that night and would also be available to testify. (R 1308) Defense counsel had also just located Ray's ex-wife who could provide important family background information, particularly about Ray's alcohol and drug abuse. (R 1308) Counsel said that Ray had been reluctant to assist in preparing for penalty phase, since he did not believe he would be convicted. (R 1309-1310) Finally, Ray was upset and angry about the verdicts, and counsel believed a brief continuance would help calm him for penalty phase. (R 1326) After the State agreed to stipulate to the testimony of Wike's mother without her having to testify, the court denied the motion for a continuance. (R 1345-1347)

While the granting or denying of a motion for continuance is within the discretion of the trial judge, see, e.g., Williams

v. State, 438 So.2d 781 (Fla. 1983); Magill v. State, 386 So.2d 1188 (Fla. 1980); Cooper v. State, 336 So.2d 1133 (Fla. 1976), the court, here, abused that discretion. The requested continuance was not a general one merely asserting inadequate time to prepare without reasons. See, Williams, 438 So.2d at 785. Instead, the request was for a short period of time for the specific purpose of securing specific mitigation witnesses. Although the State stipulated to the testimony of Wike's mother, the defense was still deprived of the opportunity to present information from Wike's ex-wife and cousin.

Denying the motion for continuance deprived Wike of his rights under the Eighth and Fourteenth Amendments to a fair opportunity to present relevant evidence in mitigation. See, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The jury's recommendation of death is flawed, and Wike's death sentences must be reversed.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE WIKE DURING PENALTY PHASE ABOUT WHETHER HE EXPRESSED REMORSE UPON LEARNING OF THE DEATH OF THE VICTIM.

Ray Wike testified in his own behalf at the penalty phase of the trial. (R 1373) On cross-examination, the prosecutor improperly suggested, via questioning, that Ray showed no remorse when told of the nature of the crimes committed against the girls whom he had known for about a year. (R 1382-1383) The prosecutor's conduct effectively inserted a nonstatutory aggravating circumstance into the penalty phase of the trial. Pope v. State, 441 So.2d 1073 (Fla. 1983). This tainted the jury and denied Ray his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States. The trial judge should have sustained defense counsel's objection (R 1383), and this Court must now reverse the death sentence.

During direct examination, Ray testified about his background, his drug and alcohol abuse, and his continued assertion of his innocence. (R 1373-1382) At one point, defense counsel asked him if he was upset about the guilty verdict. (R 13741375) He responded,

> I am kind of numb about it. Disappointed. Disbelief. The crime itself is -- words cannot describe the type of crime that has been committed.
>
> The crime that has been committed was not committed against a stranger, as far as I'm concerned, but someone that I knew and somebody that I carried[sic] for and spent a lot of time with.

(R 1376) On cross-examination, the prosecutor asked Ray how he reacted when the police officers first told him that one of Pat Rivazfar's daughters had been murdered. (R 1382) Ray said, "I myself went dumb because -- it -- I could not see any place of it making any sense." (R 1382) When asked what he said, Ray answered, "I believe that I just sat there." (R 1382) The prosecutor then directly asked Ray about any display of remorse at the time:

> Q. I guess the the[sic] bottom line question -- and I'll put it to you in a statement. Isn't it true, Mr. Wike, that you showed no regret, no remorse --

(R 1383) At this point, defense counsel objected, moved for a mistrial and a cautionary instruction. (R 1383-1384) The court denied all the requests and the prosecutor continued his questioning on the same theme:

> Q. Isn't it true you showed no regret or concern over the fact that somebody that you supposedly cared about and knew had been murdered, Mr. Wike?
>
> A. Mr. Skievaski, in front of your eyes, no. But was you with me in my cell every day and night? No. Why didn't you call my cellmates and ask how they feel, how I felt whenever I was showed what actually happened?
>
> No, I did not believe it and I didn't believe them in my mind and my heart 'til I seen the evidence myself that it was -- real.
>
> Yeah, then it hurt me. But in a privacy....

(R 1384)

In Pope, this Court recognized that lack of remorse is not an aggravating circumstance, accord, Patterson v. State, 513 So.2d 1263 (Fla. 1987); McCampbell v. State, 421 So.2d 1072

(Fla. 1982), and further held that "absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope, 441 So.2d at 1078. This Court explained the rationale for the holding as follows:

> The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered, nor is the defendant's mind set ever at issue. Thus, we find any consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel.
>
> * * * *
>
> [Use of lack of remorse] as additional evidence of an especially heinous, atrocious or cruel manner of killing only when the facts of the crime support the finding of that aggravating factor without reference to remorse is, at best, redundant and unnecessary. Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred the case now before us-- inferring lack of remorse from the exercise of constitutional rights. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors.

Pope, at 1078.

The instant case exemplifies the problem recognized in Pope. Initially, no evidentiary support exists for the conclusion that Ray lacked remorse. Furthermore, Ray, like the

defendant in Pope, denied his guilt. The prosecutor, in suggesting that Ray lacked remorse, like the judge in Pope, may very well have inferred lack of remorse from Wike's exercise of this constitutional rights. Additionally, as Ray explained, he initially did not believe the crime had occurred when the officers first told him of it. The prosecutor's improper questioning conveyed to the jury the unfounded implication that Ray lacked remorse for the crime. This injection of a nonstatutory aggravating circumstance into the sentencing process tainted the jury's recommendation and renders the death sentence unconstitutional.

CONCLUSION

For the reasons presented in Issues I through III, Ray Wike asks this Court to reverse his convictions and to order a new trial. Alternatively, in Issues IV through VI, he asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mr. Warfield Raymond Wike, #116838, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 18th day of May, 1990.

W. C. McLAIN