IN THE SUPREME COURT OF FLORIDA

JEFFREY ATWATER,

Appellant/Cross-Appellee,

vs. Case No. 76,327

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 351199

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

ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

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STATEMENT OF THE CASE

On September 7, 1989, a Pinellas County grand jury indicted the Appellant, JEFFREY ATWATER, for murder in the first degree and armed robbery. (R4) On May 4, 1990, a petit jury found Atwater guilty as charged. (R560-61) On May 17, 1990, the jury recommended death by a eleven to one vote. (R675) On June 25, 1990, Judge Stoutamyre sentenced Atwater to death, finding that the murder (1) was committed during a robbery, (2) was heinous, atrocious, or cruel, and (3) was cold, calculated, and premeditated. (R707-15) The court imposed a ten year sentence concurrent for robbery. (R717) Atwater appealed on July 13, 1990. (R742) The state has cross-appealed. (R753)

STATEMENT OF THE FACTS

Adele Coderre was Janet Coderre's mother and Jeffrey Atwater's mother's twin. (R1337-38, 1361, 1374) In June, 1989, Atwater moved in with Adele. (R1339) He cared about Adele, was protective of her, called her "Mom" and said she was more of a mother than his real mother. (R1323, 1328, 1347, 1374) Adele had wanted to raise Atwater as her own child, but his natural mother had refused. (R1347) Adele had cerebral palsy, which affected her speech but not her mental capacity. (R1346)

Adele had known Kenny Smith for a year and a half. (R1360) As of August 11, 1989, they planned to get married on August 18. (R1363) Adele said she told Atwater about the wedding, but Janet thought he did not know about it. (R1348, 1363) Smith drank too much but told Adele he would quit, after she refused to marry him otherwise. (R1349, 1351-52) They often quarreled, and Smith moved in and out of her house several times. (R1324, 1348, 1360)

Adele told Atwater once that Smith grabbed her at a market. (R1374) According to Janet, Adele came once to Janet's house for a few days after Smith

slapped her. (R1348) Adele, however, testified that Smith never slapped her and that she may have told Janet he had because she was angry with him. (R1373) Adele told Janet that, another time, Smith chased her around the house and she fell down. (R1348) Adele testified that Smith was being "romantic" when he chased her. (R1362) Atwater came from the bathroom and asked what was going on. (R1362) She said she and Smith both wanted romance, but could not do it while Atwater was there. (R1362) He angrily ordered Smith from the house. (R1362, 1373) Smith returned for his glasses and cigarettes, but Atwater became angry again when he did not knock on the door. (R1362)

Michael Painter knew Smith and Atwater for several months and was Adele's good friend and her former apartment manager. (R1315-16, 1322-23) In June or early July when Atwater and Adele were eating dinner, Painter entered the house and asked about Smith and Adele. (R1316-17) They said that Smith had pushed Adele down, and Atwater said matter-of-factly that he was going to get or kill Smith for doing it. (R1316-17, 1325) Painter did not take this statement seriously. (R1317) A few days or weeks later, Painter again asked Atwater about Adele and Smith. (R1317) Atwater said he did not like Smith and would get or kill him, but Painter again did not take this statement seriously. (R1318) Atwater usually became angry when he talked about Smith and Adele. (R1318, 1326) Around August 4, 1989, at 5:30 a.m. while they were drinking beer and smoking marijuana before Atwater went to work, Atwater told Painter that he was still upset, that he was going to get Smith, and that it would not be too long now. (R1318-19, 1325)

Painter told the police about these statements in August. (R1320) He was arrested for another charge on February 7, 1990, and was in custody during trial. (R1320-21) He denied testifying in the hope of getting a lighter sentence. (R1321)

Smith's close friend Joan Camarato saw him almost every day and knew of his relationship with Coderre. (R1045, 1054) She felt his relationship with her was his business, and she never tried to talk him into breaking up with Coderre. (R1054-55) In deposition, however, she had said she told Smith she did not like Coderre, and he should not bring Coderre to her apartment again. (R1055)

Camarato saw Atwater three days in a row in the courtyard of the apartment building where she lived and which she managed. (R1047, 1049) Each day, Atwater looked around for a minute and left. (R1047) About 11 a.m. on August 11, Smith was with Camarato when she saw Atwater outside her apartment for the third time. (R1047) Smith did not want Atwater to see him and stood away from the window. (R1047-48) He was afraid of Atwater and would not give him any more money. (R1047-48, 1050)

Smith drank a six-pack of beer and had dinner with Camarato until 7:30 p.m., when "Wheel of Fortune" was over. (R1049, 1051, 1056) She gave him twenty dollars to clean one of her apartments. (R1049) He put it in his right front pocket where he always kept it. (R1049-50) He did not carry much money. (R1056) He left, saying he would buy cigarettes on the way home. (R1049) She did not remember that he previously left her apartment to buy cigarettes. (R1049)

Smith, a daily customer at the Suncoast Market, bought two packs of cigarettes there about 7 or 7:30 p.m. from manager George Prodanov. (R1041-42) Prodanov had known Smith, a previous renter of an apartment behind the store, for three or four years. (R1041-43) Prodanov did not remember from which pocket he got his money, but he always carried his money in his front pocket. (R1042) Prodanov did not notice that he had been drinking. (R1044) Smith left, walking toward Camarato's building. (R1042)

Mary Sheridan worked in St. Petersburg at the desk of the John Knox apartments for the low-income elderly. (R1016-17) She saw Smith, a resident in

apartment 617, enter the building around 4 p.m. and again between 6:30 and 7 p.m. (R1019) A sign required all non-residents to register at the desk. (R267)

Around 8 p.m., Atwater entered and said he was going to room 617 to see Smith, his grandfather, whom he had not seen for six years. (R1019-20, 1031). Sheridan smelled alcohol on his breath. (R1031) He wore a hat; dirty, faded, yellow T-shirt with a Florida bank sign on it; and tan corduroy pants with an open zipper and a one-inch-square rip above his right knee. (R1021) She noticed his appearance because she was surprised that someone who had not seen his grandfather for six years would look so dirty. (R1023) When she asked if he wanted to call room 617, he said he wanted to surprise his grandfather. (R1020) He mistakenly wrote the wrong apartment number in the logbook but quickly corrected it. (R1020, 1031) He signed his name, recorded the time, 8:04 p.m., and went up the elevator. (R495, 1020, 1023-24, 1279) The written name was unclear, but it may have said Jeffrey Smith. (R495)

About ten to twenty-five minutes later, he returned and said Smith was not home. (R1024, 1032, 1281) He did not seem nervous, his clothes were not bloody, and he did not slur his words or stagger. (R1034, 1036, 1038-39) He said Smith was afraid for his life and had called him three days ago in Connecticut. (R1024) Sheridan was surprised because she had seen Smith go in and out; she wondered why Smith had not called the police or talked to the manager. (R1024) When Atwater asked about the building's security procedures, she said that management checked on tenants who did not turn in their tags each day. (R1025) Atwater signed the logbook at 8:22 or 8:27 p.m. and walked out. (R1026, 1028, 1038)

When Atwater left, Sheridan called Smith's room without getting an answer. (R1026, 1028) She went upstairs, opened the door, and saw Smith on the floor, shirtless and with an open zipper. (R1026) She closed the door. (R1026) She did not notice blood on the cement hallway outside the apartment or on the elevator's

linoleum floor. (R1037) Smith's neighbor came out. (R1026) The paramedics and police arrived within ten or fifteen minutes, and the medical examiner arrived at 11:50 p.m. (R1026-28, 1037, 1232)

The apartment was not disorderly, but some items were out of place. (R1093, 1111, 1309) The police did not investigate the entire apartment but only the area around the body. (R1094) Two garbage bags were full of beer cans. (R1118, 1352) The television and lights were on, but the telephone cord behind the couch was cut. (R1099, 1289, 1295) An open package of cigarettes, a lighter, and three ATM receipts dated August 3, 4, and 10 for $100, $95, and $50 were on the table. (R501, 1101, 1290, 1296, 1306) The receipts did not show that they belonged to Smith or were from Smith's account. (R501, 1307) They might have come from his pockets. (R1307) The balance on the August 10 receipt was $51.81. (R501) The police found no money except a few pennies on the floor. (R1095-96, 1296) A green lock box in the closet was unopened. (R1309)

Smith appeared to have been dragged to his final position -- on his back in a pool of blood. (R1070, 1291) His jeans were unbuttoned, unzipped, and pulled slightly down, and his pockets were pulled out. (R1120, 1290, 1232) The pockets were not bloody. (R1306) He had keys in his back pocket. (R1310) A bloody area on his stomach and another circular bloody area on the floor nearby indicated that he may have been rolled over. (R1291) No blood was in the hallway, but other rooms in the apartment had small blood transfers on the floor, and the bed had a blood spot. (R1098, 1119, 1295-96) Bloody shoe prints were on the floor between the door and the body and into the bedroom. (R1100-01, 1103, 1119, 1289) Blood had spattered on the lower three feet of the living room wall, perhaps from someone stomping in blood or attacking Smith near the ground. (R1100, 1119-20, 1295) Faint red stains in the bathroom and kitchen sinks may not have been blood stains. (R1296-97)

The medical examiner found that Smith was five feet ten inches tall, weighed 164 pounds, and had a blood alcohol level of .12 percent. (R1246, 1251) The cause of death was hemorrhage from stab wounds, especially two heart wounds, caused perhaps by a narrow, sharp, steak or pen knife. (R1234-35, 1246-47) Nine stab wounds were in the front chest, nine in the back, one in the right flank, and one in the neck. (R1255, 1239) Three front and two back wounds reaching the lungs would have caused death within an hour. (R1240) Two front wounds to the heart would have caused unconsciousness and death within one or two minutes. (R1241) Eleven slashing wounds of varying lengths were on the face, six on the neck, two on the shoulder, and one on the right thumb. (R1236) A five and a half-inch cut on the neck and a deep nose cut would have bled substantially. (R1236, 1274) His feet and pants bottoms were not bloody, and the blood from the various wounds went down his neck rather than his front chest, suggesting that he was on the floor on his back when many of the chest and facial wounds occurred. (R1248, 1256, 1272, 1293, 1296)

The back of the scalp was lacerated, perhaps from falling to the floor. (R1236, 1245) Bruises and scrapes were on the chin, face, extremities, and left eyelid. (R1237, 1244) Blunt trauma had fractured the voice box and five ribs on the back and left side. (R1237, 1244-45, 1257) The doctor found no defensive wounds, except perhaps a millimeter-long cut on the thumb. (R1244, 1265)

Tests on Smith's eye and his lack of body rigidity suggested that he had probably died two to six hours earlier. (R1233-34) Several wounds occurred before he died, and no wound had to have occurred afterwards. (R1247) They probably occurred around the same time. (R1247) The doctor thought that the less severe wounds to the back occurred first because they pointed upward; the stab wounds to the heart were the last and were fatal because it was illogical to think that the fatal wounds were inflicted first. (R1249-50, 1259) The doctor

could not, however, say with certainty the sequence in which the wounds occurred. (R1254-56) They could all have occurred within less than a minute. (R1250)

Blood in Smith's fingernail scrapings and on a towel on a newspaper rack outside the building could not be precisely identified. (R1106-07, 1199, 1201) Hair from the towel had the same microscopic characteristics as Smith's pubic hair, but the expert could not say it was Smith's hair. (R1161-62, 1165) The expert did not find hair in the fingernail scrapings. (R1164, 1168)

Between 8:30 and 9 p.m., Atwater walked into Adele's house while she was bathing Atwater's girlfriend's baby. (R1339-40, 1364) He told Janet he had slit Smith's throat, (R1340-41) He had enjoyed it and would do it again. (R1341) He put clothes in his suitcase in his room and said he had to leave the city. (R1340, 1365) According to Janet, they went to the living room, and he told Adele he had killed Smith and he was sorry. (R1341, 1366) Adele did not understand or was very shook up because she asked about the electric bill he had promised to pay. (R1341-42, 1367-68) He said angrily that he had paid it and that money was all "you damn Atwaters" thought about. (R1341-42, 1368) She did not have to worry about Smith abusing her any more. (R1349)

When Janet asked whether he was sure that Smith was dead, Atwater said he made sure the bastard was dead. (R1341, 1366) Smith had hit him in the eye in the Anchor bar parking lot. (R1342) Atwater pointed to his eye, but Janet did not see marks there. (R1342) After following Smith to his apartment building, he told the lady at the desk that he was Smith's grandson and needed to talk to Smith because his life was in danger. (R1342)

At some point, someone knocked on the door at Adele's house. (R1342, 1368) Atwater opened it and said, "Thank God, it's only you" when he saw Janet's boyfriend, Danny, at the door. (R1342-44, 1368) They returned to the living room, where Atwater took off his sneakers and asked Danny what he saw. (R1343)

Danny said it looked like blood. (R1343) Atwater repeated what he had said and added that he used a knife from Smith's apartment and wiped it on his shirt before he left. (R1343, 1367, 1369) He threw the knife away somewhere. (R1345) They asked him why he had done it. (R1369) According to Janet, he did not give a reason, but, according to Adele, he said that Smith had slapped him. (R1349, 1369)

Danny gave Atwater a ride to return the baby to its mother. (R1343, 1370) Before leaving, however, he told the Coderres and Danny that, if they turned him in, he would get out of jail and get them. (R1343-44, 1369) Janet saw blood spots on Atwater's shirt, sneakers, and lower pant legs, and his zipper was open. (R1344) Atwater did not have a noticeable injury or have trouble talking or walking. (R1344, 1370) Adele could smell alcohol but, contrary to her statement in deposition, thought he was not drunk. (R1369-70)

The police checked a park and different bars, looking for a man who fit the description Sheridan had given them. (R1060, 1072) The bartender at the Anchor Bar, a block from Smith's apartment, said that someone fitting the description might have been there. (R1061) Between 9:30 and 10 p.m., the police saw Atwater sitting inside Molly's Bar, a few blocks away. (R1061) His clothes fit the description -- a hat, yellow shirt with a bank logo on the back, and long pants ripped by the knee. (R1061-62, 1080) The barmaid said he had just come in. (R1062)

Officer Silva asked Atwater for identification. (R1062) When he asked why, Silva said he fit the description of a homicide suspect. (R1062) He showed Silva his identification and an old, dried cut on his knuckle and volunteered that he had blood on his pants and shoes because he was a quick bleeder. (R1062-66) Silva smelled alcohol on his breath and he had a beer on the bar, but he spoke coherently and walked without difficulty. (R1065, 1067) Around 10 p.m., Sheridan

identified him as the man she had seen two hours earlier. (R1029, 1063, 1073-75) He wore the same clothes, and his zipper was open. (R1029, 1075)

The police arrested him and took him to the station. (R1063-64) On the way, he again said he was a quick bleeder. (R1064) Photographs of his hands did not show recent cuts, and a red area on his face from a fresh nick was not bleeding. (R1299-1300) He said that bruises and scrapes on his face and hands came from working as a cement finisher. (R1127) His zipper was broken. (R1076) He had a fifty dollar bill, two twenty dollar bills, a one dollar bill, and $4.38 in coins. (R1125-26) An expert did not find hair on his clothes that matched Smith's hair. (R1162) The police smelled alcohol but did not notice that he had any trouble walking or talking or that he was drunk. (R1081, 1084, 1301, 1310) He was angry and quarreled with them. (R1081-83)

Officer Silva saw Atwater shuffle his feet on the carpet as if he were trying to rub something off, but Officer Rawls did not see this. (R1064, 1082) An expert testified that Atwater's shoes were consistent with shoe prints found in Smith's apartment, but he could not say that the prints in fact came from these shoes. (R1176-77) A nick on the left shoe corresponded to a distortion in the shoe prints, but the distortion could have come from the floor rather than the shoe. (R1179) The expert had not previously seen shoes of that design. (R1178)

The blood stains on Atwater's pants and shoes were not his blood and were consistent with Smith's blood, although the expert could not say that they were Smith's blood. (R1194-96) Four and a half percent of the white population had blood like Smith's blood and the blood stains. (R1196-97) Atwater's socks and shirt also had blood on them, but the expert could not identify this blood more precisely. (R1200, 1225)

A week and a half later, the Coderres went to Smith's apartment and did not

find that any knives were missing. (R1350, 1371) They were familiar with Smith's knives because the knives had previously been at Adele's house. (R1371)

PENALTY PHASE

Michael Painter repeated much of his guilt phase testimony. (R1603-11) He added that Adele told him she liked having Atwater around, but he scared her when he was drinking. (R1612) Atwater told Painter that he often blacked out when he drank. (R1612)

When Kelly Bowman came on duty at 4:45 p.m. on August 11 at the Anchor Bar, he saw Atwater there. (R1570, 1572) Bowman served him at least three doubles of Chevis Regal, and Atwater bought drinks for another man and for the bar owner. (R1573-74, 1576-77) Bowman told him to leave at 8:30 p.m., because the bar's dress code required shirts when the band started playing at 9 p.m. (R1572-73. 1575, 1578) Bowman thought that Atwater was in the bar the whole time. (R1577) He was not loud or obnoxious and walked and talked normally. (R1577)

Jean Newby saw Atwater enter the apartment building and talk to Sheridan at the desk. (R1554) He walked and talked normally. (R1561, 1563) Atwater mentioned his grandfather's room number and said he wanted to see him. (R1555) Newby walked outside for ten or fifteen minutes or perhaps a little longer. (R1555-59) When she returned, Atwater was back at the desk. (R1556) He was concerned about his grandfather, because he had knocked on the door without response. (R1557) He implied that Sheridan ought to check on Smith. (R1557) The logged sign-out time was hard to read and could have been 8:20, 8:22, or 8:29 p.m. (R1564-65)

Harvey Cuyler was Smith's neighbor. (R1582-83) On August 11 as Cuyler left the elevator, he saw Atwater slam Smith's apartment door and walk swearing to the elevator. (R1583, 1585) He first testified that Atwater was not drunk but shook his body, head, and shoulders as if he might be a little drunk. (R1585-86, 1593)

In deposition, however, Cuyler said that Atwater was staggering and must have been drinking. (R1592) Upon seeing his deposition, Cuyler then said that Atwater appeared to have been drinking and to have been drunk, but Cuyler could not say that he was in fact drunk. (R1593-95) The prosecutor leadingly had Cuyler characterize Atwater's walk as strutting. (R1599)

Cuyler later heard people knocking on Smith's apartment door. (R1586) Cuyler told them that something might be wrong and they should get a key to the apartment, because he had just seen a man who must have been half-drunk or drinking hard leave the apartment. (R1584, 1587, 1596-97, 1600) They got a key and, when they opened the door, saw Smith on the floor. (R1587)

Atwater told psychologist Sidney Merin that Smith and Adele were engaged twice. (R1661) After they broke up the second time, Smith continued to bother Adele at her apartment. (R1661) She wished that Smith would stop coming there. (R1661) One morning about four to six weeks before Smith died, while Atwater was half asleep, he heard his aunt tell Smith to stop and then heard a thud. (R1661) He left his bed and saw Smith standing over her on the floor. (R1661) She said Smith had pushed her down, but Smith denied it. (R1662) Atwater, who believed that Smith had previously abused Adele, told him to leave the key to the apartment and not come back. (R1662) Otherwise, Atwater would "knock the taste out of your mouth." (R1662) Atwater did not intend to carry out this threat. (R1662) He never saw Smith again alive except in passing on the street. (R1662-63) He later learned that Adele had not always told him the truth about his real mother and other relatives, and, in consequence, he trusted her less. (R1663)

Atwater told Dr. Merin that, on August 11, he worked as a temporary laborer and cashed his check that night at a bar. (R1660) He had a few beers but was not drunk. (R1660) He needed more than a few beers to get him drunk. (R1660) Around 5:30 or 6 p.m., he went to the Anchor Lounge, where he had six or more beers and

six or seven shots of Chevis Regal. (R1660) He talked, played pool, and left about 8 p.m. (R1660) He felt somewhat drunk but was not staggering. (R1660) He was outside Smith's apartments and decided to visit Smith. (R1660-61) He felt guilty about mistreating Smith and wanted to hear Smith's side of the story. (R1663)

A little drunk, he signed the guest register and told the woman that he wanted to surprise his grandfather, whom he had not seen for six months. (R1664) He had often referred to Smith as his grandfather when Smith lived with his aunt. (R1664) He knocked on Smith's door, and it opened because it was not fully closed. (R1664) He saw Smith lying on the floor with blood around him. (R1664) As he felt Smith's pulse, he got blood on his hands and wiped them on his pants. (R1664)

He went down the elevator and thought of asking the woman at the desk to come to the apartment with him. (R1665) He decided, however, that the police would believe he had done it. (R1665) Consequently, he made up a stupid story that she should go upstairs because Smith had not answered the door after calling him several days earlier in Connecticut to say that someone was after Smith. (R1665) He did not know why he did not tell her the truth, except that he was drunk at the time. (R1663, 1666)

She said she had seen Smith go upstairs. (R1667) At his request, she called upstairs but got no answer. (R1667) He asked her to come upstairs with him but she declined, saying that Smith could be elsewhere in the building. (R1667) If Smith did not turn in his tag later, then they would check on him, because everyone had to turn in a tag each day. (R1668) Atwater decided they would find the body in the morning anyway, because of the tag check, and, consequently, he left the building, asking her to tell Smith he had been there. (R1668)

Atwater was not sure what happened next but he thought he went to the Anchor Lounge about 8:30 p.m. (R1669) The bar would not serve him, because the band was about to start, and the bar had a dress code. (R1669) At 8:45 p.m., he went to the house of a friend, Tina, but she was not home. (R1669) He went to another bar and ordered a beer. (R1669) He saw Tina and her male roommate there, and they had a short conversation which almost ended in an argument. (R1669-70) Adele was baby-sitting Tina's daughter, and Atwater was not certain that Tina would pay Adele. (R1670) He told Tina that he would get her daughter from Adele and go to Tina's house and that Tina should be there. (R1670)

He went to Adele's house and told her and Janet what he had seen at Smith's apartment and he repeated the story for Janet's boyfriend. (R1670) He said he had not yet called the police and was afraid that the police would believe he had argued with Smith and killed him. (R1670-71) The police did not like him because, in the past when he had beaten someone, they had handcuffed him and said they finally had him. (R1671) Janet's boyfriend told him the police already knew about Smith's death. (R1671) The boyfriend took him and Tina's daughter to Tina's house. (R1671) He smoked marijuana and discussed with Tina again whether she would pay Adele. (R1671) He returned to the bar, and the police arrested him, fifteen minutes later. (R1671)

Dr. Merin testified that Atwater's parents were unmarried, and he never knew his father. (R1674) His mother had several married boyfriends. (R1676) During his early childhood, she had a daughter but was not married. (R1674) Later, she briefly married a man and had a son, who was about seven or eight years old. (R1674) When Atwater's sister died in an accident, his mother blamed him and frequently beat him. (R1676) She was a selfish alcoholic who ignored her children and treated Atwater badly. (R1675) Atwater, 26, moved to Florida from Connecticut when he was twenty-one. (R1674-75) Two years later, he returned to

Connecticut and, two years later, returned to Florida. (R1674)

He did not complete tenth grade. (R1676) He saw a mental health professional for seven months at age thirteen or fourteen. (R1678) He married briefly at age twenty-three or twenty-four after his first love died of a heart problem. (R1677) He slapped his wife when she did not keep the house clean or go to work. (R1677) He worked as a carpenter weatherizing buildings. (R1677) For much of the last ten years, he used cocaine, marijuana, and alcohol, but he largely stopped using cocaine during his last stay in Florida. (R1678-79) Dr. Merin believed that substance abuse resulted from his personality and did not contribute to his alleged homicidal act. (R1680) The substances helped him cope with his intense personality. (R1681)

Dr. Merin testified that Atwater's ability to understand words was below average at the nineteenth percentile, but his intelligence quotient was about one hundred. (R1652) He could distinguish right from wrong and acted by choice rather than psychosis or neurosis. (R1711, 1716) He had an antisocial personality or behavioral disorder in which his thoughts could be controlled, but he often disagreed with social norms and reflected a disdain for social values, rules, and authority. (R1644-45, 1649, 1652, 1699, 1724) He was impulsive, had heightened levels of energy or mania, had shallow emotions and sensitivity to others, and consequently was unlikely to hold back when he decided to act. (R1650-51) Despite his dependent personality, he wanted to prove to the world that he did not need anyone. (R1650)

Atwater had an ambivalent relationship with Adele, his mother surrogate. (R1685) Smith, the father figure, would marry her and take her away. (R1686) These psychological dynamics had a role in Atwater's actions, but his poor impulse control and anti-social traits were the primary basis for his angry and destructive actions. (R1687) Although he was thinking clearly at the time, he was

also emotionally immature and egocentric and wanted to protect his aunt and be accepted by her. (R1688-89, 1731-32) As Smith talked with him, Smith may have said something which triggered pent-up anger. (R1747-48) Trying to protect his aunt, Atwater exploded with fury under the control-reducing effects of alcohol. (R1688) This fury was consistent with the frenzied stabs and slashes on Smith's body. (R1748-49) The robbery was a side event and not a basic motive. (R1737)

Dr. Merin did not believe that statutory mitigating factors were present, with the possible exception of loosened controls associated with alcohol intake. (R1690) Atwater had, however, experienced significant emotional trauma while growing up, with an abusive and promiscuous mother, no significant male present, no chance for a meaningful relationship with an adult, and early substance abuse. (R1697, 1709) Given his background, turning out differently would have been difficult. (R1698) These circumstances were nonstatutory mitigation. (R1697)

SUMMARY OF THE ARGUMENT

I. The State's evidence did not rebut the reasonable hypothesis of innocence that the money, if any, was taken as an afterthought. The State's own evidence showed that the motive for the killing was Atwater's anger over Smith's mistreatment of Adele and Atwater's fear that Smith was taking her away from him. Several cases have held that, when another strong motive exists, a reasonable hypothesis exists that the intent to rob did not exist at the time of the death. The State's evidence also did not rebut the reasonable hypothesis of innocence that Smith did not have any money in his pocket at the time of his death. He could have spent his money before going to the apartment, put the money in his shirt, or put it elsewhere in the apartment.

II. Because felony murder was not proved, this Court cannot be sure that the jury actually voted unanimously that premeditated murder was proved. This

uncertainty necessitates per se reversal for a new trial, because the defendant may not have received his right to a trial by jury.

III. The prosecutor failed to give proper reasons for his peremptory challenge of the sole black juror on the panel. The record did not support his claim that she did not want to serve on the panel. To the contrary, she expressly said she was glad to be there. In addition, the reason was a pretext because the prosecutor failed to challenge many other white jurors who gave similar responses.

IV. In response to a juror question, the judge told the jury that he could not answer any questions about the law or give further instructions. The judge said he could not answer the individual juror's question. This response was fundamental error because untrammeled communication between judge and jury is essential and a fundamental right. In addition, the court erred by responding to the question without first asking for input from defense counsel.

V. The trial court erroneously allowed the prosecutor to introduce evidence of lack of remorse and erroneously referred to this evidence in his sentencing order.

VI. The trial court erroneously did not allow defense counsel to introduce deposition evidence to impeach a defense witness's statement that the relationships between Atwater, Smith, and Adele were not strained or boiling over. This evidence was admissible and was legitimate mitigation to support counsel's theory that the homicide occurred out of anger and was not cold and calculated.

VII. The trial court gave only part of a requested jury instruction on the heinous, atrocious, or cruel aggravating circumstance. The instruction as given omitted the part which the United States Supreme Court has relied on to uphold Florida's construction of this circumstance. The instruction as given was almost identical to an instruction which the United States Supreme Court has condemned.

VIII. Finding an aggravated circumstance for a murder committed during a robbery was improper in this case, because the evidence failed to support robbery.

IX. Finding the cold, calculated, and premeditated aggravating circumstance was improper because (1) the homicide was not cold because it arose out of a domestic dispute and was done in anger, (2) the homicide had a pretense of legal or moral justification because it was done to prevent Smith from hurting Adele any further, and (3) the homicide was not calculated because the evidence was susceptible to the conclusion that Atwater did not finally decide to kill until he reached the apartment and he and Smith had an argument.

X. Finding the heinous, atrocious, or cruel aggravating circumstance was improper because the doctor testified that the incident could have occurred within a minute and he could not say that the fatal blows did not occur first and cause unconsciousness quickly.

XI. The sentencing order failed to say which nonstatutory mitigating circumstances the trial court found or how much weight they had.

XII. The death penalty was disproportionate because the homicide occurred as the consequence of a domestic triangle in which Atwater was angry about Smith's treatment of his surrogate mother and afraid that Smith was taking her away from him. In addition, Atwater did not have a prior history of violent felonies and he had substantial nonstatutory mitigation.

ARGUMENT

ISSUE I

THE STATE'S EVIDENCE FAILED TO REBUT THE REASONABLE HYPOTHESES OF INNOCENCE THAT (1) THE THEFT IF ANY WAS AN AFTERTHOUGHT AND (2) SMITH DID NOT HAVE MONEY IN HIS POCKET.

A. Introduction

According to State v. Law, 559 So.2d 187, 188-89 (Fla. 1989),

> [a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. . . . The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

In this case, two defense theories were consistent with innocence on the robbery charge, but the State failed to introduce competent evidence inconsistent with these theories. Accordingly, the evidence failed to prove the crime charged as a matter of law, and Atwater's rights under the Florida and federal due process clauses were violated.

The State's theory was that Atwater killed Smith and then robbed him by pulling out his pants pockets and taking his money. One defense hypothesis of innocence, argued at the motion for judgment of acquittal, was that the State did not prove that Atwater had the specific intent to rob Smith at the time he was killed. (R1378) His motives instead were fear that Smith was taking his aunt away from him and anger over Smith's mistreatment of her. Consequently, after the homicide, he might have pulled out Smith's pockets and taken its contents only as an afterthought. In that event, he would have been guilty at most of petty theft. Alternatively, he might have pulled out the pockets afterward to make the death look like a robbery; or he might have left, and another person

might have entered the room and emptied Smith's pocket. The State failed to rebut these possibilities with competent and substantial evidence.

B. Relevant Cases

Several cases demonstrate that robbery cannot be an afterthought and is not proved when, like the present case, the evidence shows another motive for the killing. For example, in Bruno v. State, 574 So.2d 76 (Fla. 1991), the defense argued that the taking of the victim's stereo equipment was only an afterthought to the killing. This Court did not reject this argument out of hand but instead pointed out that, when the defendant borrowed a car that night, he said he was getting stereo equipment. Just before hitting the victim, he admired the victim's stereo equipment. Afterwards, he returned to get the equipment and ransack the house. Consequently, the jury could reasonably conclude that the defendant intended to take the equipment at the time of the killing. Bruno implied that, absent this clear and competent evidence of a prior intent to take, the defense hypothesis that taking the equipment was a mere afterthought would have been valid.

In McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), the victim was unconscious or dead after the first blow. The trial court departed from the guidelines sentence for second degree murder in part because the defendant robbed and raped the victim after she was dead or near dead. McCall ruled that this departure reason was invalid in part because "neither sexual battery nor robbery can be committed against a corpse." Id. at 1307. This Court reversed on other grounds but left this ruling undisturbed. State v. McCall, 524 So.2d 663 (Fla. 1988). This Court implied that the fifth district was right to rule that these crimes cannot be committed against a corpse. Id. at 665 n.1. By its nature, a robbery (and its associated intent) must at least start while the victim is alive. If the intent does not arise until after the victim is dead, then the

defendant is guilty only of theft.

In Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), the State's evidence did not rebut the defense hypothesis that the victim's wallet was taken only after an accidental death. "[I]t was absolutely essential that the record contain competent evidence to establish that Fowler took Jerkins' wallet by force and violence and killed him in the process." Id. at 1345. Because the evidence failed to prove an intent to take at the time of the death, the court remanded for entry of a judgment for grand theft.

In Maples v. State, 183 So.2d 736 (Fla. 3d DCA 1966), the evidence did not exclude the possibility that the defendants only assaulted the victim and made him unconscious. Somebody else could have taken the victim's wallet later during the ten minutes between the assault and the police arrival. See also Stevens v. State, 265 So.2d 540 (Fla. 2d DCA 1972) (intent to rob must exist at the time of the taking).

Several decisions on the pecuniary gain aggravating circumstance also support this fact that robbery cannot be an afterthought. In Parker v. State, 458 So.2d 750 (Fla. 1984), the State's evidence showed that the defendant wanted to prevent the victim from implicating him in the death of another person. This Court decided that taking the victim's jewelry was an afterthought and did not support a finding of pecuniary gain. "[T]here is no indication that taking [the jewelry] after her death was more than an afterthought, rather than a motive for murder." Id. at 754.

In Hill v. State, 549 So.2d 179 (Fla. 1989), the victim's wallet was missing, but she had been raped and the defendant had said that he would rape and beat her if he had the chance. Even though the evidence showed that the defendant had had no money to pay for drinks before the killing, this Court concluded that the motive for the killing was sexual battery, not robbery. "We

agree with appellant that the state did not show beyond a reasonable doubt that the murder was committed for pecuniary gain. The money could have been taken as an afterthought." Id. at 183.

In Scull v. State, 533 So.2d 1137 (Fla. 1988), and Peek v. State, 395 So.2d 492 (Fla. 1980), the defendant stole the victim's car after the killing. This Court held that an intent for pecuniary gain was unproved, because the theft could have been an afterthought. The car could have been "taken to facilitate escape rather than as a means of improving [the defendant's] financial worth." 533 So.2d at 1142.

In Simmons v. State, 419 So.2d 316 (Fla. 1982), the motive for the killing was the defendant's attachment to the victim's wife, just as the motive in the present case was the defendant's attachment to the victim's fiancee. Despite the defendant's prior statement that he would receive a new Trans-Am car as a result of the killing, this Court concluded that the State failed to prove an intent to obtain pecuniary gain.

C. The Real Motive, as Shown by The State's Own Evidence

Like the above-cited cases, the State's evidence about Atwater's motives related solely to his anger over Smith's treatment of his aunt, the twin sister of his mother; the evidence did not indicate a motive to rob. Atwater lived with Adele, cared about her, was protective of her, called her "Mom" and said she was more of a mother than his real mother. (R1323, 1328, 1339, 1347, 1374) Adele had wanted to raise Atwater as her own child, but his natural mother had refused. (R1347) Atwater may have felt that Smith was taking his surrogate mother away from him by marrying her. She also had cerebral palsy. (R1346) Her weakness and disability, his affection for her, his feeling that he was losing his mother to another man, and that man's mistreatment of her, combined to make Atwater angry.

Adele and Janet Coderre and Michael Painter testified about this

mistreatment and ensuing anger. Painter said that Atwater usually became angry when he talked about Adele's relationship with Smith. (R1318, 1326) Adele told Atwater that Smith grabbed her at a market. (R1374) According to Janet, Adele came once to Janet's house for a few days after Smith slapped her. (R1348) Adele told Janet that, another time, Smith chased her around the house and she fell down. (R1348) Atwater came from the bathroom and asked what was going on. (R1362) She said she and Smith both wanted romance but could not do it while Atwater was there. (R1362) He angrily ordered Smith from the house. (R1362, 1373) He became angry again when Smith returned for his glasses and cigarettes but did not knock on the door. (R1362) Although Adele testified that Smith did nothing serious to her, Atwater nevertheless believed that he had.

Adele and Atwater told Painter that Smith had pushed Adele down, and Atwater said matter-of-factly that he was going to get or kill Smith for doing it. (R1316-17, 1325) Painter did not take this statement seriously. (R1317) A few days or weeks later, Atwater said he did not like Smith and would get or kill him, but Painter again did not take Atwater seriously. (R1318) A week before Smith's death, Atwater said he was still upset, that he was going to get Smith, and that it would not be too long now. (R1318-19, 1325) While this evidence of Atwater's relationship with his aunt and Smith might arguably have implied a motive to harm Smith, it did not imply a motive to rob. Further evidence that Atwater did not have the intent to rob was Smith's known poverty (R1056) and residence in a project for the low-income elderly. Killing him for what little he had would have made little sense.

The evidence of a substantial motive to kill unrelated to robbery distinguished this case from other felony murders involving robbery. In most robbery murders, the defendants killed strangers or people known to carry large sums of money. In these cases, the only possible motive for the killing was

robbery. In this case, the State's own evidence presented another substantial motive. Atwater had lived with and known Smith for several months. Under these circumstances, supposing that Atwater killed him for a few dollars defies common sense.

D. The Hearsay Statement about a Prior Discussion of Money

The sole evidence that arguably related to a pre-existing motive to rob was Camarato's statement that Smith told her he was afraid of Atwater and would not give him any more money. (R1047-48, 1050) This evidence was not competent and substantial evidence of an intent to rob. In the first place, evidence that Atwater and Smith had discussed money did not mean that Atwater went to Smith's apartment with the intent to rob. Their discussion may instead merely have increased Atwater's anger when he went to the apartment. After the homicide, he might have looked through Smith's pockets only to make the death look like a robbery or only as an afterthought -- to get some of the money that he and Smith were discussing. A previous discussion about money might have reminded him after the killing to try to get it. That this discussion proved robbery was the motive for the crime is only speculation.

As discussed previously, the facts of Parker v. State, 458 So.2d 750 (Fla. 1984), were substantially similar. In Parker, the victim had previously offered jewelry to the defendant, and he had refused. The offer, however, may have prompted him to take her jewelry after killing her. Similarly in the present case, the alleged prior discussion of money might have prompted Atwater afterward to empty Smith's pocket as an afterthought. Similarly, this Court did not find an intent to obtain pecuniary gain in Simmons v. State, 419 So.2d 316 (Fla. 1982), because the evidence showed other motives, even though the defendant had also said before the killing that he would get a new Trans-Am car from it.

Not only did Camarato's testimony about Smith's statement to her not prove

that robbery was a motive for the killing, but it also was hearsay -- an out-of-court statement offered to prove the truth of the matter asserted. The State offered this statement for its truth, to prove that Smith was afraid of Atwater and desired not to give more money to Atwater. The State used it to imply that the two had had a disagreement about money.

The only exception which might have authorized this hearsay was the state of mind exception. This exception, however, did not justify the use of this statement because (1) Smith's fear of Atwater and desire not to give him money was not an issue in the case and (2) it did not explain Smith's later actions. § 90.803(3), Fla. Stat. (1989). This hearsay was exactly like the hearsay in Hodges v. State, 17 F.L.W. S74 (Fla. Jan. 23, 1992). In Hodges, two officers testified that the victim desired to prosecute the defendant for indecent exposure. Just as in the present case, the State then "used the statement to prove that Hodges had a motive to kill the victim." Id. at S74. Hodges held that the victim's statements were admitted for their truth, to prove that she desired prosecution of the defendant. Moreover, they were not admissible under the state of mind exception. The hearsay in the present case is indistinguishable from the inadmissible hearsay in Hodges. Accord Glass v. State, 574 So.2d 1099 (Fla. 1991) (victim's hearsay statements not admissible to show that the victim was afraid of the defendant); Correll v. State, 523 So.2d 562 (Fla. 1988) (same); Kelley v. State, 543 So.2d 286 (Fla. 1st DCA 1989) (hearsay evidence that defendant's husband had an affair and hoped to divorce her was not admissible to show his state of mind and her motive).

Homicide victims' statements are inadmissible under the state of mind exception to show the defendant's motive to kill and are typically admissible only if the defense claims self-defense, suicide, or accident. Ehrhardt, C., Florida Evidence, § 803.3a at 567 (West 1992). This case involved none of these

defense theories. Instead, the defense admitted that Atwater was guilty of second degree murder and asked the jury not to find first degree premeditated or felony murder. As Kelley said,

> A homicide victim's state of mind prior to the fatal event generally is neither at issue nor probative of any material issue raised in a murder prosecution. . . . [E]vidence is not ordinarily admitted under the state of mind exception to prove the state of mind or motive of someone other than the declarant. . . . Because the state in this case improperly attempted to establish a motive for the murder through the out-of-court statements, admission of the hearsay statements was error.

543 So.2d at 288.

Although defense counsel made a serious error in this case by not objecting to this hearsay, this Court in capital cases reviews the record to insure that the verdict is supported by competent and substantial evidence. Hearsay is necessarily incompetent and insubstantial evidence, and this Court therefore cannot consider it when it conducts its independent review of sufficiency.

E. The Evidence at the Scene

Like the evidence of Atwater's dealings with Smith before his death, the evidence at the scene of the homicide also implied that he did not have the intent to rob at that time. First, no attempt was made to take or open the lock box in the closet. (R1309) During penalty phase argument, defense counsel characterized this lock box as a jewelry box. (R1813) The apartment was not ransacked, and the crime scene video showed that it was largely undisturbed. A person with the intent to rob would have searched it for other valuables, rather than merely searched the pockets of someone known not to carry much money. (R1017, 1056)

Second, the numerous stab wounds and broken ribs implied anger and frenzy over Smith's maltreatment of Adele Coderre, rather than a mercenary intent to rob. Robbers with a prearranged design to steal are more likely to plan to kill

their victims quickly, rather than stab them forty times.

Third, the medical examiner found that Smith's blood alcohol level was over the legal limit for intoxication, and Atwater had also been drinking. (R1081, 1084, 1251) The control-reducing effects of alcohol may have exacerbated their hard feelings towards each other and caused their discussion to escalate into a fight, which in turn brought about the death. The presence of alcohol increased the likelihood that the death resulted from anger rather than a robbery.

Fourth, the other rooms had blood transfers and shoe prints on the floor, and the telephone cord was cut. (R1099, 1103, 1119) The body apparently was rolled over and dragged to its final position on its back in the blood on the floor. (R1070, 1291) Yet the pants pockets were not bloody. (R1306) Consequently, the pockets could not have been pulled out until after the fight was over and the body moved. These facts suggested that, after the death, Atwater moved around the apartment, then moved the body, and then pulled out the pockets. These facts were consistent with the hypothesis that Atwater killed Smith in anger and only afterwards, as an afterthought, checked his pockets for money.

F. Atwater's Conversation with the Coderres

Finally, Atwater's conversation with Janet and Adele Coderre afterward was also consistent with his hypothesis of innocence. He told Adele he had prevented Smith from abusing her. (R1349) He did not mention taking any money. When Adele asked about an electric bill he had promised to pay, he responded in anger that money was not important but was all she could think about. (R1341-42, 1367-68) When Janet asked whether he knew that Smith was dead, Atwater said he made sure the bastard was dead by cutting his throat. (R1341, 1366) All of these facts supported the hypothesis that anger rather than robbery was the motive for the homicide.

Atwater told the Coderres that Smith had hit him in the eye in the Anchor

bar parking lot. (R1342, 1369) He then decided to go to Smith's apartment. Whether he formed his intent after this parking lot encounter, during the ensuing fight in the apartment, or even earlier when he talked to Painter, is irrelevant for purposes of this issue. In any event, his anger came to a head, and, according to the State's view of the evidence, Atwater struck and killed Smith. Afterwards, either he pulled out the pants pockets as an afterthought, to get Smith's money or to make the death look like a robbery. Alternatively, he left and somebody else pulled them out. In neither case did he have the intent to rob at the time of the homicide. No competent evidence was inconsistent with this plausible scenario. This scenario in fact was more plausible than the State's hypothesis that Atwater went to Smith's apartment with the intent to rob a person he surely knew had little or no money and lived in a small apartment for the low-income elderly.

The record in the present case contained no competent and substantial evidence of a prior intent to take. Consequently, the defense hypothesis of innocence that the taking (if any) was an afterthought was valid and unrebutted. Because no competent and substantial evidence was inconsistent with this hypothesis, the State failed to prove that a robbery occurred.

G. The Failure to Prove an Actual Taking

A second defense hypothesis of innocence argued at the motion for judgment of acquittal was that the State failed to prove that Atwater took anything. (R1377) Under this hypothesis, even assuming arguendo that Atwater killed Smith with the intent to empty his pocket, the State failed to prove that it contained money. Consequently, the robbery was unconsummated, and Atwater was guilty at most of attempted robbery. Moreover, because attempted robbery is only a permissive lesser included offense of robbery and the jury was not instructed on attempted robbery as a lesser offense (R1477), this Court cannot now reduce the

charge to this merely permissive lesser offense. § 924.34, Fla. Stat. (1989); Gould v. State, 577 So.2d 1302 (Fla. 1991).

The evidence that Smith in fact had money was insubstantial. Camarato said she gave Smith twenty dollars before he left her apartment at 7:30 p.m. to clean one of her apartments. (R1049) He put it in his right front pocket where he always kept it. (R1049-50) He left, saying he would buy cigarettes on the way home. (R1049) He did not normally carry much money and lived in a project for the low-income elderly. (R1017, 1056) At 7 or 7:30 p.m., he went to a store and bought two packs of cigarettes. (R1041-42) The manager did not remember from which pocket Smith got the money, but Smith always carried it in his front pocket. (R1042)

When the police arrived between 8:30 and 9:00 p.m., they found three ATM receipts dated August 3, 4, and 10 for $100, $95, and $50 on the table. (R501, 1101, 1290, 1296, 1306) The police found no money except a few pennies on the floor. (R1095-96, 1296) When the police found Atwater at Molly's Bar between 9:30 and 10 p.m., he had a fifty dollar bill, two twenty dollar bills, a one dollar bill, and $4.38 in coins. (R1061, 1125-26)

The ATM receipts did not prove that Smith had money. They may not have been his receipts and could have belonged to somebody else. (R501, 1307) Moreover, he must have spent most or all of it, because he would not have needed more money if he had not spent it. The money withdrawn could very well have been gone by August 11.

The same is true for the twenty dollars that Camarato said she gave Smith that night. She said he never carried much money, and he certainly was not wealthy -- his ATM receipts showed a balance of only $51.81. (R501) He went to the market and probably spent some of the twenty dollars for cigarettes. He might have gone to another store and spent the rest of it on other items, or he

might have met somebody and given him the money to repay a loan. This evidence did not establish that he still had the twenty dollars when he entered his apartment.[1]

Furthermore, the evidence did not establish that he had the money remaining from his twenty dollars in his pants pocket at the time of his death. The store manager and Camarato testified that he always kept his money in his right front pocket, but this pocket could have been his shirt pocket rather than his pants pocket. Consequently, the money could have been in his shirt. He was not wearing the shirt when he died. (R1026) The evidence did not show where the shirt was or whether the police searched it. To the contrary, the police testified that they did not investigate the rest of the apartment, only the area around the body. (R1094)

Smith could also have put the money in a drawer or on furniture near his bed. See Fowler v. State, 492 So.2d 1344, 1352 (Fla. 1st DCA 1986) (friend's testimony that victim usually carried his wallet did not exclude inference that he had placed it elsewhere on the day he died). The evidence did not exclude this possibility because the police admitted that they did not search the apartment. The police did not find any money, but this testimony was inconclusive if they did not look for it. They noticed only that no money was "evident" except the pennies on the floor. (R1095) See id. at 1351 (officer's testimony that he did not determine that struggle occurred was inconclusive on whether struggle actually occurred). Noting merely that money was not evident was not the same as asserting after a careful search that no money was in the apartment.

Finally, if Smith used his twenty dollar bill to buy two packs of cigarettes, he would have received a ten and five dollar bill in exchange. When

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[1] In any event, Camarato's testimony was suspect because she said in her deposition that she gave him only ten dollars. (R252)

the police arrested Atwater, however, he had only a fifty, two twenties, and a one dollar bill. ATM machines do not give fifty dollar bills. Moreover, if Atwater took Smith's money, he should still have had the ten and/or the five because he had not had time to spend it. He had gone to his aunt's house first and did not spend it there. Because the barmaid at Molly's said he had just entered the bar, (R1062) he would not have had time to spend it there. The police testified that the bartender at the Anchor Bar told them only that someone fitting the description might have been there. (R1061) This testimony did not establish when he was there or even that he was there and spent money. Consequently, the evidence did not show that Atwater had the time or opportunity to spend money, and, under the State's theory, he should still have had a ten and/or a five dollar bill. Not having them was evidence that he did not in fact get anything from Smith.

Evidence that a person has money before an encounter with the defendant and does not have it after the encounter does not suffice to show that the defendant took it. Sanders v. State, 344 So.2d 876 (Fla. 4th DCA 1977). In Peek v. State, 395 So.2d 492 (Fla. 1980), this Court held that an intent to obtain pecuniary gain was not proved even though the victim's purse was ransacked. "Although it appears that appellant ransacked Mrs. Carlson's purse . . . there is no evidence that any money . . . [was] taken." Id. at 499. The evidence must show that the defendant took something. Reeves v. State, 493 So.2d 78 (Fla. 4th DCA 1986). Because the evidence in the present case failed to prove that Atwater took anything, the robbery conviction cannot stand.

ISSUE II

BECAUSE ROBBERY WAS NOT PROVED, ATWATER DID NOT RECEIVE A TRIAL BY JURY ON PREMEDITATED MURDER, AND INSTRUCTING THE JURY ON FELONY MURDER WAS HARMFUL ERROR.

The judge instructed the jury that it could find Atwater guilty of first degree murder in two ways, by premeditated murder or by felony murder during a robbery. (R1469-71) The prosecutor emphasized during closing argument that the jurors could convict Atwater of first degree murder even if they found him guilty only of felony murder, or even if some jurors thought the crime was felony murder and others thought it was premeditated.

> [T]he defendant is guilty of first degree murder by premeditation or through the felony murder theory of robbery. Either one or both. If you are all convinced that it is completely premeditated, unanimously, that's fine. If you're all convinced that it's unanimously felony murder, that is fine. If some of you think it is felony murder or if some of you think it's premeditated, that is fine. Either way it's an alternative way of proving first degree murder.

(R1444-45) The box on the general verdict form checked by the jury stated only that the defendant was guilty of first degree murder as charged. (R560)

Based on the judge's instructions, the prosecutor's arguments, and the general verdict, some or all of the jurors could have rejected the premeditation theory, or, alternatively, some or all of the jurors might have reached only the felony murder charge and never considered premeditated murder. It cannot be said with certainty that <u>any</u> juror -- much less a majority or all of them -- considered the premeditation theory and found Atwater guilty of it.

Appellant does not dispute the propriety of general verdicts for first degree murder. Felony and premeditated murder are not different crimes but rather are different means of proving a sufficiently egregious mental state for the same crime. Florida is like Arizona in that "neither premeditation nor the

commission of a felony is formally an independent element of first degree murder; they are treated as mere means of satisfying a mens rea element of high culpability." Schad v. Arizona, 115 L. Ed. 2d 555, 570 (1991). Florida equates "the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder." Id. at 571.

Appellant's case, however, is not like Schad because, although the jurors in each case unanimously agreed that the defendant had a sufficiently blameworthy state of mind, the jurors in this case, unlike Schad, may have based their decision at least in part on a mental state (as argued in Issue I) for which the evidence was insufficient. In Schad, no error occurred. In this case by contrast, an error occurred which could have affected the jury's decision to convict. In particular, if the argument in Issue I is correct that Atwater took the money (if any) only as an afterthought and that robbery was not proved, then (1) the trial court should have granted the motion for judgment of acquittal for robbery, (2) Atwater was guilty at most of petty theft for this charge, (3) instructing the jury on felony murder was error, and (4) the court should not have allowed the jury to base its verdict wholly or partly on this erroneous instruction.

Because the evidence was insufficient to prove felony murder and because some or all of the jurors may have rejected or not reached premeditated murder, this Court cannot now say beyond a reasonable doubt that Atwater received a trial by jury on premeditated murder, the sole remaining legitimate theory of guilt. He had a right under the Sixth and Fourteenth Amendments to a verdict agreed to by at least six jurors, Balley v. Georgia, 435 U.S. 223 (1978), by a substantial majority of the jurors on the panel, Johnson v. Louisiana, 406 U.S. 356 (1972), and, arguably, in a capital case, by a unanimous jury. Andres v. United States,

333 U.S. 740 (1948). In this case, no juror may have decided to convict on a valid theory of guilt. This violation of the right to trial by jury was per se reversible error.

Federal constitutional law is clear that, if a jury reached a general verdict without specifying which of two or more alternative theories of guilt it accepted, the invalidity of any of the theories requires per se reversal, particularly in capital cases.

> With respect to findings of guilt on criminal charges, the Court has consistently followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon in reaching the verdict. In reviewing death sentences, the Court has demanded even greater certainty that the jury's decisions rested on proper grounds. See, e.g., Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills v. Maryland, 486 U.S. 367, 377 (1988) (most citations omitted).

Similarly, Justice Rehnquist said in Boyde v. California, 108 L. Ed. 2d 316, 328-29 (1990) (citations omitted), that

> we have held that "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." In those cases a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, "it is equally likely that the verdict . . . rested on an unconstitutional ground," and we have declined to choose between two such likely possibilities.

The Court has applied this rule to several situations. In the leading case, Stromberg v. California, 283 U.S. 359, 368 (1931), the Court reversed a conviction because one of the three possible theories of guilt violated the First

Amendment.

> As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . [T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

In Leary v. United States, 395 U.S. 6 (1968), under one of two theories of guilt, the trial court instructed the jury that it could infer that a possessor of marijuana knew it was imported. This instruction violated due process because the facts proved and presumed had no rational connection. Even though the evidence was sufficient (as in the present case) to convict under the second theory of guilt, the Court nevertheless reversed because "[f]or all we know, the conviction did rest on [the first] ground. It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Id. at 31-32.

Similarly, in Yates v. United States, 354 U.S. 298 (1957), the Court reversed when the trial court misinterpreted a conspiracy statute and instructed the jury incorrectly. "[A] verdict [must] be set aside in cases where the verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected." Id. at 312.

Finally, in a case especially similar to the present case, the trial court instructed the jury to consider all means charged in a single count of conspiracy and to find a general verdict of guilt if any charge was proved. Nash v. United States, 229 U.S. 373 (1913). Some charges had been abandoned, however, and another showed only cheating and did not warrant a conspiracy conviction. Although the evidence was sufficient for the remaining charges, the Court

automatically reversed, because the evidence was insufficient for some of the charges, and it could not say that the conviction was not based solely on the abandoned or insufficient charges.

In this case, the evidence was insufficient to support the felony murder theory by which the jury might have convicted Atwater of first degree murder. Accordingly, this theory was unconstitutional because allowing the jury to convict on insufficient evidence violated due process. In re Winship, 397 U.S. 358 (1970). Although the premeditation theory was constitutional and had sufficient supporting evidence, because the general verdict did not specify whether the jury adopted the constitutional premeditation theory or the unconstitutional felony murder theory, the per se reversal rule of Stromberg and its progeny applied.

Appellant recognizes that he did not object to the felony murder instruction. Such an objection, however, would have been obviously futile after the judge had just denied his motion for judgment of acquittal on the robbery charge. "A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless." Brown v. State, 206 So.2d 377, 384 (Fla. 1968). "[I]t is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the presiding judge." Birge v. State, 92 So.2d 819, 822 (Fla. 1957). Requiring a pointless objection to the instruction would be like requiring a pointless motion for mistrial after an objection is overruled. Holton v. State, 573 So.2d 284 (Fla. 1990). Federal law is similar. The defendant in Leary did not object to the illegal instruction, but the Court considered the issue because, as in the present case, he raised it in his motion for judgment of acquittal.

An objection to the general verdict form would have been equally futile.

This Court has repeatedly upheld general verdicts. See, e.g., Brown v. State, 473 So.2d 1260 (Fla. 1985). The United States Supreme Court has also upheld them. Schad. Appellant is not contesting their validity. Stromberg and its progeny never ruled that general verdicts were illegal. Instead, they ruled that, when an appellate court determines that one method of proof supporting a general verdict is invalid, then due process requires per se reversal. Appellant's argument in this case is the same.

For several reasons, Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987), which found that a Stromberg argument was waived by failure to raise it in the trial court, is distinguishable. In the first place, Bertolotti addressed a habeas corpus petition that appellate counsel was ineffective for failing to raise a Stromberg claim. In this case by contrast, appellate counsel has chosen as a matter of strategy to raise this issue on direct appeal. The standard of review for habeas corpus petitions alleging ineffective assistance of appellate counsel pursuant to Jones v. Barnes, 463 U.S. 745 (1983), is different than it is for direct appeals alleging errors by the trial judge.

Second, trial counsel in Bertolotti never raised the issue by arguing the sufficiency of the evidence. In the present case by contrast, once the judge denied the motion for judgment of acquittal, trial counsel had an ethical obligation not to raise again an issue on which the court had already ruled. Third, although Bertolotti observed that trial counsel did not object to the general verdict form, this observation is not relevant in this case, because Appellant concedes pursuant to Schad that general verdict forms are usually legal.

Finally, Bertolotti did not in fact rule on the merits of the Stromberg argument. It ruled only that it was not preserved. A possible implication of Bertolotti was that trial counsel, not appellate counsel, was ineffective,

although this point does not seem to have been considered in any of the later appeals of Mr. Bertolotti. If this Court rules that the Stromberg error in this case was not preserved, then it should say so and allow the error to be raised in a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850.

Undersigned counsel has not found any case on direct appeal in which this Court squarely addressed Stromberg or the argument raised in this issue. In some cases, however, when this Court found that either premeditated or felony murder was not proved and the jury entered a general verdict, this Court did not automatically reverse for a new trial as Stromberg required. Instead, it merely considered whether the evidence was sufficient to prove the remaining theory of guilt. See, e.g., Jackson v. State, 575 So.2d 181 (Fla. 1991); Van Poyck v. State, 564 So.2d 1066 (Fla. 1990). In other cases, it used a harmless error theory. See, e.g., Morris v. State, 557 So.2d 27 (Fla. 1990).

Jackson, Van Poyck, and similar cases are not controlling here because the appellants in those cases apparently did not rely on Stromberg. This Court seems to have assumed uncritically that a general verdict for first degree murder is the same as two separate verdicts for separate counts of felony murder and premeditated murder. Insufficient evidence for one count then would not affect the sufficiency of the evidence for the other count. This unexamined assumption is incorrect because the jury in murder cases does not make separate findings and instead enters only a general verdict. A reviewing court cannot know which theory or combination of theories each juror chose. Jackson and Van Poyck were wrong because they affirmed first degree murder convictions and, in Van Poyck, a death sentence based solely on a theory of guilt which the jurors may have unanimously rejected. A greater violation of due process is hard to imagine.

For obvious reasons, the state has strenuously argued in other cases that

specific verdicts are not required to show whether the jury found premeditated murder, felony murder, or both. The state likes general verdicts because they allow conviction without requiring unanimous juror agreement on any one theory of guilt. The state's arguments were successful. Brown v. State, 473 So.2d 1260 (Fla. 1985). Having made its bed, however, now the state must lie in it. With one possible exception, Stromberg requires per se reversal if the evidence is insufficient for one of the alternate methods of proof that support a general verdict.

An exception may exist for surplusage. See Fla. R. Crim. P. 3.140(i). For example, a trial court might instruct the jury that drug trafficking occurs when a defendant knowingly sells cocaine or brings it into Florida. If no evidence even remotely showed that the defendant brought cocaine into Florida and if the prosecutor did not attempt to argue this theory of guilt, then the reference to importing cocaine was mere surplusage because no jury could reasonably convict him on this theory. A reviewing court could say that the error was harmless because the jurors in fact must unanimously have convicted him of the other theory. This Court seems to have adopted this harmless error theory for surplusage in Morris v. State, 557 So.2d 27 (Fla. 1990).

If, however, some or all of the jurors might have chosen an invalid theory of guilt, then, as previously argued, the error can never be harmless, regardless of the evidence in support of other theories. A reviewing court in such cases cannot say that the defendant in fact received a trial by jury on a valid theory of guilt. Some jurors may never have considered the valid theory or may have rejected it.

In any event, the error in this case was not harmless. During the first part of the defense closing argument, defense counsel argued only that "this was anything but a murder over money. There was no robbery." (R1418) "And if you

find that anything was taken from Kenny Smith by Jeffrey Atwater, I submit to you that it was an afterthought." (R1420-21) Because robbery was not proved, felony murder was not proved. (R1425) In his second closing argument, defense counsel conceded that Atwater had murdered Smith but said that the killing was second degree murder rather than first degree murder. (R1459-61) Defense argued that, although Atwater may have acted with anger and ill will, he had not acted with premeditation.

Supposing that the erroneous instruction on felony murder was harmless would mean that the judge could just as well have taken this case from the jury's consideration and convicted the defendant, on the theory that no reasonable jury could have found a lack of premeditation. To the contrary, the killing could have been a beating that got out of hand without any actual intent to kill. When Atwater entered Smith's apartment, he may have intended merely to tell Smith to stay away from Adele Coderre. Atwater could have argued with him, become angry, and fought with him without intending to kill him. Afterward, he became frightened and left. A reasonable juror could have agreed with this argument. Consequently, if this Court uses a harmless error standard, the error was not harmless.

The error was not only harmful but <u>per se</u> reversible error. Remand is therefore necessary for a new trial on first degree murder without consideration of felony murder.

ISSUE III

EXCLUDING THE SOLE BLACK JUROR IN THE VENIRE WAS ERROR BECAUSE THE RECORD DID NOT SUPPORT THE CONCLUSION THAT SHE DID NOT WANT TO SERVE ON THE JURY, AND OTHER JURORS WITH RESPONSES SIMILAR TO HERS WERE ALLOWED TO SERVE.

A. Facts

When the prosecutor peremptorily challenged juror Antoinette Ellison, the defense objected because she was the only black juror on the panel. (R851) The prosecutor responded that the defendant, who was white, lacked standing to make this objection. (R851) The court rejected this response, saying that he wanted in an abundance of caution to hear the prosecutor's reasons for excluding the juror. (R851-52) The prosecutor responded as follows:

> MR. RIPPLINGER: In an abundance of caution, if you would recall back to her demeanor when I was asking her the questions when I asked about the death penalty, she very much clammed up to a shell. Her voice lowered to where she could hardly speak. I think that she has reservations about a juror -- you know based on being a juror in this case.
>
> MR. SCHWARTZBERG: Judge, I think that she clearly and unequivocally, I think that the Court was right on point when he asked Mr. Ripplinger to restate his question to make sure the juror understood the question. I think when Mr. Ripplinger restated it in a fashion that she was capable of understanding, she did answer the question. Again, I would suggest that the only reason the State is striking Ms. Ellison is because she is the sole black person on the jury panel.
>
> THE COURT: The Court, in observing that particular juror, thought that she did respond with difficulty to the questions that were asked. Based upon the answers she gave and the demeanor, I believe the State's peremptory challenge will be well-taken.
>
> MR. SCHWARTZBERG: Just for the preservation of the record, we would move for a mistrial based on the fact that the State has stricken the sole black person on the jury panel and denied my client a fair trial by a jury of his peers.

(R852-53)

The prosecutor's claim that Ellison had reservations about serving on the jury was based on his observations of how she answered his questions rather than the answers themselves, because her actual answers during voir dire did not reveal any desire not to exercise her constitutional right to serve on the jury.

> MR. RIPPLINGER: What are your feelings about the death penalty?
>
> VENIREWOMAN ELLISON: It's all right.
>
> MR. RIPPLINGER: Excuse me?
>
> VENIREWOMAN ELLISON: It's okay.
>
> MR. RIPPLINGER: Does that mean you -- you're opposed or against the death penalty? You seem a little hesitant.
>
> VENIREWOMAN ELLISON: Well --
>
> MR. RIPPLINGER: I'm sorry, ma'am? Again do you think that you'd have any problems imposing the death penalty if the facts and the law indicated that would be an appropriate sentence?
>
> VENIREWOMAN ELLISON: No.
>
> MR. RIPPLINGER: No?
>
> VENIREWOMAN ELLISON: No.
>
> MR. RIPPLINGER: Okay. Do you think, ma'am, that you would be, if you heard the evidence of the case, that you might start making decisions based on a possible penalty as opposed to just the facts that you're hearing that occurred in the case? We're trying to take this all down.
>
> THE COURT: Why don't you rephrase that question, Mr. Ripplinger, so we're certain she does understand the tenor of the question.
>
> MR. RIPPLINGER: You were listening to the evidence, the early evidence and the law, and, you know, you're speaking with the other jurors and you're trying to, you know, make a decision, you know, did he do it, did the State prove the case beyond a reasonable doubt, do you think he would -- the possible penalty that could be imposed, do you think that that could start creeping in and influencing the decisions you made?

VENIREWOMAN ELLISON: No.

MR. RIPPLINGER: Okay. You could separate the two?

VENIREWOMAN ELLISON: Yes.

(R815)

Ellison's answers to defense counsel's questions also did not reveal reluctance to exercise her constitutional right to serve on the jury. When the defense asked the panel members whether they were glad to be there, especially after hearing that the case involved first degree murder, two of the jurors expressed reluctance and said they were there with a heavy heart. (R841, 843-44) Ellison, however, said she was glad to be there. (R844) The defense also asked the panel where they would stand on a football field if one endzone represented those against capital punishment and the other endzone represented those who were for capital punishment. (R834-35) Like most of the other jurors, Ellison said that she would be on the fifty-yard line. (R837)

B. Applicable Law

1. The Neil "solely" test now requires race neutrality.

Batson v. Kentucky, 476 U.S. 79 (1985), allowed defendants to allege discrimination solely by reference to the prosecutor's challenges of prospective black jurors in a particular case. Justice White said that "[i]t appears . . . that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread." 476 U.S. at 101 (White, J., concurring). Studies indicated that prosecutors routinely challenged eighty to ninety percent of all blacks in the jury pool. 476 U.S. at 103-04 (Marshall, J., concurring). That this discrimination continues to this day is incontestable, given the large number of decisions since Batson and State v. Neil, 457 So.2d 481, 483 (Fla. 1984), that have reversed for new trials on this issue. Many prosecutors today still improperly exclude black jurors because they believe

these jurors are more likely than white jurors to be defense-oriented.

Prosecutors of course will never admit to such a belief and may be able to give neutral reasons to support their challenges. Most prosecutors in fact believe in good faith that they are unprejudiced and do not make unsubstantiated assumptions about blacks as a group. State v. Slappy, 522 So.2d 18, 22-23 (Fla. 1988). Whether conscious or not, however, such assumptions can have no place in the jury selection process. A defendant's right to equal protection of the laws and to a jury composed of a fair cross-section of the community is violated whenever these presumptions about blacks play any conscious or unconscious part in the jury selection process.

For this reason, Slappy clarified Neil's test that the trial judge should sustain an objection only if the opposing "party has been challenging prospective jurors solely on the basis of their race." 457 So.2d at 487 (emphasis added). Although later cases have often repeated this test, it is no longer entirely accurate. Slappy held instead that the prosecutor's reasons for challenging jurors must be race-neutral. In other words, race can play no part in the selection process, and a challenge based partly on race is as illegal as a challenge based solely on race. Federal courts likewise require the defendant to show only that the challenges occurred "at least in part because of" race. Hernandez v. New York, 114 L. Ed. 2d 395, 406 (1991).

A contrary interpretation of Neil would allow prosecutors to admit being racist and still claim that their challenges were validly based on other reasons as well as race. Rejecting this interpretation, this Court held that challenging a prospective juror partly because the juror and the defendant were both black and partly because they were both of the same age was improper, even though their shared race was not the sole reason for the challenge. Wright v. State, 586 So.2d 1024 (Fla. 1991); see also Thompson v. State, 548 So.2d 198 (Fla. 1989)

(juror challenged partly for having been in prison and partly because blacks in the 1950's were hanged for spitting on the sidewalk). Slappy and Neil teach that the prosecutor and judge must be not partly but fully "color blind." Reed v. State, 560 So.2d 203, 206 (Fla. 1990).

2. This Court has adopted an objective rather than subjective test on this issue.

Because Batson relied on the equal protection doctrine which required proof of intent, it adopted a subjective test which required the defendant to prove "purposeful discrimination." 476 U.S. at 98. Federal courts treat this question as a pure issue of fact decided by the trial judge and entitled to deference on appeal under a "clearly erroneous" standard. Hernandez. For at least three reasons, this Court has not adopted this subjective test and instead has used a more objective test which requires accountability when the prosecutor's peremptory challenges appear improper.

First, although Appellant is not waiving any federal issue,[2] the fact remains that the federal test is difficult to meet because a prosecutor's actual intent is difficult to prove. Prosecutors seldom admit that their peremptory challenges are race-conscious, and they may not know all of their motivations. The problem is the subtle and unfounded assumptions they might make about criminality and the typical black's response to it, combined with the easily abused nature of the peremptory challenge. Batson, 476 U.S. at 96. Neil sought to root out not only obvious racism but also these subtle assumptions. Discrimination today is a subtler thing than it was thirty years ago and can be consistent with good prosecutorial intentions.

Second, unlike the federal courts, this Court has founded its analysis on

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[2] Appellant expressly asserts that the prosecutor exercised purposeful discrimination under federal constitutional law and that the trial judge erred under this law by not sustaining the Appellant's objection to the prosecutor's peremptory challenge.

the defendant's right to an impartial jury. This Court said that prosecutors could not use peremptory challenges "as a scalpel to excise a distinct racial group from a representative cross-section of society." Neil, 457 So.2d at 486. By its nature, this analysis focuses as much or more on the challenges' objective effect as on the prosecutors' subjective intent.

Third, although the federal courts have recognized three rationales for Batson's decision, they have generally considered only two rationales -- prevention of discrimination against minority defendants and prevention of discrimination against minority jurors. Florida, however, has also taken seriously the third rationale -- bolstering the public's confidence in the jury system. As Slappy pointed out, "the appearance of discrimination in court procedure is especially reprehensible." 522 So.2d at 20. Likewise, Reynolds v. State, 576 So.2d 1300, 1301 (Fla. 1991), said that "the public justifiably might distrust the use of peremptories and the fairness of the jury selection process."

Because Florida is concerned about the appearance of the jury selection process to the public, it requires objective accountability when peremptory challenges appear improper. Showing that challenges are improper does not require proof that the prosecutor is or would like to be a member of the Ku Klux Klan. Instead, it requires the defense to present a prima facie case of the appearance of impropriety. The burden then shifts to the state to rebut the prima facie case by relying on objective facts in the record to account for the challenges in a race-neutral manner. Intent is not an element of the prima facie case or its rebuttal.

Indeed, this Court has said that prosecutorial denials of prejudicial intent will not satisfy the state's burden. Slappy, 522 So.2d at 22. As this Court said in Reynolds,

> Ordering the state to justify its use of the peremptory challenge in no sense impugns the state or suggests an

> accusation of racism. Its sole purpose is to apply the principle of accountability to the peremptory challenge. . . . [S]ome abuses have created an appearance of impropriety, however unfounded today, that must be eliminated. Our opinions in Neil, Slappy, and the present case eradicate this appearance of impropriety by creating a simple, brief, and easily enforced system of accountability in this very limited context.

576 So.2d at 1302. Reynolds focused squarely on objective accountability rather than on subjective intent.

3. The discretion accorded the trial court varies with the mixture of fact or law presented.

In federal courts, the critical question is whether the prosecutor intended to discriminate. Federal appeals courts give substantial discretion to the fact-finder on this subjective question of fact. Florida, however, has established an objective rather than a subjective test. Consequently, cases such as Files v. State, 586 So.2d 354 (Fla. 1st DCA 1991), badly miss the boat when they rely on federal cases to determine the amount of discretion a trial judge has when this issue arises.

This Court has always said that the trial court has discretion, but this discretion is not unbounded. For example, trial courts do not have discretion not to find a prima facie case when the prosecutor strikes the only minority juror on the panel. Reynolds. Trial courts also do not have discretion to conclude without record support that a teacher is liberal. Slappy. On the other hand, a trial court did have discretion to conclude that a prima facie case did not exist even though eight of ten blacks were excluded, when the prosecutor volunteered facially valid reasons, and the defendant and victim were white. Reed v. State, 560 So.2d 203 (Fla. 1990).

This Court has given different degrees of discretion to the trial courts in different situations because the issues generally involve different mixtures of law and fact. If an issue is one of fact, the trial court has substantial

discretion because appeals courts are not well-equipped to resolve factual questions. A trial court, however, has less discretion to draw conclusions from facts, because these conclusions often include legal judgments. See Tillman v. State, 522 So.2d 14, 17 n.1 (Fla. 1988) (trial court may not, without record support, accept conclusions drawn from facts). Finally, if the issue is one of law, an appeals court can handle it as well as the trial court and therefore need not accord the trial court substantial discretion.

Thus, for example, the trial court in Slappy had discretion to determine as a matter of fact that the prospective jurors challenged were teachers. Slappy ruled as a matter of law, however, that challenging jurors because they were teachers was unacceptable if the prosecutors did not question the jurors about their alleged group bias. In Slappy, the amount of discretion accorded the trial judge varied with the aspect of the issue considered and the relevant facts. The amount of discretion accorded the trial judge in the present case should similarly vary with the mixture of law and fact presented.

C. Applying the Law to the Facts of this Case

1. The asserted reason for challenging the juror was a pretext because white jurors who were not challenged also expressed hesitation, nervousness, and/or dismay at the prospect of serving in a capital case.

In the present case, the defense made its prima facie case. Over defense objection, the prosecutor excluded the only black juror on the panel. This Court has ruled as a matter of law that excluding all prospective black jurors, even if only one is on the panel, presents a prima facie case of discrimination. Reynolds v. State, 576 So.2d 1300 (Fla. 1991). Moreover, the trial court required reasons from the prosecutor for the exclusion, thereby implicitly finding that a prima facie case of discrimination existed. This case was not like Reed v. State, 560 So.2d 203 (Fla. 1990), in which the prosecutor volun-

teered reasons and the trial court never expressly found that a prima facie case was made.[3]

The burden then shifted to the prosecutor to provide clear, reasonably specific, race-neutral, and legitimate reasons for excluding the prospective juror, based on the juror's answers at voir dire or otherwise disclosed in the record. The court could not accept the prosecutor's reasons at face value but had to evaluate them for reasonableness and lack of pretext. Slappy, 522 So.2d at 22-23.

The prosecutor in this case failed to satisfy his burden of proof. His reason was that, when he "asked her about the death penalty, she very much clammed up to a shell. Her voice lowered to where she could hardly speak. I think that she has reservations about . . . being a juror in this case." The prosecutor leaped to this conclusion even though Ellison expressly said she was happy to be there. The immediate suspicion is that the prosecutor consciously or unconsciously assumed that blacks as a group were more likely than whites to have reservations about serving in a capital case. Slappy commanded, however, that the prosecutor must have not partly but fully race-neutral reasons for challenging jurors. If this assumption that blacks were more likely to disfavor the death penalty played any part in the peremptory challenge, then it was not race-neutral and therefore improper.

The record in this case supported the conclusion that this assumption was the real reason for the challenge and that the prosecutor's stated explanation was a pretext. Several jurors gave responses like Ellison's and yet were not

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[3]In any event, Reed's distinction between reasons which are volunteered and reasons which are ordered has now been overruled. See Hernandez v. New York, 114 L. Ed. 2d 395, 405 (1991) ("Once a prosecutor has [volunteered] a race-neutral explanation . . . and the trial court has ruled, . . . the preliminary issue of whether the defendant made a prima facie showing becomes moot.").

challenged. This Court has ruled as a matter of law that trial courts do not have discretion to accept an explanation if the record shows that it is a pretext that applies to other jurors not challenged. Slappy.

Charles Naylor, for example, eventually served as the foreperson of the jury. (R1493-94) He did not clearly respond to the prosecutor's questions during voir dire on the death penalty and did not finish his answer. Consequently, the prosecutor put words in his mouth about his position on it.

> MR. RIPPLINGER: What are your feelings about the imposition of the death penalty, sir?
>
> VENIREMAN NAYLOR: The death penalty?
>
> MR. RIPPLINGER: Yes, sir.
>
> VENIREMAN NAYLOR: I think something has to be done. I can't say everything has to be weighed except for being totally --
>
> MR. RIPPLINGER: Do you -- it sounds like from your answer you feel it is an appropriate penalty.
>
> VENIREMAN NAYLOR: Yes, sir.

(R797) Naylor added, just as Ellison did, that he would listen to all relevant circumstances before considering the penalty to impose during the penalty phase. (R787-98) He had previously sat on a jury in a case involving "police brutality," a phrasing which, if anything, indicated a disposition against the state. (R795) Naylor later said that he was on the fifty yard line with respect to the death penalty, just as Ellison was. (R835)

Naylor's reluctance to serve on the jury in a capital case, however, became clear in response to defense questions.

> MR. SCHWARTZBERG: Mr. Naylor, you got a summons in the mail that told you you had to come and sit for jury duty. How did you feel about that?
>
> VENIREMAN NAYLOR: I knew I would -- if I didn't want to show up, you would come after me, so here I am.
>
> MR. SCHWARTZBERG: Now that you're here and you've sat

> through roughly almost two hours of intensive questioning, hopefully some of them intelligent, still wish you were back home?
>
> VENIREMAN NAYLOR: Yes, sir. Especially when the judge made the comments.
>
> MR. SCHWARTZBERG: Okay. I noticed that when you were sitting out there and the judge told you that it was a murder in the first degree case you sort of closed your eyes. You realized then the seriousness?
>
> VENIREMAN NAYLOR: Yes, sir.

(R841) Naylor alluded here to the following judge's comments:

> I would advise you that this is a case that is commonly referred to as a capital case. The charge, murder in the first degree, does carry the possibility of the defendant being subjected to the death penalty if found guilty of that offense as charged.

(R770)

Thus, unlike Ellison, Naylor indicated that, after hearing judge's comments, he did not want to come to voir dire, was reluctant to serve in a capital case, and wanted to go home. He had realized the case was serious and closed his eyes. If Naylor had been black and the prosecutor forced to give reasons for challenging him, the challenge would have been proper because he expressly said he did not want to serve. Woods v. State, 490 So.2d 24 (Fla. 1986) (reluctance to sit on jury is valid reason); Williams v. State, 566 So.2d 1348 (Fla. 1st DCA 1990) (afraid to sit on jury); Johnson v. State, 537 So.2d 117, 122 n.1 (Fla. 1st DCA 1988) (juror had conflict and wanted to be elsewhere); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985) (juror did not want to serve).

By contrast, Ellison expressly denied being unhappy and said she was glad to be there. Her answers were otherwise similar to Naylor's. Yet the prosecutor denied Ellison her constitutional right to serve on the jury because she supposedly had secret reservations about serving in a capital case; but he

allowed Naylor, who clearly expressed his reservations, to serve as the foreperson of the jury.

Sue Walsh also expressed nervousness and reservations about serving on a capital jury and yet eventually did serve. (R1493-94)

> MR. RIPPLINGER: How did you feel when the judge read the nature of these charges?
>
> VENIREWOMAN WALSH: Well, I was a little nervous about it. It's a heavy responsibility, being on a jury of this nature.
>
> MR. RIPPLINGER: You've had some time to think about it now, listening to the questions. How do you feel about it now?
>
> VENIREWOMAN WALSH: I'll do my duty.
>
> MR. RIPPLINGER: You could get through all the testimony and evidence in a case like this?
>
> VENIREWOMAN WALSH: Yes, sir.
>
> MR. RIPPLINGER: How do you feel about the possibility of a death penalty?
>
> VENIREWOMAN WALSH: Again, I feel that's really a heavy responsibility for a jury or a juror, and I think there should be a death penalty. Again, it depends on the circumstances of the case, whether it warrants it or not.
>
> MR. RIPPLINGER: Where do you fall in that little --
>
> VENIREWOMAN WALSH: On the fifty yard line.
>
> MR. RIPPLINGER: Fifty yard line?
>
> VENIREWOMAN WALSH: Very crowded fifty yard line.

(R914-15) When questioned on the subject by defense counsel, Ms. Walsh reiterated both her discomfort at the prospect of serving on a capital jury and her willingness to accept her duty to serve.

> MR. SCHWARTZBERG: How do you feel about that?
>
> VENIREWOMAN WALSH: As I was saying earlier, in this type of a trial it's a real heavy responsibility, but I think people need to be on juries in order for the

system to work.

(R926-27) Thus, unlike juror Ellison, Walsh expressly stated her discomfort at the heavy responsibility of serving on a death penalty jury. Distinguishing white juror Walsh's answers from black juror Ellison's answers in a reasoned and conceptual way is difficult. Yet, the prosecutor challenged Ellison and did not challenge Walsh.

Mary Lawrie displayed much more reluctance about serving on the jury than Ellison's answers did. Nevertheless, the prosecutor said that he did not wish to challenge any of the twelve persons, including Lawrie, who were then in the jury box. When the defense excluded her, the prosecutor expressed surprise. (R959) Lawrie was a nurse, (R937) and many prosecutors believe that nurses are unsympathetic to the state. See Mayes v. State, 550 So.2d 496 (Fla. 4th DCA 1989) (prosecutor excluded juror because she was a nurse). Moreover, she expressed a clear aversion to the death penalty.

> MR. RIPPLINGER: Do you have any particular feelings about the death penalty in the light we've been discussing it?
>
> VENIREWOMAN LAWRIE: I think that the death penalty is an extreme penalty and should be applied only in extreme circumstances.
>
> MR. RIPPLINGER: Okay. So do you think that you might be more towards the non-death penalty side of the things we've been talking about?
>
> VENIREWOMAN LAWRIE: Most probably.
>
> MR. RIPPLINGER: Would you be able to separate the guilt phase that we've been talking about and the penalty phase?
>
> VENIREWOMAN LAWRIE: Certainly.

(R938)

Later, Lawrie said her house had been burglarized and that, while justice was done and the burglars caught, they eventually escaped on work release. (R954-

55) This experience would make her somewhat uneasy about the ultimate outcome of the case. (R955) She could put this experience aside, however, and, like Ellison, decide the case solely on the law and the evidence. (R955) Her answers did not cast doubt on her initial clear bias against the death penalty. Unlike Ellison, she expressed a strong disagreement with the death penalty except in extreme circumstances, and yet the prosecutor challenged black juror Ellison because of a supposed bias against serving in a capital case and did not challenge white juror Lawrie.

Juror Dorothy Moore, who eventually served on the jury, (R1493-94) evinced nervousness and hesitation when asked about the death penalty. When black juror Ellison had paused a moment to reflect, the prosecutor pounced and asked why she was so hesitant. By contrast, he was sensitive and understanding about Moore's nervousness and failure to answer his questions immediately.

> MR. RIPPLINGER: Do you have any feelings one way or the other about the death penalty?
>
> VENIREWOMAN MOORE: No, I don't.
>
> MR. RIPPLINGER: Okay. And do you think it's an appropriate penalty under the right circumstances?
>
> VENIREWOMAN MOORE: Do you mind repeating that?
>
> MR. RIPPLINGER: Do you think that it can be an appropriate penalty?
>
> VENIREWOMAN MOORE: Yes.
>
> MR. RIPPLINGER: Given it much thought before, or, you know, we've talked with some of the jurors about reading the newspaper story or maybe talking with -- talking about the issue of, you know, somebody else.
>
> VENIREWOMAN MOORE: I'm a little nervous, so excuse me.
>
> MR. RIPPLINGER: Okay. Take your time.
>
> VENIREWOMAN MOORE: Put it to me again, could you? I'm sorry.
>
> MR. RIPPLINGER: Have you ever had, you know, an

opportunity to talk over the death penalty with another person?

VENIREWOMAN MOORE: Oh, yes. Yes. Uh-huh.

MR. RIPPLINGER: And --

VENIREWOMAN MOORE: I read the newspapers, and we discuss it.

MR. RIPPLINGER: Have you ever found yourself taking a side?

VENIREWOMAN MOORE: Well, I am for the death penalty.

MR. RIPPLINGER: Okay. Are you on the fifty yard line like most of the people, or do you have any feelings one way or the other?

VENIREWOMAN MOORE: Yes.

MR. RIPPLINGER: Fifty yard line?

VENIREWOMAN MOORE: Yeah.

MR. RIPPLINGER: And can you listen to the facts in the guilt phase and decide whether I've proven the case beyond a reasonable doubt?

VENIREWOMAN MOORE: Yes.

MR. RIPPLINGER: And then make a decision on the penalty in the next part, if there is one?

VENIREWOMAN MOORE: Yes.

(R966-67)

Here, unlike his sharp response to Ellison's hesitation in answering his question, the prosecutor understandingly gave Moore more time when she had difficulty answering his questions and said she was nervous. This difference in his attitude and the nature of his responses was itself a reason to suspect pretext. Slappy (singling out black jurors for questioning is evidence of pretext). Like Ellison, Moore said she could follow the law, could separate the two phases of the trial, and would be on the fifty-yard line with respect to the death penalty. Once again, distinguishing the two jurors' answers is difficult.

Yet Moore was allowed her right to serve while Ellison was not.

Thus, of these five jurors -- Ellison, Naylor, Walsh, Lawrie, and Moore -- the prosecutor challenged only the black juror Ellison. Yet their answers were approximately the same. The four other jurors each to varying degrees had reservations about serving in a capital case and had difficulty answering questions about their views on the death penalty. Each gave approximately similar answers about following the law and expressed fifty-yard line neutrality about the death penalty (except for Lawrie who was biased in the defendant's favor against the death penalty). Yet none of these jurors was challenged. In light of this evidence of pretext, the prosecutor did not as a matter of law account objectively for his appearance of impropriety. Slappy.

The question remains why the prosecutor singled out Ellison for exclusion. The answer is surely that he shared an assumption common to many lawyers, that blacks tend to be more opposed than whites to the death penalty. As the five jurors gave approximately similar responses to questions about the death penalty, the prosecutor automatically assumed that the black juror would more likely disfavor the death penalty, and he responded sharply to the black juror on that assumption while keeping an understanding and open mind for the white jurors. Absent this assumption, he would not have excluded the black juror or would have excluded the white jurors as well. Whatever its abstract merits, however, this assumption cannot justify denying jurors their right to serve, until it is shown to be true for the particular juror. Slappy. An assumption that blacks disfavor the death penalty is patently not the race-neutral reason required by Slappy.

This case illustrates the subtlety of discrimination today. The prosecutor in this case would doubtless wholly reject any claim that he was prejudiced. His conscious or unconscious assumption that blacks are more likely than whites to be opposed to the death penalty was arguably true. Nevertheless it was an

assumption about blacks as a group rather than an observation about juror Ellison as an individual. This clear discrimination against Ellison as an individual black person now warrants reversal.

Perhaps for this reason, this Court has held that a prosecutor cannot challenge jurors because of their views on the death penalty if their answers reveal that they can follow the law and recommend a sentence of death if the circumstances warrant it. Roundtree v. State, 546 So.2d 1042 (Fla. 1989). Ellison could follow the law and recommend a sentence of death if the circumstances warranted it. Consequently, she should not have been excluded.

2. The record did not support the prosecutor's claims that the juror clammed up to a shell and could hardly talk.

The prosecutor claimed that Ellison had reservations about being a juror because, when asked about the death penalty, she "clammed up to a shell" and lowered her voice "to where she could hardly speak." Whether the juror clammed up and lowered her voice was a question of fact that the judge had discretion to resolve. At the same time, however, the objectively verifiable record had to support the prosecutor's claims. In this instance, because the reason was not apparent from the record, the judge had to observe and confirm it on the record. Wright v. State, 586 So.2d 1024 (Fla. 1991); Tillman v. State, 522 So.2d 14, 17 n.1 (Fla. 1988); Shelton v. State, 563 So.2d 820 (Fla. 4th DCA 1990) (record did not show that juror was continuously looking down); McKinnon v. State, 547 So.2d 1254 (Fla. 4th DCA 1989) (if juror hugged defendant's child, judge should have confirmed this for the record); Mack v. State, 545 So.2d 489 (Fla. 2d DCA 1989) (record did not show that juror was inattentive and unresponsive). The judge here said only that he had observed the juror's demeanor and felt that she had responded with difficulty to the questions asked. (R852-53)

Moreover, the record belied the claim that she lowered her voice more than the other jurors and could hardly talk. Juror Ellison in fact talked repeatedly

during this voir dire and answered both the defense and the prosecutor's questions. In addition, the acoustics in the courtroom were extremely poor and many of the jurors had trouble hearing or being heard. Ellison could not fairly be singled out for talking quietly, when the objective record showed that almost everybody had trouble on this score. (R909) She was no different from the other jurors in this regard. The prosecutor himself admitted he was not talking loudly and the court twice instructed him to talk more loudly, as the following parts of the record reveal.

> THE COURT: If there are those of you who are in the courtroom who are prospective jurors that are having difficulty hearing Mr. Ripplinger, if you want to move your position where you can hear him better, that would be fine. (R782)
>
> VENIREMAN FONT: Can you repeat the question? (R783)
>
> VENIREMAN FONT: I'm sorry? (R798)
>
> MR. SCHWARTZBERG: Your Honor, I'm sorry, but I cannot hear the answers coming from the jury box.
>
> THE COURT: All right. It is difficult. Mr. Ripplinger, if I could ask you to speak up a bit more loudly, and ladies and gentlemen, it is necessary for all parties to hear your responses and there's no reason to be shy about it, so if you would all speak up so everyone can hear. And if any of you have any difficulty hearing the questions of Mr. Ripplinger, if you'd raise your hand. And if you might want to pull your podium back just a bit and that may make you talk -- what was the last response? Did you not hear it?
>
> MR. SCHWARTZBERG: I heard some of it, but if you could get him to answer it again, I'd appreciate it. (R799-800)
>
> MR. RIPPLINGER: Could you speak up a little, sir? (R806)
>
> MR. RIPPLINGER: Excuse me? (R811)
>
> THE COURT: I'm sorry. I didn't hear that question. (R821)
>
> VENIREMAN DEVOGEL: I didn't hear that. (R822)

VENIREWOMAN MILLER: Was I what? (R845)

MR. SCHWARTZBERG: Ms. Umberg, Mr. Ripplinger asked you a question about whether or not any member of your family had arrested anybody, and unfortunately, I couldn't hear what it was.

VENIREWOMAN UMBERG: He didn't ask me, so I couldn't say. (R846)

MR. SCHWARTZBERG: I don't know if he asked you what it was that he was arrested for or not, or if you told him, but I certainly did not hear it. (R847)

THE COURT: I'm sorry? (R851)

MR. SMITH: Pardon?

VENIREWOMAN PETERSON: My sons are nearly grown.

MR. SMITH: Okay. Let me just ask everybody that when they respond to the questions, speak real loud because we have to have Mr. Atwater over here hear this, as well as the court reporter and the judge and myself. Maybe if I move it back, according to what the judge had suggested earlier, you'll talk back to us a littler louder. Okay. Could you repeat yourself, ma'am?

VENIREWOMAN PETERSON: The whole story?

MR. SMITH: No. Just what you said when you were trailing off. (R866-67)

THE COURT: Ms. Ethington, you may be one of the few remaining soft-spoken women, but there are some. If you would please speak up.

VENIREWOMAN ETHINGTON: I'm sorry. I thought I was talking louder.

THE COURT: I'm sure you did, but it's a very large courtroom and we're quite spread out, so if you don't mind trying to speak up so you can be clearly heard by all. (R909)

THE COURT: Ms. Meyer, I'm sure the court reporter is going to have to ask you to speak up if you would. (R913)

MR. SCHWARTZBERG: I missed it the last time when Mr. Ripplinger asked you. (R955)

MR. RIPPLINGER: And what did you retire from?

VENIREWOMAN SLAVICH: Colon cancer.

MR. RIPPLINGER: I'm sorry. You misunderstood me. Your husband --

VENIREWOMAN SLAVICH: I beg your pardon?

MR. RIPPLINGER: I think that's what I asked. You probably didn't hear me. Was that what your husband passed away from?

VENIREWOMAN SLAVICH: Yes.

MR. RIPPLINGER: Okay. What did he do for an occupation?

VENIREWOMAN SLAVICH: He was a contract manager.

MR. RIPPLINGER: What I was -- I think I asked -- I was asking probably, we were speaking kind of low, is what did you personally retire from? (R969)

THE COURT: It's entirely possible that my hearing is going, but I think you all are talking more softly than you were earlier. If you could speak up a bit, Mr. Ripplinger, I think it would be of benefit. (R970)

In light of the prosecutor's own inability to talk loudly enough and Ms. Ethington's belief that she was talking loudly when in fact she was not, as well as the obvious problems that everybody had with hearing and being heard, the prosecutor's reliance on Ellison's soft-spokenness as partial justification for challenging her was unwarranted. Interestingly, he allowed Ms. Peterson to serve on the jury, even though her answers had "trailed off." (R867, 1493-94) The most that could be said about Ellison's answers on the record, in accordance with the trial court's observations on the record and the problems everyone had with talking loudly enough, was that her initial answers were not given immediately but instead after some reflection. Taking time to reflect is not unusual when jurors are asked difficult questions about the death penalty, regardless of whether they favor or disfavor it. Indeed, reflectiveness is the hallmark of a good juror from the State's point of view. The record did not support the prosecutor's claims that the juror clammed up and could not talk, and these claims

therefore failed to rebut the defense prima facie case. Slappy (state's explanation unsupported by the record).

3. The objectively verifiable facts in the record did not support the prosecutor's conclusion that the juror had reservations about exercising her constitutional right to serve on the jury.

From factually unfounded claims, the prosecutor drew a legally insupportable conclusion. He decided that, because juror Ellison had answered his initial questions with difficulty, she must have reservations about sitting on the jury. "I think that she has reservations about . . . being a juror in this case." (R852) The facts in the record did not support this conclusion, and drawing it without record support was error. Tillman, 522 So.2d 14, 17 n.1 (Fla. 1988).

This conclusion involved a mixed question of law and fact. The factual portion of this mixed question was whether the juror had difficulty giving answers. The legal portion was whether jurors who have initial difficulty with their answers are reluctant to serve on the jury. Because this question of law and fact was mixed, this Court need not accord the trial court as much discretion as it would if the issue was a pure question of fact. As Justice Stevens wisely said in a concurring opinion in Washington v. Davis, 426 U.S. 229, 253 (1976), "[t]he extent of deference that one pays to the trial court's determination of the factual issue, and indeed the extent to which one characterizes the . . . issue as a question of fact or a question of law, will vary in different contexts." Judicial discretion is not an all-or-nothing affair.

In this case, juror Ellison's initial hesitance and need to reflect on her answers to the prosecutor's difficult questions about the death penalty hardly implied that she did not want to exercise her constitutional right to sit on the jury. Many people have difficulty answering these questions. While hesitance might in some cases mean a reluctance to serve, it means in more cases that the juror wants to give a truthful answer and needs a moment to think about something

she may not have seriously considered before. More voir dire was necessary before the conclusion could be drawn from this skimpy record that she had reservations about sitting on the jury.

This was the lesson of Slappy. In Slappy, the jurors were excluded because they were teachers and therefore allegedly liberal. This Court in Slappy accorded the trial court discretion to determine the pure question of fact whether the jurors were teachers. This Court also ruled as a matter of law that liberalism was a valid reason to exclude jurors. It refused, however, to accept uncritically the mixed assumption of law and fact that the jurors were liberal because they were teachers. While many teachers are liberal, not all of them are. This Court refused to deny many teachers their constitutional right to serve on juries on the basis of a stereotyped liberalism that they did not individually share.

Consequently, Slappy required the prosecutor to ask questions to clarify this matter. "[W]e cannot accept the state's contention that all elementary school assistants, and these two in particular, were liberal. If they indeed possessed this trait, the state could have established it by a few questions taking very little of the court's time." 522 So.2d at 23. For similar reasons, this Court required the prosecutor to ask questions to establish whether a black juror was in fact in ill health. Id. at 23 n.3.

Just as Slappy required the prosecutor in that case to ask about the teachers' political views rather than assume that they were liberal, so also in this case Slappy required the prosecutor to ask about the juror's difficulty in answering his questions rather than immediately conclude that she did not want to serve on the jury. To his credit, the prosecutor did ask some questions on this matter, and, when his questions became confusing, the court directed him to clarify them. Unfortunately for him, however, once the juror had thought about

it and understood his question, she gave unequivocal answers that she did want to serve on the jury and could follow the law on the death penalty. Unlike other jurors, she unequivocally told defense counsel that she was happy to be there in the jury pool and would sit impartially on the fifty-yard line when considering the death penalty.

Thus, the prosecutor in this case followed the command of Slappy to ask questions to clarify and rebut any stereotyped assumptions. Having asked the questions, however, he was bound by the answers. It would be wholly ironic if Slappy required prosecutors to ask questions and then did not require them to listen to the answers. The prosecutor in this case could not properly say that the juror had reservations about serving on the jury, because, as Slappy commanded, he asked questions to clarify her reservations and she said forthrightly she had none. Accordingly, the prosecutor's reason did not satisfy his burden to account objectively for the appearance of impropriety and thereby rebut the defense prima facie case. Slappy; Reynolds.

D. A Violation of Witherspoon and the Legislative Intent

Slappy and Batson held that, once a prima facie case is made, the prosecutor must give legitimate reasons for challenging the juror. 522 So.2d at 22. This requirement of legitimacy necessarily encompassed the other Slappy and Batson requirements, such as record support, race neutrality, and the like, but it also had independent substance. For example, according to an early opinion by Judge Grimes, challenging a black juror to insure that a child witness identified the right black person (the defendant) in court was illegitimate because the state cannot legitimately have such little confidence in its witnesses. Hale v. State, 480 So.2d 115 (Fla. 2d DCA 1985). In the present case, by excluding a black juror for supposedly having reservations about the death penalty, the prosecutor used an illegitimate reason contrary to the legis-

lature's intent and to Witherspoon v. Illinois, 391 U.S. 510 (1968).

Thirty-one jurors were called and questioned in this case. Of these, the judge excused two for cause for opposing the death penalty. (R861, 932-34) The prosecutor challenged another five jurors peremptorily, almost certainly because they expressed negative ideas about the death penalty. (Reali; R838, 851; Kensell: R843-44, 904; Umburg: R833, 842, 851; Meyer: R912-13, 929; Flanders: R941-42, 959) An eighth juror, Ellison, the prosecutor excused peremptorily because she supposedly expressed reservations when asked about the death penalty. Thus, the prosecutor challenged eight of the thirty-one jurors, more than twenty-five percent of them, for not favoring the death penalty. This percentage of jurors with reservations about the death penalty was consistent with many Florida venires. Similarly, excluding all of these jurors peremptorily or for cause was and is routine prosecutorial practice.

Section 921.141(2), Florida Statutes (1989), directs the penalty phase jury to advise the court whether the defendant should be sentenced to life or death. This advisory opinion informs the court of "the judgment of the community" and "is entitled to great weight, reflecting as it does the conscience of the community." Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). The legislature wanted the judge to have a sense of the conscience and weight of community opinion before imposing the ultimate penalty of death.

In this case, however, the one-fourth of the community most disposed to recommend life was eliminated before the jury was even selected. By most standards, these people were among the most conscientious members of the community. A penalty phase jury does not fairly reflect the conscience of the community when a large percentage of its most conscientious members is routinely excluded. Consequently, regularly empaneling juries of this sort is contrary to

the legislative purpose.

Any respectable statistician or pollster would laugh at this methodology. It cannot catch the conscience of the community because its selection procedure stacks the deck. A group cannot represent the conscience of a community if a disproportionate number of those who have the most scruples and are disposed to disfavor the position in question are routinely excluded from the group. Nevertheless, this result is exactly what happens in most Florida death penalty cases. Penalty phase juries are expected to deliver the sense of the community, after the selection procedures which created them are loaded in favor of death. This procedure is contrary to the legislative intent underlying section 921.141(2), which presumes that a fair cross-section of the entire community has been selected.

Peremptory challenges for this reason against jurors who can follow the law are illegitimate not only because they are contrary to the legislative intent but also because they violate Witherspoon v. Illinois, 391 U.S. 510 (1968). According to Adams v. Texas, 448 U.S. 38, 45 (1980), a juror may be challenged for cause if his views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." On the other hand, jurors are not excludable for cause if they merely have general objections against the death penalty, or have religious or conscientious scruples against it, or think it is unjust. Witherspoon, 391 U.S. at 522; Lockhart v. McCree, 476 U.S. 162, 176 (1986).

The peremptory challenge of juror Ellison violated Witherspoon and Adams because these cases applied regardless of whether the juror was challenged for cause or peremptorily. Challenges of both sorts unconstitutionally produce a jury that is unrepresentative of the community and organized to return a verdict of death.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. . . . A jury composed exclusively of [people who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling majority. . . .
>
> [W]hen it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die . . . . [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death . . . . No defendant can constitutionally be put to death at the hands of a tribunal so selected.
>
> Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State . . . has stacked the deck against the petitioner. To execute this death sentence would deprive him of life without due process of law.

Witherspoon, 391 U.S. at 519-23.

Adams applied Witherspoon to a Texas law which required jurors to swear that their views on the death penalty would not affect their deliberations on any issue of fact. Like the reasoning in Witherspoon, the reasoning in Adams applied equally to both peremptory challenges and challenges for cause. After quoting extensively from Witherspoon, Adams concluded that

> to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their view about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law. . . . [T]hese individuals were [not] so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

448 U.S. at 50-51.

Witherspoon and Adams do not teach that, to preserve the defendant's right to an impartial jury, the court should force the prosecutors to use peremptories if they wish to exclude jurors who have reservations about the death penalty but can still follow the law. Neither case even mentions peremptory challenges. Instead, these cases teach that the state should not exclude such jurors at all. Whether these jurors are challenged peremptorily or for cause is irrelevant. Regardless of how they are excluded, the end result is the same. The jury eventually sworn is a hanging jury organized to return a verdict of death. Such hanging juries are stacked against defendants and deprive them of their lives without due process of law. Witherspoon, 391 U.S. at 523.

The California Supreme Court agreed with this reading of Witherspoon in People v. Sears, 450 P.2d 248 (Cal. 1969). In dictum, the Court declined to speculate

> that the prosecutor would have exercised his peremptory challenges to produce the sort of unrepresentative "hanging jury" that Witherspoon condemns. We cannot assume that a prosecutor would abuse the high responsibilities of his office by employing peremptory challenges to accomplish an otherwise constitutionally impermissible result, the impaneling of a jury "uncommonly willing to condemn a man to die." . . .[5]

---

[5] A prosecuting attorney is not the representative of an ordinary party to a controversy; rather he is the agent of a sovereignty whose paramount interest is not in "winning" but in seeing that justice is done. . . . Witherspoon . . . holds that . . . the capital jury "must do nothing less than express the conscience of the community on the ultimate question of life or death." . . . [W]hen the state excludes from a jury "all who would be reluctant to pronounce the extreme penalty" -- thereby producing a jury which . . . is "uncommonly willing to condemn a man to die," . . . it denies a fair trial on the issue of penalty to any defendant sentenced to death by that jury. Therefore, a prosecutor who uses peremptory challenges for the purpose of producing such a jury is violating his obligation to assure the defendant a fair trial. . . . [I]n light of the

> Witherspoon definition of a capital jury which is "impartial" on the issue of imposing the death penalty it cannot be assumed that a prosecutor who uses peremptory challenges to remove all jurors who have reservations concerning the death penalty is acting on the basis of "acceptable considerations."

450 P.2d at 257-58.

This issue was left unresolved in Gray v. Mississippi, 481 U.S. 648 (1987). Gray's four justice plurality implied in dictum that a prosecutor could not constitutionally use peremptory challenges to exclude potential jurors with reservations about capital punishment. 481 U.S. at 667-68. The four dissenters and one concurring justice in Gray said in dictum that defense peremptory challenges counterbalance prosecution peremptory challenges; the result is a fair jury. 481 U.S. at 671, 679.

The dissenters' argument was wrong for at least three reasons. First, as the facts of the present case show, Atwater would gladly trade the two jurors he excluded because they might be too much in favor of the death penalty, (Devogel: R836, 851; Ethington: R842, 929) for the eight jurors the prosecutor excluded because these jurors arguably disliked the death penalty. See Adams, 448 U.S. at 49 ("[I]t is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment.")

Second, the Court justified death qualification of juries in part because those jurors who believe the death penalty is unjust will still serve if they say they can set aside their beliefs in deference to the rule of law. Lockhart v. McCree, 476 U.S. 162, 176 (1986). This justification has no meaning if the prosecutor can challenge such jurors peremptorily. It is mere sleight of hand to say in one case that a death-qualified jury is constitutional because non-Witherspoon-excludables will serve on the jury, and then say in another case that such jurors may be challenged peremptorily and therefore will not serve on the

jury.

Finally, the State's argument here, by equating the State's rights with the defendant's rights, compared apples and oranges. In criminal cases, the defendant always has more rights than the state, because it is better that many guilty persons go free than that one innocent person be found guilty. This maxim has special relevance in capital cases.

A hanging jury cannot be squared with the Constitution. A reason for excluding black jurors which had the effect of creating such a jury as defined in Witherspoon could not be legitimate and therefore violated Slappy and Batson. Because the reason given in this case for excusing juror Ellison had this effect, it was not legitimate. Remand is therefore necessary for a new trial.

ISSUE IV

FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL JUDGE TOLD THE JURY THAT HE COULD NOT ANSWER ANY JURY QUESTIONS ABOUT THE LAW OR PROVIDE ADDITIONAL INSTRUCTIONS.

A. Facts

After the jury instructions were given but before the jury retired for deliberations, an unidentified juror tried to ask a question about the law. Without consulting with counsel for either side, the judge responded sua sponte that he could not answer any jury questions on the law, including this question, or provide any additional instructions.

> A JUROR: Before we leave, I have a question that has to do with the interpretation of the law.
>
> THE COURT: All right. Let me ask, and I'll tell you that I can tell you nothing more than I have given in these particular instructions, so if you will read the instructions again, if you have difficulty in understanding them, these are the only instructions I can give you, so I would hope that you would read the instructions very fully and completely and in consultation with your fellow jurors, I think you can come,

> hopefully, to the conclusion that's necessary for you to deliberate here. If you have some other question, though, if you go back into the jury room and as a group wish to have that question asked, then you may come back in, letting the bailiff know that you need to address the Court with a question. All right, sir? Thank you. Thank you, Mr. Bailiff.
>
> MR. SMITH: Judge, can we approach?
>
> THE COURT: Why don't we just wait.
>
> MR. SMITH: Judge, before you let the alternates go, what if there's a penalty phase, you gotta warn them that they might have to get called back before alternates are discharged.
>
> THE COURT: Okay.
>
> MR. SMITH: Just wanted to do it quick.
>
> THE BAILIFF: The jury's out of the hearing of the Court, your Honor.

(R1489-90) As a result of the judge's comments, the juror was not able to ask his question, and the jury did not return to the courtroom to ask it or any other question. (R1492)

The clear message of the first part of the judge's response to the juror's aborted attempt to ask a question about the law was that the judge could not answer any questions about the law. If the jurors did not understand the instructions, they should read them again, because the judge could tell them nothing more than he had already said in the instructions, and "these are the only instructions I can give you." The court instructed the jurors to read the instructions "fully and completely" until they could come "hopefully to the conclusion that's necessary for you to deliberate here." From the jurors' point of view, the most reasonable interpretation of this instruction was that they should not ask the judge any questions about the law because he could not answer them.

In the last part of these comments, the court did say that the jurors could

ask other questions. In light of the court's earlier comments, the most reasonable understanding of these "other" questions was that they included only non-legal questions about matters not dealing with the law. If the jurors wanted coffee or wanted to return the next day for further deliberations, they could ask questions on these topics if they agreed as a group to ask them. Questions about the law and requests for further instruction, however, were clearly forbidden. Moreover, by giving the jury permission only to ask "other" questions, the court implicitly but specifically told the unidentified juror that he could not ask his question.

B. Telling the Jury Not to Ask Questions Was Error

Although defense counsel did not object to the court's sua sponte instruction, it was fundamental error in two ways. First, a defendant in a criminal case has a right under Florida Rule of Criminal Procedure 3.410 to have the jury ask questions and request additional instructions after they have retired for deliberations. "After the jurors have retired to consider their verdict, if they request additional instructions . . . they shall be conducted into the courtroom . . . and the court may give them . . . additional instructions." Id. While judges need not always grant jury requests for further instruction on the law, defendants are entitled to have judges consider such requests and grant them if they are reasonable. A judge should alleviate jury confusion and encourage communication, rather than discourage it and thereby increase the chance that the jury does not understand the law. Accordingly, the trial court's affirmative disapproval of communication in this case was error.

Several cases have explicitly or implicitly found fundamental error in (1) a refusal to ascertain the substance of a jury question, (2) an instruction that jurors could not request additional information or instructions, or (3) any other factor which inhibited free communication between judge and jury. For example,

in Brown v. State, 538 So.2d 833 (Fla. 1989), while the judge was gone, the jury asked for transcripts of testimony. Counsel for both sides agreed that the judge need not return. They instead told the jurors to rely on their memories. Brown held that the judge's absence thwarted the fundamental fairness of the proceeding and was fundamental error. The defendant had the right to have a judge consider all jury requests in person because free discourse was essential between judge and jury. This Court especially noted the prosecutor's statement that he did not want any more questions, a statement similar to the judge's comments in the present case.

> [W]e hold that the judge's presence cannot be waived when a jury wishes to communicate with the court during its deliberations. Free discourse is essential in such a situation but is thwarted by the judge's absence. . . . In the instant case the jurors might have requested that portions of the testimony be read back to them when informed that they could not have the transcripts. . . . Brown now claims that the prosecutor . . . told them that he did not want any more questions. . . . [T]his whole proceeding might well have had a chilling effect on the jury's deliberations. . . . The possibility of prejudice is so great in this situation that it cannot be tolerated. We hold, therefore, that communications from the jury must be received by the trial judge in person. . . . We disagree with the state that Brown's failure to object precludes our consideration of the judge's absence.

Id. at 836. Although Brown dealt with the absence of the judge during a jury question, while the present case dealt with the judge's instruction to the jury not to ask any questions, the two cases were not substantively different. In each case, free communication between judge and jury was frustrated, and fundamental error occurred.

Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987), and Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987), were like the present case because the trial court told the jurors that they could not get additional instructions or have any testimony read back. The court said that "the judge's words may reasonably have

conveyed to the jurors that to ask for clarification of instructions or rereading of testimony would be futile. As a result, they may have reacted as they did because they misapprehended the law or had a distorted recollection of some of the testimony." 511 So.2d at 581. Neither Biscardi nor Huhn indicated that the appellant objected to this instruction, but these cases nevertheless found it to be reversible error.

In Hendrickson v. State, 556 So.2d 441 (Fla. 4th DCA 1990), and George v. State, 548 So.2d 867 (Fla. 4th DCA 1989), as part of his preliminary instructions to the jury, the judge said that the court reporter could not reread witness testimony. Hendrickson and George agreed that this instruction was fundamental error. 556 So.2d at 441 n.1; 548 So.2d at 867. The instruction in the present case not to ask questions was not conceptually different from the erroneous instruction in Hendrickson and George.

Cedars of Lebanon Hospital v. Silva, 476 So.2d 696 (Fla. 3d DCA 1985), affirmed the granting of a new trial because, among other things, the judge told the jurors three times that he could not be their pen pal and did not want to influence their deliberations by answering questions. During closing instructions, after the judge said he could not be the jurors' pen pal, a juror asked about damages. The judge did not answer the question and instead merely reread the verdict form and sent the jury to deliberate. The quotation in Cedars of the judge's comments implied that the parties did not object. Nevertheless, the court affirmed the granting of the new trial. The trial court had improperly "prohibited the jury from asking it questions necessary to allay the jury's confusion." 476 So.2d at 703. Similarly, in Blancher v. Metropolitan Dade County, 436 So.2d 1077 (Fla. 3d DCA 1983), error occurred because the clerk failed to relay the jury's question to the judge. The parties had a right to have the judge consider the question.

In Rodriguez v. State, 559 So.2d 678 (Fla. 3d DCA 1990), the jury asked that some testimony be read back to it. The court denied a defense request that the jury specify exactly what it wanted. Instead, the court told the jury that no statements would be read back. The third district found reversible error because the trial court could not properly exercise its discretion without knowing the nature of the request. The desired information might have been readily supplied. Although Rodriguez did not involve fundamental error, it was otherwise similar to this case, because the trial court in the present case also never ascertained the specific nature of the juror's question.

In Lamonte v. State, 145 So.2d 889 (Fla. 2d DCA 1962), and Penton v. State, 106 So.2d 577 (Fla. 2d DCA 1958), the jurors asked that transcripts be read or instructions given on a important issue at trial. The trial court responded that it could not tell the jurors what the evidence was and they would have to use their memory. Lamonte found this response to be fundamental error, while Penton found it to be error and Penton's extensive quotation from the proceedings seemed to indicate that no objection was made.

Finally, in Furr v. State, 9 So.2d 801 (Fla. 1942), the jurors told the judge they were confused about the testimony. The judge responded that he could not discuss it with them. Furr's quotation from the trial proceedings implied that the defense did not object to this response. The Court nevertheless held that the trial court had departed from the essential requirements of the law and had the "duty . . . to ascertain which witness it was whose testimony was the subject of disagreement and, if that witness had given any material testimony, to then have the testimony of such witness read to the jury." Id. at 802. Although Lamonte, Penton, and Furr each involved in part the interpretation of a statute later superseded and repealed when this Court adopted Rule 3.410, this rule is substantially similar to the statute as it was then interpreted. See

Lutins v. State, 194 So. 803 (Fla. 1940) (trial court had discretion when responding to jury questions); Bates v. State, 102 So.2d 826 (Fla. 2d DCA 1958) (same). Consequently, the principle of these cases is still valid that unnecessarily impeding free communication between judge and jury is fundamental error.

This Court's cases on sequestering juries during deliberations are relevant to this issue. In Raines v. State, 65 So.2d 558 (Fla. 1953), allowing the jury to go home without suitable cautionary instructions during deliberations was reversible error despite the lack of objection. As this Court explained in Livingston v. State, 458 So.2d 235, 238 (Fla. 1984), "some situations carry such an inherent danger of improper influence that courts should remedy the error without requiring the accused to show that any such improper influences actually operated upon or affected the jury." Raines recognized that jury deliberations are highly sensitive and subject to improper influences. See Curtis v. State, 480 So.2d 1277, 1279 (Fla. 1985) (jury questions during deliberations occur "during one of the most sensitive stages of the trial"); Colbert v. State, 569 So.2d 433 (Fla. 1990) (same). In this case, the erroneous instruction was the last statement in court before the highly sensitive deliberations began and surely affected the jury's discussions.

Pope v. State, 569 So.2d 1241 (Fla. 1990), interpreted Raines and ruled that not sequestering the jury during deliberations was fundamental error only when the jury was not given proper cautionary instructions. Pope presumed that the jury would obey its instructions. In this case, the jury was given an incorrect instruction about its deliberations which it presumptively followed and obeyed. Thus, under the logic of Raines and Pope, the incorrect instruction obeyed by the jury which adversely impacted on this highly sensitive aspect of the jury's deliberations was reversible error despite the lack of objection.

The many cases cited here provide a powerful basis for concluding that not

allowing the jury to ask for additional instructions about the law is fundamental error. Consequently, because the trial court in this case generally instructed the jury not to ask questions about the law and specifically instructed the unidentified juror not to ask his question, reversible error occurred, and remand is necessary for a new trial.

C. Not Discussing the Instruction with Counsel Was Error

The trial judge did not give defense counsel (1) notice that the jury would not be allowed to ask questions about the law, (2) a chance to participate in the discussion of the proper response to the juror's question, and (3) an opportunity to object before the jury left the courtroom. This failure to provide notice and opportunities to participate and object was fundamental error.

Rule 3.410 states that additional jury instructions shall be given only after notice to defense counsel. Accordingly, Ivory v. State, 351 So.2d 26, 28 (Fla. 1977), held that

> it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Ivory was consistent with Deas v. State, 161 So. 729 (Fla. 1935), which found error in a sua sponte instruction that, like the present one, was given without first affording defense counsel a chance to discuss it. In the present case, the juror requested an instruction on the law. See Curtis v. State, 480 So.2d 1277, 1278 (Fla. 1985) (additional instructions are given when the jury is uncertain about a point of law or aspect of the evidence). The trial judge did not discuss the request first with defense counsel before instructing the jurors not to ask questions about the law. The judge also did not give counsel a chance

to object before the jury left the courtroom. This failure to provide an opportunity for discussion and objection was reversible error. Ivory.

The State might argue that the judge's response was only a refusal to answer and not within the ambit of Rule 3.410. Curtis, however, rejected this argument. "As the . . . response in this case indicates, even a refusal to answer questions frequently will require something more than a simple "no," and both the state and the defendant must have the opportunity to participate, regardless of the subject matter of the jury's inquiry." 480 So.2d at 1279.

The State might argue that defense counsel was present at the time and therefore had a chance to object. The judge, however, did not want to hear from counsel until after the jury had left the courtroom. (R1489-90) By the time counsel had an opportunity to object, it was already too late.

More importantly, Ivory required not only an opportunity to object but also an opportunity for discussion before the juror's question was answered. In effect, Ivory placed an affirmative duty on the trial court to obtain defense counsel's input before answering the jury's question. For this reason, this Court did not find dispositive the State's suggestion in Curtis that defense counsel actually knew about the jury's question. Even if counsel in Curtis did know about the question, the trial court's failure to obtain a response "in open court [was] alone sufficient to find error. 480 So.2d at 1278 n.2. Similarly, this Court did not find dispositive the defense concession during oral argument in Bradley v. State, 513 So.2d 112 (Fla. 1987), that defense counsel was present when the court answered the jury question. "The right to participate . . . includes . . . the right to make full argument as to why the jury request should or should not be honored." Id. at 114. In the present case, defense counsel made no response in open court about the juror's question before the judge answered it. This was sufficient to find error.

Third, the State might argue that Rule 3.410 applies only to questions asked during jury deliberations. The rule might not apply in the present case because the question occurred before the jury retired for deliberations. This argument, however, splits hairs because the instruction in this case was the judge's last comment to the jury before he immediately told the bailiff to take the jury to the jury room to start deliberations. It surely had an impact on their actual deliberations.

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), Williams v. State, 488 So.2d 62 (Fla. 1986), and Hitchcock v. State, 413 So.2d 741 (Fla. 1982), this Court held that a harmless error analysis should be used when the jury question does not involve instructions on the law or rereading of testimony and therefore does not fit within the express notice requirements of Rule 3.410. The issue in this case is closer to and is controlled by the per se reversal rule of Curtis rather than the harmless error rule of Rhodes, because, unlike the jury's question in Rhodes, the juror's question below did request instruction on the law. Moreover, as in Curtis and unlike Rhodes, the judge's answer had a continuing impact on the jury during its deliberations.

Even if Rhodes controls, however, the State still has the burden of proving beyond a reasonable doubt that the error did not contribute to the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The State cannot sustain its burden in this case, because, as a result of the judge's actions, the record does not show what the juror's question was, and the jury did not ask any questions. Showing harmless error is impossible under these circumstances. Consequently, the failure to provide notice and an opportunity for discussion and objection was reversible error, which now requires remand for a new trial.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING EVIDENCE OF THE DEFENDANT'S LACK OF REMORSE AND BY REFERRING TO IT REPEATEDLY IN THE SENTENCING ORDER.

Over defense objection, the court allowed the prosecutor to ask Dr. Merin a leading question about the defendant's lack of remorse. This question was hardly a question but rather was the prosecutor's own testimony.

> Q: And generally these type of people with the antisocial personality disorder, they would have no remorse about their effects on other people.
>
> MR. SCHWARTZBERG: Objection, your Honor.
>
> THE COURT: Overruled. You can answer that question, sir.
>
> THE WITNESS: They generally have a lot of difficulty generating remorse or contrition or regret, which is usually a function of conscience, there's usually an absence of those qualities which then permits them to do the same thing the next time, or do something similar to it the next time, not necessarily the same thing, but to break the rules in some way. One day it may be one thing, and another day it may be something else, but in both instances you would be in opposition to the values and the rules.

(R1726-27)

During closing argument, the prosecutor returned to this theme, saying that Atwater was "not governed by a great sense of guilt or conscience, [didn't] care about his effects of his behavior on other people. . . . [E]very time he stabbed Kenny, he was trying to stab [his aunt], too, and he went back to the person it would hurt most to tell them what he did." (R1780-81) "He goes right back to the people it would hurt the most, I killed Kenny, I enjoyed it. If he was alive, I would do it again. He had so much intent to kill, he wished he could do it some more." (R1785) Although the defense did not object to this argument, the court had already ruled that evidence of lack of remorse was admissible. See

Colina v. State, 570 So.2d 929 (Fla. 1990) (implying that objections to additional evidence of lack of remorse were unnecessary after the court had overruled an initial defense objection).

The prosecutor again stressed this theme in his sentencing memorandum to the judge.

> Jeffrey Atwater's statements immediately after the homicide clearly illustrate the cruel, pitiless, consciousless (sic) nature of this killing when he told Janet Coderre that he wished Kenny Smith was alive again so he could kill him again because he enjoyed it so much. . . . Dr. Sidney Merin . . . testified . . . that he is a person not governed by any great sense of guilt or conscience, and testified that Jeffrey Atwater does not care about the effects of his behavior on other people and actually enjoys hurting other people for the sake of hurting other people. . . . Merin testified that this personality profile will reflect a person who is not governed by any sense of guilt or conscience, and who does not care how his actions affect other people and who actually enjoys the infliction of pain on other people. . . . [O]ther nonstatutory mitigating factors . . . do not exist in this case such as the existence of remorse. . . .

(R698, 700, 703)

Having heard it repeatedly from the prosecutor, the judge's incorporation of this theme of lack of remorse in his sentencing order was not surprising. To show that the killing was heinous, atrocious, or cruel, the court quoted from the prosecutor's memorandum and said that the "defendant's statements immediately after the homicide clearly illustrate the cruel, pitiless, consciousless (sic) nature of this killing when he told Janet Coderre that he wished Kenny Smith was alive again so he could kill him again because he enjoyed it so much." (R710) To show that the killing was cold, calculated, and premeditated, the court said that the "defendant went so far as to say that he wished the victim was alive again so he could kill him again because of the enjoyment the act gave him." (R711)

This evidence and the prosecutor's arguments were in fact evidence of and

arguments about the lack of remorse. Atwater's wish to be able to kill Smith again because he enjoyed it was a desire to repeat the crime and hence was evidence of lack of a guilty conscience or remorse over the crime committed. It was similar to the evidence condemned in Sireci v. State, 587 So.2d 450, 454 (Fla. 1991) ("he seemed rather proud of it"), and Derrick v. State, 581 So.2d 31 (Fla. 1991) (defendant said he had killed the victim and would kill again).

Presenting evidence of this lack of remorse and incorporating it in the sentencing order was plain error because it involved a nonstatutory aggravating circumstance. Sireci; Valle v. State, 581 So.2d 40 (Fla. 1991); Colina v. State, 570 So.2d 929 (Fla. 1990); Jones v. State, 569 So.2d 1234 (Fla. 1990); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Lack of remorse cannot be used to show that a crime satisfies the heinous, atrocious, or cruel aggravating circumstance; the cold, calculated, and premeditated aggravating circumstance; or any other aggravating circumstance. Cochran v. State, 547 So.2d 928 (Fla. 1989); Robinson v. State, 520 So.2d 1 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986). As this Court said in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), "nor is the defendant's mindset ever at issue" with respect to the heinous, atrocious, or cruel aggravating circumstance. "Events occurring after death, no matter how revealing of depravity and cruelty, are not relevant to the atrocity of the homicide." Id. In this case, Atwater's wish to kill Smith again occurred after the death. Accordingly, this lack of remorse after the crime occurred was not an aggravating circumstance.

The error was not harmless. The prosecutor specifically introduced evidence of lack of remorse and stressed it repeatedly. The judge, who should have known better, stressed it twice in considering whether two of the three aggravating circumstances were proved. If the judge mistakenly considered it, then certainly the jury did. The State cannot "rule out the possibility that the

jury's advisory verdict was improperly influenced by the" evidence of remorse. Hill v. State, 549 So.2d 179, 184 (Fla. 1989). Moreover, it clearly affected the judge's decision. Remand is necessary for resentencing before a new penalty phase jury or at least for a new sentencing proceeding.

ISSUE VI

THE COURT IMPROPERLY LIMITED THE DEFENSE PRESENTATION OF EVIDENCE IN THE PENALTY PHASE BY NOT ALLOWING DEFENSE COUNSEL TO QUESTION THE WITNESS ABOUT HIS DEPOSITION STATEMENT THAT PRESSURE WAS BUILDING UP.

During the penalty phase examination of Michael Painter, defense counsel asked whether he sensed that the relationships between Atwater, Smith, and Adele were starting to boil. (R1619) Painter responded that the three of them were getting along well, except for a few spats between Smith and Adele. (R1619-20) Painter told the prosecutor that he never saw their relationships steaming like a pot of water. (R1620) This testimony contradicted his statement in deposition.

> Q: Anything unusual about the conversation you had with Kenny?
>
> A: No, no. I just mentioned -- I said, "You know, Jeff's still mad at you." And he said, "Yeah, well, I hate the kid and all, that, that, and the other, you know, and I don't like being around him. I can't see Adelle, he wouldn't let me go over to see Adelle," and things like this, and I knew there was pressure building up, I just didn't know how serious it was.

(R179-80)

Defense counsel asked that Painter be declared a court witness so that he could be questioned about this deposition testimony. (R1621-22) The court refused, ruling that the deposition did not contradict the courtroom testimony. The court agreed with the prosecutor that Painter's courtroom testimony referred to pressure building up around everybody rather than in the apartment and therefore was not inconsistent with the deposition. (R1622)

Undersigned counsel does not even understand the prosecutor's distinction between pressure in the apartment and pressure around everybody. Hence, counsel cannot respond to it, except to say that it has no support in the record. Both the deposition and the courtroom testimony referred to pressure generally rather than a specific type of pressure. Painter, however, contradicted his deposition by stating that pressure was not building up.

For several reasons, defense counsel should have been able to introduce this evidence and not allowing him to do so violated the defendant's constitutional rights. First, parties may impeach their own witnesses whenever

> the witness makes an affirmatively harmful or prejudicial statement against the calling party on direct examination. If the witness proves adverse, the calling party may lead and impeach the witness with prior inconsistent statements, provided that the trial court first finds that the live testimony was affirmatively harmful.

Shere v. State, 579 So.2d 86, 91 (Fla. 1991). In this case, the witness made an affirmatively harmful statement. The defense theory was that the homicide could be mitigated because Adele, Smith, and Atwater were involved in a domestic dispute that had been simmering and was getting worse. Painter directly contradicted this theory by stating that the three of them were getting along well. Because the statement was affirmatively harmful in this way, Atwater should have been allowed to impeach it.

Second, even if the request to impeach the witness was contrary to a narrow construction of the rules of evidence, these rules should not be strictly enforced in a penalty phase hearing. Chandler v. State, 534 So.2d 701 (Fla. 1988). Around the time of the trial in this case and effective a few months later, section 90.608, Florida Statutes (1989), was amended to allow impeachment of a party's own witnesses. A statute being amended is not a rule of evidence to be strictly enforced at a penalty phase hearing, if it operates to the

detriment of the defendant.

Third, excluding this evidence violated the command of Lockett v. Ohio, 438 U.S. 586 (1978), that penalty phase juries must be allowed to consider all relevant mitigating evidence. In this instance, evidence that the pressure was building among Atwater, Smith, and Adele was basic to the defense theory of the penalty phase. The defense argued that the crime was not aggravated and was mitigated because it was committed in anger and by impulse. (R1807, 1810) The evidence in question supported this argument and constituted valid mitigation.

Finally, the defense had said without objection in opening argument that Painter would testify about the deteriorating situation that "a pot of water was boiling and boiling." (R1544) The prosecutor then elicited testimony that Painter did not think the relationships were steaming like a pot of water. Not allowing defense counsel to show the basis of his statement in opening argument was especially harmful.

This error affected the decisions of both the penalty phase jury and the judge. Remand is therefore necessary for a new penalty phase or at least for another sentencing hearing.

ISSUE VII

THE COURT ERRED BY FAILING TO GIVE A DEFENSE INSTRUCTION WHICH WOULD HAVE CLARIFIED FOR THE JURY THE NATURE OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

The trial court agreed to give the first half of a requested defense jury instruction as follows: "Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." (R1515-17, 1913) The court, however, refused to give the

second half of the defense requested instruction. "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." (R1515-17, 1913) The prosecutor believed that the second half of the instruction was not a correct statement of law. (R1516) Both portions of the requested instruction, however, were direct quotations from Dixon v. State, 283 So.2d 1, 9 (Fla. 1973).

A few months after trial, this Court approved for publication a new standard jury instruction on this aggravating circumstance that was essentially the same as that requested by defense counsel. In re Standard Jury Instructions Criminal Cases -No. 90-1, 15 F.L.S. S368 (Fla. June 21, 1990). The committee said that this instruction improved the old instruction and addressed any problem the old instruction had in light of Maynard v. Cartwright, 486 U.S. 356 (1988). This Court has now approved this new instruction, and it is in the standard jury instruction books. Needless to say, this Court cannot say that the defense instruction requested in this case was error when it later approved it as an improved standard instruction.

Shell v. Mississippi, 111 S. Ct. 313 (1990), found that a Mississippi jury instruction essentially identical to that actually given in this case was unconstitutionally vague. In Shell as in the present case, the instruction left out the language about "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." This omitted language, however, was the basis for the decision in Proffitt v. Florida, 428 U.S. 242 (1976), to uphold the heinous, atrocious, or cruel aggravating circumstance. Consequently, the instruction given in this case left out the most important aspect of the Dixon language and made it unconstitutional.

Appellant is aware that Walton v. Arizona, 111 L. Ed. 2d 511, 528-29 (1990), upheld Arizona's heinous, cruel, or depraved aggravating circumstance, even though there was "no serious argument" that it was not facially vague, because judges rather than juries sentence Arizona defendants to death. Considered together, however, Walton and Shell teach that this aggravating circumstance can be defined more vaguely for judges than for juries. In Florida, however, although judges are the sentencers, juries incontestably play an important role. Consequently, this aggravating circumstance cannot be vaguely defined for the jury.

A jury's recommendation of life can be overridden only if virtually no reasonable person could differ on the appropriateness of imposing death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Tedder was a "crucial protection" that helped to correct the deficiencies of Florida's first capital sentencing scheme. Dobbert v. Florida, 432 U.S. 282, 295-96 (1977). This court has long recognized that a capital jury is "an integral part of the death sentencing process." Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987). The jury's recommendation can be a "critical factor" in determining whether the defendant will be sentenced to die. Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). This court is much more likely to reverse for a life sentence when the jury recommends life rather than death. Cochran v. State, 547 So.2d 928 (Fla. 1989). Even in cases in which this court has held that the jury is an "advisor" to the judge, this court has still "emphasize[d] the importance of the jury's role." Combs v. State, 525 So.2d 853, 857 (Fla. 1988). A life recommendation can have double jeopardy consequences later.

Because jurors have this important role in the sentencing process, clear instructions on the law relevant to their decision are essential. The contrary conclusion -- that penalty phase juries in Florida may be given unconstitutional-

ly vague instructions -- is absurd. The precepts of Shell therefore apply to this case, and Walton does not control. Because the instruction in this case omitted the same portion of the Dixon language that the Mississippi court in Shell omitted, the instruction constituted reversible error.

The error was not harmless. Although multiple stab wounds occurred in this case, other jurisdictions have held that multiple stab wounds by themselves are not enough to establish this aggravating circumstance. See, e.g., State v. Hunt, 558 A.2d 1259, 1289 (N.J. 1989); State v. Tuttle, 780 P.2d 1203, 1218-19 (Utah 1989). In addition, defense counsel during closing argument pointed out that (1) the entire event could have occurred within a minute, (2) Smith could have become unconscious early in the struggle, (3) the struggle did not go from room to room, (4) Smith did not have defensive wounds, (5) he probably did not have much time to reflect, (6) the assailant did not move the knife around in the wounds in order to inflict additional pain, and (7) the killing was probably done in anger and frenzy. (R1804-07) In light of these circumstances, the jury might have found that this homicide was not heinous, atrocious, or cruel if it had been properly instructed.

Consequently, harmful error occurred, and remand is necessary for a new penalty phase jury or, at least, a new sentencing proceeding.

ISSUE VIII

THE FINDING THAT THE KILLING WAS HEINOUS, ATROCIOUS, OR CRUEL WAS NOT SUPPORTED BY THE EVIDENCE THAT SMITH COULD HAVE DIED WITHIN A MINUTE AND BECOME UNCONSCIOUS QUICKLY.

The trial court found that the killing was heinous, atrocious, or cruel because the medical examiner testified that (1) unconsciousness and death would not have occurred until one or two minutes after the fatal stab wounds to the

heart and (2) the fatal wounds were probably inflicted last. (R709-10) This finding ignored the equivocal nature of the doctor's testimony, which did not rule out the possibility that the fatal wounds occurred first and that the victim could have been unconscious in less than a minute.

The doctor testified that the two wounds to the heart could have caused unconsciousness within a minute. (R1241) Smith was probably on the floor on his back when many of the wounds occurred because the blood flowed to the floor rather than down his body. (R1248) The doctor found no defensive wounds, except perhaps a tiny wound on the thumb. (R1244, 1265) The wounds probably all occurred around the same time and could have occurred within a minute. (R1247)

Contrary to the trial court's finding, the doctor only thought that the fatal wounds "most likely" occurred last and could not say that they in fact did. "Well, this, to me, is a reasonable sequence, although not the only one. . . . And I'm certainly not swearing that this is it." (R1255) Moreover, the doctor's opinion was based solely on his unsubstantiated assumptions about the killer's logic and rationality, as the following portions of his testimony show:

> Q: And do you have an opinion as to the order of the infliction of these type of injuries with respect to the injuries to the heart?
>
> A: I'd say most likely the stab wounds in the front of the chest, especially the ones hitting the heart, would have been the last.
>
> Q: Why do you say that?
>
> A: We find really a progression of severity of wounds, and it's more logical that the wounds which are not fatal would be administered first. Once the person is dead, there's no reason to inflict more. Occasionally, there is, you know, bizarre murders where there's strange things carried out after death. We don't really find any indication of this. I find no reason that you would keep stabbing in the back and moving and cutting after the person were dead.

(R1249)

Contrary to this testimony, it is possible that Atwater in anger and frenzy delivered the fatal blows first and then continued to strike while Smith was on the floor unconscious. The doctor's opinion was based solely on his speculations about Atwater's state of mind and how illogical it would be to continue to stab a person after he was dead or unconscious. This Court is well aware of killing frenzies that continue after the victim is unconscious and is capable of deciding for itself whether such actions are "logical." See, e.g., Herzog v. State, 439 So.2d 1372 (Fla. 1983); Halliwell v. State, 323 So.2d 557 (Fla. 1975). "Not even 'logical inferences' . . . will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met." Clark v. State, 443 So.2d 973, 977 (Fla. 1983).

A reasonable hypothesis which rebuts an aggravating circumstance must be accepted if the evidence supports it. Eutzy v. State, 458 So.2d 755 (Fla. 1984). An aggravating circumstance must be rejected if the facts are reasonably susceptible to other conclusions. Harmon v. State, 527 So.2d 182, 188 (Fla. 1988). In this case, a reasonable hypothesis was that, as Atwater said, he met Smith outside the bar and they argued. (R1342) Atwater followed Smith to his apartment, intending to get even in some way without necessarily intending to kill. As Dr. Merin's unrebutted testimony suggested, Smith may have said something which triggered pent-up anger. (R1747-48) Trying to protect his aunt, Atwater grabbed a steak knife and exploded with fury under the control-reducing effects of alcohol. (R1688) This fury was consistent with the frenzied stabs and slashes on Smith's body. (R1748-49) A continued assault after Smith was unconscious was not unlikely under these circumstances.

The medical examiner's own testimony supported this scenario. As he admitted, Smith probably had no defensive wounds and most of the wounds occurred while he was on the floor. The most likely explanation of these events was that

Smith, a sixty-four year old man, became unconscious and fell to the ground quickly. See Harvey, 439 So.2d at 1380 ("It can also be reasonably inferred from the record that she was semi-conscious during the whole incident, as there is evidence that the victim offered no resistance, nor did she make any statements during the attack."). After this unconsciousness, Atwater continued to strike. The evidence even showed that the body was dragged to its final position and turned over, which may have explained how some of the other wounds occurred. (R1070, 1291) Finally, Atwater told the Coderres afterward that he made sure Smith was dead, which suggests that he continued to strike after Smith was unconscious.

Because the evidence and the doctor's reasoning did not exclude the possibility that Smith was soon unconscious, the heinous, atrocious, or cruel aggravating circumstance was not proved. This case is similar to Halliwell v. State, 323 So.2d 557 (Fla. 1975), in which the defendant initially beat his lover's husband with fatal blows to the head and then immediately continued beating, bruising, and cutting him, because the defendant was under emotional strain over the husband's mistreatment of his wife. Atwater could have been under a similar emotional strain in this case and for the same reason, and, moreover, the strain could have had the same effect. This Court found in Halliwell that the aggravating circumstance was not proved and should find likewise in the case at hand.

ISSUE IX

THE TRIAL COURT (1) ERRONEOUSLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING A ROBBERY AND (2) ERRONEOUSLY FOUND THIS CIRCUMSTANCE TO EXIST.

As discussed in Issue I of this brief, the state failed to present

sufficient evidence of robbery. If this Court agrees that the evidence is insufficient, then instructing the jury on this aggravating circumstance (R1316-17) and finding it to exist (R708) were reversible errors. Accordingly, remand is necessary for a new penalty phase jury or at least for reconsideration of the sentence.

ISSUE X

THE KILLING WAS DONE IN ANGER AND PASSION IN RESPONSE TO SMITH'S TREATMENT OF ATWATER'S AUNT AND THEREFORE WAS DONE WITH A PRETENSE OF JUSTIFICATION AND WAS NOT COLD AND CALCULATED.

The trial court found as an aggravating circumstance that the killing was cold, calculated, and premeditated without pretense of legal or moral justification. (R710-11) This finding was error because the killing was not cold, was not calculated, and did have a pretense of legal or moral justification.

A. The Killing was not Cold

In Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), this Court said that its obligation in interpreting statutory language such as the cold, calculated, and premeditated aggravating circumstance was to give its words their plain and ordinary meaning. Accordingly, this Court has cited dictionary definitions to explain the words "calculated" and "pretense" in this aggravating circumstance. Id.; Banda v. State, 536 So.2d 221, 225 n.2 (Fla. 1988).

This Court has never defined the word "cold." In light of Rogers and Banda, however, using dictionary definitions is clearly appropriate. According to Webster's New Universal Unabridged Dictionary at 354 (2d ed. 1983), "cold" means "without warmth of feeling; without enthusiasm; indifferent; as, a cold personality. . . . calm; detached; objective; as, a cold logic." "In cold blood" means "without the excuse of passion." According to The American Heritage

Dictionary at 290 (2d college ed. 1985), "cold" means "not marked or affected by emotion; objective: cold logic." "Cold-blooded" means "lacking in feeling or emotion: a cold-blooded killer." Of these definitions, the best for purposes of this aggravating circumstance are those for "cold-blooded" or "in cold blood," because they have the closest relation to homicide. Accordingly, an appropriate definition for "cold" in this context is a killing which is lacking in feeling or emotion or done without the excuse of passion.

This Court has agreed in principle with this understanding of "cold" and said that a killing is not necessarily cold even if it is calculated. Douglas v. State, 575 So.2d 165 (Fla. 1991), was similar to the present case and involved an emotional triangle between the defendant, the victim, and the victim's wife. The defendant and the victim's wife had lived together, and he was still emotionally involved with her. Similarly, in the present case, Atwater lived with the victim's fiance and was emotionally involved with her because he thought of her as his surrogate mother and believed that the victim was taking her away from him. In Douglas, the defendant entered the victim's car with a rifle and said he felt like blowing their brains out. Under the circumstances, this threat was more explicit than the statements that Atwater told Painter about "getting" Smith. In Douglas, during the next four hours, the defendant forced the victim and his wife to perform sexual acts, hit him forcefully with a rifle, told her to get back, and then shot him. This evidence of passion and the relationship between the parties meant that the killing was not "cold," i.e., was not lacking in feeling and emotion and was done with the excuse of passion.

Santos v. State, 591 So.2d 160 (Fla. 1991), was also close to the present case. In Santos, the victim had lived with the defendant for several years before they separated. He became angry when he could not visit his daughter. He went to the victim's house and threatened to kill her. Two days later, after

purchasing a gun, he went to her house, saw her walking on the street, ran after her, turned her around, and shot her and her daughter.

This Court in Santos said of Douglas that, even though the assailant obtained a weapon and tracked down the victim, "the killing arose from violent emotions brought on by the defendant's hatred and jealousy associated with the love triangle. . . . It was not 'cold' even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection. . . ." Id. at 163. Santos was similar to Douglas, and, consequently, the evidence in both cases negated any "inference that [the] acts were accomplished through 'cold' deliberation." Id. Thus, Santos in effect held that, to be cold, calculated, and premeditated, a killing must be not only "calculated" in the sense of "by prearranged design," but also "cold" in the sense of "without emotion or passion."

Dr. Merin's unrebutted testimony in this case showed that the killing involved emotion or passion. Atwater had a difficult time in early life with his parents and, as a consequence, developed a complex attitude about them that he later attached to the twin sister of his mother. (R1685) He had powerful and ambivalent love/hate feelings about her, his mother surrogate. (R1685-86) He felt threatened because Smith, the father figure, would marry her and take her away. (R1686) Dr. Merin characterized the situation as triangular and said that these psychological dynamics had an important role in Atwater's actions. (R1686-87)

Dr. Merin believed that Atwater's poor impulse control and anti-social traits were the primary moving factor in the choices he made to commit his angry and destructive actions. (R1687) He never learned discipline or how to delay his impulses. (R1688) Emotionally immature and egocentric, he wanted to protect his surrogate mother and be accepted by her. (R1688-89) As Smith talked with him,

Smith may have said something which triggered his accumulated and pent-up anger. (R1747-48) Justified by his desire to protect his aunt, he exploded with fury under the control-reducing effects of alcohol. (R1688) This fury was consistent with the frenzied stabs and slashes on Smith's body. (R1748-49) The robbery was a side event and not a basic motive. (R1737)

Dr. Merin's account showed that, influenced by alcohol and encumbered by poor impulse control and anti-social traits, Atwater exploded with anger as he talked with Smith, because he wanted to protect his surrogate mother. The killing was not lacking in feeling or emotion or done without the excuse of passion. It was not cool, detached, and objective; but rather angry, emotional, and passionate. Accordingly, it was not "cold," even if it was "calculated." "[R]age is inconsistent with the premeditated intent to kill someone. . . ." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988). "Hansbrough's frenzied stabbing of the victim does not demonstrate the cold and calculated premeditation necessary to aggravate his sentence with this statutory factor." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). "This case involves a passionate, intra-family quarrel, not an organized crime or underworld killing." Garron v. State, 528 So.2d 353, 361 (Fla. 1988).

B. The Killing had a Pretense of Justification

The killing in this case was not only not cold, but it also was done under a pretense of moral or legal justification. "[A] 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Banda v. State, 536 So.2d 221, 225 (Fla. 1988). A pretense is "something alleged or believed on slight grounds: an unwarranted assumption." Id. at 225 n.2. This Court has found a pretense of moral or legal justification when the defendant had a pretense of protecting his own life. Banda; Cannady v.

State, 427 So.2d 723 (Fla. 1983). This pretense existed in Cannady even though the only evidence to support it was the defendant's own statement, and even though this statement was unbelievable because the victim was a quiet, unassuming minister who was shot five times. Id.

The principle of self-defense also applies to defense of others, such as family or friends. Gil v. State, 266 So.2d 43 (Fla. 3d DCA 1972); Raneri v. State, 255 So.2d 291 (Fla. 1st DCA 1971). Consequently, if an "unwarranted assumption" of self-defense "believed on slight grounds" can provide a pretense of moral or legal justification, then an unwarranted assumption of defense of others can provide the same pretense of justification. In each instance, the pretense rebuts the cold and calculated nature of the homicide by providing an excuse to justify the action.

In this case, Atwater had the pretense of protecting both himself and his surrogate mother from being hurt. His statement to her afterward that she did not have to worry about Smith abusing her confirmed that this defense of her was a justification for the act. (R1349) Similarly, he told her that he killed Smith because Smith slapped him. (R1369) This self-defense pretense was similar to the pretense accepted in Cannady (defendant shot victim because victim jumped at him) and was likewise based on the defendant's own statement.

The trial court refused to find a pretense of justification because no testimony could reasonably have resulted in such a belief, and direct testimony showed that no such abuse occurred. (R711) The judge's refusal to find that this pretense was reasonable was like the judge's erroneous finding in Cannady that the appellant's statements were not believable. Whether the pretense was reasonable was not relevant, since a pretense by its nature is not reasonable. What mattered instead was whether Atwater actually believed that his aunt was abused and whether he had some basis, however unwarranted, for this belief.

The evidence showed that he did have this belief and had a basis for it. Painter said that Atwater usually became angry when he talked about Adele's relationship with Smith. (R1318, 1326) Adele told Atwater that Smith grabbed her at a market. (R1374) Adele told Janet that Smith chased her around the house and she fell down. (R1348) Atwater came from the bathroom and asked what was going on. (R1362) She said she and Smith both wanted romance, but could not do it while Atwater was there. (R1362) He angrily ordered Smith from the house. (R1362, 1373) Adele and Atwater told Painter later that Smith had pushed Adele down. (R1316-17, 1325) Consequently, because he did have this belief that Adele was abused and some basis for it, he had a pretense of justification which rebutted a finding of the aggravating circumstance.

C. The Killing was not Calculated

Finally, the killing was not calculated. To prove calculation, the State must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). The prosecutor claimed that the killing was calculated, primarily because Atwater told Painter three times that he was going to get or kill Smith for pushing Adele Coderre down, and said the third time that it would not be long now. (R1316-19)

Painter himself, however, did not take these comments seriously. People often say that they will kill somebody without meaning it. Some persons would probably be killed hundreds of times if their spouses carried out their repeated but idle threats to kill.[4] Atwater's comments may just have been a way of saying he was angry or would soon get even with Smith in some way for what he had done, without necessarily having the intention then of killing him. Only later, when -- as Dr. Merin testified -- Smith said something which touched off

[4] Undersigned counsel has repeatedly threatened to kill his cat.

Atwater's pent-up anger, did Atwater actually decide to carry out his idle threats. Consequently, these statements were "susceptible to conclusions other than finding [the killing] was committed in a cold, calculated, and premeditated manner." Harmon v. State, 527 So.2d 182, 188 (Fla. 1988). They must have been susceptible to the conclusion that they were just a way of expressing anger or an intent to confront Smith if Painter, the person who heard them, drew this exact conclusion from them.

Furthermore, Painter's testimony was less than clear. According to him, Atwater said he was "going to get Kenny for it, for hurting his aunt, or going to kill him, or something like that," (R1317) or "he don't like Kenny, or something like that, but he was going to get him," and mentioned he would kill him (R1318) or "he was still upset and he was going to get Kenny." (R1319) During penalty phase, Painter said only that Atwater said he was going to get Smith or beat him up. (R1611) This equivocal testimony about what Atwater said did not clearly reveal an intent to kill and was similar to the comment in Reed v. State, 560 So.2d 203, 207 (Fla. 1990), that the defendant planned to "get even" with the victims. In Reed, this comment did not necessarily mean that the defendant intended to kill the victims at that time, because he might have intended to get even with them in some other way. Id. A similar conclusion applies in this case.

Besides the statements to Painter, the evidence of calculation was weak. Even if the evidence supported a design to confront Smith (and Appellant is not conceding that it did), it did not show beyond a reasonable doubt a prearranged design to kill. Mere evidence that he planned in advance to confront Painter could not be transformed into proof that he planned to kill. Harvey v. State, 529 So.2d 1083 (Fla. 1988).

For example, the trial court's written order claimed that the defendant

tried to locate the victim for three days before the murder. (R710) Even if it was true, this claim did not necessarily show a design to kill. Moreover, the only evidence to support it was Camarato's claim that she saw Atwater in the courtyard of her apartment building for three days. (R1047-49) Although Smith often saw Camarato, the record is devoid of any evidence that Atwater knew of their friendship. Camarato did not even know who Atwater was. (R1045-46) Moreover, Atwater might have known other people who lived at the building. An inference of calculation was unjustified absent evidence that Atwater did not know anybody else at the apartment building and knew that Smith was often at Camarato's apartment.

The trial court also mentioned Atwater's deceptive plan to enter Smith's apartment building. (R710) Using deception to enter the building, however, did not necessarily mean that he had a prearranged design to kill. He may at that time have intended merely to "get" Smith without killing him. This deception was not inconsistent with Dr. Merin's thesis that the angry killing rage was not finally triggered until Smith said something in the apartment.

The trial court said that, according to Mary Sheridan's testimony, Atwater left the apartment building calmly and deliberately. (R710) Sheridan, however, testified only that, during the brief time she saw him, Atwater did not seem nervous or out of breath and seemed to walk and talk normally. (R1034, 1038) Being able later to conceal his emotions for a minute or two did not mean that Atwater had acted calmly and deliberately earlier in the apartment. He had several minutes to calm down before he left the apartment. As the prosecutor himself said during closing argument, "He's up there longer than that. There's time to regain your composure." (R1441-42) Despite this time to settle down, Cuyler testified that Atwater slammed Smith's apartment door, walked swearing to the elevator, and shook his body, head, and shoulders with the appearance of

being drunk. (R1583-86, 1592-95) Slamming the door, swearing, and shaking his body was not evidence of calmness and deliberation.

The trial court claimed that the defendant brought the murder weapon with him to the apartment. (R710-11) This claim was wholly unjustified. Atwater told the Coderres that he got the knife from the apartment. (R1343) After confessing to the killing, he had no reason to lie about this fact. In addition, the doctor mentioned a kitchen steak knife as a likely murder weapon. (R1247) The trial court's claim might have been valid if Atwater specially carried to the apartment a gun that he did not normally carry. See Huff v. State, 495 So.2d 145 (Fla. 1986). Atwater, however, might normally have carried a pocket knife. Finally, the evidence that he did not use a knife from the apartment consisted solely of the Coderres' claim that they did not find any knives missing a week later. (R1350, 1371) Although Smith had lived with the Coderres earlier, they would not have known if Smith had gotten other knives after he stopped living with them. In any event, it was unlikely they could remember every knife he owned.

Finally, the judge said that Atwater told the Coderres that "he made sure the bastard was dead" by cutting his throat. (R711) Making sure that Smith was dead afterward was not evidence of a prearranged design to kill beforehand. Moreover, Smith may already have been dead from the heart wounds by the time Atwater made sure he was dead by cutting his throat. Evidence of acts after death are not relevant to prove aggravating circumstances. Pope v. State, 441 So.2d 1073 (Fla. 1983).

The killing in this case was not cold and calculated and was done with a pretense of legal or moral justification. Accordingly, the jury instruction on this aggravating circumstance over defense objection (R1519-20) and the later factual finding that it existed were both in error. Remand is therefore necessary for a new penalty phase jury or at least for a new sentencing order.

ISSUE XI

THE SENTENCING ORDER DID NOT CLEARLY SAY WHICH NONSTATUTORY MITIGATING FACTORS THE JUDGE FOUND OR WHAT WEIGHT HE GAVE THEM.

In his sentencing order, the judge discussed the defendant's nonstatutory mitigating factors but did not say which ones he found to exist.

> In considering any other aspect of Defendant's character or record or any other circumstances in the evidence which was proffered as a mitigating circumstance, the Court has carefully considered the following: whether the Defendant was under the influence of mental or emotional distress (even if not "extreme"); whether the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired (even if not "substantially" impaired) by lack of intelligence, personality disorder, consumption of alcohol, or a perception that his aunt was being treated abusively by the victim. The Court additionally considered and weighed the Defendant's family background and his lack of a close family relationship. All of these factors were presented to the jury during the penalty phase of the proceedings in this case, as well as now being fully considered and weighed by the Court. . . . It is the finding of the Court that, having considered and weighed those statutory aggravating factors which were found to be proven beyond a reasonable doubt and having considered and weighed all mitigating factors presented, that the aggravating circumstances greatly outweigh the mitigating circumstances.

(R715)

This order, filed eleven days after Campbell v. State, 571 So.2d 415 (Fla. 1990), was decided, failed to comply with Campbell and Rogers v. State, 511 So.2d 526 (Fla. 1987). Campbell said that

> the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant. . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . . The court must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.

Id. at 419-20. Although the last-quoted sentence in the order showed that the judge apparently found some mitigating circumstances, the order did not reveal which mitigating circumstances these were, did not evaluate them, and did not determine how much weight they had. The order said merely that the judge had "fully considered and weighed" them. Absent a statement of which circumstances were found, proper appellate review is difficult if not impossible.

The defense presented these nonstatutory mitigating circumstances to the judge, and the evidence supported them. (R1338-39) Atwater had a history of cocaine, marijuana, and alcohol use. (R1678-79) He drank several beers and six or seven shots of Chevis Regal the night he went to Smith's apartment. (R1573-74, 1660) Cuyler, who saw Atwater leave the apartment, said that Atwater appeared to have been drinking, although Cuyler could not say that he was in fact drunk. (R1593-95) He scared people when he drank. (R1612) Although he could walk and talk and may not have been intoxicated, he was under the influence of alcohol.

Dr. Merin testified, without rebuttal, that alcohol intake had loosened Atwater's controls as a possible marginal statutory mitigating circumstance. (R1690) He had experienced significant emotional trauma while growing up, with an abusive and promiscuous mother, no significant male present, no chance for a meaningful relationship with an adult, and early substance abuse. (R1697, 1709) Given his background, turning out differently would have been difficult. (R1698) In addition, the State's own theory of the case, substantiated by evidence it expressly chose to introduce, was that the killing arose from Atwater's anger over Smith's treatment of his aunt. Atwater believed that Smith had abused his aunt in the past, and he witnessed a specific incident in which Smith had pushed her to the ground. (R1661-62)

The evidence of the control-reducing effect of alcohol intake, coupled with the circumstances of Atwater's relationship with his aunt, his desire to protect

her, his poor impulse control, his anti-social traits, and his history of substance abuse, strongly supported at least one substantial mitigating circumstance. See Ross v. State, 474 So.2d 1170 (Fla. 1985) (error not to consider as a collective significant mitigating factor that defendant had drinking problems, had been drinking when he attacked the defendant, and killing resulted from domestic dispute in which he had difficulty controlling his emotions); Penn v. State, 574 So.2d 1079 (Fla. 1991) (heavy drug use and wife told defendant that mother stood in way of their reconciliation); Fead v. State, 512 So.2d 176 (Fla. 1987) (court has frequently found alcohol or drug abuse as a mitigating circumstance). Similarly, his difficult childhood was another substantial mitigating circumstance. Nibert v. State, 574 So.2d 1059 (Fla. 1990); Brown v. State, 526 So.2d 903 (Fla. 1988); Hollsworth v. State, 522 So.2d 354 (Fla. 1988).

Each of these mitigating circumstances was at least as substantial as any of the statutory mitigating circumstances, if not more so. Nevertheless, the sentencing order did not say which of these circumstances the trial judge found and how much weight they had. This was error requiring remand for a new sentencing order.

ISSUE XII

THE DEATH SENTENCE WAS A DISPROPORTIONATE PENALTY.

As discussed in Issue XI, the nonstatutory mitigating circumstances could fairly be grouped together to constitute two substantial mitigating circumstances. Atwater's difficult childhood was one such mitigating circumstance, and the control-reducing effects of alcohol intake, coupled with the circumstances of Atwater's relationship with his aunt, his desire to protect her, his poor impulse control, his anti-social traits, and his history of substance abuse, supported

another substantial mitigating circumstance. In this brief, he has challenged the sufficiency of the three aggravating circumstances and challenged the jury instruction for one of them.

Certainly, this Court's decisions on the three issues relating to the aggravating circumstances will have some impact on its consideration of proportionality. If, for example, only one aggravating circumstance remains, then the death sentence is disproportionate because this case had mitigation, and death sentences with only one aggravator are generally not affirmed if mitigation exists. McKinney v. State, 579 So.2d 80 (Fla. 1991). Moreover, each of the aggravators was weak. Incontestably, the robbery aggravator relied on a factor which was not the primary motive for the act. It was less heinous, atrocious, or cruel than many other homicides because it could have occurred in less than a minute with little if any foreknowledge of death. It was probably done in a frenzy with some pretense of protecting Adele, which made it much less cold and calculated than the typical execution or contract murder.

In any event, the number of aggravating and mitigating circumstances does not dispose of this issue. This case involved fear that a man was taking the defendant's surrogate mother away and anger over his mistreatment of her. This Court has consistently found that the death penalty is disproportionate for domestic cases of this sort. For example, in Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975),

> the crime arose from a love triangle in which the Appellant flew into a violent rage after the husband of the woman he loved had beaten her. Appellant grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal injuries to the brain.

These facts were substantially similar to the triangle in the present case, in which, according to the State's theory of the case, the Appellant became angry

over Smith's mistreatment of his aunt, and, during a confrontation in Smith's apartment, finally killed him with several blows of a knife. This Court found that death was a disproportionate penalty for these facts and it should find the same in the case at hand.

In Blakely v. State, 561 So.2d 560 (Fla. 1990), the trial court found that the defendant's bludgeoning of his wife with a hammer was heinous, atrocious, or cruel, as well as cold, calculated, and premeditated. The defendant was angry because his wife favored her own child, and they argued on the night of her death. This Court found that the death penalty was disproportionate for this domestic case. The decision emphasized that, as in the present case, the defendant had committed no prior similar crime.

In Ross v. State, 474 So.2d 1170 (Fla. 1985), the trial court found that the killing was heinous, atrocious, or cruel. As in the present case, the defendant had a drinking problem but he was not drunk that night. Just as in this case when Dr. Merin testified that Atwater had poor impulse control which was reduced even further by alcohol, the defendant in Ross was involved in "an angry domestic dispute in which the victim realized the appellant was having trouble controlling his emotions." Id. at 1174. Also like the present case, the defendant had not committed prior violent felonies and the killing had probably occurred quickly. Consequently, the death penalty was disproportionate.

In Blair v. State, 406 So.2d 1103 (Fla. 1981), the defendant became angry when his wife threatened to go to the police about his sexual advances to their child. He purchased a gun, had his son dig a burial site, sent his children away, and killed her with the gun. The death sentence was disproportionate for this crime because it involved a domestic dispute.

In Farinas v. State, 569 So.2d 425 (Fla. 1990), the defendant was jealous that the woman who had lived with him was perhaps becoming involved with another

man. Although the killing was heinous, atrocious, or cruel and occurred during a kidnapping, this Court found the death sentence disproportionate because, like the present case, it involved jealousy and fear within a domestic dispute.

Like the above cited cases, the present case involved violence committed within a domestic triangle. Consequently, imposing the death sentence for it was disproportionate.

CONCLUSION

Appellant asks for the following relief:

Issue I: discharge on the robbery count, or, as a lesser alternative, a judgment for petty theft, or as a lesser alternative, a judgment for attempted robbery.

Issue II: a new trial on premeditated murder alone.

Issues III and IV: a new trial.

Issues V, VI, and VII: a new penalty phase before a jury.

Issues VIII, IX, and X: striking of an aggravating circumstance with a new penalty phase before a jury, or, as a lesser alternative, a new sentencing proceeding.

Issue XI: a new sentencing proceeding.

Issue XII: entry of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 24 day of March, 1992.

Respectfully submitted,

Steve Krosschell

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

STEPHEN KROSSCHELL
Assistant Public Defender
Florida Bar Number 351199
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

SK/mlm