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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,139

KENNETH WATSON,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a direct appeal by the defendant Kenneth Watson from an adjudication of guilt and sentence of death entered following a jury trial before the Honorable Juan Ramirez, Circuit Judge, Eleventh Judicial Circuit, Dade County, Florida.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Transcript of Proceedings

(ST) - Supplemental Transcripts of October 2, 1991
Volumes I and II

STATEMENT OF THE CASE

Mr. Watson was charged by indictment with first degree murder, armed robbery and armed burglary. (R.1-3A).

TRIAL

A. Defendant's Challenge For Cause of Jurors Webster, Benton and Vento

During voir dire, defense counsel asked the prospective jurors whether they could accept the principle that a defendant does not have to produce evidence or testify at trial. (S.T. 162). Three of the jurors indicated that they could not accept this principle. (S.T. 163-64, 168-69). When asked how they would feel if the defendant offered no evidence or did not testify, the three jurors responded as follows:

Juror Webster:

> MR. SMITH: Right. Who feels the same way as Ms. Mena, that it would concern them if we didn't prove anything by bringing witnesses or bringing evidence?
>
> Ms. Webster, that would concern you?
>
> MS. WEBSTER: Yes, that would.
>
> MR. SMITH: Why would it concern you? Same reason or for a different reason, you wonder why what we're doing here?
>
> MS. WEBSTER: I think he should have the opportunity to have witnesses come in and testify for him.
>
> MR. SMITH: Let's say we do have the opportunity but we choose not to do it, would it concern you?
>
> MS. WEBSTER: Yes, it would because I think of that he was not being fairly represented in the criminal justice system.

MR. SMITH: Would it cause you to wonder whether or not Mr. Watson was guilty if we didn't put on any evidence?

MS. WEBSTER: I can't say that I would think that in my mind because in my mind I think he's innocent until proven guilty.

MR. SMITH: Okay. Let's say that they present their evidence and they rest their case and then the judge says to us what evidence do you have to present and we say none, would that concern you, would you think that Mr. Watson's probably guilty because we did that?

It's a hard question.

MS. WEBSTER: It is.

MR. SMITH: What do you think? The reason I'm asking you this is because there's a rule that says we're not required to do anything and if it would be difficult for you to follow the rule, as I said, the worst that happens is that you're not on the jury in this case. And if that rule is --

MS. WEBSTER: I don't think I could accept the fact that he did not present any evidence. (S.T. 163-64).

Juror Benton:

MR. SMITH: Mr. Benton, what do you think about that?

MR. BENTON: I believe if you didn't defend him you're not doing your job.

You need some defense, you don't just sit there.

MR. SMITH: What about Mr. Watson, what would you be thinking if we did that with Mr. Watson?

MR. BENTON: Where is the alibi or whatever.
(S.T. 164).

Juror Vento:

MR. SMITH: Mr. Vento, how about that?

MR. VENTO: I don't think nothing, its a very hard question.

MR. SMITH: I know it is, I don't ask easy questions.

MR. VENTO: You have to present something.

MR. SMITH: Well, what if we didn't present any witnesses or didn't put on any evidence and the judge told you we don't have to, would you say well, the judge told me they don't have to, but it bothers me and I'm thinking about it. You see, it's tough to try to juggle those two things.

MR. VENTO: Would bother me.

MR. SMITH: Could you follow the law if the law said we didn't have to?

MR. VENTO: I don't know.

MR. SMITH: That would cause you some problem?

MR. VENTO: Yes.

(S.T. 168-69).

None of these three jurors modified, retracted or was otherwise rehabilitated from their expressed inability to accept the law.

Defense counsel moved to strike these three jurors for cause. (S.T. 243, 244, 246). The court denied all three challenges. (S.T. 243, 244,, 246). Defense counsel was forced to exercise peremptory challenges against all three, (S.T. 249, 253, 255), and subsequently exhausted his remaining challenges. Defense counsel requested three additional peremptory challenges (S.T. 261);

however, the court permitted only one. Defense counsel pressed for two more peremptory challenges, specifically identifying the objectionable jurors. (S.T. 262). The trial court denied this motion.

B. Juror Moss Informs Jury That Based On His Knowledge Of Case Death Only Appropriate Penalty

During voir dire, the panel was asked whether anyone had read or heard about the case. (S.T. 64). Juror Moss indicated at sidebar that he had read about the case in the newspaper and that he remembered that the crime was "kind of heinous." (S.T. 66). Later, defense counsel asked the jurors whether they believed that the death penalty should be the only punishment for first degree murder. (S.T. 204). Juror Moss stated in front of the entire juror venire:

> MR. MOSS: Okay, knowing a little bit about what happened, the crime itself, and the violent nature of it, the heinous nature of it and my opinion, I think I would have a lot of trouble trying to find mitigating circumstances if, if the defendant was convicted, I would have trouble finding mitigating circumstances against the death penalty in this particular case.

(S.T. 205).

Defense counsel immediately requested a sidebar, to no avail. (S.T. 205). At the conclusion of voir dire, but before the panel was chosen, defense counsel moved to strike the entire panel as

prejudiced by juror Moss' comments. (S.T. 239-240).[1] Without any inquiry of the panel, the court denied the motion. (S.T. 241).

C. Jurors Allowed To Participate In Examination of Witness

Before the opening statement, the court indicated that it was going to allow the jurors to submit questions during the trial and if the court felt the questions were appropriate it would pose the jurors' questions to the witnesses. Defendant objected to this procedure. (S.T. 266). During the trial, over the continuing objection of counsel, the jurors submitted numerous questions to the trial court. (T. 995, 1038, 1127, 1128, 1213, 1344, 1345, 1346). The court posed some of the jurors' questions to witnesses and refused to pose others. (T. 995, 1037, 1410).

D. Opening Statement by Prosecutor

During opening statement, the prosecutor made improper comments which were designed to inflame the passion of the jurors by appealing to their sympathy:

The prosecutor began his opening statement by telling the jury that the victim Ella Hickman, was a 53 year old woman, was for fifteen years "the wife of the Reverend Donnie Hickman . . . known affectionately by her friends as Sister Ella, Sister Hickman." (S.T. 274). Defendant objected and at sidebar moved for a mistrial since the statements were designed solely to invoke sympathy and

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[1] The court did grant defense counsel's request to strike juror Moss for cause. (T. 245).

had no relevance to defendant's innocence or guilt. (S.T. 274). The court denied defendant's motion for mistrial. (S.T. 277).

The prosecutor thereafter persisted in an attempt to illicit sympathy from the jury. He again stated that Ms. Hickman was "known affectionately by her good friends as Sister Ella, or Sister Hickman, by the younger people as Mama" and that Mrs. Hickman "worked hard as a housekeeper four days a week." (S.T. 278). Defendant's objection to this irrelevant and prejudicial argument was overruled. (S.T. 278). The prosecutor emphasized to the jury the impact of the offense upon the victim and her husband when he asked the jury to "[t]hink about what Ella had gone through" (S.T. 181) and then told the jury "[Mr. Hickman's] whole life was shattered." (S.T. 181). Once again, defendant's motion for mistrial was denied. (T. 827-28).

E. Juror Abernott Telephones Co-Worker And Describes Prosecution As "Open and Shut"

Immediately after opening statement, Juror Abernott called her place of work, telling a co-worker that she had been selected to serve on an "open and shut case."[2] (T. 875). Pursuant to the trial court's leading and suggestive questions, the juror stated that all she meant by this comment was that the trial was going to be short. (T. 876-79). The court accepted this explanation and denied defendant's motion to replace juror Abernott with an

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[2] The juror worked at the same place where the victim's stepson worked. (T. 874).

alternate juror, or, in the alternative, his motion for mistrial. (T. 877-78).

F. Facts

On October 31, 1988, Donnie Hickman came home from work at approximately 4:30 p.m. (T. 835). As he approached his front door, he noticed a broken window on the porch. (T. 847). Mr. Hickman walked around the perimeter of the house and, noting nothing else amiss, he entered it. (T. 847).

As Mr. Hickman entered the house, he saw his wife's purse on the living room floor with its contents emptied. (T. 849). He also noticed a cigarette butt on the living room floor. He proceeded into his son's room, where a container of coins had been emptied onto the floor. (T. 850). Mr. Hickman then went into his bedroom and discovered that his cuff links and ties had been moved. (T. 861). After looking in his room, Mr. Hickman entered his wife's room, where he found her body bound with rope, lying on the floor. (T. 891). He immediately called 911, then went to his neighbor's house. (T. 894).

Dr. Barnhardt, a medical examiner, testified that the victim had suffered six stab wounds around the head and neck area and that the cause of death was a stab wound to the carotid artery. (T. 1113). The doctor opined that the victim died within minutes after receiving this wound. (T. 1106).

Technician Stoker gathered evidence at the scene: blood stains by the alarm box, front door, closet door and bathroom door; (T. 1055-57) and a cigarette butt in the living room. (T. 1081).

After gathering the evidence, the technician lifted fifty-one fingerprints. (T. 1151). Two of the prints were found on a glass bottle near the victim's body (T. 1142) and one was found on a glass bowl in the living room. (T. 1134). The remaining prints were found around the house. (T. 1131-44).

Technician Miller, a fingerprint examiner, testified that of the fifty-one latent prints he received, thirteen were of value. (T. 1279). He put these prints into the computer and the computer listed twenty potential suspects, including the defendant. The computer did not rate defendant as the primary suspect. (T. 1328).

Technician Miller compared defendant's fingerprints with the thirteen latent prints. His opinion was that two fingerprints lifted from the glass bottle found near the victim's body, and one print found on a glass bowl in the living room matched defendant's fingerprints. (T. 1288-89). After receiving Technician Miller's report, Detective Decora contacted numerous family members of the victim to see if they knew defendant. When the family members indicated they did not, the detective obtained an arrest warrant for defendant. (T. 1370).

On December 8, 1988, Detective Capittillo went to the Clayton County Jail in Georgia, to interview defendant. (T. 365). The detective advised defendant of his constitutional rights and defendant told the detective he knew his rights but he would not sign anything. (T. 369). The defendant spoke to the detective for one hour, denying any involvement in the homicide. (T. 377).

Defendant terminated the interview and told the detective if he had anything else to say he would contact the detective. (T. 377).

On June 14, 1989, Detective Fabregas, along with another detective, went back to Georgia in an attempt to get a statement. (T. 1420). According to the detective, defendant now waived his rights (T. 1422-24) and stated that "he entered the house with an intent to do something other than kill her and that he was there with an additional person." (T. 1429). The statement was not recorded nor memorialized in any way. (T. 1436).

During the investigation, the police obtained blood samples and saliva samples from defendant. Teresa Merritt, a forensic serologist, tested defendant's blood and determined that defendant had blood type B and that he was a secreter. (T. 1197). The serologist admitted that Donnie Hickman, the victim's stepdaughter Yolanda Davis, and the victim's stepson Christopher Hickman, were also blood type B secreters. (T. 1201).

An examination of the blood found in the hall, floor and closet door revealed that it was type B. (T. 1203). The saliva found on the cigarette butt was also left by a blood type B secreter. The serologist admitted that 22% of the black population has blood type B and are secreters. (T. 1204).[3]

After deliberation, the defendant was convicted on all counts. (R. 192-94).

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[3]The Hickmans, Yolanda Davis and defendant were all black Americans.

PENALTY PHASE

Prior to trial, defendant filed a motion alleging that under the Eighth and Fourteenth Amendments of the Federal Constitution, the trial court was required to instruct the jury that it was prohibited from considering two aggravating circumstances supported by a single aspect of the crime. (R. 68-69). A second motion alleged that Florida's jury instruction defining heinous, atrocious, and cruel was unconstitutionally vague. (R. 60-63). These motions were denied. (T. 401, 502).

During the penalty phase charge conference, the motions were renewed and again denied. (T. 1914, 1917). Defense counsel additionally requested that the jury be instructed regarding specific non-statutory mitigating factors, but the request was denied. (T. 1927-29).

The state's evidence consisted of two prior convictions: one for kidnapping in Georgia, in 1989; and one for aggravated assault, in 1981. (T. 1761, 1766).

The defense called Dr. Toomer, a psychologist. Dr. Toomer had conducted a psychodiagnostic interview with Kenneth Watson, then 26-years old. (T. 1771). Mr. Watson was born in Jacksonville, to a poor family from the projects, and moved to Miami when he was four years old. (T. 1773-74). Mr. Watson had five sisters and seven brothers and was raised primarily by his mother -- because his father was a truck driver who was usually on the road. (T. 1774). Mr. Watson completed the seventh grade. (T. 1774).

Dr. Toomer was of the opinion that Mr. Watson's family was dysfunctional, in that there was no effective communication nor appropriate nurturing. (T. 1774). The doctor indicated that he had an extremely difficult time interacting with defendant and that the interview revealed that Kenneth had impaired insight and judgment. (T. 1778). The doctor also observed that Kenneth had no plans or aspirations when he was a child. (T. 1779).

After conducting the psychological interview, Dr. Toomer gave Kenneth a digital span test, which showed that he had a weak cognitive processing ability. (T. 1780). The doctor also conducted the revised Beta exam, which revealed an IQ of 73, indicating borderline retardation. (T. 1786). Based on these tests, the doctor concluded that Kenneth's retardation caused severe emotional problems, which resulted in his committing the crime while under the influence of extreme mental disturbance. (T. 1787). In addition, Mr. Watson lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (T. 1789).

After the defense rested, the state indicated that it intended to call Dr. Haber, who had been listed in a pleading as a rebuttal witness. (T. 1842). The defense objected on the basis of a discovery violation: the state had failed to notify defense counsel of Dr. Haber's oral report to the prosecutor. (T. 1854-1858). The court ruled that the state's failure to give defense counsel Dr. Haber's oral report was not a discovery violation, because Dr. Haber previously had been listed as a witness. (T. 1908).

Dr. Haber testified to the contents of his oral report to the prosecutor. He had reviewed the revised Beta exam given by Dr. Toomer and had concluded that the test was based on an improper method, and that, in addition, it had been improperly calculated. (T. 1874). Dr. Haber said that had Dr. Toomer properly calculated the figures yielded by the improper methodology, the test result would indicate a much lower IQ even than that reported by Dr. Toomer; Dr. Haber said a proper calculation yielded an intellectual deficit so profound as to be inconsistent with his observations of the defendant. (T. 1874).

The jury, by a 10-2 vote, recommended the death penalty. The court then dismissed the jury panel. (R. 256-57).

One week later, the court allowed testimony concerning the sentence that should be imposed. Coral Lee Watson, defendant's mother, related that Kenneth, now 28 years old, was one of thirteen children; that the family grew up in poverty; and that, during defendant's childhood, defendant's father was rarely home. (T. 1993). This resulted in Mrs. Watson being required to work to support her children, while Kenneth was responsible for taking care of his younger siblings. (T. 1995). Mrs. Watson said that Kenneth dropped out of school in the seventh grade; he had never learned to read or write. (T. 1996). As Kenneth grew up, he developed a severe drug problem, which persisted at the time of the crime charged. (T. 1996-97). Kenneth's sister also testified to his severe drug problem. (T. 2010).

In addition to this testimony on Kenneth's background the court considered the unanimous conclusion of the three court-appointed competency doctors that Kenneth has an extremely low intelligence level. (T. 2072, 2086, 2105).

On November 6, 1991, the trial court pronounced sentence. In the sentencing order, the court found four aggravating circumstances: (1) the defendant was previously convicted of two violent felonies, kidnapping and aggravated assault; (2) the capital felony was committed while defendant was committing a robbery and/or burglary; (3) the capital felony was committed for pecuniary gain;[4] and (4) the capital felony was especially heinous, atrocious, or cruel. (R. 311-13).

In its order, the court acknowledged that the defendant may have had a severe drug problem; that he could not read or write; that he had a low IQ and an intellectual deficit; that he was raised in poverty; and that he had a dysfunctional family. (R. 316). The court nevertheless found no mitigating circumstances. (R. 318).

The court sentenced the defendant to death, as to Count I, as to counts two and three, the court sentenced defendant to two consecutive life sentences and based its departure on the fact that the capital felony was not included in the scoresheet. (R. 318).

A timely notice of appeal was filed. (R. 320-21). This appeal follows.

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[4] After making findings two and three, the order recited that the court had considered only circumstance two. (R. 312).

ISSUES ON APPEAL

GUILT PHASE

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CHALLENGES FOR CAUSE AGAINST JURORS WEBSTER, BENTON AND VENTO WHERE ALL THREE JURORS INDICATED THAT THEY COULD NOT FOLLOW THE LAW CONCERNING DEFENDANT'S RIGHT TO REMAIN SILENT AND NOT PRODUCE EVIDENCE.

II.

DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WHEN, AFTER OPENING STATEMENTS, ONE OF THE JURORS CALLED HER PLACE OF WORK AND STATED THAT SHE WAS SELECTED TO BE ON A JURY IN AN "OPEN AND SHUT CASE."

III.

THE TRIAL COURT DENIED DEFENDANT HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY BY FAILING TO STRIKE THE PANEL WHEN A JUROR INFORMED THE ENTIRE PANEL THAT, BASED UPON A NEWSPAPER ARTICLE, HE FELT THE HOMICIDE WAS HEINOUS AND THE ONLY APPROPRIATE PENALTY WAS DEATH.

IV.

THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS BY ALLOWING THE JURORS TO BECOME ADVOCATES RATHER THAN FACT FINDERS WHEN THE COURT ALLOWED THE JURORS TO QUESTION WITNESSES.

V.

THE TRIAL JUDGE ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S OPENING STATEMENT WHEREIN THE STATE IMPROPERLY APPEALED TO THE SYMPATHY OF THE JURY.

PENALTY PHASE

VI.

THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE RICHARDSON HEARING REQUIRES REVERSAL.

VII.

A NEW SENTENCING HEARING IS REQUIRED BECAUSE THE JURY INSTRUCTIONS FAILED TO PROPERLY DEFINE AND LIMIT WHEN THE DEATH PENALTY IS REQUIRED.

VIII.

THE IMPROPER VICTIM IMPACT ARGUMENT MADE DURING THE STATE'S OPENING ARGUMENT IN THE GUILT PHASE DENIED DEFENDANT A FAIR SENTENCING HEARING.

IX.

THE TRIAL JUDGE FAILED TO CONSIDER AND PROPERLY WEIGH ALL THE MITIGATING CIRCUMSTANCES INTRODUCED DURING THE PENALTY PHASE, IN VIOLATION OF KENNETH WATSON'S RIGHTS UNDER FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

X.

IN CONTRAVENTION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

SUMMARY OF ARGUMENT

GUILT PHASE

I. During voir dire, three jurors expressed strong opinions reflecting their inability to accept that a defendant is not required to produce evidence in a criminal case. These opinions were never modified or retracted by subsequent questioning by the court or the prosecutor. Because there existed reasonable doubt concerning these jurors' ability to give the defendant a fair trial, defense counsel moved to challenge them for cause. The trial court denied these challenges and defense counsel was forced to exhaust his remaining peremptory challenges and request three additional peremptory challenges. Defense counsel identified three objectionable jurors he wanted to excuse. The court only granted the defendant one of the three extra peremptories requested, and therefore two objectionable jurors remained on the panel. This infringement upon the defendant's peremptory-challenge right compels reversal for a new trial.

II. Immediately after opening statement and before the presentation of any evidence, a juror contacted a co-worker by telephone and told her that she was a juror on an "open and shut case." This juror's publicly expressed, preconceived opinion of the defendant's guilt required her dismissal and replacement with the alternate juror. Rather than dismiss the juror, the trial court lectured her about its previous admonition against forming and expressing any opinion about the defendant's guilt prior to deliberation. The court then strongly suggested to the juror that

when she stated that the case was "open and shut," she did not mean that she decided defendant was guilty. The juror's response to the judge's leading questions did not eliminate the strong likelihood that the juror had predetermined the defendant's guilt. The trial court erroneously allowed this juror to deliberate upon defendant's innocence or guilt.

III. The trial court erred in failing to strike the jury panel when one of the jurors announced in the presence of the remaining panel that based upon his extra-judicially acquired knowledge of the case, he concluded that the crime was extremely heinous and that death was the only appropriate penalty. Exposure of the panel to this damning extrajudicial information vitiated the defendant's right to a fair trial.

IV. Prior to the trial, the trial court indicated that it would allow the jurors to ask the witnesses questions that were approved by the court. Defense counsel objected to this procedure. By allowing the jurors to propound questions, the trial court allowed the jurors to become adversaries, in derogation of the strict neutrality required by that body.

V. In opening statement, the prosecutor, despite repeated defense objection, engaged in impermissible "victim impact" and "golden rule" argument. These improper arguments appealed to the sympathy of the jurors and prevented them from reaching a neutral and dispassionate resolution of both guilt or innocence and the appropriate penalty. A new trial and sentencing hearing are therefore required.

PENALTY PHASE

VI. Dr. Haber had been appointed to conduct a competency evaluation. During the trial the state hired Dr. Haber to give opinions concerning sentencing. Prior to sentencing, Dr. Haber furnished the state with new opinions related to sentencing that were not included in his original report. The state's failure to apprise defense counsel of the new report constituted a discovery violation. The trial court wrongfully concluded that there was no discovery violation, and, consequently, failed to conduct an adequate *Richardson* inquiry into the critical question of procedural prejudice.

VII. The jury instructions failed to properly guide the jury as to the correct application of the death penalty. Over defense objection the court failed to instruct the jury that it could not rely on two aggravating factors that were supported by a single aspect of the crime. The court also failed, over defense objection, to define the several non-mitigating factors that may have applied to this case. Additionally, over defense objection, the court gave the jury an unconstitutionally vague instruction on the heinous, atrocious and cruel aggravator. In light of the several mitigating factors established at trial it can not be established beyond a reasonable doubt that the improper jury instructions did not impair the jury's death recommendation.

VIII. The trial court recognized that several mitigating factors were established at the sentencing hearing. However, the court in deciding to impose the death penalty, erroneously failed

to weigh any of these mitigating factors. Therefore, a new sentencing hearing is required.

ARGUMENT
I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CHALLENGES FOR CAUSE AGAINST JURORS WEBSTER, BENTON AND VENTO WHERE ALL THREE JURORS INDICATED THAT THEY COULD NOT FOLLOW THE LAW CONCERNING DEFENDANT'S RIGHT TO REMAIN SILENT AND NOT PRODUCE EVIDENCE.

A trial court's discretion to decide a juror's competency for cause is limited by the Sixth Amendment of the United States Constitution and Article I, Section 16 of the Florida Constitution, which provide a criminal defendant the right to an impartial jury. A challenge for cause **must** be granted:

> if there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial.

Singer v. State, 109 So. 2d 7 at 23-24 (Fla. 1959); *Accord Moore v. State*, 525 So. 2d 870 (Fla. 1988); *Hill v. State*, 477 So. 2d 553 (Fla. 1985); *Price v. State*, 538 So. 2d 486 (Fla. 3d DCA 1989); *Gilbert v. State*, 593 So. 2d 597 (Fla. 3d DCA 1992); and *Henry v. State*, 586 So. 2d 1335 (Fla. 3d DCA 1992). A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. *Hamilton v. State*, 547 So. 2d 630, 635 (Fla. 1989); *Price v. State, supra*. Close cases should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. *Club West Inc. v. Tropigas of Florida, Inc.*, 514 So. 2d 426 (Fla. 3d DCA 1987); *Sydelman v. Benson*, 463 So. 2d 533 (Fla. 4th DCA 1985). A juror should be not only impartial, but beyond even the suspicion of impartiality.

In the present case, defense counsel asked all the prospective jurors whether they would have any problems following the most basic principle of our criminal justice system: a defendant does not have the burden to establish his innocence either by producing witnesses, or by testifying on his own behalf. The answers given by Jurors Webster, Benton and Vento demonstrated that these jurors could not accept this principle.[5]

Juror Webster:

> MR. SMITH: Who feels . . . that it would concern them if we didn't prove anything by bringing witnesses or bringing evidence?
>
> MS. Webster, that would concern you?
>
> MS. WEBSTER: Yes, that would.
>
> MR. SMITH: Why would it concern you? Same reason or for a different reason, you wonder why what we're doing here?
>
> MS. WEBSTER: I think he should have the opportunity to have witnesses come in and testify for him.
>
> MR. SMITH: Let's say we do have the opportunity but we choose not to do it, would it concern you?
>
> MS. WEBSTER: Yes, it would because I think of that he was not being fairly represented in the criminal justice system.
>
> MR. SMITH: Would it cause you to wonder whether or not Mr. Watson was guilty if we didn't put on any evidence?
>
> MS. WEBSTER: I can't say that I would think that in my mind because in my mind I think he's innocent until proven guilty.

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[5]This principle was extremely relevant in this case, because the defense did not intend to present any evidence.

MR. SMITH: Okay. Let's say that they present their evidence and they rest their case and then the judge says to us what evidence do you have to present and we say none, would that concern you, would you think that Mr. Watson's probably guilty because we did that?

It's a hard question.

MS. WEBSTER: It is.

MR. SMITH: What do you think? The reason I'm asking you this is because there's a rule that says we're not required to do anything and if it would be difficult for you to follow the rule, as I said, the worst that happens is that you're not on the jury in this case. And if that rule is --

MR. WEBSTER: I don't think I could accept the fact that he did not present any evidence. (S.T. 163-164). (emphasis added)

The last comment establishes beyond any doubt that Juror Webster could not follow the law and could not be a fair and impartial juror. Neither the prosecutor nor the trial court made any effort to rehabilitate this juror from her conceded inability to follow the law. Juror Webster never repudiated, retracted or modified her disqualifying admission.[6]

Juror Benton:

MR. SMITH: Mr. Benton, what do you think about that?

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[6]This Court has recently recognized that if a juror gives answers that indicate she may not be a fair juror, it is the state or court's burden to attempt to rehabilitate the juror. (*See Bryant v. State*, 601 So. 2d 529 (Fla. 1992). *See also Wilkins v. State*, Florida L. Weekly (Fla. 3d DCA Case No. 91-2456 1992)(Court recognized that when jurors last response indicating potential prejudice was not retracted or modified, juror must be stricken for cause.)

MR. BENTON: I believe if you didn't defend him you're not doing your job.

You need some defense, you don't just sit there.

MR. SMITH: What about Mr. Watson, what would you be thinking if we did that with Mr. Watson?

MR. BENTON: Where is the alibi or whatever.

(S.T. 164). (emphasis added)

Juror Benton's last comment, like that of Juror Webster, indicated that he would require the defendant to present some evidence, to establish an "alibi or whatever." Neither the prosecutor nor the trial court made any effort to rehabilitate this juror, either.

Juror Vento:

MR. SMITH: Mr. Vento, how about that?

MR. VENTO: I don't think nothing, it's a very hard question.

MR. SMITH: I know it is, I don't ask easy questions.

MR. VENTO: You have to present something.

MR. SMITH: Well, what if we didn't present any witnesses or didn't put on any evidence and the judge told you we don't have to, would you say well, the judge told me they don't have to, but it bothers me and I'm thinking about it. You see, it's tough to try to juggle those two things.

MR. VENTO: Would bother me.

MR. SMITH: Could you follow the law if the law said we didn't have to?

MR. VENTO: I don't know.

MR. SMITH: That would cause you some problem?

MR. VENTO: Yes. (S.T. 168-169) (emphasis added)

(S.T. 168-69).

Juror Vento admitted that he would have a hard time following the court's instructions concerning the fact that a defendant did not have to produce evidence in a criminal case. Mr. Vento specifically stated that he did not know if he could follow the law in this regard, and that trying to do so would cause him problems. (S.T. 169). Despite this juror's admitted doubt about his ability to accept the state's burden of proof, neither the prosecutor nor the trial court attempted to rehabilitate him.

All three jurors acknowledged an inability to accept the state's burden of proof. All three jurors required the defendant to present evidence of his innocence. This Court, in *Singer*, held that such a juror is incompetent to serve:

> "The accused, guilty or innocent, is entitled to the presumption of innocence in the mind of every juror until every element of the offense charged against him has been proved by competent evidence adduced upon the trial beyond a reasonable doubt. This is not accomplished when a juror is taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocence to avoid a conviction at the hands of that juror". (emphasis added)

Singer v. State, supra, 109 So. 2d at 24, (quoting Justice Buford in *Powell v. State*, 131 Fla. 254, 175 So. 213, 216 (1928)).

This Court reaffirmed this principle in *Hamilton v. State, supra*, in which the trial court erroneously refused to excuse a juror who, like jurors Webster, Benton, and Vento, indicated that

she would want the defendant to introduce evidence to establish that he was innocent. Even though the juror in *Hamilton* subsequently indicated that she could judge the evidence with an open mind at trial and on the instruction given by the court, this Court concluded that her responses, taken as a whole, raised a reasonable doubt about the juror's ability to be impartial.

This case is far more compelling than *Hamilton*. Unlike the juror in *Hamilton*, none of the jurors in this case subsequently indicated that he could follow the court's instruction regarding the state's burden of proof. Neither the prosecutor nor the trial court endeavored in any measure to rehabilitate these jurors. *See Gibson v. State*, 534 So. 2d 1231 (Fla. 3d DCA 1988)(juror who indicated that she would require defendant to testify in order to find him not guilty because "I feel if they are innocent, they can tell their side of the story to the judge," should have been excused for cause despite the fact that she said she would not hold it against defendant if he did not testify); *Diaz v. State*, 17 Florida L. Weekly 2502 (Fla. 3d DCA 1992)(juror's desire that defendant produce evidence required removal for cause); *Wilkins v. State, supra*, (juror who admitted she could not follow law concerning reasonable doubt should be excused). *See also Powell v. State*, 131 Fla. 254, 262, 125 So. 213, 216 (1937); *Jefferson v. State*, 489 So. 2d 211, 212 (Fla. 3d DCA 1986).

At the conclusion of jury voir dire, defense counsel moved to strike jurors Webster, Benton, and Vento for cause.[7] (S.T. 243, 44, 246). The trial court denied those challenges for cause. Because all three jurors indicated that they could not presume Mr. Watson innocent if the defense failed to present evidence, and defense counsel knew no defense evidence would be presented, counsel was forced to use three peremptory challenges on these jurors. (S.T. 249, 253, 255). After exhausting his peremptory challenges, defense counsel requested three additional challenges, and identified those jurors whom he would strike with the additional challenges. (S.T. 261).[8] The court granted defendant one additional challenge. Defense counsel used that challenge, then renewed his request for two more, which request was denied.[9]

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[7]At the outset of the challenge-for-cause conference, defense counsel moved to excuse another juror on the basis that he expected the defendant to produce evidence. Immediately after the court denied this challenge, defense counsel unsuccessfully sought to challenge the next juror on the same ground. The court asked defense counsel if he intended to challenge all the jurors, and defense counsel advised that he would seek to challenge any juror who was not willing to accept that a defendant was presumed innocent and did not have to produce evidence. (S.T. 242). Right after this assertion, defense counsel moved to strike jurors Benton and Webster, reiterating the same grounds. Once again, the court denied these challenges. (S.T. 243). Defense counsel then unsuccessfully moved to strike Juror Vento whose responses during voir dire were virtually identical to the responses of jurors Webster and Benton. (S.T. 245-46).

[8]One of those was juror Abernott, the subject of Point I(B).

[9]In *Castro v. State*, 597 So. 2d 259, 261 (Fla. 1992), this Court warned:

> [we] caution trial judges to scrutinize with care assertions that jurors cannot be fair. It is much easier to grant additional peremptory challenges when necessary than it is to retry a capital case.

(S.T. 262). Therefore, the trial court's error in refusing to excuse jurors Webster, Benton and Vento was harmful, and a new trial is required. *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990).

II.

DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WHEN, AFTER OPENING STATEMENTS, ONE OF THE JURORS CALLED HER PLACE OF WORK AND STATED THAT SHE WAS SELECTED TO BE ON A JURY IN AN "OPEN AND SHUT CASE."

At the conclusion of opening statements,[10] the trial court instructed the jurors that they were not allowed to discuss the case with anyone, and that they should not form any opinion about the case until they commenced deliberations. (S.R. 287).[11] On the following morning, Juror Abernott[12] violated this order: she called her workplace[13] and told a co-worker that she had been selected as a juror on a first degree murder case, and that the case was "open and shut". (T. 875). When the trial court learned of this violation, it interviewed the juror and she admitted violating the court's order by telling someone that the case was "open and shut".

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[10]The prosecutor's resort to inflammatory and prejudicial argument, in his opening statement, is the subject of Point V.

[11]This instruction was issued pursuant to § 918.06, Florida Statutes (1991).

[12]Juror Abernott was one of the jurors that defense counsel would have excused if the trial court had granted his request for additional peremptory challenges. (S.R. 262).

[13]Juror Abernott worked at the same place that the victim's stepson worked.

(T. 875). Defense counsel requested that the court replace this juror with an alternate. (T. 878). The court denied this request, as well as the defendant's request for a mistrial. (T. 877, 879).

In the case of *Irwin v. Dowd*, 316 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the United States Supreme Court recognized the importance of a juror's having an open mind until the end of jury deliberations:

> In the ultimate analysis, only the jury can strip a man of his liberty. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." Co.Litt 1556. His verdict must be based upon the evidence developed at the trial. *Cf. Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 4 L.Ed.2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807); "the theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244. (emphasis added)

This Court has held that "if there is a basis for any reasonable doubt as to any juror possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at trial he should be excused." *Singer v. State,* 109 So. 2d 7 (Fla. 1959). Accord *Hamilton v. State,* 547 So. 2d 630 (Fla. 1989). This is the standard to be employed when a juror's inability to be fair is discovered during the trial. *Graham v. State*, 470 So. 2d 97 (Fla. 1st DCA 1985)(standard for excusing juror for cause is the same after jury has been sworn). *See also Valle v. State*, 581 So. 2d 40

(Fla. 1991)(juror can be struck for cause after being sworn if good cause shown).

The presumption of innocence and the reasonable doubt standard are the fundamental components of due process in the criminal justice system. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When the actions of a juror reveal that she cannot follow these basic concepts, that juror must be excused. *See Hamilton v. State, supra*, (juror must be excused for cause if responses reveal that she cannot presume defendant innocent).

Juror Abernott, immediately after having heard opening statements only, called a co-worker and told her that the case was "open and shut." (T. 875). Without hearing any testimony, Juror Abernott had plainly decided that the defendant was guilty of the crimes charged. A trial judge must strike a juror for cause when the juror expresses an opinion of guilt prior to the juror's deliberation.[14] *See Medina v. State*, 466 So. 2d 1046 (Fla. 1985)(trial court properly excused juror during trial when it became apparent that juror no longer had open mind); *Roland v. State*, 584 So. 2d 68 (Fla. 1st DCA 1991)(trial court erred in denying defendant's motion to interview juror when affidavit alleged that juror had preconceived notion of defendant's guilt),

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[14]Juror Abernott not only had a preconceived notion of guilt, she also violated the court's order by reaching an opinion before all the evidence was received and talking about the case with co-workers. *See Gonzalez v. State*, 511 So. 2d 700 (Fla. 3d DCA 1987)(error not to conduct a full inquiry when juror committed misconduct by discussing case with people prior to deliberations); *Durano v. State*, 262 So. 2d 733 (Fla. 3d DCA 1972)(error when juror discusses case with other people prior to deliberations.)

Ortiz v. State, 543 So. 2d 377 (Fla. 3d DCA 1989)(juror who indicated in jury voir dire that defendant was guilty had to be excused for cause.)

In *O'Donnell v. State*, 374 S.E. 2d 729 (Ga. 1989), a juror, after being sworn, told a person unrelated to the case that two children had seen appellant shoot the victim and that it was an "open and shut" case. The trial judge in *O'Donnell* recognized that, when a juror states that the case is an "open and shut case," prior to deliberation, the juror must be excused because she has evinced a preconceived notion of the defendant's guilt.[15]

In *McGill v. State*, 468 So. 2d 356 (Fla. 3d DCA 1985), an alternate juror was dismissed prior to deliberations, and confided to the judge her belief that the defendant was guilty. During deliberations, the court discovered that one of the regular jurors did not speak English. Despite the alternate juror's previously expressed belief in the defendant's guilt, the judge re-called her to serve. In reversing defendant's conviction, the Third District Court of Appeal held:

> "Both the majority and minority in Lamb would seemingly agree that a finding that a juror made and publicly expressed an opinion about the defendant's guilt prior to entering into deliberations would require disqualification." (emphasis added)

Id. at 358.

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[15]The appellate court ruled that since the trial court excused the juror who had stated it was an open and shut case, there was no reason to strike the entire jury panel. The trial court in this case should have excused juror Abernott as the trial judge did in *O'Donnell*.

Upon learning that a juror may have publicly expressed an opinion about the defendant's guilt prior to deliberations, the trial court must conduct an objective inquiry into whether the juror is fair and impartial. *See Gonzalez v. State, supra.*

A review of the colloquy between the trial court and juror Abernott reveals that the trial court, upon learning of the juror's expression of opinion about the defendant's guilt, did not conduct an objective inquiry into whether she could nevertheless be fair and impartial. Instead, the trial judge sternly admonished her that she may have violated his order; then, through leading questions, advised the juror that she could escape a finding of violation by stating that she did not have a fixed opinion concerning innocence or guilt:

> JUROR ABERNOTT: I was, yes.
>
> THE COURT: We're not concerned with you calling your work or telling them you're on a jury, but apparently you also made a remark to them, it appeared like an open and shut case.
>
> JUROR ABERNOTT: Oh.
>
> THE COURT: One of the things I instructed you on is that you shouldn't form any definite or fixed opinion until you have heard all the evidence, argument of counsel and my instructions.
>
> Now, I hope, if you did form an opinion, that it was not a definite or fixed opinion because you haven't heard all the evidence yet or argument of counsel or in instructions.
>
> Have you formed any definite or fixed opinion?
>
> JUROR ABERNOTT: What I meant is -- I was talking to them -- I didn't think I would be

here for weeks because of what you had said about going --

THE COURT: So when you were talking about open and shut, was that talk about the length of the trial?

JUROR ABERNOTT: Yes.

THE COURT: Not about the strength of the evidence?

JUROR ABERNOTT: We have not seen any evidence, so I had no opinion of the evidence at all.[16] (emphasis added)

(T. 877).

Juror Abernott's response that "open and shut" meant a short case rather than an overwhelming case for the state was obviously a response produced by leading questions posed by a trial judge whom the juror anxiously sought to appease, in view of her violation of his order.[17]

In fact, the term "open and shut" case has been repeatedly found to mean that the state's case against the defendant is

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[16]After the trial court finished questioning Juror Abernott, defense counsel attempted to clarify what the juror meant by "open and shut." After the juror admitted making the comment the trial court interrupted defense counsel and asked the jury "what you meant is it was a short duration? (T. 876). Once again the juror succumbed to the trial court's leading question and answered the court's question in the affirmative. No further questions were asked of the juror.

[17] In *Price v. State, supra*, the court recognized the following:

> We have no doubt but that a juror who is being asked leading questions is more likely to "please" the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented.

overwhelming; when juror Abernott called the case "open and shut", she plainly meant that the defendant was guilty. *See State v. Van Duyne*, 204 A.2d 841 (S.Ct. N.J. 1964)(code of ethics prohibits a prosecutor from telling the press the case is an "open and shut case"); *Diaz v. State*, 567 So. 2d 18 (Fla. 3d DCA 1990) (allowing jurors to take notes harmless error since state had an "open and shut case"); *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954)(error not harmless because case not "open and shut"); and *United States v. Harrigan*, 586 F.2d 860 (1st Cir. 1978)(erroneous jury instruction required reversal since case was "far from open and shut case.").

Therefore, the fact that juror Abernott told a co-worker, after opening statement, but before any evidence was heard, that the case was "open and shut" indicated the juror's preconception of the defendant's guilt, creating a "reasonable doubt" about her ability to be fair, which was not assuaged by her responses to the trial judge's leading questions. The trial court was required, upon defense counsel's motion, to replace juror Abernott with an alternate. This would not have prejudiced the state and would have guaranteed the defendant his right to an impartial jury under both the Florida and United States Constitutions. Reversal is therefore warranted.

III.

THE TRIAL COURT DENIED DEFENDANT HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY BY FAILING TO STRIKE THE PANEL WHEN A JUROR INFORMED THE ENTIRE PANEL THAT, BASED UPON A NEWSPAPER ARTICLE, HE FELT THE HOMICIDE WAS HEINOUS AND THE ONLY APPROPRIATE PENALTY WAS DEATH.

During voir dire, juror Moss indicated that he had read an article in the newspaper concerning this case. The juror was called sidebar and the trial court instructed him not to discuss what he read in the newspaper with any of the other jurors. (S.T. 66-68). The court also instructed the jurors not to talk to Mr. Moss. (ST. 69). Subsequently, juror Moss was asked in front of the entire panel whether he felt that death was the only appropriate penalty for first degree murder. Juror Moss replied:

> MR. MOSS: Okay, knowing a little bit about what happened, the crime itself, and the violent nature of it the heinous nature of it in my opinion, I think I would have a lot of trouble trying to find mitigating circumstances if, if the defendant was convicted, I would have trouble finding mitigating circumstances against the death penalty in this particular case. (emphasis added)

(S.T. 105).

Counsel immediately requested a sidebar. (S.T. 105). The court ordered counsel to "save it." Shortly thereafter, counsel requested the court to strike the jury panel on the basis that it had become infected by juror Moss' interjection of extrajudicial information that the crime charged was heinous and warranted imposition of the death penalty. (S.T. 239-40). The court denied defendant's request to strike the jury panel.

The purpose of voir dire is to secure an impartial jury. *Lewis v. State*, 377 So. 2d 640 (Fla. 1979). Where, as here, a juror communicates to other panel members material extrajudicial information, he thereby taints the panel, necessitating a new venire, unless the record affirmatively establishes, through questioning by the trial court, a lack of prejudice. *See e.g., Russ v. State*, 95 So. 2d 594 (Fla. 1957); *Moncur v. State*, 262 So. 2d 688 (Fla. 2d DCA 1979); *Marrero v. State*, 343 So. 2d 883 (Fla. 2d DCA 1977); *Kelly v. State*, 371 So. 2d 162 (Fla. 1st DCA 1979). In *United States v. Dennis*, 786 F.2d 1029, 1044 (11th Cir. 1986), *cert. denied*, 95 L.Ed.2d 914, the court stated that "when statements made by potential jurors at voir dire raise the specter of 'potential actual prejudice' on the part of the remaining panel members, specific and direct questioning is necessary to ferret out those jurors who could not be impartial.'" *Citing United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981).

Once Juror Moss had published his opinion that, based on extrajudicial information, this was a heinous crime warranting the death penalty, it was incumbent upon the court either to inquire of the remaining panel members regarding the potential prejudice, or to dismiss the entire panel. The court did neither.

The defendant has the absolute and fundamental right to a fair and impartial jury. Exposure of the entire panel to damning extrajudicial information concerning the crime charged and the

penalty warranted vitiated the defendant's right to a fair jury both at trial and sentencing.

IV.

> THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS BY ALLOWING THE JURORS TO BECOME ADVOCATES RATHER THAN FACT FINDERS WHEN THE COURT ALLOWED THE JURORS TO QUESTION WITNESSES.

Before opening statement, the court informed counsel that it was going to allow the jury to ask questions during the course of the trial. Defense counsel objected to this procedure as unauthorized. The trial court overruled defense counsel's objection and informed the jurors that they could ask questions of the witnesses if the court approved the questions. (S.T. 266).

In *Ferrara v. State*, 101 So. 2d 797 (Fla. 1958), and *Shoultz v. State*, 106 So. 2d 424 (Fla. 1958), this Court observed in dictum with no citations to any authority -- that it was permissible for jurors to submit questions to witnesses.[18] However, the Fourth District Court of Appeal this year condemned the practice of permitting jurors to question witnesses:

> We strongly discourage trial courts from promoting jurors' questions or encouraging jurors to ask questions. While allowing jurors to ask questions of witnesses is permissible, it is hard to discern the benefit of such a practice when weighed against the endless potential for error.

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[18]In *Strawn v. State ex rel. Anderson*, 332 So. 2d 601 (Fla. 1976), this court reiterated in dictum, and citing only *Ferrara* and *Shoultz*, that a trial court has discretion to permit jurors to pose questions of witnesses.

Pierre v. State, 17 Florida L. Weekly 1651 (Fla. 4th DCA 1992).

The potential for error which inheres in juror examination of witnesses, was explained by Chief Judge Levin in *United States v. Johnson*, 892 F.2d 707, 711 (8th Cir. 1989), who states, in his concurrence that:

> The fundamental problem with juror questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process. Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury's role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct.
>
> Allowing juror questions disrupts neutrality, because even a seemingly innocuous juror question can sway the jury's appraisal of the credibility of the witness, the party, and the case. The factfinder who openly engaged in rebuttal or cross-examination, even by means of a neutral question, joins sides prematurely and potentially closes off its receptiveness to further suggestions of a different outcome for the case. While nothing can assure the jury will remain open-minded to the end, keeping the jury out of the advocacy process increases the probability. (emphasis added)

Id. at 713. As Judge Levin noted, juror neutrality is crucial to the truth-seeking process of a trial. It is counsel's job to draw out a witness's misperceptions or the weaknesses of the other side's story. Allowing the fact-finder to assist in this function can only encourage jurors to prematurely adopt one side over the other without the benefit of all the evidence and the court's instructions. *Id.* at 713-715. Furthermore, it is equally important that the process appear fair, neutral and just. "Juror questions

give the impression that the defendant faces a tribunal bias against him."

Another concern is the fact that the admission of evidence is governed by rules that a juror does not know or understand. And though a court may take remedial steps once an improper or prejudicial juror question is posed, those steps "may well make the questioning juror feel abashed and uncomfortable, and perhaps even angry if he feels his pursuit of truth has been thwarted by rules he does not understand." *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d at 512, 516. (4th Cir. 1985)

A review of what occurred in this case establishes why questions submitted by the jurors to the trial court, and posed by the trial court to the witnesses, should not be allowed. Juror examination encouraged the panel members to become advocates rather than factfinders. In particular, inculpatory questions submitted by the jurors and posed to the fingerprint technician were typical of those questions an experienced prosecutor might ask.[19] The questions were so prosecutorial in nature that they motivated the prosecutor to ask follow-up questions. (T. 1345-46; R. 184, 187).

By allowing the jurors to ask questions, the trial court permitted them to weigh in as adversaries, in derogation of the

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[19]The jurors asked the following questions:
(1) Is it possible that the technician made a mistake on all three identifications?
(2) Can you recall any situation either locally, nationally or worldly where any two people have ever had the same fingerprints?
(3) What are the chances of any two people having the same fingerprints)?
(T. 1345-46).

strict neutrality required of the jury and thereby deprived the defendant of his right to a fair trial. Therefore, defendant's right to an impartial jury as guaranteed by both the United States Constitution and Florida Constitution was denied.

V.

THE TRIAL JUDGE ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S OPENING STATEMENT WHEREIN THE STATE IMPROPERLY APPEALED TO THE SYMPATHY OF THE JURY.

A prosecutor's concern "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Modica*, 663 F.2d 1173, 1180 (2d Cir. 1981); *Rosso v. State*, 505 So. 2d 1230 (Fla. 4th DCA 1987). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Modica, supra*.

In *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985), this Court cautioned that a prosecutor's argument should not be used to inflame the jury when the court stated:

> Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

In seeking the return of a guilty verdict, a prosecutor must confine his comments and argument to the merits of the case without indulging in appeals to prejudice, passion or sympathy. *Grant v. State*, 194 So. 2d 612 (Fla. 1967); *Edwards v. State*, 428 So. 2d 357 (Fla. 3d DCA 1983); *Harper v. State*, 411 So. 2d 235 (Fla. 3d DCA

1982). Prosecutorial argument or comment that shifts the jurors' attention away from the evidence and toward sympathy for the victim and the victim's family and hostility for the defendant is prohibited. *See also Lewis v. State*, 377 So. 2d 640 (Fla. 1979); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

In *Jones v. State*, *supra*, this Court recognized the evil in allowing victim impact testimony during the guilt phase when it stated:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Id. at 1239 (emphasis added)

The prosecutor began his opening statement by telling the jury that the victim Ella Hickman, was a 53 year old woman, was for fifteen years "the wife of the Reverend Donnie Hickman . . . known affectionately by her friends as Sister Ella, Sister Hickman." (T. 274). Defendant objected and at sidebar moved for a mistrial since the statements were designed solely to invoke sympathy and had no relevance to defendant's innocence or guilt. (S.T. 274). The court denied defendant's motion for mistrial. (S.T. 277).

The prosecutor thereafter persisted in an attempt to illicit sympathy from the jury. He again stated that Ms. Hickman was "known affectionately by her good friends as Sister Ella, or Sister Hickman, by the younger people as Mama" and that Mrs. Hickman

"worked hard as a housekeeper four days a week." (S.T. 278). Defendant's objection to this irrelevant and prejudicial argument was overruled. (S.T. 278). The prosecutor emphasized to the jury the impact of the offense upon the victim and her husband when he asked the jury "Think about what Ella had gone through"[20] and then told the jury ["Mr. Hickman's] whole life was shattered." (S.T. 181). Defense counsel objected to each of these comments. The court sustained these objections, but denied defendant's motion for mistrial. (T. 827-828).[21]

The Florida courts have repeatedly condemned similar prosecutorial attempts to illicit sympathy for the victims and their families. In *Nevels v. State*, 351 So. 2d 762, 763 (Fla. 1st DCA 1977), the court held it was error for the state attorney, in his opening statement, to call the jurors' attention to the fact that the deceased was married and had a thirteen year old daughter. In *Gomez v. State*, 415 So. 2d 822, 823 (Fla. 3d DCA 1982), the court reversed the defendant's conviction when the prosecutor told

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[20]This argument also violated the "golden rule." By telling the jurors to "think about what Ella had gone through" the prosecutor was telling them to put themselves in the victim's place. *Bullock v. Branch*, 130 So. 2d 74 (Fla. 1st DCA 1961); *Bullard v. State*, 436 So. 2d 962 (Fla. 3d DCA 1983)(by advancing a "golden rule" argument, that is, asking the jurors to place themselves in the victim's position, the prosecutor violated defendant Bullard's right to a fair trial by impartial jurors).

[21]The court offered to give a curative instruction at the conclusion of the opening statement. However, defense counsel properly argued that no curative instruction could cure the error that occurred as result of the prosecutor's continuous improper argument . *See Cuzbak v. State*, 570 So. 2d 925 (Fla. 1990)(request for curative instruction not required where instruction would not overcome error.) (T. 827, 828).

the jury not to let the victim "with three children and a wife walk away without justice in this case." In *Harper v. State*, 411 So. 2d 235 (Fla. 3d DCA 1982), the court found it improper for the prosecutor to comment that the victim's wife and three children were sorry the defendant killed the victim. *See also Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983)(prosecutor's comment asking for justice on behalf of victim's wife and children was "an improper appeal to the jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused"); *Macias v. State*, 447 So. 2d 1020, 1021 (Fla. 3d DCA 1984) (prosecutor's question as to whether victim had ever seen his posthumously born child was improper appeal to sympathy of jury).

A review of the state's entire opening statement reveals that its central theme was that both the victim and her family suffered tremendously as a result of the crime. The issue the jury had to decide was not whether the victim and her family suffered but instead whether defendant was the individual who committed the crimes charged. The improper arguments made by the state violated defendant's due process rights under both the Florida and United States constitutions.

Under this Court's decisions in *State v. Lee*, 531 So. 2d 133 (Fla. 1988) and *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), the state must establish beyond a reasonable doubt that the prosecutor's impermissible comments in its opening statement did not contribute to the jury verdict. The cumulative impact of the

errors committed by the state in its opening argument had to have had an effect on the jury's verdict, therefore, the errors require reversal.

The state's evidence against the defendant consisted of an alleged oral statement and a fingerprint technician's opinion that defendant's fingerprints were found in the victim's home. At the trial, defendant contested both of these pieces of evidence. The alleged oral statement was not recorded, audio or video-taped or transcribed or reduced to writing, or otherwise memorialized.[22] (T. 1449). Nor did the defendant execute a written waiver of his rights. (T. 1444). The defendant had initially denied any involvement in the crime. (T. 370). It was not until one year later that the defendant allegedly confessed to Detectives Fabregas and Roque. (T. 1429). The state did not produce Detective Roque at trial. As defense counsel maintained in closing, it was highly unlikely that Mr. Watson, who is borderline retarded, would have been the author of the statement, reported by Fabregas: "I entered with the intent to do something other than kill her." Defense counsel argued, on the basis of these facts, that the defendant had never made the alleged oral statement. (T. 1542-1547).

Defendant also contested Detective Miller's opinion based on a visual examination, that defendant's fingerprints were the prints found in the victim's house. This opinion was refuted by the

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[22]Defense counsel asked Detective Fabregas why he did not in any way record the defendant's alleged oral statement. The detective responded that he did not know whether the detention facility would permit him to bring recording equipment. (T. 1440).

results of a computer analysis of the three fingerprints. The computer did not list the defendant as a possible suspect as to two of the prints. As to the third print, the computer only named defendant as a suspect after six (6) runs and defendant was not rated the primary suspect. (T. 1328-29). The weight to be accorded Detective Miller's opinion concerning defendant's prints was substantially reduced.

Given the vigorous challenge advanced by the defense to the only two pieces of evidence connecting the defendant to the crime charged, this Court cannot find beyond a reasonable doubt that the prosecutor's misconduct in opening statement did not affect the verdict. Therefore, a new trial is warranted.

PENALTY PHASE

VI.

THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE RICHARDSON HEARING REQUIRES REVERSAL.

Florida Rule of Criminal Procedure 3.220(b)(1)(x) requires the state to furnish the defense "reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons." Rule 3.220(j) imposes a continuing duty promptly to disclose all discovery material and specifically requires the state to inform the defendant if there are any changes or additions to the previously supplied discovery. If an expert gives a report, then later amends it, the state's failure to disclose the new information constitutes a discovery violation. *Lee*

v. State, 538 So. 2d 63 (Fla. 2d DCA 1989); *Alfaro v. State*, 471 So. 2d 1345 (Fla. 4th DCA 1985).

Upon finding a discovery violation, the trial court must conduct a hearing and make an adequate inquiry into all the surrounding circumstances. *Richardson v. State*, 246 So. 2d 771 (Fla. 1971); *State v. Hall*, 509 So. 2d 1093, 1096 (Fla. 1987); *Williams v. State*, 513 So. 2d 684, 685 (Fla. 3d DCA 1987). The trial judge must determine whether the violation was willful or inadvertent; substantial or trivial; and, prejudicial or harmless. *Brown v. State*, 515 So. 2d 211, 213 (Fla. 1987); *Smith v. State*, 500 So. 2d 125, 126 (Fla. 1986); *Smith v. State*, 372 So. 2d 86, 88 (Fla. 1979); *Wilcox v. State*, 367 So. 2d 1020, 1023 (Fla. 1979). The burden is on the state to show that the defendant was not prejudiced. *Cumbie v. State,* 345 So. 2d 1061 (Fla. 1977). Failure to conduct an adequate inquiry requires reversal. *Richardson v. State, supra; Hall v. State, supra.*

In this case, Dr. Haber was initially appointed by the court to conduct a competency evaluation. (R. 46). Dr. Haber interviewed defendant in defense counsel's presence, to determine his competency. The doctor filed a report, which concluded that defendant was competent to stand trial. (T. 2100). Dr. Haber testified at a pretrial competency hearing; his testimony was confined to the issue of competency. (T. 2100).

During the trial and unbeknownst to defense, the State of Florida retained Dr. Haber as an expert and requested that he

review Dr. Toomer's reports.[23] (T. 1888-1889). After reviewing Dr. Toomer's reports, Dr. Haber contacted the state attorney and gave him an oral report that Dr. Toomer had improperly administered and scored the IQ test. Dr. Haber also informed the state that he did not believe any of the statutory mitigating factors applied to defendant. (T. 1899). After trial, the state filed an amended witness list, which included Dr. Haber. (T. 1900). However, the state failed to disclose, pursuant to Rule 3.220(b)(1)(x) that Dr. Haber had furnished an expert opinion which had not been previously included in his competency report.

In *Alfaro v. State*, 471 So. 2d 1345 (Fla. 4th DCA 1985), a trial of manslaughter by drunken driving, the critical issue was the identity of the driver. The medical examiner's report and deposition concerned only autopsies and blood alcohol test results. Shortly before trial, the state directed the medical examiner to perform an accident reconstruction which identified the defendant as the driver. The trial court allowed the expert to testify to the contents of his accident reconstruction report, notwithstanding the prosecution's failure to disclose this report prior to trial. The Fourth District Court of Appeal held that the state's failure to disclose the doctor's new report until trial was a clear violation of the criminal discovery rules. *See also, Neimeyer v. State*, 378 So. 2d 818 (Fla. 2d DCA 1979) (when state receives expert's

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[23] Dr. Toomer was going to be a Defense witness at the sentencing hearing.

oral report which amends prior opinion, state's failure to disclose constitutes a discovery violation).

The trial court ruled that, because the state listed Dr. Haber as a rebuttal witness, its failure to comply with Rule 3.220(b)(1)(x) was not a discovery violation. However, listing a witness does **not** discharge the state's responsibility to comply with other discovery rules. In *Lavigne v. State*, 349 So. 2d 178 (Fla. 1977), the state violated the discovery rules by failing to inform defense counsel that his client made an oral statement. The state argued that there was no discovery violation because the state had given defense counsel the name of the witness to the oral statement; so that, if defense counsel had deposed that witness, he would have learned about the statement. In rejecting this argument and granting defendant a new trial, the court held:

> The State argues that it informed Lavigne that Sciadini would be a witness at the trial, that the State made Sciadini available for interview or deposition, that Lavigne did not move for a continuance, that Lavigne does not claim prejudice and that the trial court's inquiry was sufficient. None of these arguments has merit. Lavigne had no reason to interview or take Sciadini's deposition because he had not been informed by the State as required by a rule of criminal procedure that Sciadini was a witness to an oral statement made by him. There is no requirement that Lavigne ask for a continuance because the State violated a rule of criminal procedure. The law does not require that a defendant claim prejudice; the law requires that the State prove there is no prejudice to the defendant. The trial court did not make the inquiry required by *Richardson v. State, supra*. This was error. (emphasis added)

Id. at 179

Accord, *Brey v. State*, 382 So. 2d 395 (Fla. 4th DCA 1980)(rule requiring state to disclose oral statements not satisfied by listing name of witness who took statement); and *McClennon v. State*, 359 So. 2d 869 (Fla. 1st DCA 1978).

In this case, listing Dr. Haber as a rebuttal witness did not relieve the state of its duty to inform defense counsel of opinions by Dr. Haber that were not furnished in his initial report. Because defense counsel had previously reviewed Dr. Haber's report, and had heard him testify at the competency hearing, defense counsel had no reason to expect that Dr. Haber had formed a new opinion on subjects unrelated to competency.[24] Indeed, the record reflects that the prosecutor first revealed Dr. Haber's new opinion immediately before calling him as a witness. (T. 1844).

Therefore, the state's failure to inform defense counsel of Dr. Haber's expert opinion was a discovery violation necessitating a *Richardson* hearing. Because the court wrongfully had concluded that there was no discovery violation, no inquiry occurred, and therefore, the court entirely failed to inquire into procedural prejudice and appropriate sanctions.[25] (T. 1908). The court's

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[24]When the state requested that Dr. Haber be appointed to evaluate defendant for sentencing, the court denied this request but told the state that if it were to present case law, the court would reconsider. The state never presented any case law nor renewed its request to have Dr. Haber appointed as an expert for sentencing. (T. 532).

[25]Indeed, the inadequate inquiry itself was conducted belatedly, after the witness had concluded his testimony, for, in the trial court's words, "the record" only. (T. 1897).

failure to conduct an adequate inquiry constituted per se reversible error, and a new sentencing hearing is required.

VII.

A NEW SENTENCING HEARING IS REQUIRED BECAUSE THE JURY INSTRUCTIONS FAILED TO PROPERLY DEFINE AND LIMIT WHEN THE DEATH PENALTY IS REQUIRED.

Before *Espinosa v. Florida*, __ U.S. __, 112 S.Ct. 2926, 120 L.Ed.2d 951, (1992) this Court had held that because the trial judge, and not the jury, is the sentencer, vague and incomplete jury instructions regarding aggravating and mitigating circumstances did not offend the Eighth Amendment. *See Smalley v. State*, 546 So. 2d 720 (Fla. 1989). However, in *Espinosa*, the United States Supreme Court, in recognizing the great weight to be accorded the jury's recommendation under Florida's death penalty scheme, held that Florida's capital sentencing authority has been placed in two actors rather than one: the jury and the judge. Thus, in light of *Espinosa*, in order to avoid arbitrary application of the death penalty, vague and improper jury instructions can no longer be justified based upon the rationale that the trial court is the ultimate sentencer.

In the present case, the jury: (a) was not instructed against duplicative consideration of certain aggravators; (b) the jury received a vague instruction on the aggravator "heinous, atrocious and cruel"; and (c) was not informed of the specific, non-statutory mitigating factors which may have applied to this case. Therefore,

under *Espinosa, supra*, defendant is entitle to a new sentencing hearing.

A. No Instruction On Doubling Aggravators

In *Castro v. State*, 597 So. 2d 259 (Fla. 1992), this Court recognized that it is improper for a jury to consider two aggravating circumstances supported by a single aspect of the crime. The court held that "a limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one." The court also concluded that when requested, a limiting instruction must be given.

In this case, defense counsel argued at the charge conference that if the court failed to give a limiting instruction on "doubling," the instructions would be unconstitutional. (T. 1914). Despite this request, the court refused to give the limiting instructions. (T. 1914-15). The state introduced evidence that the homicide occurred during a burglary or robbery and that the homicide was committed for pecuniary gain. The trial judge, in his order, recognized that these two aggravating factors could not both be considered separately, yet failed to tell this to the jury. (R. 312). As a result, the jury may well have improperly considered both of them in reaching its death recommendation. Therefore, a new sentencing hearing is required.

B. Heinous, Atrocious, and Cruel

In *Espinosa v. Florida, supra*, the United States Supreme Court recognized that an aggravating circumstance is invalid if its

description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. The court ruled that the instruction given prior to 1990 which failed to define heinous, atrocious, and cruel was unconstitutional.

In the instant case the trial judge, over the objection of counsel,[26] gave a more detailed jury instruction on heinous, atrocious and cruel.[27] The instruction given in this case still fails to adequately define when a homicide is heinous, atrocious, and cruel. The heinous, atrocious, and cruel instruction that was given in this case was almost identical to the instruction in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) which was held unconstitutional by the United States Supreme Court. In *Shell, supra*, the Court stated, "Although the trial court in this case used a limiting instruction to define the especially heinous, atrocious and cruel factor, that instruction is not constitutionally sufficient."

The last sentence in the Florida instruction which states, "What is intended to be included are those capital felonies where the actual commission of the capital felony is accompanied by such

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[26]Prior to trial, defendant filed a motion to declare the Florida death penalty unconstitutional since the aggravating factor heinous, atrocious and cruel," was vague and could apply to any homicide. (R. 62-65). This objection was renewed at the charge conference. (T. 1915-20).

[27]Counsel recognizes that this Court in *Lucas v. State*, 18 Florida L. Weekly 515 (Fla. 1993) has held that the heinous, atrocious and cruel jury instruction is constitutional. In light of *Shell v. Mississippi, supra*, counsel urges this Court to reconsider its opinion in *Lucas*.

additional acts as to set the crime apart from the norm of capital felonies, that is the conscienceless or pitiless crime which is unnecessarily torturous to the victim," and which was not included in the *Shell* jury instruction, does nothing to channel the broad discretion of the jury in making its recommendation. A juror more than likely has never served on prior capital cases, and therefore, to tell the jury that a heinous, atrocious or cruel homicide is one that is "apart from the norm of capital felonies" does nothing to help the jury determine if the homicide is heinous, atrocious or cruel.

Since the United States Supreme Court has held that an almost identical jury instruction in *Shell v. Mississippi, supra*, was unconstitutional, the jury instruction in this case must be held unconstitutional. Furthermore, since the United States Supreme Court in *Espinosa* has held that a new sentencing hearing is required when the jury is given a vague instruction on heinous, atrocious, and cruel, a new sentencing hearing is required in this case.

C. The Trial Court Erred In Denying Defense Requested Jury Instructions Regarding The Specific Non-Statutory Mitigating Factors That Had Evidentiary Support.

At the charge conference, defense counsel requested a specific jury instruction listing the following potential non-statutory mitigating factors (1) poverty, (2) limited intellectual ability and illiteracy, (3) and defendant was not the actual killer. (T. 1927-29). The state did not dispute that these instructions had

evidentiary support.[28] Rather the state, relying upon *Jackson v. State*, 530 So. 2d 269 (Fla. 1988), argued that the reading of the catch-all provision concerning non-statutory mitigating factor was sufficient.

In *Jackson, supra*, this Court had held that the failure to define non-statutory mitigating factors was not error. At the time *Jackson* was decided, this Court had endorsed the view, articulated in *Smalley, supra*, that the ultimate sentencer was the trial judge and, therefore, comprehensive jury instructions were not constitutionally required.

However, subsequent to *Smalley, supra*, the United States Supreme Court in *Espinosa v. Florida, supra*, has recognized that both the jury and the trial court are the sentencers under the Florida Death Penalty scheme. Therefore, this Court's prior decisions concerning the adequacy of jury instructions must now be reconsidered. Since the jury's recommendation has crucial significance, it is mandatory that the jury be instructed completely on non-statutory mitigating circumstances.

This Court has recognized repeatedly that the jury instructions requested by defense counsel here encompassed non-statutory mitigating factors that the jury is authorized to consider. *See Campbell v. State*, 571 So. 2d 415, 411 (Fla.

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[28]Dr. Toomer testified that defendant grew up in an impoverished family and that he was borderline retarded. (T. 1774, 1786). Detective Fabergas testified that defendant told him that he did not kill the victim. (T. 1429).

1990)(impaired mental capacity, poor reasoning skills and poor reading ability are mitigating factors); *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) *cert. denied*, 488 U.S. 944 (1988) (lack of education and training, disadvantaged childhood, borderline detective I.Q. of 70-75 are mitigating factors); *Scull v. State*, 533 So. 2d 1137, 1143 (Fla. 1988)(low emotional age is a mitigating factor); *DuBoise v. State*, 520 So. 2d 260, 266 (Fla. 1988) (defendant's I.Q. of 79 was a non-statutory mitigating factor).

Without furnishing the jury guidance and identifying these specific non-statutory mitigating factors, the jury was left to guess as to what factors other than the statutorily enumerated factors, they could lawfully consider. The trial judge's sentencing order itself illustrates the importance of informing the jury as to what factors it can lawfully consider in mitigation. The trial judge in his own order recognized that the evidence established that defendant had an "impoverished childhood, could barely read or write, had a low I.Q. and that he had an intellectual deficit." (R. 316). Despite this fact, the court wrongfully concluded that defendant introduced no non-statutory mitigating evidence. (R. 318).[29]

The state cannot establish beyond a reasonable doubt that as result of the denied jury instructions defining the specific non-statutory factors that may have applied to this case, the jury did not labor under the same misunderstanding as the trial judge in

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[29] Point IX discusses the trial court's failure to properly weigh mitigating circumstances.

reaching its death recommendation. Therefore, a new sentencing hearing is required.

D. Cumulative Effect Of Improper Jury Instructions Require A New Sentencing Hearing

The state argued that it established four aggravating circumstances and that the defendant offered no mitigating circumstances. The four alleged aggravating circumstances were: (1) defendant was previously convicted of two violent felonies, (2) the capital felony was committed while defendant was committing a robbery and/or burglary; (3) the capital felony was committed for pecuniary gain; and, (4) the felony was especially heinous, atrocious and cruel. Based upon the improper and omitted instructions, there is a strong likelihood that the jury may have found that all four aggravating circumstances existed and that there were no mitigating circumstances. If this is what the jury found, it is easy to understand why the jury recommended the death penalty. However, if the jury had been told it could not double aggravating factors supported by a single aspect of the crime and been properly instructed on the definition of heinous, atrocious and cruel, it may have found only two aggravating circumstances rather than four. Most important, had the jury been advised what factors they could lawfully consider in mitigation, they may have found several mitigating factors. Therefore, had the jury had received proper jury instructions, they may have concluded that the appropriate sentence should be life rather than death. Because the state cannot establish beyond a reasonable doubt that the improper jury instructions did not lead to the jury's ultimate

decision to recommend death, a new sentencing hearing is required. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Yates v. Evatt*, 111 S.Ct. 1884 (1991).

VIII.

THE IMPROPER VICTIM IMPACT ARGUMENT MADE DURING THE STATE'S OPENING ARGUMENT IN THE GUILT PHASE DENIED DEFENDANT A FAIR SENTENCING HEARING.

As previously argued in Point II of this brief, the state made continuous improper victim impact arguments in opening statement. Because defendant's offense was committed prior to July 1, 1992, Florida Law 92-81 which allows victim impact evidence at sentencing, was not applicable to this case. The same improper victim impact arguments that require a new trial also require a new sentencing hearing.[30]

IX.

THE TRIAL JUDGE FAILED TO CONSIDER AND PROPERLY WEIGH ALL THE MITIGATING CIRCUMSTANCES INTRODUCED DURING THE PENALTY PHASE, IN VIOLATION OF KENNETH WATSON'S RIGHTS UNDER FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is well established that in addressing mitigating circumstances, the sentencing court first must consider whether the facts alleged in mitigation are supported by the evidence, then must determine whether the established facts are of a kind capable

[30]*See* Point II for more detailed discussion on the improper victim impact argument made by prosecutor.

of mitigating the defendant's punishment. *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990); *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). Mitigating circumstances are "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." *Wickham v. State*, 593 So. 2d 191 (Fla. 1991), *pet. for cert. filed*, (Case No. 91-8126); *Rogers v. State, supra*, at 534. The sentencing court must find as a mitigating circumstance each factor "that is mitigating in nature and has been reasonably established by the greater weight of the evidence." *Campbell v. State, supra* at 419. In this regard, this Court has stated the "trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase." *Wickham v. State, supra* at 194; *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990).

In fulfilling this obligation, the sentencing court must ultimately determine whether the mitigating circumstances are of sufficient weight to counterbalance the aggravating factors. *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

During the penalty phase, the defense presented evidence to establish the following statutory mitigating circumstances: (1) Mr. Watson committed the crime while under extreme emotional stress, and (2) he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of the law. (T. 1789). The defense also introduced evidence to establish the following non-statutory mitigating circumstances: (1) Mr. Watson was borderline retarded and illiterate (T. 1786); (2) was raised by his mother in poverty along with eleven (11) brothers and sisters (T. 1774); (3) was always good to his family and helped raise some of his siblings while his mother worked. (T. 1995) and (3) had a severe drug problem (T. 1996)

This Court consistently has recognized that the above-mentioned factors are proper mitigating factors that must be weighed by a trial court. *See Campbell v. State*, 571 So. 2d 415, 411 (Fla. 1990)(impaired mental capacity, poor reasoning skills and poor reading ability are mitigating factors); *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988), *cert. denied*, 488 U.S. 944 (1988)(lack of education and training, disadvantaged childhood, borderline defective I.Q. of 70-75 are mitigating factors); *Scull v. State*, 533 So. 2d 1137, 1143 (Fla. 1988)(low emotional age is a mitigating factor); *DuBoise v. State*, 520 So. 2d 260, 266 (Fla. 1988) (defendant's I.Q. of 79 was a non-statutory mitigating factor); *Wright v. State*, 586 So. 2d 1024 (Fla. 1991)(alcohol abuse a mitigating factor); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990)(alcohol abuse a mitigating factor); *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988)(good to family a mitigating factor); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990)(taking care of family a mitigating factor).

The judge found evidence establishing that defendant was borderline retarded, illiterate, raised in poverty and had a drug problem. (R. 316). Nevertheless, the court concluded that no mitigating factors were shown to exist. (R. 318). This conclusion was legally erroneous. Once the judge had found evidence in mitigation, he was required to weigh this evidence and not ignore it. *Dailey v. State*, 594 So. 2d 254 (Fla. 1992); *Campbell v. State*, 571 So. 2d 415, 420 (Fla. 1990); *Santos v. State*, 591 So. 2d 160 (Fla. 1991)("mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence"); *Eddings v. Oklahoma*, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Lamb v. State*, 532 So. 2d 1051, 1054 (Fla. 1988); *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988), *cert. denied*, 488 U.S. 944 (1988). Consequently, the trial court failed to properly consider and weigh all the mitigating circumstances and the defendant's sentence of death violates both the Florida and United States Constitution and, therefore, must be reversed and remanded for a proper resentencing. *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

X.

IN CONTRAVENTION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Defendant filed several pre-trial motions attacking the constitutionality of Florida's death penalty statute. (R. 59-68). Although this Court has rejected similar attacks in other cases, defendant respectfully requests this Court to reconsider the following attacks on the constitutionality of Florida's death penalty statute.

The capital sentencing statute in Florida fails to provide any standard of proof for determining whether the aggravating circumstances "outweigh" the mitigating factors, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. *See Godfrey v. Georgia*, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty. (R. 58-61).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. *See Godfrey v. Georgia, supra*; *Witt v. State*, 387 So. 2d 922, 931-32 (Fla. 1980)(England J. concurring.). *Herring v. State*, 446 So. 2d 1049, 1058 (Fla. 1984)(Ehrlich, J., concurring in part and dissenting in part). (R. 60-63). Furthermore, the fact that Florida Statute 91.141 does not require the jury to make any

factual findings regarding the aggravating and mitigating circumstances results in arbitrary and capricious imposition of the death penalty in violation of the United States Constitution. (R. 56-57).

Finally, the constitutionality of Florida Statute 921.141 is contingent on this Court's proportionality review of death sentences. *Witt v. State*, 387 So. 2d 922 (Fla. 1980) and *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981). This Court has failed to adequately and consistently review death sentences which has resulted in inconsistent and a capricious application of the death penalty. (R. 54-55). Furthermore, the court has created irrational exceptions to the death penalty based upon who the victim was and what weapon was used, neither of which is included in the aggravating or mitigating factors outlined in the statute. (R. 64-67).

In view of the arbitrary and capricious application of the death penalty at every level of the criminal justice system, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated argument, defendant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court reverse his conviction and sentence of death and remand the case to the trial court for a new trial and new sentencing or, in the alternative, remand the case for a new sentencing hearing before a new sentencing jury or, in the alternative, remand the case for a new sentencing before the judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Fariba Komeily, Assistant Attorney General, Criminal Division - Post Office Box 013241, Miami, Florida 33101 this 13th day of January, 1993.

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