IN THE SUPREME COURT OF THE STATE OF FLORIDA

Supreme Court Case No.: 79,217
18th Cir. Case No: 90-16062 CF-A

**Chadwick Willacy,**

**Appellant,**

**vs.**

**The State of Florida,**

**Appellee.**

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# Initial Brief of the Appellant

An Appeal from a Judgment and Sentence of Death by the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida

Brief for the **Appellant** by:

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## Statement of the Case

The crime at issue here was the murder of Mrs. Marlys Sather, committed September 5,1990. The appellant was arrested on September 6, 1990. Appellant was indicted for first-degree murder, robbery, and burglary. After various motions were heard on August 6,1991 and September 27,1991, before Judge Martin Budnick, trial commenced on October 7, 1991 before senior Circuit Judge Theron Yawn sitting by designation. On October 17, 1991, the jury found appellant guilty as charged. On October 18, a penalty phase proceeding was held, and the jury recommended that appellant be sentenced to death by a vote of 9-3. On December 10, 1991, Mr. Willacy was sentenced to death on the murder count and to prison terms for the other crimes. A notice of appeal was timely filed.

The undersigned moved this Court to relinquish jurisdiction to allow the hearing of a Motion for New Trial based on the claimed ineligibility of the jury foreman to serve on the jury. The motion to relinquish jurisdiction was granted on August 18,1992, and on October 12,1992, the court held a hearing on the motion for a new trial. By order dated December 29,1992, Judge Yawn denied the motion.

# Statement of the Facts

## General facts

On September 5, 1990, at approximately 11:00 a.m. to 11:30 a.m., Ms. Marlys Sather left her job at Harris Corporation in Palm Bay, Florida, (R 823-25) to go home to meet with Mr. Roland Sasscer to discuss selling a car to Mr. Sasscer. She did not return to work that day or the next, nor did she succeed in meeting up with Mr. Sasscer. When she did not appear for work the next morning, her co-workers became concerned (R 826-28), and a co-worker, Ms. Connie Humphery, went to her home to determine whether there was a problem (R 849-50). When Ms. Humphery saw no indication that Ms. Sather was at home, she reported that fact to her supervisor, who then attempted to call family members (R850-530).

Mr. Charles Denning Loveridge, Ms. Sather's son-in-law, received a call on the morning of September 6 from Ms. Sather's supervisor, and as a result of the call, Mr. Loveridge went to Ms. Sather's home (R 855). He went to the home, found it locked, and entered the home through a screened back porch. (R 859-60). On the back porch he noticed a VCR, a tape player, a video tape rcwinder, a shotgun, and a television set, items normally kept inside the house (R 861). Upon entering the home, he noticed it was in disarray and noticed the strong smell of gasoline (R 866-67). Upon exploring the house, he found the burned body of Marlys Sather in a bedroom used as an office (R 868-70). There was an oscillating fan blowing on the body at the time of discovery (R 870-73). Mr. Loveridge promptly called the police.

Dr. Charles Wickham, the Brevard County medical examiner (along with other police officers), testified that the body was badly burned (R 1029 et *seq.*). The upper torso was burned with a diagonal line going across the front of the chest below the left breast. Her clothing was burned, as was her face, neck and hair. There was blood caked in her hair. Her legs were bound with plastic cord and her hands were bound behind her with rope and duct tape. Some areas of her panty hose were burned

and melted. There was a ligature around her neck made from a two-wire electrical cord (R1030). In various areas of the house, blood was found on the floor, walls, and ceiling (R 1017-20, R 1031-37).

During his autopsy, Dr. Wickham observed injuries to Ms. Sather's mouth consistent with her biting her tongue (R 1058), and injuries from the ligature around her neck (R 1059) and wrists (R 1069-70). There were irregular and semi-circular lacerations on the scalp (R 1060-62, 1075-77), and a chip in the skull under one of the scalp lacerations, which Dr. Wickham described as a "divit" [sic, presumably "divot"] (R 1077).

Dr. Wickham's internal examination revealed fractured cricoid cartilage in the throat, and also revealed soot in the trachea (R 1107-08). He opined that Mrs. Sather was breathing at the time of the fire (R 1108-10). He expressed the opinion that force had been applied to the ligature on her neck, resulting in the cartilage fracture (R1109-10), and that bleeding in the eyes provided evidence of strangulation (R1111-14). He stated that the scalp wound were consistent with being struck with a hammer (R 1115-18). The cause of death was smoke inhalation following strangulation and blunt-force trauma to the head (R1120). He also expressed the opinion that the strangulation she suffered alone would have been sufficient to cause death irrespective of the fire (R 1121). On cross, Dr. Wickham clarified his opinion that the blow to the head causing the "divot" was largely straight on but with a left-to-right component (R1123-24).

Blood spatter evidence showed that Ms. Sather had been struck repeatedly on the head by a person swinging a weapon with his left hand (R 1537, 1543-44). She apparently had been attacked in her dining room, she tried to get out a door into her garage, but was forcibly brought back into the house, she was strangled, bound up, and dragged into the extra bedroom. She was doused with gasoline and ignited. A fan was placed at her feet, apparently in an attempted to fan the flames. The home's smoke detectors were disabled.

Ms. Sather had been to a local grocery store shortly before she came home. Testimony from Laura Reed (R 1466-1475), a clerk at the local Winn-Dixie, showed that Mrs. Sather had purchased a small bag of groceries with a receipt dated September 5 and time stamped 11:33 a.m.. The receipt was found on the dining room table with the contents strewn about (R 1374).

Various pieces of evidence tended to implicate the appellant in this crime. Testimony showed that he lived next door to Ms. Sather, and that he had in the past mowed Ms. Sather's lawn (R 7861). He was seen in the area by some neighbors around the time of the killing (R 952-60, 964-80). Ms. Sather's car was seen pulling into a local bank at 12:45 to 12:50 p.m. (R 1492-95)by Luis Rodriguez, and friend of Mrs. Sather's. An ATM photo resembling defendant, with a car resembling Ms. Sather's in the background, taken at the Same First Florida bank into which Mrs. Sather's car was seen turning, was introduced (Exhibit #161-63, R 1796), and several ATM withdrawals on Ms. Sather's account were attempted by the person in the picture (Exhibit #207, R 2103-08, R1545-58) at 12:50 p.m. to 12:55 p.m. (R 1558).Defendant's fingerprints were found on the fan placed at Ms. Sather's feet (R 1662-64, 1700), on the videotape rewinder found on the back porch (R 1698), and on a gasoline can found in the kitchen (R 1700). Upon executing a search warrant at appellant's home, property belonging to Mrs. Sather was found hidden in the home in a gym bag containing a health club card belonging to appellant's girlfriend (Exhibit #155, R 1755).

Evidence tending to exculpate defendant showed that he was strongly right-handed (R 2294-95, 2299-2301), and Mrs. Sather's attacker had beaten her while holding a weapon in his left hand. There were no fingerprints belonging to appellant on the smoke detectors (R 1674) or on the car, which he had allegedly driven for several hours after the killing. Identifiable but unmatched fingerprints were found on coin holder belonging to Mrs. Sather found in the defendant's home (R 1690-91).

The defense moved to suppress the identification testimony of Mr. John Barton (R 3306-07), alleging that the identification was tainted by an unlawful showup.

Among the items found missing from the victim's house was her car, a beige and maroon Ford LTD (R 2950-52). On September 6 at approximately 3:00 p.m., the car was located parked beside Lynbrook Plaza, a small strip shopping center (R 2953). While the car was being towed, an officer located John Barton, a 16-year old high school student who said he had seen the car being parked in the spot where it was found. He testified at a suppression hearing that he was walking home from the school bus stop at approximately 4:00 p.m. when he saw a car beside the plaza "driving forward and reverse" (R 2918). He could see the driver's face "not too clearly but I got a good enough look" (R 2918). He said the driver was a black man with hair short on the sides and a little longer on top a "skinny kind of" face, the driver seemed fairly tall and muscular (R 2920-21). He described the car as a red and white Ford LTD (R 2921). The next day, Mr. Barton was delivered to Det. Santiago, and they began working on a composite of the person Mr. Barton had seen. While working on the composite, they were interrupted by word that Mr. Willacy had returned home and was present in the neighborhood (R 2957).

The police took Mr. Barton to Jarvis street, where Det. Santiago caused Mr. Willacy to come out of his house and stand in the street on the pretense of discussing minor matters. Mr. Baron was present in another car driven by Det. Vail, who drove Mr. slowly past Mr. Willacy. Mr. Barton testified that he recalled telling the police that Mr. Willacy "looked a lot like [the driver] but I wasn't a hundred percent sure" (R 2929). On a scale of one to ten, he rated his degree of sureness at "eight and a half" (R 2929). When asked if he could go into the courtroom and identify the person driving the car without reference to the showup, after expressing some confusion about the request, he said, "I think so" (R 2930-31).

On cross, Mr. Barton indicated that he thought nothing of the car and the driver until the day after he observed them when the police began to question him (R 2936). While in the police car on Jarvis street, the police officer driver specifically

asked Mr. Barton to see if the black man standing in the street was the driver of the car (R 2941).

The state conceded that the lineup was improperly suggestive and argued only that Mr. Barton's in-court identification should not be suppressed because it was not tainted by the impermissible showup (R 2908-09). Det. Santiago testified that he thought a showup procedure was proper under the circumstances:

> I'm under the belief that the victim should be the one who sees a lineup, six people in a photo lineup of a stand-up lineup. If you're a witness, I don't believe that you should have to use that standard.
> Q. [Mr. White] Well, you're wrong.
> **A.** I found that out.
> (R 2959)

Judge Budnick entered an order finding "that the out of court identification of the Defendant by use of an unnecessarily suggestive show-up was illegal," and granted the defense motion (R 2977,3340).

Following his arrest by Det. Santiago, the defendant made an inculpatory statement in which he denied killing the victim but admitted being involved and admitted seeing the bound body in the house. He indicated that a person named "Goose" did the killing, but the statement was tantamount to an admission to felony murder. The defense moved to suppress the statement, alleging a violation of the defendant's fifth amendment rights (R 3308-09). During the statement, Mr. Willacy asked to be allowed to contact a public defender. He talked with a public defender, and following the invocation of his fifth amendment right to counsel, Det. Santiago reinitiated conversation with him, resulting in the statement outlined above. Following the hearing on the motion to suppress, the court, by Judge Martin Budnick, issued an order suppressing the statement, finding that the police "baited" Mr. Willacy into "telling his side of the story" (R 3338-39). **As** the order was unclear whether the court had found that the statement was suppressible as a result of a *Miranda* violation, or because the statement was coerced, the defense then moved in limine to prevent the state from using the statement as impeachment should the defendant take the stand in

trial and testify differently than he did in his statement (R 3347-48). The court declined to rule on the motion until the trial (R 3242).

At trial, the defense renewed its motion, seeking a ruling whether the statement could be used for impeachment. (R 2140 et seq.). The state agreed with the generally defense proposition that the court must make a ruling, before the introduction of defendant's statement as impeachment, whether the statement was voluntarily made (R 2144-45) After protracted argument regarding the proper procedure to follow, with the state arguing that the defendant should first be required to testify then, if the state believed the suppressed Statement was useful as impeachment, the state could seek a ruling that the statement was voluntarily made and use it as impeachment (R 2145-46). The defense argued that it was entitled to a ruling before the defendant testified on the voluntariness issue (R 2151-52, 2154-55). The court ultimately agreed with the defense (R 2156-59), and the state proceeded with a proffer of evidence relating to the voluntariness of the statement.

During that proceeding, Det. Santiago testified that after Mr. Willacy was arrested, he was transported to the Palm Bay Police Department around midnight (R 2169). **A** problem arose during booking when Mr. Willacy did not wish to give his fingerprints, and he was allowed to contact a public defender (R 2170). During that conversation, Mr. Willacy was instructed not to talk to the police, and Mr. Willacy told Det. Santiago he should not talk with the officer (R 2186). Despite that knowledge, around 4:00 a.m., Det. Santiago "went over to check" on Mr. Willacy, allegedly to make sure he had gotten his supper and "to make sure he hadn't injured himself while he was in the holding cell." (R 2172). **A** conversation ensued, and Det. Santiago read to Mr. Willacy what Det. Santiago had written on the "923 form".[1] He testified that he explained the identification information on the form (R 2189), then he read to Mr. Willacy the following:

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[1] The "923" form is a short-hand term for the form called for in section 923.01, Florida Statutes (1991).

"That on the 5th day of September, 1990, at 1200 p.m., the defendant did unlawfully enter the victim's residence for the purpose of committing grand theft. The defendant was confronted by the victim while inside her residence and did purposely do bodily harm to the victim until she was dead. Defendant beat the victim about the head with a blunt object. Defendant strangled the victim with a belt. The defendant then bound the victim's hands with rope and duct tape. The defendant then purposely threw gasoline on the victim and set her on fire. The defendant left the residence with the victim's car" — "vehicle —

I'm sorry.

— "and abandoned it approximately one mile from the original crime scene. Several witnesses state seeing a black male in the area as well as driving said vehicle. One witness was able to identify the defendant as being the same black man parking the stolen car behind Lynbrook Plaza. The vehicle was recovered by Palm Bay officers. A check" —

I can't read it here. I think is says "a checkbook" or something. There's a word before it.

— "belonging to the victim was found in the wastepaper basket in the defendant's bedroom. The transaction book was found by Mr. Marcel Walcott, father of the defendant's girlfriend."

(R2190-91)

The act of reading the form succeeded in prodding Mr. Willacy into agreeing to tell Det. Santiago "the real story" (R 2191).

The defendant testified that during the discussion with the public defender about the fingerprints, he was told several times not to talk (R 2241-42). He testified that, at 4:00 a.m., Det. Santiago came to the holding cell and told him:

"Are you sure you don't want to say" — you don't have anything you want to tell me," or, you know, "you know you have M-1 hanging over your head."

And I said, "What's M-1?"

And he said, Murder first degree." and he had a form in his hand. I guess that's the 923 he described earlier. I don't remember if he read it to me or not, but I can't remember that, but I know he showed me the paper, and he kind of waved it and said, "You have M-1 hanging over your head. It's best you cooperate to the best of your ability if you want to try to get out of here tonight. If you know anything, tell me something that I want to hear that will help you get out of here tonight.

I said, "I told you everything I know."

(R 2244)

Following extensive argument, the court ruled that the statement was voluntarily made (R 2288).

Following the presentation of other defense testimony, the defense announced rest and announced that the defendant was electing not to take the stand in his own defense and the "sole factor in deciding not to take the stand is the Court's ruling on our Motion in Limine earlier that was argued earlier this morning" (R 2381). After inquiring whether the defendant had voluntarily decided against testifying, the defense reiterated that the reason the defendant had been counseled not to testify was because of the court's ruling (R 2385-86).

## I. Guilt-phase proceedings

**A.** Jury selection

**1.** Refusal **to** allow rehabilitation.

In selecting the jury, the court used a procedure in which twelve prospective jurors were called, questioned, and strikes made. After the first series, seven of the twelve were stricken peremptorily or for cause (R 291-303), and seven new venirepersons were called to take their places (R 303-04), thereby returning the number in the box to twelve. Those seven then were questioned individually or jointly by the court and parties, and strikes were then made against five of those seven (R 335-480). The process continued with successively smaller numbers of jurors being called, questioned, and stricken, with those remaining being added to the preceding group. Consequently, the process required eight separate series of calling, questioning, and striking,[2] with the last three series involving only one new prospective juror each.

The result of this laborious and inefficient process was a lengthy and somewhat tedious jury selection. During the course of the jury selection proceedings, the court made repeated requests to the attorneys speed up the process. Although jury selection took only two days, certainly not an unusual length of time to chose twelve jurors in a death penalty case, the court repeatedly expressed its displeasure with the length of time

[2] Series one is reported on record pages 128 - 303; series two, R 304 - 477; series three, R 480 - 540; series four, R 540 - 600; series five, R 600 - 39; series six, R 640 - 61; series seven, R 662 - 77; series eight, R 680 - 95.

the process was taking. During the first day of jury selection after strikes were exercised against the first series of jurors, the court stated, "All right. Counsel, let me tell you this: We've done very well so far in the voir dire, but now that we start with the second panel I'm going to start putting the pressure on you if you don't move it along. I do not want to take a whole week for the jury selection. The jury should have been impaneled a long time ago. This is the longest I've ever taken on a jury selection. ... Let's move this process along." (R 301-02). Shortly after that comment, the court broke for an evening recess at 4:55 p.m. (R 318).

The next day, while exercising strikes at a bench conference, the court again expressed its frustration with how long the jury selection process was taking. Judge Yawn stated, "Counsel, I'm going to insist at this juncture that this process be expedited. We're doing a lot of foot dragging. We're repeating a lot of questions applying to the same ground. I hate to embarrass you or myself by continuing to interrupt you to move along. That's what I'm going to do from this juncture forward if this proceeding doesn't speed up somewhat." The undersigned attempted to suggest a way to speed the process by calling up more prospective jurors at one time instead of only replacing those that were struck, but the court refused. "No, we're not going to start the process over with a new set of rules, Mr. Erlenbach. We're going to follow with what we started. We're just going to move it along like we should. ... (R 438 - 39). Later during the same bench conference, the court again expressed its frustration; "... I would encourage you to go ahead and exercise those challenges in an orderly fashion and as expeditiously as possible because at the rate we're going we won't have a jury by Friday; and I do have means available to me by which to expedite, but I do not particularly wish to resort to them. Now, let's quit this foot dragging and get on with this case." (R 447). After the next set of jurors was questioned, during another bench conference during which the jurors were struck, the court again expressed its frustration, practically pleading with the attorneys to speed the process; "Counsel, please heed my admonition. Quit this foot dragging and move this process along." (R 479-80). Each of the above comments were made after

each side had exercised peremptory challenges to strike a number of potential jurors, and the court clearly was frustrated with the attempts by the parties to seat a suitable jury.

Following the last comment quoted above, five new prospective jurors were seated, and the court asked some preliminary questions (R 480-81). One juror, Mr. Campbell, expressed his inability to recommend the death penalty, stating, "Let me put it this way: I would have no trouble finding the defendant guilty, but as far as voting for capital punishment I would not." (R 482). The Court then stated, "I'll leave that matter for counsel to explore." (R 482). During the state's voir dire, Mr. Campbell again stated his objection to capital punishment, (R 485-86), and the state, "in order to save time" (R 486), asked for an challenge for cause. (R 486). The defense expressly sought no rehabilitation, but the court apparently misunderstood the request:

> MR. ERLENBACH: Your Honor, for the record we do not seek an effort to rehabilitate --
> THE COURT: Sir?
> MR. ERLENBACH: We do not seek to --
> THE COURT: The Court has ruled, Mr. Erlenbach. Mr. Wendt, Juror No. 178.
> (R 486-87)

Shortly thereafter, after Mr. Wendt was excused by the court for a hardship, the following occurred:

> THE COURT: Juror No. 41, Maria Josefina **Cruz.**
> ...
> MR. WHITE: May I inquire, your Honor?
> THE COURT: You may, sir.
> MR. WHITE: Is it Ms. Cruz?
> MS. CRUZ: Uh-huh.
> MR. WHITE: Is there anything that you know of that would make it impossible or difficult to serve on this jury?
> MS. CRUZ: The same thing as the first gentleman. If it ever came to the penalty part, I will not be able to give a death penalty sentence.
> MR. WHITE: You realize from all the questions that the law is, if you are to serve here, you should consider the death penalty under the applicable rules and law that the Court gives you. Are you saying you cannot abide by that law?
> MS. CRUZ: Right.
> MR. WHITE: Excuse me. Your honor--
> THE COURT: One other thing let me mention. If any of you have any problems with working late tonight, please let me know be-

cause we're not going to recess this court until the jury is impaneled. We may not reach that, but I want to place you on notice and I will give you an opportunity to make such arrangements as you may have to. The Court will continue until the jury is sworn.

All right sir, Go right ahead.

MR. WHITE: Well, your Honor, with regard to Ms. Cruz, it's the state's position that she's announced that under her beliefs, religious or conscientious or whatever, she could not abide by the law with regard to the penalty in this case, and for that reason we would ask the Court to excuse her for cause.

THE COURT: Very well. Miss Cruz, you may step down and return to the jury pool area.

Jurornumber –

MR. ERLENBACH: Your Honor, we would like a brief opportunity to try to rehabilitate.

THE COURT The Court has ruled, Mr. Erlenbach.

Juror No. 117, Brenda Murphy McGonnell.

MR. WHITE: Good afternoon, ma'am. ...

(R 489-91)

Later, the court continued with its pressure to complete jury selection; during a bench conference in which prospective jurors were stricken and the state asked for direction regarding scheduling its witnesses, the following occurred:

MR. WHITE: If you were going to go to seven, we might get to witnesses. I just wanted to know. If we're quitting at five, I'll call them.

THE COURT: 1 just wanted to facilitate the impaneling of this jury. At the rate we're going we're never going to get a jury.

MR. WHITE: Judge, I speeded this thing up now.

THE COURT: I noticed. I commend you for it. I appreciate it.

(R 539)

Following the next series of questions and strikes, the Court asked, "Gentlemen, how much longer are you going to take with this? I've got to do something about some of these people that have to make arrangements for baby-sitters and pre-schoolers. I got to give them some time to make a telephone call. Are we through here in the next short period of time?" (R 678). Finally, during questioning by the state of potential alternate jurors, the court interrupted and said, "Excuse me, Mr. Craig. Would you mind addressing your questions to the other three gentlemen collectively and let them answer separately. I think that would expedite the process." (R 731-32). The jury selection process was completed by the end of the second day at 6:00 p.m. (R 657).

**2.** ***Neil*** violation involving **Juror** Alvin Payne.

During the questioning of the second panel of prospective jurors, near the end of the first day of jury selection, a black prospective juror named Alvin Payne was called. During preliminary questioning of the entire venire, Mr. Payne had stated, "Hi. My name is Alvin Payne. I live in South Melbourne. I'm single. I have three kids, and I work for Pennzoil Ten Minute Oil Change, and the question is, yes, I served in the armed forces in the U.S. Navy, and I got out as an E-4." (R **84).** After he was called to the box, he indicated that he knew several of the state's witnesses:

> THE COURT: Mr. Payne, I believe you indicated that you knew of someone.
> MR. PAYNE: Several
> THE COURT: Who, sir?
> MR. PAYNE: I think the first name was Oscar.
> THE COURT: Could you speak up a little, sir, so we can hear.
> MR. PAYNE: Jim Symonette, was that another one?
> MR. WHITE: Yes, sir, it was.
> MR. PAYNE: Doug Fowler. I believe that's it.
> THE COURT And how do you know –
> MR. PAYNE: From school.
> THE COURT: How?
> MR. PAYNE: From school.
> THE COURT: How long ago has that been, sir?
> MR. PAYNE: 1 was in school -- they was before me, but I knew of them from football.
> THE COURT: I can't hear you, sir. I'm sorry.
> MR. PAYNE: I knew Oscar Restrepo. Well, I graduated with him. That's how I know him.
> THE COURT: Did you have some contingent *[sic]* relationship with him right on?
> MR. PAYNE: No. Well, to be honest he's still a friend, yes.
> THE COURT: Do you see him often, associate with him and socialize with him and so forth?
> MR. PAYNE: No. I haven't seen him in over two years.
> THE COURT: Did you indicate there was someone else on there that you're acquainted with?
> MR. PAYNE: 1 know James Symonette.
> THE COURT: Who?
> MR. PAYNE: James Symonctte.
> THE COURT: What's the source of your acquaintance with him?
> MR. PAYNE: I just know him from football.
> THE COURT: My question to you then, sir, is if they do testify in this case, would the fact that you know them make it easier or more difficult for you to believe their testimony than you would that of somebody else just because you know them?
> MR. PAYNE: I don't think it would have any effect because we've never been that close.

THE COURT: In other words, you can weigh their testimony on the same scale that you would weigh anybody else's testimony?
MR. PAYNE: Yes, sir.
THE COURT: All right, sir.
(R **310** - 13)

During subsequent questioning by the state, information was elicited showing that Mr. Payne was single, had worked at Pennzoil for about a year and worked at "Harris" before that as a shop technician, he had never been married, he had lived in Brevard County most of his life, he liked to fish and play basketball in his spare time, did not subscribe to a newspaper or any magazines, and lived with his mother. (R **347-49).** He had no knowledge of the case (R **363).** Later, the following occurred:

MR. CRAIG: ... Anyone else have any contact with the court system as a witness in a case or as a party to a lawsuit?
Mr. Payne.
MR. PAYNE: Witness.
MR. CRAIG: "Witness" in a case. Was that a criminal or civil case?
MR. PAYNE: Criminal.
MR. CRAIG: Did you appear in court and give testimony in that case?
MR. PAYNE: Yes, sir.
MR. CRAIG: You don't have to tell us, but do you know how the case turned out?
MR. PAYNE: Yes, sir.
MR. CRAIG: Were you satisfied with the ultimate resolution of that case? Do you believe that justice was served from what you know?
MR. PAYNE: From what I know, yeah.
MR. CRAIG: How do you feel that you were treated by the court system and by, I presume, the prosecuting attorneys?
MR. PAYNE: Good.
MR. CRAIG: Was that here in Brevard County?
MR. PAYNE: Yes, sir.
MR. CRAIG: Can you tell us what the charges were?
MR. PAYNE: Yeah. It was a drug charge.
MR. CRAIG: "Drug charge?"
MR. PAYNE: Uh-huh.
(R 367-68)

Mr. Payne indicated later during questioning that he had appeared as a witness on the defendant's behalf in that trial (R 388). He was asked briefly during the state's questioning about the jurors' understanding of the concept of inferring intent from a person's action (R 377) and during the state's questioning about the concept of felony **murder** (R 382- ***84).***

Later, the following the state asked the following questions of Mr. Payne:

MR. CRAIG: Mr. Payne, I need to pick on you just a moment. I apologize for this. You didn't tell us how old you were, but you graduated from high school in '85 or so?

MR. PAYNE: '84

MR. CRAIG: It makes you approximately the same age as the defendant. Okay? So I guess we could call both of you young, black males.

Do you feel that that fact would in any way affect your ability to listen to the evidence, listen to the Court's instructions on the law and deliberate with the other jurors in the case recognizing that it's not unlikely that you would be seated on a jury with eleven white people?

MR. PAYNE: Well, maybe. Maybe. I don't know. It might make me feel different about it.

MR. CRAIG: Do you think it might make you uncomfortable?

MR. PAYNE: It sure will.

MR. CRAIG: I appreciate your candor.

(R 395 - 97).

During defense questioning of Mr. Payne, the following occurred:

MS. ERLENBACH: ... Again, Mr. Payne, none of us are comfortable being here. I'm here probably -- you know, we lawyers are here in this setting a little more often so we act a little more comfortable, a little more sure of ourselves, but are you, sir, willing to do your duty here even though it might make you uncomfortable to be with a group of people you don't know at all and be the only black man? Are you willing to do your duty to sit in this caw?

MR. PAYNE: Yes, ma'am.

MS. ERLENBACH: Do you agree to apply the same standard of belief to a police officer as to any other person who might come before you to testify?

MR. PAYNE: Yes, ma'am.

(R 426-27)

He later related that he "really [doesn't] think about it that much" when asked about his opinions on the death penalty (R 432).

The next day, the state exercised a peremptory challenge to exclude Mr. Payne (R 442), and the defense made a *Neil*[3] objection (R 442). The state asked that the court find that the objection was well-founded and that a proper predicate had been laid so that the state's explanation for the strike could be given (R 444). At the time the strike was exercised, Mr. Payne was the only black on the panel (R 442).

Prior to beginning the day's proceedings, an unreported conference had been held at which the state related various information they had received about Mr.

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[3] *Neil v. State*, 457 So. 2d 481 (Fla. 1984).

Payne concerning some minor criminal trouble (R **443 - 44).** As part of their explanation for striking Mr. Payne, Mr. White stated:

> I think there is more than an adequate record for a peremptory challenge of him that is non-racially motivated, and it would be our request that you make that finding of an adequate predicate and facially valid challenge and allow us to voir dire Mr. Payne additionally as to the police report and as to records that we obtained through the computer showing that he actually was charged for the offense Mr. Erlenbach spoke about and pled nolo contendere to disorderly conduct and also to resisting without violence.
>
> I'd point out to the Court that also when he was asked about his employment, he skipped over his employment at Dip Stix where this event occurred; and while perhaps he didn't out and out lie to us, he misrepresented by not telling **us** that he had been employed there.
>
> Furthermore, in the jury questionnaire there are questions designed to elicit information about any prior charges against the defendant. He never made that known to us. He withheld that all along, and also he offered in his voir dire that he testified on behalf of a defendant in a drug charge.
>
> Now, all of those are not racially motivated. **All** of those are facts which we assert to the Court are present with regard to him that are substantially different than any other juror in this particular case.
>
> **(R 444 - 45)**

Over defense objection, the court agreed with the state's request to allow further questioning of Mr. Payne in chambers (R **446).** Later, in chambers, before taking further testimony from Mr. Payne, the state gave an expanded explanation for their strike:

> And we wish to strike him for the reasons that during voir dire he volunteered that the had participated in court as a witness, and it was further developed that he had testified for the defendant in a criminal case involving charges of drugs. Drugs will be involved in this case. The particular defendant was involved with drugs to one extent or another. How much it is going to come out, I don't know, but there is evidence that would seem to indicate that it's possible the defense may at some point want to develop his use of cocaine perhaps as a defense in the death penalty phase. I don't know.
>
> Also, Mr. Payne did not advise us of an employment with the company --
>
> MR. CRAIG: Dip Stix.
>
> MR. WHITE: Well, I want to give a full name.
>
> -- Dip Stix Enterprises, Inc. When I asked about employment, I distinctly recall him talking about working for Pennzoil and prior to that he worked for Harris Corporation. He omitted to tell us about his employment with Dip Stix Enterprises which is a lack of candor on his part with the state that would bother us in an of itself.
>
> The reason he didn't do that apparently is that on **5-22-91** there was **a** complaint made against him to the Palm Bay Police Department involving allegations that his white, female supervisor

was assaulted by him at work and she requested police assistance to remove him from the premises as a result of that, and that case number for Palm Bay P.D. is 91-12328.

It is the same Alvin Payne we believe as noted by the court. The name and address shown on the jury list match the report we previously provided to the court.

**As** a result of that he appeared in court on Case No. 90-21696 MMA and pled no contest to those charges for which adjudication was withheld. We understand he was given community control, and a further check of the computer shows that he's failed to comply with the requirements of that which were community service.

MR. ERLENBACH: Wait. A '90 case that occurred in 1991?

MR. CRAIG: I think you're in error, Chris. I don't think there were ever any charges filed against him for the '91 complaint.

MR. WHITE: Perhaps you're correct. Perhaps you're correct.

Looking at this number then, it would appear that in addition to the charge that we referred to in the report there's another case which is 90-21696 which is an entirely separate incident he failed to tell us about where he apparently was charged with resisting without violence and disorderly conduct and pled no contest.

There's also another complaint on his record for a battery charge which was no filed, and as I pointed out, he failed to share any of this information with us during the course of voir dire, and the questionnaire the Court handed out would seem to indicate that a person should relate to us any sort of connection they may have had with the law and certainly if any charge have been filed against them.

(R 450 - 53)

The defense then objected to taking testimony from Mr. Payne, arguing that the record could not be supplemented with further evidence through voir dire once the strike had been exercised (R 454). The court agreed to take the testimony, and Mr. Payne explained (1) the Pennzoil oil change business for which he worked was the same operation as the Dip Stix business (R 460); (2) he considered his leaving that business as a resignation, not a firing (R 460); (3) he was unaware of any criminal complaint made against him by his supervisor (R 460); (4) in another matter he had pled no contest to disorderly conduct for which he completed community service at the Palm Bay Rec Center (R 461); and (5) he had not been arrested for anything else. After taking testimony briefly from Mr. Payne, the state offered the following explanation as to how they came to obtain these police reports on Mr. Payne:

MR. ERLENBACH: If the state can show they ran these same checks on these other [white] prospective venire persons, then 1 would concede I'm in error, but I don't believe they're going to do that.

THE COURT: Well, let me ask them.

Were similar checks run as to any of the other venire?

MR. WHITE: No, sir, there weren't. There was a reason for that which I told Mr. Erlenbach which he chooses not to accept.

This particular prospective juror is the juror who told us he happened to know three people who are witnesses in the case, two of whom are Palm Bay police officers. As a result of that -- both of them are witnesses in our case. As a result of that yesterday afternoon I called the case officer in the case, George Santiago, and requested that he contact those persons and ask them what they know about this man, why he knows them, what their contact is of him, which they did provide me; and that information that we got back there generally was that, well, they know him from school; he seems like an okay guy. Okay?

However, Mr. Santiago of his own volition said, "Mr. White, why don't I run a records check on him?"

I said -- well, what I told him actually, foolish me, was: "There's really not a need to do that."

And he said, "I'll go ahead and do it anyway."

And he went ahead and ran a records check under the name I had given him.

(R 467 - 68)

The defense argued that the state's actions in singling out Mr. Payne for such treatment was discriminatory, that the record provided sufficient explanation for the bases used by the state to justify the strike (R 464), and that the state's questioning of Mr. Payne designed to elicit his feeling about being the only black on an all-white jury showed that the strike was racially motivated (R 474). The court reviewed case law and subsequently allowed the state to make the challenge, and Mr. Payne was excused (R 477).

**3.** Concurrent felony prosecution of jury foreman Edward Clark

The error in the way Mr. Payne was handled is pointed up in a subsequent incident involving juror Edward Paul Clark. Mr. Clark was called from the panel during the sixth series (R 592), along with a Mrs. Giguere. During preliminary questioning of the entire venire, Mr. Clark stated that he was married, lived in Melbourne, had five children with one in college, he was self-employed, and his wife was a mortgage broker (R 84). When he was called to the box, he indicated that he was a mortgage broker, his wife was a mortgage processor, that he had five children, he sailed and played golf, and did not belong to any organizations (R 616). Later, the following colloquy occurred:

MR. WHITE: Let me ask both of you. Have either of you had any prior experience in the courtroom before in any capacity at all?

MS. GIGUERE: Never.

...

MR. WHITE: Have either of you had any sort of contact with a law enforcement agency or officer that left you with a particularly strong feeling about the contact in the way you were treated or the way your matter was handled?

MS. GIGUERE: Never.

MR. CLARK: No.

(R 621)

Mr. Clark eventually was seated as a juror and sat throughout the guilt phase and the penalty phase of the case. He was chosen to serve as foreman of the jury.

At the time of his participation in the trial, Mr. Clark was being prosecuted by the Office of the State Attorney for the Eighteenth Circuit, in Brevard County, in case number 90-16802 CFA (R 3516-18). He was charged with grand theft of computer equipment (R 3519,3565). He had been arrested on February 19,1991, and bonded out that day on a $1,000.00 bond. On October 29, 1991, twelve days after the jury upon which Mr. Clark sat returned a guilty verdict against Mr. Willacy and eleven days after they returned a recommendation of death, Assistant State Attorney Chris White, who prosecuted Mr. Willacy, signed the necessary documents to place Mr. Clark into the Pretrial Intervention Program, and on May 14, 1992, Chris White entered a nolle prosequi in his case. The information concerning Mr. Clark's record was easily available to the state at the time of voir dire.

The undersigned learned of Mr. Clark's prosecution while researching this Brief (R 3557-58). In order to show the discriminatory nature of the challenge to Mr. Payne, the undersigned researched the criminal records of the white venirepersons by running their names through the records of the clerk of court for Brevard County (R 3558). Upon learning of Mr. Clark's prosecution, the undersigned filed a Motion to Relinquish Jurisdiction with this Court, which Motion was granted on August **18,** 1992 (R 3628), and on October 12, 1992, a hearing was held on defendant's Motion for New Trial. At that hearing, the following facts were elicited.

During the jury qualification process, jury clerk Lucille Rich asked the assembled venirepersons questions designed to determine whether they were qualified to

serve under section 40.013(1), Florida Statutes (1991), which states in pertinent part, "No person who is under prosecution for any crime ... shall be qualified to serve as a juror." (R 3534-38) Ms. Rich placed the prospective jurors under oath and asked all of them whether they were under prosecution for any crime, and no one, Mr. Clark included, answered affirmatively, despite being given an opportunity to answer privately (R 3539). Mr. Clark testified that he really was not paying attention to the jury qualification process, and he considered the process to be "just a formality." (R 3519-20).

At the hearing, Assistant State Attorney Chris White described Mr. Clark's prosecution generally as a civil dispute between Mr. Clark and a former business partner over ownership of a computer (R3599-3600). The case was submitted for pre-trial intervention under section 948.08, Florida Statutes (1991) with the approval of Mr. Clark's attorney, and on October 2, 1991, Chris White approved the PTI program's recommendation that Mr. Clark be accepted (R 3591-92). Word of Mr. White's approval was sent to Joe Brand, the program co-ordinator with the Department of Corrections, on October **4,** 1991, the Friday before jury selection for Mr. Willacy was to begin (R 3567). On October 7, the day Mr. Clark's jury service began, Mr. Brand sent a letter to Mr. Clark and his attorney informing them of his acceptance and informing them that the PTI contract signing date was set for October 18 (R 3567-68). On October 7, jury selection in this case began and on October 8 Mr. Clark was selected as a juror.

Mr. Clark testified that he received the letter informing him of his PTI signing date sometime after he was chosen to sit on the jury (R 3520). He called Joe Brand to inform him that he may have difficulty making the signing date because he had been selected for a murder trial jury (R 3520; 3586). Upon learning of Mr. Clark's problem, Mr. Brand testified that he called Mr. White's secretary, and the secretary called Mr. White (R 3575; 3586).

Mr. White testified that he received a call on one of the early days of the trial informing him that there may bc a problem with a juror and that a PTI candidate may

be on the jury (R3592). Mr. White stated that he was not sure that the PTI candidate referred to by his secretary was the Edward Paul Clark selected to sit on the jury (R 3602), and he likewise testified that he did not know that section 40.013(1) disqualified from jury service any person "who is under prosecution for any crime" (R3596). Mr. White testified that during a break in the trial he approached the defense table, and while he did not recall whether the undersigned, co-counsel Susan Erlenbach, or both of us, were present[4], he said he informed the defense that a juror might be in PTI (R 3593-96).[5] He testified that he was surprised there was no reaction from the defense (R 3594), and he stated he was expecting a serious dispute on the matter given the difficulties experienced in jury selection in general (R 3601-02). He also testificd that he did not inform the court of the problem or otherwise make his notice to the defense part of the record (R 3595).

The undersigned and Susan Erlenbach both testified that we were never informed of the problem with Mr. Clark (R 3557; R 3612). The undersigned testified that, had the defense learned of Mr. Clark's prosecution, the defense would have challenged him for cause and, if that challenge were denied, the defense would have sought to strike him peremptorily (R 3559).

After hearing this rather unusual motion, Judge Yawn stated that he wanted memoranda on the issue and then said, "This is a most unusual adventure as far as I'm concerned. It's one that is knew [sic] to my experience having never run into it before and when you think you've seen all the situations that can arise" (R 3626). After receiving the parties' memoranda (R 3652-61; 3563-73), the court, in an unreported telephone call to Mr. Craig and myself informed us on December **3,** 1992, that the motion was denied and directed Mr. Craig to prepare an order (see R 3681-82). No findings of fact were specified. Upon the state preparing an order with extensive findings of fact, none of which were ever expressed by the court, the court entered the order found at R 3674-79.

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[4] Mr. Rappel testificd that only Susan Erlcnbach was present (R3607)

[5] This claim by the state is and was vigorously denied by the defense (R 3612).

The defense filed an objection to that order, expressing the concern that the court, not the state, should make appropriate findings of fact (R 3681-82).

## Penalty phase

At the penalty phase proceeding, the state recalled Dr. Wickham to provide additional information about Mrs. Sather's death. Dr. Wickham was unable to express an opinion whether Mrs. Sather was conscious when the ligature was placed around her neck (R 2719), though he did opine that placing the ligature around her neck was sufficient to cause her to become unconscious (R 2722-23). He was unable to express an opinion about the length of time Mrs. Sather laid on the floor before the fire started (R 2727).

The defense called the defendant's father to present background information about Chadwick Willacy. Colin Willacy testified that Chadwick turned 24 years old shortly before trial (R 2740). He was born in Brooklyn, New York, and moved to Florida in April or May, 1990, from his parent's home in Bellmore, New York (R 2740-41). During Chadwick Willacy's childhood, Colin Willacy worked as a banker for Chase Manhattan Bank while his mother worked as a registered nurse (R2743). Chad Willacy attended Catholic Elementary schools (R 2743-44). Colin Willacy described the family as "very stable" and described the family's socio-economic class as "above the average, the average middle class" (R 2744). In high school, Chad Willacy performed on an average level academically but excelled in sports, particularly track (R2746). He graduated from high school with his class and began Nassau Community College (R 2747). He had minor criminal problems relating to drugs (R 2748-51), and he decided to move to Florida in an attempt to get away from the problems (R 2751). Mr. Willacy described his son as non-violent, caring, and respectful (R 2755-59).

The court found in its sentencing order (R 3461-69) the following aggravating factors: (1) that the killing was committed while the defendant was engaged in the crime of arson; (2) that the killing was committed for the purpose of preventing a lawful arrest or effecting an escape from custody; **(3)** that the killing was committed for

pecuniary gain; and (4) that the killing was especially heinous, atrocious and cruel. In mitigation, the court found the statutory mitigating factor that the defendant had no significant history of prior criminal activity and further found non-statutory mitigation in that the defendant has no history of violence or a tendency toward violence, and that he had performed well in confinement prior to trial. The court rejected as mitigation evidence tending to show the defendant's healthy relationships with his family, the good quality of his family background, his intelligence and education (R **3466-67).**

# Argument

## Guilt phase arguments

I. THE COURT REVERSIBLY ERRED WHEN IT REFUSED TO ALLOW THE DEFENSE AN OPPORTUNITY TO REHABILITATE MARIA CRUZ BEFORE SHE WAS STRICKEN FOR CAUSE.

The error committed by the Court in refusing to allow the defense an opportunity to rehabilitate Maria Cruz prior to her excusal for cause is both patent and patently reversible. Rule 3.300(b), Fla.R.Crim.Pro, states:

> The Court may then examine each prospective juror individually or may examine the prospective jurors collectively. *Counsel* for *both the State and defendant shall have the right to examine jurors orally on their voir dire.* The order in which the parties may examine each juror shall be determined by the court. *The right of the parties to conduct an examination of each juror orally shall be preserved.*
> [emphasis added]

This Court in *O'Connell v. State*, 480 So. 2d 1284 (Fla. 1985), reversed the conviction and death sentence of the defendant there for precisely the reason raised here. The trial court in *O'Connell* apparently removed for cause two death-scrupled jurors without allowing the defense an chance to rehabilitate them. The court indicated that it did not allow rehabilitation because, "I don't believe [the defense] could rehabilitate them under any stretch of the imagination because I wouldn't accept a change in moral values between now and the hour he gets through ...." *Id.* at 1286. The Supreme Court stated:

> We agree that "there may be situations where the trial court is justified in curtailing voir dire, [and where] it has considerable discretion in determining the extent of counsel's examination of prospective **jurors**." [citations omitted]. Here, however, the trial court's refusal to allow the defense an opportunity to examine the two "death-scrupled" **jurors** cannot be justified as an exercise of "control of unreasonably repetitious and argumentative voir dire qucstioning," *Jones v. State*, 378 So. 2d 797 (Fla. 1st **DCA** 1979), *cert. denied*, 388 So. 2d 1114 (1980), since defense counsel never got to ask either of them a single question.
> *Id.* at 1286-87.

*O'Connell* was followed by the fourth district in *Green v. State*, **575** So. 2d 796 (Fla. 4th **DCA** 1991):

> Appellant objected at trial to the trial court's failure to allow appellant to examine either juror before they were excused. Appellant appropriately relies on *O'Connell v. State*, 480 So. 2d 184 (Fla. 1985), in which the supreme court found the trial court committed reversible error when it did not allow defense counsel to examine excluded jurors on voir dire.
>
> ...
>
> As in *O'Connell*, no examination of the two jurors was permitted in the instant case. Applying the holding of *O'Connell* to the instant case leads to the conclusion that the trial court did err reversibly.
>
> *Id.* at **797.**

Even the dissent in *Green* supports the conclusion that failure to permit rehabilitation under the circumstances here makes reversible error:

> The defense had participated in voir dire, prior to the judge's questioning, through a written questionnaire. This is not a capital case and does not involve, as did *O'Connell v. State*, the prejudice that accrues to a defendant facing a death sentence who is not afforded an opportunity to rehabilitate a potential juror expressing doubts about the imposition of capital punishment.
>
> *Id.* at 797.

The court's action here was even more egregious than in *O'Connell* because the court's sole concern appeared to be some self-imposed time pressure, not the *O'Connell* trial court's belief that rehabilitation would be unavailing. Immediately after Ms. Cruz stated her reluctance to recommend death, a seemingly impatient Judge Yawn informed the entire court and jury panel (for no apparent reason), "We're not going to recess this court until the jury is impaneled. ... The Court will continue until the jury is sworn." With Mr. Campbell, the death-scrupled juror excused for cause without a request to rehabilitate prior to Ms. Cruz, the court even specifically stated that it would "leave that matter for counsel to explore," yet the court did not do so when Ms. Cruz expressed her position.

While the *O'Connell* trial court may validly have believed that the excused jurors could not have been rehabilitated, there was no such indication in this trial pertaining to Ms. Cruz. In fact, the value of permitting rehabilitation became apparent with Mr. Herman Scott, another juror who initially indicated a reluctance to recommend the death penalty, but who was later rehabilitated through questioning. The fact that the state did not exercise a peremptory challenge to remove Mr. Scott when

their challenge of him for cause was refused indicates that merely expressing a reluctance to recommend death did not, in the eyes of these prosecutors, immediately disqualify that juror from participating. The failure of the state to peremptorily challenge Mr. Scott points up in stark relief the court's error in refusing rehabilitation of Ms. Cruz.

The U.S. Supreme Court has specifically declined to apply harmless error analysis to death qualification errors. In *Davis v. Georgia*, 429 U.S. 122, 50 L.Ed. 2d 339, the Supreme Court adopted a per se rule requiring vacation of a death sentence imposed by a jury from which a death-qualified potential juror was erroneously excluded due to an incorrect application of *Witherspoon*[6] principles. In Gray *v. Mississippi*, 481 U.S. *648*, 95 L.Ed. 2d 622 (1987), the court refused to exclude several jurors alleged to be death-scrupled, resulting in the state using all its peremptories to remove them. When another juror expressed reluctance to impose the death penalty, the court agreed to exclude the juror without a proper *Witherspoon* foundation, and failed to follow Mississippi law in questioning the jurors to explore the depths of their objections. The Court stated:

> Had [the judge properly questioned the jurors,] despite their initial responses, the venire members might have clarified their positions upon further questioning and revealed that their concerns about the death penalty were weaker than they originally stated. It might have become clear that they could set aside their scruples and serve as jurors. The inadequate questioning regarding venire members' views in effect precludes **an** appellate court from determining whether the trial judge erred in refusing to remove them for cause.
> *Id.* at 481 U.S. 662-62, 95 L.Ed. 2d 636 [footnote omitted]

The Court went on to say:

> Because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury, Wainwright v. Witt, 469 U.S., at 416, ... and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman [v. California, 386 U.S. 18 (1967)] harmless error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18 (1967). The right to an impartial adjudicator, be it judge or jury, is such a right.

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6 Witherspoon **v.** Illinois, 391 U.S. 510, 20 L.Ed. 2d 776 (19••).

*Id.* at 481 U.S. 668, 95 L.Ed. 2d 639-40

While the decision in Gray reversed the sentence and not the conviction, and while the facts in Gray are fairly unique and not particularly similar to the facts at bar, the reasoning remains completely applicable. Ms. Cruz was stricken by the state following an inadequate death qualification voir dire. The voir dire was inadequate because her minimal response did not conform to *Witherspoon* and because the defense was not allowed a chance to rehabilitate her. Had the defense been allowed a chance to voir dire, and the judge had erroneously granted a challenge for cause, the sentence would be reversible per se. Here, following *O'Connell* and Gray, both the sentence and the conviction are infirm and not subject to harmless error because of the complete failure by the court to allow even a single question of this juror.

II. THE COURT REVERSIBLY ERRED UNDER *NEIL v. STATE*, 457 So. 2d **481** (FLA. 1984). AND ITS PROGENY WHEN IT ALLOWED THE STATE TO EXERCISE **A** PEREMPTORY CHALLENGE TO REMOVE ALVIN PAYNE FROM THE JURY PANEL.

The state's actions concerning juror Alvin Payne present a new and different twist in the ever-changing Neil challenge landscape. The defense concedes that the fact that a venireman has a criminal conviction is, generally, a sufficiently non-racial reason to exercise a peremptory challenge. See, e.g., Tillman v. State, 522 So. 2d 14 (1988) at 17 fn. 1; . But the facts surrounding Mr. Payne's strike are very different. The state here ran a criminal record check on Mr. Payne and Mr. Payne alone. The state then used the information they obtained to justify their strike, despite the fact that (1) one "conviction" upon which they relied in fact was merely a complaint that resulted in no arrest and no prosecution; (2) there was no evidence presented that the disorderly conduct[7] misdemeanor to which Mr. Payne pled resulted in a conviction or whether an adjudication of guilt was withheld; and (3) the state failed to investigate the erroneous information they received by questioning Mr. Payne about it prior to exercising the strike, and then, when the court allowed further voir dire of Mr. Payne

[7] **A** second degree misdemeanor under section 877.03, Florida Statutes (1991).

after the strike was exercised, the state persisted in seeking to exclude him despite learning that much of the information they had received was wrong.

The strike of Mr. Payne was predicated on the following concerns; (1) he allegedly was charged with disorderly conduct and resisting arrest; (2) he showed a "lack of candor" when he "skipped" his employment at Dip Stix, and (3) he testified for the defendant in a drug charge. **As** for reason (1), Mr. Payne's alleged criminal record cannot stand as a basis to sustain a strike under the circumstances of this case because the state allowed, as argued below, a person under active prosecution for a felony to sit on the jury. It is incomprehensible that a single disorderly conduct plea in a black man's past should be disqualifying, but an active grand theft prosecution of a white man is not. **As** for reason (2), there was no "lack of candor" regarding Mr. Payne's employment at Dip Stix; in fact, Mr. Payne did not "skip" his employment at Dip Stix, he was completely candid about his employment and the prosecutors were confused about the names of the business, a confusion Mr. Payne cleared up during voir dire following the strike. **As** for reason (3), regarding Mr. Payne's participation in the drug trial, the state did nothing to develop the background of Mr. Payne's participation, so it is unknown whether he testified voluntarily, whether he was compelled to appear, what his involvement in the case was, or what his testimony was about. Mr. Payne could have been compelled to appear on behalf of a person totally unknown to him to establish an alibi; the defendant in that case, for example, could have been a customer at Dip Stix whose car Mr. Payne serviced. There is simply no basis for the state's speculation that, since Mr. Payne testified on behalf of a drug defendant in a criminal trial, Mr. Payne would be somehow biased.

When those facts are balanced with the fact that Mr. Craig specifically said to Mr. Payne, "... So I guess we could call both [the defendant and] you young, black males. Do you feel that that fact would in any way affect your ability to listen to the evidence, listen to the Court's instructions on the law and deliberate with the other jurors in the case recognizing that it's not unlikely that you would be seated on a jury

with eleven white people?" it becomes overwhelmingly clear that race was at the forefront of these prosecutors' minds during this selection process, and that Alvin Payne's race was a significant concern to them.

Complicating the situation is that fact that the state chose to run a records check only on Mr. Payne. The state's explanation for running the check on Mr. Payne is simply nonsensical; because he stated some of his high school classmates had become police officers, the case officer thought it was appropriate to run a records check. The strike of Mr. Payne was tainted by racial bias, and the court reversibly erred when it allowed the state to exercise the strike.

## III. THE COURT ERRED WHEN IT FAILED TO GRANT A NEW TRIAL WHEN IT WAS DISCOVERED THAT JURY FOREMAN EDWARD CLARK WAS FOUND TO BE INELIGIBLE TO SERVE UNDER SECTION 40.013, FLORIDA STATUTES (1991).

The law is clear that litigants during voir dire are entitled to truthful responses from prospective jurors, *Loftin v. State*, 67 So. 2d 185 (Fla. 1953); *Roland v. State*, 584 So. 2d 68 (1st DCA 1991); *State v. McGough*, 536 So. 2d 1187 (2d DCA 1989); *U. S. v. Perkins*, 748 F.2d 1519 (11th Cir. 1984), and, while no case has been found precisely on point, it is clearly reasonable to assume that the litigants and the court likewise are entitled to truthful responses to the juror qualification questions posed by jury clerks prior to the beginning of voir dire. The issue thus becomes at what point does the failure by a prospective juror during voir dire to answer honestly a question posed to him require a new trial.

In *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 104 L.Ed. 2d 845 (1984), the U. S. Supreme Court provided the answer in a civil context. In a federal personal injury trial, a prospective juror during voir dire did not respond when asked whether any venireman or member of his family, "had sustained any severe injury ... that resulted in any disability or prolonged pain and suffering ...." The venireman was selected to sit on the jury, and counsel for the plaintiff learned after the trial **that** the juror's son in fact had been seriously injured. After the Tenth Circuit ordered a new trial,

the Supreme Court adopted the following standard for determining when nondisclosure warranted a new trial:

> To invalidate the results of a 3-week trial because of a juror's mistaken, though honest, response to a question is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination. Whatever the merits of the Court of Appeals' standard in a world which would redo and reconstruct what had gone before upon any evidence of abstract imperfection, we think it is contrary to the practical necessities of judicial management reflect in rule 61 and §2111. We *hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis* for *a challenge for cause.* [emphasis added]
>
> *Id.* at 555-56, 78 L.Ed. 2d at 671.

Under *McDonough,* there is thus created a two-part test; the movant must show (1) that a juror failed to answer honestly a material question, and (2) that a correct response would have provided a valid basis for a challenge for cause.

Justice Brennan's concurrence, arguing that the movant should be required to show actual prejudice by the prevaricating juror, highlights the point that *actual prejudice* is not the issue, and that the existence of a valid basis for a challenge for cause hidden by the juror is the crucial inquiry in the second prong. This point is significant, because several subsequent federal cases seem to interpret *McDonough* to require an actual prejudice showing. Such an interpretation is understandable, because it is rare that one could make a showing sufficient to sustain a challenge for cause without showing actual prejudice. The instant case, however, is that rare instance. Although Mr. Clark claimed not to be biased by his imminent entry into PTI, his statutory disqualification makes it clear that a challenge for cause lawfully would and should have to be granted if the opportunity to make the challenge had occurred.[8]

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8 In the state-prepared order denying the defendant's motion for new trial, the court apparently adopted the state's claim that a defendant in a pre-trial diversion program created under section 948.08, Florida Statutes (1989), is not "under prosecution" for section 40.013(1) purposes, citing Likens v. State, 16 So. 2d 158 (•• 1944). In Likens, the case charging the defendant/juror had been placed on a "removal docket" (the case report does not explain what

Applying the *McDonough* standard, it is clear that both prongs are met in the instant case. Mr. Clark failed to answer honestly a material question when asked by jury clerk Lucille Rich whether he was under prosecution for any crime, and the fact that he was under prosecution at the time of his service certainly renders him subject to a challenge for cause under the clear language of section **40.013.**

While no Florida case cites *McDonough,* several 11th circuit cases have applied the standard in criminal contexts. In *United States v. Perkins,* **748** F.2d 1519 (11th Cir. **1984),** the court invalidated the verdict based on a juror's failure to reveal several matters touching on his contacts with the legal system, including his participation as a defendant in a civil suit and his testimony as a witness for the government in a criminal matter. The court applied *McDonough* and reversed the conviction. In *United States* v. *Casamayor,* **837** F.2d 1509 (11th Cir. **1988),** the court denied a motion for a new trial where the jury foreman failed to reveal that he had been a police trainee for three months **23** years before the trial, and had met the defendant during that time. The court found that the juror's short tenure with the Key West Police Department would not sustain a Challenge for cause.

Of particular interest is *United States v. Bollinger,* **837** F.2d **436** (11th Cir. **1988).** Defendant's counsel first learned of a juror's possible bias and exposure to extrinsic evidence from a phone call on June 10 while the jury was deliberating. Counsel did not bring the matter to the court's attention until an adverse verdict was rendered. the court stated:

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a "removal docket" is) and apparently the prosecution had been abated when he was called for jury duty. The court held that a juror whose case is on the "removal docket" is not "under prosecution" and thus is eligible to sit. Likens provides no support for the state's position here, and it is patently clear that Mr. Clark was "under prosecution" he sat on the jury. Section 948.08(2) states in pertinent part, "In no case, however, shall any individual be released to the pretrial intervention program unless, after consultation with his attorney or one made available to him if he is indigent, he has voluntarily agreed to such program and has knowingly and intelligently waived his right to a speedy trial for the period of his diversion." The state possibly could claim that Mr. Clark was not "under prosecution" after the PTI contract signing occurred, but to claim that merely being accepted into the program by the state is sufficient to abate the prosecution is absurd. Section 948.08(4) allows the state to restart the prosecution of a diverted defendant essentially at will (if the "public interest so requires"), so to claim that a defendant in a PTI program, or a defendant seeking entry into a PTI program, is not "under prosecution" is simply wrong.

> Although the June 10 telephone call did not disclose the full extent of [the juror's] misconduct, [footnote omitted] enough information was relayed that counsel should have contacted the district court while counsel continued his investigation. *It is up to the court, and not the parties to determine the appropriate response when evidence of juror misconduct is discovered.* See *United States v. Caldwell,* 776 F.2d 989, 997 (11th Cir. 1985); *United States v. Carrodeguas,* 747 F.2d 1390 (11th Cir. 1984). [Defendant's] decision to gamble on the jury rather than inform the court of the problem in time to allow the court to determine is corrective action was possible prior to verdict **is** fatal to his claims regarding juror Hunter [emphasis added].
>
> Id. at 439

*Bollinger* is applicable to the instant case in various ways. If the state in fact effectively communicated to the defense the fact that juror Clark was pending entry into the PTI program, and that the defense made a tactical decision not to raise it, *Bollinger* would support the state's contention that failure to raise the matter prior to the verdict waived the defect. However, *Bollinger* makes it clears that it is "up to the court and not the parties to determine the appropriate response when evidence of juror misconduct is discovcrcd." Here, the state admittedly failed to inform the court that a problem may have existed with Mr. Clark, despite the state's knowledge at a point in the trial when the matter easily could have been remedied. The state's failure to inform the court, regardless of the reason why the court was not informed, is prejudicial error that requires a new trial. Had the court been informed, Mr. Clark could have been struck and the last alternate substituted.

Under Florida law, juror misconduct occurs when a juror responds untruthfully, even if unintentionally, to questions asked on voir dire. *Roland v. State,* 584 *So.* 2d 68 (Fla. 1st DCA 1991); *Sconyers v. State,* 513 So. 2d 1113 (Fla. 2d DCA 1987). The court should next apply the *McDonough* rule discussed above to determine whether the misconduct is sufficient to warrant a new trial, and the defense contends that each prong of the *McDonough* test is met.

In *Mitchell v. State,* 458 *So.* 2d 819 (Fla. 1st DCA 1984), defendant was charged with offenses arising from a disturbance at a prison where defendant was an inmate. During voir dire, the court **asked** the venire whether any prospective jurors had friends

or relatives who were employed at the prison, and all jurors answer no. After the verdict, the defense learned that one juror had a nephew who was employed as a correctional officer. The court stated:

> Even assuming, as the trial court found, that the juror had no intent to deceive, nonetheless relief will be afforded where (1) the question propounded is straightforward and not reasonably susceptible to misinterpretation; (2) the juror gives an untruthful answer; (3) the inquiry concerns material and relevant matter which counsel may reasonably be expected to give substantial weight in the exercise of his peremptory challenges; **(4)** there were peremptory challenges remaining which counsel would have exercised at the time the question was asked; and (5) counsel represents that he would have peremptorily excused the juror had the juror truthfully responded [footnote omitted].
>
> *Id.* at **821**

The *Mitchell* test, like the *McDonough* requirements, clearly is met here: (1) Ms. Rich's question was clear and unmistakable; **(2)** Mr. Clark did not respond accurately; (3) the question certainly was relevant to his qualifications to serve; **(4)** while the defense had used all its peremptory challenges, a statutory disqualification clearly is a sufficient basis for a challenge for cause, and finally; ***(5)*** the undersigned testified that he would have sought to challenge Mr. Clark had the information been presented timely.

Several older Florida cases indicate that failure to raise juror qualifications prior to the entry of the verdict waives review. See *Ex parte Sullivan,* **19** *So.* 2d **611** (Fla. **1944).** *Sullivan* is somewhat similar to the facts here; the defense there did not learn until several months following defendant's conviction and death sentence, and after the conviction and sentence were affirmed on appeal, that a juror was a deputy sheriff, and thereby statutorily disqualified. The court stated:

> If one of the jurors was in fact a deputy sheriff, it was a matter of record available to the petitioner at the trial and should have been seasonably raised. He should have challenged for cause and exception taken on refusal of the challenge. The challenged error could have then been reviewed on appeal.

*Sullivan* is inapposite to the case here. There is no indication in *Sullivan* that the juror misled the parties by failing to inform them of his employment, and the court seems to be basing its decision on the fact that the defense could have learned of the **ju-**

ror's employment, perhaps with appropriate questions. In the instant case, Mr. Clark was asked a direct question intended to address this very point, and he failed to respond accurately. While the state may argue that the defense should have or could have asked additional questions in voir dire designed to elicit the fact of Mr. Clark's prosecution, there is no reason to believe that he would have responded to questions in voir dire differently than he did during jury qualifying. Further, it is clear from Judge Yawn's overriding impatience with the jury selection process, the judge would not have stood for the parties repeating the jury qualification questions during voir dire. Had the question not been asked of Mr. Clark, the *Sullivan* rule might apply, since his prosecution "was a matter of record" of which the defense through some stretch of imagination could have learned, though it is somewhat unreasonable to require the defense to run police records on each juror during the course of a trial.

The order signed by Judge Yawn contains a finding that the defense had been put on notice of Mr. Clark's prosecution. The order making such a finding was prepared by the state based solely on the court's directive at an unreported five-minute telephone conference telling the parties that the motion was denied and directing the state to prepare an order. The court made no findings of fact and gave no direction to the parties as to what the court found to be the facts. The defense objected to this procedure, arguing that, given the serious factual disputes involved, the court must make specific findings of fact. The court instead merely signed the lengthy order prepared by the state with the findings of fact the prosecutors decided were necessary.

IV. THE COURT ERRED WHEN IT FOUND DEFENDANT'S STATEMENT TO HAVE BEEN VOLUNTARILY MADE, THEREBY ALLOWING THE STATE TO USE THE STATEMENT TO IMPEACH THE DEFENDANT HAD HE ELECTED TO TESTIFY ON HIS OWN BEHALF.

The trial court erred when it ruled Mr. Willacy's statement was voluntarily made, thereby overruling the defense Motion in Limine to preclude the state from using the statement to impeach Mr. Willacy's trial testimony. As a result of that incorrect

ruling, Mr. Willacy decided to give up his right to testify on his own behalf to prevent the introduction of the coerced statement.

The determination whether a statement is voluntarily made depends on a determination whether there was any overreaching by the police. *Colorado v. Connelly,* 93 L.Ed. 2d 473 (1986). Det. Santiago's conduct in procuring the statement is the focus of the court's inquiry.

The manner in which the statement was procured is largely undisputed. Det. Santiago, after being told that Mr. Willacy did not wish to speak to him, proceeded to reinitiate contact with Mr. Willacy and essentially confronted Mr. Willacy with the evidence against him. Mr. Willacy testified that Det. Santiago essentially promised him that he would be released if he cooperated, while Det. Santiago testified to no such promises. In its ruling, the court's did not whether state whether it was accepting Mr. Willacy's testimony on the issue whether promises of leniency were made.

Police tactics that improperly influence, trick or coerce the defendant to make a statement will result in a finding that the statement was not voluntary. *Thomas v. State,* 456 *So.* 2d 454 (Fla. 1984). **A** police violation of *Miranda* rights, such as the invocation of the defendant's fifth amendment right to counsel, in addition to the use of other police tactics designed to obtain a confession is more likely to result in a finding that a statement is not voluntary. *State v. Snwyer,* 561 *So.* 2d 278 (2d DCA 1990). *See also Traylor v. State,* 596 *So.* 2d 957 (Fla. 1992).

The trial court's ruling on voluntariness is presumed correct, *Henry v. State,* 586 *So.* 2d 1335 (Ha. 1991), and the burden is on the state to show by a preponderance of the evidence that the statement is voluntary. *Thompson v. State,* 548 *So.* 2d 198 (Fla. 1989). Merely reciting the evidence against a defendant does not render a subsequent statement involuntary, *State v. Chavis,* 546 So. 2d 1094 (5th DCA 1989), though promises of leniency clearly will result in suppression. *Brewer v.* State, 386 So. 2d 232 (Ha. 1980).

Under the circumstances of this case, the court erred in finding the statement to be voluntary. Mr. Willacy had invoked his right to counsel, which invocation was

blatantly ignored by Det. Santiago. Det. Santiago reinitiated contact after the invocation, and read the arrest report to defendant, which act directly resulted in the defendant giving a Statement to clear the record. The defendant's statement under those circumstance is not voluntary, and the court should not have allowed the state to use the statement as impeachment.

## Penalty phase arguments

V. THE COURT ERRED WHEN IT FOUND THAT THE KILLING **WAS** COMMITTED FOR THE PURPOSE OF PREVENTING **A** LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

In his sentencing order, Judge Yawn wrote:

> The victim and Defendant were next door neighbors and knew each other. Had he left her alive, she would have been able to identify him as her assailant and as the person who burglarized her home and who robbed her. These facts, standing alone, are not sufficient proof of this aggravating circumstances. But add these facts: The Defendant was burned alive after being bludgeoned into submission and securely bound thus rendering her incapable of interfering with Defendant's actions or preventing his escape. She could cause him no harm and did not pose a threat to him of any kind whatsoever.
>
> Having considered all these facts, the Court concludes that the dominant motive for this murder was the elimination of Marlys Sather as a witness and to avoid detection and arrest. There was no other discernible reason to kill her.
>
> (R 3464)

The law is clear that when the victim is not a police officer, witness elimination must be shown to be the "dominant motive" for the killing to establish this factor. *Robertson v. State*, 611 *So.* 2d 1228 (Fla. 1993); *Preston D. State*, 607 *So.* 2d **404** (Fla. 1992); *Davis v. State*, 604 So. 2d 794 (Fla. 1992). Further, the mere fact that the victim can identify the defendant is not, as Judge Yawn recognized, sufficient to support this factor. See, e.g., *Davis v. State*, 604 *So.* 2d 794 (Fla. 1992).

This Court has repeatedly held that the fact that the victim and defendant knew each other, standing alone, cannot support this factor. *Davis v. State*, 604 *So.* 2d 794 (Fla. 1992); *Geralds v. State*, 601 *So.* 2d 1157 (Fla. 1992); *Jackson v. State*, 599 So. 2d 103 (Fla. 1992); *Jackson v. State*, **575** So. 2d 181 (Fla. 1991); *Bruno D.* State, 574 So. **2d 76** (Fla. 1991). The facts in *Davis* are highly analogous to the facts here; the victim there

was an acquaintance of the defendant's, she was found dead in her home with several items of her personal property missing, and the trial judge found that the motive for the killing was to prevent his identification.[9] **In** almost every case in which this Court has upheld the finding of this factor when the victim is not a police officer, there are additional facts that justify its finding, such as a statement by the victim, *see e.g., Espinosa v. State*, 589 *So.* 2d 887 (Fla. 1991); a statement by the defendant, *see e.g.,* Young *v. State*, 579 *So.* 2d 721 (Fla. 1991), *Hitchcock v. State*, 578 *So.* 2d 685 (Fla. 1990), *Reed v. State*, 560 *So.* 2d 203 (Fla. 1990), *Lopez v. State*, **536** *So.* 2d **226** (Fla. 1988), ***Swafford v. State***, 533 *So.* 2d 270 (Fla. 1988); or an overriding plan by the defendant, see e.g., *Zeigler v. State*, 580 *So.* 2d 127 (Fla. 1991), *Correll v. State*, 523 *So.* 2d 562 (Fla. 1988).There was no evidence presented in the instant case going to any of those points.

Judge Yawn appeared to recognize this law, but then tried to justify finding this factor by adding apparently irrelevant facts. The manner in which this killing occurred does not help show that the killing- was done to eliminate a witness. In fact, no evidence other than the fact that the defendant and victim knew each other tends to prove this factor, and that fact standing alone does not support this aggravator. The Court erred in finding this aggravator and in considering it as part of the sentence.

VI. THE COURT ERRED IN FINDING THE KILLING TO BE ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

In his sentencing order, Judge Yawn wrote:

> In accomplishing the victim's death, the Defendant bludgeoned, strangled and bound her rendering her incapable of resistance, defense or escape. The Defendant then applied a combustible liquid to her body and set it on fire while she was still alive. These actions by defendant raise his conduct to a level setting this case apart from the norm of capital felonies bringing it well within the definition of "heinous, atrocious and cruel" found in *Dixon v. State*, 283 *So.* 2d 1 (Fla. 1983) *(sic,* actually 1973).
> (R **3465)**

[9] The Davis trial court found that "*one* of the Defendant's motives for killing the victim was to prevent identification." Id. at 798 ( emphasis added).

While a surface evaluation of the manner of Mrs. Sather's death would tend to support this finding, the details of the death provided by Dr. Wickham tend to show otherwise. Dr. Wickham testified that the strangulation injuries she received, standing alone, were sufficient to cause death. There was no evidence presented that Mrs. Sather was conscious after the fire was set, and the severity of the strangulation injuries would tend to show that she was not conscious. Further, she was struck several times in the head with a blunt object, at least once sufficiently hard to knock a piece from her skull. Assuming, as would appear likely, that the strangulation occurred after the blows to the head, there is no evidence to show that she was in a state of consciousness sufficient to recognize the fact of her impending death. While strangulation perpetrated on a conscious victim involves the foreknowledge of impending death, *Sochor v. State*, 580 So. 2d 595 (Fla. 1991), sufficient to support this factor, there is no evidence that Mrs. Sather was conscious during the strangulation following the beating or that she was able to comprehend her impending death. While the state is able to postulate a wide range of scenarios about how this death happened, and many such scenarios involve a killing that would meet the criteria for this aggravator, speculation about how the killing was accomplished will not suffice to meet the state's burden of proving this factor beyond a reasonable doubt.

## VII. THE COURT'S ORDER PURPORTING TO WEIGH THE MITIGATING AND AGGRAVATING CIRCUMSTANCES FAILS TO MEET THIS COURT'S REQUIREMENTS AS SET OUT IN *CAMPBELL v. STATE*, 571 So. 2d 415 (FLA. 1990), IN THAT THE COURT FAILED TO GIVE ADEQUATE WEIGHT TO THE MITIGATING EVIDENCE PRESENTED AND THE WRITTEN ORDER FAILS TO PRESENT SUFFICIENT DETAIL OF THE WEIGHING PROCESS USED BY THE COURT IN ARRIVING AT ITS SENTENCE.

The trial court summarized the mitigation presented into four discrete categories, two of which the court dismissed as "not a mitigating circumstance." Those four categories are (1) strong support of his family; (2) the defendant's lack of history of violence; (3) defendant's good performance while incarcerated; and (4) that the defendant is intelligent and educated (R3466-67). The court dismissed out-of-hand

categories (1) and (4), holding in each without analysis that the evidence presented "is not a mitigating circumstance." **In** categories (2) and (3), the court merely stated that the circumstances was accepted as a non-statutory mitigating circumstance. The court engaged in no clearly-defined weighing of the evidence, nor did it present any analysis of the weighing process. The only weighing of the factors and the evidence apparent from the court's order comes in a section of the order entitled "Summary," which states in full:

> After weighing the evidence the Court finds four aggravating circumstances to exist. It further finds one statutory mitigating circumstance to exist and that two non-statutory mitigating circumstances are considered ***(sic)*** but deserve little weight.
>
> The aggravating circumstances are found to substantially outweigh the mitigating circumstances. In conclusion, the Court has not used the score card approach proscribed in *Dixon v. State, 283 So.* 2d 1 (Fla. 1973).
>
> (R 3467)

The sentencing order fails in two ways as it deals with mitigation. First, the court failed to find mitigation in the evidence presented, and, second, the court's order fails to set out in sufficient detail the weighing process used by the court in reaching its decision.

In *Campbell v. State,* 571 So. 2d 415 (Fla. 1990), this Court set out five non-exclusive specific categories of non-statutory mitigating factors. Evidence going to one of those factors was presented to the Court, and was dismissed out-of-hand. The trial court's failure to properly weigh that evidence indicates that the sentence imposed herein should be reversed.

In *Campbell,* this Court specifically required the sentencer to take into account the defendant's "potential for rehabilitation" as a non-statutory mitigating factor. *Campbell v. State,* 571 So. 2d 415, 419 n.4. The trial court found defendant's education, intelligence, and family support not to be mitigating circumstances. However, there can be no greater aids to rehabilitation than intelligence, education, and family support. The fact that Mr. Willacy is an intelligent, well-educated man with a mother and father who truly love him goes directly to his ability to be rehabilitated. See *Stevens*

*v. State*, 552 *So.* 2d 1082 (Fla. 1989). This Court broadly defined mitigating circumstances as "'any aspect of a defendant's character or record ...' that reasonably may serve as a basis for imposing a sentence less than death," *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), citing *Lockett v. Ohio*, 438 586, 57 L.Ed. **2d** 973 (1978). The factors the court rejected without discussion in fact go quite directly to the issue whether this man deserves a sentence less than death, and the sentence as a result is infirm.

Further, it is difficult to analyze what effect the court's failure to consider Mr. Willacy's potential for rehabilitation had on the sentence because the analysis of the mitigating factors and the weighing of the aggravation and mitigation is so sparse. This Court requires the trial court to give the aggravating and mitigating circumstances presented a "reasoned weighing" before imposing sentence. Floyd *v. State*, 569 *So.* 2d 1225 (Fla. 1990). While the order issued here is more detailed than that found deficient in *Bouie v. State*, 559 *So.* 2d 1113 (Fla. 1990), the review of mitigating circumstances and the weighing of the mitigation and aggravation appears to be similar to that found barely sufficient in *Rhodes v. State*, 547 *So.* 2d 1201 (Fla. 1989). In *Rhodes*, the Court stated:

> Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do written findings of fact merely serve to "memorialize" the trial court's decision. ... [citation omitted] Specific findings of fact provide this Court with the opportunity for meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors.
>
> We note that in this case it is difficult to ascertain for the sentencing order the analysis used by the trial court to weigh aggravating and mitigating factors; it appears the trail court merely stated which aggravating and mitigating factors applied. The findings of fact contain little analysis and very little application of the specific facts of Rhodes' case. Although we find the sentencing order in this case to be sufficient, we urge trial judges to use greater care when preparing their sentencing orders so it is clear to this Court how the trial judge arrived at the decision to impose the death sentence.
>
> ***Id.*** at 1207

The Court remanded the case for a new sentencing hearing **based** on other errors that occurred during the penalty phase.

The Willacy trial occurred more than two years after *Rhodes* was issued. That which barely passed muster in 1989 should not be allowed to stand today when this Court has made it clear that death sentencing orders must afford the Court with a meaningful opportunity to review the death sentence. While the trial court here did a fairly good job setting forth its evaluation of the aggravators, the mitigators were given very short shrift and there is a total lack of analysis in weighing the competing factors, other than to state in a totally conclusory fashion, "The aggravating circumstances are found to substantially outweigh the mitigating circumstances." (R 3467) Such a gross lack of analysis should not be allowed to stand.

Based on the foregoing, the imposition of the death sentence should be reversed and the cause remanded for resentencing.

## VIII. UNDER THE CIRCUMSTANCES, WITH TWO VALID AGGRAVATING FACTORS PLUS THE MITIGATION FOUND BY THE COURT AND THE MITIGATION THE COURT PROPERLY SHOULD HAVE FOUND, DEATH IS NOT A PROPORTIONATE PENALTY.

In *Tillman v. State,* 591 So. 2d **167** (Fla. 1991), this Court indicated that a proportionality review requires the court to perform a thoughtful and careful review of the facts of the case and determine whether, compared to other death penalty cases, the imposition of death is warranted. The defense herein contends that the two valid aggravating factors (killing committed in the course of an arson, and killing for pecuniary gain) when compared to the mitigation presented, indicates that death is not **a** proportionate sentence.

As shown by the evidence presented during the penalty phase, Mr. Willacy is a bright, educated, articulate young man, the product of an intact family with educated, professional parents who love and support him. He had a minor brush with the law as a result of a drug problem when he was growing up in New York, but the trial court here found his criminal history to be sufficiently minor to find the statutory mitigator of no significant prior criminal activity (R 3465). The killing of Mrs. Sather was shockingly

out of character for this man. Mr. Willacy is the kind of person who can contribute to society, even if it is prison society. Under these circumstances, death simply is not a proportionate sentence. See *e.g., Smalley v.* State, 546 So. 2d 720 (Fla. 1989).

## Conclusion

For the reasons set out above, Mr. Willacy's conviction is infirm and his sentence was improperly imposed. The violation of rule 3.300(b) and *O'Connell v. State* by failing to allow rehabilitation of a death-scrupled juror, standing alone, is clearly sufficient to reverse the conviction, and the Neil violation occurring in the strike of Mr. Payne, coupled with the state's actions in allowing a juror under active felony prosecution to sit as foreman of the jury, shows unequivocally that the jury selection process was impermissibly tainted resulting in a conviction that must be reversed.

Further, in imposing the death sentence, the court improperly found two aggravating circumstances, failed to find properly presented mitigating circumstances, and then failed to provide a sufficient sentencing order. The magnitude of these error lead unerringly to the conclusion that the defendant's conviction and sentence are legally and constitutionally infirm, and must be reversed.

## Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by hand/U.S. Mail/fax to Barbara Davis, Office of the Attorney General, 210 N. Palmetto Avenue, Suite **447,** Daytona Beach, **FL** 32114, this 9th day of June, 1993.

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