IN THE SUPREME COURT OF FLORIDA

Case No.:79,217

CHADWICK WILLACY,

Appellant/Cross-appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross-appellant.

Reply Brief of the Appellant
Answer Brief of the Cross-Appellee

An Appeal from a Judgment 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 Facts

The state's Statement of Facts is generally correct with the exceptions noted below. The appellant, however, does not concede that the state's Statement of Facts should be used exclusiveley; it should be viewed as merely supplemental to the appellant's Statement. The state is incorrect in its statement of facts pertaining to the suppression of part of John Barton's testimony. The state says, "The police took Barton to a housing project[1] where at least two black men were in custody." In fact, no one was in custody (R 3009-10)[2], and the showup occurred in the street outside Mr. Willacy's home. (R 2957-60). The second black male standing in the street at the time of the showup is nowhere identified, and apparently was a police officer or onlooker.

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[1] The record reflects that th locatia vas "housi g development," not a "housing project.'' While not a point of great importance, in fact the location of the showup was in the street of a middle class residential area of single-family homes.

[2] Mr. Willacy was not arrested until later that night, hours after the showup, when Det. Santiago was called to Mr. Willacy's house by Mr. Willacy's girlfriend to retrieve a checkbook register found in the wastebasket of their home.

Argument

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

The state in its reply on this issue fails to address certain key points and clearly attempts to mislead the Court in both a determination of what happened and how the law applies to the facts of the situation. The state fails even to mention rule 3.300(b), Fla.R.Crim.Pro., and its unequivocal requirement that both parties be allowed to question individual jurors, and it confuses the rule 3.300(b) aspect of the defense argument with the *Witherspoon* aspect in an attempt to excuse this error.

The state begins its misdirection by attempting to restate the issue; the appellant frames the issue as whether "The court reversibly erred when it refused to allow the defense an opportunity to rehabilitate Maria Cruz before she was stricken for cause;" the state formulates the issue as, "Whether the trial court abused its discretion in denying Willacy's attempt at rehabilitating prospective juror Cruz." The state ignores clear precedent and rule 3.300(b), Fla.R.Crim.Pro.[3], by trying to claim that the trial court has "discretion" not to comply with the rule requiring the court to allow defense voir dire of prospective jurors. No case has ever interpreted rule 3.300(b) as merely advisory.[4]

[3] "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 right of the parties to conduct an examination of each juror shall be preserved."

[4] See *Ter Keurst v. Miami Elevator*, 486 *So.* 2d 547 (Fla. 1986) (Adkins, J., dissenting), discussing rule **1.431**(b), Fla.R.Civ.Pro, the civil counterpart to rule 3.300(b):

> Many trial judges are developing ingenious plans to limit the time of jury selection in order to expedite cases and increase the case count for an individual circuit. These judges are conscientious and well-

See *Francis v. State*, 579 *So.* 2d 286 (Fla. 3d DCA 1992) ("In *Gosha v. State*, 534 *So.* 2d 912 (Fla. 3d **DCA** 1988), this court held that imposition of severe time restraints on counsel's voir dire examination of each prospective juror is, as a matter of law, unreasonable and an abuse of discretion. That holding compels reversal where, as here, the trial court totally precludes individual examination of jurors."); *Gosha v. State*, 534 *So.* 2d 912 (Fla. 3d **DCA** 1988) (In Florida, a reasonable voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b)."); *Jones v. State*, 378 *So.* 2d 797 (Fla. 1st DCA 1979) ("Meaningful voir dire examination of prospective jurors, by the court and by counsel, is assured by Fla.R.Crim.P. 3.300(b). ... [citations omitted] Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors ...."). The court has discretion to limit voir dire; it has no discretion to refuse voir dire. The rule and the cases interpreting it do not grant the court "discretion" to ignore the rule where, as here, the court felt the hour was growing late. The state's formulation of the issue is simply wrong; the issue is not one of "abuse of discretion," it is one of whether the court erred when it blatantly ignored established law.

> meaning, but are allowing the disposition of cases to become more important than the administration of justice. Unfortunately, we contribute to this problem by demanding speedy trials and quick determinations so that the trial docket will flow as steadily as the crowds through Disney World. But the courts are not businesses opened for the sale of merchandise or services.
>
> In the trial of a case the jury selection and voir dire examination are just as critical to the outcome as the presentation of the evidence. Rule 1.431(b) [Fla.R.Civ.Pro.] recognizes the importance of jury selection by providing that "the right of the parties to conduct a reasonable examination of each juror shall be preserved."

The state's next attempt at obfuscation come when they predictably argue that the error in refusing to allow voir dire of this juror was not preserved. The state cites the relevant law; "[I]t was incumbent upon the appellant to raise a timely objection and thereby allow the trial court to specifically rule on the issue." *Lucas v. State*, 376 *So.* 2d 1149, 1151 (Fla. 1979). Here, the court granted the state's request that Ms. Cruz be excused for cause. The undersigned stated, "[W]e would like a brief opportunity to try to rehabilitate," which was forcefully and unmistakably rejected; "The court has ruled, Mr. Erlenbach." *Lucas*, as argued by the state, requires that the court be allowed "to specifically rule on the issue." It is patently absurd to claim that Judge Yawn's clear statement was anything other than a ruling on the issue.[5] The state made a motion, the court granted the motion, the defense interposed an objection, and the court ruled. The state would have the defense argue with the court by, apparently, objecting again once the court's unmistakable ruling is issued. Such swinging after the bell is nowhere required by this Court's precedent, is absolutely nonsensical, and is grossly disrespectful to the court. In fact, it is difficult to imagine how the issue could have been more clearly preserved; there is no set of "magic words" needed to express an

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[5] See Roscoli Yatchng Ctr. v. Lexington Ins. Co., 601 So. 2d 1246 (Fla. 4th DCA 1992) at 1247-48:

> It is often tempting to read a verbatim account of an argument literally and conclude in retrospect that magic words have not been incanted, so that something has been waived or otherwise lost. We are charged, however, to do substantial justice. This means that we should be reluctant to construe words apart from their context. ... The tone and text of this dialogue, however, portrays a judge who had made **up** his mind and ended discussion. To say that the plaintiff should have resisted further is to prefer intransigence to a healthy respect for the obvious.

objection, the defense made it perfectly clear that it objected to Ms. Cruz' dismissal and the court could not have made itself clearer in stating it would not allow questioning. The defense properly objected when the erroneous ruling was made, it moved for a mistrial and presented case law to the court before the jury was sworn, and it objected again when asked if it accepted the jury. The error could not have been more clearly preserved absent out-and-out defiance of the trial judge.

The state inexplicably fails even to mention rule 3.300(b), Fla.R.Crim.Pro. The rule, as set out above, clearly requires that the court allow the defense to participate in voir dire of *each* juror, and no case has ever held that violation of the rule is harmless error. The state's silence on this issue is instructive; it does not even attempt to construct an interpretation of the rule that would save this conviction because no such construction exists. The state confuses the *Witherspoon* D. *Illinois,* 391 U.S. 510 (1968) aspect of this issue with the rule 3.300(b) aspect[6] by arguing, apparently, that the court can ignore the rule so long as it complies with *Witherspoon* requirements. *O'Connell* D. *State,* 480 *So.* 2d 1284 (Fla. 1985), cited by the appellant in his brief, is not a *Witherspoon* case, nor is it, as the state argues, a case setting merely out a rule of fairness requiring the court to allow the defense to rehabilitate jurors if the state is allowed that right. Rule 3.300(b) is simple and clear, and its violation results in reversal.

On the *Witherspoon* issue, the state argues that Ms. Cruz, in light of her answers to two brief questions in which she spoke a total of twenty-six words, exhibited and "unyielding conviction and rigidity of

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[6] The appellant likewise admits to confusing the issues somewhat in his initial brief

opinion regarding the death penalty."[7] It is simply impossible for this Court to make that determination in light of the trial court's refusal to allow the defense a chance to ask a single question. Further, even if this Court could make that determination without the participation of the appellant, the things Ms. Cruz said and the questions asked simply do not make out a case of a juror unable to follow the law as set forth in *Witherspoon*. What is abundantly clear from Ms. Cruz' brief voir dire is that the court was growing increasingly exasperated with the voir dire process and that, having failed to browbeat the attorneys into speeding things up, the court was turning to the venire itself to move things along. Once Ms. Cruz indicated general disapproval of the death penalty, the prosecutor asked one leading question, got a one word answer, and succeeded in getting her removed. The questioning process does not come close to complying with *Witherspoon*, and was handled in a way designed solely to appease the increasingly irritable trial judge.

The state's argument on this point is circular and simply nonsensical. The state argues, "Had Cruz believed that she could follow the law despite her personal views concerning the death penalty, she could have informed them of this fact. Thus, Willacy's burden in establishing that the trial court abused its discretion in granting the state's motion to excuse Cruz for cause is insurmountable." (Appellee's Answer Brief at 60). Apparently, according to the state, if a prospective juror disapproves of the death penalty, rehabilitation is *per* se unavailing; however, if no such disapproval is expressed, there is no

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7 *Chandler v. State*, **442** So. **2d** 171, 173 (Fla. 1983)

need for rehabilitation. The state's argument is both inventive and flat wrong.

If the violation were solely a *Witherspoon* error, the remedy would be resentencing, as harmless error analysis cannot apply, though not necessarily a new trial. *Gray v. Mississippi,* 481 U.S. 648, 95 L.Ed. 2d 622 (1987). Since the error is both a *Witherspoon* and rule 3.300(b) error, the entire integrity of the jury selection process is called into question, and the remedy can only be a reversal of the conviction.

Harmless error analysis cannot be applied to a rule 3.300(b) error under the circumstances shown here because it is apparent that rehabilitation of a death scrupled juror can and does work. Before the colloquy with Ms. Cruz occurred, the following went on with venireman John Scott:

> MR. CRAIG: Mr. John Scott, basically the same questions to you.
> Do you have any feelings or beliefs regarding the death penalty that would preclude you from rendering a fair verdict of the defendant's guilt knowing that, if the jury's verdict is guilty of first-degree murder, that the sentence, potential sentence, could be the death sentence?
> MR. SCOTT: I disagree.
> MR. CRAIG: You disagree?
> MR. SCOTT: Yeah. I don't agree with the death penalty
> MR. CRAIG: Let's talk about that for a moment.
> Listen to my question. I have to kind of ask it a certain way. Okay?
> MR. SCOTT: Yeah.
> MR. CRAIG: You told me that you have beliefs concerning the death sentence. You don't agree with the death sentence. Is that what you're saying?
> MR. SCOTT: Yes, sir.
> MR. CRAIG: Everybody is entitled to their beliefs. Would those beliefs preclude you -- interfere with your consideration of the verdict in the case because, if the verdict were guilty of first degree, the sentence could be the death sentence?
> MR. SCOTT: No.
> MR. CRAIG: You could still consider whether he's guilty or not?
> MR. SCOTT: Yes.
> MR. CRAIG: And your feelings about the death sentence wouldn't interfere with that?
> MR. SCOTT: No.

MR. CRAIG: Are you telling me -- don't let me put words in your mouth. Okay?

MR. SCOTT: Okay.

MR. CRAIG: But would about capital punishment mean that you could render a verdict of guilty only if it was accompanied by a recommendation for life?

MR. SCOTT: Yes.

MR. CRAIG: So am I to understand then that you cannot today conceive of circumstances under which you could vote to recommend to impose the death sentence?

MR. SCOTT: No.

MR. CRAIG: Even though the facts would support it and even though the Court's instructions would --

Let's see how to say that.

Even though the law would support it and the facts would support it?

MR. SCOTT: I would disagree.

MR. CRAIG: So you're telling us today that you can't vote for the death sentence?

MR. SCOTT: No.

MR. CRAIG: In this case or in any case?

MR. SCOTT: No.

(R 544-47)

...

MR. CRAIG: Mr. John Scott, you don't believe you could follow the Court's instructions. Is that what I understand you to say?

MR. SCOTT: Well, I could follow the Court's instructions, but to vote for the death penalty, I would not be able to do that.

MR. CRAIG: Even if to follow those instructions would mean that you should do that?

MR. SCOTT: Yes.

(R 549)

During defense questioning, the following occurred:

MS. ERLENBACH: Mr. Scott, do you understand that whether you yourself believe that the death penalty or bad is a separate issue from whether or not you're willing to follow the Court's instructions on the law?

Now, Mr. Scott, can you follow the Court's instructions on the law if it gets to the penalty phase, listen to those instructions and apply those instructions concerning whether or not death should be recommended?

MR. SCOTT: Yes.

MS. ERLENBACH: Do you assure the court of that?

MR. SCOTT: Yes.

MS. ERLENBACH: So if, in fact, you believe there is a finding of guilt and if, in fact, you believe that the State fulfilled the requirements necessary to convince you that death is the more appropriate sentence than life in this case, are you able to follow those instructions?

MR. SCOTT: Yes. If the State convinces me and can prove that that individual did things that they say, then I would go with it.

MS. ERLENBACH: Okay. All right. That's all we ask.

(R 580-82)

The state challenged Mr. Scott for cause (R-588), and after further questioning, the challenge was denied (R-599). It is patently clear, therefore, that the refusal to allow Ms. Cruz' questioning later that day was not harmless. The state did not choose to exercise a peremptory challenge on Mr. Scott, and he ultimately sat on the jury. Mr. Scott's initial comments showed no more "unyielding conviction and rigidity of opinion regarding the death penalty'' than Ms. Cruz's comments. It is readily apparent that the error is not harmless.

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 arguments concerning the alleged *Neil* error involving Mr. Payne similarly serve to misdirect the court's attention to the real issues. The state's claim that the error was not preserved is wrong, and it fails to address the key point of the claim: Why the state would see fit to strike a black man with two second degree misdemeanor charges, but not strike a white man under active prosecution for a third degree felony.

The state claims that counsel's act of conditionally accepting the jury waived any prior objection raised on this point. The state properly shows that, when asked whether the jury was acceptable, the undersigned stated that it was acceptable "with the *objections* as noted. [emphasis added]" Citing as authority *Joiner v. State*, 18 F.L.W. S280 (Fla. May 13, 1993), a case decided 19 months after the instant trial, the state argues that, to preserve a claimed jury selection error, the defense must again specifically enumerate the objections that have already been made, argued, and ruled upon. Appellant posits that, even under the *Joiner* standard, the error was preserved. It was made clear that, aside from the objections (plural) "as noted," the jury was acceptable. To claim that each specific objection must be re-stated and re-argued shows, appellant submits, a true lack of understanding of how trial judges operate. Few acts are as aggravating to most judges as the act of re-arguing points already decided. Under the procedural law in effect at the time of this October 7 - 17, 1991, trial, failing to note objections prior to accepting the jury was not construed as waiving the objections, in

that the Fifth District's opinion in *Joiner. v. State,* 593 So. 2d 554 (Fla. 5th DCA 1992)[8] had not been issued. The Fifth District's opinion in *Joiner* was the first case to accept the state's contention that accepting the jury panel waived any preceding objection. Further, the *Neil* objection in *Joiner* was apparently weak and expressed perfunctorily, thereby justifying the court's determination that the act of accepting the jury was an abandonment of earlier objections. The vigorous *Neil* objection raised in the instant case shows very much the opposite.

The state argues next that the state offered "several race neutral reasons for the strike, all of which were supported by the evidence." (Appellee's Answer Brief pg. 64). Three reasons are argued in the brief: **(1)** Mr. Payne "had been less than forthright about his employment with Dip Stix," **(2)** Mr. Payne "had not mentioned the offense he had committed," and **(3)** Mr. Payne "had been a witness for a defendant in a drug case." (Appellee's Answer Brief at 64-65). Each of the three bases are discussed at length and refuted at length in appellant's Initial Brief at page **32-33:** (1) Any confusion about Mr. Payne's employment was cleared up when the state re-questioned him after the strike was exercised (the state learned that the Pennzoil oil change business was the same as the Dip Stix that Mr. Payne mentioned); (2) while Mr. Payne did not mention the offenses, he was not asked, but even if he had been asked, the state does not address why a black man is struck due to a misdemeanor while a white man under active prosecution for a felony is not; and **(3)** merely being a defense witness in a criminal case, without more, cannot logically be a valid reason for exercising a

[8] Decision dated January **24,1992.**

strike.[9] The error in the way Mr. Payne was handled is patent and clearly reversible.

[9] By the state's logic, Ms. Esther LaChapelle, a black witness called in the instant case to testify that Mr. Willacy is right-handed, could now lawfully be challenged for that reason alone if she were later called for jury duty.

III. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR NEW TRIAL DUE TO JUROR MISCONDUCT WHEN JURY FOREMAN CLARK FAILED TO REVEAL THAT HE WAS UNDER CRIMINAL PROSECUTION WHEN HE SAT ON THE JURY

The state's argument that this issue was not preserved, while somewhat closer than their claim regarding the previous two issues, still falls short. The issue at bar is distinguishable from ***Ex Parte Sullivan*, 19 So. 2d** 611 (Fla. **1944)** and ***Leach*** *v. State,* 132 So. 2d **329** (Fla. 1961), because the facts as related in those cases do not reveal that the jurors whose qualifications were questioned actively failed to answer a direct question relating to their qualifications. Juror Clark was asked directly by jury clerk Lucille Rich whether he was under prosecution for any crime, and he failed to respond. The questioned jurors in ***Sullivan*** and ***Leach*** apparently were not asked about the matters that showed their lack of qualifications; juror Clark was asked and he did not answer accurately. When the defense is not accorded an opportunity to object to a juror's qualifications because the juror did not respond to a proper question, the rule as set down in *Sullivan* should not apply.

The state next argues, "The prosecutors' testimony at the hearing on Willacy's motion for a new trial clearly established that defense counsel was notified of Clark's alleged 'pending prosecution'[10] status during jury selection. [footnote omitted] However, for unknown reasons, defense counsel took no action." The record reflects no such confusion about reasons for taking no action; the defense did not know. The record nowhere reflects that anyone, state or defense, knew

[10] Why the fact of Clark's admitted prosecution is referred to derisively as an "alleged pending prosecution"' is unknown. There is no dispute about the accuracy of this "allegation."

of Mr. Clark's prosecution during jury selection, and the prosecutors themselves did not claim to know of the fact until well after testimony began. Further, the state claims in footnote 9 that Susan Erlenbach's testimony "makes clear that both defense counsel knew of Clark's status *before* the jury returned its verdict." That statement is unequivocally untrue. Susan Erlenbach's testimony revealed that one prosecutor made an off-hand comment to her after the trial was almost over, which comment in no way could be construed as "notice" that Mr. Clark was being prosecuted while he sat on the jury.

The state next tries to confuse a statutory juror disqualification with the discretionary standard set forth in *Lusk v. State,* 446 So. 2d 1038 (Fla. 1984). *Lusk* pertains to a juror's statements during voir dire that raises a question about that juror's fairness. The appellant does not claim, and has never claimed, that the record reflects that Mr. Clark possessed any impermissible bias or prejudice. Despite the interpretation the state wants the Court to adopt, the trial court has no discretion to permit a statutorily unqualified juror to serve.

The state next argues that it was not actively prosecuting Mr. Clark when he sat on the jury. Such a claim is clearly incorrect. He had been charged, arrested, released on bond, retained counsel, and gone through the pre-trial intervention screening process. To say that he was not "under prosecution" because the state did not "actively pursue its case with a steadfast purpose of having a court or jury determine his guilt," is absurd. The pre-trial intervention program created under section 948.08, Florida Statutes (1991) is a statutorily created diversion program. Some defendants are accepted, some are not. Common sense shows that they are all being prosecuted until the charges are

dismissed, irrespective of how vigorously the state chooses to purse them.

The state claims that Mr. Clark himself did not think he was under prosecution because of his pretrial intervention status. The facts show that Mr. Clark was not notified that he was accepted into the program until after he was accepted onto the jury (R-3567-68, 3520). He testified that he simply was not paying attention to the jury qualification process (R-3519-20). While research reveals no case precisely on point factually, *Mitchell v. State,* 458 So. 2d 819 (Fla. 1st DCA 1984), as argued in appellant's initial brief, is the closest, and the state cites no authority to the contrary.

IV. WHETHER 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 state in its reply on this issue misconstrues the appellant's claim. The state claims, "Willacy does not challenge the propriety of the use of statements, although ruled inadmissible in a state's case in chief based on *Miranda v. Arizona*, 384 U.S. 436 (1966), or *Edwards v. Arizona*, 451 U.S. *477* (1981) violations, for impeachment purposes. State and federal case law firmly establishes the principle that, if the statements were given voluntarily, their use for impeachment is permissible [citations omitted]."[11] The propriety of the use of those statements is exactly what the appellant is challenging. Appellant recognizes the state's statement as a correct formulation of the law; appellant contends that the court erred in finding that the statements were voluntarily made and thereby admissible as impeachment.

Even if, as the state contends, Det. Santiago's version of the events surrounding the taking of the statement, is accepted in full, the statements could not reasonability be found to be voluntary. Santiago confronted Willacy with Santiago's version of events after Willacy had invoked his right to counsel and spoken with a public defender, and Santiago goaded him into talking by reading Santiago's narrative on the arrest form. As argued in appellant's initial brief, the court erred in finding these statements to be voluntarily made.

[11] State's Answer brief at 73, footnote **11.**

V. WHETHER THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The state's response on this issue confirms appellant's argument as stated in the initial brief. The facts related by the state[12] merely add to appellant's contention that the only basis for finding this aggravator was the fact that appellant and the victim knew each other. In many of the cases cited by the state, the defendant made statements that indicated the killing was done to eliminate a witness; no such admission was made here. While an admission is not necessary, *Swofford v. State, 533 So.* 2d 270 (Fla. 1988), in the large bulk of cases that do not involve the murder of a police officer an admission exists. The state here, as the prosecutors did in the trial court, seeks to have the court speculate about the motive of this homicide. To claim that such speculation meets the court's requirements of finding an aggravator beyond a reasonable doubt is simply wrong.

The state's response fails to distinguish *Davis v. State, 604 So.* 2d 804 (Fla. 1992) except to asset without foundation that, "Here, the state proved witness elimination was the sole reason for the killing through evidence, and the trial court found this was the sole reason for the killing." The court, however, found that the killing was for pecuniary gain, so it is apparent that witness elimination was not the "sole reason for the killing." Such findings are mutually exclusive; if the killing was for pecuniary gain, then witness elimination simply cannot be the sole reason for the killing. The court erred in finding this factor.

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[12] Page **76** of the state's answer brief.

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

The state's reply to appellant's argument on this point fails to acknowledge the medical examiner's testimony that the strangulation of the victim was sufficient in and of itself to result in her death. The state makes an assertion that is contrary to both common sense and medical understanding; "Because the victim could have been conscious and in fact was alive until the fire, the victim would have suffered great pain."[13] Given that the victim suffered strangulation sufficient to cause her death, and there is no evidence that she was conscious during the fire, there is no evidence that she was aware of her impending death.

Similarly, given the severity of the victim's head wounds, this Court's statement in *Sochor v. State,* 580 So. 2d 595 (Fla. 1991), that, "strangulation, when perpetrated upon conscious victim, involves foreknowledge of death, extreme anxiety, and fear," simply does not apply. There is no evidence that the victim was conscious during the strangulation. She had been beaten severely on the head, in a manner sufficient to excise a divot from her skull. The state again encourages speculation about what happened in the victim's home; while it certainly is possible that the victim was conscious during the strangulation and/or burning, there is not evidence to support those contentions and significant evidence supporting the proposition that she was not conscious. Again, the state cannot properly claim that this factor was proven beyond a reasonable doubt.

[13] State's reply brief **at** 81.

VII. WHETHER 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 state's answer regarding this issue merely restates the court's order. The appellant argues that several factors, specifically his education, intelligence, and family support, all of which clearly fall into the "potential for rehabilitation" category of Campbell v. State, 571 So. 2d 415 (Fla. 1990), simply were categorically dismissed with the erroneous ruling that those matters were not mitigating circumstances. Such a ruling is wrong under Campbell, and the state argues nothing in response. Further, absolutely no weighing process is revealed in the court's order, likewise violating Campbell. While the sentence may not have been affected by the process used by the court, it is impossible for this Court to review the trial court's weighing process when it is hidden from view. Given the errors regarding the other aggravators, this Court should remand for resentencing on this issue.

VIII. WHETHER, 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.

The Court's review of this issue is largely dependent upon the decision rendered on issues V, VI, VII, and X. Whether the sentence imposed was proportionate is argued at length in appellant's initial brief and the state, predictably, cites the cases where this Court has ruled otherwise. Should this Court find the avoiding lawful arrest and heinous, atrocious and cruel aggravators to be invalid, the sentence will be disproportionate, especially if the trial court failed to consider proper mitigating evidence. Likewise, if the Court upholds those aggravators and rules for the state on issue X, appellant's argument is substantially weakened. The appellant stands by its arguments on those issues and the argument presented in his initial brief regarding this issue.

IX. WHETHER THE COURT ERRED IN PRECLUDING JOHN BARTON'S IDENTIFICATION OF THE DEFENDANT AT TRIAL.

The cross-appellant confesses to failing to understand the state's argument in this regard. The state apparently claims that, because there was no improper state action on September 5, 1990, when Mr. Barton saw a person resembling the defendant in a car later identified as the victim's car, Mr. Barton should be allowed to testify to his identification of the defendant. In fact, an eyewitness' initial viewing of a suspect is never the result of any improper police conduct; in theory, at least, the first time a witness sees the suspect in the usual case is when the witness sees the suspect during the crime.

Here, assuming arguendo that the person Mr. Barton saw in the victim's car was Mr. Willacy, it is clear that no police misconduct caused that viewing and the defense never claimed that it did. However, given the very brief look Mr. Barton had at the person in the car, and the fact that there was nothing unusual about his observation of the car or the driver (*i.e.,* nothing out of the ordinary that would draw his attention to the driver),[14] it is clear that the court's ruling was predicated on the fact that the conceded improper showup tainted Mr. Barton's reliability or recollection about what he had seen. Such a ruling is traditionally how the courts deal with impermissibly suggestive lineups and showups. *Edwards v. State, 538 So.* 2d 440 (Fla. 1989). It accomplishes nothing to suppress a witness' in-court identification (The witness pointing at the defendant and saying, "That's the man."), but to allow the witness to testify to every

[14] As distinguished from the "usual" case in which a crime victim is asked to identify a person who committed the crime.

identifying factor short of pointing him out. Recollections are tainted by improperly suggestive identification procedures. The court found that Mr. Barton's recollection was improperly tainted and thus suppressed the identification. To allow the witness to use that tainted recollection to testify to everything just short of pointing out the defendant sitting in the courtroom is error and does not comport with the constitutional requirements of *Neil v. Biggers, 409* U.S. 188, *93* S.Ct. *375 (1972)* and *Manson v. Braithwaite, 432* U.S. *98, 97* S.Ct. *2243 (1977).* If the procedure used to obtain an identification is improperly suggestive, but is found to be reliable, the witness' independent recollection of events occurring prior to the police misconduct will allow the identification to be admitted. But here, Judge Budnick before trial ruled that the procedure was improper (as was conceded by the state), and also that the improper procedure tainted the identification. There was no error in Judge Yawn reaffirming that ruling at trial and refusing to give the state a second bite at the apple.

X. WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION IN FINDING THAT THE STATE DID NOT PROVE THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BEYOND **A** REASONABLE DOUBT.

In its second issue on cross appeal, the sate argues that the court abused its discretion in refusing to find that the murder was cold, calculated, and premeditated. The evidence, in fact, fully supports the court's ruling, and the court would have been in error had it found that aggravator.

The state argues that the record reveals "heightened premeditation in his elaborate planning and execution" of the murder. The fact that the killing took at least several minutes does not show that it was " calculated," *Capehart v. State,* **583** *So.* 2d 1009 (Fla. 1991). Where, as here, there clearly was no pre-planning and the killing was the result of a surprise, this factor simply does not apply. *McKinney v. State,* 579 *So.* 2d 80 (Fla. 1991).

To make this factor applicable, the court must find "a careful plan or prearranged design to kill." *Holton v. State,* 573 So. 2d 284, 292 (Fla. 1990). There clearly was no "prearranged design to kill;" in fact the state's evidence and argument showed exactly the opposite. The state's theory was that the killing occurred when the victim surprised the cross-appellee while he was burglarizing her home. Such a theory almost per se excludes any "prearranged design to kill," and the added fact that the burglary occurred at a time when the victim would not be expected to be at home only bolsters that point. There likewise was no "careful plan" involved in the killing; again the state's evidence showed exactly the opposite. The killing was accomplished crudely and haphazardly; if the state's theory is correct, the defendant used

whatever ill-suited items were readily at hand to accomplish the task; a squeegee and/or a hammer to strike her, screen spline and an iron cord to bind her, and gasoline from her own can to burn her. The evidence showed anything but a "careful plan" in carrying out this killing. Similarly, the fact that strangulation was involved does not show that the killing was cold, calculated, and premeditated. *Hardwick v. State*, 461 *So.* 2d 79 (Fla. 1984). If the evidence shows anything, it shows the human body's incredible resilience to death and the difficulty of killing a person without tools designed for the job.

Wickham v. State, 593 *So.* 2d 191 (Fla. 1992) does not support the state's argument. The heightened premeditation in *Wickham* appears directed toward the overall criminal plan; the defendant carefully planned a robbery using a ploy, and shot and killed the victim after he begged for his life. There is no similar evidence showing any such highly developed plan; if anything, the evidence showed a rather run of the mill daylight burglary that escalated when the killer was surprised by the victim. Likewise, neither *Jones v. State*, 18 Fla. L. Weekly S11 (Fla. December 7, 1992), nor *Hall v. State*, 18 Fla. L. Weekly S63 (Fla. January 14, 1993) support the state's argument. In *Jones*, the defendant planned the killing to further his desire to rob them, and in *Hall*, the defendant went far beyond the acts needed to kill the victim (including sexually battering the victim) once his robbery (as opposed to a planned burglary here) did not go off as planned.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by hand/U.S. Mail/fax to Gypsy Bailey, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050 this 18th day of Nov., 1993.

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