IN THE SUPREME COURT OF FLORIDA

MICHAEL GENE ABSHIRE,

Appellant,

v. CASE NO. 81,326

STATE OF FLORIDA

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

David S. Morgan
Florida Bar number 651265
724 South Beach Street, Suite 3
Daytona Beach, Florida 32114
(904) 248-1116

COUNSEL FOR THE APPELLANT

TABLE OF CONTENTS

PENALTY PHASE

Point Eleven

Point Twelve

Point Thirteen

Point Fourteen

Point Fifteen

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

Florida Constitution

Florida Statutes

Miscellaneous

STATEMENT OF CASE AND FACTS

The defendant, Michael Gene Abshire, and his codefendant, John Christopher Marquad, were charged by indictment with the first degree murder of Stacey Ann Willetts and with armed robbery with a deadly weapon (R 30).[1] The public defender was appointed to represent the defendant at pretrial on March 30, 1992 (R 20). Private counsel, Robert L. McLeod II, was appointed by the court on April 7, 1992, to represent the defendant (R 21).

PRETRIAL

The defense filed a number of pretrial motions (R 40; 61; 84; 89; 92; 96; 128; 128; 163; 178; 183; 185). The motions were denied.

GUILT PHASE PROCEEDINGS

VOIR DIRE

During voir dire the prosecutor made a number of sexist remarks. The following exchange took place at side bar:

> MR. WHITSON [prosecutor]: Judge, ***if we can get something besides women*** and former police officers, we'll get us a panel.
>
> MR. McLEOD [defense counsel]: What's wrong with women?

(R 875, emphasis added).

The prosecutor and William R. Hallinan, a former police officer, had the following exchange:

> PROSPECTIVE JUROR HALLINAN: I think my background makes me

---

[1]The parties will be referred to by their trial court designations, *i.e.*, the defendant and the state. References to the record on appeal are indicated by "(R and page number)".

jaded.

MR. WHITSON: I don't think you have a chance sitting on this jury, ***just between us girls***, if that will help you any.

(R 886, emphasis added; *see also* 876; 877).

The court asked spontaneously why the prosecution was striking another woman. The defense objected because the prosecution continued to exercise peremptory strikes against women. The trial judge expressly found that the state was systematically excluding women, but overruled the defense objection because previous holdings from this court had involved improper peremptories based upon race rather than gender:

THE COURT: If you'd go back out there and have a seat. I believe it's now the State's opportunity to tell me about --

MR. WHITSON: How many strikes did I have?

THE COURT: You have six.

MR. WHITSON: I'm going to take three right now, strike number one. That's Mrs. Toler.

THE COURT: What is the reason you are striking her?

MR. WHITSON: On the back side. I want one more.

THE COURT: Because what?

MR. WHITSON: Somebody on the back side that I want more than I want her.

THE COURT: I was curious. Go ahead. Who else?

MR. WHITSON: Jo Walton and Willie Williams.

THE COURT: Okay.

MR. McLEOD: I want to interpose an objection, challenge the peremptories. Given the statement made the last time about women, given the

systematic exclusion, back strike on women this time, I want to challenge the State to indicate why, on each and every one of the women that they have challenged on a peremptory basis, perhaps to Slappy which I understand and Neil deals with blacks and not women.

THE COURT: Deals with distinct racial groups.

MR. McLEOD: And I want to make the objection based upon the fact that women, constitutionally, like racial groups and like minorities, are protected areas, and why they are being systematically excluded from this jury.

THE COURT: Why are they being excluded?

MR. WHITSON: They are not being systematically excluded. We have five women on the jury.

THE COURT: Well, based on the rules that I understand are laid down by Slappy, the fact that you have blacks on the jury does not excuse you from systematically excusing other blacks and ***I don't think there is any question in this case but you're systematically excluding women.*** You even made that statement that if you could get anything but police officers and women on this jury, you wouldn't have any problem.

Tell me why you are systematically excluding women.

MR. WHITSON: It's my impression, Judge, from the people that I've asked to have stricken, ***they tend to be more, more emotional*** than the other people on the jury that I have not stricken from my view of their answers. Their answers to some of the tougher questions were more equivocal than the remaining people that we've asked to have stay on the jury.

THE COURT: Well then, the next question is why do you suddenly decide to excuse Toler and Walton when you've not asked them additional questions?

MR. McLEOD: And Williams, Judge.

MR. WHITSON: I remember the answers from the earlier question process.

THE COURT: Tell me what the questions were and the answers they gave that made you think that.

MR. WHITSON: It's the impression I'm left with regards to their

questions, to questions I've put. I haven't written down my mental impression, but I've been left with those mental impressions and I'm sharing those with the Court. There are people on the back side of the venire panel that I think are more qualified to sit as the triers of fact in this case than those three that I've asked to have stricken now.

THE COURT: That's not sufficient, but Slappy doesn't apply to women. Williams is stricken and Toler and Walton and Williams. Slappy does not apply to women because they are not a distinct racial group.

Let's go to the defendant.

*****

MR. McLEOD: One more thing on the record. I object specifically to the State's argument concerning the exclusion, the systematic exclusion of women based upon their quote emotions, as being a stereotyping of females.

THE COURT: Well, until the Florida Supreme Court, the United States Supreme Court recognizes women as being a distinct group who cannot be systematically excluded from the jury, I will not do so. Otherwise, that only leaves white males who can be systematically excluded from the jury and I think we are fast arriving at the point in the system where peremptory challenges are going by the board. I don't think that's the intent of the Slappy case.

(R 923-27, emphases added).

OPENING STATEMENTS

During the state's opening statement the prosecutor commented about the defendant and his counsel:

[MR. WHITSON:] Throughout the history of this case, up to approximately June of this year, Michael Abshire has continued to send notes to Pat Greenhalgh, the case agent in this case, wanting to talk to her. Numbers and numbers of theses requests. Some of which have specific clues on the bottom of them. ***"I don't want my lawyer in here."***

MR McLEOD: May I approach the bench?

THE COURT: Yes, you may.

(Whereupon, the following side-bar conference

was had.)

MR. McLEOD: I object to the statement or the opening statement regarding any request for counsel or denial of counsel. I move for a mistrial based on it.

*****

THE COURT: What is the purpose of telling the jury about the statement that says he didn't want his lawyer present?

MR. WHITSON: Well, there is no point to do so.

THE COURT: Motion for mistrial is denied.

Don't talk about what he said about his lawyer.

MR. WHITSON: Okay.

THE COURT: Otherwise, the objection is overruled.

(R 1215-17, emphasis added).

STATE'S CASE-IN-CHIEF

The only statement that had been given by the defendant which was allowed into evidence was given on November 16, 1991 (R 1109; 1259).[2] Virtually all of the details concerning the crime were provided to the police through statements given to them by the defendant (R 485). The defendant told the investigating detective that he was willing to take a polygraph to prove that he was telling the truth (R 1299).

The defendant's companions, his codefendant and the victim, argued as they drove to Florida (R 1153). The codefendant told the defendant at a convenience store that he was going to take the victim into the woods and kill her. The defendant told the codefendant that he would

[2]The defense successfully objected to the admission of testimony concerning statements made by the defendant to the police after counsel had been appointed (R 1142).

have to kill her by himself (R 1153; 1268). However, the defendant had been certain that the codefendant would not go through with it (R 1269).

By the third day in Florida the codefendant and the victim were arguing again (R 1155). The two codefendants told the victim that they were going to go to a party in the woods. (R 1156; 1271). After driving three-tenths to one-half of a mile on a dirt road, the codefendants "geared up", *i.e.*, put on camouflage pants, poncho, and suspenders which held knives, flashlights and similar items (R 1157; 1278-79). The defendant led the way further into the woods because he had the flashlight and because he was frightened (R 1280). The victim was walking immediately behind him and the codefendant was at the rear. (R 1157) They tried a number of paths but encountered impassable briars (R 1157; 1280).

The victim said she had seen a snake and said that she wanted to go back (R 1281). On the way back the defendant heard a muffled scream (R 1158; 1281). He turned and saw the codefendant with his hand over the victim's mouth, and her feet off of the ground. *Id.* Marquad stabbed her in the front of her body and threw her to the ground (R 1158; 1282). He then straddled her and twice placed her head under water. The victim stopped breathing at this point (R 483). The codefendant gave the defendant a knife and told him to stick the lifeless body. As the defendant followed the directions of the codefendant he saw that the victim's throat had been cut (R 1159; 1283). The codefendant took out his Gurka knife and chopped at the back of the head (R 1159; 1284). He turned to the defendant and said: "Your knife has not been bloodied. You need to do it." The defendant complied with the direction by chopping at the same spot where the codefendant had chopped (R 1159; 1285). Detective Greenhalgh admitted that the state lacked evidence to establish that the victim was not dead the first time that the defendant stabbed

her (R 1185). The codefendant took the victim's wallet (R 1286).

Back at their motel the codefendant went through the victim's duffle bag. He took certain items and gave some large shirts to the defendant (R 1160; 1288). The remainder of her belongings were later discarded.

After dumping the victim's belongings the codefendants drove to Orlando (R 1291). The codefendant would not let the defendant talk about what had happened (R 1292). The codefendant told him that if he did talk he would kill him (R 1293).

They met Pat Sippel (R 1294). Ms. Sippel rented a building to the codefendants between June and September, 1991 (R 1349). The following took place before the jury at the beginning of cross examination of this witness:

BY MR. McLEOD:

Q Mrs. Sippel, during that time, did you get to know Mike and John?

A Fairly much.

Q Okay. And did you know Mike as a polite or quiet person?

MR. WHITSON: Judge, objection, outside the scope of direct. ***If he wants to try his case, I don't have any objection to anything he wants to do with his case in chief.***

THE COURT: Sustained.

MR. McLEOD: May I approach side bar?

THE COURT: Yes, you may.

(Whereupon the following proceedings were had at side bar:)

MR. McLEOD: I object to the comment that the prosecutor said about my case as being a comment on my client's right to remain silent and/or the preventative or to present a defense and I move for a mistrial based on the

statement.

> THE COURT: That motion is denied. The jury has no idea what case in chief means unless you tell them. Don't make any more comments that refer in any way to that. You know, you-all can take the case and gum it up by aside comments like that.
>
> MR. WHITSON: Yes, sir.
>
> THE COURT: Don't say anything else about it.
>
> MR. WHITSON: Yes, sir.

(R 1349-50, emphasis added).

Hunters found the body of the victim (R 976). The evidence technician of the St. Johns County Sheriff's Office (SJCSO) found bones and clothing scattered around the location (R 986). A dog trained to locate cadavers was brought to the scene and located one bone (R 1150).

A forensic anthropologist located a couple of bones as well. *Id.* This witness, however, did not have an opinion as to the cause of death (R 1386). Nor could he say whether the victim had been decapitated (R 1387).

The medical examiner found evidence of a cut wound on vertebrae, which he characterized as a fatal wound (R 1024-1025). He testified that a person with such a wound would not be able to move (R 1026). He also found defects to the fifth and sixth ribs, indicating wounds (R 1025). The witness was not, however, able to determine if any wounds had been inflicted after death or which of the wounds had been inflicted prior to death (R 1033). He acknowledged that death could have been caused by other wounds (R 1036). The prosecutor asked the medical examiner: "You cannot rule out that this ***lady was virtually scared to death*** before she was cut?" (R 1041, emphasis added). The defense objection was sustained.

Detective Greenhalgh first contacted the defendant in Wilmington, North Carolina (R

1080). Defense counsel asked the investigating detective if the defendant had ever expressed any ill feelings toward the victim (R 1308). The prosecutor advised the court at side bar that he viewed this as opening the door to questions regarding lack of remorse by the defendant (R 1308-09). The following colloquy was had:

> Q [by Mr. McLeod] And Detective Greenhalgh, I take it then that at that time and on that date when you spoke with Mr. Abshire, he never expressed any malice towards Stacey Willetts.
>
> A No, he did not.
>
> Q Thanks, that's all.
>
> THE COURT: Just so everybody will understand, what do you mean by malice?
>
> BY MR. McLEOD:
>
> Q He never expressed, Detective Greenhalgh that he had any ill feelings, bad feelings towards Stacey Willetts.
>
> A No, he did not.
>
> MR. McLEOD: Thank you.
>
> MR. WHITSON: Judge, my redirect is going to necessitate some questions outside of the jury because of the way I think a door on that issue has been opened and I'd like to put some questions to the witness.
>
> THE COURT: Come to the side bar.
>
> (Whereupon, the following proceedings were had at side bar:)
>
> Tell me what it's about.
>
> MR. WHITSON: By him putting that question to the witness, I think he's opened the door about me asking this witness whether or not he expressed any emotion at all towards Stacey Willets, including remorse.
>
> MR. McLEOD: I asked him in that statement did he ever, say

anything to express any malice or ill will towards her. That doesn't talk about remorse or the crime done. I also couched it only into that statement at that time.

THE COURT: Do you have an objection to his questioning or not.

MR. McLEOD: Yes.

THE COURT: What's your objection?

MR. McLEOD: You can't ask a witness, State v. Jones, you can't ask a question directed toward whether or not a client showed any remorse for a crime he had done.

THE COURT: You can ask a question did he show any ill will, but he can't ask --

MR. McLEOD: That's not what I asked. What I asked was did he make any statements that indicated he had malice or ill will towards Stacy.

THE COURT: The objection is sustained.

MR. WHITSON: Judge, before you roll back over there, can I ask you one more question?

THE COURT: Yes, you may.

MR. WHITSON: My understanding of the case law, and I'm willing to take it up on appeal and suffer the consequences if I'm wrong about this, Judge, but when that issue of emotion is opened by the defense the State can follow it up with the question that I want to put now, if you find that the word remorse is wrong, did he express any emotion at all concerning Stacy Willets.

THE COURT: The objection is sustained as to remorse. You may ask the question about any emotion.

MR. WHITSON: Thank you.

(R 1309-10).

The court limited the defense when it attempted to question a detective who had investigated the codefendant:

BY MR. McLEOD:

Q Detective Welborn, you were involved in the investigation of the homicide; is that correct?

A Yes, sir.

Q And you conducted an investigation specifically of John Marquad in St. Petersburg, Florida, isn't that correct?

A Yes, sir.

Q And your investigation of John Marquad revealed that in fact John Marquad did stab and murder Stacy Willets, is that correct?

MR. WHITSON: Judge, this is outside the scope of direct examination.

THE COURT: Well --

MR. WHITSON: And too, Judge, if he gets to try his case on cross-examination, it defects [sic] the rules of evidence.

THE COURT: Mr. Whitson, that's not for the jury. The objection is sustained for a number of reasons, all of which are known to both of you.

MR. McLEOD: I cannot go forward with the question?

THE COURT: You cannot go forward with the question. The objection is sustained.

(R 1326).

The state called Hobart Harrison, whose first degree murder charge was reduced to second degree murder, as a witness against the defendant (R 1411). This witness' attorney also represented the codefendant in this case (R 1412). Although the convict attempted to portray the defendant as the more culpable of the two who were involved, he admitted that he was frightened of Marquad, but not of the defendant (R 1418-19; 1420). The witness also testified that it was the codefendant, John Marquad, not the defendant, who had played Dungeons and Dragons all

day long in the jail (R 1420).

The state rested after this witness testified, as did the defense (R 1430).

DEFENSE MOTIONS

The defense moved for a judgment of acquittal as to the murder by arguing that there was no evidence of premeditation (R 1431). A motion for judgment of acquittal as to the robbery was based upon the fact that the victim was dead prior to the taking of her property (R 1434). The motions were denied. *Id.*

CHARGE CONFERENCE

Defense counsel requested the standard instruction on accessory after the fact (R 1467). The court, however, denied the request (R 1469). The defense also requested an instruction that specific intent was required to establish that the defendant was acting as a principal (R 1469-1470). The written request stated:

> DEFENDANT'S REQUESTED JURY INSTRUCTION
> REGARDING INTENT AND PRINCIPALS
>
> (Add to principal instruction)
>
> In order to convict someone of aiding and abetting in a crime as a principal in the first degree, the State must prove that MICHAEL ABSHIRE at the time of so aiding and abetting another commit the crime had the specific intent to participate and commit the crime(s) charged.
>
> Valdez v. State, 504 So. 2d 9 (2nd DCA 1986)
>
> Mere knowledge that the offense is being committed is not the same as participation with criminal intent, and mere presence at the scene or the display of questionable behavior after the fact, is insufficient to establish participation in the offense.
>
> Staten v. State, 519 So. 2d 622 (Fla. 1988).

(R 283; during the charge conference the defense also cited *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA 1983)).

CLOSING ARGUMENTS

During the state's argument the prosecutor's remarks prompted the defense to object on at least three occasions.. The first objection was in response to the prosecutor's characterization of the defendant as the "dragon master":

> [MR. WHITSON:] I'm going to take you on a little trip through Michael Abshire's mind. Dungeons and Dragons ***dragon master***. . . .
>
> Page two of the confession we decided not to go to Atlanta. I think I convinced him. Michael Abshire convinced Marquad. He's leading the pack. Stacey had $300 when they left.
>
> Page two. "who registered for the motel," Ms. Greenhalgh. "I did." The ***dragon master*** did. He got paid back.
>
> Page three. Like I held most of my -- all of my money and most of John's. The dragon master held the money.
>
> MR. McLEOD: Objection, Your Honor. May I approach side bar?
>
> THE COURT: All right.
>
> (Counsel for the state and counsel for the Defense approached the bench and the following proceedings took place outside the presence of the jury.)
>
> MR. McLEOD: There's no evidence in this statement and there's no evidence in this case before this jury that my client ever even played Dungeons and Dragons or was a ***dragon master***, and I don't want that said again, and I move to strike.
>
> THE COURT: Well, there is evidence in the case that they played Dungeons and Dragons, and there is evidence in there whether you believe it or not where Hobart Harrison said about the remarks, he said about the circle on the floor and so forth. Stay away from the name calling, Mr. Whitson. Try to stay with the facts. You understand me?
>
> MR. WHITSON: Yes, sir.
>
> MR. McLEOD: Can I add one thing?
>
> THE COURT: Sure.

MR. McLEOD: There's no testimony by any witness that my client ever played Dungeons and Dragons, and that Marquad did --

THE COURT: There is evidence from what inference can be drawn that your client was part and parcel. It will not be stricken but stay away from the name calling and try the facts.

MR. WHITSON: Yes, sir.

(R 1505-06, emphases added).

The prosecutor later suggested that if the defendant was not convicted then no one would be punished for the victim's death because the codefendant could tell a similar story:

[MR. WHITSON:] Ladies and gentlemen, if John Marquad gets up in here and tells the kind of story that this man wants you to believe, is sufficient to find this man not guilty of killing Stacey Willets and taking her property incident to that murder, ***nobody is going to get convicted for the loss of Stacey.***

"John's only regret was not killing her sooner because it would have cost less financially if he'd killed her sooner."

MR. McLEOD: I need to interpose an objection at side bar, Judge.

THE COURT: Come on up.

(Counsel for the State and counsel for the Defense approached the bench and side bar conference was had out of the hearing of the jury as follows:)

MR. McLEOD: I think I need to object to the statement that if my client is not convicted that there will be no conviction for Stacey Willets by anybody because of John Marquad --

THE COURT: I'll instruct the jury to disregard that and not consider it.

MR. WHITSON: Okay, sir.

(R 1514-15, emphasis added).

The defense was goaded into objecting yet a third time by the prosecutor's attempt to use the grand jury indictment as evidence of guilt:

[MR. WHITSON:] He's also going to tell you that you can look to see if he's been convicted of crime. But that's just one of the ingredients, ladies and gentlemen. You decide for yourself whether or not any part of Hobart Harrison's testimony is believable and is consistent with other evidence in the case before discounting that, but that ain't the only evidence upon which ***Michael Abshire is guilty of the charges that the Grand Jury leveled against him.***

Follow the law that Judge Watson tells you to apply. He's going to give you a copy --

MR. McLEOD: Sorry to interrupt you again, Mr. Whitson, but I have to make an objection at the side bar.

THE COURT: Come on over.

(Counsel for the State and counsel for the Defense approached the bench and a side bar conference was had out of the hearing of the jury as follows:)

MR. McLEOD: I'm sorry to keep coming here, but now we've had two references to the Grand Jury charges as if those carry weight with this jury. I object to the reference to the Grand Jury and ask that it be stricken, and/or the jury be instructed that the Grand Jury charges are not evidence in this case at all, and I think because of the reference to that and the previous reference to John Marquad's trial, if Mike Abshire doesn't get convicted, I have to move for a mistrial.

THE COURT: That motion is denied.

Don't make any references to the Grand Jury.

(The following proceedings were had in open court.)

MR. WHITSON: Ladies and gentlemen, you know, our code of law starts out with a code of moral responsibility, and Mr. McLeod, the defense attorney in this case, has told you over and over again that his client is guilty of incredible moral reprehensible behavior. He refuses to acknowledge that very morally reprehensible behavior also falls within ***the violations of the law this man is charged with violating.***

MR. McLEOD: Objection.

THE COURT: Objection is overruled.

(R 1519-20, emphases added).

JURY INSTRUCTIONS

Defense counsel accepted the instructions without objection, other than the omission of the special instruction that had been previously requested regarding specific intent as to principals and accessory after the fact (R 1558).

VERDICTS

The defendant was found guilty of both first degree murder and armed robbery with a deadly weapon (R 1565).

PENALTY PHASE PROCEEDINGS

PRELIMINARY INSTRUCTION CONFERENCE

The prosecutor indicated that he was going to seek in aggravation that the defendant had previously been convicted of a felony involving the use or threat of violence. His explanation of how he planned to establish the aggravator prompted an objection by the defense:

> MR. WHITSON: Yes, sir. We're going -- we are going to bring the prosecutor that prosecuted him in 1988 for assault with intent to kill in New Hanover County, North Carolina. He's going to prove the crime by providing facts and circumstances of the incident, photographs of the victim and certified judgment and sentence.
>
> MR. McLEOD: Judge, I'm going to object to any photographs of any victim from a prior crime. I think the appropriate format for that would be for Mr. Whitson to present a judgment and sentence for a qualifying offense, but not the details of the crime. I think that would be overly prejudicial to do that. The fact that it exists causes it to be an aggravating circumstance if he can prove that. The nature of the offense would not be relevant, and I don't think it should be admissible.
>
> THE COURT: The State of Florida is allowed to present details of the prior offense. . . .

(R 1574-75).

The state asked for a special instruction regarding the aggravating circumstance that the crime was committed while the defendant was under the sentence of imprisonment:

> MR. DALY [prosecutor]: It would be after they're told that if you're under sentence of imprisonment -- that is an aggravator -- that they're also instructed that if you find that the defendant was on parole, that constitutes a sentence of imprisonment, because they're not going to have any understanding of the case law in the State. They're not going to know that parole means imprisonment.
>
> THE COURT: I agree.
>
> MR. WHITSON: I had proposed, Judge, that we simply include a sentence that says parole status is equivalent to a sentence of imprisonment or community control after that first sentence.
>
> THE COURT: That's fine.
>
> MR. McLEOD: I specifically disagree and object to any change in the rendering of the Supreme Court approved aggravating circumstances as they are set forth in the instructions.
>
> THE COURT: Well, since they have down here in the new instructions with under sentence of imprisonment or to be placed on community control, and since the cases say that being in [sic] parole is equivalent to being under sentence of imprisonment, take it from the State's request and include that in that Number 1, aggravated. Because there's no sense giving the jury instructions if you don't want them to understand them.

(R 1581-82).

The defense requested an instruction that death was not an appropriate sentence if the jury found that the defendant played a substantially diminished role in the murder (R 1600-01). The court denied the motion (R 1604).

STATE'S CASE

The first witness for the state was a representative from the North Carolina Department of Corrections. He testified that the defendant had been on parole without interruption between

March 9, 1990, to January 24, 1992 (R 1611).

The second state witness was an assistant district attorney in Wilmington, North Carolina (R 1618). The defense renewed the objection it had made at the preliminary charge conference when the witness was asked to detail the specifics of the North Carolina incident (R 1625).

The third witness for the state was the SJCSO detective who had assisted Detective Greenhalgh in her investigation. She admitted that until the defendant gave his statement to the police law enforcement did not know what had occurred on the night of the murder (R 1640).

DEFENSE CASE

SJCSO Detective Frank Welborn had taken statements from the codefendant (R 1659). Marquad told the detective that he had found himself outside of his body, standing over the victim and that he could not stop himself (R 1661). He never accused the defendant of stabbing or wounding the victim (R 1662).

The next witness, Andrew Beyer, testified that Marquad liked telling others what to do (R 1669). The codefendant called him from jail and told him that he had killed the victim (R 1671). The codefendant also told him that the defendant had not killed her. *Id.* The codefendant explained that the reason he had made the defendant stab the victim after she was already dead was so the defendant would not report the codefendant to the authorities (R 1671-72).

Patricia Sippel testified that the codefendant had told her that "he was a military machine and could kill without a problem[.]" (R 1677). She had often seen the codefendant, but not the defendant, sharpening knives (R 1678).

The defendant's mother was the last witness to testify. She made the following statement to the jury:

I realize my son Mike indicted himself by his own statement, but I also know he was just telling the truth which was proven over and over by the evidence. If he wanted to lie, I feel like he would have said -- he would not have said he stabbed her after John did or covered her up. As I said, he indicted himself. However, the jury found him guilty of first-degree and I can't change that.

I feel like my son Michael needs therapy to find out why he goes along with anything to keep a friend. This has happened many times. If he is with college-type people, he acts and does what they do. If he has a friend that is kind of wild, he acts the same. He seems to feel no one will accept him as himself.

I know he will be in prison a long time, most likely my life time.

At the time of his dad's and my separation Mike was 15 and a half years old, a bad time for him to go through this. His dad and I did not deal with our separation and divorce well. We both seemed to go our own ways and make our own lives and could not consider Mike -- and did not consider Mike as a child, but treated him as grown -- treated him as grown by doing our own things and more or less letting him go his own way. I wish I had known then how much he needed us at that time.

I also want you to know that before Michael was involved with John Marquad and Dungeons and Dragons, he was attending college, working two jobs most of the time with a bicycle as his only transportation and attending church regularly, for a while, three times a week singing in the church group. He made good grades and [sic] school and loves to read.

There is good in him. Please consider what I have said. Thank you, his mom.

(R 1699-1700).

JURY INSTRUCTIONS

The first two aggravating circumstances were defined as follows:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: Number one, the felony was committed by a person under the sentence of imprisonment or placed on community control. Parole status is the equivalent to the sentence of imprisonment or community control.

Number two, the Defendant has been previously convicted of a felony involving the use or threat of violence to some person. The crime of assault with

intent to kill is a felony involving the use or threat violence [sic] to another person.

(R 1732-33).

The court also instructed the jury on the aggravating circumstances that the homicide was committed during the course of a robbery or for financial gain; that it was especially heinous, atrocious, or cruel; and that it was cold, calculated, and premeditated (R 1733).

The defense again requested an instruction that the death penalty was an inappropriate penalty for less culpable codefendants (R 1742).

JURY RECOMMENDATION

The jury recommended by a vote of 11 to 1 that the death penalty be imposed (R 1745-46; 376).

SENTENCING

The defense motion for a new trial was considered and denied prior to sentencing (R 1771).

Prior to reading the judgment and sentence as to the murder conviction the judge addressed the defendant. He observed that he found some remorse in the defendant and that the defendant had told the truth the best that he could (R 1789-90). The judge also stated that the defendant was "probably less culpable than Marquad." (R 1790).

The court found five aggravating circumstances: (1) the capital felony was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of a felony involving the use of violence; (3) the murder was committed during the commission of a robbery or was committed for financial gain; (4) the crime was especially heinous, atrocious, and cruel; and (5) the court found the crime to have been committed in a cold, calculated, and

premeditated manner (R 481-483).

The court found as a statutory mitigating factor that "there was some dominance of Defendant by Marquad at the time of the killing." (R 485). The court also detailed several non-statutory mitigating circumstances:

> The principal circumstance is Defendant's testimony in the trial of John Christopher Marquad which resulted in a verdict of guilty of murder in the first degree with a 12 - 0 recommendation of death and a verdict of guilty of armed robbery with a deadly weapon. Defendant's testimony was important and critical evidence in Marquad's case.
>
> Defendant cooperated with law enforcement after initially lying to them. He told law enforcement what happened. He minimized his participation, but his statements appear to be fairly accurate versions of how the crime occurred. Without his statements the State had difficult cases against both Defendants.
>
> Defendant's mother, Virginia Murray, testified that when she and her husband were divorced the Defendant was 15 years old. She stated that was a bad time in his life and she and her husband did not consider Defendant as a child - they more or less allowed him to go and do things on his own, suggesting they failed to give him the emotional support and love that he needed at the time.
>
> She further testified that before Defendant got involved with Marquad and the game of Dungeons and Dragons Defendant attended college, worked two jobs, rode a bicycle as his only transportation, attended church regularly, sang in a church group and made good grades.
>
> Mrs. Murray testified that Defendant goes along with anything to keep a friend and may need therapy to determine why, lending some support to the theory that Defendant was dominated by Marquad.
>
> The court considers the testimony given by Mrs. Murray to be true.

(R 485-86).

The court imposed the death sentence (R 486-87). The court imposed a departure sentence of life imprisonment on the armed robbery count. The basis for the departure was that the victim had been murdered (R 499; 1804).

The appellate proceedings were initiated by the timely filing of a notice of appeal (R 506).

SUMMARY OF ARGUMENT

GUILT PHASE

Point One: The Florida Constitution bars the discriminatory use of peremptory challenges to exclude women from the venire. The *Neil* holding, which has been extended to Hispanics, now should be expanded to include women.

Point Two: The United States Constitution bars the discriminatory use of peremptory challenges to exclude women from the venire. The *Batson* decision should be extended as well to women.

Point Three: The prosecutor improperly assailed opposing counsel and in the process indirectly commented upon the defendant's exercise of his right to remain silent.

Point Four: The prosecutor again improperly commented on the defendant's right to remain silent during cross examination of a state witness.

Point Five: The prosecutor improperly questioned an expert witness by asking an unfairly prejudicial question with no clinical answer. He asked the medical examiner if the victim had been scared to death.

Point Six: The prosecutor was permitted to ask indirectly about the defendant's lack of remorse over defense objection. After the defense ascertained that the defendant had expressed no malice towards the victim, the prosecutor was allowed to inquire if he had shown any emotion.

Point Seven: The trial court erred when it would not allow the defense to ask a detective if the investigation had not revealed that the codefendant killed the victim.

Point Eight: The prosecutor repeatedly made improper remarks during closing argument.

He called the defendant the "dragon master" although there was no evidence to support the characterization. He referred to the grand jury as if it constituted evidence of the defendant's guilt, and he suggested that no one would be punished for the victim's death if the defendant were not convicted.

Point Nine: The court erred in not giving the special instruction on principals requested by the defense. There was evidence that the defendant did not believe that the codefendant would kill the victim.

Point Ten: The defendant was denied a fair trial. The repeated instances of prosecutorial misconduct, when considered in conjunction with the court's errors, deprived him of due process.

PENALTY PHASE

Point Eleven: Section 921.141 is unconstitutionally vague. It fails to provide adequate guidance on how juries are to find mitigating and aggravating circumstances.

Point Twelve: The trial court erred in instructing the jury that parole is equivalent to the aggravating circumstance of under the sentence of imprisonment. Due process requires strict construction of penal statutes. The applicability of parole has been done without the required legislative enactment.

Point Thirteen: The prosecutor should not have been allowed to inquire regarding the specifics of a previous violent felony. The particulars are immaterial and highly prejudicial because the judge instructed the jury that as a matter of law the defendant's prior offense was violent in nature.

Point Fourteen: Neither robbery nor pecuniary gain was properly found in aggravation.

The codefendant, not the defendant, had planned to take the victim's belongings. The small amount of property which the defendant took was taken as an afterthought.

Point Fifteen: The trial court could not find both robbery and pecuniary gain in aggravation because both refer to the same aspect of the crime.

Point Sixteen: The trial court erred in finding that the defendant had murdered the victim in heinous, atrocious, and cruel fashion. The victim was already dead from wounds inflicted by the codefendant before the defendant did anything to the body.

Point Seventeen: The court incorrectly found the murder to be cold, calculated and premeditated. The defendant had no plan to kill the victim.

Point Eighteen: The death penalty is disproportional in this case. In addition to the improper finding of aggravating circumstances, the defendant's role was minor.

ARGUMENT

GUILT PHASE

Point One

THE DISCRIMINATORY EXCLUSION OF WOMEN FROM THE VENIRE VIOLATED THE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY AND THE EXCLUDED JURORS' EQUAL PROTECTION RIGHTS AS PROVIDED UNDER THE FLORIDA CONSTITUTION.

"The time now has come to extend *Neil* to protect potential jurors from being excluded from the jury solely on the basis of [gender]." *State v. Alen*, 616 So. 2d 452, 454 (Fla. 1993), referring to *State v. Neil*, 457 So. 2d 481 (Fla. 1984). "The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws." *State v. Slappy*, 522 So. 2d 18, 20 (Fla. 1988). Although the use of gender-based peremptories by a prosecutor in a criminal case appears to be an issue of first impression in Florida, there is "no foundation in justice or in logic to differentiate between discriminatory uses of peremptory challenges based on racial or ethnic grounds, rather than on grounds of whether the prospective juror is a male or female." *People v. Mitchell*, 593 N.E.2d 882, 888-889 (Ill. App. Ct. 1992) (footnote omitted). The prosecutor in the instant case sought to exclude women from the jury for no reason other than their gender.

During voir dire the prosecutor made a number of sexist remarks. The following exchange

took place at side bar:

> MR. WHITSON [prosecutor]: Judge, ***if we can get something besides women*** and former police officers, we'll get us a panel.
>
> MR. McLEOD [defense counsel]: What's wrong with women?

(R 875, emphasis added).

The prosecutor and William R. Hallinan, a former police officer, had the following exchange:

> PROSPECTIVE JUROR HALLINAN: I think my background makes me jaded.
>
> MR. WHITSON: I don't think you have a chance sitting on this jury, ***just between us girls***, if that will help you any.

(R 886, emphasis added; *see also* 876; 877).

Later, the court asked spontaneously why the prosecution was striking another woman and the defense was prompted to object as the prosecution continued to exercise peremptory strikes against women. The trial judge expressly found that the state was systematically excluding women, but overruled the defense objection because previous holdings from this court had involved improper peremptories based upon race rather than gender:

> THE COURT: If you'd go back out there and have a seat. I believe it's now the State's opportunity to tell me about --
>
> MR. WHITSON: How many strikes did I have?
>
> THE COURT: You have six.
>
> MR. WHITSON: I'm going to take three right now, strike number one. That's Mrs. Toler.
>
> THE COURT: What is the reason you are striking her?
>
> MR. WHITSON: On the back side. I want one more.

THE COURT: Because what?

MR. WHITSON: Somebody on the back side that I want more than I want her.

THE COURT: I was curious. Go ahead. Who else?

MR. WHITSON: Jo Walton and Willie Williams.

THE COURT: Okay.

MR. McLEOD: I want to interpose an objection, challenge the peremptories. Given the statement made the last time about women, given the systematic exclusion, back strike on women this time, I want to challenge the State to indicate why, on each and every one of the women that they have challenged on a peremptory basis, perhaps to Slappy which I understand and Neil deals with blacks and not women.

THE COURT: Deals with distinct racial groups.

MR. McLEOD: And I want to make the objection based upon the fact that women, constitutionally, like racial groups and like minorities, are protected areas, and why they are being systematically excluded from this jury.

THE COURT: Why are they being excluded?

MR. WHITSON: They are not being systematically excluded. We have five women on the jury.

THE COURT: Well, based on the rules that I understand are laid down by Slappy, the fact that you have blacks on the jury does not excuse you from systematically excusing other blacks and ***I don't think there is any question in this case but you're systematically excluding women.*** You even made that statement that if you could get anything but police officers and women on this jury, you wouldn't have any problem.

Tell me why you are systematically excluding women.

MR. WHITSON: It's my impression, Judge, from the people that I've asked to have stricken, ***they tend to be more, more emotional*** than the other people on the jury that I have not stricken from my view of their answers. Their answers to some of the tougher questions were more equivocal than the remaining people that we've asked to have stay on the jury.

THE COURT: Well then, the next question is why do you suddenly decide to excuse Toler and Walton when you've not asked them additional questions?

MR. McLEOD: And Williams, Judge.

MR. WHITSON: I remember the answers from the earlier question process.

THE COURT: Tell me what the questions were and the answers they gave that made you think that.

MR. WHITSON: It's the impression I'm left with with regards to their questions, to questions I've put. I haven't written down my mental impression, but I've been left with those mental impressions and I'm sharing those with the Court. There are people on the back side of the venire panel that I think are more qualified to sit as the triers of fact in this case than those three that I've asked to have stricken now.

THE COURT: That's not sufficient, but Slappy doesn't apply to women. Williams is stricken and Toler and Walton and Williams. Slappy does not apply to women because they are not a distinct racial group.

Let's go to the defendant.

*****

MR. McLEOD: One more thing on the record. I object specifically to the State's argument concerning the exclusion, the systematic exclusion of women based upon their quote emotions, as being a stereotyping of females.

THE COURT: Well, until the Florida Supreme Court, the United States Supreme Court recognizes women as being a distinct group who cannot be systematically excluded from the jury, I will not do so. Otherwise, that only leaves white males who can be systematically excluded from the jury and I think we are fast arriving at the point in the system where peremptory challenges are going by the board. I don't think that's the intent of the Slappy case.

(R 923-927, emphases added).

This court "specifically limited the impact of *Neil* to peremptory challenges exercised solely because of the prospective jurors' race. [It] also stated that the applicability of *Neil* to

other groups would be addressed as such cases arose." *Alen, supra,* 454. The instant case now squarely places before this court the issue whether the exclusion of women from the venire based solely upon their gender is unconstitutional. It is time to extend the *Neil - Slappy* rationale to gender based peremptory strikes. While previous holdings of this court addressed peremptory strikes based on racial and ethnic grounds, the rationale is equally applicable to gender based peremptory strikes:

> The elimination of potential jurors by discriminatory criteria is an invalid exercise of peremptories and does not assist in the creation of an impartial jury. Such discrimination in the "selection of jurors offends the dignity of persons and the integrity of the courts." The discriminatory exclusion of potential jurors causes harm to the "excluded jurors and the community at large." Therefore, a party's right to use peremptory challenges can be subordinated to a venireperson's constitutional right not to be improperly removed from jury service.

Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992).

The discriminatory exclusion of women from the venire is no more valid an exercise of peremptory challenges than is the improper striking of African Americans or Hispanics. The dignity of women who are so stricken is no less offended than that of those who are excluded because of the color of their skin or their heritage. As women constitute a majority of the population, it is possible that the harm to the community at large is enhanced when they are unconstitutionally excluded from juries.

Women constitute a cognizable class entitled to protection under *Neil*:

> Although neither the Supreme Court nor the law of this state provides us with any precise definition of a cognizable class, the cognizability requirement inherently demands that the group be objectively discernible from the rest of the community. First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

Alen, supra, 454.

Unquestionably, women as a group fit the above definition of a cognizable group. Moreover, this fact was implicitly recognized by this court when it stated in *Alen* that "[w]hen an identifying trait is a physically visible characteristic such as race or ***gender***, the process of defining a class is comparably less arduous than defining a class of people in the same ethnic group." *Id.*, 455 (emphasis added).

It is well established that "[a]rticle I, section 16 of the Florida Constitution guarantees the right to an impartial jury." *Neil, supra*, 486; see also *State v. Aldret*, 606 So. 2d 1156, 1157 (Fla. 1992). California has approached the problem in similar fashion, but has broadened the protection to prevent bias against any group in the jury selection process:

> In criminal cases, the rule is well established that a party may not exclude potential jurors on the basis of "group bias." In *People v. Wheeler*, [(1978)] 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, the California Supreme Court held that a prosecutor's exercise of peremptory challenges to exclude prospective jurors solely on the basis of "group bias" violates a defendant's right "to a trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. . . .
>
> The California Supreme Court has since "made it clear that the courts of this state cannot tolerate [such] abuse of peremptory challenges to strip from a jury, solely because of a presumed 'group bias,' all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds." "Group bias" is defined as "a presumption that certain jurors are biased simply because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds."

DiDonato v. Santini, 232 Cal.App.3d 721, 283 Cal.Rptr. 751, 756-57 (Cal.App. 2 Dist. 1991) (citations other than *Wheeler* omitted).

Neil and its progeny generally rely upon article I, section 16, of the Florida Constitution as establishing a defendant's right to challenge the improper use of peremptories, but look to the equal protection clause of the federal constitution for protection of venirepersons rights to serve

upon a jury. See *Slappy, supra*, 21; *Bryant v. State*, 565 So. 2d 1298, 1301 (Fla. 1990); *Aldret, supra*, 1158.

However, as evidenced by its application in *Tillman v. State*, 522 So. 2d 14, 17 (Fla. 1988), another provision within the state constitution affords female members of the venire with protection independently of the federal constitution. "The Equal Protection Clause of our state Constitution provides: 'All natural persons are equal before the law. . . ." *Traylor v. State*, 596 So. 2d 957, 969 (Fla. 1992). "The equal protection Clause of our state Constitution was framed to address all forms of invidious discrimination under the law. . ." *Id.* (Footnote omitted). A number of states with similar provisions have prohibited gender based peremptories on the strength of equal rights provisions contained within their respective state constitutions. *Tyler v. State*, 623 A.2d 648 (Md. 1993); *Mitchell, supra*; *State v. Burch*, 830 P.2d 357 (Wash.App. 1992); *Commonwealth v. Hyatt*, 568 N.E.2d 1148 (Mass. 1991); *State v. Gonzales*, 808 P.2d 40 (N.M.App. 1991); *State v. levinson*, 795 P.2d 845 (Hawaii 1990); *People v. Blunt*, 561 N.Y.S.2d 90 (A.D. 2 Dept. 1990).

Perhaps an even more compelling reason to hold that the state constitution prohibits gender based discrimination than the case law is the fact that this court has pursued equality between the sexes within the legal system in other ways. In 1987 a Gender Bias Commission was created. After two years of study the committee rendered its *Report of the Florida Supreme Court Gender Bias Study Commission* (March 1990). One of the committee's observations was that "[g]ender bias permeates the legal profession." *Id.*, p. 35 The committee opined that "witnesses and litigants frequently experience gender bias that often affects the outcome of cases." *Id.* The committee recommended that "[t]he Florida Supreme Court and the Florida Bar

should amend the Code of Judicial Conduct and the Rules Regulating The Florida Bar to prohibit inappropriate, unprofessional behavior toward female litigants, witnesses and attorneys." *Id.*, p. 37.

Subsequently, the Florida Bar was requested by this court to form a committee to formulate recommendations to eradicate the problem of gender bias within the legal profession. The *Interim Report and Recommendations of the Special Committee for Gender Equality in the Profession* was issued in July 1992. The committee began its report with the following:

> The Commission found during its two years of hearings and study that gender bias -- discrimination based solely on one's sex -- is a reality for far too many people involved in the legal system. And invariably, those who regard gender bias as an illusion have never suffered its effects. Indeed, the overwhelming weight of evidence and research gathered by the Commission supports only one possible conclusion: Although some may ignore its existence, gender bias permeates Florida's legal system today. Certainly the Commission is aware that the practice of law often only reflects our society's larger culture. Gender bias surely did not originate with lawyers alone. Nevertheless, gender bias is practiced to a disturbing degree by members of the state's legal profession, often in forms that have become highly institutionalized. The refusal of some lawyers to acknowledge this fact is one of the primary mechanisms by which gender bias is perpetuated.

Id., p. 2.

In addressing the issue of credibility, the commission asked rhetorically: "Are men always more credible than women? In the legal profession, there are many who think so. And even when they do not publicly subscribe to this view, many others nevertheless act as though they do." *Id.*, 197. The prosecutor in this case denied that his actions were discriminatory. However, his unguarded words revealed a good deal more about his bias than did his responses to direct inquiries from the trial court. While questioning a potential juror who thought his background as a law enforcement officer might make him jaded the prosecutor responded: "I

don't think you have a chance sitting on this jury, ***just between us girls***, if that will help you any." (R 886). At best this comment from one male to another is a weak attempt at humor. However, it appears to be a poorly veiled expression of condescension. The statement bears out the committee's observation that "[n]ot in a few instances, bias creeps into judicial proceedings because men do not accord women the same status that men themselves claim." *Interim Report*, p. 201.

The first recommendation of the commission is "that Rule 4-8.4, Rules of Professional Conduct, be amended to add subsection (g) to read as follows:

> A lawyer shall not:
>
> (g) In the performance of legal duties, by words or conduct, manifest bias or prejudice based on race, ethnicity, gender, religion, national origin, disability, age, or sexual orientation towards clients, litigants, ***jurors***, witnesses, attorneys, or others with whom the attorney deals in a professional capacity.

Id., p. 4 (emphasis added).

It would send an anomalous if not confusing message if gender based peremptories were permitted while this court is seeking to eradicate gender bias throughout the legal profession. The *Neil* and *Slappy* holding should be extended to preclude gender bias in the jury selection process in order to afford women equal status in the criminal justice system and to ensure due process for criminal defendants.

Point Two

THE USE OF GENDER BASED PEREMPTORY STRIKES TO EXCLUDE WOMEN FROM THE VENIRE VIOLATED THE EQUAL PROTECTION CLAUSE AND THE FAIR CROSS SECTION OF THE COMMUNITY REQUIREMENT OF THE UNITED STATE CONSTITUTIONS.

"If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." *Duren v. Missouri*, 439 U.S. 357, 369-70, 99 S.Ct. 664, 671, 58 L.Ed.2d 579 (1979). The Supreme Court held in *Duren* that a Missouri law which granted an automatic exemption to jury service to women who requested it violated the fair cross section requirement of the sixth amendment. Similarly, the Court held unconstitutional on the same basis a Louisiana jury selection system which virtually excluded all women from petit jury service in *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Like the Florida courts, the United States Supreme Court has yet to rule directly on the instant issue.[3]

The bases for prior holdings of the Supreme Court are largely consistent with the holdings of this court regarding group bias peremptory challenges. The fair cross section requirement under the sixth amendment is akin to the same requirement under article I, section 16 of the state constitution. The sixth amendment was invoked in *Taylor* and *Duren, supra*. It was also utilized in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990), to hold that a white defendant had

---

[3]The Court has before it now the issue whether the exclusion of women from the venire in a civil case through gender based peremptory challenges violates federal constitutional provisions. *J.E.B. v. T.B.*, 606 So.2d 156 (Ala. 1992), *cert. granted*, 113 S.Ct.2330, 124 L.Ed.2d 242, 61 USLW 35335, 61 USLW 3759 (U.S. May 17, 1993) (No. 92-1239).

standing to object to racially based peremptory challenges.

The federal constitution's equal protection clause, similar to article I, section 2 of our constitution, was relied upon in a number of other group bias cases. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (black defendant denied due process when state used peremptories to strike blacks from venire); *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364 (1991) (white defendant had standing under equal protection clause to challenge peremptory challenges against black venirepersons, *cf. Holland, supra*); *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859 (1991) (use of peremptory strikes to remove Hispanic members of venire); *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348 (1992) (state has standing to challenge improper use of peremptory challenges by criminal defendant). In light of the parallel protections in this area under the state and federal constitutions, should this court reach the federal issue,[4] it should hold that the use of peremptory challenges to exclude women from the venire violates the federal constitution for the reasons discussed in detail under point one.

Moreover, a federal appellate court has addressed the issue directly and held "that equal protection principles prohibit striking venirepersons on the basis of their gender." *United States v. DeGross* 960 F.2d 1433, 1439 (9th Cir. 1992). The court noted that "[t]he history of juries in the United States is one of pervasive, government sanctioned exclusion of women." *Id.*, 1438. It reasoned that "full community participation in the criminal justice system, whether measured by race or gender, is critical to public confidence in the system's fairness. A jury is not truly

---

[4]"When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause therein." *Traylor, supra* 962 (footnote omitted).

representative of the community unless both sexes have an equal opportunity to serve." *Id.*, 1439.

Not only does a natural growth of law support the prohibition of challenges of the nature advanced by the prosecutor in this case, but sound policy does as well because "[p]ermitting gender-based peremptory challenges would simply affirm an erroneous and unconstitutional presumption that women are less qualified than men to serve as jurors." *Id.*, 1438.

Point Three

THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED WHEN THE PROSECUTOR COMMENTED ON AN INFLAMMATORY AND IRRELEVANT MATTER.

It is improper for a prosecutor to "urge[] consideration of factors outside the scope of the jury's deliberations." *Jackson v. State*, 522 So. 2d 802, 809 (Fla. 1988). The prosecutor below commented during opening statement about the defendant and his counsel in the following manner:

> [MR. WHITSON:] Throughout the history of this case, up to approximately June of this year, Michael Abshire has continued to send notes to Pat Greenhalgh, the case agent in this case, wanting to talk to her. Numbers and numbers of theses requests. Some of which have specific clues on the bottom of them. ***"I don't want my lawyer in here."***
>
> MR McLEOD: May I approach the bench?
>
> THE COURT: Yes, you may.
>
> (Whereupon, the following side-bar conference was had.)
>
> MR. McLEOD: I object to the statement or the opening statement regarding any request for counsel or denial of counsel. I move for a mistrial based on it.
>
> *****
>
> THE COURT: What is the purpose of telling the jury about the statement that says he didn't want his lawyer present?
>
> MR. WHITSON: Well, there is no point to do so.
>
> THE COURT: Motion for mistrial is denied.
>
> Don't talk about what he said about his lawyer.

MR. WHITSON: Okay.

THE COURT: Otherwise, the objection is overruled.

(R 1215-17, emphasis added).

It has long been established that "[p]rosecuting attorneys must be particularly careful to avoid remarks or conduct which might influence juries beyond the evidence." *Klepak v. State*, 18 Fla. L. Weekly D1515 (Fla. 4th DCA June 30, 1993), citing *Haager v. State*, 83 Fla. 41, 90 So. 812 (1922). "Attorneys should not be the focus of the trial." *Landry v. State of Florida*, 18 Fla. L. Weekly D 1513, D1515, n. 1 (Fla. 4th DCA June 30, 1993). Whether or not defense counsel had advised his client to remain silent is unrelated to any material issue in the case. Indeed the prosecutor, who conceded that there was no point in telling the jury that the defendant did not want his attorney present, was hedging in that answer. Undoubtedly the prosecutor had a purpose for making the remark, however, there simply was no legitimate point to be made.

The First District Court of Appeal considered the issue of personal attacks upon opposing counsel in *Redish v. State*, 525 So. 2d 928 (Fla. 1st DCA 1988). The court found "the prosecution's personal attack on defense counsel by referring to his 'cheap tricks' to be clearly beyond the bounds of proper closing argument." *Id.*, 931. The remark made by the prosecutor below went beyond that of the *Redish* prosecutor. Not only did the remark constitute an attack on opposing counsel, but by speaking of the "specific clues" on the bottom of the notes sent by the defendant to the detective that "I don't want my lawyer in here", the prosecutor raised by implication the defendant's previously asserted right to remain silent. The *Redish* court continued:

In *Briggs v. State*, 455 So. 2d 519, 521 (Fla. 1st DCA 1984), this court stated:

> Verbal attacks on the personal integrity of opposing counsel, rather than appropriate comments on the credibility of witnesses and inferences to be drawn from the evidence before the jury, are wholly inconsistent with the prosecutor's role.
>
> *See also Ryan v. State*, 457 So. 2d 1084 (Fla. 4th DCA 1984), *pet. for rev/ denied*, 462 So. 2d 1108 (Fla. 1985) (resort to personal attacks on defense counsel is an improper tactic which can poison the minds of the jury); *Jackson v. State*, 421 So. 2d 15 (Fla. 3d DCA 1982) (prosecution's personal attacks upon defense counsel were utterly and grossly improper).

Redish, 525 So. 2d at 931.

In *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990), this court addressed a similar tactic. The prosecutor in that case chose to attack defense witnesses rather than defense counsel, but for a similar purpose. For example, he sought to discredit one expert witness by misrepresenting the amount charged by the witness. The questioning, like the statement of the prosecutor below, was "irrelevant, improper, and misleading". *Id.*, 1354.

The sole purpose of the remark by the prosecutor below as to inflame the jury by discrediting opposing counsel and in the process the defense. The motion for mistrial should have been granted.

Point Four

THE PROSECUTOR IMPROPERLY COMMENTED ON THE DEFENDANT'S FAILURE TO TESTIFY.

"Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985). "If the comment is 'fairly susceptible' of being interpreted by the jury as a comment on the defendant's exercise of his right to remain silent it will be treated as such." *Jackson v. State*, 522 So. 2d 802, 807 (Fla. 1988). The following exchange took place during the cross examination of a state witness:

Q Mrs. Sippel, during that time, did you get to know Mike and John?

A Fairly much.

Q Okay. And did you know Mike as a polite or quiet person?

MR. WHITSON: Judge, objection, outside the scope of direct. ***If he wants to try his case, I don't have any objection to anything he wants to do with his case in chief.***

THE COURT: Sustained.

MR. McLEOD: May I approach side bar?

THE COURT: Yes, you may.

(Whereupon the following proceedings were had at side bar:)

MR. McLEOD: I object to the comment that the prosecutor said about my case as being a comment on my client's right to remain silent and/or the preventative or to present a defense and I move for a mistrial based on the statement.

THE COURT: That motion is denied. The jury has no idea what case in chief means unless you tell them. Don't make any more comments that

refer in any way to that. You know, you-all can take the case and gum it up by aside comments like that.

MR. WHITSON: Yes, sir.

THE COURT: Don't say anything else about it.

MR. WHITSON: Yes, sir.

(R 1349-50, emphasis added).

The prosecutor could have simply objected to the question as being beyond the scope of direct examination. However, as the trial judge's admonition to the prosecutor suggests, the gratuitous remark by the assistant state attorney was entirely unnecessary and prejudicial to the defendant. As the prosecutor's statement is "fairly susceptible of being interpreted by the jury as a comment on the defendant's right to remain silent", *Jackson, supra*, the motion for mistrial should have been granted.

Point Five

THE PROSECUTOR IMPROPERLY QUESTIONED THE MEDICAL EXAMINER.

"Relevant evidence is admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." §90.403, Fla. Stat. (1991). While the cause of death is indisputably relevant in a homicide case, the prosecutor deliberately sought an answer to a question with no clinical answer.

The medical examiner found evidence of a cut wound on vertebrae, which he characterized as a fatal wound (R 1024-1025). He testified that a person with such a wound would not be able to move (R 1026). He also found defects to the fifth and sixth ribs, indicating wounds (R 1025). The witness was not, however, able to determine if any wounds had been inflicted after death or which of the wounds had been inflicted prior to death (R 1033). He acknowledged that death could have been caused by other wounds (R 1036). The prosecutor asked the medical examiner: "You cannot rule out that this ***lady was virtually scared to death*** before she was cut?" (R 1041, emphasis added).

"[T]he potential confusion and unfair prejudice far outweighed any probative value, even if we assume this evidence had any relevance at all." *Mendyk v. State*, 545 So. 2d 846, 849 (Fla. 1989). While lay persons speak in terms of an individual being "scared to death", such a diagnosis certainly does not rise to the level of clinical precision. Perhaps it would have been proper for the prosecutor to have asked, for example, if the victim could have suffered a heart attack or a stroke, but the question as advanced served no other purpose than to inflame the passion of the jurors.

Point Six

THE PROSECUTOR WAS PERMITTED TO INQUIRE REGARDING LACK OF REMORSE ON THE PART OF THE DEFENDANT.

"This Court has repeatedly held that lack of remorse has no place in the consideration of aggravating factors." *Jones v. State*, 569 So. 2d 1234 (Fla. 1990). After the court sustained the defense objection to cross examination during the guilt phase on lack of remorse, the prosecutor was permitted to inquire on the issue in veiled fashion:

> Q [by Mr. McLeod] And Detective Greenhalgh, I take it then that at that time and on that date when you spoke with Mr. Abshire, he never expressed any malice towards Stacey Willetts.
>
> A No, he did not.
>
> Q Thanks, that's all.
>
> THE COURT: Just so everybody will understand, what do you mean by malice?
>
> BY MR. McLEOD:
>
> Q He never expressed, Detective Greenhalgh that he had any ill feelings, bad feelings towards Stacey Willets.
>
> A No, he did not.
>
> MR. McLEOD: Thank you.
>
> MR. WHITSON: Judge, my redirect is going to necessitate some questions outside of the jury because of the way I think a door on that issue has been opened and I'd like to put some questions to the witness.
>
> THE COURT: Come to the side bar.
>
> (Whereupon, the following proceedings were had at side bar:)
>
> Tell me what it's about.

MR. WHITSON: By him putting that question to the witness, I think he's opened the door about me asking this witness whether or not he expressed any emotion at all towards Stacey Willets, including remorse.

MR. McLEOD: I asked him in that statement did he ever, say anything to express any malice or ill will towards her. That doesn't talk about remorse or the crime done. I also couched it only into that statement at that time.

THE COURT: Do you have an objection to his questioning or not.

MR. McLEOD: Yes.

THE COURT: What's your objection?

MR. McLEOD: You can't ask a witness, State v. Jones, you can't ask a question directed toward whether or not a client showed any remorse for a crime he had done.

THE COURT: You can ask a question did he show any ill will, but he can't ask --

MR. McLEOD: That's not what I asked. What I asked was did he make any statements that indicated he had malice or ill will towards Stacy.

THE COURT: The objection is sustained.

MR. WHITSON: Judge, before you roll back over there, can I ask you one more question?

THE COURT: Yes, you may.

MR. WHITSON: My understanding of the case law, and I'm willing to take it up on appeal and suffer the consequences if I'm wrong about this, Judge, but when that issue of emotion is opened by the defense, the State can follow it up with the question that I want to put now, if you find that the word remorse is wrong, did he express any emotion at all concerning Stacy Willets.

THE COURT: The objection is sustained as to remorse. You may ask the question about any emotion.

MR. WHITSON: Thank you.

(R 1309-10).

The prosecutor's contention that the door was opened by the defense question is incorrect. This court rejected a similar argument in *Walton v. State*, 547 So. 2d 622 (Fla. 1989):

> In his second point, Walton argues that the state improperly presented evidence concerning lack of remorse as a nonstatutory aggravating circumstance. In response, the state asserts that Walton's counsel initiated the questioning of defense witnesses concerning remorse and expressly asked one witness "what if any remorse" had Walton shown, thus opening the door concerning this issue. This Court has consistently held that lack-of-remorse evidence cannot be presented by the state in its case in chief, *see Robinson v. State*, 520 So. 2d 1 (Fla. 1988); *Patterson v. State*, 513 So. 2d 1263 (Fla. 1987); *Pope v. State* 441 So. 2d 1073 (Fla. 1983); *Jackson v. Wainwright*, 421 So. 2d 1385 (Fla. 1982), *cert. denied* 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983) . . .

Id., 547 So. 2d at 625.

The fact that the defense asked a question about the defendant's lack of ill will towards the victim did not open the door to the prosecution to question the witness about lack of remorse during the state's case in chief.

In stating that he "willing to take it up on appeal and suffer the consequences", the prosecutor implicitly acknowledged that he was still seeking to question the witness about lack of remorse on the defendant's part. Concession or not, it is nonetheless apparent that that was precisely what took place. The defense had established that there was no ill will towards the victim from the defendant. The flip side of the coin is, of course, did he feel any remorse. The question allowed was an improper inquiry concerning lack of remorse.

Point Seven

THE INQUIRY BY DEFENSE COUNSEL REGARDING A MATERIAL ISSUE WAS IMPROPERLY RESTRICTED.

"The threshold test for admissibility of evidence on cross-examination is relevance. . ." *Johnson v. State*, 595 So. 2d 132, 135 (Fla. 1st DCA 1992). "Relevant evidence is evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (1991). The evidence which the defense sought to elicit was highly relevant:

BY MR. McLEOD:

Q Detective Welborn, you were involved in the investigation of the homicide; is that correct?

A Yes, sir.

Q And you conducted an investigation specifically of John Marquad in St. Petersburg, Florida, isn't that correct?

A Yes, sir.

Q And your investigation of John Marquad revealed that in fact John Marquad did stab and murder Stacy Willets, is that correct?

MR. WHITSON: Judge, this is outside the scope of direct examination.

THE COURT: Well --

MR. WHITSON: And too, Judge, if he gets to try his case on cross-examination, it defects [sic] the rules of evidence.

THE COURT: Mr. Whitson, that's not for the jury. The objection is sustained for a number of reasons, all of which are known to both of you.

MR. McLEOD: I cannot go forward with the question?

THE COURT: You cannot go forward with the question. The objection is sustained.

(R 1326).

The First District quoted this court at length in *Johnson* to emphasize the long standing principle that a full and fair cross examination is essential to a fair trial:

> Long before the enactment of the Florida Evidence Code, case law forcefully acknowledged the *constitutional right* of a defendant in a criminal case to fully cross-examine a prosecution witness as to transactions and events about which the witness had testified during direct examination. In *Coco v. State*, 62 So. 2d 892 (Fla 1953), the court said,
>
> > It is too well settled to need citation to authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an *absolute right*, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called * * * Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable *right* and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error. Moreover, the right to cross-examination stems from the constitutional guaranty that an accused person shall have the right to be confronted by his accusers.
>
> *Coco v. State*, 62 So. 2d at 894-895 (emphasis supplied). The court then quoted the following language with approval:
>
> > * * * it is error for the trial court to refuse to permit the cross-examination to extend to all matters germane to the direct examination, for such a cross-examination is a matter of absolute right and is not a mere privilege. * * * if a question is within the scope of direct examination it is not objectionable on cross-examination because it tends to establish a defense to the action. * * * when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness of cross-examination.

Johnson v. State, 595 So. 2d at 135 (emphases in opinion).

The results of the investigation against the codefendant were clearly material. The defense theory below throughout was that the codefendant Marquad committed the murder. Unlike the situation in *Corbett v. State*, 602 So. 2d 1240, 1243 (Fla. 1992), the evidence that the defense sought was not already before the jury. The undue restriction by the court on the defense inquiry of the detective who had investigated the codefendant constituted reversible error. *Cf. Jones v. State*, 580 So. 2d 143 (Fla. 1991). The defendant's right to confrontation under both the federal and state constitutions were violated.

Point Eight

THE PROSECUTOR REPEATEDLY MADE IMPROPER COMMENTS DURING HIS CLOSING ARGUMENT.

The prosecutor below made a number of improper comments during his closing argument. The prosecutor's remarks prompted the defense to object on at least three occasions.. The first objection was in response to the prosecutor's characterization of the defendant as the "dragon master":

> [MR. WHITSON:] I'm going to take you on a little trip through Michael Abshire's mind. Dungeons and Dragons ***dragon master***. . . .
>
> Page two of the confession we decided not to go to Atlanta. I think I convinced him. Michael Abshire convinced Marquad. He's leading the pack. Stacey had $300 when they left.
>
> Page two. "who registered for the motel," Ms. Greenhalgh. "I did." The ***dragon master*** did. He got paid back.
>
> Page three. Like I held most of my -- all of my money and most of John's. The ***dragon master*** held the money.
>
> MR. McLEOD: Objection, Your Honor. May I approach side bar?
>
> THE COURT: All right.
>
> (Counsel for the state and counsel for the Defense approached the bench and the following proceedings took place outside the presence of the jury.)
>
> MR. McLEOD: There's no evidence in this statement and there's no evidence in this case before this jury that my client ever even played Dungeons and Dragons or was a dragon master, and I don't want that said again, and I move to strike.
>
> THE COURT: Well, there is evidence in the case that they played Dungeons and Dragons, and there is evidence in there whether you believe it or not where Hobart Harrison said about the remarks, he said about the circle on the floor and so forth. Stay away from the name calling, Mr. Whitson. Try to stay with the facts. You understand me?

MR. WHITSON: Yes, sir.

MR. McLEOD: Can I add one thing?

THE COURT: Sure.

MR. McLEOD: There's no testimony by any witness that my client ever played Dungeons and Dragons, and that Marquad did --

THE COURT: There is evidence from what inference can be drawn that your client was part and parcel. It will not be stricken but stay away from the name calling and try the facts.

MR. WHITSON: Yes, sir.

(R 1505-06, emphases added).

A number of courts have found name calling by the prosecutor to constitute error. Although it had received an *Anders* brief in *Hippensteel v. State*, 525 So. 2d 1027 (Fla. 5th DCA 1988), the Fifth District nonetheless rendered a decision. The court stated "that error was committed for the trial court's failure to declare a mistrial after the prosecutor called the defendant, and his codefendant, 'punks' . . ." *Id.* The Second District found "that the prosecutor's reference in closing argument to defendant as 'slime' was improper." *Biondo v. State*, 533 So. 2d 910 (Fla. 2d DCA 1988) (citation omitted). This court addressed a similar issue in *Craig v. State*, 510 So. 2d 857 (Fla. 1987). The case involved a prosecutor who repeatedly referred to the defendant as a liar, and the issue was resolved this way:

> When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.

Id., 865.

The impropriety below was, unlike the situation in *Craig*, that there was no evidence in the guilt phase that justified the prosecutor's characterization of the defendant as the "dragon master". Indeed, the only evidence that even referred to Dungeons and Dragons was elicited from the inmate Hobart Harrison, and it pertained to the codefendant (R 1420).

The prosecutor later suggested that if the defendant was not convicted then no one would be punished for the victim's death because the codefendant could tell a similar story:

> [MR. WHITSON:] Ladies and gentlemen, if John Marquad gets up in here and tells the kind of story that this man wants you to believe, is sufficient to find this man not guilty of killing Stacey Willets and taking her property incident to that murder, ***nobody is going to get convicted for the loss of Stacey.***
>
> "John's only regret was not killing her sooner because it would have cost less financially if he'd killed her sooner."
>
> MR. McLEOD: I need to interpose an objection at side bar, Judge.
>
> THE COURT: Come on up.
>
> (Counsel for the State and counsel for the Defense approached the bench and side bar conference was had out of the hearing of the jury as follows:)
>
> MR. McLEOD: I think I need to object to the statement that if my client is not convicted that there will be no conviction for Stacey Willets by anybody because of John Marquad --
>
> THE COURT: I'll instruct the jury to disregard that and not consider it.
>
> MR. WHITSON: Okay, sir.

(R 1514-15, emphasis added).

In a case involving a similar type of argument, this court cautioned that "[c]ontinual use of this type of argument can well result in the expenditure of additional taxpayer funds to retry capital cases due to the prosecutor's failure to abide by established legal principles." *White v. State*, 18 Fla. L. Weekly S 184, S186 (Fla. March 25, 1993).

The situation below was very similar to the case of *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990). Like the prosecutor in that case the prosecutor here was guilty of repeated instances of misconduct. And like the prosecutor in the earlier case, the prosecutor below convinced the jury that a conviction was necessary to ensure that some one was punished for the murder. This court had this to say about that prosecutor's attempt to divert the jury's attention by suggesting that the defendant would escape punishment:

> Over repeated objections, the state attorney again attempted to mislead the jury during Dr. Vaughn's cross-examination. The height of overreaching came, however, when the state asked Dr. Vaughn to confirm that a "stay in a state hospital for the criminally insane is actually about six to eight months [and] is not uncommon." Thus the jury was led to believe that if it found Nowitzke not guilty by reason of insanity, he would be out on the streets within eight months.

Id., 1354.

The prosecutor below was unlike the prosecutor in *Nowitzke* in at least one respect. The *Nowitzke* prosecutor appears to have attempted to shield the true nature of his questions. The prosecutor below, on the other hand, was very straightforward in his approach. Either the jury was going to convict Abshire or chances were, according to the prosecutor, that no one would be punished.

The defense was goaded into objecting yet a third time by the prosecutor's attempt to use the grand jury indictment as evidence of guilt:

> [MR. WHITSON:] He's also going to tell you that you can look to see if he's been convicted of crime. But that's just one of the ingredients, ladies and gentlemen. You decide for yourself whether or not any part of Hobart Harrison's testimony is believable and is consistent with other evidence in the case before discounting that, but that ain't the only evidence upon which ***Michael Abshire is guilty of the charges that the Grand Jury leveled against him.***
>
> Follow the law that Judge Watson tells you to apply. He's going to give

you a copy --

MR. McLEOD: Sorry to interrupt you again, Mr. Whitson, but I have to make an objection at the side bar.

THE COURT: Come on over.

(Counsel for the State and counsel for the Defense approached the bench and a side bar conference was had pout of the hearing of the jury as follows:)

MR. McLEOD: I'm sorry to keep coming here, but now we've had two references to the Grand Jury charges as if those carry weight with this jury. I object to the reference to the Grand Jury and ask that it be stricken, and/or the jury be instructed that the Grand Jury charges are not evidence in this case at all, and I think because of the reference to that and the previous reference to John Marquad's trial, if Mike Abshire doesn't get convicted, I have to move for a mistrial.

THE COURT: That motion is denied.

Don't make any references to the Grand Jury.

(The following proceedings were had in open court.)

MR. WHITSON: Ladies and gentlemen, you know, our code of law starts out with a code of moral responsibility, and Mr. McLeod, the defense attorney in this case, has told you over and over again that his client is guilty of incredible moral reprehensible behavior. He refuses to acknowledge that very morally reprehensible behavior also falls within ***the violations of the law this man is charged with violating.***

MR. McLEOD: Objection.

THE COURT: Objection is overruled.

(R 1519-20, emphasis added).

"[A]n indictment is nothing more than a vehicle to charge a crime and is not evidence for a jury to consider as any proof of guilt[.] *Reichmann v. State*, 581 So. 2d 133, 139 (Fla. 1991), citing *Dougan v. State*, 470 So. 2d 697, 701, n. 12 (Fla. 1985). In *Reichmann* this court determined that the trial court had correctly sustained an objection to the prosecutor's argument

that "Reichmann had been indicted by '23 grand jurors.'" *Id.* The prosecutor's repeated references to the grand jury were unnecessary and were intended to convince the members of the jury that the defendant was guilty as charged.

Point Nine

THE TRIAL COURT ERRED IN NOT GIVING THE MODIFIED PRINCIPAL INSTRUCTION THAT HAD BEEN REQUESTED BY THE DEFENSE.

"The defense is entitled to jury instructions on rules of law applicable to a theory of defense if evidence has been introduced to support these instructions." *Hansbrough v. State*, 509 So. 2d 1081, 1085 (Fla. 1987) (citation omitted). The defense sought in addition to the standard principal instruction, the following:

DEFENDANT'S REQUESTED JURY INSTRUCTION
REGARDING INTENT AND PRINCIPALS

(Add to principal instruction)

> In order to convict someone of aiding and abetting in a crime as a principal in the first degree, the State must prove that MICHAEL ABSHIRE at the time of so aiding and abetting another commit the crime had the specific intent to participate and commit the crime(s) charged.
>
> Valdez v. State, 504 So. 2d 9 (2nd DCA 1986)
>
> Mere knowledge that the offense is being committed is not the same as participation with criminal intent, and mere presence at the scene or the display of questionable behavior after the fact, is insufficient to establish participation in the offense.
>
> Staten v. State, 519 So. 2d 622 (Fla. 1988).

(R 283; during the charge conference the defense also cited *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA 1983)).

There was evidence that the defendant did not believe that the codefendant would go through with his stated plan of killing the victim (R 1269). There was also evidence that the defendant had turned and was leaving from the woods when the codefendant attacked the victim from the rear (R 1158; 1281). Additionally, there was evidence that the victim was dead before the defendant followed the codefendant's directions to stab the body (R 1159; 1283-1285).

Detective Greenhalgh admitted that the state lacked evidence to establish that the victim was not dead the first time that the defendant had stabbed the body (R 1185).

"In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988). "In order to convict one of aiding and abetting in a crime, the State must establish: (1) that the defendant assisted the actual perpetrator by doing or saying something that caused, encouraged, assisted, or incited the perpetrator to actually commit the crime; and (2) that the defendant had the specific intent to participate in the crime." *Saffor v. State*, 558 So. 2d 69, 70-71 (Fla. 1st DCA 1990).

Because there was evidence from which the jury could have reasonably inferred that the defendant was not a principal to the murder because he lacked the specific intent to commit the crime, the requested instruction should have been given.

Point Ten

THE REPEATED PROSECUTORIAL MISCONDUCT THAT OCCURRED BELOW COUPLED WITH THE ERRONEOUS RULINGS OF THE COURT DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

Abshire "was denied a fair trial by the prosecutorial misconduct that permeated this case. . . . While isolated incidents of overreaching may or may not warrant a mistrial, in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive [Abshire] of a fair trial." *Nowitzke, supra,* 1350; see also *Garron v. State*, 528 So. 2d 353, 358 (Fla. 1988). The prosecutorial misconduct began during voir dire and continued virtually unabated throughout the guilt phase.

The prosecutor denigrated women at least three times during voir dire (R 875 ; 886; 923-27). He cast personal aspersions towards defense counsel and in the process referred to the exercise of the defendant's right to counsel (R 1215-1217). He referred to the defendant's exercise of his right to remain silent (R 1349-50). The medical examiner was asked if the victim had been "scared to death" (R 1041). An acquaintance of the defendant was asked indirectly about remorse on the defendant's part. (R 1308-10). During closing argument the prosecutor labeled the defendant the "dragon master", although there was no evidence to support such a characterization (R 1505-06). The jury was cautioned improperly that if the defendant was not convicted than no one would be punished for the victim's death if the codefendant told a similar story in his trial (R 1514-15). The grand jury was alluded to a number of times to suggest that the defendant was guilty (R 1519-20). The record reveals that these and [perhaps] other instances of misconduct . . . precluded the defendant from the fair and impartial trial to which he is entitled

under due process of law. *Nowitzke, supra*, 1356.

Compounding the intentional misconduct of the prosecution were the erroneous rulings of the trial court. "Although some of the errors might be considered harmless when considered independently, . . .when considered collectively, these errors cannot be found to be harmless beyond a reasonable doubt." *Amos v. State*, 618 So. 2d 157 (Fla. 1993). The defendant is entitled to a new trial.

PENALTY PHASE

Point Eleven

THE COURT ERRED IN DENYING THE MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL FOR FAILURE TO PROVIDE ADEQUATE GUIDANCE IN THE FINDING OF SENTENCING CIRCUMSTANCES, AND TO PRECLUDE THE DEATH SENTENCE.

In this death penalty case heightened standards of due process apply. See *Elledge v. State*, 346 So. 2d 998 (Fla. 1977) ("heightened" standard of review), *Mills v. Maryland*, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds,"), *Proffitt v. Wainwright*, 685 F. 2d 1227, 1253 (11th Cir. 1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and *Beck v. Alabama*, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed. 2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. *Godfrey v. Georgia*, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of

murder. *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990), *Lowenfield v. Phelps*, 108 S.Ct. 546, 554 (1988).

PROFFITT AND THE CONSTITUTIONALITY OF SECTION 921.141

In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976), the Supreme Court upheld the constitutionality of section 921.141. How then can the defendant now contend that the statute is unconstitutional? Because the Court in *Proffitt* was not confronted with the issues raised in this brief. *Hitchcock v. Dugger*, 107 S.Ct. 1821 (1987) makes clear that the Court did not consider that *Proffitt* barred all challenges to the constitutionality of Florida's death penalty law. In *Hitchcock* the Court held unanimously that section 921.141 was unconstitutional insofar as it limited the consideration of mitigating evidence. Thus, *Proffitt* is limited to the issues set out in its opinion and does not bar the consideration of issues such as those raised at bar.

HOW IS THE JURY TO FIND MITIGATION?

Section 921.141 requires that the jury determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances, but sets out no method by which the jury is to do this. The state supreme court has not authoritatively construed section 921.141 in a way to provide the jury adequate guidance in determining and weighing mitigation. Hence the statute is unconstitutional.

1. How many votes are necessary to find mitigation?

The statute is silent as to whether the mitigating circumstances are to be determined unanimously, or by a substantial majority, a bare majority, a plurality, or only by individual jurors. The Florida Supreme Court has never construed this aspect of the statute. The standard

jury instructions on capital cases merely state that the penalty verdict be made a majority vote with a tie vote resulting in a life verdict, but makes no provision as to how individual circumstances are to be determined by the jury. This absence of guidance renders section 921.141 unconstitutional.

The Constitution requires strict guidance tot he jury in capital sentencing. The eighth amendment requires a higher standard of definiteness than does the Due Process Clause with respect to jury instructions in capital cases. See *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). Jury instructions which preclude the full consideration of mitigating evidence are improper. *Hitchcock.*

In *Mills v. Maryland*, 108 S. Ct. 1860 the Court held unconstitutional jury instructions which did not adequately guide the jury as to how many votes were necessary to determine the existence of mitigating circumstances. There the Court considered a statute requiring a unanimous jury penalty verdict. The jury was instructed to determine the existence of aggravating and mitigating circumstances, but was not instructed as to how many votes were required to determine the existence of any particular mitigating circumstance. The Supreme Court held that the jury could reasonably have concluded that it could consider only mitigating circumstances found by unanimous vote. Noting that **any** limitation of the jury's consideration of mitigation is unconstitutional, the Court reversed Mills' death sentence.

The Court further clarified matters in *McKoy v. North Carolina*, 110 S.Ct. 1227 (1990). Holding unconstitutional a sentencing law that required jury unanimity as to mitigating circumstances, the Court wrote at page 1233 (emphasis is original):

> The Constitution **requires** States to allow consideration of

> mitigating evidence in capital cases. Any barrier to such consideration must therefore fall.

The Court went on to note at pages 1233-34 that aggravating and mitigating circumstances are not to be treated alike:

> A State may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances.

Under section 921.141, the jury has no guidance as to whether there is a threshold number of votes required before mitigating evidence can be determined. Given the standard instructions, the jury could conclude that there is such a threshold and could in consequence be misled into failing into considering mitigating evidence. Accordingly, section 921.141 is unconstitutional.

2. What is the standard for proof regarding mitigation?

Section 921.141 provides no standard for the proof of mitigating evidence. The jury instruction committee, apparently out of the blue, has promulgated an instruction that the jury is to consider only mitigation after being "reasonably convinced" of its existence.[5] This instruction

---

[5]Recently, in *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990), the court wrote (footnotes omitted):

> The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81.

Thus, the court has established two standards: "reasonably established," and "reasonably convinced." The standard jury instruction, however, remain unchanged, and speak only of the "reasonably convinced" standard.

is improper for three reasons: (a) it invades the province of the Legislature; (b) it is an incorrect statement of Florida Law; (c) it unconstitutionally limits the consideration of mitigating evidence.

(a) Article 2, section 3 of the Florida Constitution forbids the judiciary from exercising the powers of the Legislature:

> **Branches of government**. -- The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter of properly addressed by the Legislature. Section 921.001 (1), Florida Statutes; *Smith v. State*, 537 So. 2d 982 (Fla. 1989) (sentencing guidelines). Questions regarding standards of proof are manifestly "outcomedeterminative." E.g. *Vinsant Painting & Decorating, Inc. v. Koppers Company, Inc.*, 822 F. 2d 1022 (11th Cir. 1987) (in diversity actions, federal courts must apply local law with respect to burden of proof in affirmative defenses). Hence they are matters of substantive law.

From the foregoing, the question of the standard of proof regarding mitigating circumstances is one of substantive law, to be resolved by the Legislature. The promulgation of the "reasonably convinced" standard by the standard jury instruction committee violates the Florida Constitution's separation of powers. Hence the "reasonably convinced" standard is unconstitutional.[6]

---

[6]The promulgation of the "reasonably convinced" standard by the jury instruction committee also violates the Cruel and Unusual Punishment Clauses of the state and federal constitutions. A death penalty statute is constitutional only to the extent that it reflects the reasoned judgment by the people through their duly elected representatives in the Legislature. *Gregg*. Here we have a major provision of Florida's death penalty scheme substantially

(b) The "reasonably convinced" standard set out in the jury instructions is contrary to Florida law. Although the supreme court has adopted the standard instruction,[7] the instruction is contrary to statutory and constitutional provisions regarding the construction of penal statutes.

Section 775.021 (1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle, known as the "rule of lenity," is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed. 2d 743 (1979) (rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed. 2d 205 (1980). Use of the "reasonably convinced" standard, which (as set

---

rewritten by a little known committee of lawyers.

[7]Adoption of standard instructions by the supreme court does not necessarily mean that the instructions correctly state the law. *Yohn v. State*, 476 So. 2d 123, 127 (Fla. 1985) (promulgation of standard instructions does not mean they are necessarily correct; standard jury instruction on insanity improper.). See also *Pope v. State*, 441 So. 2d 1073 (Fla. 1984) (standard instruction on "heinous, atrocious or cruel").

out below) is a very high standard of proof, is directly contrary to the requirement of law and constitution that the statute be strictly construed in favor of the defendant.

(c) Use of the "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence be considered and it imposes an unconstitutionally high standard of proof.

The state and federal constitutions require that **all** mitigating evidence be considered. *Hitchcock.* Any jury instruction that prevents consideration of all mitigating evidence is unconstitutional. *Mills.* **Full** consideration of mitigating evidence is essential in a capital case; the jury must be able to consider and give effect to **any** mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989).

The "reasonably convinced" standard is directly contrary to these well-established principles of law. Further, it is an unreasonably high standard of proof. A standard that the jury be "convinced" of the evidence "is more stringent than our tradition or the needs of justice warrant, and seems equivalent to the standard of 'clear, strong and convincing proof,' hitherto thought to be appropriate only in exceptional cases." *McCormick's Handbook of the Law of Evidence* 794-795 (E. Cleary 2d ed. 1972) (footnote omitted).

HOW IS THE JURY TO FIND AGGRAVATING CIRCUMSTANCES?

Section 921.141 makes no provision as to how the jury is to go about determining the existence of aggravating circumstances. The defendant argues that section 921.141 is unconstitutional because it does not provide for how many votes are necessary to find any

particular aggravating circumstances.

1. **How many votes are necessary to find aggravating circumstances?**

Florida law requires that the state prove the aggravating circumstances beyond a reasonable doubt, and the jury is so instructed. But it contains no provision as to how many jurors must find any particular aggravating circumstance. Since it is usually the case that the jury is instructed as to several aggravating circumstances, it is quite possible for a jury to return a death verdict without even a majority of the jurors finding any one aggravating circumstance. This situation is contrary to the constitutional requirement of definiteness in sentencing determinations and the general due process requirement that verdicts in criminal cases be rendered by at least a substantial majority of the jury.

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, The defendant argues that the Florida right to a jury[8] must be administered in a way that does not violate due process. *Cf. Anders v. California* 386 U.S. 736, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967) (although there is no constitutional right to appeal, state law right to appeal must be administered in compliance with due process.).

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed. 2d 1523 (1972), and *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed. 2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

---

[8]The right to a jury in capital sentencing predates the 1968 constitution and is therefore incorporated into article I, section 22, Florida Constitution. *Cf. Carter v. State Road Depart.*, 189 So. 2d 793 (Fla. 1966).

The defendant concedes that in *Alvord v. State*, 322 So. 2d 533 (Fla. 1975), the supreme court rejected the contention that a penalty verdict for death must be unanimous. See also *James v. State*, 453 So. 2d 786 (Fla. 1984) and *Fleming v. State*, 374 So. 2d 954 (Fla. 1979) (both following *Alvord* without analysis). In *Alvord*, the court did not specifically decide the separate issue of whether a bare majority verdict was constitutional. The subsequent authority of *Burch* shows that a verdict by less than a substantial majority violates due process.

In *Burch*, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates of due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. See, e.g., *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983), *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988), and *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed. 2d 982 (1977). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

Since jurors could reasonably construe the law as authorizing a death verdict where not even a majority of them agree as to any one aggravating circumstance, Florida's death penalty statute is unconstitutional for failure to channel the sentencer's discretion as required by the teachings of, e.g., *Godfrey and Lowenfield.*

Point Twelve

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT PAROLE IS EQUIVALENT TO A SENTENCE OF IMPRISONMENT OR COMMUNITY CONTROL AND IN FINDING IN AGGRAVATION THAT THE DEFENDANT COMMITTED THE CAPITAL OFFENSE WHILE UNDER SENTENCE OF IMPRISONMENT.

The state asked for a special instruction regarding the aggravating circumstance that the crime was committed while the defendant was under the sentence of imprisonment:

> MR. DALY [prosecutor]: It would be after they're told that if you're under sentence of imprisonment -- that is an aggravator -- that they're also instructed that if you find that the defendant was on parole, that constitutes a sentence of imprisonment, because they're not going to have any understanding of the case law in the State. They're not going to know that parole means imprisonment.
>
> THE COURT: I agree.
>
> MR. WHITSON: I had proposed, Judge, that we simply include a sentence that says parole status is equivalent to a sentence of imprisonment or community control after that first sentence.
>
> THE COURT: That's fine.
>
> MR. McLEOD: I specifically disagree and object to any change in the rendering of the Supreme Court approved aggravating circumstances as they are set forth in the instructions.
>
> THE COURT: Well, since they have down here in the new instructions with under sentence of imprisonment or to be placed on community control, and since the cases say that being in [sic] parole is equivalent to being under sentence of imprisonment, take it from the State's request and include that in that Number 1, aggravated. Because there's no sense giving the jury instructions if you don't want them to understand them.

(R 1581-82).

Despite the defense objection, the court gave the following instruction: "the felony was committed by a person under the sentence of imprisonment or placed on community control. Parole status is the equivalent to the sentence of imprisonment or community control." (R 1732). The defense is aware that this court has recognized parole as the equivalent of being under a sentence of imprisonment. *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990); *Carter v. State*, 576 So. 2d 1291, 1293 (Fla. 1989). Nonetheless, it is urged that the issue be revisited because of constitutional provisions militating against continued recognition of parole in this context without legislative enactment:

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.
>
> Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property.
>
> *****
>
> The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch.

Perkins v. State, 576 So. 2d 1310 (Fla. 1991) (citations omitted); see *Maynard v. Cartwright*, 486 U.S. 356, 361-64, 108 S.Ct. 1853, 1857-59, 100 L.Ed.2d 372 (1988).

The continued recognition by the Florida courts of parole as the equivalent of under a sentence of imprisonment without legislative enactment constitutes a violation of due process under both the state and federal constitutions and the separation of powers provision of the Florida Constitution.

Point Thirteen

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INQUIRE REGARDING THE CIRCUMSTANCES OF THE PREVIOUS CONVICTION OF A FELONY INVOLVING THE USE OF VIOLENCE.

Under the standard instruction to the aggravating circumstance of previous conviction for a violent felony the judge is advised:

> Since the character of a crime if involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance '2' the court should instruct the jury of the following, as applicable:
>
> *****
>
> **b. The crime of** (previous crime) **is a felony involving the [use] [threat] of violence to another person**[.]"

Florida Standard Jury Instructions in Criminal Cases, p. 76.

The judge instructed the jury in accordance with the standard jury instruction (R 1732-33).

Even though the characterization of the previous crime is a matter of law, as opposed to a matter of fact, the trial judge allowed the prosecution to inquire regarding the specifics of the previous crime of the assistant district attorney from North Carolina.[9] The prosecutor indicated that he was going to seek in aggravation that the defendant had previously been convicted of a felony involving the use or threat of violence. His explanation of how he planned to establish the aggravator prompted an objection by the defense:

> MR. WHITSON: Yes, sir. We're going -- we are going to bring the prosecutor that prosecuted him in 1988 for assault with intent to kill in New

[9]The trial court's ruling is in accord with holdings of this court: *Padilla v. State*, 18 Fla. L. Weekly S 181, S183 (Fla. March 254, 1993).

Hanover County, North Carolina. He's going to prove the crime by providing facts and circumstances of the incident, photographs of the victim and certified judgment and sentence.

MR. McLEOD: Judge, I'm going to object to any photographs of any victim from a prior crime. I think the appropriate format for that would be for Mr. Whitson to present a judgment and sentence for a qualifying offense, but not the details of the crime. I think that would be overly prejudicial to do that. The fact that it exists causes it to be an aggravating circumstance if he can prove that. The nature of the offense would not be relevant, and I don't think it should be admissible.

THE COURT: The State of Florida is allowed to present details of the prior offense. . . .

(R 1574-75).

Evidence concerning the specifics of the previous crime was irrelevant and, therefore, unfairly prejudicial. It was irrelevant because it did not tend to prove a material fact. §90.401, Fla. Stat. (1991). Because the judge directly instructed the jurors that "[t]he crime of assault with intent to kill is a felony involving the use or threat [of] violence to another person[,]" there is no need for the underlying facts of the previous crime to be detailed in order to establish that the offense was violent in nature (R 1732-33). Just as Mr. McLeod argued below, it was unnecessarily prejudicial to provide this evidence to the jury because the only material matter to be proved was whether or not the defendant had been convicted of the crime.

Point Fourteen

THE TRIAL COURT ERRED IN FINDING EITHER ROBBERY OR PECUNIARY GAIN AS AGGRAVATING CIRCUMSTANCES.

"[T]he evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire [on the part of the defendant] for the[] objects [which belonged to the victim]. The evidence implicates only the codefendant in this regard. As the court found, it was the codefendant who had expressed an interest in taking the victim's belongings (R 482). In making its finding, the court quoted from the April 7, 1992, statement which the defendant had given to a detective:

> ML: "OK, when was the first time that you remember him saying something?"
>
> MA: One or two days before we left Wilmington. We were getting ready to leave, he spoke about killing her in the woods, somewhere.
>
> ML: Did he say why?
>
> MA: At the time, it wasn't you know, anything that he just like, speculating, it was the car and you know, money and stuff [, but you know, it was just one of those things people talk about, that you know, no serious intent, I thought. Just like, you know, "hey, let's go rob the Brinks truck." You know its [sic] a joke.]

(R 482; bracketed portion from statement at R 363).

The order continued:

> Immediately after Stacey was rendered helpless, ***Marquad*** removed the money from her pockets, her purse and wallet. Defendant and Marquad then took her car. When they returned to the motel room they divided her clothes between themselves. When Defendant was arrested he was in possession of Stacey's car. When Marquad was arrested he was in possession of her stereo.

(R 482, emphasis added).

The clothing that the defendant took from the motel room was limited to a couple of large shirts, which the codefendant had given to him (R 1160; 1288).

The evidence presented by the state does not prove beyond a reasonable doubt that the pecuniary gain or robbery aggravating circumstances apply:

> While it is true that [Abshire] took [Willet]s' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain. As in *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), it is possible that the car was taken to facilitate escape rather than as a means of improving his financial worth. The record simply does not support the conclusion that [Willets] was murdered for her car.

Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988).

Similarly, "the state did not show beyond a reasonable doubt that the murder was committed for pecuniary gain. The [shirts] could have been taken as an afterthought." *Hill v. State*, 549 So. 2d 179 (Fla. 1989).

The same analysis applies to the robbery aggravator. "[T]he trial court erred in finding that the murder was committed during a robbery. While there is no question that [Abshire] took [Willets'] [car] and [shirts] after h[er] death, this action was only incidental to the killing, not a primary motive for it." *Clark v. State*, 609 So. 2d 513, 515 (Fla. 1992). "[T]here is no indication that taking it after her death was more than an afterthought, rather than a motive for the murder. This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor must be based." *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984) (citation omitted). Neither pecuniary gain nor robbery should have been found to be aggravating circumstances.

Point Fifteen

THE TRIAL COURT ERRED IN FINDING BOTH ROBBERY AND PECUNIARY GAIN IN AGGRAVATION.

"[T]he doubling of aggravating circumstances is improper where they refer to the 'same aspect' of the crime." *Cherry v. State*, 544 So. 2d 184, 187 (Fla 1989) (citation omitted). The court below found that "[t]he crime for which Defendant is to be sentenced was committed while he was engaged in the commission of a robbery or committed for financial gain." (R 482). As the robbery and pecuniary gain aggravators refer to the same aspect of the crime, the pecuniary gain aggravating circumstance should be stricken. *Johnson v. State*, 608 So. 2d 4, 11 (Fla. 1992).

Point Sixteen

THE TRIAL COURT ERRED BY FINDING IN AGGRAVATION THAT THE DEFENDANT HAD MURDERED THE VICTIM IN A HEINOUS, ATROCIOUS, AND CRUEL MANNER.

"Events occurring after death are irrelevant to the atrocity of the homicide, regardless of their depravity and cruelty." *Jones v. State*, 569 So. 2d 1234 (Fla. 1990). The defendant was held vicariously liable for the actions of his codefendant in this regard. *Cf. Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993). The findings of the trial court are consistent with the evidence that was presented at trial, *i.e.*, that the codefendant was the person who actually attacked and killed the victim:

> Chopping, stabbing and attempting to drown a defenseless, unsuspecting young woman with a bowie knife, a dagger and attempting to cut her head off with a Gurka knife is extremely wicked and shockingly evil. Such conduct is designed to inflict a high degree of pain with indifference to the suffering of Stacey Ann Willets. Stacey's throat was cut and she was stabbed in the chest with a knife.
>
> > "They struggled for a little bit more, and he kind of carried her over into the middle of the clearing and threw her down on her stomach and sat on her back, and held her face down under the water until she quit breathing. And he just sat there."
>
> Stacey started breathing again and ***Marquad*** held her face under the water again ***until she stopped breathing*** again.
>
> Defendant ***then*** ". . . stuck the knife about half way into her back."

(R 483, emphasis added).

The victim had already expired prior to the defendant following his codefendant's directions to stab the lifeless body. As a result, the trial court erred in finding this aggravator.

Point Seventeen

THE TRIAL COURT ERRED BY APPLYING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR TO THE DEFENDANT.

"To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated, and premeditated manner, the evidence must show that the defendant had a 'careful plan or prearranged design to kill'" *Powers v. State*, 605 So., 2d 856, 864 (Fla. 1992) (citation omitted). The court again held the defendant vicariously liable for the actions of the codefendant.

The court found the following three identifiable motives: (1) To get rid of her because she was a burden; (2) to take her property; and (3) to experience killing a human being. (R 484). It was the codefendant who wanted to be rid of the victim. The codefendant and the victim, had argued as they drove to Florida (R 1153). The codefendant told the defendant at a convenience store that he was going to take the victim into the woods and kill her. The defendant told the codefendant that he would have to kill her by himself (R 1153; 1268). However, the defendant had been certain that the codefendant would not go through with it (R 1269). By the third day in Florida the codefendant and the victim were arguing again (R 1155).

The second motive is inapplicable for two reasons. It should be disregarded because it refers to the same aspect of the crime as the robbery or pecuniary gain aggravators. *Cherry, supra*. Secondly, it was the codefendant's intent to steal the victim's property (R 482; 363).

Similarly, the evidence revealed that it was the codefendant who wanted "to experience killing a human being." (R 484). As the court found, "He (***Marquad***) just wanted to experience it. And to know in his own mind and heart that he actually killed somebody and that he could

do it . . ." (R 483, emphasis added).

"None of the facts recited above establish that [Abshire] had a prearranged plan to *kill* [Stacey Willets]." *Power, supra* (emphasis in opinion). To the contrary, the evidence reveals that the codefendant had such a plan, which the defendant did not believe would be carried out. It was only through the codefendant's domination of the defendant, which the trial court found to have existed (R 485), that the codefendant was able to carry out his plan to kill the victim. The cold, calculated and premeditated aggravating circumstance was not proven beyond a reasonable doubt by the state to apply to the defendant.

Point Eighteen

APPLICATION OF THE DEATH PENALTY IS DISPROPORTIONAL PUNISHMENT.

"It is well settled that a fundamental requirement of the eighth amendment to the United States Constitution is that a death penalty must be proportional to the culpability of the defendant." *Jackson v. State*, 575 So. 2d 181, 190 (Fla. 1991), citing *Tison v. Arizona*, 481 I.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In light of the diminished role of the defendant in this crime, the death penalty is disproportional.

"In *Enmund* and *Tison*, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill." *Jackson, supra.* The evidence before the court consistently revealed the defendant to have occupied a minor role. The codefendant had the plan to murder the victim, he dominated the defendant, and the defendant did not stab the body until after the victim was already dead from wounds that had been inflicted by the codefendant. The state, which relied entirely upon the cooperation of the defendant to successfully prosecute both him and the codefendant, simply had no contrary evidence. "[I]f the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment. *Id.*

The trial court concluded that "[t]he mitigating circumstances pale in comparison to the aggravating circumstances. It is difficult to imagine a more brutal senseless or unnecessary

murder." (R 486). The, evidence, however, revealed that the defendant did not kill the victim:

> Stacey was completely defenseless. The ***attack was from behind by Marquad*** and unprovoked. They stabbed her, tried to drown her and tried to behead her. She struggled, but was no match for her assailants. They could have taken her car, her money and her property without a struggle.

(R 486, emphasis added).

The evidence showed defendant did not stab the body until after the codefendant had killed the victim, which he did at the codefendant's direction (R 1159; 1283; *see also* R 483; point sixteen, *supra*). Additionally, she struggled with the codefendant, who was the one who drowned her. *Id.* The court determined that the victim had been killed for three reasons:

> (1) Defendant and Marquad wanted to get rid of her. ***She argued with Marquad***, hadn't found a job and fewer people meant the money would go further; and
>
> (2) Defendant and Marquad wanted her money, her car and her property; and
>
> (3) ***Marquad*** wanted to know what it was like to kill someone. Defendant recognized that was probably one of Marquad's motives and the Court believes that was one of Defendant's motives also. Defendant and Marquad played Dungeons and Dragons on many occasions, This time they had a real victim.

(R 486, emphases added).

The court attributed to the defendant inculpable evidence that should have been applied only to the codefendant. The evidence did not show that the defendant wanted to get rid of the victim for any reason. Nor did the evidence support the finding that the defendant wanted her property. The trial court's belief that the defendant, as well as the codefendant, wanted to know what it was like to kill someone, simply was not proven beyond a reasonable doubt.

Assuming, *arguendo*, there was evidence of considerable mitigating circumstances. The

court found as a statutory mitigating factor that "there was some dominance of Defendant by Marquad at the time of the killing." (R 485). The court also detailed several non-statutory mitigating circumstances:

> The principal circumstance is Defendant's testimony in the trial of John Christopher Marquad which resulted in a verdict of guilty of murder in the first degree with a 12 - 0 recommendation of death and a verdict of guilty of armed robbery with a deadly weapon. Defendant's testimony was important and critical evidence in Marquad's case.
>
> Defendant cooperated with law enforcement after initially lying to them. He told law enforcement what happened. He minimized his participation, but his statements appear to be fairly accurate versions of how the crime occurred. Without his statements the State had difficult cases against both Defendants.
>
> Defendant's mother, Virginia Murray, testified that when she and her husband were divorced the Defendant was 15 years old. She stated that was a bad time in his life and she and her husband did not consider Defendant as a child - they more or less allowed him to go and do things on his own, suggesting they failed to give him the emotional support and love that he needed at the time.
>
> She further testified that before Defendant got involved with Marquad and the game of Dungeons and Dragons Defendant attended college, worked two jobs, rode a bicycle as his only transportation, attended church regularly, sang in a church group and made good grades.
>
> Mrs. Murray testified that Defendant goes along with anything to keep a friend and may need therapy to determine why, lending some support to the theory that Defendant was dominated by Marquad.
>
> The court considers the testimony given by Mrs. Murray to be true.

(R 485-86).

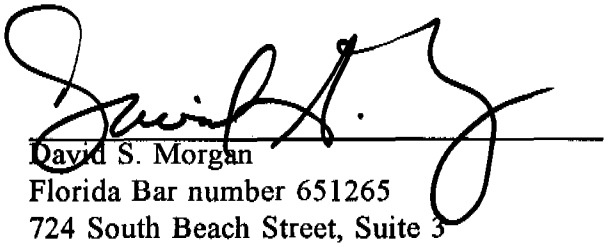
"Upon this record, [there is] insufficient evidence to establish that [Abshire]'s state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder." *Jackson, supra*, 193. The defendant is entitled to a new sentencing.

CONCLUSION

The defendant is entitled to a new trial. There were repeated instances of prosecutorial misconduct, which included gender based discrimination during voir dire, impugning opposing counsel's character, improper questioning of an expert witness, questions concerning lack of remorse, name calling during closing argument, referring to the grand jury as evidence, and cautioning the jury that it needed to convict the defendant to ensure that someone was to be punished. The instances of misconduct, individually and collectively, in conjunction with the erroneous rulings of the trial court during the guilt phase deprived the defendant of a fair trial.

Alternatively, the sentence of death should be reversed and a life sentence imposed or the matter remanded for a new sentencing proceeding. Testimony regarding specifics of the prior felony should not have been allowed because the trial court instructed the jury as a matter of law that the crime constituted a violent felony, the aggravating circumstances were improperly found, and the death sentence is disproportional in light of the defendant's diminished role.

Respectfully submitted,



David S. Morgan
Florida Bar number 651265
724 South Beach Street, Suite 3
Daytona Beach, Florida 32114
(904) 248-1116

COUNSEL FOR THE APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by hand delivery to the Office of the Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 15th day of September, 1993.

David S. Morgan

COUNSEL FOR THE APPELLANT