IN THE SUPREME COURT OF FLORIDA

MICHAEL GENE ABSHIRE,

Appellant,

v. CASE NO. 81,326

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The statement of the case in facts in the state's answer brief inaccurately indicates the number of peremptory challenges exercised by the two parties (AB 2).[1] The state exercised nine peremptory challenges: six against women and three against men. The defense exercised nine peremptory challenges: two against women and seven against men. The other 17 strikes, 10 men and 7 women, were stricken either for cause or by the court *sua sponte*. The breakdown follows:

FEMALE VENIRE MEMBERS STRICKEN

	TRIAL COURT	DEFENSE	STATE
Yvette NEELY	(R 654)		
Sophia WESLEY	(R 755)		
Agatha MILLER		(R 784)	
Marlene UPSON	(R 796)		
Sandra PARKS	(R 803)		
Beverly APPEL		(R 873)	
Monica THIELE			(R 874)
Regina IANELLI			(R 874)
Beatrice CARDELLA			(R 874)
Edna LARSEN	(R 875)		
Martha MARTIN	(R 907)		
Teresa TOLER			(R 923)
Jo WALTON			(R 923)
Willie WILLIAMS			(R 923)
Carol KING	(R 932)		

[1]References to the state's answer brief are indicated "(AB and page)"; those to Abshire's initial brief are denoted "(IB and page)". The parties are again referred to as the defendant and the state. Record references are indicated "(R and page).

MALE VENIRE MEMBERS STRICKEN

	TRIAL COURT	DEFENSE	STATE
Anders HANSEN	(R 655)		
Franklin DEBOW	(R 660)		
Robert FITZGERALD			(R 779)
Ricky COOPER		(R 781)	
Patrick CLOWER			(R 781)
Stephen MELCHING		(R 781)	
Joseph KENDRICK	(R 783)		
Jerry BURDEN	(R 783)		
John MEIR	(R 783)		
John REARDON		(R 784)	
Mario FUSTO	(R 820)		
Brett SENDLER	(R 872)		
George DUNNIGAN		(R 873)	
Robert DYR			(R 874)
Hugh WRIGHT	(R 879)		
James RUTZLER	(R 882)		
William HALLINAN	(R 926)		
George BOWMAN		(R 926)	
Verlin PARSONS		(R 926)	
Robert PIRTLE		(R 926)	

Three of the seven defense peremptory challenges against men came on the heels of the state's last three peremptory strikes against females (R 926 vis-a-vis 923).

The statement in the answer brief also inaccurately indicates that the jury was comprised of eight women and four men (AB 2; 10, reference to R 1771). The state's record reference is

to the hearing on the defense motion for new trial, which took place after the trial. Near the conclusion of *voir dire*, the trial prosecutor placed on the record: "If everybody involved will look at the jury panel right now, you will recognize that essentially, its a balanced panel. There are six males and six females. I just want to have the record reflect that." (R 933). After that representation was made there were no further strikes and two alternate jurors were seated (R 940).

The defense objected when the state peremptorily struck venirewomen Toler, Walton and Williams from the jury panel (R 923). The prosecutor claimed that these women tended to be more emotional than other persons who were still on the panel (R 924). During examination defense counsel asked Ms. Walton: "Would you describe yourself as an extremely-emotional [sic] person or somebody who's fairly in check emotionally or neither?" (R 774). She responded: "Somewhere in the middle." *Id.* Ms. Toler simply answered: "Emotional". (R 775). Neither counsel nor the court followed up with additional questions on the issue with these two venire persons. Moreover, no questions whatsoever regarding emotions were asked of Ms. Williams.

However, during later examination by the state the following exchange took place:

> MR. WHITSON [prosecutor]: People on the new panel -- Mr. McLeod asked a question earlier of the old panel. I'd like to ask the new panel, how many on the new panel think that they are on an emotional side of the range of emotions for human nature? Do you?
>
> PROSPECTIVE JUROR LARSEN: Sure.
>
> PROSPECTIVE JUROR SENDLER: I don't understand.
>
> MR. WHITSON: You cry easily, when you watch a movie that's got a very touchy theme in it, would you be prone to cry?

PROSPECTIVE JUROR SENDLER: No.

MR. WHITSON: How about you?

PROSPECTIVE JUROR KELLER: Sometimes.

MR. WHITSON: How about you?

PROSPECTIVE JUROR IANELLI: I'm not sure.

PROSPECTIVE JUROR YOUNG: I'm emotional.

(R 847).

Despite acknowledgements by Ms. Keller that she sometimes cried easily at movies and by Ms. Young that she is emotional, neither were stricken by the state (R 928).

At one point after the state exercised some of its peremptory challenges the following occurred:

THE COURT: You-all don't want to try this case, do you?

MR. McLEOD [defense counsel]: Wait a minute, now. I thought I was pretty reserved.

THE COURT: I thought you were, too. I agree with that. Go ahead.

(R 874).

The state inaccurately assumes that no issues concerning the robbery conviction are raised in this appeal (AB 1, n. 1). While no direct challenge is raised, the defense does seek a new trial on that count as well as on the murder charge because of the errors that occurred during the guilt phase.

ARGUMENT

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 holding of this court in *State v. Neil*, 457 So. 2d 481 (Fla. 1984), was recently extended to improper gender based peremptory challenges by the Fourth District Court of Appeal in *Laidler v. State*, 18 Fla. L. Weekly D2583 (Fla. 4th DCA December 8, 1993). The district court stated in material part:

> Florida has had a long history of invidious discrimination against women serving on juries. Until four years after World War II ended, juries were limited to qualified men only. *See* §40.01(1), Florida Statutes (1941). In 1949, the flat prohibition was modified to allow women to serve, but only if they registered with the clerk of the circuit court expressly for that purpose. *See* Ch. 25126, Laws of Fla. In other words, unlike male jurors, it took a positive and affirmative act on the part of a woman to be able to serve on a jury in Florida.
>
> In 1967, the registration requirement was eliminated and a provision allowing expectant mothers and women with children under 18 to avoid service was substituted. *See* Ch. 67-154, Laws of Fla. In 1975, the age of children allowing avoidance was lowered to 15. *See* Ch. 75-78, Laws of Fla. It was not until four years later, however, that all sex based distinctions in jury service in Florida were finally repealed. *See* Ch. 79-235, Laws of Fla.
>
> Thus, as was the circumstance for race in *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] and *Neil*, there is an undeniable record in Florida of invidious discrimination against women in jury service. That fact makes the strongest possible case for adding sex as an identifiable classification under *Batson* and *Neil*. In other words - whatever may be the arguments for applying *Batson* and *Neil* to other classes such as national origin or ethnicity or religion - there is an indelible chronicle in Florida statutory law of the purposeful exclusion of women from jury service to serve as a logical and indistinguishable basis to apply *Batson* and *Neil* to women.

Id.

The state contends that the defense claim is without merit because "the jury that ultimately decided this case consisted of eight women and four men." (AB 10). As already pointed out, that is not factually correct, there were six of each sex (R 933). Moreover, such a position overlooks the teachings of this court in those cases involving the improper use of peremptory challenges in a racially discriminatory manner. A similar state argument was rejected by this court in *Bryant v. State*, 565 So. 2d 1298 (Fla. 1990):

> The state argues that the fact that the actual jury contained six black persons establishes that the prosecution did not exclude persons because of race. In *Slappy*, we quoted the United States Court of Appeals for the Eleventh Circuit in *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir.1987), *vacated in part on other grounds*, 836 F.2d 1312, *cert. dismissed*, 487 U.S. 1265, 109 S.Ct. 28, 101 L.Ed.2d 979 (1988), stating: " '[T]he striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.' " *Slappy*, 522 So.2d at 21. While the responses of some of the challenged black jurors during *voir dire* appear to indicate valid bases for challenges, it would be impossible for this Court to make that evaluation for each of the black jurors challenged. We conclude that an evaluation by the trial judge was required in this cause.

Id., 1301, *citing State v. Slappy*, 522 So. 2d 18, 21 (Fla. 1988) (citation omitted). "Indeed, the issue is not whether several jurors have been excused because of their race, but whether *any* juror has been so excused, independent of any other." *Slappy*, 21 (emphasis in opinion). The same holds true in the exercise of improper gender bias peremptory challenges to exclude females from the jury.

Similarly, the state opines, without quotation or reference to the record, that "while it is difficult to discern from the record, the jurors who were peremptorily challenged responded to the voir dire questioning in a manner that led the prosecutor to believe that other prospective

jurors were more desirable." (AB 10). To the contrary, the record is quite clear that peremptory strikes were exercised improperly by the state and that the prosecutor's reasoning was no more than a pretext. The defense objected when the state peremptorily struck the venirewomen Toler, Walton and Williams (R 923). During examination defense counsel had asked Ms. Walton: "Would you describe yourself as an extremely-emotional [sic] person or somebody who's fairly in check emotionally or neither?" (R 774). She responded: "Somewhere in the middle." *Id.* Ms. Toler simply answered: "Emotional". (R 775). Neither counsel nor the court followed up on the issue with these two venirepersons. No questions whatsoever regarding emotions were asked of Ms. Williams by either side or the court. Additionally, during later examination by the state the following exchange took place:

> MR. WHITSON: People on the new panel -- Mr. McLeod asked a question earlier of the old panel. I'd like to ask the new panel, how many on the new panel think that they are on an emotional side of the range of emotions for human nature? Do you?
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> PROSPECTIVE JUROR LARSEN: Sure.
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> PROSPECTIVE JUROR SENDLER: I don't understand.
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> MR. WHITSON: You cry easily, when you watch a movie that's got a very touchy theme in it, would you be prone to cry?
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> PROSPECTIVE JUROR SENDLER: No.
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> MR. WHITSON [prosecutor]: How about you?
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> PROSPECTIVE JUROR KELLER: Sometimes.
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> MR. WHITSON: How about you?
>
> PROSPECTIVE JUROR IANELLI: I'm not sure.
>
> PROSPECTIVE JUROR YOUNG: I'm emotional.

(R 847).

Despite acknowledgements by Ms. Keller that she sometimes cried easily at movies and by Ms. Young that she is emotional, neither were stricken by the state (R 928).

The pretextual nature of the basis stated by the prosecutor for striking venirewomen Toler, Walton, and Williams is obvious. The prosecutor claimed that he was striking them because their answers revealed them to be more emotional than other persons who remained on the panel (R 924). The record refutes that claim. Ms. Williams was never asked any questions about her emotions. Ms. Walton said that she was in the middle of the emotional range (R 774). Ms. Toler stated simply that she was emotional (R 775). However, Ms. Young also stated that she was emotional (R(487) and Ms. Keller said that she sometimes cried easily at movies, *id.*, yet neither of the latter two was stricken by the prosecutor.

An after the fact argument similar to that advanced by the state in the instant case was rejected by this court in *Bryant*:

> Although the state proffered no reasons to justify its actions to the trial court, it now contends that the record shows reasons which were neutral and reasonable and not a pretext. By making this argument, the state is asking this Court to review the bare record and make a determination without the benefit of an inquiry and an independent evaluation by the trial judge. The purpose of a trial judge's Neil inquiry is to (1) obtain additional information about the challenge from the challenging counsel and (2) permit the trial judge to evaluate all of the information that he heard during *voir dire* with the reasons given by challenging counsel. This process was established to assure that trial counsel gives his or her reasoning at or near the time the challenges are made and to permit the trial judge to evaluate those reasons in light of the jurors' responses to determine whether the reasons are neutral and reasonable and not a pretext.

Id.

The judge below did evaluate the state's peremptory challenges and rejected the reason given by the prosecutor. The state on appeal tries to diminish the finding made by the trial court.

It argues: "Apparently, the trial court's comment concerning the state's supposed systematic exclusion of women was based upon an inaccurate perception of the number of peremptories the state had exercised against women." (AB 16). The trial judge did not merely make some remark in passing, a very specific finding was stated on the record that the state was systematically excluding women:

> 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.

. . .

(R 924-25, emphasis added).[2]

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[2]The state also attempts to divert attention from the primary issue by claiming that it was the defense below which was improperly using peremptory challenges. Again, the state is asking

Not only was the prosecutor unable to specifically detail his reasons for excluding the women (no doubt because they were pretextual), but his desire to obtain different jurors was legally insufficient. This court has rejected similar arguments: "There is no doubt that the State gave an inadequate reason for exercising a peremptory challenge against Mrs. Gamble. We held in *Kibler* that the reasons 'I preferred other jurors' and 'I liked [other jurors] better' were insufficient to rebut the defendant's assertion that the exercise of a peremptory challenge was racially motivated." *Joiner v. State*, 618 So.2d 174, 175 (Fla. 1993), *citing Kibler v. State*, 546 So. 2d 710 (Fla. 1989).

The state resorts to circular logic when it argues that "[t]he second reason that this claim is without merit is because the *Neil-Slappy* rationale does not apply to purported gender-based discrimination." (AB 11). The law is not, and has never been, static. Moreover, not only does the state's assertion ignore the holding of the Fourth District in *Laidler*, which was rendered prior to the filing of the answer brief, in which the state acknowledges the decision (AB 16), but it ignores the following express statement of this court in *Neil, supra*: "We choose to limit the

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this court to reach that conclusion based upon the cold record. However, as the state admits (AB 10), there was no objection on this ground voiced by the state before the trial court. In any event, the record reveals the contrary. As noted *supra*, the trial judge expressly found that the state was systematically excluding women. No similar finding was made as to the defense striking men. The following transpired at one point after the state exercised some of its peremptories:

THE COURT: You-all don't want to try this case, do you?

MR. McLEOD [defense counsel]: Wait a minute, now. I thought I was pretty reserved.

THE COURT: I thought you were, too. I agree with that. Go ahead.

(R 874).

impact of this case also and do so to peremptory challenges of distinctive racial groups solely on the basis of race. The applicability to other groups will be left open and will be determined as such cases arise." *Id.*, 487; *see also State v. Alen*, 616 So. 2d 452, 454 (Fla. 1993). In *Alen* this court extended the holdings of *Neil* and *Slappy* to Hispanics. "The time now has come in Florida to extend *Neil* to protect potential [female] jurors from being excluded from the jury solely on the basis of [gender]." *Id.*, 454.

The state points out that Abshire is not a woman (AB 12). That observation is of no moment. "[U]nder article I, section 16 of the Florida Constitution, it is unnecessary that the defendant who objects to peremptory challenges directed to members of a cognizable racial group be of the same race as the jurors who are being challenged." *Kibler v. State*, 546 So. 2d 710, 712 (Fla. 1989). Similarly, the state's contention that "there is no . . . history of discrimination against women in jury selection[]" is without merit. (AB 12). As detailed by the Fourth District in *Laidler, supra*, there is a history of statutorily sanctioned discrimination against women in jury service throughout the state of Florida.

Four of the five articulated *Slappy* factors, as well as a factor not specified in the "nonexclusive list" apply in this case. *Id.*, 22. First, venire members Toler, Walton and Williams are females and as such share the alleged group bias. The state contends that the first factor "can never apply to peremptory challenges based on gender because women are not a 'group' in the sense that they have 'an internal cohesiveness of attitudes, ideas or experiences that may not be adequately represented by other segments of society.'" (AB, 12, *citing Alen, supra*) The state's reliance on *Alen* is paradoxical in that this court observed 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). In a footnote the state contends that "[t]he underlying requirement for classification as a 'group' for jury selection purposes is that the group be a substantial minority within the community." (AB 13, n. 4, *citing Alen* at n. 3). There is no such "substantial minority" requirement expressed or implied in the decision. To the contrary:

> [T]he cognizability requirement inherently demands that the group be objectively discernable 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, 454.

Women are readily discernable from men in the community. As they comprise a slight majority of the population, women as a group have a sufficient population to be identifiable within the overall population. As evidenced by popular literature and media, women are recognized as an identifiable group within the community. Virtually every magazine and television or radio talk show at some point addresses differences between the sexes. These media also reveal the internal cohesiveness of attitudes, ideas and experiences. For example, many shows and magazines are focused exclusively on women. Similarly, organizations, such as the National Organization of Women, have been formed to advance the interests of women.

The second *Slappy* factor applies because the prosecution did not further examine either Toler or Walton, both of whom had simply responded in summary fashion to defense counsel's perfunctory questioning. Ms. Toler said only that she was emotional (R 775). Ms. Walton, however, stated that she was somewhere in the middle of the emotional range (R 774). Ms. Williams was never questioned by anyone on the issue. The fact that Walton and Williams were

stricken by the state when neither gave an answer consistent with the prosecutor's claim that they were more emotional, revealed the stated basis to be nothing more than a pretext.

The third *Slappy* factor does not apply because the state did not single out any of these women for special questioning; indeed, he did not question any of them regarding their emotions.

The fourth *Slappy* factor does apply because the prosecutor's reason for striking the women was unrelated to the facts of the case. In light of the murder charge involving a female victim, one is hard pressed to understand the prosecutor's aversion to female jurors. Merely stating that one is emotional is not a valid basis to exercise a peremptory strike. While one might reason that an emotional person is more inclined to be sympathetic to a defendant, it is equally possible that the passions of an emotional person could readily be inflamed against a murder defendant. In either event, the pretextual reason stated by the prosecutor that the women were too emotional was, as defense counsel below pointed out (R 927), nothing more than a stereotype.

The fifth *Slappy* factor also applies because the prosecutor did not challenge other jurors on the basis of their "emotions". Venirewoman Keller testified that she sometimes cries easily at movies and Ms. Young said that she is emotional (R 847). Nonetheless, both Keller and Young sat on the jury (R 928).

Another factor exists in addition to the five articulated *Slappy* factors. Unguarded remarks by the prosecutor at other points during *voir dire* revealed his bias against women and the pretextual nature of his reason for excluding them from the venire. During *voir dire* the prosecutor made sexist remarks in addition to saying that women were too emotional. 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).

A short time later 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).

The state on appeal expresses some confusion as to the significance of the denigrating remarks of the prosecutor (AB 32). The remarks, none of which were "benign", *id.*, are significant because they reveal the prosecutor's true disdain for females and the pretextual nature of his excuse for peremptorily striking women from the panel. A passage from the *Report of the Florida Supreme Court Gender Bias Study Commission* (1990) addresses cavalier acceptance of gender bias:

> 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 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 this 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., 2; *see also Interim Report and Recommendations of the Special Committee For Gender Equality in the Profession*, 2.

While the state focuses upon its claim that the exclusion of certain female venire members did not prejudice the defendant, it does not address in meaningful fashion the equal protection deprivation of the women wrongfully excluded from the jury. Indeed, that issue is treated with a mere wave of the hand: "[G]iven the decision in *Powers v. Ohio*, 111 S.Ct. 1364 (1991), the Supreme Court seems to no longer focus on racial identity between the prospective juror and the defendant, choosing instead to focus on the right of the juror to serve." (AB 12). Not only does this observation by the state support the federal claim raised under point two *infra* (*see also* IB 35), but the state fails to address the consistent holdings of this court. For example, this court has instructed:

> 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.

Slappy, supra, 20 (emphasis added).

The equal protection clause of the Florida Constitution, as well as its federal counterpart, protects female venire members from discriminatory deprivation of their right to sit upon a jury.

The state engages in policy arguments against a rule of law prohibiting exclusion of women venire members based solely upon their gender. The state contends that "[i]f the law is as Abshire wants it to be, no juror will be subject to peremptory challenge." (AB 14). That is gross overstatement; if the law is as Abshire wants it to be, then no female juror will be subject to *improper* peremptory challenge solely because of her sex. Assuming, *arguendo*, that the state's position were accurate, it would constitute not only wiser policy to preclude the discriminatory

use of gender based peremptory strikes, but subordination of the use of peremptory challenges to the right of women to sit on a jury is constitutionally mandated. This court has said:

> While we recognize the importance of peremptory challenges to the guarantee of an impartial jury, the seating of an improperly challenged juror does not violate the constitutional rights of the party who attempted to exercise the challenge. It is the right to an impartial jury, not the right to peremptory challenges, that is constitutionally protected. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Neil*, 457 So. 2d at 486. Peremptory challenges merely are a "means of assuring the selection of a qualified and unbiased jury." *Batson*, 476 U.S. at 91, 106 S.Ct. at 1720.
>
> 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." *Powers*, 111 S.Ct. at 1366. The discriminatory exclusion of potential jurors causes harm to the "excluded jurors and the community at large." *Id.* at 1368. 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 state protests that "there must be some sort of reasonable rule." (AB 15). The defense agrees: No woman should be peremptorily stricken from jury service solely because of her gender. The state suggests that "[i]f this court rules in accord with Abshire's position, there will never be any need to address whether, for example, age can be a basis for the use of peremptory strikes because the gender-based prohibition against peremptory strikes will swallow every other basis." (AB 15, n. 7). That simply is not so. If, for example, an African American woman is improperly peremptorily stricken along with men of her race because of their race, then gender is a non-issue in such a situation. Conversely, if such a woman is stricken along with women of other races, then gender rather than race is the issue, but gender has not consumed race or other improper grounds for peremptory strikes, the latter are simply irrelevant in that setting.

Parties will continue to enjoy the use of peremptory strikes, they merely will not be able to employ them against women in discriminatory fashion. As with racially motivated strikes, "[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for [gender] prejudice." *Powers v. Ohio*, 449 U.S. 400, 111 S.Ct. 1364, 1374 (1991).

The state also argues that "[t]his court cannot hold that only women are protected from gender-based peremptory striking and be consistent with federal constitutional law." (AB 17). That position, too, is inaccurate. While this court may extend protection to men as well as women by precluding gender based peremptory strikes against either sex, holdings are generally limited to the facts of a given case. *Cf. Neil, supra*, 487; *Chestnut v. State*, 538 So. 2d 820, 822 (Fla. 1989). Secondly, the instant issue has not yet been determined by the United States Supreme Court. While "[s]tate judges are firmly bound by oath to follow federal law as interpreted by the highest federal court[]", holdings by the assorted federal circuit courts of appeals are but persuasive authority. *Walker v. State*, 573 So. 2d 415, 417 (Fla. 5th DCA 1991), *vacated on other grounds*, ___ U.S. ___, 112 S.Ct. 1927 (1992); *see also* (AB 20). Thirdly, the defense claim raised under point one is limited to guarantees provided under the *state* constitution. Assuming, *arguendo*, that the Supreme Court ultimately holds that the federal constitution does not preclude peremptory strikes of women based upon gender, protection of the right of women to serve on juries in Florida may be and should be protected under the state constitution. "Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes . . ." *Traylor v. State*, 596 So. 2d 957 (Fla. 1992).

The state concludes its argument by contending that any error was harmless. It posits that "[b]ecause jurors are constitutionally indistinguishable, Abshire cannot have suffered any prejudice . . ." (AB 17). However, as the gender bias commissions have observed, "in the legal system, witnesses and litigants frequently experience gender bias that often affects the outcome of cases." *Report of the Florida Supreme Court Gender Bias Study Commission*, 35 (1990); *see also Interim Report and Recommendations of the Special Committee for Gender Equality in the Profession*, 38 (1992). The slanted logic of the state is insufficient for it to carry its burden of establishing beyond a reasonable doubt that the improper peremptory striking of the women venire members by the prosecutor did not contribute to the verdict. Indeed, the effect of their improper removal can never be determined.

In any event, what the state cannot refute is that the female venirepersons who were stricken from the jury by the prosecutor below were deprived of their equal protection rights because they were not permitted to sit on the jury in this case solely because of their gender. The discriminatory striking of them from the jury panel was not harmless because they were deprived of the opportunity to perform their civic duty in this cause. The Supreme Court explained in part its reason for granting criminal defendants standing to "raise the third-party equal protection claims of jurors excluded by the prosecution because of their race[]" in *Powers, supra*:

> The final inquiry in our third-party standing analysis involves the likelihood and ability of the third parties, the excluded venirepersons, to assert their own rights. . .
>
> The barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's

> exercise of peremptory challenges. Unlike a challenge to systematic practices of the jury clerk and commissioners . . . , it would be difficult for an individual juror to show a likelihood that discrimination against him at the *voir dire* stage will recur. And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his [or her]own rights.

Id., S.Ct. at 1372-73 (citations omitted).

There is a more fundamental reason than the practical considerations of litigation discussed by the Supreme Court that the excluded venire members could not obtain redress on their own. The stricken venirewomen in this case, who were not privy to bench side conferences during *voir dire* left the courtroom not knowing that they had been improperly stricken merely because they were women. Because they did not know why they had been excused, they could not have been cognizant of the fact that there was a basis for a legal claim. What is likely, however, is that they left the courthouse with considerably less confidence in the justice system than they had when they had entered the courthouse anticipating service on the jury.

In closing on this issue, there is a paramount policy reason to preclude use of gender based peremptory challenges. "Florida in recent years has clearly established its commitment to equality of treatment in the courts." *Foster v. State,* 614 So. 2d 455, 465-66 (1992) (Barkett, CJ, concurring in part, dissenting in part), *citing Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission* (1990 & 1991); *The Florida Supreme Court Gender Bias Study Commission Final Report* (1990). This court adopted the following amendment to rule 4-8.4(d) of the Rules Regulating the Florida Bar:

> ***A lawyer shall not***:
>
> (d) engage in conduct in connection with the practice of law that is prejudicial to

> the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or ***discriminate against*** litigants, ***jurors***, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, ***on account of*** race, ethnicity, ***gender***, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic[.]

The Florida Bar re Amendments to Rules Regulating the Florida Bar, 624 So. 2d 720, 722 (Fla. 1993) (underscoring omitted; emphases added).

The need for the amendment was explained this way:

> The rules were proposed because studies by the Florida Supreme Court Racial and Ethnic Bias Study Commission and the Florida Supreme Court Gender Bias Study Commission identified a number of problems faced by minorities and women in the legal profession. After reviewing the findings of the study commissions, both the Bar and the individual members recognized the need for specific rules prohibiting discriminatory practices by members of the Bar. . . .
>
> *****
>
> The proposal seeks to ensure the fair administration of justice and to preserve the public's confidence in our judicial system. A judicial system cannot survive without public confidence in its evenhanded administration of justice. As officers of the court, lawyers involved in the system have a significant impact upon the public's perception of the system's objectivity. A system of justice that tolerates expressions of bias by lawyers cannot maintain public confidence in the discharge of its responsibilities to assure equal justice.
>
> *****
>
> . . . [T]he amendment should preclude *any* conduct prejudicial to the administration of justice.

Id., 721 (emphasis in opinion).

A passage in the comment to rule 4-8.4 is particularly appropriate to the use of gender based peremptory challenges by the prosecutor in this case: "Lawyers holding public office assume legal responsibilities beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney." 624 So. 2d at 723.

If this court were to tolerate the exercise of gender discriminatory peremptory challenges to jurors, such a decision would render futile in a significant way the efforts of the Florida Supreme Court Racial and Ethnic Bias Study Commission and the Florida Supreme Court Gender Bias Study Commission. Moreover, in light of amended rule 4-8.4(d), members of the Bar would be confronted with an inexplicable contradiction. Most troublesome, however, permitting the continued use of gender based peremptory strikes would undermine the public's confidence in our judicial system because "[a] system of justice that tolerates expressions of bias by lawyers cannot maintain public confidence in the discharge of its responsibilities to assure equal justice." 624 So. 2d at 721. Again, "[t]he time now has come in Florida to extend *Neil* to protect potential [female] jurors from being excluded from the jury solely on the basis of [gender]." *Alen, supra*, 454.

Point Two

THE USE OF GENDER BASED PEREMPTORY STRIKES TO EXCLUDE WOMEN FROM THE VENIRE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The fourteenth amendment to the United States Constitution provides in material part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend XIV, §1.

As the state concedes (AB 12), the Supreme Court has focused upon the rights of improperly excluded jurors. In the context of racially discriminatory strikes, the Court held:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.

Powers v. Ohio, 449 U.S. 400, 111 S.Ct. 1364, 1370 (1991).

Moreover, the holding was not limited to the injury suffered by the improperly stricken venire members. The Court also stated: "The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice." *Id.*, S.Ct. at 1371.

Peremptory strikes against women based solely upon their sex are as discriminatory as those based upon race or national origin. This court should prohibit their use under both the state and federal constitutions.

Point Three

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

Contrary to the position taken by the state, the comment by the prosecutor was clearly an attack on trial defense 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."

(R 1215).

The comment served no legitimate purpose. The state on appeal contends that "it is difficult to

determine how that comment, which was not repeated, amounts to an attack on Abshire's lawyer." (AB 21). The trial court apparently viewed it as such:

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

(R 1217).

The comment was obviously made to discredit the defense attorney in the eyes of the jury by implying that counsel was attempting to keep his client from the police. While those who are familiar with the criminal process are aware that it is counsel's duty to protect the interests of a client, many lay persons on the jury are probably not sophisticated enough to understand counsel's role.

The state again resorts to a harmless error argument. It contends: "In light of the overwhelming evidence against Abshire, the comment at issue, if it was error, was harmless beyond a reasonable doubt." (R 21). "The [harmless error] test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). "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 v. State*, 572 So. 2d 1346, 1350 (1990).

Point Four

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

The defense will rely upon its argument in the initial brief on this point.

Point Five

THE PROSECUTOR IMPROPERLY QUESTIONED THE MEDICAL EXAMINER.

The defense will rely upon its argument in the initial brief on this point.

Point Six

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

The state contends that "[o]bviously, Abshire['s counsel] asked a question concerning a specific emotion and, by doing so, opened the door for the state to inquire as to whether Abshire displayed any other emotions during that interview session." (AB 25). As pointed out in the initial brief (IB 46), a similar situation was presented to this court in *Walton v. State*, 547 So. 2d 622 (Fla. 1989). "[T]he state asserts that Walton's counsel initiated the questioning of the 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 . . ." *Id.*, 625. Although the state argues that it is "obvious" that the door was opened by the defense, the state did not acknowledge *Walton*, much less distinguish the instant case from that decision.

Although the prosecutor did not expressly ask if "remorse" had been shown, the purpose of the question was clear. As the defense had obtained an answer from the witness that the defendant had not shown any malice toward the victim, the prosecutor posed his question in rebuttal, *i.e.*, no remorse.

Point Seven

THE INQUIRY BY DEFENSE COUNSEL WAS IMPROPERLY RESTRICTED

The defense will rely upon its argument presented in the initial brief on this point.

Point Eight

THE PROSECUTOR REPEATEDLY MADE IMPROPER COMMENTS DURING HIS CLOSING ARGUMENT.

Without any record reference the state claims that "[t]he record supports the inference that the defendant participated in the game known as Dungeons and Dragons." (AB 28). The only reference during the guilt phase to that game was by inmate Hobart Harrison and he was referring what he claimed the codefendant John Marquad did in jail after his arrest, not what the defendant had done (R 1420). Unlike the situation in *Craig v. State*, 510 So. 2d 857 (Fla. 1987), the prosecutor below was not urging the jury to infer facts from the evidence.

The prosecutor improperly urged the jury to convict the defendant by contending that if the codefendant advanced a similar claim at his trial, then "nobody is going to get convicted for the loss of Stacey." (R 1514-15). This court has cautioned prosecutors 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 S184, S186 (Fla. March 25, 1993).

The prosecutor, over defense objections, referred at least twice to the grand jury indictment (R 1519-20). "[A]n indictment is nothing more than a vehicle to charge a crime and is not evidence for a jury to consider as proof of guilt[.]" *Reichmann v. State*, 581 So. 2d 133, 139 (Fla. 1991).

Point Nine

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

Contrary to the argument by the state (AB 31), the principal instruction given to the jury, which the state did not include in its brief, did not cover the specific intent aspect requested by defense counsel:

> [THE COURT]: Now, if two or more persons help each other commit or attempt to commit a crime, and the defendant is one of them, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if the defendant knew what was going to happen, and intended to participate actively or by sharing an expected benefit, and actually did something about which he intended to help commit or attempt to commit the crime.
>
> Help means to aid, plan, or assist. To be a principal the defendant does not have to be present when the crime is committed or attempted.

(R 1546-47).

The defense requested that the jury be instructed that the defendant had specific intent to murder the victim (R 283, *citing Valdez v. State*, 504 So. 2d 9 (Fla. 2d DCA 1986); *see also Saffor v. State*, 558 So. 2d 69, 70-71 (Fla. 1st DCA 1990). The defense also asked the judge to instruct the jury that mere knowledge was insufficient to convict the defendant as a principal (R 283, *citing Staten v. State*, 519 So. 2d 622 (Fla. 1988).

Point Ten

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

In cases involving "multiple errors, [this court] must consider whether even though there

was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *Jackson v. State*, 575 So.2d 181, 189 (Fla. 1991) (citations omitted); *see also Pippin v. Latosynski*, 622 So.2d 566, 568-69 (Fla. 1st DCA 1993). The cumulative error in this case deprived the defendant of a fair trial. 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 cumulative error in this case constituted fundamental error that deprived the defendant of a fair trial.

Point Eleven

SECTION 921.141, FLA. STAT., IS UNCONSTITUTIONAL.

The defense will rely upon its argument in the initial brief under this point.

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 defense will rely upon its argument in the initial brief under this point.

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.

The defense will rely upon its argument in the initial brief under this point.

Point Fourteen

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

The state contends, without specific reference to the record or response to the issues raised in the initial brief, that the sentencing order "establishes the existence of the robbery/pecuniary gain aggravating factor beyond a reasonable doubt." (AB 41). That simply is not so. The sentencing order found that it was the codefendant who had expressed an intent to take the victim's possessions (R 482). The evidence showed, however, that the defendant thought that it was mere talk (R 363). There was no evidence that the property obtained by the defendant was anything more than an afterthought. As such, the aggravating factors were improperly found.

See Peek v. State, 395 So. 2d 492 (Fla. 1980); *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984); *Scull v. State*, 533 So. 2d 1137, 1142 (Fla. 1988); *Hill v. State*, 549 So. 2d 179 (Fla. 1989); *Clark v. State*, 609 So. 2d 513, 515 (Fla. 1992).

Point Fifteen

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

The defense will rely upon its argument in the initial brief under this point.

Point Sixteen

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

The facts of this case clearly establish that the codefendant John Marquad committed the murder in a heinous, atrocious, or cruel fashion. The order reflected that the evidence showed that Marquad had killed the victim prior to his directing the defendant to stab the lifeless body. "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 murder that was committed by his codefendant. *Cf. Archer v. State* 613 So. 2d 446, 448 (Fla. 1993); *Williams v. State*, 622 So.2d 456, 463-64 (Fla. 1993).

The state notes that since "only skeletal remains were discovered, it is not possible to determine if the victim had any stab wounds other than those described on [(AB 6)]. Likewise, it is not possible to determine to a reasonable degree of medical certainty whether or not the victim drowned." (AB 43, n. 12). Precisely. Neither the state nor the trial court may rely upon

inference as proof beyond a reasonable doubt that aggravating factors apply. *Cf. DeAngelo v. State*, 616 So. 2d 440, 442 (Fla. 1993). "The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Moreover, even the trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden." *Robertson v. State*, 611 So.2d 1228, 1232 (Fla. 1993) (citations omitted).

Point Seventeen

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

The evidence revealed that the codefendant had planned to murder the victim, but that the defendant did not believe that he would carry out the plan.

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 disproportionate. *See* §921.141(6)(d), Fla. Stat. (1991).

"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. 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).

Contrary to the court's findings, the evidence showed defendant did not stab the body until after the codefendant had killed her and then he only did it at the codefendant's direction (R 1159; 1283). Additionally, she struggled with the codefendant, who was the one who drowned her. *Id.* The court based its conclusion on its determination that the victim was 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. 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. Nor did the evidence support the finding that the defendant wanted her property.

Weighing against the above court's findings, 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.

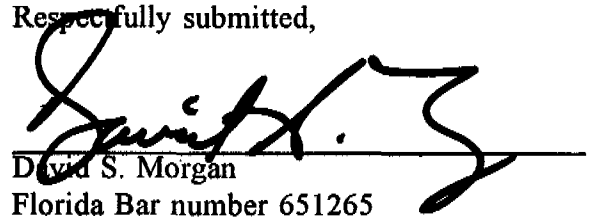
CONCLUSION

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,



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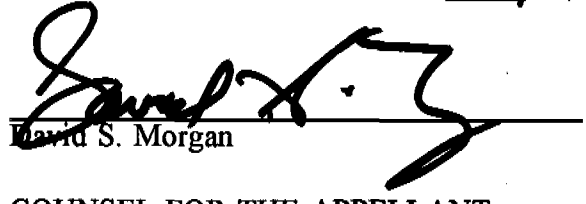
CERTIFICATE OF SERVICE

I certify that a copy hereof has been mailed to the Assistant Attorney General Margene A. Roper, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 22nd day of February, 1994.



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